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DEPARTMENT OF LAW

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THE BREAKTHROUGH OF MIRROR IMAGE RULE UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND CHINESE CONTRACT LEGISLATION

Specialty BM.5848.2020 – Transnational Legal Practice (in English)

DISSERTATION

for a degree of

master of law

Research advisor

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Saint Petersburg

2022

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INTRODUCTION

The Mirror Image Rule is a well-established common law concept that is generally acknowledged in both the civil and common law systems.[1] As social relations have changed, however, the historical backdrop of modern contract law has drastically transformed. The prevalence of industrial mass production and mass sales has increased, as has the use of form contracts, and the natural desire of the parties to the transaction to maximise their own interests will inevitably lead to conflicts between form contracts. The Battle of the Forms has become a prominent topic in the system of contract law. The Battle of the Forms has developed as an important topic within the contractual law system. In certain cases, the old Mirror Image Rule may result in the establishment of no contract or a contract formed unilaterally on the conditions of one party, hindering the transaction or producing an unfavourable outcome.[2] Due to the significance of the Battle of the Forms, international law has permitted its settlement. Multiple international harmonisation papers already address the Battle of the Forms as the international harmonisation process accelerates.[3]

When seen through the lens of the rule of law, the market is a

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[1] Douglas G. Baird, Robert Weisberg. Rules, Standards, and the Battle of the Forms: A Reassessment of Section 2-207/ 68 Va. L. Rev. 1217,1982. –P.12.

[2] Phillip A. White. A Few Comments about the Proposed Revisions to UCC Section 2-207: The Battle of the Forms Taken to the Limit of Reason/103 Com. L.J. 471,1998. – P.146.

[3] Maria del Pilar Perales Viscasillas. Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002, 6 Vindobona Journal of International Commercial Law and Arbitration, 2002.–P.439

collection of contracts.[4] Globally, the outcomes of all types of trade and investment activities are primarily articulated in the form of contracts, in which the meaning of the parties to the transaction is regulated by the contractual agreement acknowledged by the legal system.[5]

In every form of contract, the meaning of the parties to the transaction is determined by the contractual agreement recognised by the legal system, which determines the parameters of the contract and satisfies contractual duties. However, the economic climate is continuously evolving, and there are several chances for change between the time an offer is made and when the offeree accepts it. In addition, an overemphasis on the consistency of contractual substance necessarily increases the function of monitoring performance on both sides of the transaction, resulting in the extreme phenomena of over-reinforcing obligations. In practise, if the contract strictly adheres to the standard of a high degree of consistency in the offer and promise, it is necessary to repeatedly negotiate the offer and promise, which will inevitably lead to the formation of the contract indefinitely backwards, the signing of the contract into repeated negotiations, and will undoubtedly increase the risk of defeating the purpose of the contract.[6]

This mirror-image criterion in contract formation is intended to

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[4] James Willard Hurst， Law and Economic Growth: The Legal History of the Lumber Industry in Wiscosin 285 ,1964. –P.16

[5] Wang Jiangyu. The General Rules for the Formation of Sale Contracts and the Battle of Forms in International Trade/ Civil and Commercial Law Series, vol. 8. – P.117

[6] Secretariat Commentary on the 1978 Draft, in Pace Law School Institute of International Commercial Law Official Records 24.

demand that the formalistic intrinsic endowment of an offer and a commitment be equal, thus jeopardising contract formation. In this regard, the *United Nations Convention on Contracts for the International Sale of Goods* has responded flexibly to the application of the mirror rule in contract formation by expanding the scope of application of the Convention,[7] lowering the requirement of content consistency between offer and acceptance, and strengthening the understanding of the relationship between offer and acceptance in contract law through legislative techniques such as supplementary provisions. The helpful legislative effort of the *CISG* has, to some degree, overcome the contradiction between contractual law and transaction time. The Mirror Image Rule in contract creation derives from the common law contractual system and represents the goal to seek total consent and exact representation of the promise based on the parties' shared reliance interests.[8]

Under this regulation, the offeree is strongly obligated to adhere to the terms of the offer, and any sort of modification to the offer's conditions is strictly banned. In fact, this rule ensures the greatest stability possible in the construction of contracts, and the standard it establishes is applicable to all kinds of contracts, therefore simplifying difficult

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[7] Ingeborg Schwenzer. Commentary on the UN Convention on the International Sale of Goods/Oxford University Press .G.H, 2010. – P.348.

[8] 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/38UCC L.J, 2005.-P.55,144,146.

contractual concerns. Although the regulation seems to play a significant role in the completion of contracts, its excessive formality has become more evident and has been harshly criticised. In a rapidly expanding economy, the norm has proven unsuited for the creation of contractual contingencies, according to one complaint. As the substance of the contract is largely influenced by the conditions of the offer, the Mirror Image Rule would necessarily result in a circular discussion between the parties in order to take the initiative in the transaction, according to another objection. In order to gain the initiative, the Mirror Image Rule will result in a circular negotiation between the two parties on all aspects of the performance of the contract, thereby extending the lead time and increasing the cost of contracting, which is ultimately contrary to the contract law principle of efficiency.

Although the regulation seems to play a significant role in the completion of contracts, its excessive formality has become more evident and has been harshly criticised. In a rapidly expanding economy, the norm has proven unsuited for the creation of contractual contingencies, according to one complaint. As the substance of the contract is largely influenced by the conditions of the offer, the Mirror Image Rule would unavoidably lead to circular negotiations between the parties in order to seize the initiative in the transaction, according to another critique. In order to gain the initiative, the Mirror Image Rule will result in a circular

negotiation between the two parties on all aspects of the performance of the contract, thereby extending the lead time and increasing the cost of contracting, which is ultimately contrary to the contract law principle of efficiency.[9]

In conclusion, these criticisms illustrate the difficulties of correctly implementing the rule in the context of the present fast growth of the global economy. To discover an innovative solution, it is required to address the challenges generated by the norm and to modify the concept of rigid contractuality. In the Chinese academic community, this topic has gotten less attention and debate, which is regrettable. Despite the fact that there have been sporadic publications on the topic, they fall short of the mark since a vast number of research and commentary have been published in foreign theoretical communities in the interim. In practise, legislative reforms and the creation of new international legal instruments have occurred.[10]

As a consequence of China's reform and opening up since 1978, China's present civil legal system consists of a number of independent laws, including the General Principles of Civil Law, the Contract Law, the Property Rights Law, and the Tort Liability Law. In 1999, the present Chinese Contract Law was enacted. China has previously adopted three

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[9] Daniel T. Ostas. Frank P. Darr. Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms,73 Denv. U.L. Rev. 403,1996. -P.371

[10] Arthur Taylor Von Mehren. The Battle of the Forms: A comparative view/38 Am. J. Com-P. L 265,1990. -P.219

distinct contract laws between 1981 and 1987, notably the Economic Contract Law of 1981, the Law on Foreign-related Economic Contracts of 1985, and the Law on Technical Contracts of 1987. These three distinct statutes were eventually consolidated into the present Contract Law.

The *CISG* has had a significant influence on Chinese contract law and the Chinese market economy since the early 1980s. Since its initial draught was released, the Chinese government and Chinese lawyers have stated their support for this international convention, as it embodies contemporary, uniform, and fair contract basics in both international and local contexts. Additionally, we acknowledge that the *CISG*'s form and substance reflect both the wisdom of civil law contract law and the spirit of common law contract law. This is why China's Foreign Economic Contract Law, which regulates foreign commerce, largely uses the *CISG*. The Foreign Economic Contracts Law, for instance, imposes strict responsibility for breach of contract and also defines the concept of fundamental breach of contract, but in a somewhat different way.[11]

The Standing Committee of the National People's Congress resolved to alter the Economic Contracts Law in September 1993. In the same year, the Legal Affairs Working Committee of the Standing

[11] Wang, Liming. The United Nations Convention on Contracts for the International Sale of Goods and China's Contract Law. Beijing University Press, 2016. -P301

Committee of the NPC called a conference of specialists to consider the Economic Contract Law's revision. The group achieved two consensuals. The first recommendation was that the three different laws be consolidated. The second was that a panel of specialists was required to produce a legislative proposal to amend China's contract law.[12]

The 2020 codification of China's civil code attempts to unify and systematise the previously listed autonomous civil laws. Formally, the *CISG* remains a significant reference for China's civil code codification. The Contract Law, for instance, is a distinct section of the Civil Code and is not included in the claims law.

The author will begin by breaking the Mirror Image Rule and will then **introduce and analyse the resolution and breakthrough of the Battle of the Forms** in the rules of the international uniform legislation—the *United Nations Convention on Contracts for the International Sale of Goods*, the United States Uniform Commercial Code, the *German Civil Code*, and Chinese civil legislation—using comparative analysis.

CHAPTER 1. The Battle of the Forms

§ 1. Origin of the Battle of the Forms

§ 1.1. formation of a contract

[12] Wang, Liming. The United Nations Convention on Contracts for the International Sale of Goods and China's Contract Law. Beijing University Press, 2016. -P341

A "contract formation" is a factual decision that "refers to an agreement between contracting parties reached by a unanimous declaration of purpose."[13] The fundamental requirement for contract creation is agreement between the parties' intents, as indicated in the offer and acceptance procedure. In general, a contract is made when one party makes an offer, the other party accepts, and the parties agree on their intended outcome.[14]

The process by which the parties to a contract approach, negotiate, and agree on the contract's fundamental provisions is often separated into two stages: the offer and the acceptance. "It is an objective reality that each contract formed by agreement must pass through two stages: offer and acceptance, without which no contract exists, and with which an offer and acceptance must be made."[15] This is also provided for in Chinese Civil Code, § 471, "The parties may enter into a contract by offer and acceptance or any other means."[16]

§ 1.1.1. Offer

An offer is a statement of intent, i.e., an invitation made by one party to another to enter into a contract with that party and contains an

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[13] Gallagher A. The law of federal negotiated contract formation. Rockville, Md. (225 N. Stonestreet Ave., Rockville 20850): GCA Publications, 1981. -P. 105.

[14] Owsia P. Formation of contract. London: Graham & Trotman, 1994. -P. 102.

[15] Schulze R. Formation of contract. -P. 36.

[16] Civil Code of the People's Republic of China. 2020. § 471. [Electronic resource].
URL: https://www.pkulaw.com/CLI.1.342411(EN) (accessed: 11.03.2022).

expression of purpose to bind that party after the other party has pledged to do so. As noted by Corbin, a key figure in American contract law, the essence of an offer is "the right (power) which one person grants to another to create a contractual relationship between them."[17]

§ 472 of *Chinese Civil Law* defines the offer as follows: “An offer is a declaration of will to contract with another person, and the declaration of will shall meet (1) Its contents shall be specific and definite. (2) It indicates that the offeror will be bound by the declaration of will.”[18] Additionally, the *United Nations Convention on Contracts for the International Sale of Goods* defines the offer, stating that (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific -persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.”[19]

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[17] Corbin. Book of Forms of Contracts and Conveyancing; and of Legal Proceedings under the Laws of the State of New Jersey, with Notes, Explanations and References to Authorities. [S.l.]: Newark, N. J.: Soney & Sage Co., 1921. -P. 66.

[18] Civil Code of the People's Republic of China. 2020. § 472. [Electronic resource]. URL: https://www.pkulaw.com/CLI.1.342411(EN) (accessed: 11.03.2022).

[19] United Nations Convention on Contracts for the International Sale of Goods. § 14 [Electronic resource]. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf (accessed: 01.03.2022)

As a result of the preceding provisions, we may infer that for selected countries, a statement of intent must satisfy the following essential elements in order to constitute an offer: To begin, the offer's substance must be precise and unambiguous. It is not required to include all of the contract's terms and conditions; rather, just the critical terms, i.e., the transaction's fundamental elements, such as the products, price, quantity, delivery, and payment, may be provided. In general, the contract will be created after these parameters are agreed upon, while the other details may be negotiated later. Second, the offer should express the offeree's willingness to be bound by the commitment. The "presumption" concept is applied to the existence or absence of such an intention, i.e., if the offeror makes no opposite indication, he is believed to be willing to be bound. A contrasting purpose is indicated by the addition of a reservation to the offer, such as "subject to our final confirmation," "right of first sale," and so on. If no such indication is included in the offer, it is not an offer but may be interpreted as an invitation to treat.

§ 1.1.2. Acceptance Of An Offer

Acceptance is the offeree's indication of assent to the offer. Corbin's definition of a promise states: "An acceptance is a voluntary act by the offeree in conformity with the offeror's rights, thereby establishing

the legal relationship known as a contract."[20] The following elements must be completed for an offeree's response to an offer to constitute a legitimate acceptance and, eventually, a contract.

To begin with, the offeree must accept the pledge. Because acceptance is a right bestowed by the offeror on the offeree, it can be exercised only by the offere. Naturally, the act of the offeree's agent, who performs legal activities within the limits of the agent's power, is regarded as the act of the offeree[21], and accepting the offer on the offeree's behalf is likewise considered acceptance of the offer. Acceptance by a third party that lacks the legal authority to do so is not a legal acceptance, but rather an offer. Second, the offeror should be notified of acceptance by notice or other means. It may be communicated to the offeror in writing or by actions depending on the nature of the transaction or the offer. Third, the acceptance's content should be consistent with the offer's content. Fourth, acceptance should occur inside the acceptance period. If the offer includes a time range for acceptance or if the offer has a term, the offeree must accept the offer within that time period. If no such term is specified in the offer, acceptance shall occur within a reasonable period, as the case may be.

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[20] Corbin. Book of Forms of Contracts and Conveyancing; and of Legal Proceedings under the Laws of the State of New Jersey, with Notes, Explanations and References to Authorities. [S.l.]: Newark, N. J.: Soney & Sage Co., 1921. -P. 115.

[21] Arthur Taylor Von Mehren. The Battle of the Forms: A comparative view/38 Am. J. Comp. L 265,1990.-P121

§ 2. The Mirror Image Rule and its Breakthrough

§ 2.1.The concept and origin of the Mirror Image Rule

The Mirror Image Rule, sometimes referred to as the "Ribbon Matching Rule,"[22] demands that the acceptance's contents be identical to those of the offer, without modification or restriction. If the acceptance and the offer are inconsistent (some courts need a significant change), the acceptance is not regarded genuine, but rather a rejection of the offer or a counter-offer.

The Mirror Image Rule is a well-established principle.[23] Under this regulation, a legitimate acceptance must exactly match the substance of the offer and cannot be in any way contradictory with it. Why is this necessary? Due to the fact that a contract is a representation of the parties' willingness to agree on their rights and responsibilities, and its core is "consent," As a legally enforceable representation of purpose, once made, an offer establishes a contract and ensnares the offeror in a "legal lock." The offeror's indication of intent to enter into a contract on specified terms is limited to the terms it offers and is unaffected by terms added or amended by the offeree in the acceptance. Thus, a conveyed offer establishes a right of commitment to that offer and only that offer. Allowing the offeree to modify the substance of the offer at whim and

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[22] Corneill A. Stephens ESCAPE FROM THE BATTLE OF THE FORMS: KEEP IT SIMPLE/STUPID 11 Lewis & Clark L. Rev. 233,2007. -P291

[23] Kevin C. Stemp. SOLVING PROBLEMS FACING INTERNATIONAL LAW TODAY: A COMPARATIVE ANALYSIS OF THE "BATTLE OF THE FORMS/15 Transnat'l L. & Contemp. Probs. 243,2005.-P172.

still constitute an acceptance would be comparable to putting the offeror in a position of weakness. The offeror is at the offeree's mercy. The reason for this is because any conditions he submits at this time will be included into the contract as an acceptance.[24] This is certainly unjust, and making an offer would devolve into a risky economic activity, inhibiting the social economy's operation. Thus, the social economy's functioning is harmed.

This is why, while being a common law rule, the mirror image rule's meaning and spirit are shared by civil law and common law systems, and it is also prevalent in civil law systems. For instance, Section 150(2) of the *German Civil Code* states that "An acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer."[25]

§ 2.2. A Precedent of the Mirror Image Rule

The Mirror Image Rule, a long-standing common law rule, has been applied in contract matters for a long period of time, and

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[24] Maria del Pilar Perales Viscasillas. Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002. 6 Vindobona Journal of International Commercial Law and Arbitration,2002.-P463.

[25] "Section 150 Late and altered acceptance (1) The late acceptance of an offer is considered to be a new offer. (2) An acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer." Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by § 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719).)[Electronic resource]. URL: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0450 (accessed: 01.03.2022)

LANGELLIER V. SCHAEFER,[26] decided in 1887, is famous for its classic description of the rule, which serves as a model case law for its application.

The plaintiff lived in St. Paul, Minnesota, whereas the defendant lived in Rushmoore, Nobles County. The plaintiff received a letter from the defendant offering to sell the property for $800 in cash. The letter requested that the money be personally delivered to the defendant at his or her address. The plaintiff responded that he desired to change the location of the deed and price to a location other than St. Paul, as required by the offer, and requested that the deed be delivered to a specific individual in St. Paul who would ultimately deliver the deed and collect the sale price for the defendant. Subsequently, the parties differed over whether the deal was concluded. The plaintiff launched a lawsuit alleging that the defendant breached the contract by failing to transfer a specified piece of real land to the plaintiff. In its defence, the defendant denied entering into any contract with the plaintiff.

The issue in this case was whether the parties had entered into a contract. Mr. Justice Michel, the presiding judge, held that: 1. As a matter of law, any restriction or variation from the content of an offer renders it

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[26] AUGUSTE L. LANGELLIER vs.ANTHONY SCHAEFER // Minn. 1887. vol. 36. -P. 361(Earliest decision dated 1851. Includes official and paralled citations from: 1-312 Minn. (1851-1977); 1 N.W.2d (1941-current); 1-300 (N.W.). Selected unpublished decisions from 1985.).[Electronic resource]. URL: https://advance-lexis-com.proxy.library.carleton.ca/api/permalink/10f3ec29-f9be-40a3-a94f-61684394ba7f/?context=1505209 (accessed: 01.03.2022)

null and worthless unless the party making the offer agrees to the restriction or deviation. When consultations are conducted via letters, these letters cannot constitute a contract unless the reply to the offer is merely a promise to offer and does not include any new terms. In this case, the plaintiff changed the place of delivery of the deed and price to a location other than that specified in the offer—So Paulo—in his reply letter, thereby imposing a restriction on and departing from the offer. Although the plaintiff's instructions to give the deed to a specific person in St. Paul's and to have him finally deliver it, as well as to collect the fee for the defendant, were preceded by the polite expression "please," this did not mean that the request was not required. As a result, the plaintiff declined the defendant's offer. As a result, no contract between the parties was created. Finally, the court dismissed the plaintiff's claim.[27]

§ 2.3. The modern dilemma of the Mirror Image Rule

Without a question, the Mirror Image Rule, as a basic common law rule, has played a significant influence in contract law. However, as time passed, it became evident that this old norm, which required parties to agree on every detail, had been somewhat overwhelmed by the

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[27] AUGUSTE L. LANGELLIER vs.ANTHONY SCHAEFER // Minn. 1887. vol. 36. -P. 361(Earliest decision dated 1851. Includes official and paralled citations from: 1-312 Minn. (1851-1977); 1 N.W.2d (1941-current); 1-300 (N.W.). Selected unpublished decisions from 1985.).[Electronic resource]. URL: https://advance-lexis-com.proxy.library.carleton.ca/api/permalink/10f3ec29-f9be-40a3-a94f-61684394ba7f/?context=1505209 (accessed: 01.03.2022).

quickness and volume of contemporary commercial commerce, and was thus in a precarious situation.

In the late 18th and early 19th centuries, when life was simpler, the common law of contract took form. The laws governing its establishment were based, in part, on the "archaic" exchange of products between two farms, such as horses. We may see a transaction in which the two parties "negotiate" face to face, with the horse present, in which the buyer is required to inspect the horse's teeth, certify its age, and study its genealogy... Only once both parties have agreed on all elements can a contract be formed. A buyer will never pay easily, and the seller will not release the horse until all terms are agreed upon; a contract is made first, and more terms are added subsequently." The contract is made when the vendor and the buyer agree on their objectives. However, if the offer and the promise are in conflict, the contract cannot be made. Prior to the application of the parties' assignment, the old Mirror Image Rule, the common law, must be followed. To bind the parties, the contract's presence must be rigorously needed.[28]

However, the social framework in which contemporary contract law operates has shifted dramatically, from "rudimentary" commodity transactions to industrial production and mass sales. Contracts in their formal form have developed. A form contract, also known as an adhesion

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[28] Giesela Ruhl.THE BATTLE OF THE FORMS: COMPARATIVE AND ECONOMIC OBSERVATIONS 24 U. Pa. J. Int'l Econ. L. 189, 2003.-P262.

contract, a final contract, or a standard contract, is one that is prepared in advance by one of the parties in order to contract with an undetermined majority and that does not enable the opposing party to alter its content. A standard contract is a reasonable and natural outcome of a huge and complicated economy. It is pre-drafted by one of the parties and is reusable, drastically reducing transaction time, increasing transaction efficiency, and lowering transaction costs. Simultaneously, by supplying a model contract, a party may define the transaction's terms, manage the business risks it carries, position itself more advantageously in the transaction, and even direct the dispute resolution system to produce a more favourable outcome for its own side. As a result, form contracts are preferred and commonly employed in contemporary commercial transactions. Because a party's use of a pre-drafted form contract enables it to provide more favourable terms and conditions to its own party and to position itself better in the transaction, each party sends its own form contract to the other party. The buyer often submits a purchase order in response to the seller's catalogue or price list. Upon receipt, the vendor responds with a return receipt. Both the order and acknowledgment are written on the reverse with each party's terms and conditions. Due to the fact that each party's form is meant to protect its own interests and is "self-serving," the terms and conditions included within the form will vary—the buyer's form may include a guarantee on the products, whilst

the seller's form may include a disclaimer. However, businesspeople in commercial trade practise concentrate on the transaction's critical elements, such as quantity and price, and are "careless" about other potential conflicts in the parties' forms, or are unwilling to argue and chatter about these issues, placing their hopes in the contract's performance. Negotiation and the industry's requirement of discipline are the only option for settling these disagreements. As a result, notwithstanding the inconsistencies in the paperwork, the transaction proceeds. Unless a disagreement emerges, these contracts have little resemblance to the law from the commencement through the conclusion of performance.[29]

If, as indicated before, the contractual procedure is legally immaterial, the issue arises when a disagreement between the parties over the transaction develops. Was there an agreement between the parties? What is the contract's content? Is it to be decided by the form contract used by the buyer or by the form contract used by the seller? Or is it decided differently? This is the Forms Battle. The "Battle of Forms" is a frequent occurrence in contemporary contract law. Let us attempt to settle it using the Mirror Image Rule: the purchase order accompanied by the buyer's transaction's terms is an offer, and the seller's response, since it is not accompanied by the same conditions as the offer, cannot be a promise,

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[29] Kevin C. Stem-P. Solving Problems Fancine International Law Today: A Comparative Analysis Of The 'Battle Of The Forms/15 Transnat'l L. & Contem-P. Probs,2005. -P.263.

but merely a counter-offer. Because neither side had agreed to the terms provided by the other, there was no agreement between them, no "consent," and no contract was established.

The decision that "no contract existed" was clearly unsatisfactory to the parties, who were looking to the law to assist them in resolving their dispute and ensuring contract performance. Simultaneously, by denying that a contract may be created by the exchange of forms, the law creates an opportunity for the parties to "avoid" a true agreement. For instance, if the parties agree on the contract's essential elements through an exchange form and then commence performance, the transaction proceeds easily. When the market price of the items increased, the seller was motivated to look for contradictions in the forms and brought the matter to court, arguing that the parties did not have a contractual connection, so obtaining a bigger profit. This seller's conduct was plainly unethical and violated the civil law standard of honesty and trust. Regrettably, if the " Mirror Image Rule" is rigorously enforced, no contract between the parties is made. The seller's unethical and dishonest assertion was backed up by the law, thus the " Mirror Image Rule" is not applicable.[30]

On the other hand, in the context of industrial production and mass sales, requiring traders to agree on any specific conditions of the

[30] Daniel T. Ostas. Frank P. Darr. Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms.73 Denv. U.L. Rev. 403,1996.-P.404.

transaction via recurrent bargaining in line with the " Mirror Image Rule" is neither practical nor practicable. As previously said, the appeal of form contracts stems from their convenience and efficiency, which may help reduce transaction costs and boost transaction efficiency. If the parties to a transaction exchange forms and then continue to study and negotiate each condition until they agree on all of the details, regardless of the time and effort spent or business opportunities missed, the value and significance of a pre-drafted form contract is lost, as opposed to the parties sitting down to negotiate and define the contract's content one by one. While the parties may chose this arduous technique for the all-important "big deal," if obliged to do so for every transaction, their time and energy may be stretched beyond their capacity.[31]

These issues are growing more prevalent as the economy expands and transactions get more complicated. In reality, the continuous use of the " Mirror Image Rule" to resolve the "format war" issue is clearly out of step with current economic growth requirements. The " Mirror Image Rule" revolution is epiphany occurred.

§ 3. The Mirror Image Rule, The Last-shot Rule And The Knockout Rule

As the " Mirror Image Rule " has become increasingly

[31] Li Kaiguo. Contract Law. Beijing Law Press. 2002 edition. -P. 73.

inapplicable in practice, several major breakthrough rules of the " Mirror Image Rule " have emerged in the domestic law of States and in international uniform legislation. Several major breakthrough rules of the " Mirror Image Rule " have emerged. In this part, the author of this thesis will only briefly introduce them, and in the following part, they will be discussed in depth.

§ 3.1. The Last-shot Rule

The Last-shot Rule, commonly known in Germany as the "letzte Worte,"[32] states that regardless of how many times an offer is made over the course of a commercial transaction, once this cycle concludes, the receiver is believed to have committed himself by silence. The contract is based on the usual terms of the most recent offer, i.e. the "offer - several counter-offer cycles - acceptance by behaviour" paradigm. The phrase "last shot" is a metaphor. Each side fires a shot at the other party each time it transmits its own copy of the form to the other party in a war of the forms. Whoever survives until the last shot wins the game. The contract's content is determined by the most recent form copy provided. This last word is referred to as the contract's "letzte Worte."

This notion originated with the English precedent of BRSv. crutchley (1967)[33] and is quite popular in Germany and England.

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[32] Achilles A. et al. Bürgerliches Gesetzbuch nebst Einführungsgesetz. Berlin: J. Guttentag, 1909. -P. 135.

[33] British Road Services v Arthur V Crutchley & Co Ltd (Factory Guards Ltd Third parties) // All ER. 1968. vol. 1. -P. 811. [Electronic resource].

Although the rule was criticised in the 1930s and defined as "utterly primitive" by Professor Raiser, it retained its appeal for decades in Germany. National courts did not seek to reinvent the customary method until the 1970s. In England, however, the previous general rule of offer and acceptance remained the prevailing norm for settling Battle of the Forms because to the common law's deep impact,[34] and notwithstanding Lord Denning's novel views[35], the Last-shot Rule was typically followed.

Numerous §s see the Last-shot Rule as a breakthrough from the " Mirror Image Rule" and as a solution to the Battle of the Forms alongside the " Mirror Image Rule" and others.[36] Indeed, the Last-shot Rule is a logical extension of the Mirror Image Rule.[37] In a business transaction, the two parties exchange their form texts, and when these form texts differ, they are inevitably insufficient to construct a contract under the "Mirror Image Rule." However, the acceptance of "complete agreement" may be represented not only in language and words, but also in the act of expressing itself.

URL: https://advance-lexis-com.proxy.library.carleton.ca/document/documentlink/?pdmfid=1505209&crid=8fe3272a-f5d5-44e5-a494-26e28699c9c9&pddocfullpath=%2Fshared%2Fdocument%2Fcases-uk%2Furn%3AcontentItem%3A4CSP-35S0-TWP1-6164-00000-00&pdcontentcomponentid=124160&pddoctitle=%5B1968%5D+1+All+ER+811&pdmetaitem=highlighttoken%2Crecalltoken&pdproductcontenttypeid=urn%3Apct%3A284&pdiskwicview=false&ecomp=43x8k&prid=4632b6cd-28c5-4257-8715-eb6d1ec094d3# (accessed: 11.03.2022)

[34] Stemp K. A Comparative Analysis of the Battle of the Forms. 2005. -P. 257.

[35] It was held that the protection provided by the defendant was inadequate and therefore the defendant’s negligence was deemed to have caused the loss. As a result of this, the defendants were liable to the plaintiffs for damages. The court found that due to the conditions of the agreement, the defendant was only liable for £800 per ton in damages.

[36] Wang Min. The Battle of Forms, Law and Society. No. 12. 2007. -P. 812.

[37] Achilles A. et al. Bürgerliches Gesetzbuch nebst Einführungsgesetz. Berlin: J. Guttentag, 1909. -P.70.

Thus, while an exchange of communications does not constitute a contract, when one party becomes silent and expresses its commitment to the other party's counter-offer through an act of performance, a contract is formed, and the contract's content is naturally governed by the text's most recent form. While it may seem that using the "Last-shot Rule" results in a different conclusion than applying the "mirror rule," the two do not truly conflict or contradict one another, and the "last shot rule" is not a contradiction. The "Last-shot Rule" is not a break with the Mirror Image Rule, but rather a continuation of it. As previously stated, the Last-shot Rule does not violate the Mirror Image Rule, but rather serves as a basic remedy.

Although the contract is constructed in accordance with the Last-shot Rule, a number of issues remain. To begin, the last shot rule tends to encourage parties to continue sending their own form texts to the other party, because once they do, the content of the contract is determined by the content of the other party's text, creating a vicious circle that adversely affects transaction efficiency and is counterproductive to business objectives. More significantly, it violates the notion of justice. This is because, regardless of the actual contracting procedure, the Last-shot Rule dictates that the contract's substance is simply established by the text's final form. In actuality, the seller often fires the "last shot" in the form of a confirmation of sale, thus application

of the Last-shot Rule frequently results in a seller bias. Because taking possession of the items is viewed as an acceptance of an unread phrase in the seller's acknowledgment, the purchase order is rendered obsolete. Given that neither the Mirror Image Rule nor the "Last-shot Rule" can meet the demands of the present contractual legal system, the times need a new solution, and a breakthrough is unavoidable.[38]

§ 3.2. Knock Out Rule

§ 2-207, paragraph 3 of the *Uniform Commercial Code* states, "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for salealthough 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."[39] That is, under this doctrine, the conflicting parts of the parties' respective form terms are offset against each other and are not effective.

CHAPTER 2. Legislative Breakthroughs of the Mirror Image Rule in the *United Nations Convention on Contracts for the International Sale*

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[38] Rühl G. THE BATTLE OF THE FORMS: COMPARATIVE AND ECONOMIC OBSERVATIONS u. Pa. J. Int'l Econ. L., 2003. -P.189.

[39] UNIFORM COMMERCIAL CODE. 1952. vol. 2-207. [Electronic resource]. URL: https://advance-lexis-com.proxy.library.carleton.ca/document/?pdmfid=1505209&crid=6ac4e9a2-44fc-42a3-890f-2bfe0c310a75&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5D72-1DG0-00S0-40GV-00000-00&pdtocnodeidentifier=AACAACAAH&ecomp=2cgg&prid=a61e7eae-0df6-4818-91ec-b21a93e5e984 (accessed: 11.03.2022)

of Goods (*CISG*)

Established in 1980, the *United Nations Convention on Contracts for the International Sale of Goods* is the convention on international commercial contracts with the most member nations to date. The result of negotiations between industrialised and developing countries, civil and common law systems, and Eastern and Western countries, it has widespread international support and has been ratified by more than 60 nations.[40]

It has long been the worldwide language not just of the sales law, but also of the basic principles of debt law, with breach of contract and legal remedies at its heart, due to its widespread applicability and significant effect on international uniform legislation and numerous local laws.[41] The *CISG* is also the first international convention to distinguish between "substantive" and "non-substantive" revisions to an offer while adhering to the Mirror Image Rule. This has had a substantial influence on the domestic legislation of many nations, especially the Contracts section of the Chinese Civil Code.[42]

§ 19:

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the

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[40] Kevin C. Stem-P. Solving Problems Fancine International Law Today: A Comparative Analysis Of The 'Battle Of The Forms. 15 Transnat'l L. & Contem-P. Probs. 243. 2005. p260.

[41] Peter Schlechtriem, Commentary on the United Nations Convention on Contracts for the International Sale of Goods (3rd ed.), compiled by Huini Li, Beijing: Peking University Press. 3rd edition. 2006. p156

[42] Schlechtriem P. et al. Commentary on the UN Convention on the International Sale of Goods (CISG). -P.113.

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 constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(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.[43]

It is evident that 19(1) provides for the Mirror Image Rule, which has been widely accepted in both civil and common law systems; and that the traditional contract law of each country stipulates that a promise must be consistent with the offer; and that an "acceptance" that adds to, restricts, or modifies the offer is not, in fact, an acceptance.[44] Paragraph (2), however, states that an addition or alteration to the offer may constitute acceptance and become a term of the contract provided it "does not fundamentally affect" the offer. The third paragraph further

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[43] United Nations Convention on Contracts for the International Sale of Goods. § 19 [Electronic resource].
URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf (accessed: 14.03.2022)

[44] CISG, Art. 19, 23 EuGVVO // Internationales Handelsrecht. 2006. vol. 6, number 4.

specifies what constitutes a "substantive change." This is a violation of the Mirror Image Rule. According to the classic Mirror Image Rule, an acceptance must be unconditional regardless of whether the criteria are "serious." For a response to be considered a "acceptance," it must be unconditional, and the offeree may simply repeat the conditions of the offer, at most with a complaint or an accompanying demand (another new offer), or a declaration of the legal consequence of the agreement.[45]

§ 1. Scope of § 19 of the *CISG*

In reality, Article 19 of the *CISG* clarifies two important concerns in contracts for the international commerce of products, namely, what are the contract's particular terms? Second, what are the parties' duties under the contract? The parameters of the sales contract are determined based on the substance of the offers and acceptances made between the parties. 19(1) of the *CISG* follows the classic mirror image requirement, i.e., in order for the offeree's answer to the offer to constitute a legal acceptance, the response must be similar to the substance of the offer.

The exemption to the Mirror Image Rule is outlined in the second paragraph of Section 19. A counteroffer is not an acceptance under paragraph (2) if the offeree's answer includes additional or

[45] International approach to the interpretation of the united nations convention on contracts for the international sale of goods. New York: Cambridge New York: Cambridge: Univ Press, 2007. -P.76.

contradictory elements that fundamentally modify the offer's terms. Only if the offeror accepts the counter-offer may the significantly revised terms become part of the parties' sales contract. Thus, 19(2) *CISG* grants the offeror the ability to reject a modification that is not substantial. In a contemporary market with fluctuating prices, allowing the offeror this right of refusal prevents the offeror from incurring excessive losses.

19(3) specifies the conditions under which an offer is regarded to have been substantially modified. This section is quite extensive and encompasses almost all of the principal terms in a standard sales contract. This makes it likely that, in the majority of circumstances, the offeree's reaction will be a counteroffer. In international trade practise, even if a proposal to add or inconsistency under 19(3) materially modifies the offer, it is not always determined that the answer is a counteroffer as opposed to an acceptance.[46] In a case in the United States, the seller (the offeree) argued in court that its response to the buyer's (the offeror) offer contained a "rejection of the arbitration clause contained in the offer," which materially altered the content of the offer and should be considered a counter-offer, and that the parties had not formed a contract of sale. The New York court rejected the seller's allegation and determined that a sales contract existed.[47]

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[46] 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. Pace Int'l L. Rev. 1. 2020. -P.326.

[47] John E. Murray,Jr.The Realism of Behaviorism Under the Uniform Commercial Code/51 Or. L . Rev. 269,1972.-P.173

Section 19 of the *CISG* is silent on the use of form phrases in transactions. In pursuit of efficiency, dealers make heavy use of pre-drafted form contracts during transactions. In addition, the provisions of these form contracts often include a substantial modification clause, as required by 19 (3). Due to the fact that dealers' form contracts are drafted in pursuit of their own interests, there are often disagreements between the provisions of the form contracts, i.e., a fight of the forms. In such instances, traders will continue trading in pursuit of their own objectives. This problem is not directly addressed by the *CISG*. During the construction of the *CISG*, the subject of combat of the forms was examined, and it was determined that a fight of the forms was not required under the present *CISG* regulations. This was because lawmakers believed that the current *CISG* standards adequately addressed the problem.

§ 2. Resolution of the Battle of the Formats Under the *CISG*

There is a wide divergence in practice and doctrine as to how the battle of the forms under *CISG* should be resolved, and so far there is no uniform model of resolution.[48] However, we can find that it can be

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[48] Larry A. Di Matteo et al. CISG-AC Opinion, Exclusion of the CISG, supra note 10, at 349-57.
The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

summarised in the following three settlement models: First, the application of the domestic law of each member state; second, the application of the Last-shot Rule; and third, the application of the Knock-out Rule.

§ 2.1. Application of the Domestic Laws of the Member States

The *CISG* does not give a realistic and effective solution to the battle of the forms, according to this concept. Since the problem of a battle of form hinges on the decision of the contract's legality, the domestic law of the member states may very well be relevant to address the matter under 4 (a) of the *CISG*. The legality of the contract, its contents, or its use is in question.

This approach is not commonly recognised by the international community due to the fact that the problem of the battle of the forms is not to validate the legitimacy of the contract, but rather to decide its substance. The argument against this approach is that the application of national law to the issue is inconsistent with the goal of the *CISG*, which is to establish an internationally applicable legal instrument with uniform application. According to Article 7(2) of the *CISG*, matters not specifically governed by the *CISG* shall be decided in line with the general principles recognised by the *CISG*.[49] Therefore, under *CISG*, the

[49] 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, 38UCC L.J. 2005. -P.55, 144,

question of the battle of the forms and the determination of the content of the contract can be resolved by applying the principle of "party autonomy" as set out in § 6 of *CISG*. The provisions of the *CISG* should first be exhausted before resorting to the application of national laws.[50]

§ 2.2. Application of the Last-shot Rule

The Last-shot Rule relies only on the offer and promise rules to choose the victor in a battle of forms. According to 19(1) and (3) of the *CISG*, an offeree's answer to a form response including a significant modification to the offer is not a legal acceptance but rather a counteroffer. Then, if the opposing party's answer to that counter-offer likewise includes a substantial change provision, it is considered a rejection of that counter-offer, and so on until a party starts to act for performance, which is considered an acceptance of the final offer. The Last-Shot Rule is supported by Article 18 of the *CISG*: "An acceptance is a word or action by the offeree signifying consent to an offer." Under the Final-shot Rule, a contract is created when one party conducts an act of performance, and the nature of the contract is governed by the terms of the last offer, since the act of performance is considered a commitment to the last offer. The party presenting the last offer wins the battle of the forms and the conditions of their pro forma contract, which becomes a

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[50] Moccia, supra note 8, at 662-63.

part of the parties' sales contract. The Last-shot Rule has been welcomed with both support and criticism.[51]

§ 2.2.1 Arguments in favour of the Last-shot Rule

First, the Last-shot Rule, which seeks a solution to the fight of the forms within the rules of the *CISG*, is entirely compatible with the *CISG*'s main aim.[52] Second, the Last-shot Rule ensures predictability in the selection of the contractual content of the parties, since the substance of the last offer determines the contractual content.[53]

§ 2.2.2 Arguments against the Last-shot Rule

The Last-Shot Rule has mostly been criticised on the grounds that its implementation would result in an unfair outcome. The last shot rule requires parties to reject the other party's proposition of addition or contradiction in a timely way; if they fail to do so, they are believed to have implicitly accepted the other party's offer and made an acceptance.[54] Nevertheless, a substantial amount of international trade experience demonstrates that parties often fail to recognise that the conditions of the other party's standard form contract vary from their own and are in conflict. Therefore, the last shot rule puts an unreasonable responsibility on the one doing the act.

Another argument against the last shot rule is because, in fact, it

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[51] Perales Viscasillas, Editorial Remarks, supra note 18.
[52] Reynolds R. A contractual content analysis. -P. 324.
[53] Piltz, supra note 7, at 233-44.
[54] Strmosljanin, supra note 14, at 65.

is unknown who party delivers the "last shot," which makes determining the terms of the contract more difficult.[55] In actuality, there are countless instances in which the form contract of one or both parties includes a provision that explicitly rejects the form contract clause of the other party, so that the other party's contract clause cannot be included in the contract between the parties. In such a scenario, it cannot be argued that one party has committed to the conditions of the other party by doing an act.

§ 3. Application of the Knock-out Rule

The Knock-out Rule states that a contract is formed even if the writing is insufficient to form a contract, provided that the conduct of the parties constitutes an acknowledgment of the existence of the contract and that the contract is based on the terms agreed to by the parties in the writing and the terms added by law. Disagreements between the parties nullify each other and render the provisions ineffective.

This regulation is supported by the *CISG*'s fundamental principles, particularly Article 6's "autonomy of the parties" provision. In accordance with section 6, the performance of the parties is presumed to be a tacit acceptance of the formation of the contract, regardless of the offer and acceptance requirements set out in section 19. Even if the parties have not agreed on all aspects of the contract, their actions suggest

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[55] Janssen, supra note 12, 457.

that they want it to be properly established and to serve their individual interests. The Knock-out Rule makes a clear difference between the issue of contract creation and the determination of its particular provisions. It gives the parties considerable freedom of choice. If the parties act for performance, they are said to have accepted the contract's structure. The contract's terms may then be defined based on what the parties have agreed upon. Incompatible clauses are null and void and are replaced by the *CISG* regulations. Section 8 of the *CISG* states that a party's action may be construed according to its subjective purpose, provided that the other party knew or could not have been oblivious of this subjective aim. Where it is impossible to discern the subjective purpose of the parties, 8(2) gives a more objective method for evaluating a party's response or other action based on what a reasonable person in the same circumstances as the other party would have interpreted it to be. Like the Last-shot Rule, the Knock-out Rule has received both criticism and favour.

§ 3.1. Arguments against the Knock-out Rule

The Knock-out Rule has been extensively criticised, mostly due to the fact that it sidesteps the implementation of *CISG* Article 19. Another reason is that the majority of *CISG* drafters rejected the knockdown rule. During *CISG* drafting, the Belgian delegation presented the following proposal: "The *CISG* rules should provide the settlement of

the format dispute. It is suggested to add the following provision to section 19: If the parties utilise a form contract, any contradictory clauses in the form contract cannot be incorporated into the parties' contract."[56] The drafters rejected this idea on the grounds that the war of formats is a very complicated problem that needs further research and dialogue. The third issue was that it was inconsistent with the intent of Article 7 of the *CISG*, which is to establish a standard paradigm for the implementation of the *CISG* regulations.

§ 3.2. Arguments in favour of the Knock-out Rule

The previous refusal by Belgium does not indicate that the knock-out Rule should not be used. The primary reason for the Knock-out Rule is that it gives a more realistic, equitable, and fair solution to the fight of the forms. As it does not put one party in a dominating position, it avoids the unfairness of the Last-shot Rule, which depends on the form contract of one party to define the substance of the contract between the parties. Similarly, the establishment of a contract under the Knock-out Rule does not require the parties to agree on all of the contract's provisions but simply on the simpler fundamental conditions, thereby avoiding the complexity of using the Final-shot Rule, i.e., establishing

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[56] 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 2002.20 Pace Int'l L. Rev. 1 .

who "fired the last shot."[57] The allegation that the Knock-out Rule does not provide a uniform solution is not persuasive.

The German Federal Supreme Court upheld this settlement in a September 2002 ruling [BGH VIII ZR 304/00]. On a dairy farm, the plaintiff (buyer, situated in New Zealand) acquired milk powder from the defendant (seller, located in Germany) and resold it to purchasers in the Netherlands and Algeria. The parties made verbal proposals and commitments, which were later reaffirmed in writing to formalise the transaction. "Notwithstanding the seller's responsibility to refund the purchase price or otherwise involving the return of the purchase price, the seller's liability for damages is limited to the amount invoiced for the products provided." "(The seller's confirmation form indicates that "The buyer must promptly check the products upon arrival and document any claims on the delivery note." .... If the issue is not observable at the time of delivery, it may only be raised prior to the due date that is written on the invoice. .... The buyer must offer the products at issue or a representative sample. If so, the vendor is ineligible for warranty reimbursement. " The form confirmation also includes the following clause: "Our sales are governed only by our general terms and conditions." Incompatible statutory requirements and general terms and conditions supplied by the seller will not be recognised and will not be

[57] 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 2002.20 Pace Int'l L. Rev. 1 .

included into the agreement. " Later, the merchant delivered the products. The buyer has examined the milk powder before sending it to the next household. However, while processing the milk powder, the subsequent household discovered that it had a rotten odour and demanded recompense from the buyer. The buyer paid a total compensation of NLG 29,256. The buyer sought damages of USD 198,150.36 against the seller, claiming that the milk's spoiling was caused by the seller's improper treatment of the product prior to its resale. The plaintiff eventually filed a lawsuit. The buyer asserted that the *CISG* was not excluded from the vendor's standard conditions and, therefore, the seller was responsible under the *CISG*. The seller argued for a liability restriction based on the M.P.C. provision in the buyer's form.

In this instance, the Federal Court determined that the terms and conditions submitted by the buyer and the seller did not substitute the application of the *CISG* in whole or in part, and decided in line with the *CISG* provisions. First, regarding the formation of the contract, the Court ruled that "Contradictory form conditions between the parties do not invalidate the legality of the contract." On the basis of the purpose shown in the execution of the parties' actions, we may conclude that agreement on all of the contract's conditions is not required for its formation. " [BGH VIII ZR 304/00]. There are significant indications of the court's implementation of the knock-out rule in this debate. Regarding the

contract's substance, the court ruled that the M.P.C. language in the buyer's proform was replaced by an overall rejection clause in the seller's confirmation. "By virtue of good faith and fair dealing under 7(1) *CISG*, the seller may not cherry-pick the other party's form conditions and unilaterally apply them in its favour." [BGH VIII ZR 304/00]. Thus, the Court denied the seller's request to rely only on the limitation of responsibility language (M.P.C. clause) in the buyer's proform text. In this case, the court did not identify which technique was employed but relied on the concept of good faith in Article 7 of the *CISG*, which corresponds to the Knock-out Rule, and ruled that "the opposite approach (the Last-shot Rule) would not have led to a different result." Accordingly, it is widely acknowledged that the court resolved the issue by adopting the Knock-out Rule.

The implementation of the Knock-out Rule results in the nullification of all conflicting provisions and the adoption of the *CISG* regulations. The end consequence is that the *CISG* rules apply in lieu of the parties' deviations from the *CISG* requirements, resulting in uniform implementation of the *CISG* regulations.[58]

CHAPTER 3. Legislative Breakthroughs of the Mirror Image Rule in the US and Germany

[58] Ingeborg Schwenzer. Commentary on the UN Convention on the International Sale of Goods/ Oxford University Press, 2010. -P.348.

§ 1. Provisions in the *United States Uniform Commercial Code (UCC)* and Breakthrough

In the 1940s, the American Law Institute (ALI) and the National Council of Uniform Laws (NCCUSL) began establishing the *UCC* with the intention of unifying and simplifying the laws governing commercial transactions and fostering the expansion of commerce and trade.[59] Approximately a decade later, all 50 states, the District of Columbia, the US Virgin Islands, and Puerto Rico ratified the *UCC* into law.

The drafters of *UCC* 2-207 were acutely aware of current market dynamics. In a standard transaction, the Mirror Image Rule deems the contract invalid if the seller's response to the buyer's offer to purchase includes an inconsistent clause.[60] In contrast, the buyer and seller

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[59] Baird & Weisberg, supra note 24, at 1224. Moreover, in a letter to Professor Robert Summers, Grant Gilmore, one of the principal drafters of the Code, made the following statement regarding UCC § 2-207:

The 1952 version of 2-207 was bad enough . . . but the addition of subsection (3), without the slightest explanation of how it was supposed to mesh with (1) and (2), turned the section into a complete disaster. . . .My principal quarrel with your discussion of 2-207—and all the other discussions I have read—is that you treat the section much too respectfully—as if it had sprung, all of a piece, like Minerva from the brow of Jove. The truth is that it was a miserable, bungled, patched-up job—both text and Comment — to which various hands — Llewellyn, Honnold, Braucher and my anonymous hack — contributed at various points, each acting independently of the others (like the blind men and the elephant). It strikes me as ludicrous to pretend that the section can, or should, be construed as an integrated whole in light of what "the draftsman" "intended." (I might note that, when subsection (3) was added, Llewellyn had ceased to have anything to do with the code project).

Letter from Professor Grant Gilmore to Professor Robert Summers (Sept. 10, 1980), reprinted in RICHARD E. SPEIDEL, ROBERT S. SUMMERS & JAMES J. WHITE, COMMERCIAL AND CONSUMER LAW: TEACHING MATERIALS 54 – 55 (3d ed. 1981).

[60] White J. et al. Uniform Commercial Code 207-3. 5th ed. 2000. -P. 30.

continue with the transaction; the vendor delivers the things, the customer accepts them, and the agreement is finalised. In contrast, the Last-shot Rule views the buyer's acceptance as a commitment to the seller's counter-offer, and the seller's response defines the whole contract.[61] The *UCC* 2-207 seeks to rectify the inequitable effects of the Mirror Image Rule and Last-shot Rule and to bring the Battle of the Forms resolution in line with modern business requirements. In spite of the founders' good intentions, *UCC* 2-207 has resulted in a number of practical issues, with courts using and interpreting it inconsistently. According to one expert, "it's a legislative disaster, with every term providing an interpretation dilemma." *UCC* 2-207 has been described as "an amphibious tank meant for swamp warfare but deployed in parched battle" and "a skulking demon that waits patiently for the interpreters who will condemn it and instil a feeling of despondency in the population."[62]

§ 1.1. Provisions in § 2-207 of the *UCC*

§ 1.1.1. § 2-207(1) of the *UCC*

"A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from

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[61] Corneill A. Stephens. Escape From The Battle Of The Forms: Keep It Simple, Stupid. 11 Lewis & Clark L. Rev. 233. 2007. -P.12.

[62] Stephens C. On ending the battle of the forms. KY. L.J., 1991. -P. 815, 822.

those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."[63]

Under the Mirror Image Rule, the acceptance must be identical to the offer; otherwise, the counteroffer is a rejection of the acceptance. James J. White and Robert S. Summers, 207-3 at 30 (5th ed., 2000). In contrast, *UCC* 2-207 (1) differs from the conventional Mirror Image Rule by stating that an acceptance is effective even if it modifies the conditions of the original offer so long as it is definitive and timely. It affirms the legitimacy of an acceptance that is inconsistent with the terms of the offer and is arguably a subversive amendment to the Mirror Image Rule. This clause has two effects: first, the formation of the contract; and second, the acceptance of the offeror's proposed terms.[64]

Thus, 2-207(1) of the *UCC* stipulates that a contract is created based on the terms of the offer. First, section 2-207 (1) of the *UCC* eliminates the conventional Mirror Image Rule, which requires the acceptance to be similar to the offer, and confirms that a contract may be created even if the acceptance and offer are not the same. This section represents the fundamental premise of the Code, which is that an exchange of standard form documents may result in a legally binding

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[63] UNIFORM COMMERCIAL CODE. 1952. vol. 2-207(1). [Electronic resource]. URL: https://advance-lexis-com.proxy.library.carleton.ca/document/?pdmfid=1505209&crid=6ac4e9a2-44fc-42a3-890f-2bfe0c310a75&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5D72-1DG0-00S0-40GV-00000-00&pdtocnodeidentifier=AACAACAAH&ecomp=2cgg&prid=a61e7eae-0df6-4818-91ec-b21a93e5e984 (accessed: 11.03.2022)

[64] John E. Murray, Jr.The Realism of Behaviorism Under the Uniform Commercial Code, 51 Or. L. Rev. 1972. -P.269, 299.

agreement even if the parties' terms differ. The lawmaker intended to decrease the number of instances in which a party might cite a difference in a form language as a reason for nonperformance. In other words, 2-207(1) of the *UCC* is concerned with whether the parties are really engaged in a transaction, not with formalities. Second, the nature of the contract is largely determined by the offeror's conditions. A supplemental provision is nothing more than a fresh proposal by the original offeree to modify an existing contract. The original offeror may accept or reject this counteroffer. (The impact of the supplemental clause is described in (2). "The conditions of the contract correspond to the terms of the initial offer," which is another departure from the Last-shot Rule, developed from the old Mirror Image Rule. The dominating position switches from the "last shot" issuer to the "first shot" issuer. Generally speaking, the buyer places the order before the seller, so the advantage flows to the buyer.

Despite the fact that *UCC* 2-207 (1) answers each of these difficulties, two more things are worthy of mention. Therefore, 2-207 (1) focuses on whether there has been an actual deal, not whether there has been a formal contract.[65] First, the second part of paragraph (1) qualifies

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[65] Professor Murray calls this "intention over terms." See John E. Murray, Jr., Intention Over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts, 37 FORDHAM L. REV.1969. p317. See also John E. Murray, Jr., The Realism of Behaviorism Under the Uniform Commercial Code, 51 OR. L. REV. 1972. p269, 299, wherein Professor Murray states:
In order for commercial practices to expand, i.e., to change, and in order for the law to react effectively to these changes, courts must become accustomed to digging into the nature of the practices surrounding the transaction. In order for courts to determine what the bargain of the parties was, in fact, courts must begin to empathize with the behavior patterns of the parties under the particular

the acceptance of an undertaking by stating "unless specifically made contingent on acquiescence to the additional or alternative conditions." Nonetheless, there are divergent interpretations of this exclusion. The literal interpretation of paragraph (1) is that the offeree must specify specifically in the acceptance that the approval of the offeror is necessary for the acceptance to become effective, which is a prerequisite for the application of the exclusion. Some have claimed, however, that an acceptance is a "acceptance contingent on the offeror's permission" if the change in the acceptance is to the offeror's harm. Additionally, it has been contended that only if the offeree specifically indicates in the acceptance that the offeror's permission is necessary for the acceptance to take effect, and the offeror likewise expressly consents, would the acceptance take effect. The so-called "explicit provision" stipulates that the tone and structure of the offeree's words, as well as its position in the transaction, must be such that a reasonable offeror would both recognise and comprehend it without ambiguity. The court placed tight restrictions on this.[66] Second, the *UCC* and its commentators do not specify what constitutes an "expression of acceptance." In reality, it is conceivable to use both a "reasonable person test" and a "reasonable person standard" to

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circumstances of their transaction. This requires empirical verification which will, on many occasions, require courts to depart from the documentary evidence of the transaction and consider other manifestations of the parties and the surrounding circumstances to identify more precisely their circle of assent. Parties do make agreements in fact and these are the agreements which should be enforced—not the agreements mechanically constructed from the printed pieces of paper which the parties happened to use as partial tools.

[66] Von Mehren A. The battle of the forms. [Berkeley]: American Association for the Comparative Study of Law, 1990. -P. 274.

evaluate whether an offeree subjectively accepts an offer. The assessment of an "expression of acceptance" may potentially restrict the applicability of *UCC* section 2-207 (1). Even though the word "commitment" is used in the offeree's answer, it is not an "indication of commitment" if the key elements of the commercial talks, such as quantity and price, are materially different from the initial offer.[67]

§ 1.1.2. § 2-207(2) of the *UCC*

"(2) The additional terms are to be construed as proposals for addition to the contract. Between merchantssuch 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."[68]

The objective of this paragraph is to establish the terms of the contract made by the parties' actions. § 2-207(1) of the *UCC*, which allows for the creation of a contract in the case of contradiction between the acceptance and the offer and if the content is based on the offer,

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[67] White J. et al. Uniform Commercial Code. -P.108.

[68] UNIFORM COMMERCIAL CODE. 1952. vol. 2-207(2). [Electronic resource]. URL: https://advance-lexis-com.proxy.library.carleton.ca/document/?pdmfid=1505209&crid=6ac4e9a2-44fc-42a3-890f-2bfe0c310a75&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5D72-1DG0-00S0-40GV-00000-00&pdtocnodeidentifier=AACAACAAH&ecomp=2cgg&prid=a61e7eae-0df6-4818-91ec-b21a93e5e984 (accessed: 11.03.2022)

seems to be too favourable to the offeror. 2-207(2) of the *UCC* goes on to provide for the impact of new provisions in the offeree's undertaking, which may join the contract and become a part of it, with three exceptions. This is done out of fairness and to reverse the offeror's dominant position.

§ 1.1.2.1. Definition of the Scope of A "Proposals for Addition"

§ 2-207(2) of the *UCC* states that suggestions for addition may be included into the contract, however the definition of "proposals for addition" is the subject of great disagreement.

In § 2-207(1) of the *UCC*, an acceptance is enforceable even if it is "different from or in addition to the offer," and in this case, the differences in the promise contain both differential and additional terms. It goes without saying that a "additional" phrase is a "proposal for addition." However, does a differential clause fit within the definition of "proposals for addition"? Does it applicable to *UCC* § 2-207(2)? What are the implications of its implementation? On this question, there is no agreement in US law and doctrine, and there are three perspectives:

The first position is that "different terms" should be construed as suggestions for addition, to which § 2-207(2) of the *UCC* states that suggestions for addition may be included into the contract, however the definition of "proposals for addition" is the subject of great disagreement.This perspective starts by confirming the presence of

"different terms" in the proposals for addition, but then removes them from the contract by using subsection (b) of 2-207(2)'s exclusion, which regards the different terms as a major change. This viewpoint has been mirrored in a number of US court rulings.[69]

The second position is that "different terms" are not suggestions for addition, are not subject to *UCC* 2-207 (2), and so cannot be included in the contract. First, according to 2-207 (1) of the *UCC*, the content of the contract is dependent on the content of the offer, and neither the different conditions nor the additional terms in the acceptance constitute the basis for the contract's content. Only by virtue of paragraph (2) may new terms be added to and incorporated into the contract. However, the word "proposals for addition" in 2-207(2) of the *UCC* refers exclusively to the "additional terms" in paragraph (1) and excludes the "different terms." Therefore, "the different terms" do not join the contract via paragraph (1). (2).

Thirdly, the acceptance and the conflicting conditions of the offer cancel each other out, and the offeree's form text may only serve as an acceptance of the offeror's terms that are not in conflict. The official commentary to section 2-207 of the *UCC* supports this position: when

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[69] BRASS REMINDERS CO., INC. V. RT ENGINEERING CORP. 2020. VOL. 462 F.SUPP.3D 707, 708+,. AD HOC ENERGY, LLC v. BRADLEY EQUIPMENT CO. // WL 2198035. 2020. vol. NOCV20190393.11. [Electronic resource]. URL: § 2-207. Additional Terms in Acceptance or Confirmation MA ST 106 § 2-207Massachusetts General Laws Annotated Part I. Administration of the Government (Ch. 1-182) (Approx. 2 pages) [online] // Proxy.library.spbu.ru. 2022. URL: https://proxy.library.spbu.ru:5014/RelatedInformation/NDE983D30173B11DB9292C066B0348FB7/kcCitingReferences.html?docSource=cd089423b1674eb3aa2fb272b0b18c14&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&ppcid=31e94f3af355434d9c7fd8387b209145&originationContext=citingreferences&transitionType=CitingReferences&contextData=%28sc.DocLink%29 (accessed: 01. 05. 2022).

parties transmit contradictory terms on the confirmation, each party is expected to object to the conflicting words in its own wording. Thus, the second criterion of rejection notice has been met, and the contradictory provision cannot be included in the contract.[70] Moreover, the bill of *UCC* § 2-207(2), which originally contained a "different" clause, was deleted when it was formally approved, which shows that the legislator did not want "different" clauses to be treated as proposals for addition.[71]

The first and second perspectives are referred to as the "conventional view." Despite the variances in their analyses, they all reach the same conclusion: that new conditions cannot be added to the contract and that the contract content follows that of the offer, sometimes known as the "first shot rule." Contrary to the usual Last-shot Rule, this conclusion offers the offeror an advantage, which is against the principles of justice. Thus, the "first shot rule" has been heavily criticised by academics.[72] The third view is the "innovation view", also known as the "Mutual Elimination Rule", according to which conflicting provisions do

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[70] UCC § 2-207 cmt. 6 (1966) provides:
If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. 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 himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a 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).
The written confirmation is also subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section failure to respond permits additional terms to become part of the agreement. [Emphasis added.]

[71] Bill on Uniform Commercial Code[Electronic resource].
URL: https://proxy.library.spbu.ru:5014/Browse/Home/SecondarySources/CommercialLawSecondarySources/CommercialLawTextsTreatises/UniformCommercialCodeOfficialText?originationContext=typeAhead&transitionType=CategoryPageItem&contextData=(sc.Default) (accessed: 01.03.2022)

[72] Keating D. Exploring the Battle of the Forms in Action // SSRN Electronic Journal. 2000. -P22

not affect each other.[73] This viewpoint is fair and reasonable, consistent with the legislative purpose and the language of *UCC* Section 2-207 (3), and the author of this thesis endorses it.

§ 1.1.2.2. Substantive Changes

2-207(2) of the *UCC* stipulates that a request for addition may constitute an extra component of the contract, but imposes three exclusions. Except for (b), which allows for a "substantive change" and is readily disputable in theory and practise, (a) and (c) are clearly understood and may be summarised as previous or subsequent objections by the offeror. If the proposed addition does not substantially alter the terms of the contract, then it can be incorporated into the contract and become an integral part of it, thereby regulating the rights and obligations of the parties, and the offeror must object in a timely manner if he does not agree to it; if it does significantly alter the terms of the contract, the offeror can simply disregard it without raising any objections. Official Comment 4 to *UCC* 2-207 clarifies the distinction: "there are terms that " substantially change" the contract and which, if inserted into the contract without the other party's full knowledge, would lead to shocks and difficulties for the offeror. "A common example of this sort of clause

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[73] Valentino D. Economic Globalisation and Disorder of Law. An example: Battle of the Forms vs. Mirror-Image Rule // Zeitschrift für Gemeinschaftsprivatrecht. 2010. vol. 7, -P.4.

is..."[74] The commentary describes the use of the "substantive change" criteria as "unexpected and unpleasant" and provides examples of common sentences. In contrast, Official Commentary 5 to Section 2-207 contains provisions that do not significantly affect the contract's terms. Although the official commentary to the *UCC* identifies substantive and non-substantial changes, the author of this thesis considers that the determination of "substantive change" cannot be simply applied to the commentary and that the list can only be used as a guide to identify substantive changes. The decision of whether a change is "substantive" must also include if it is "unexpected and embarrassing." In practise, courts often see this problem as a matter of fact, but sometimes as a question of law. It is vital to consider the value of the transaction, the connection between the parties, business practises and performance norms, and other variables while reaching a conclusion.

§ 1.1.3. § 2-207(3) of the *UCC*

"Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for salealthough the writings of the parties do not otherwise establish a contract. In such case the

[74] UCC § 2-207 cmt. 4 (1966) provides:
Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

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."[75]

The *UCC*'s § 2-207(3) is a typical example of the Knock-out Rule. It applies to circumstances in which the parties have begun performance, but the exchange of standard form papers between them does not constitute a contract, and specifies the construction and substance of the contract in such scenarios.

The § 2-207(3) of the *UCC* is twofold: the first sentence establishes that a contract may be formed by the conduct of the parties even if the writing of the parties is insufficient to form a contract; and the second sentence establishes that a contract may be formed by the conduct of the parties even if the writing of the parties is insufficient In such a circumstance, the second phrase describes the substance of the contract: "the terms of the specific contract consist of those conditions on which the parties' writings agree, as well as any additional terms included under other sections of this Act." It is evident from the first sentence that a repetition of the legislative intent in paragraph (1) is necessary to maximise the development of the contract.[76] In subsection (1), the

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[75] UNIFORM COMMERCIAL CODE. 1952. vol. 2-207(3). [Electronic resource]. URL: https://advance-lexis-com.proxy.library.carleton.ca/document/?pdmfid=1505209&crid=6ac4e9a2-44fc-42a3-890f-2bfe0c310a75&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5D72-1DG0-00S0-40GV-00000-00&pdtocnodeidentifier=AACAACAAH&ecomp=2cgg&prid=a61e7eae-0df6-4818-91ec-b21a93e5e984 (accessed: 12.03.2022)

[76] Douglas G. Baird, Robert Weisberg. Rules, Standards, and the Battle of the Forms: A Reassessment of Section 2-207, 68 Va. L. Rev. 1217.1982. p1224.

requirement for a promise has been relaxed to the extent that it need not be identical to the offer. If the exchange of documents between the parties does not create a contract under these relaxed conditions, subsection (3) goes further and the act of performance establishes the formation of the contract. As stated in Official Comment 2 to *UCC* § 2-207, "There is no reason why a proposed transaction, which has been concluded in the ordinary course of business, should not be considered as if a contract in fact existed." The first sentence of § 2-207(3) of the *UCC* again makes it clear that the *UCC* is concerned with whether the parties are in fact dealing and is not bound by form. The second sentence does not determine the content of the contract on the basis of unilateral terms, as in the case of the “First Shot Rule" or the “Last-shot Rule", but rather the content of the contract is determined by the terms agreed upon by the parties and the legal filler clause.[77] Respecting party autonomy via the establishment of a contract on mutually agreed-upon terms while not depending on one party's terms for contradictory sections, avoids the dominant party from raising the duties of the other party and results in a fair and acceptable solution. This is the Knock-out Rule technique, which is also compatible with 207. (2).

§ 1.2. Current *UCC* § 2-207 As Amended in 2003

[77] White J. et al. Principles of Sales Law. St. Paul: West Academic, 2017.p201.

Due to the evolution of internet commerce, the original rules of the *UCC* have been revised several times as they eventually became out of date. In May of 2003, the ALI and the NCCUSL made substantial revisions to Article 2 (Sales) of the *UCC*, resulting in a revised official wording. Additionally, Article 2-207 has been extensively revised.[78]

The current *UCC* § 2-207:

"*In addition to section 2-202, a contract is formed by the conduct of the parties if (i) the parties' conduct acknowledges the existence of the contract, although their records do not otherwise establish it, (ii) the contract is formed by offer and acceptance, or (iii) a contract formed in any manner is confirmed by the records which contains additional or different terms from those contained in the confirmed contract, then the terms of the contract are:*

(a) the terms appearing in the records of both parties.

(b) a term to which both parties agree, whether or not it appears in the record; and

(c) a term provided for or incorporated under any provision of this Act."[79]

The current section 2-207 of the *UCC*, titled "Contract Terms;

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[78] The Uniform Law Commissioners (" ULC ") approved the amendments in Summer,2002. The American Law Institute (ALI ") approved the amendments in Spring, 2003. The Uniform Commercial Code is a joint enterprise of the ALI and ULC.

[79] UNIFORM COMMERCIAL CODE. 2003. vol. 2-207. [Electronic resource].
URL: https://advance-lexis-com.proxy.library.carleton.ca/document/?pdmfid=1505209&crid=1d62165e-3180-4dea-875b-ad2ec33d93d2&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5D72-1DG0-00S0-40GV-00000-00&pdtocnodeidentifier=AACAACAAH&ecomp=2cgg&prid=0258961f-f0fe-4b05-869b-5e761a7bb805 (accessed:12.03.2022)

Effect of Confirmation," may be separated into two sections. The first section addresses the creation of a contract and outlines the three kinds of contract formation; the second section addresses the substance of the contract and the composition of the conditions after the formation of the contract.

§ 1.2.1. Formation of the Contract

The amended *UCC* Section 2-202, entitled "Final Written Expression: Parol or Extrinsic Evidence", is a provision relating to the determination and interpretation of terms in documents between the parties, under which a contract may be formed in three forms.[80]

§ 1.2.1.1. Acknowledgement of the Existence of A Contract by the Conduct of the Parties

Even if the documentation is insufficient, the parties may recognise the existence of a contract via their behaviour, and the contract should then be created. The purpose of the parties to create a contract by performing an act is not exclusive to the Uniform Commercial Code. International agreements and the civil law of Germany, the United Kingdom, and China all permit the creation of a contract with an offer of performance. The Last-shot Rule also accurately establishes the structure

[80] John E. Murray, Jr. Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability, 39 U. PITT. L. REV. 1978. p597, 605.

and substance of a contract via an act of performance. In contrast to the Last-Shot Rule, this *UCC* clause establishes the formation of a contract based on an act of performance but not its subject matter.[81] The content of the contract is set out in the latter part.

§ 1.2.1.2. The Form of Offer and Acceptance

The form of offer is the overall manner in which a contract is established and is often a general provision in the establishment of contracts. According to conventional thought, the acceptance must be similar to the offer, and the contract's terms are without a doubt identical to those of the offer. Nevertheless, under the present *UCC* standards, the substance of the contract will be determined by the relevant terms in the contract's last section. According to this clause, there is no longer a difference between a standard contractual dispute and a Battle of the Forms, and the methods for assessing the contract's substance are similar. This is a clear violation of the Mirror Image Rule.

§ 1.2.1.3. Contracts Formed by Confirmations

Strictly speaking, this subparagraph is not a distinct kind of contract creation from the previous two, but it does emphasise the importance and effect of the confirmation for formed contracts. In

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[81] E.AlLen Farnsworth, Farnsworth on Contracts. 3d ed. 2004.p21.

contemporary commercial transactions, contracts are often executed by the exchange of standard form texts, which frequently vary according to the respective interests of the parties. In turn, the contract confirmation is often distinct from the terms to be verified. As this subparagraph makes clear, these discrepancies do not impact the creation of the contract, which is made in the same manner as the previous two subparagraphs and is controlled by the later portion of 2-207.

§ 1.2.2. The Terms of the Contract

The latter portion of 2-207 stipulates that the terms of the contract should consist of three parts: (a) the terms appearing in the records of both parties; (b) a term to which both parties agree, regardless of whether it appears in the record; and (c) a phrase to which both parties agree. (a) and (c) are similar to the original provision and the 1993 amendment—the conditions agreed upon in writing by the parties. Subparagraphs (a) and (c) are identical to the original provision and the 1993 amendment—the conditions to which the parties agreed in writing and the legal supplement, respectively—whereas subparagraph (2) is new. A provision that the parties have really agreed to is included in the contract, regardless of whether or not it is documented in writing. This clause is more respectful of the liberty of the parties, and the assessment of the parties' "agreement" is no longer restricted to the written document,

but also includes the contractual process and the act of performance.

§ 2. Provisions in the *German Civil Code (GCC) and Breakthrough*

§ 2.1. Last-Word Rule - Traditional Use of German Law

§ 150 (2), 151, 154 (1) and 155 of the *German Civil Code* provide as follows:

§ 150 (2): An acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer.

§ 151: A contract comes into existence through the acceptance of the offer without the offeror needing to be notified of acceptance, if such a declaration is not to be expected according to customary practice, or if the offeror has waived it. The point of time when the offer expires is determined in accordance with the intention of the offeror, which is to be inferred from the offer or the circumstances.

§ 154(1): As long as the parties have not yet agreed on all points of a contract on which an agreement was required to be reached according to the declaration even of only one party, the contract is, in case of doubt, not entered into. An agreement on individual points is not legally binding even if they have been recorded.

§ 155: If the parties to a contract which they consider to have been entered into have, in fact, not agreed on a point on which an agreement was required to be reached, whatever is agreed is applicable

if it is to be assumed that the contract would have been entered into even without a provision concerning this point.[82]

It is clear from the above provisions that German civil law applies the Last-shot Rule (known in Germany as the "Rule of Last Word").[83] § 150(2) provides that an acceptance which expands, restricts or otherwise modifies the offer is deemed to be a rejection of the original offer and a new offer, clearly requiring that the acceptance must be identical to the offer, in the same way as the mirror image rule. § 151 establishes the legality of acceptance by performance by providing that the acceptance need not be expressed to the offeror and that the contract is formed as soon as it is made. This is precisely the model of the Last-shot Rule - "offer - counter-offer - acceptance by conduct". According to § 155, once the contract is formed, it is presumed that the "last word" is decisive for the content of the contract.

§ 2.2. A Change in the Theoretical Basis

On the legal basis, the Last Shot Rule became popular in Germany before the 1970s. Early decisions of the German Federal Court of Justice used the Last Shot Rule to resolve conflicts of form clauses. In June 1973, the Federal Court of Justice handed down a decision in which

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[82] GERMAN CIVIL CODE. 2002. vol.150 (2), 151, 154 (1) and 155. [Electronic resource]. URL: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0450 (accessed: 15.03.2022)

[83] Louis F. Del Duca. Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of Forms CLSG Provisions in Civil and Common law Countries. 25 J.L. & Com. 2005. -P.133.

the theoretical basis of the last shot rule was removed from the discussion.[84]

On 1 December 1969, the defendant (the purchaser) submitted a standard order specifying that delivery would occur on 15 April 1970.[85] In addition, the order noted that "any differences between the form order of the party receiving the order and ours must be certified in writing by us for the difference to be acceptable." A month after receiving the order, the defendant (the purchaser) sent a confirmation of the form, modifying the delivery date to mid- to late-April and releasing it from obligation for late delivery damages. The commodities were not delivered until June 1970, when the customer harvested and used them, but only paid a portion of the sum, retaining a portion as late delivery damages. The seller eventually filed a lawsuit against the defendant for the entire purchase amount (the buyer).[86] The lower court ruled in favour of the plaintiff. According to section 150 (2), the seller's form confirmation comprised an acceptance with revisions, a rejection of the buyer's order form (offer), and a counteroffer. This counteroffer has been accepted due to the buyer's failure to timely oppose. The buyer's continued usage of the act represented an acceptance of the counteroffer.

The Germany Federal Court, however, reversed this verdict.

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[84] Loewy W. The Civil Code of the German Empire. -P.1087.

[85] VIII ZR 277/99. [Electronic resource]. URL: https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2000&nr=22717&pos=27&anz=2206 (accessed: 24.03.2022)

[86] BGH 26 sept, BGHZ 61 1973. p282-289

First, the court determined that there was a contractual connection between the parties. 150 (2) must be read in line with the concept of good faith, that the parties' actions—delivery and acceptance of the goods—reflected the existence of a contract, and that the sinfulness of some clauses should not prohibit the creation of a contract. However, the "final shot" (the seller's pro forma wording) was insufficient to define the contract's terms. Since there were substantial disparities between the plaintiff's (seller's) and the defendant's (buyer's) proform, the seller was not permitted to presume, in line with the concept of good faith, that the buyer's silence signified approval of his own pro form. In addition, the buyer's subsequent receipt and use of the goods could not be considered an acceptance of the counter-offer, as the recipient had demonstrated that he adhered to his own proform, while the seller had not stated at the time of delivery in June 1970 that actual delivery was contingent on the buyer's acceptance of the seller's proform.

The declaration of the Federal Court that "there is no right to suppose that silence equals acceptance of a standard form" and that "the act of accepting delivery and utilising it cannot be interpreted to establish a pledge to make a counter-offer" shatters the "Last-shot Rule". It acknowledges the contractual relationship between the parties but does not presume that silence and performance constitute a promise to counter-offer. Instead, it relies on the "last shot" to determine the content

of the contract, distinguishing between the "formation of the contract" and the "content of the contract." However, no precise method is provided for determining the contract's substance in such circumstances. In addition, the Federal Supreme Court seems to imply that the seller's form is not the "last shot" by stating that "the consignee has demonstrated that he adheres to his own form, whereas the seller did not state at the time of delivery in June 1970 that actual delivery was contingent on the buyer's acceptance of the seller's form." The seller's pro forma wording was not the "last attempt." However, no precise method is provided for determining the contract's substance in such circumstances. In addition, the Federal Supreme Court seems to imply that the seller's form is not the "last shot" by stating that "the consignee has demonstrated that he adheres to his own form, whereas the seller did not state at the time of delivery in June 1970 that actual delivery was contingent on the buyer's acceptance of the seller's form." The seller's pro forma wording was not the "last attempt."

Thus, despite the fact that this case shook the doctrinal basis of the Last-shot Rule, it has been characterised as "merely demonstrating that the last word theory" is no longer as impregnable as it previously was, but does not explain (how to settle) such disputes." It does not really explain how to overcome such issues.[87]

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[87] O de Lousanoff. Die wirk samkeit des Eigentumslorbehaltes bei kolliderenden allgemeinen Geschoftsbedingungen. NJW. 1982. p1727, 1730

§ 2.3. The Modern View

If the judgement of the Federal Court of Justice in 1973 was only an improvement, then the decision of the Court of Appeal of Koln on March 19, 1985 was nothing short of a revolution. It was a continuation of the 1973 ruling of the Federal Supreme Court and a further departure from the Mirror Image Rule and the Last-shot Rule. First, the court determined that the unilateral use of one party's standard form was contrary to good faith and that the receipt of goods by one party without objection could not be construed as an acceptance by the other party, and interpreted this as "a willingness to leave the point in dispute to be resolved later for fear of the risk of negotiation failure that could be incurred as a result." The Court of Appeals also construed the contract's formation. Although prior case law had upheld the establishment of the contract, the explanation of how it was created was rather hesitant, indicating merely that the parties' delivery and reception of the goods showed the existence of a contract. In this aspect, the reasoning of the Court of Appeal appears more convincing. The conditions previously agreed upon by the parties represented the conclusion of the offer, i.e., their acceptance. Contract formation has occurred.

Section 154 of the *German Civil Code* addresses the establishment of a contract, not its legality. Therefore, failing to agree on

specific aspects of a standard contract form does not always make the whole deal ineffective or invalid. In addition, the Court of Appeal of Koln provided a solution to a subject not addressed in the preceding case law: how the contract's substance was assessed. Where the parties had agreed to terms, the contract was established based on those terms; otherwise, the applicable law was applied to generate the requisite contractual terms. The approach of the Court of Appeal of Cologne was affirmed by the Federal Court of Justice and has been followed and developed by subsequent jurisprudence, resulting in the Knock-down Rule: the terms agreed upon by the parties form the basis of the contract; conflicting terms have no effect on the contract. A contradictory provision has no effect on the construction of the contract, but it is null and invalid and is replaced by the applicable rule of law.

CHAPTER 4. Research on Chinese Contract Legislation with Case Studies and Suggestions

§ 1. Overview of Current Status of Chinese Contract Legislation

§ 1.1. *Contract Law of the People's Republic of China* (1999) and Related Judicial Interpretations

§ 1.1.1. Provisions of § 30 and 31 of the *Contract Law of the People's Republic of China* (1999)

Prior to 1999, China's three contract laws (the Economic

Contract Law, the Law on Foreign-related Economic Contracts and the Law on Technical Contracts) contained no basic provisions on offer and acceptance, and under the control of the planned economy, there was a dearth of corresponding cases. In 1999, the Contract Law was promulgated and implemented, and as a party to the *CISG*, China's Contract Law "borrowed" or even "copied" the rules on offer and acceptance from the *CISG*. This makes the provisions of China's contract law almost identical to those of the *CISG*, although there are some minor differences.

§ 30: The content of the acceptance shall be consistent with the content of the offer. If the offeree makes substantive changes to the content of the offer, it shall be a new offer. Changes concerning the subject matter of the contract, quantity, quality, price or remuneration, period of performance, place and manner of performance, liability for breach of contract and method of dispute settlement are substantive changes to the content of the offer.

§ 31: Where there is an acceptance which does not substantively change the contents of the offer, the acceptance shall be valid and the contents of the contract shall be subject to the acceptance, except where the offeror objects in time or where the offer indicates that the acceptance shall not make any change to the contents of the offer.[88]

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[88] CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA. 1999. § 472. [Electronic resource]. URL: https://flk.npc.gov.cn/detail2.html?MmM5MDlmZGQ2NzhiZjE3OTAxNjc4YmY2MDUzYTAyMTc%

As can be seen from the above two legal provisions, §s 30 and 31 of the Contract Law roughly correspond to paragraphs (1), (3) and (2) of § 19 of the *CISG*. In § 30, first of all its first and second sentences still affirm the mirror rule, which requires the acceptance to be consistent with the content of the offer. However, it is also somewhat more restrictive than the traditional mirror rule and only provides for a new offer if it " substantively changes" the content of the offer. The third sentence is almost identical to § 19(3) *CISG*, which provides for an enumeration of substantive changes. However, the provisions of our Contract Law seem to be more stringent. Firstly, the enumeration is more restrictive with the addition of "subject matter" and "manner of performance". Secondly, the term "time limit for performance and place of performance" replaces the term "payment, place and time of delivery" in the *CISG*, which covers the latter and limits the obligations of the parties in a broader sense. The former covers the latter and limits the obligations of the parties in a broader sense.[89]

§ 31 of the Contracts Act corresponds to § 19(2) of the *CISG* and provides for the validity of acceptances containing non-substantive changes. There is a slight difference between the two in terms of exclusions. Under *CISG*, a non-substantive change constitutes a promise

3D(CN) (accessed: 11.03.2022).

[89] Li Wisdom. Comparison of the formation of contract between the Contract Law and the United Nations Convention on Contracts for the International Sale of Goods. Frontiers, 2005, No. 10, -P. 136.

unless "the offeror objects to the difference by oral or written notice within a period of time that is not unduly delayed".

Chinese contract law, on the other hand, provides for two exceptions: "the offeror expresses its objection in a timely manner" and "the offer indicates that the undertaking shall not make any change to the content of the offer". The addition of the "offer to indicate" exclusion to our Contract Law is a clear reference to § 2-207 of the *UCC* and is more expansive than the *CISG*.

On the whole, although China's Contract Law follows the *CISG* and adapts the Mirror Image Rule, its exhaustive list of "substantive changes" makes it difficult to use "non-substantive changes". As a result, China's contract law practice has actually adhered to the Mirror Image Rule. In addition, § 22 of the Contract Law provides that an acceptance may be based on the custom of the transaction or on an offer by conduct. The Last-shot Rule can then also be applied based on the "offer - counter-offer - acceptance by conduct model. " The disadvantages of the Mirror Image Rule and the Last-shot Rule in the battle of the forms have been discussed above and have been improved in legislation and practice. As a law approaching the new century, it is clear that the provisions of the Contract Law are somewhat outdated and do not conform to the prevailing legislation and practice in the world today.

Since China's membership in the *CISG*, the flexible Mirror

Image Rule provisions of the Convention have had a significant influence on China's contract law. Is The elimination of the Mirror Image Rule in China's Contract Law Articles 30 and 31 When China's existing contract law sought a suitable route, it referred to the relevant legislative procedures of the *CISG*, combined the *CISG*'s contract formation principles, and acknowledged the discrepancy between the offer and the promise. Moreover, the breadth of the concept of a substantial change in the offer's substance is explicitly stated (Table 1).

Table 1 Comparison of the provisions of the *CISG* and the Chinese Contract Law on the Mirror Image Rule

Type	Convention on the Sale of Goods	Chinese Contract Law
Logical model	Article 19, paragraph 1 of the *CISG* first affirms the Mirror Image Rule, paragraph 2 introduces an exception to the rigid common law Mirror Image Rule and paragraph 3 elaborates on the meaning of "substantive change in the offer Paragraph 3 sets out the meaning of "substantive changes to the offer".	Article 30(1) provides for consistency between offer and acceptance, paragraph 2 aims to clarify the circumstances in which an offer is substantially changed and paragraph 3 sets out the scope of that circumstance. Article 31 provides for a commitment that is valid when the offer is not substantially changed.
Types of substantive	Three types of "additions, limitations or other changes".	Only one type of change is referred to as " change ".

changes to an offer		
Scope of substantive changes to an offer	As the *CISG* applies only to international contracts for the sale of goods, i.e. only to tangible objects, it provides for "price, payment, quality and quantity of goods".	The Chinese Contract Law has a wide scope of application, including labour and services in addition to physical goods, and therefore includes "the subject matter of the contract, the quantity, the quality and the price".

Articles 30 and 31 of the Chinese Contract Law contain a comprehensive regulation of promises and are consistent with the *CISG* in order to encourage transactions. In accordance with paragraphs 1, 3, and 2 of Article 19 of the *CISG*, the exclusions are defined in detail, one by one. Nonetheless, when contrasted to the *CISG*'s legislative logic, the rationale of paragraphs 30 and 31 is structurally inverted and merits consideration. Specifically, article 30 is modelled after the *CISG* and has three paragraphs:

First, paragraph 1, which is based on the Mirror Image Rule, establishes the criteria for determining a substantive change, i.e., the offeree must strictly adhere to the requirement that the offer and the promise be identical, and the content of the promise cannot be changed privately, lest it constitute a substantive change to the offer. It also specifies two sorts of substantive and non-substantive adjustments to the

text of the offeree's contract proposal. Article 30 of the Chinese Contract Law only specifies one technique for modifying the substance of an offer, but Article 19 of the *CISG* specifies three categories of addition, limitation, and other modifications. Moreover, both the *CISG* and Chinese Contract Law lack limitations on the breadth and extent of modifications to the offer, such that even a minor modification to the contract's terms might impair the promise's enforceability. In contrast to the provisions of the *CISG*, the Chinese Contract Law defines changes to the terms of the "mode of performance" of the contract as the scope of a substantive change.[90] However, the extent of the change in the mode of performance is not specified, and in practise it is still worthwhile to determine whether the determination constitutes a substantive change.[91]

A significant change to the substance of the offer by the offeree is considered a new offer.The modification of the offer's substance becomes a new offer. In other words, a major modification to the offer will result in the failure of the initial offer. For instance, in the appeal case between Zhongshan Mingpai Lighting Co., Ltd. and Weiyali Electronics (Shenzhen) Co., Ltd.,[92] the defendants were Weiyali

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[90] In the case of Yates Building Co. v. Pulleyn, which required that the promise be made by registered letter, the promise was not usually a condition specified in the offer, and therefore the promise made by ordinary mail was valid. See Stephen Gage, Commercial Law, translated by Qu Guangqing and Chen Xiaoyun, China University of Political Science and Law Press, 2004, -P. 63.

[91] The 1999 Interpretation of the Contract Law prepared by the Legal Affairs Commission of the National People's Congress also provides only that "in some cases, minor changes to the necessary terms of the contract do not affect the formation of the contract and the promise may be presumed to be valid."

[92] Zhongshan Intermediate People's Court, Guangdong Province. Civil Judgment. (2014) Zhong Law Civil Second Final No. 379

Electronics (Shenzhen) Co., Ltd. The contract was not created since the corporation had not accepted the new offer or given its approval to engage in an irreversible contract. This case illustrates that the "responsibility for breach of contract" provision is viewed as a significant development in our contract law.

Lastly, paragraph 3 of the Chinese Contract Law and the relevant sections of the *CISG* are largely identical and provide a further list of material modifications to the offer. Both are further enumerations of the offer's fundamental modifications. Article 30 of the Chinese Contract Law has a larger area of enumeration in contrast. Unlike the *CISG*, which exclusively defines the manner of payment in the form of "price," the Contract Law permits "price or compensation." Due to the fact that Chinese Contract Law is not confined to the link between the contract of sale and purchase of products, it is necessary to mention both the price and compensation. For instance, the word "time for performance" in Chinese Contract Law is defined more widely than the term "time for payment and delivery" in the *CISG*. It is no longer merely the idea of "period" under the two actions of "payment and delivery" as in the *CISG*, whose scope comprises a change or extension of the "performance time." In the case of Bao Guangsheng involving a disagreement over an insurance contract (2014 Ying Min Er Chu Zi No. 00018), the court ruled that such a substantial change in the time of

performance constituted a substantive change in the offer. This demonstrates that the concept of "period of performance" under China's Contract Law is broader than "time of delivery" alone.[93]

The preceding indicates that the relevant sections of China's contract law have significant design benefits over the *CISG*; yet, the definition of "major change" is ambiguous and sufficiently open to interpretation that any modification offered by the offeree may seem to be a material alteration. In addition, compared to Article 19(2) of the *CISG*, Article 31 of Chinese Contract Law includes the case of "offer indication." Overall, it is evident that Chinese contract law has benefited from the *CISG*.

Overall, it is evident that the rules of the *CISG* have been integrated favourably into China's Contract Law and that non-substantive changes to the offer's substance are not automatically void. This demonstrates that, on the one hand, the promise is not an arrogation of the original terms of the offer; furthermore, if the offeror expressly states that it cannot be changed, there is no need to differentiate between substantive and non-substantive changes to the offer, which would necessarily

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[93] On the issue of contract formation, judicial practice mostly relies on Article 30 of the Contract Law to determine whether a contract is formed or not, see Supreme People's Court (2011) Min Shen Zi No. 170; Guangdong Province Yunfu Intermediate People's Court (2015) Yun Zhong Fa Min Er Final Zi No. 310; Sichuan Province Guangyuan Intermediate People's Court (2015) Guan Min Final Zi No. 570; Hubei Provincial High People's Court (2013) E Min Er Ji Zi No.] 0029; in the case of disputes, most of the necessary provisions of Article 1(1) of the Interpretation (II) of the Supreme People's Court on Several Issues Relating to the Application of the Contract Law of the People's Republic of China on "the subject matter, name and name, and quantity" are applied to determine the establishment of the contract, such as the Supreme People's Court ((2013) Min Tizi No. 90; Supreme People's Court (2016) Supreme Law Min Shen No. 200; Beijing No. 1 Intermediate People's Court (2015) Yizhong Min Jin Zi No. 03072; Heilongjiang Province Harbin Intermediate People's Court (2015) Harbin Min 6 Min Jin Zi No. 2.

constitute a new offer. In the event of a non-substantive modification, on the other hand, the offeror may challenge the validity of the acceptance.

§ 1.1.2. Judicial Interpretation II of the *Contract Law of the People's Republic of China* (1999)

On 9 February 2009, the Interpretation (II) of the Supreme People's Court on Several Issues Relating to the Application of the *Contract Law of the People's Republic of China* (Judicial Interpretation II) was considered and adopted by the Judicial Committee of the Supreme People's Court and has been in force since 13 May 2009. Its opening first § provides for the formation of contracts:

§ 1 Where there is a dispute between the parties as to whether a contract has been formed and the people's court is able to determine the names of the parties, the subject matter and the quantity, it shall generally find that the contract has been formed. However, unless the law provides otherwise or the parties agree otherwise. If the parties fail to agree on the contents of the contract other than those stipulated in the preceding paragraph, the people's court shall determine them in accordance with the relevant provisions of §s 61, 62 and 125 of the Contract Law.[94]

From paragraph (1), it can be seen that as long as the contract

[94] Interpretation of the Supreme People's Court on Several Issues Relating to the Application of the Contract Law of the People's Republic of China (II). 2009. § 472. [Electronic resource]. URL: https://flk.npc.gov.cn/detail2.html?NDAyODgxZTQ1ZmZiYmU0MTAxNWZmYmZjMzQ4OTAzNTg%3D(CN) (accessed: 15.03.2022).

has the name of the parties, the subject matter and the quantity, the court shall find that the contract is established, except for some cases. § 12 of the Contract Law provides that a contract generally includes the name or name and domicile of the parties, the subject matter, the quantity, the quality, the price or remuneration, the period, place and manner of performance, the liability for breach of contract and the method of dispute settlement. Judicial Interpretation II clearly relaxes the requirements for the formation of a contract. At the same time, it should be noted that Judicial Interpretation II provides that the court "shall find that the contract is formed", where the legislation uses the word "shall" instead of "may". This also shows the positive attitude of the legislation towards the formation of contracts.

Paragraph (2) supplements paragraph (1). The contract only needs three elements to be formed, but it is inevitable that there cannot be only three elements in the contract, so how the other elements are to be determined is a remedy given in paragraph (2), i.e. they are to be determined in accordance with the relevant provisions of the law. Combined with §s 61, 62 and 125 of the Contract Law, the rules for determination are as follows:

Firstly, the parties shall supplement their agreement; if the parties fail to reach a supplemental agreement, the determination shall be made in accordance with the relevant provisions of the contract or the

custom of the transaction; if the above method is still not determinable, the provisions of § 62 of the Contract Law shall apply; if the parties dispute the interpretation of the terms of the contract, the interpretation shall be made in accordance with § 125 of the Contract Law. Compared to the Contract Law, the Judicial Interpretation II is more lenient in its determination of the formation of a contract, as only three elements are required for the formation of a contract to be deemed.

This approach is clearly more appropriate to modern economies of scale and mass production transactions than the traditional strict Mirror Image Rule. In the battle of the forms, its attitude of finding the contract to be formed as far as possible, and the filling in of the contents of the contract, is also clearly based on the application of the Knock-out Rule. This approach is more conducive to the realisation of the parties' interests and the preservation of the security of the transaction, and is also in line with the world trend of legislation, which is more reasonable and feasible. However, such a novel way of thinking and method is only provided for in general terms by way of judicial interpretation and lacks detailed provisions in specific operations, which is not sufficient. In this regard, the author of this thesis would like to put forward her suggestions.

In contrast to the legislative provisions of the *CISG* and the Contract Law, Article 1 of Interpretation II of the Contract Law breaks the ice of the traditional concept of the " Mirror Image Rule" and applies the solution

of the Knock-out Rule in paragraph 2 (Table 2).

Table 2 Comparison of the elements of contract formation in China's Interpretation II of the Contract Law with the *CISG* and the Chinese Contract Law

Type	Name	Item
Contracts Formation Elements	*CISG*	Includes "the price of the goods, payment, quality of the goods and .....".
	Contract Law	Mainly refers to "the subject matter, quantity, quality, price or remuneration .....".
	Interpretation II of the Contract Law	Only the "identification of the name of the parties, the subject matter and the quantity" etc. are required and "quantity, quality ....." etc. are excluded.

§ 1.2. Provisions of § 488 of the *Civil Code of the People's Republic of China*

According to the comments of the Secretariat drafting the Convention, the *CISG* has taken the approach of specifically listing matters of substantive change by presuming that the price, the method of payment, the quality and quantity, the place and time of delivery, and the extent of the contracting party's liability all constitute substantive changes

to the terms.[95]

The *Civil Code of the People's Republic of China* and the *Contract Law of the People's Republic of China* are consistent with regard to this subject. Section 488 of the Chinese Civil Code essentially adopts the rules of the Convention on Contracts for the International Sale of Goods and does not define the meaning of substantive change in an abstract manner but rather lists the specific circumstances of substantive change without adding a dispute resolution method. Adopting such a model is logical since it may, on the one hand, provide judges with clear rules for determining substantial change, thereby ensuring consistency in adjudication. On the other hand, the law clearly outlines the conditions of substantial modifications for the parties to the transaction, which is also beneficial to protecting the parties' reasonable expectations of the transaction. 488 of the Chinese Civil Code clearly enumerates the specific circumstances under which substantive changes to the content of an offer may be made. However, the question of whether a change to the above-mentioned matters by an acceptance constitutes a substantive change must be evaluated in light of the specific circumstances of each case, in particular, the impact of a change to the content of an offer by an acceptance on the interests of the parties notwithstanding. If the offer is accepted by a person who has made a modification to the

[95] Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, UN Doc. A/CONF.97/5.1979.

above-mentioned issues but the change does not significantly damage the offeror's interests, it should not be regarded as a substantive change. Therefore, while deciding whether a change represents a substantive change under section 488 of the Chinese Civil Code, it is often required to apply the rule in a restricted way to eliminate scenarios that do not have a substantial influence on the parties' interests. In addition, the purpose of the offeror should be considered when deciding whether a material change has occurred. If the offeror specifically specifies that there will be no modifications to the terms of the offer, with no differentiation between substantive and non-substantive changes, then each change constitutes a new offer. Notably, the circumstances of substantive changes listed in 488 of the Chinese Civil Code are the typical circumstances. However, there are numerous types of contracts, and determining whether changes to the subject matter, including quantity, quality, price or remuneration, period of performance, place and manner of performance, liability for breach of contract, and method of dispute resolution, constitute substantive changes requires consideration of the particular circumstances. On the one hand, the material conditions are not limited to those listed above, since the contract contains many terms and it is impossible to complete the list in the legislation. The inclusion of "etc." as an underwriting provision in this implies that it is not confined to the conditions specified by law; for example, the choice of law relevant to

dispute resolution should also be a substantive provision. Alternatively, the unique content and circumstances should be taken into consideration while concluding a contract. In contracts where the manner of performance is not crucial, for instance, a change in the manner of performance should not be considered a material alteration. A slight adjustment to the amount of the subject matter is another example of a modification that should not be considered significant. In conclusion, while assessing substantial changes, it is also necessary to consider the transaction's particular circumstances.

§ 2. Comparative Analysis on Legal Practice and Suggestions for Amendments

§ 2.1. Distinguishing between a Battle of Forms And a General Contract Dispute

In some situations, the clause in Judicial Interpretation II stating that a contract may be made on the basis of name, subject matter, and number alone, without even incorporating the very crucial aspect of price, may seem to be too careless. The purpose of lenient contract formation findings is to settle disputes about form, but if overused, they undermine fairness and justice in general contract disputes. The departure from the Mirror Image Rule is a result of the radical changes in the social setting of contemporary contract law. Industrialized manufacturing and mass

marketing have significantly increased the prevalence of form contracts. In this context, disagreements over form, a challenge that could not be resolved by the old mirror rule, needed contract law innovation and breakthrough. However, despite the development of form contracts, it is impossible to deny the reality of basic commodity transactions. Using the battle of the forms rules to resolve contractual disputes in basic commodity transactions would surely be incorrect and unsuitable. In 2-207 of the *Uniform Commercial Code* (*UCC*), the difference between dealers and non-dealers is established. In Ohio Grain v. Swisshelm[96], the court determined whether or not a merchant was a merchant before determining whether *UCC* 2-207 applied properly.

Therefore, according to the author, a difference should be drawn between the war of forms between merchants and general contract conflicts. For common contract disputes in basic commodity transactions, the conventional Mirror Image Rule should continue to be used to guarantee that the parties' real intent is expressed and to prevent coercion. In the event of conflicts between dealers about the use of form contracts, it is no longer suitable to adhere to the Mirror Image Rule; rather, it is necessary to adapt to the prevailing trend by actively influencing the construction and substance of the contract in order to promote transactions.

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[96] OHIO GRAIN CO., APPELLANT, v. SWISSHELM, APPELLEE / N.E.2d. 1973. vol. 318. -P. 428.

§ 2.2. Knock-out Rule to fill the gap

The Knock-out Rule, which was first established in 2-207 (3) of the *UCC*, states that conflicting terms between the parties to a contract are each void and cannot constitute the contract's content. However, the knock-out rule does not affect the formation of the contract, which consists of the terms agreed to by the parties and the applicable legal provisions. In reality, the knock-out rule is likewise represented in German contract law. The Knock-out Rule is more equitable and reasonable than the Mirror Image Rule and the Last-shot Rule, and it has become the norm in the international contract law system for resolving a battle of forms.

Regrettably, China's Contract Law does not include this rule, and the Judicial Interpretation II upholds the creation of the contract and the additional rules of the absence of words but does not outline the Knock-out Rule of conflicting terms. Therefore, the author of this thesis suggests that China's contract law should define the knock-out rule and establish that contradictory standard terms shall not constitute the contract's subject matter. If contradictory clauses are eliminated, it is necessary to fill up the gaps. After the invalidation of the opposing provisions, the relevant portion of the contract is incomplete without the agreed-upon terms, creating gaps and loopholes. These contractual voids must subsequently be addressed by the courts using the applicable

regulations. The employment of the gap-filling approach enables a more equitable and reasonable supplement that takes into consideration the interests of both parties in a balanced way, without favouring one party or burdening the other, resulting in a more equitable and reasonable contractual content and conclusion. Therefore, filling in the blanks as an essential addition to the Knock-out Rule plays a crucial part in the management of the forms fight.

But how can the holes be filled? The relevant provisions of 61, 62, and 125 of the Contract Law are outlined in 1 of Judicial Interpretation II: "If the parties fail to reach an agreement on the contract's content other than that specified in the preceding paragraph, the people's court shall determine it in accordance with these provisions." In other words, the parties must first amend the agreement; if they are unable to do so, it will be resolved in accordance with the relevant sections of the contract or the transactional norms.

62 of the Contract Law applies if there is still uncertainty; 62 of the Contract Law applies if the parties' interpretation of the terms of the contract is in dispute.

In the event of a disagreement between the parties about the interpretation of the provisions of the contract, 125 of the Contract Law governs the interpretation. Judicial Interpretation II contains a range of approaches, including additional agreements, trade customs, legal

requirements, and contract interpretation, and its sequence of application is rational and transparent. Here, the author of this thesis makes just two more observations about its practical applicability.

(1) fully investigate the parties' genuine intentions, together with the negotiating process and their behaviour, to ascertain the substance of the contract. "Consent" is the core of the contract, and the court should respect the liberty of the parties in defining its meaning. Therefore, supplementing the agreement is the first step in bridging the gaps. In addition to the supplemental agreement, the court may also examine the negotiating process and behaviour of the parties, as well as their genuine objectives, in order to reach a decision that is fair and acceptable to both parties.

(2) After all methods specified in 1 of Judicial Interpretation II have been exhausted, if there are still contents or issues that cannot be determined or resolved, the judge's discretion will be monitored based on the principles of fairness, equality, honesty, and credit in contract law and even civil law. Obviously, the values of equality, freedom, and honesty and credit are all rather imprecise and do not permit the exact prediction of a particular conclusion. The law cannot, however, be thorough and address all difficulties. The purpose of legal principles is to use principles, notably good faith, to settle disputes between parties when the rules have been exhausted.

CONCLUSION

The Mirror Image Rule is a common law principle with a long history. According to this regulation, a genuine acceptance must match the terms of the offer and cannot be contradictory to it in any manner. The Mirror Image Rule has played a significant part in contract proceedings for a long time as a conventional rule of common law and civil law. However, the social background of contemporary contract law has undergone a profound transformation.[97]

Form contracts are favoured and commonly employed in contemporary commercial activity. Faced with form contracts, particularly for large-scale transactions between businesses via document exchanges, the Mirror Image Rule has progressively shown its drawbacks and is no longer suited to the evolution and needs of contemporary contract law. In response to this predicament, the Last-shot Rule was developed. However, the Last-shot Rule does not diverge from the Mirror Image Rule and continues to be an archaic solution. Even when the contract is constructed in accordance with the Last-shot Rule, there are still several issues. A breakthrough is necessary. Both the Mirror Image Rule and the Last-shot Rule do not match the demands of the present contractual legal system. The *Uniform Commercial Code* (*UCC*) was the first to accomplish this legislative breakthrough, with a considerable

[97] Ingeborg Schwenzer, Pascal Hachem & Christ Opher Kee, Global Sales and Contract Law, Oxford University Press,2012, -P.165.

deviation from the evolving typical mirror image requirement in 2-207. This section examines the most often quoted version of the original *UCC*'s Section 2-207, as well as the current form after substantial revisions to the 2003 sales chapter. In the German legal system, there has been a progressive shift away from the Mirror Image Rule. Early rulings of the German Federal Court of Justice used the Last Shot Rule to settle form-clause disagreements. This conventional method, however, was progressively overturned by the law, culminating in the Knock-out Rule. In terms of globally harmonised law, international bodies have been active in drafting internationally harmonised legal documents with the aim of resolving international trade disputes via legal means. In order to provide legal remedies for international trade conflicts, international organisations have been engaged in producing international uniform legal instruments pertaining to international uniform law. In contract law, the *CISG* is the principal representative of globally harmonised legal instruments. The UN Convention on the International Sale of Goods is an example of a legal document that violates the Mirror Image Rule. The Chinese Contract Law was promulgated and implemented in 1999, including the *CISG* concept of offer and promise. The Supreme People's Court's Interpretation II on Certain Issues The first chapter relating to the application of the contract law of the People's Republic of China (the Judicial Interpretation II), which has been in effect from the beginning,

addresses the establishment of contracts. The Judicial Interpretation II is more forgiving in determining the formation of a contract than the Contract Law, and it is more suited to current economies of scale and mass manufacturing transactions than the Mirror Image Rule. Nonetheless, this new style of thinking and approach is limited to the form of judicial interpretation to produce broad provisions; the absence of particular operations in the detailed provisions is insufficient to ameliorate the situation.

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