BATTLE OF THE FORMS, MODIFICATION OF CONTRACT, COMMERCIAL LETTERS OF CONFIRMATION: COMPARISON OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) WITH THE PRINCIPLES OF EUROPEAN CONTRACT LAW (PECL)

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I. THE *MIRROR IMAGE* RULE AND *MODIFIED ACCEPTANCE* (COUNTER-OFFER OR ACCEPTANCE?)

An acceptance must coincide with each and every term of an offer in order to conclude a contract.[1] This requirement is known as the "mirror image rule" since the acceptance must be the very reflection of the offer in a mirror. An exception is established for the possible introduction of new terms into the acceptance that do not substantially alter the offer. In that case, the acceptance will be valid; the contract will consist of both the terms of the offer and those included in the acceptance that do

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[1] *See United Nations Convention on Contracts for the International Sale of Goods*, Apr. 11, 1980, U.N. Doc. A/CONF. 97/18, Annex I, at art. 19(1), *reprinted in* 19 I.L.M. 668 [hereinafter CISG]; PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I AND II COMBINED AND REVISED, at art 2:208(1) (Ole Lando & Hugh Beale eds. 2000) [hereinafter PECL].

not substantially alter the offer, so long as the offeror without delay does not object to the new terms,[2] or the offer does not expressly limit acceptance to the terms of the offer,[3] or the offeree does not make his acceptance conditional upon the offeror's assent to the additional or different terms, and the assent reaches the offeree within a reasonable time.[4]

On the other hand, if an element that is included in the acceptance adds new terms, modifies the terms of the offer or introduces any other type of limitation to the offer that substantially alters it, the contract will not be considered concluded. The response to the offer will be regarded as a counter-offer, that is, if it meets all requirements under the United Nations Convention on Contracts for the International Sale of Goods (CISG) or the Principles of European Contract Law (PECL) to be considered an offer in and of itself.[5]

To determine when an element of an acceptance materially alters the corresponding offer, a list of items is provided by the CISG. However, the list merely provides examples of such elements, as can be inferred from the expression "among other things," in CISG Article 19(3). Furthermore, the list has a presumptive nature since it predetermines that such "[a]dditional or different terms . . . *are considered* to alter the terms of the offer materially."[6]

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[2] *See* CISG, *supra* note 1, art. 19(2); PECL, *supra* note 1, art. 2:208(3)(b).

[3] *See* PECL, *supra* note 1, art. 2:208(1); The CISG is silent on this issue.

[4] *See* PECL, *supra* note 1, art. 2:208(3)(c); The CISG is silent on this issue.

[5] *See* CISG, *supra* note 1, art. 14, cmt.; PECL, *supra* note 1, art. 2:208(1) (indicating that an acceptance by conduct may contain additional or different terms. These terms may be material, for instance, if the offeree dispatches a much smaller quantity of a commodity than that which was ordered by the offeror, or immaterial if only a very small quantity is missing). *See also* OLG [Appellate Court] Frankfurt am Main, March 4, 1994 (Germany), *available at* http://cisgw3.law.pace.edu/cases/940304g1html.

[6] The list includes, *inter alia*, the following elements: price (only those modifications relating to the total amount of the offer price) (Supreme Court of Spain, *Internationale Jute Maatschappij v. Marin Palomares*, January 28, 2000 *available at* http://www.uc3.es/cisg/sespan7.htm, http://cisgw3.law.pace.edu/cases/000128s4.html); clauses that modify the price because of increases in costs (Supreme Court of France *Fauba v. Fujitsu Mikkroelectronik*, January 4, 1995, *available at* http://cisgw3.law.pace.edu/cases/950104f1.html); payment method (LG Giessen [District Court], December 22, 1992 (Germany), *available at* http://cisgw3.law.pace.edu/cases/921222g1.html); place and time, quality and quantity of merchandise (OLG [Appellate Court] Frankfurt am Main, March 31, 1995 (Germany), *available at* http://cisgw3.law.pace.edu/cases/950331g1); place and time of delivery (OLG Mu-

The list provided in the CISG contains only substantive elements that refer to rights and obligations that arise in a sales contract, eliminating certain elements from being considered material alterations, e.g., the initiative of the offeree to negotiate again and any small changes in the wording of the offer that have no effect on the acceptance.[7] Also, a modification of an offer whose content benefits the offeror should not be considered material.[8]

The PECL does not provide a similar rule to the one embodied in CISG Article 19(3). Nevertheless, the PECL Comments to Article 2:208 reach a similar result. The PECL regards a term as material "if the offeree knew or as a reasonable person in the same position as the offeree should have known that the offeror would be influenced in its decision as to whether to contract or as to the terms on which to contract."[9] The PECL Comments

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nich, February 8, 1995 (Germany), *available at* http://cisgw3.law.pace.edu/cases/950208g1.html), the extent of one party's liability to the other (LG Baden-Baden, August 14, 1991 (Germany), *available at* http://cisgw3.law.pace.edu/cases/910814g1.html), or the settlement of disputes.

Nevertheless, it is very possible that courts may consider the list in the sense that the aforementioned terms substantially alter an offer in *every* case. For example, in OLG Hamm, September 22, 1992 (Germany), *available at* http://cisgw3.law.pace/edu/cases/920922g1.html, an indication of a material alteration was the rejection of packaged bacon "in polyethylene bags" by means of a counter-offer in which the packaging was established as "loose."

To arrive at a clear set of rules for interpreting when a modification to an offer is material, the term "material" should be interpreted in a limited way. *See* FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 100 (1992). *See also* PILAR PERALES VISCASILLAS, LA FORMACIÓN DEL CONTRATO DE COMPRAVENTA INTERNACIONAL DE MERCADERÍAS, 625-735 (1996).

[7] Examples of such non-material alterations are: an acceptance in which certain elements are added ("I accept because I urgently need the merchandise," or "I agree but was hoping for a more satisfactory agreement"); where recommendations are made or questions are asked ("I accept. Payment should be in bills of 100 euros," or "I accept. Would it be possible to include an arbitration clause?"); where requests are made ("Keep the acceptance confidential until it is announced publicly by both parties"); *see, e.g.,* Metropolitan Court of Budapest, *United Technologies (Pratt and Whitney Commercial Engine Business) v. Malev Hungarian Airlines*, January 10, 1992 (Hungary), *available at* http://cisgw3.law.pace.edu/cases/920110h1.html.

[8] *See* Oberster Gerichtshof [Supreme Court], 20 March 1997 (Austria), *available at* http://cisgw3.law.pace.edu/cases/970320h1.html.

[9] *Cf.* PECL, *supra* note 1, art. 1:301(5) which defines a matter as *material* "if it is one which a reasonable person in the same situation as one party ought to have known would influence the other party in its decision whether to contract on the proposed terms or to not contract at all." *Id.*

state that the list contained in CISG Article 19(3) was not provided in the PECL since it could only have been illustrative and not exhaustive.

Under both the CISG and PECL, course of dealing and trade practices,[10] as well as previous negotations and other elements of intent,[11] can play an important role in the interpretation of materiality. There are also circumstances in which CISG Article 4(a) may come into play as validity issues can arise in connection with certain of the terms listed in CISG Article 19(3). For example, where arbitration is the specified method of resolution of disputes, the validity of the arbitration (choice of forum) clause can turn on domestic law.[12] In a similar vein, domestic laws on unconscionability can impact upon the validity of limitation of liability clauses.[13]

II. RESOLVING THE *BATTLE OF THE FORMS* (CONFLICTING GENERAL CONDITIONS)

The *battle of the forms* is an expression that refers to a situation in which the parties exchange general conditions,[14] usually preprinted forms prepared by one of the parties or its trade association that often add one or more terms that materially modify the offer.

This is a very controversial issue in the CISG. Some scholars believe the *last-shot* rule applies, a rule that has been rejected by UCC section 2-207(3), which applies the *knock-out* rule. The PECL (in PECL Article 2:209, which follows UNIDROIT Principles Article 2.22) has adopted a variation of

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[10] *See* CISG, *supra* note 1, art. 9; PECL, *supra* note 1, art. 1:105.

[11] *See* CISG, *supra* note 1, art. 8; PECL, *supra* note 1, arts. 2:102, 5:101.

[12] This was the reasoning of *Cámara Nacional en lo Comercial*, sala E (*Inta SA v. MCS Officina Meccanica S.p.A*), October 14, 1993 (Argentina), *published in* El Derecho, 25 abril 1994, (t.157), No. 4, 129-137 *available at* http://cisgw3.law.pace.edu/cases/931014a1.html. *But see Filanto S.p.A. v. Chilewich International Corp.*, 789 F. Supp. 1229-1242 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993) *available at* http://cisgw3.law.pace.edu/cases/920414u1.html.

[13] *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, 182 et seq. (3d ed. 1999). *See e.g.*, Uniform Commercial Code §§ 2-302 and 2-719 [hereinafter U.C.C.].

[14] "General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties." PECL, *supra* note 1, art. 2:209(3).

the UCC approach. PECL Article 2:209 is an exception to the general rule in PECL Article 2:208 on modified acceptance.

The complexity of this issue is increased by the customary practice of sending offers and acceptances that contain general conditions. Such conditions may reveal contradictions and raise the following two questions: "Has a contract been concluded?" and, if so, "What are the terms of the contract?" Practice shows that the answer to the first question is generally affirmative; usually the parties go ahead with the contract although each has referred to its own general conditions, the problem being the determination of the exact content of the contract. Below, some solutions to the problem that have been provided under the CISG are examined to show the different approaches to solving this difficult issue of contract formation, with cross-reference to CISG Article 19.

A. Under the CISG, the battle of the forms should be considered a gap that must be resolved by applying the general principles upon which the CISG is based. Following this approach, some authors believe that the principle of good faith should apply. These authors conclude that the clauses contained in the forms that are contradictory would cancel each other out, leaving the issue to be governed by the applicable law, usage or good faith. That is, they adopt a solution such as that followed in certain legal systems, i.e. the "knock-out" rule,[15] the "*partiell dissens*" rule in BGB sections 154 and 155 [German Civil Code], or the similar solution provided in PECL Article 2:209(1) and UNIDROIT Principles Article 2.22.[16] A variation on this theory is that the situation produces an implied exclusion of CISG Article 19.

B. The opinion that is followed most, however, leads to the application of what is known as the "last-shot" rule – the last person to send his form is considered to control the terms of the contract and therefore is the one who wins the battle. For example, a German buyer ordered doors that had to be manufactured by the seller according to buyer's specifications. The seller sent the buyer a confirmation letter that contained his general con-

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[15] *See* U.C.C. § 2-207.

[16] *See generally* PECL, *supra* note 1, art. 2:209, cmts., illus. 182.

ditions of sale on the back. These conditions included the statement that "the seller must be notified of any defects of the merchandise within eight days of delivery." This provision varied from the terms of buyer's offer. Subsequently, the seller delivered the merchandise and the buyer accepted it. In this case, the seller's confirmation letter was considered to be a counter-offer that was implicitly accepted by the buyer's conduct when he accepted the merchandise. Therefore, the rules of the CISG also apply when forms are used. Consequently, any variation in those forms would be a counter-offer. Such a counter-offer could most certainly be accepted through an act of performance.[17]

The PECL has decided to follow a more recent approach, applying the "knock-out" rule to solve the battle of the forms problem, thus adopting the innovative approach of the UCC. According to PECL Article 2:209(1), the general conditions form part of the contract to the extent that they are common in substance. Therefore, any conflicting terms would be expelled out of the contract. However, following PECL Article 2:209(2), no contract is formed if one party: a. has indicated in advance, explicitly, and not by general conditions, that it does not intend to be bound by a contract on the basis of paragraph 1, i.e., there is a so-called "*clause paramount*;" or b. without delay, informs the other party that it does not intend to be bound by such contract.[18]

III. MODIFICATION OF THE CONTRACT AND COMMERCIAL LETTERS OF CONFIRMATION

A. Modification of the contract. CISG Article 29(1) states that a contract may be modified by the mere agreement of the parties. The modification of the contract can be viewed in terms

[17] *See generally* Pilar Perales Viscasillas, *Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 UCC and the UNIDROIT Principles*, 10 PACE INT'L L. REV. 97-155 (1998).

[18] One also has to take into account the rules of interpretation of PECL arts. 2:104, 5:103 and 5:104. *See* Court of Appeal of Grenoble *Société Simri v. Société Harper Robinson*, January 24, 1996 (France), Unilex – UNIDROIT Principles, Transnational, June 2000, D.1996-1, *citing* UNIDROIT Principles art. 2.21 as a principle in international trade whereby the non-standard term prevails over a standard term in case of contradiction. *See also* PILAR PERALES VISCASILLAS, FORMATION OF THE CONTRACT UNDER THE CISG. IN LAW AND PRACTICE OF EXPORT TRADE, 97-114 (2001).

of offer and acceptance. In that sense, an attempt to modify a contract may be deemed to be an offer to modify the contract that must be accepted by the other party.[19]

B. Commercial letters of confirmation. Sending a confirmation letter following the conclusion of a contract is a very common practice in international commercial transactions. The customary purpose of such a letter is to set in writing that which was previously negotiated and to establish proof of that which was agreed. Confirmation letters are generally designed to eliminate or reduce doubts or errors that might arise by setting out the terms by which the contract is governed. When the terms contained in the confirmation letter coincide with those that were actually agreed upon – they are a summary, an exact repetition or confirmation of such – no problems exist. However, what can happen is that prior to (or simultaneous with) the execution of the contract, a confirmation letter or invoice is sent out that alters or adds to the terms of the contract that has already been formalized. Such changes can take place by including certain new elements or general conditions, an entire set of general conditions that had not been previously discussed by the parties or indicated as included in the contract, or conditions that provide for something different than that which was agreed upon. This issue raises the question of how such confirmation letters should be treated under the law.[20]

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[19] *See* LG District Court Hamburg, September 26, 1990 (Germany), *available at* http://cisgw3.law.pace.edu/cases/900926g1.html; Court of Appeal of Grenoble, *Société Cámara Agraria v. André Margaron*, March 29, 1995 (France), *available at* http://cisgw3.law.pace.edu/cases/950329f1.html; Supreme Court of Spain, *Internationale Jute Maatschappij v. Marin Palomares*, January 28, 2000 *available at* http://cisgw3.law.pace.edu/cases/000128s4.html (where the offer of modification of the international sales contract made by a United States seller was never accepted by the Spanish buyer). *See also* the comment by E. Fernández Masiá, Sentencia de 28 de enero de 2000, Cuadernos Civitas de Jurisprudencia Civil, abril-septiembre 2000, 673-689; F. Oliva Blázquez, Aceptación, contraoferta y modificación del contrato de compraventa internacional a la luz del artículo 8 del Convenio de Viena. La indemnización de daños y perjuicios y el "deber de mitigar" "ex" artículo 77 CISG. Comentario a la STS de 28 enero 2000 (RJ 2000, 454), Revista de Derecho Patrimonial, 2000, I, no. 5, 203-19.

[20] *See* Pilar Perales Viscasillas, Tratamiento jurídico de las cartas de confirmación en la Convención de Viena de 1980 sobre Compraventa Internacional de Mercaderías, Revista Jurídica del Perú (Trujillo), octubre-diciembre 1997, no. 13, 241.

In the legal systems of Germany, Austria and Switzerland, when the contractual relationship is between merchants, silence or inactivity on the part of the recipient of a confirmation letter produces an acceptance by silence of the modifications introduced in the commercial letter of confirmation. Even though the modifications may be accepted, this does not mean that the confirmation letters containing them are held in the same light as the offer and acceptance.

In Anglo-American law, confirmation letters are regulated in a manner similar to the battles of the forms,[21] although with certain differences. In particular, jurisprudence has indicated that a confirmation conditional upon the recipient's acceptance to new terms is not acceptable because it would mean imposing new conditions on a contract that has already been concluded.[22]

The CISG is silent on the treatment of commercial letters of confirmation. However, the subject can be analyzed in the familiar context of offer and acceptance. The sending of a written confirmation which adds to or modifies the terms previously agreed upon by the parties is treated as an offer to modify the contract and has to be accepted by the addressee for the contract to be concluded on those terms, unless there is an applicable usage or practice to the contrary.[23]

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[21] *See generally* U.C.C.

[22] *See* JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE. Vol. I. 48 §§ 1-3 (3d ed. 1988). This would mean that the final part of U.C.C. § 2-207(1) would not be applicable: "unless acceptance is expressly made conditional on assent to the additional or different terms." *Id.*

[23] *See* (CISG art. 9(2)). Among the cases applying CISG to commercial letters of confirmation, see Civil Tribunal of Basel-Stadt, December 21, 1992 (P4 1991/238) (Switzerland) *available at* http://cisgw3.law.pace.edu/cases/921221s1.html (considering that in a contract of sale between a Swiss buyer and a Austrian seller there is an international trade usage (CISG art. 9(2)) whereby silence in response to a commercial letter of confirmation amounts to an acceptance) (note that this is more of a *regional* usage recognized in Germany, Austria, and Switzerland). *Cf.* OLG [Appellate Court] Dresden, July 9, 1998 (Germany), *available at* http://cisgw3.law.pace.edu/cases/980709g1.html; OLG Köln, February 22, 1994 (22 U 202/93) (Germany), *available at* http://cisgw3.law.pace.edu/cases/940222g1.html; OLG Frankfurt am Main, July 5, 1995 (Germany), *available at* http://cisgw3.law.pace.edu/cases/950705g1.html (reaching a consistent result: denying the value of silence as an acceptance to the usage described when one of the parties does not belong to a country that recognizes that usage of trade). *But see* OLG Saarbrücken February 14, 2001 (Germany), *available at* http://cisgw3.law.pace.edu/cases/010214g1.html (involving a contract of sale between an Italian seller and a German buyer where the tribunal held that "the contract is binding with the content

The PECL has an explicit rule that deals with commercial letters of confirmation. The solution offered by the PECL is to specifically apply the rules of offer and acceptance from Chapter II. With a similar solution to that of PECL Article 2:208 (relating to acceptances with modifications), PECL Article 2:210 provides that additional or different terms that are included in a confirmation letter become part of the contract unless they substantially alter the terms of the contract or the recipient of the letter objects without delay to their inclusion.[24]

IV. CONCLUSIONS

The modification of the offer under both the CISG and the PECL is dealt with in a similar fashion. However, the two instruments differ in their treatment of the battle of the forms. In this case, the PECL cannot aid in the interpretation of the CISG, since the solutions under the two regimes are completely different. However, the treatment of the commercial letters of confirmation adopted by the PECL is in accord with the rules of offer and acceptance under the CISG. Therefore, there should be no impediment to the use of the PECL to help interpret the CISG in that regard.

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given to it in the letter of confirmation, unless the sender of the letter has either intentionally given an incorrect account of the negotiations, or the content of the letter deviates so far from the result of the negotiations that the sender could not reasonably assume the recipient's consent. The recipient's silence causes the contract to be modified or supplemented in accordance with the letter of confirmation. . . .") *Id.*

[24] *See* PECL, *supra* note 1, art. 2:210.