IN THE FORMATION OF CONTRACTS UNDER THE CISG, HOW DOES ARTICLE 19 SOLVE THE BATTLE OF FORMS ISSUE?

Vo Sy Manh[*]

Abstract

In today's typical commercial transactions, the buyers and sellers use the standardized forms to communicate with each other. The each party's form contains pre-printed standard terms which are drafted with different interest in both parties' mind, especially each party drafts the terms of his form for his benefit. Therefore, the the parties' standard terms conflict seems to be indispensable. Consequently, the exchange of forms containing conflicting standard terms is referred to as the "battle of forms.".It can be said that there are various legal solutions that apply in solving the battle of forms cases. The CISG does not include any clear and complete rules concerning the battle of the forms. The only provision that could be applied in situations like these is Article 19 of the CISG.

Key words: *CISG, formation of contract, battle of forms*

1.Introduction

In today's typical commercial transactions, the buyers and sellers use the standardized forms to communicate with each other. The each party's form contains pre-printed standard terms which are drafted with different interest in both parties' mind, especially each party drafts the terms of his form for his benefit. Therefore, the problem of that the parties' standard terms conflict seems to be indispensable. Consequently, the exchange of forms containing conflicting standard terms is referred to as the "battle of forms"[1]. In other words, the battle of forms is an expression that refers to a situation in which the parties exchange general conditions[2].

The battle of forms receives significant attentions of scholars and commentatorsabout how it is to be solved. When there is the

[*] LLM. Foreign Trade University. Email: manhvs@ftu.edu.vn

[1] E. Allan Farnsworth, Article 19, in Bianca-Bonell, Commentary on the International Sales Law, 175, 177 (1987), available at <http://cisgw3.law.pace.edu/cisg/biblio/farnsworth-bb19.html> (last visited June 12, 2012).

[2] Guide to Article 19: Comparison with Principles of European Contract Law (PECL) available at http://www.cisg.law.pace.edu/cisg/text/peclcomp19.html#10 (last visited June 12, 2013).

[3] GieselaRuhl, 'TheBattle of the Forms: Comparative and Econimic Observations' (2003) 24 U. Pa. J. Int'l Econ. L. 189.

[4] André Janssen, KollidierendeAllgemeineGeschäftsbedingungen in InternationalenKaufrecht (CISG) [Conflicting Standard Terms in International Contract Law] (2002)16 WirtschaftsrechtlicheBlätter 453, 454.

battle of the forms, the questions are how to determine formation of contract and what are the terms of the contract. Academics around the world have been struggling with the answer these questions[3].It also is one of the most controversial issues under the United Nations Convention on Contracts for the International Sales of Goods (the "CISG")[4] which was formed to provide uniform rules governing the international sale of goods.

It can be said that there are various legal solutions that apply in solving the battle of forms cases[5]. The CISG does not include any clear and complete rules concerning the battle of the forms[6]. The only provision that could be applied in situations like these is Article 19 of the CISG. Although some academic writers may argue that Article 19 does not apply to the battle of the forms, many national courts apply Article 19 in interpreting and resolving such conflicts[7]. This problem will be examined to show how Article 19 of the CISG solves the battle of forms and will be addressed in this paper.

2. The determination of conclusion of a contract in the battle of the forms

A battle of the forms arises when parties exchange forms that have conflictingstandard terms. At this time, it is widely accepted that rule to determine the conclusion of contract provided under Article 19 seems to be very strict[8]. Article 19(1) CISG stresses that 'a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.' This provision reflects the "mirror image rule"[9], according to which an offer can only be accepted by a response that exactly matches the terms of the offer, i.e. a contract can be concluded only if there are no discrepancies between an offer and its acceptance.If there is any difference, the purported acceptance amounts to a rejection which constitutes a new offer or counter-offer[10]. It is generally assumed that this provision applies not only to individual terms but also to terms contained in standard forms[11].

In the commercial practices, both the buyer and seller have their own standard forms for their interest. Accordingly, the modifications of an offer by purported acceptance appear to bedifficult to evade. If so, it seems that there might not be the conclusion of the contract in reality in accordance with the mirror image rule.Clearly, the acceptance containing

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[5] One is that a solution has to be found in domestic law; another opinion applies the Last Shot Doctrine; and a third opinion follows the Knock Out Rule. See KaiaWildner, 'Art. 19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002' (2008) 20 Pace International Law Review1-18.

[6] ZoiValioti, 'The Rules on Contract Formation under the Vienna Convention on Contracts for the International Sale of Goods (1980)' available at http://www.cisg.law.pace.edu/cisg/biblio/valioti.html#int#int (last visited June 12, 2013).

[7] Larry A. DiMatteo, Lucien Dhooge, Stephanie Greene, Virginia Maurer and Marisa Pagnattaro. 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) 34 Northwestern Journal of International Law and Business 299-440 available at http://cisgw3.law.pace.edu/cisg/text/anno-art-19.html#*ld (last visited 12/06/2013).

[8] GieselaRuhl, 'TheBattle of the Forms: Comparative and Econimic Observations' (2003) 24 U. Pa. J. Int'l Econ. L. 189.

[9] Seev 26 March 2009 U.S. District Court [Ohio] (MiamiValley Paper, LLC v. Lebbing Engineering & Consulting GmbH) available at http://cisgw3.law.pace.edu/cases/090326u1.html. In this case, the Court stresses that the CISG applies the common law concept of mirror image and states in Article 19. See also Maria delPilarPeralesViscasillas, Cross-References and Editorial Analysis: Article 19, <http://cisgw3.law.pace.edu/cisg/text/cross/cross-19.html> (last visited July 22, 2013).

[10] François Vergne, 'The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods' (1985) 33 American Journal of Comparative Law 233-258.

[11] J. Honnold, Uniform Law for International Sales under the Convention (Boston 1982) p. 190.

additional or differential terms can turn the offer into counter-offer, and in principle, therefore, the contractcannotcannot be concluded. However, by the virtue of Article 19(2), if the modified terms do not materially alter the offer, a valid contract is formed and the modified terms enter the contract unless the receiving party promptly objects to their inclusion[12].Article 19(2) is considered as a very modest exception to the "mirror image" rule[13] and appears to mitigate the harshness of the matching acceptance rule of 19(1)[14]. Accordingly, the main issue of whether there is the conclusion of the contract depends on whether modifications (additions, restrictions as detrimental to the conclusion of a contract) are material or immaterial which are not be objected orally or by a notice.

2.1. The material modifications

It can be said that the CISG in general, Article 19 in particular does not define "materiality" term, but limits modifications which are considered as "materiality". Article 19(3) sets a broad materiality standard by listing price[15], payment[16], quality and quantity of the goods[17], place and time of delivery[18], extent of one party's liability to the other or the settlement of disputes[19] as terms that would materially alter the offer. Furthermore, if the modifications are not considered material by the parties or in the light of usages, these modifications are not material[20] This conclusion can be illustrated by *Mono ammonium phosphate case*[21]. In this case, the buyer, a company with its place of business in Russia, ordered from the seller, a company

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[12] Article 19(2).

[13] Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, July 1981, available at http://www.cisg.law.pace.edu/cisg/text/ziegel19.html

[14] John E. Murray, 'An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 8 Journal of Law and Commerce 11-51.

[15] CLOUT case No. 424 [AUSTRIA ObersterGerichtshof [Supreme Court] 9 March 2000, available online at <http://cisgw3.law.pace.edu/cases/000309a3.html>]; CLOUT case No. 417 [UNITED STATES Magellan International v. Salzgitter Handel Federal District Court [Illinois] 7 December 1999, available online at <http://cisgw3.law.pace.edu/cases/991207u1.html>]; CLOUT case No. 193 [SWITZERLAND Handelsgericht [Commercial Court] Zürich 10 July 1996, available at <http://cisgw3.law.pace.edu/cases/960710s1.html>].

[16] CLOUT case No. 176 [AUSTRIA ObersterGerichtshof [Supreme Court] 6 February 1996, available online at <http://cisgw3.law.pace.edu/cases/960206a3.html>].

[17] CLOUT case No. 291 [GERMANY Oberlandesgericht [Appellate Court] Frankfurt 23 May 1995, available online at <http://cisgw3.law.pace.edu/cases/950523g1.html>]; CLOUT case No. 135 [GERMANY Oberlandesgericht[Appellate Court] Frankfurt 31 March 1995, available online at <http://cisgw3.law.pace.edu/cases/950331g1.html>]; CLOUT case No. 121 [GERMANY Oberlandesgericht [Appellate Court] Frankfurt 4 March 1994, available online at <http://cisgw3.law.pace.edu/cases/940304g1.html>]; CLOUT case No. 227 [GERMANY Oberlandesgericht[Appellate Court] Hamm 22 September 1992, available online at <http://cisgw3.law.pace.edu/cases/920922g1.html>].

[18] CLOUT case No. 413 [UNITED STATES Calzaturificio Claudia v. Olivieri Footwear Federal District Court [New York] 6 April 1998, available online at <http://cisgw3.law.pace.edu/cases/980406u1.html>]; CLOUT case No. 133 [GERMANY Oberlandesgericht[Appellate Court] München 8 February 1995, available online at <http://cisgw3.law.pace.edu/cases/950208g1.html>].

[19] CLOUT case No. 242 [FRANCE Cour de Cassation [Supreme Court] 16 July 1998, available online at <http://cisgw3.law.pace.edu/cases/980716f1.html>]; CLOUT case No. 23 [UNITED STATES Filanto v. Chilewich Federal District Court [New York] 14 April 1992 available online at <http://cisgw3.law.pace.edu/cases/920414u1.html>].

[20] The UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, A/CN.9/SER.C/DIGEST/CISG/19, 2004, available at http://www.cisg.law.pace.edu/cisg/text/digest-art-19.html#udfn5#udfn5.

[21] CLOUT case No. 189 [AUSTRIA ObersterGerichtshof [Supreme Court] 20 March 1997, available online at <http://cisgw3.law.pace.edu/cases/970320a3.html>].

with its place of business in Austria, 10,000 tons+/- 10% of monoammoniumphosphate (MAP) with the specification "P 205 52% +/- 1%, min 51%", but the seller accepted instead to deliver 10,000 tons +/- 5% MAP with the specification "P 205 52% +/- 5%, min 51%". At first glance, the seller altered the terms of the offer materially. In contrast, the Supreme Court held that in the light of usages, the negotiations, these alterations are not to be considered as altering the terms of the offer "materially".

It is worth noting that a reply to an offer which contains material additional or differential terms that materially alter the offer cannot be deemed an acceptance under Article 19(1) of the CISG. Such a reply is a rejection and a counter-offer. Under this circumstance, a party may reject the counter-offer, thus, no contract is concluded[22]. Offers are rejected and new counter-offers submitted back and forth. Accordingly, there will be a contract only if the last submitted counter-offer must be accepted, i.e. one party may begins to perform its obligations, for example, by accepting the other party's goods[23]. This means that the last offereewould have acts of performance which under the norms of the Convention can be regarded as acts of acceptance[24].

For example[25], a buyer sends to a seller an offer (purchase order) that ordered to purchase specified production machinery. The reverse side of the offer set forth the following terms: 'Seller will be responsible for damages resulting from defects in the machinery'. Then, the seller delivered to the buyer an order acknowledgment on which the seller agreed with the terms in the buyer's offer, except for that the reverse side of the seller's form included the following terms: 'Seller will replace or repair any defective part of the machinery but will not be responsible for shut down cost or other consequential damages'. Then, the seller shipped the goods and they were received and put into use by the buyer. It is clear that the seller' reply on the buyer's offer contains material modification to the 'extent of one party's liability to the other' in the sense of Article 19(3). Seller's purposed acceptance constituted a rejection and a 'counter-offer'. Nevertheless, the exchange of purchase and acknowledgement forms followed by shipment and acceptance of the goods indicate that the seller and the buyer made a contract[26].

It follows from the foregoing considerations thatin case of material modifications Article 18(3) CISGis used to support the proposition that the party that receives a counter-offer under the rules of Article 19 and subsequently performs the contractual obligations has accepted the terms of the counter-offer[27]. The traditional rule of Article 19, in conjunction with Article 18(3), therefore, is to favour the party that "fires the last shot"[28] . In other words, in case of existence of material modified terms, under Article 19(1) and Article 19(3) of

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[22] Bianca C.M and Bonell M.J, Commentary on the International Sales Law the 1980 Vienna Sales Conventions (1987), at.179.
[23] Ibid.
[24] Maria delPilarPeralesViscasillas, '"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles' (1998) 10 Pace International Law Review 97-155 available at http://www.cisg.law.pace.edu/cisg/biblio/pperales.html.
[25] John O. Honnold, 'Article 19: Acceptance with Modifications' available at http://www.cisg.law.pace.edu/cisg/biblio/ho19.html.
[26] John O. Honnold, 'Article 19: Acceptance with Modifications' available at http://www.cisg.law.pace.edu/cisg/biblio/ho19.html.
[27] Ibid, at.179. Also Honnold J, Uniform Law for International Sales under the 1980 *United Nations Convention* (1987), at 195.
[28] Ibid, at.179.

the CISG, rules of offer and acceptance along with acts of performance are applied to solve the issue of the battle of the forms[29].

In addition, the contract can be concluded on the basis of the parties' agreement about the *essentialianegotii*[30] irrespective of material modifications. The case of *Knitware*[31] provides a good illustration of this point. In this case, the buyer sent an order on its General Terms of Purchasing for Finished Products to the seller, but the seller accepted the order on its own General Terms of Business. Thus, the Court held that this acceptance altered materially the order and would have constituted a counter-offer in the sense of Article 19(1). However, it follows from the performance of the contract that both parties were in agreement about the *essentialianegotii*[32]. Thus, the enforcement of conflicting standard terms was waived and the contract has been concluded.

2.2. The Immaterial modifications

It could be true that an offer containing the modifications which are beyond provisions set out in Article 19(3) constitutes an acceptance unless the offeror notifies the offeree without undue delay that the offeror objects to the modifications[33]. Furthermore, the Supreme Court in *Mono ammonium phosphate case*[34] held that the modifications merely in favor of the other party do not require an express acceptance.

From reality of the application of Article 19 by national courts, it would be widely accepted the following modifications as immaterial one: alterations of the terms of the offer by stating the adjustment of the price in accordance with the market[35]; the clause reserving a change of the delivery date in seller's standard conditions[36]; a request to treat the contract confidential until the parties make a joint public announcement[37]; contractual requirement that buyer must reject goods delivered within stated period[38].

In case of immaterial modifications, only when the offeree objects orally to the discrepancy or dispatches a notice to that effect without undue delay, the offeree's purported acceptance if the offeree can be treated as a rejection of the offer[39]. Therefore, there is no contract in sense of the Article 19(2). In contrast, the assent by the offereewith immaterial modifications will be treated as an acceptance and the contract is concluded.

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[29] Maria delPilarPeralesViscasillas, '"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles' (1998) 10 Pace International Law Review 97-155 available at http://www.cisg.law.pace.edu/cisg/biblio/pperales.html.

[30] Put the meaning of this phrase in simple English in the footnote

[31] Germany 6 October 1995 Lower Court Kehl (Knitware case) available at http://cisgw3.law.pace.edu/cases/951006g1.html.

[32] The grounds for the Court to say about "the parties were in agreement about the essentialianegotii" should be put in footnote

[33] Article 19(2)

[34] CLOUT case No. 189 [AUSTRIA ObersterGerichtshof [Supreme Court] 20 March 1997, available online at <http://cisgw3.law.pace.edu/cases/970320a3.html>].

[35] CLOUT case No. 158 [FRANCE Courd'appel [Appellate Court] Paris 22 April 1992, available online at <http://cisgw3.law.pace.edu/cases/920422f1.html>].

[36] CLOUT case No. 362 [GERMANY Oberlandesgericht [Appellate Court] Naumburg 27 April 1999, available online at <http://cisgw3.law.pace.edu/cases/990427g1.html>].

[37] [HUNGARY FováosiBíróság [Metropolitan Court] Budapest 10 January 1992, available online at <http://cisgw3.law.pace.edu/cases/920110h1.html>].

[38] CLOUT case No. 50 [GERMANY Landgericht [District Court] Baden-Baden 14 August 1991, available online at <http://cisgw3.law.pace.edu/cases/910814g1.html>].

[39] Article 19(1) and Article 19(2).

3. The determination of the content of the contract in the battle of the forms

In the light of the foregoing considerations, the conclusion of the contract can be determined by using rules of offer and acceptance and acts of performance ("last-shot rule"). This means that the first question arising from the battle of the forms – whether there is a contract - is solved by applying Article 19. However, the more difficult issue is to determine which party's standard terms should be incorporated into the contract when the conflicting standard terms still exist. It can be said that there mainly might be two situations to solve this problem: (1) Avoid the conflicting standard terms: (2) The conflicting standard terms are considered as a part of the contract.

3.1. Avoid the conflicting standard terms (knock-out doctrine)

Although the contract is concluded under Article 19, but the conflicting standard terms between the parties' forms are invalid, i.e. no one wins the battle. An example would be the German Supreme Court's decision *in Powdered milk case*[40] where the Court held that the partial contradiction of the referenced general terms and conditions of the buyer and the seller did not lead to the failure of the contract within the meaning of Article 19(1) and Article 19(3) of the CISG. This means that despite conflicting standard clauses, the contract is valid, and the conflicting terms are void and replaced by the provisions of the convention regulating the respective subject matter.

Similarly, in *Knitware case*[41], the Court stated that both parties were in agreement about the *essentialianegotii*[42], therefore, they waived the validity of their conflicting terms or they derogated from the application of Article 19. Consequently, the contract would have been entered into in accordance with the terms of the CISG. Clearly, even though the conflicting terms in such cases could be considered material under Article 19(3), courts prefer to dismiss the conflicting terms rather than find that no contract was concluded[43]. In other words, the courts will "knock-out" the conflicting standard terms. By application "knock-out" doctrine[44] in these cases, Article 19(3) seems only to be useful in determinations of whether there are conflicting standard terms because if the essential terms of the contract are agreed and the parties have commenced performance, the court will find there was a valid contract and ignore the conflicting standard terms[45]. If the parties have not performed, there is a greater chance that courts will find no valid contract existed when material terms are in sense of Article 19(3)[46].

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[40] [GERMANY Bundesgerichtshof [Federal Supreme Court] 9 January 2002, available online at <http://cisgw3.law.pace.edu/cases/020109g1.html>].

[41] Germany 6 October 1995 Lower Court Kehl (Knitware case) available at http://cisgw3.law.pace.edu/cases/951006g1.html.

[42] In English, essentialianegotii means essential aspects or basic terms

[43] Larry A. DiMatteo, Lucien Dhooge, Stephanie Greene,Virginia Maurer and Marisa Pagnattaro, 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) 34 Northwestern Journal of International Law and Business 299-440.

[44] Ibid.

[45] Peter Schlechtriem, 'Battle of the Forms in International Contract Law:Evaluation of approaches in German law, UNIDROIT Principles, European Principles, CISG; UCC approaches under consideration, in Karl-Heinz Thume (eds.), Festschrift für Rolf Herber 70 (Geburtstag, Newied: Luchterhand, 1999) available at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem5.html.

[46] OLG Frankfurt 25 U 185/94, Mar. 31, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950331g1.html>.

3.2. The conflicting standard terms are considered as a part of the contract (last shot doctrine)

The "last shot rule" will be again applied to determine the contents of the contract[47]. When a valid contract is formed and the last person who send his form is considered to control the terms of the contract, i.e. the last person wins the battle[48], For example, in *Cashmere sweaters case*[49] the buyer sent a purchase order containing the clause "The Standard Conditions of the German Textile and Clothing Industry are part of the order", then the seller confirmed the buyer's orders by enclosing its "General Sale and Delivery Conditions in the Contractual Relationship with Foreign Customers". Clearly, the seller's acceptance materially altered the terms of offer in sense of Article 19(3) and constituted a counter-offer. However, the buyer accepted those additional General Conditions, i.e. the seller's counter-offer (which modified its offer) by carrying through with the contract. Thus, the Court of Appellate held that the contract was formed and the terms of the contracts were the terms of the buyer's offer with the modifications contained in the seller's acceptance.

Likewise, the Court of Arbitration of the ICC in *Industrial equipment case*[50] stressed that if the sales and delivery conditions were considered an essential modification, the contract was concluded with the acceptance of the delivered goods together with invoice to which the sales and delivery conditions are attached.

The "last-shot rule" will be applied not only to determine whether a contract was formed, but also to determine the content of the contract, i.e. which standard terms will be incorporated into the contract.More accurately, Article 19 of CISG is the proper guideline to decide which of the standard terms will be included[51]. Put simply, whatever the modifications are material or immaterial the terms of the last party who forwards a letter containing standard terms, "fires the last shot" will be a part of the concluded contract. The standard terms of the other party are rejected and not part of the contract[52].

When purposed acceptance does not differ materially from the offer, in sense of Article 19(2), the terms of the contract will be those of the offer plus those contained in the acceptance that 'contains additional or differential terms which do not materially alter the terms of the offer'[53]. An example is found in *Wall tiles case*[54] where a German buyer had ordered goods from an Italian seller. In this case,

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[47] John E. Murray, 'An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 8 Journal of Law and Commerce 11-51.

[48] Mª delPilarPeralesViscasillas , 'Battle of the Forms and the Burden of Proof: An Analysis of BGH 9 January 2002' (2002) 6 Vindobona Journal of International Commercial Law and Arbitration No. 2, 217-228.

[49] CLOUT case No. 232 [GERMANY Oberlandesgericht [Appellate Court] München 11 March 1998, available online at <http://cisgw3.law.pace.edu/cases/980311g1.html>].

[50] ICC Court of Arbitration, case No. 8611 of 1997, available online at <http://cisgw3.law.pace.edu/cases/978611i1.html>.

[51] Andre Corterier, 'A Peace Plan for the Battle of the Forms' (2006) 10 Int'l Trade & Bus. L. Rev. 195

[52] John E. Murray, 'An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 8 Journal of Law and Commerce 11-51.

[53] Article 19(2).

[54] CLOUT case No. 50 [GERMANY Landgericht [District Court] Baden-Baden 14 August 1991, available online at <http://cisgw3.law.pace.edu/cases/910814g1.html>].[5] Exceptions are regional trade agreements that are mostly controlled by two dummies ASEAN and APEC

the seller replied in a writing that included a provision calling for all claims of defect to be made within thirty days. When Buyer alleged that the goods were non-conforming and refused to pay the entire purchase price, the court held that the additional term in the seller's acceptance requiring notification of defect within thirty days had become a part of the contract because the offer had not been materially altered[55].

In case of additional or differential terms which materially alter an offer, the reply to the offer will be considered as a rejection and a counter-offer[56]. In principle, any standard terms which are considered material under Article 19(3) of the CISG are not part of the contract and these standard terms may prevent the formation of the contract[57]. However, the contract may be concluded by the way that the counter-offer may be accepted by acts of performance. If there is such a counter-offer and acceptance by acts of performance, in more the classic sense of Article 14 and Article 18 of the CISG, the terms of the contract will be those of the counter-offer[58]. For example, a German court held that an 8-day notice of defects provision in a confirmation letter was enforceable at the time the buyer took delivery of the goods[59]. The notification terms contained in the seller's confirmation letter were additional material terms that constituted a counter-offer under Article 19(1), but by accepting delivery the buyer accepted those terms[60].

In a similar vein, in *Shoes case*[61] German court held that acceptance of delivery indicated assent to a material modification. In this case, when the buyer claimed to have ordered a certain quantity of shoes and the seller delivered a different quantity, the court interpreted the delivery of a different quantity as a material alteration under Article 19(3). The court held, however, that the delivery was a counter-offer under Article 19(1) which the buyer accepted by taking the goods[62].

It must be borne in mind that as a general rule, however, the offeror has an opportunity to prevent the incorporation in the contract of such additional or different terms by objecting to them[63] "without undue delay"[64]. If not do so, the offeror a party continues to perform or fails to object to additional terms, she runs the risk that her act of performance will be interpreted by a court as an acceptance of those terms[65]. This view conclusion was supported

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[55] Ibid.

[56] Article 19(3).

[57] Andre Corterier, 'A Peace Plan for the Battle of the Forms' (2006) 10 Int'l Trade & Bus. L. Rev. 195

[58] Maria delPilarPeralesViscasillas, '"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles' (1998) 10 Pace International Law Review 97-155.

[59] OLG Saarbrücken 1 U 69/92, Jan. 13, 1993 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/930113g1.html.

[60] Ibid.

[61] OLG Frankfurt/M 5 U 209/94, May 23, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950523g1.html.

[62] OLG Frankfurt/M 5 U 209/94, May 23, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950523g1.html.

[63] Maria delPilarPeralesViscasillas, '"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles' (1998) 10 Pace International Law Review 97-155.

[64] Article 19(2).

[65] Maria delPilarPeralesViscasillas, '"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles' (1998) 10 Pace International Law Review 97-155.

by *Filanto v. Chilewich case*[66] where the court held that amanufacturer accepted an arbitration provision as part of the agreement, because he failed to object in a timely manner and commenced performance by opening a letter of credit. This was despite the fact that it repeatedly objected during negotiations to the incorporation of an arbitration clause and that such a clause is a material term under Article 19(3)[67]. In a similar view, in *Magellan Int'l Corp. v. Salzgitter Handel GmbH*[68], the court found that a contract was formed when a distributor indicated assent by opening a letter of credit and the terms of the contract were those agreed on at the time the letter of credit was opened.

In lights of the foregoing considerations, It could be to say that by virtue of Article 19 of the CISG, the battle of the forms is solved on the basis of the application of the "last-shot rule", i.e. it would be possible to determine who (the buyer or the seller, the offeror or the offeree) wins in the battle of the forms and standard terms will control the content of the contract. Admittedly, although the last-shot rule is rigid, "it provides adequate protection to the parties in the majority of cases and permits enterprises to more perfectly plan their standardized transactions"[69].

4. Conclusion

In the context of the battle of the forms, the issue to be determined by application of Article 19 of the CISG of national courts is whether a contract has been concluded and the terms of that contract.

Article 19 provides an exception of mirror image rule which allow the parties to commercial transactions to modify an original offer in comply with their trade practices and conditions. By doing so, the modifications can be immaterial or material, but the conclusion of the contract may be determined without objection or acts of performance ("last shot rule) relatively. In addition, Article 19 also allows the application of "last shot rule" to determine the content of the contract. When a valid contract is formed with existence of the conflicting standard terms, these terms can be incorporated into the contract as its part. Put simply, by applying Article 19 of the CISG the contract is concluded by an act of performance of one party and the terms that will control the content of the contract will be those of the counter-offer or the other party's form.❑

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[66] Article 19(2).

[67] Ibid.

[68] Magellan Int'l Corp. v. Salzgitter Handel GmbH, No. 99 Civ. 5153, 1999 U.S. Dist. LEXIS 19386 (N.D. Ill. Dec. 7, 1999).

[69] Maria delPilarPeralesViscasillas, '"Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles' (1998) 10 Pace International Law Review 97-155.