THE BATTLE OF THE FORMS: COMPARATIVE AND ECONOMIC OBSERVATIONS

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1. INTRODUCTION

In today's typical commercial transactions, buyers and sellers communicate with each other using standardized forms. Normally, the buyer initiates the transaction by sending the seller a purchase order. The seller then replies to the purchase order by sending a sales acknowledgment or invoice or some other commercial reply form. Both the seller's form and the buyer's form generally contain a description of the goods, the price, the quantity, and the delivery terms. Further, each party's form contains additional preprinted standard terms. Those terms usually have not been mentioned in any preliminary negotiations between the parties and, in fact, normally have not even been considered. As both parties draft their standard terms with different interests in mind, the respective terms almost always conflict. When the seller ships the goods subsequent to the exchange of the forms and contractual problems materialize, the following questions arise: Does the exchange of the conflicting terms form a contract? If so, what are the contract terms? Do one party's terms prevail? If so, whose? The seller's? The buyer's? If there is no binding contract because of the conflicting terms, does performance form the contract? If so, what are the contract terms?

Academics around the world are, and have been, struggling with the answers to these questions. Commonly called the "battle of the forms,"¹ the problem of conflicting standard terms has

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¹ When referring to battle of the forms cases in the following, I refer to the "classical" battle of the forms case. In the "classical" battle of the forms case, the
become the focus of one of the most spirited debates in legal literature. Surprisingly, two aspects of the problem have essentially been omitted from the discussion. First, hardly any academic has made the attempt to describe the rules that are currently applied around the world in battle of the forms cases. Second, only a handful of academics has submitted those rules to an economic analysis and has thus tried to solve the problem of the battle of the forms by taking economic aspects into account. In the following, I will therefore first give an overview of the different legal solutions that apply in battle of the forms cases in different countries and under different international contracts and restatements. I will then analyze those solutions under the notion of efficiency. I will come to the conclusion that they only partly promote economic efficiency and will propose a new solution that claims to remedy their perceived economic flaws.

2. THE EXISTING SOLUTIONS – A COMPARATIVE OVERVIEW

Around the world, the question of how to deal with the legal problems created in battle of the forms cases has been the focus of an extensive and vigorous legal debate. The solutions that emerged from these debates, although different in detail, can usually be classified as either a last-shot rule or a knock-out rule.

2.1. Last-shot Rule

The so-called last-shot rule is the rule traditionally applied under the common law to deal with a battle of the forms situation. The buyer makes an offer to buy a certain amount of a certain good by referring to his standard terms. The seller accepts the offer but refers to his own standard terms that substantially differ from the buyer's. He then delivers the goods. After delivery, contractual problems materialize, and the parties discover the differences in their standard terms.


It provides that a contract does not come into existence as long as offer and acceptance do not match. Each party's reference to its own general conditions is considered a rejection of the other party's offer and treated as a counteroffer. Only if one party accepts the other party's offer—including its general conditions—is a contract formed. The terms of the contract are those of the party whose offer has been accepted and thus of the party who has managed to "fire the last shot." In the "classical" battle of the forms case, this is usually the seller: By sending to the seller a purchase order referring to his own general conditions, the buyer makes an offer under his own standard terms. By referring to his own standard terms in the reply the seller rejects the offer and makes a counteroffer. The buyer implicitly accepts this offer through acceptance of delivery.

Although by now most common law countries have abandoned or at least dramatically limited the scope of the last-shot rule, it is still the prevailing solution to the battle of the forms problem under English law. Additionally, although controversial, it is the rule governing in principle under the United Nations Convention on Contracts for the International Sale of Goods.

2.1.1. England

The application of the last-shot rule under English law is due to the fact that English courts tackle battle of the forms cases through the general rules of offer and acceptance. Therefore, a contract comes into existence only if the terms of the acceptance correspond exactly to the terms of the offer. An acceptance that is not in

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4 See supra note 1 (discussing the elements of a "classical" battle of the forms case).
5 See e.g., Hyde v. Wrench, 49 Eng. Rep. 132 (1840) ("The Defendant offered to sell... and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract."); Tinn v. Hoffmann & Co., 29 L.T.R. 271 (1873) (finding no contract because the terms were not consistent); P.J. Cooke & D.W. Oughton, The Common Law of Obligations 30 (2d ed. 1993); Laurence Koffman & Elizabeth Macdonald, The Law of Contract 16-17 (2d ed. 1995) (explaining that "[valid acceptance] must be an acceptance of the offeror's proposal without varying the terms or adding new terms"); G.H. Treitel, An Outline of the Law of Contract 10 (5th ed. 1995) ("The most important note with regard to an acceptance is that it must correspond with the offer. If it seeks to qualify or to vary the offer, it is ineffective as an acceptance."); Robert UPeX, Davies on Contract 13 (7th ed. 1995); Michael H. Whincup, Contract Law and Practice: The English System and Continental Comparisons 35 (3d ed. 1996); Francois Vergne, The "Battle of the Forms" Under the 1980 United Nations Convention on Contracts for the International Sale of Goods, 33 Am. J. Comp. L. 233, 239 (1985)
conformity with the terms of the offer is considered a rejection of the offer\(^6\) and usually treated as a counteroffer.\(^7\) Of course, there are a few exceptions to this rule: "A meaningless term will be ignored."\(^8\) A term that would be implied by law will be allowed,\(^9\) as will be an additional term solely for the other party's benefit,\(^10\) a reasonable intimation\(^11\) or a statement that is only a request or suggestion.\(^12\) However, as the terms that are generally in question in battle of the forms cases usually do not fall into one of these categories, formation of the contract requires one party to accept the terms of the other party, including the general conditions.

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\(^6\) {See e.g.}, Hyde, 49 Eng. Rep. at 132; Tinn, 29 L.T.R. at 271; Koffman & McDonald, supra note 5, at 17 (explaining that any variation in terms will lead to a counteroffer "which amounts to a rejection of the original offer"); John C. Smith, The Law of Contract 39 (2d ed. 1993) ("An acceptance which purports to add something to the terms is, by definition a counter-offer and does not create a contract."); Treitel, supra note 5, at 11 ("[An] acceptance which introduces different terms is... a counteroffer."); Vergne, supra note 5, at 239 ("An acceptance which is not in conformity with the offeror's terms is considered as a rejection of the offer.").

\(^7\) {See e.g.}, Hyde, 49 Eng. Rep. at 132; Tinn, 29 L.T.R. at 271. See also Cooke & Oughton, supra note 5, at 30; Koffman & McDonald, supra note 5, at 17 (explaining that "attempts to introduce new terms... will be regarded as a counter offer"); Smith, supra note 6, at 39 ("An acceptance which purports to add something to the terms is, by definition, a counter-offer and does not create a contract."); Treitel, supra note 5, at 11; Whincup, supra note 5, at 39; Vergne, supra note 5, at 239 (stating that a nonconforming offer "may be a counteroffer").

\(^8\) Jacobs, supra note 2, at 299. See also Nicolene Ltd. v. Simmonds, 1 Q.B. 543, 551 (1953); Treitel, supra note 5, at 10-11.

\(^9\) Treitel, supra note 5, at 10-11; Vergne, supra note 5, at 240.

\(^10\) Jacobs, supra note 2, at 299; Vergne, supra note 5, at 240.

\(^11\) See e.g., In re Imperial Land Co. of Marseilles, 7 L.T.R. 587, 593 (1872) (discussing how an intimation is a "mere notification not intended to be a stipulation and it was never considered... as a new term introduced"). See also Jacobs, supra note 2, at 299.

\(^12\) See e.g., Stevenson, Jacques, & Co. v. McLean, 5 Q.B.D. 346, 350 (1880) (finding the agreement to be a "mere inquiry... and not treated as a rejection of the offer"). See also Cooke & Oughton, supra note 5, at 30; Smith, supra note 6, at 39 (explaining that "acceptance may be signified by words or documents, or by the conduct of the parties"); Jacobs, supra note 2, at 299 (explaining that a statement which is only a request or suggestion and which could not itself amount to an offer does not come within the common law's definition of a counter-offer"); Vergne, supra note 5, at 240-41 (stating that a mere request for information included in the acceptance will not be considered a rejection).
Acceptance of an offer under English law may be expressed either explicitly by words of acceptance or implicitly by conduct. In battle of the forms cases, this rule will usually result in formation of the contract through conduct: The buyer makes an offer that is rejected by the seller because he refers to his own general conditions. Subsequently, he delivers the goods. Acceptance of the goods by the buyer amounts to acceptance of the seller's counteroffer by conduct. Because the buyer accepted the seller's offer, the seller's terms, as the party who "fired the last shot," govern the contract. The general principles of offer and acceptance under English law, thus, naturally lead to application of the last-shot rule.

The application of the last-shot rule in battle of the forms cases was called into question by Lord Denning M.R. in Butler Machine Tool Co., Ltd. v. Ex-Cell-O Corp. (England), Ltd. The dispute in this case revolved around a machine tool the plaintiff offered to sell to the defendants. The offer was made on a standard form that allowed the seller to increase the price from that quoted to that prevailing at the date of delivery. It was also provided that these terms should prevail over any terms and conditions in the buyer's order. The defendants accepted the offer on their own standard order form, which contained no price variation clause. The buyers' form included a tear-off section to be completed by the sellers that stated, "[w]e accept your order on the Terms and Conditions stated thereon." The plaintiff signed and returned the slip to the defendants. The machine tool was constructed, but before delivery, the sellers sought to invoke the price variation clause. The buyers protested, claiming that the contract had been concluded on their terms.

The Court of Appeals unanimously found for the buyers. Lawton L.J. and Bridge L.J. adopted the traditional common law approach of offer and counteroffer to solve the problem of the battle of the forms by stating that the buyers' reply was a

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13 KOFFMAN & MACDONALD, supra note 5, at 18; TREITEL, supra note 5, at 10; UPEX, supra note 5, at 12-13.


16 Id. at 403.
counteroffer that was expressly accepted by the sellers when they signed and returned the acknowledgment. Lord Denning M.R. accepted this analysis for the case at hand, but pointed out that in many other battle of the forms cases, it was out of date. He suggested solving the problem of the battle of the forms by separating the question of the formation of the contract from the question of its content. As to the first question, formation of the contract, he proposed “to look at all the documents passing between the parties—and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points—even though there may be differences between the forms and conditions printed on the back of them.”

He came to the conclusion that in “[a]pplying this guide, it will be found that in most cases when there is a ‘battle of forms,’ there is a contract as soon as the last of the forms is sent and received without objection being taken to it.” As to the second question, content of the contract, he suggested that depending on the circumstances of the case, the contract could be governed by the terms of the last form sent, the terms of the first form sent, or the reconcilable terms of both forms with the irreconcilable terms being replaced by reasonable implications. He pointed out that the terms of the last form sent were to be decisive if there was acceptance, express or implied from conduct, that the terms of the first form were to prevail if the acceptance contained differences so material that they would affect the price, and that the terms of both forms would govern if, and so far as, the terms were reconcilable.

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17 Id. at 404.
18 Id.

19 In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them. . . . In some cases, the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back: and the buyer orders the goods purporting to accept the offer—on an order form with his own different terms and conditions on the back—then if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller. There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable—so that they are mutually contradictory—
Since Butler Machine Tool Co., academics have been struggling with the impact of Lord Denning's opinion on English law. While at least two scholars believe that his opinion relaxed the rigid common law standard, another academic denies any influence on English law, arguing that Lawton L. J. and Bridge L. J. "emphatically rejected" Lord Denning's opinion. The majority, however, do not really comment on the impact of Lord Denning's opinion on English Law, thereby indicating that they do not consider it to have affected the application of the last-shot rule. Apart from Butler Machine Tool Co., English academics do not really seem to care about battle of the forms cases and the application of the last-shot rule. Especially as compared to other countries—the United States and Germany, for example—academic discussion is extremely sparse and is usually in support of the last-shot rule, at least in principle. Only a few academics have criticized the traditional common law approach or even attempted to find new

then the conflicting terms may have to be scrapped and replaced by a reasonable implication.

Id. at 404-05.


21 von Mehren, supra note 2, at 273.

22 COOKE & OUGHTON, supra note 5, at 30; MICHAEL P. FURMSTON, CHESIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 162-63 (12th ed. 1991); KOFFMAN & MACDONALD, supra note 5, at 20; SMITH, supra note 6, at 40-41; TREITEL, supra note 5, at 20; UPEx, supra note 5, at 13.


24 See Rawlings, supra note 23, at 721 (arguing for application of the last-shot rule despite "certain drawbacks" at least until more research into the attitudes and expectations of the parties is done). See also McKendrick, supra note 23, at 207 (arguing for application of the "traditional rules of offer and acceptance").

25 See Adams I, supra note 23, at 298-99; Jacobs, supra note 2, at 297; Shanker, supra note 23, at 264-76.
solutions to the battle of the forms. However, as of yet, the courts have applied none of these solutions.


In addition to its application in England, the last-shot rule is the prevailing solution for battle of the forms cases under the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). As in England, its application can be attributed to the fact that the problem of the battle of the forms is tackled through the general rules of offer and acceptance, which are by and large the same as under English law. There is, however, one essential difference between the traditional English common law rules and the rules of the CISG: According to Article 19(2) CISG, a reply that purports to be an acceptance, but that contains additional or different terms, constitutes an acceptance notwithstanding the modifications if those do not materially alter the terms of the offer. In this case, contrary to the English rule and the general rule of Article 19(1) CISG, the contract is formed despite the discrepancy of offer and acceptance. The terms of the contract are those of the offer with the modifications contained in the acceptance. By allowing an acceptance to contain modifications without losing its quality as an acceptance, Article 19(2) essentially departs from the traditional English rule.

The alteration, however, has little practical impact: Article 19(3) CISG declares modifications relating 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

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26 See Adams I, supra note 23, at 299, 301-02; Adams II, supra note 23, at 483-84 (arguing for a solution on an individual case-by-case basis). See also Jacobs, supra note 2, at 314-16 (suggesting a set of seven general principles).


29 Id. arts. 14-18, 19(1).

30 Id. art. 19(2).

31 The contract is not formed only if the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. Id. art. 19(2).
disputes as material.\(^{32}\) Article 19(3) CISG thus turns virtually all terms that in practice contain modifications into material ones and thus submits them to the regime of Article 19(1) CISG.\(^{33}\) Therefore, the last-shot rule as traditionally applied in England will usually prevail.

The majority of academics support the application of the last-shot rule in battle of the forms cases under CISG.\(^{34}\) However, it has

\(^{32}\) That the modifications enumerated in Article 19(3) CISG are material is only an assumption, which can be disproved by invoking usages for example. See Fritz Enderlein & Dietrich Maskow, International Sales Law 101 (1992); Fritz Enderlein et al., Internationales Kaufrecht: Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungs-konvention 93 (1991); Peter Schlechtriem, in Kommentar zum Einheitlichen UN-Kaufrecht art. 19, para. 8, at 219 (Peter Schlechtriem ed., 3d ed. 2000).


also been vigorously disputed. In fact, the question of how to solve battle of the forms cases has turned out to be one of the most hotly debated topics. Numerous academics have made suggestions that are primarily designed to avoid the application of Article 19 CISG and, thus, the last-shot rule. Those suggestions range from the interpretation of the parties' declarations as waiver of Article 19 CISG, limitation of Article 19 CISG to those cases in which no performance has taken place, application of the general principles of the CISG, and application of the national law. However, as in England, none of these suggestions have prevailed in the courts.

2.2. Knock-out Rule

Today most countries solve the problem of the battle of the forms by application of a rule that is usually called the knock-out rule and is especially designed to deal with battle of the forms cases. In contrast to the last-shot rule, it is not based on the general


36 L. Diez-Picazo & Ponce de León, ¿Una Nueva Doctrina General del Contrato?, 156 Anuario de Derecho Civil 1705, 1716 (1993). See also Christian Mouly, La formation du Contrat, in La Convention de Vienne sur la Vente Internationale et les Incoterms 57, 69 (Yves Derains & Jacques Ghestin eds., 1990) (giving examples of battle of the forms cases in which Article 19 CISG does not govern); Bernard Audit, La Vente Internationale de Marchandises: Convention des Nations-Unies du 11 Avril 1980, 70 (1990) (arguing that only cases in which performance has taken place and the modifications contained in the acceptance are material are not governed by Article 19 CISG).

37 Louis F. Del Duca & Patrick Del Duca, Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II), 29 UCC L.J. 99, 122 (1996); Drobnig, supra note 33, at 126; Moccia, supra note 33, at 674-79; Frans J. A. van der Velden, Uniform International Sales Law and the Battle of the Forms, in Unification and Comparative Law in Theory and Practice—Contributions in Honor of Jean George Sauveplanne 233, 243 (Jean George Sauveplanne ed., 1984). Unfortunately, most of the commentators who favor the application of the general principles of the Convention do not specify those principles and how they apply in battle of the forms cases. According to Christine Moccia, supra note 33, at 675, and Frans J. A. van der Velden, supra note 37, at 246-47, a contract comes into existence if the parties have reached an agreement on the goods, the price, and the quantity. The terms of the contract are the terms agreed upon, supplied with terms the court thinks are reasonably suited under all circumstances of the case to fill the gaps.

rules of offer and acceptance and the traditional assumptions that only the acceptance of the terms of the offer forms the contract and that only the terms of the offer constitute the terms of the contract. Rather, it provides that a contract comes into existence even though—due to the differing general conditions—offer and acceptance do not perfectly match. The terms governing the contract are those that are common in substance in both sets of general conditions. The differing terms knock each other out and are replaced by the default rules of the law.

The knock-out rule usually applies in the United States, Germany, and France. Additionally, it is the rule prevailing under the UNIDROIT Principles of International Commercial Contracts (1994) and the Principles of European Contract Law (1998).

2.2.1. United States

In the United States, the application of the knock-out rule is the result of Section 2-207 of the Uniform Commercial Code ("U.C.C."). According to this provision, a definite and seasonable expression of acceptance that is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. Thus, contrary to the traditional English rule a contract may come into existence despite the fact that the acceptance is not in conformity with the offer. The acceptance need only meet two requirements. First, it must be couched in terms of a "definite and seasonable expression of acceptance" and second, it must not be "expressly made conditional on assent to the additional or different terms." If the acceptance fulfills these two requirements, the terms of the contract are essentially those of the offer. In view of additional terms contained in the acceptance, Section 2-207(2) of the U.C.C. provides that they are proposals for addition to the contract if the parties to the contract are not both

39 Prior to the adoption of the U.C.C., the last-shot rule applied. See e.g., Poel v. Brunswick-Balke-Collender Co., 110 N.E. 619 (N.Y. 1915) (applying an analysis of the last-shot rule to the particular facts in a breach of contract dispute); Cohn v. Penn Beverage Co., 169 A. 768 (Pa. 1934) (applying the last-shot rule to a breach of contract suit where the court found no "exact conformity" between offer and acceptance); Hutchinson Baking Co. v. Marvel, 113 A. 433 (Pa. 1921) (noting that no contractual relationship was established absent an "unqualified" offer and acceptance); Cram v. Long, 142 N.W. 267, 270 (Wis. 1913) (allowing a party to withdraw an offer on a land contract upon analysis under the last-shot rule).
merchants. The offeror can either agree to their inclusion or not as he wishes. If the parties to the contract are both merchants, the additional terms automatically become part of the contract unless: (a) the offeror has stated in his offer that he will agree only on the basis of his terms; (b) the additional terms will materially alter the existing contract; or (c) the offeror has already objected or thereafter objects within a reasonable time to the additional terms. Regarding different terms contained in the acceptance, U.C.C. Section 2-207(2) is silent. Therefore, the majority of courts and academics hold that different terms cancel each other out and are replaced by the default rules of the U.C.C. The problem of different terms, which is the problem that usually occurs in battle of the forms cases, is thus solved by application of the knock-out rule.

If a contract is not formed under U.C.C. Section 2-207(1), it may still come into existence under U.C.C. Section 2-207(3). According to Section 2-207(3) of the U.C.C., conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such a case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms

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40 According to U.C.C. Section 2-104, a merchant is defined as a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Comment 2 to U.C.C. Section 2-104 suggests that for purposes of U.C.C. Section 2-207, almost every person in business would . . . be deemed to be a ‘merchant’ under the language ‘who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . .’ since the practices involved in the transaction are non-specialized business practices such as answering mail.


incorporated under any other provision of this Act. Thus, irrespective of how the contract comes into existence under Section 2-207 of the U.C.C., the knock-out rule applies.

The majority of academics in the United States essentially support the application of the knock-out rule in battle of the forms cases. However, the wording of U.C.C. Section 2-207 has been the subject of harsh criticism\(^\text{42}\) and has caused numerous academics to make suggestions for both reasonable interpretations\(^\text{43}\) and revisions.\(^\text{44}\) The National Conference of Commissioners on Uniform State Laws responded in 1994 and appointed the Drafting Committee to Amend Uniform Commercial Code Article 2. The revision process has produced countless suggestions on how to revise or replace U.C.C. Section 2-207, the most recent dating from August 2002. However, since no new version has yet been adopted, the United States still applies the original version of U.C.C. Section 2-207.

2.2.2. Germany

Apart from the United States, the knock-out rule is the solution that has prevailed in Germany since the 1980s. Before that time German courts used to address the problem of the battle of the forms by applying the last-shot rule, in German law usually called the "theory of the last word" ("Theorie des letzten Wortes").\(^\text{45}\) On the basis of Section 150(2) of the German Civil Code, which provides that an acceptance with modifications is a rejection of the offer coupled with a new offer, German courts usually decided that in a battle of the forms case a contract was only concluded if the terms

\(^{42}\) The points of criticism are too numerous to be comprehensively discussed here. For a detailed discussion of the problems incurred by Section 2-207 U.C.C. see Jacobs, supra note 2, at 308-10; John E. Murray, The Chaos of 'The Battle of The Forms': Solutions, 39 VAND. L. REV. 1307, 1322-54 (1986); Corneill A. Stephens, On Ending the Battle of the Forms: Problems with Solutions, 80 Ky. L.J. 815, 823-24 (1992); Travakio, supra note 3.


\(^{45}\) Bundesgerichtshof [BGH] [Supreme Court], BB 882, No. 1624; BGH, NJW 1248; Oberlandesgericht [OLG] [Court of Appeals] Köln, WM 846, 847 (1971).
of offer and acceptance perfectly matched. Therefore, the party who managed to make the last offer—the party who managed to "fire the last shot"—prevailed with its terms. In most battle of the form cases the German courts decided that the seller won the battle of the forms: They argued that the seller, by accepting the offer under his own standard terms, rejected the offer made by the buyer and made a new offer that was accepted through receipt of delivery on the part of the buyer without objection to the seller's terms.

At the beginning of the 1970s German courts gradually began their departure from the last-shot rule. In 1970, they held that acceptance of delivery without objection to the other seller's terms did not amount to acceptance where the buyer had indicated that he only wanted to contract under his own terms and rejected the other party's terms. However, they still found that a contract had been formed. To reconcile this finding with Section 150(2) of the

46 BGH, BB 882, No. 1624; BGH, NJW 1248; OLG Köln, WM 846, 847 (1971).
47 The German Supreme Court did not apply the last-shot rule in only one case where buyer and seller had explicitly and repeatedly insisted on their own terms. It decided that neither party's offer had been accepted. Nevertheless, and contrary to the last-shot rule, the Court found that a contract had been formed. It assumed that although delivery had not taken place, both buyer and seller had indicated through their conduct—the buyer by insisting on delivery, the seller by trying to match the buyer's needs—that they wanted the contract despite the differing standard terms. It ruled that under the principle of good faith and fair dealing the parties did not have the right to deny the existence of a contract because of Section 150(2) of the German Civil Code. The contract was to be governed by the default rules of the law. BGH, BB 728.
48 BGH, BB 882, No. 1624; BGH, NJW 1248; OLG Köln, WM, (1971) 846, 846. The Supreme Court assumed only once that the buyer's terms governed the contract even though the seller had accepted his offer under his own standard terms. The Court argued that, under the principle of good faith and fair dealing, the seller's acceptance, which contained only minor modifications, was to be understood as acceptance without modifications and thereby as acceptance of the buyer's offer. BGH, BB 238.
49 BGH, BB 1136; BGH, WM 451. Additionally, this approach was adopted by the lower courts: in 1975, the Court of Appeals of Frankfurt and the Court of First Instance of Hagen decided that in cases where both buyer and seller had insisted on their own terms and rejected the other party's terms, acceptance of delivery did not amount to acceptance, but that a contract was formed nevertheless. OLG Frankfurt, BB 1606 (1975); Landgericht [LG] [Trial Court] Hagen, BB 723 (1976). The Court of Appeals of Karlsruhe, in 1973, had already decided that a contract came into existence even if acceptance of delivery was not understood to be acceptance of the seller's offer. OLG Karlsruhe, BB 816, 816 (1973).
German Civil Code, they argued that Section 150(2) had to be interpreted in light of the principle of good faith and fair dealing as established in Section 242 of the German Civil Code. If the parties behaved as if they had a contract, for example through delivery and acceptance of delivery, in the light of good faith and fair dealing they were not allowed to deny the existence of the contract. Additionally, the courts argued that Section 154(1) of the German Civil Code, which provides that a contract is not concluded if the parties have not agreed upon all terms of the contract upon which at least one party wanted to reach agreement, did not prevent the formation of a contract. They held that Section 154(1) was only a presumption that was overcome when the parties performed the contract. As to the terms of contract, the courts found that the contract was completely governed by the default rules of the law. They thereby clearly departed from the last-shot rule.

The first time that a German court actually applied the knock-out rule to solve the problem of the battle of the forms was in 1980. The Court of Appeals in Cologne dealt with a dispute that revolved around a forum selection clause contained in one party’s terms. The Court accepted the position developed by German courts in the 1970s that acceptance of delivery did not amount to acceptance of the other party’s standard terms where the party had insisted on its own terms or rejected the other party’s terms, but that nevertheless a contract was formed. The Court, however, departed from the position taken by German courts in the 1970s in that it decided that the contract was not completely governed by the default rules of the law, but only insofar as the standard terms of the parties did not match. To the extent the parties’ terms were in agreement, they became part of the contract. The Court found support for this approach in Section 6(2) of the Act on the Regulation of the Law of General Conditions of Contract ("Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen"). which provides that a standard term that does not become part of

51 BGH, 61 BGHZ 282.
52 BGH, BB 1136, 1137.
the contract because it is ineffective under the provisions of the General Conditions of Contract Act is replaced by the default rules of law.\textsuperscript{57} The Court held that Section 6(2) of the Act on the Regulation of the Law of General Conditions of Contract contained a general legal principle whose application was not confined to the cases explicitly enumerated.\textsuperscript{58} In the following, the solution found by the Court of Appeals of Cologne was approved by other German courts.\textsuperscript{59} The German Supreme Court finally accepted the knock-out rule in 1985.\textsuperscript{60}

Today, the application of the knock-out rule in battle of the forms cases is not seriously called into question. As most academics agree in essence with the courts’ argumentation,\textsuperscript{61} academic discussion has essentially ceased. The most recent law review articles dealing with the problem of the battle of the forms date back to the late 1980s. The overwhelming acceptance of the knock-out rule, however, does not mean that the last-shot rule no longer finds application, particularly as it was never explicitly discarded by the courts. As the application of the knock-out rule depends on the parties’ indication that they only want to contract under their own terms and that they reject the other party’s terms, there is still room for the last-shot rule where the parties do not explicitly insist on their own terms or do not explicitly reject the other party’s terms. In these cases, German courts hold that acceptance of delivery amounts to acceptance of the offer and thus to formation of the contract under the terms of the offer last

\begin{itemize}
\item \textsuperscript{57} OLG Köln, BB, (1980) 1237, 1240.
\item \textsuperscript{58} OLG Köln, BB 1237, 1240 (1980).
\item \textsuperscript{59} LG Düsseldorf, ZIP 359 (1980); OLG Stuttgart, ZIP 176 (1981); OLG Hamm, WM 785 (1985).
\item \textsuperscript{60} BGH, NJW 1838 (1839).
\end{itemize}
made. These cases, however, are rare, as standard terms in Germany usually contain so-called defensive clauses, which explicitly state that the contract is only subject to the party’s own terms or that the other party’s terms are rejected. Thus, in practice, the knock-out rule applies in all battle of the forms cases.

2.2.3. France

In France, as in Germany and the United States, the problem of the battle of the forms is solved by application of the knock-out rule. Its design under French law very much resembles its design under German law. There is only one difference worth mentioning: French courts even apply the knock-out rule where standard terms do not contain a defensive clause that explicitly states that the contract is only subject to the party’s own terms or that the other party’s terms are rejected. The courts hold that use of standard terms alone is sufficient to show that the party insists on application of its own terms and rejects the other party’s terms. This understanding of the knock-out rule differs significantly from the one in Germany. As indicated, under German law, the parties must state explicitly that they do not intend to contract under terms different from their own. A party’s simple use of its own terms is not sufficient.

62 ULMER ET AL., supra note 61, § 2, para. 98-99, at 258-59; WOLF, supra note 61; Bork, supra note 61, at 543.


In France, as in Germany, the application of the knock-out rule is not seriously called into question. Almost all French academics support the approach taken by the French courts. However, it should be noted that the French Supreme Court itself departed from the knock-out rule in two cases. In the first case, the Court decided that a contract was concluded under the buyer's terms. The seller made an offer under his standard terms, which contained in bold and striking letters a forum selection clause in favor of the court of first instance at the seller's domicile. The buyer accepted the offer referring to his own standard terms, which contained a different forum selection clause and which were found on the back of the acceptance in fine print. The French Supreme Court found that the two forum selection clauses were irreconcilable and that under traditional theory, they should knock each other out. However, the Court held that the seller's forum selection clause became a part of the contract because it was written in bold and striking letters, in contrast to the buyer's forum selection clause, which was written in fine print.

In the second case, the French Supreme Court apparently applied the last-shot rule. In that case, the seller made an offer under his standard terms, which contained, among others, a condition reserving property to the seller after delivery. The buyer accepted the offer referring to his own standard terms, which explicitly rejected any clause reserving property to the seller. The French Supreme Court held that the term in the reservation of property clause in the seller's standard terms did not form part of the contract. Noteworthy, however, was the Court's reasoning: It did not refer to the traditionally applied knock-out rule, which would have led to the same result. Instead, the Court argued that the buyer's term rejecting any reservation of property clause prevailed because it was brought to the seller's knowledge. It thus gave effect to the last standard terms sent. The ruling in fact amounted to application of the last-shot rule. However, apart from the rare exceptions of these two cases, the general rule

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67 Id.
69 Id.
applied by French courts in battle of the forms cases is the knock-out rule.

2.2.4. UNIDROIT Principles of International Commercial Contracts (1994)

The knock-out rule as an approach to handle battle of the forms cases, gained international acceptance in 1994 when the International Institute for the Unification of Private Law ("UNIDROIT") adopted it in its Principles of International Commercial Contracts, usually known today as UNIDROIT Principles. Drafted by academics and practitioners from all major legal systems of the world, the UNIDROIT Principles reflect concepts of contract law found in many, if not all, legal systems. The Principles try to embody what are perceived to be the best solutions, even if they are not yet generally adopted. They are not designed for adoption as a treaty or as a uniform law, but rather constitute a restatement of the commercial contract law of the world. Despite the lack of binding force, their impact and influence should not be underestimated. The preamble lists a number of possible practical uses of the UNIDROIT Principles, ranging from application as choice of law rules to application as a model for national and international legislation.

The UNIDROIT Principles address the problem of the battle of the forms in Article 2.22. Especially designed to cover battle of the forms cases, the Article provides that where both parties use standard terms and reach agreement except on those terms, a


72 For a detailed discussion of impact and influence of the UNIDROIT Principles, see Bonell, supra note 70, at 1141-47; Viscasillas, Sphere of Application, supra note 70, at 391-420; Ferarri, supra note 71, at 1228-35.
contract is concluded on the basis of the agreed terms and any standard terms that are common in substance, unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract. The knock-out rule thus established in the UNIDROIT Principles is very much like the German and French knock-out rules, with two important differences. First, the UNIDROIT Principles do not answer the question of how to fill the gaps in the contract caused by elimination of differing terms; whereas both German and French laws provide that the gaps are to be filled by the applicable national law. Second, according to the Official Commentary, the intention not to be bound cannot be declared in advance in the standard terms under the UNIDROIT Principles. In contrast, under German and French law, objection against formation of the contract or the other party's terms can be raised in the standard terms. Under French law the objection does not even have to be explicit. The simple use of standard terms is sufficient.

2.2.5. Principles of European Contract Law (1998)

In addition to the UNIDROIT Principles, the Principles of European Contract Law have adopted the knock-out rule as the solution for battle of the forms cases. Drafted by the Commission on European Contract Law under the chairmanship of Professor Ole Lando in 1995 and revised in 1998, the Principles of European Contract Law constitute a restatement of the common core of contract law in Europe. The Principles of European Contract Law deal with the battle of the forms problem in Article 2.209. Like Article 2.22 of the UNIDROIT Principles, it is especially designed to cover battle of the forms cases. It provides that if the parties have reached agreement, except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance. No contract is formed if one party has indicated in advance, explicitly and not by way of general conditions, that it does not intend to be bound or, without delay,

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73 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 2.22, cmt. 3 illus. 2, 3 (1994).

informs the other party that it does not intend to be bound by such contract. As in the UNIDROIT Principles, the question of how to fill the gaps in the contract is not answered. However, it is made clear in the text of Article 2.209 that the intention not to be bound cannot be declared in standard terms.

3. THE EXISTING SOLUTIONS – AN ECONOMIC ANALYSIS

As indicated above, the legal solutions currently applied around the world to deal with the battle of the forms problem can roughly be classified under either the last-shot rule or the knock-out rule. The question that has to be answered now is whether those rules deal with battle of the forms cases in an efficient way.75

3.1. Last-Shot Rule

The last-shot rule traditionally applied under the common law to govern the problem of the battle of the forms faces criticism for a number of reasons:76 for leading to arbitrary solutions by unjustly favoring the party who sent the last offer;77 for favoring evasion by denying the existence of a contract until performance takes place;78 for being mechanistic, formal and ignoring modern realities of commerce;79 and for disappointing the parties’ intentions and
business expectations. From an economic point of view, the last-shot rule is questionable, because it does not enforce mutual agreements and incurs high transaction costs.

3.1.1. Enforcement of Mutual Agreements

The economic approach to contract law begins with the proposition that contract law should foster voluntary exchange by enforcing mutually understood agreements. The basis for this proposition is that individuals are assumed to be rational maximizers of welfare and, therefore, do not agree to an exchange unless they believe that the exchange will make them better off. As individuals have idiosyncratic knowledge about the details of a particular exchange unavailable to anybody else, there is a strong presumption that voluntary exchange between competent individuals will indeed make both better off. Assuming that the exchange will not reduce the welfare of third parties more than it increases the welfare of the parties, it will also foster efficiency. The core economic function of contract law is therefore to foster
voluntary exchange by enforcing mutually understood agreements.84

Application of the last-shot rule in battle of the forms cases, however, does not enforce mutually understood agreements. Under the last-shot rule a contract comes into existence only if the terms of the acceptance perfectly match the terms of the offer. The slightest difference in the terms prevents the formation of the contract, even though the parties have agreed on the most important terms. Therefore, it might happen that no contract comes into existence although both parties actually want to be contractually bound. In the classical battle of the forms case, for example, application of the last-shot rule amounts to formation of the contract on the day of delivery when the buyer accepts the goods. The parties, however, have reached a mutually understood agreement on the most important terms, usually the price and the quality of the goods, with the exchange of the standard forms. Even though they do not agree on every single term, they want to be contractually bound from that day on. Still, they cannot enforce their mutually understood agreement until the day of delivery.

In other cases, it might happen that a contract does not even come into existence on the day of delivery. Assume, for example, that the seller delivers the goods and hands them over to the buyer with a statement in writing that delivery is made only under his standard terms and that the buyer accepts the goods but returns a receipt, stating that acceptance of the goods does not amount to acceptance of the seller’s terms and that only his own standard terms shall govern the contract. As both parties explicitly insist on their own standard terms and refuse the other party’s terms, it is impossible to interpret either party’s declaration or conduct as acceptance of the other party’s standard terms. However, it is clear that both parties have reached a mutually understood agreement on the most important terms and want to be contractually bound. The last-shot rule thus hinders, and in some cases even prevents, the formation of a contract, despite the existence of a mutually understood agreement of the parties.

84 COOTER & ULEN, supra note 75, at 184; KRONMAN & POSNER, supra note 81, at 1-2; Michael I. Meyerson, The Efficient Consumer Form Contract: Law and Economics Meets the Real World, 24 GA. L. REV. 583, 593 (1990) (discussing the economics of consumer contracts); Ostas & Darr, supra note 3, at 410; POSNER, ECONOMIC ANALYSIS, supra note 75, at 15,111-12; STEPHEN, supra note 75, at 155-56.
3.1.2. Transaction Costs

Apart from fostering voluntary exchange by enforcing mutually understood agreements, contract law should promote voluntary exchange by keeping transaction costs as low as possible. The basis for this proposition is to be found in the ideas that are today known as the Coase Theorem. Introduced by Ronald Coase in his 1960 article, The Problem of Social Cost, the Coase Theorem states that an efficient allocation of resources will result from private bargaining regardless of the initial assignment of rights if transaction costs are zero or low. It is therefore the economic function of contract law to promote voluntary exchange by keeping transaction costs as low as possible.

At first blush, application of the last-shot rule in battle of the forms cases seems to comply with this function of contract law. The reason for this impression is that the last-shot rule provides a strict and clear rule for both the formation of the contract and the determination of the contract terms. In addition, the application of strict rules instead of flexible standards usually keeps transaction costs low. They provide for a clear framework into which businesspeople can fit their actions or intentions and thus enable businesspeople to be sure that they achieve their desired expectations. Strict rules induce greater certainty and enhance the predictability of the law.

However, at second glance it becomes obvious that the last-shot rule, despite or because it provides a clear and strict rule, also incurs considerable transaction costs. First, it encourages an extensive exchange of standard forms because both parties know that the other party's standard terms will control the complete

85 Ostas & Darr, supra note 3, at 412 (describing basic tenets of an economic approach to contract law).
86 R.H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960). See also Cooter & Ulen, supra note 75, at 85 (stating that "bargaining necessarily succeeds when transaction costs are zero"); Jeffrey L. Harrison, Law and Economics in a Nutshell 56 (1995) (discussing the Coase Theorem and its implications); Thomas J. Miceli, Economics of the Law 7-10 (1997) (using the Coase Theorem to help introduce material on economics and the law); Schäffer & Ott, supra note 74, at 81 (discussing and illustrating the Coase Theorem); Veljanovski, supra note 75, at 49-51 (providing a general overview of the Coase Theorem).
87 Cooter & Ulen, supra note 75, at 93-94; Ostas & Darr, supra note 3, at 411; Posner, Economic Analysis, supra note 75, at 108.
88 See Travalio, supra note 3, at 364 (discussing formalism and its relation to predictability).
89 Id.
transaction if the other party manages to make the last offer. As any substantial difference between the parties' terms makes the responding document a new offer, accepted by delivery of the goods, the parties have incentives to continue sending documents to each other in order to ensure that their own document arrives last. It has been argued, however, that it is unlikely that parties engage in an endless exchange of standard forms. According to Baird and Weisberg, most businesspeople have little interest in playing games with legal rules, because they realize that by sending a new form, they lose the chance to do business, albeit on the terms in the other party's form. No strategy ensures that a particular party would be the last to send a form, and an attempt to send the last form could backfire completely, because the other party could simply decide not to do business with a party that rigidly insists on its own terms. Reality, however, proves the opposite. Studies have shown that businesspeople try to "fire the last shot" by attaching their standardized terms and conditions to any written document sent to their customers.

Second, the last-shot rule incurs high transaction costs because it does not promote the most efficient contract terms. Under the last-shot rule, the contract is completely governed by the terms of one party, namely the terms of the party who manages to make the last offer. The terms of one party, however, are not likely to be the most efficient. Each party knows that there is a chance its standard terms will control the entire transaction if it manages to "fire the last shot," which creates an incentive to draft standard terms that maximize his or her own profit. Terms that maximize the profit of one party, however, do not necessarily maximize the joint profit of both parties. Assume, for example, that in a contract for the sale of a certain good the risk for destruction of the goods before delivery must be assigned. Assume also that the seller can prevent this risk at a lower cost than the buyer can. The most efficient way to deal with the risk that the goods could be destroyed before delivery

90 Baird & Weisberg, supra note 3, at 1252 ("Most businessmen, after all, have little interest in playing games with legal rules.").
92 The most efficient terms are those that keep transaction costs as low as possible. Cooter & Ulen, supra note 75, at 201; Kronman & Posner, supra note 81, at 6; Posner, Economic Analysis, supra note 75, at 105.
would be to assign the risk to the seller. It would keep the transaction costs necessarily involved in the assignment of risk as low as possible, and would thus maximize the joint profit of the parties. If the seller has to decide about the assignment of the risk, he will assign it to the buyer because, given that the exchange still takes place, this way of dealing with the problem will maximize his own profit.

It has been argued, however, that the risk that parties do not draft terms that only maximize their own profit is not reflected in reality, and that the last-shot rule actually is the rule that best promotes efficient contract terms. According to Baird and Weisberg, market forces will encourage parties to draft provisions that advance their mutual interests because the party that offers terms which solely maximize its own profit will recognize that at least some of those receiving these terms will take their business elsewhere rather than accept. This reasoning, however, seems doubtful in at least two respects. First of all, it is based on the questionable presumption that at least some parties will read the other party's forms. Under the assumption of rationality, however, businesspeople do not have an incentive to read the standard terms they receive. As most transactions are completed without incident, it is usually not efficient to spend time and money reading and negotiating over standardized terms. The verbal and legal obscurity of preprinted terms renders the cost of searching out and elaborating on these terms and, therefore, bargaining costs, exceptionally high. In particular, if the probability that a certain term comes into play or the value of performance is low, the cost of thorough search and deliberation on preprinted terms, even disregarding the cost of legal advice about the meaning and effect of the terms, will usually be prohibitive relative to the benefits.

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93 Baird & Weisberg, supra note 3, at 1253-60 (arguing that the “self-interested” approach of “unilaterally advantageous terms” on preprinted forms is not standard practice nor is it advantageous under the mirror image rule).

94 Id. at 1255 (discussing advantages of unilaterally advantageous forms).

95 Rosh, supra note 3, at 562-63 (evaluating the attentiveness of businessmen to a standard exchange of forms); Alex Y. Seita, Uncertainty and Contract Law, 46 U. PITT. L. REV. 75, 133-35 (1984) (noting that consumers rarely read contracts and that parties should not expect that they have actually done so with any reasonable assurance); Travalia, supra note 3, at 355 (finding that the “winner-takes-all approach seems inappropriate” given the lack of attention given to boilerplate terms).

96 See Melvin A. Eisenberg, The Limits of Cognition and the Limits of Contract, 47 STAN. L. REV. 211, 244-45 (1995) (using pre-printed banking terms as an
Therefore, businesspeople will usually decide not to read the other party’s standard terms. Second, even if some businesspeople, for whatever reason, decide to read the standard terms they receive, market forces probably will not make the other party change its terms. Market forces will not have this effect unless a significant number of businesspeople read the standard forms they receive. However, the above-described rational ignorance will prevent a significant number of businesspeople from reading standard terms. And as businesspeople know that other businesspeople usually will not engage in reading their standard terms, they have no reason to change their terms so long as they believe a provision that maximizes their own profit could be enforced against an unwary party who neglects to read standard terms in detail.

3.1.3. Summary and Conclusion

It can be inferred that the last-shot rule incurs the two following economic disadvantages. First, it does not foster voluntary exchange because it contains the risk that the formation of a contract will be hindered though the parties want to be contractually bound. Second, it incurs high transaction costs because it encourages an extensive exchange of standard forms and does not promote the most efficient contract terms.

The only economic advantage of the last-shot rule is that it keeps transaction costs low by applying a strict rule rather than a flexible standard to determine whether a contract has been formed and to identify the contract terms. This advantage, however, is directly related to the rule’s disadvantages: The last-shot rule effectively impedes voluntary exchange, encourages an endless exchange of standard forms, and does not promote the most efficient contract terms because of the strict rule it applies to

Illustration); Seita, supra note 95, at 133-35 (“No reasonable consumer would waste his life perusing all the legal documents that accompanied consumer purchases.”).

Goldberg, supra note 3, at 164-65 (proposing three reasons for skepticism of the Baird-Weisberg argument that the mirror image rule encourages parties to send recipients "attractive" documents); Rosh, supra note 3, at 569 (suggesting the Baird-Weisberg analysis creates "a classic 'prisoners' dilemma'" leading to distrust on both sides).

Eisenberg, supra note 96, at 244-45 (using pre-printed balancing terms as an illustration); Goldberg, supra note 3, at 164 (suggesting hypothetical results if buyers actually read documents more carefully).

Goldberg, supra note 3, at 164-65 (concluding the Baird-Weisberg argument is not credible under realistic circumstances); Rosh, supra note 3, at 569.
determine the formation and the terms of the contract. Apparently, the price the last-shot rule has to pay for the economic advantage of a strict rule are these aforementioned economic disadvantages.

In balancing the economic advantages and disadvantages of the last-shot rule, its disadvantages by far exceed its advantages. The mere fact that the last-shot rule keeps transaction costs low by application of a strict rule does not outweigh the fact that it effectively hinders voluntary exchange and increases transaction costs by encouraging an endless exchange of standard forms and by failing to promote the most efficient contract terms. The last-shot rule therefore does not constitute an efficient solution in battle of the forms cases.

3.2. Knock-Out Rule

The knock-out rule, at least in the United States and Germany, was intended to cure the perceived flaws of the traditionally applied last-shot rule. In terms of economic efficiency, it indeed manages to avoid some of the undesirable implications of the last-shot rule.

3.2.1. Enforcement of Mutual Agreements

The first economic disadvantage of the last-shot rule is that it impedes voluntary exchange because it does not enforce mutually understood agreements. The knock-out rule manages to cure this perceived economic disadvantage because it provides that a contract comes into existence if the declarations and the conduct of the parties indicate that they want to be contractually bound. It does not matter if the terms of offer and acceptance do not perfectly match. In the classical battle of the forms case, for example, application of the knock-out rule results in the formation of a contract with the exchange of the terms. Thus, the contract comes into existence when both parties have reached a mutually understood agreement on the most important terms and wish to be contractually bound.

3.2.2. Transaction Costs

The second economic disadvantage of the last-shot rule is that it incurs high transaction costs because it encourages an endless exchange of standard forms and fails to promote the most efficient contract terms. The knock-out rule manages to eliminate at least
one of these two causes of high transaction costs. Under this rule, an endless exchange of standard forms is not encouraged because the terms of the contract are the standard terms of the parties, to the extent they agree, and also the default rules of the law. In contrast to the last-shot rule, the knock-out rule will never allow the terms of one party to control the contract. Since both parties know that there is no risk that the other party's terms will govern the contract in its entirety, there is no reason for an endless exchange of forms.

Unfortunately, this analysis is not entirely correct in view of how the knock-out rule is applied under U.C.C. Section 2-207(1) and (2). As indicated above, Section 2-207(1) of the U.C.C. allows the offeree to convert his acceptance into a rejection coupled with a new offer if he makes his acceptance expressly conditional on assent to his standard terms. If the offeror accepts, the contract is governed by standard terms of the offeree. The offeror thus has an incentive to send back his own forms. Even if the chance that the offeree's terms will exclusively control the entire contract has been significantly limited by the courts, there is still a chance that those terms will exclusively control the contract. U.C.C. Section 2-207(1) and (2), therefore, create an incentive for the parties to exchange forms. This incentive, however, is not as strong as under the last-shot rule because the risk that the transaction will be controlled exclusively by the other party's terms is significantly smaller. Thus the knock-out rule as applied under U.C.C. Section 2-207(1) manages to avoid an endless exchange of forms.

No version of the knock-out rule, however, eliminates the second source of high transaction costs. Much like the last-shot rule, it does not promote the most efficient contract terms. If standard terms conflict, the conflicting terms cancel each other out and are replaced by the law's default rules. The terms of the contract are the standard terms of the parties to the extent that they agree, coupled with the default rules. Thus, parties to the contract know that, even though they might not be able to insist on its

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100 See Ostas & Darr, supra note 3, at 413 (explaining the problems associated with Section 2-207). For the view that U.C.C. Section 2-207 does not create incentives to read and negotiate standard terms, see Baird & Weisberg, supra note 3, at 1249.

101 Courts have generally held that acceptance of delivery does not amount to acceptance of the new offer but that it usually leads to formation of a contract under U.C.C. Section 2-207(3). C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228, 1237 (7th Cir. 1977); Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168-69 (6th Cir. 1972).
standard terms, the worst thing that can happen is that the contradicting terms knock each other out and are replaced by the default rules of the law. From the perspective of the party sending the standard terms first, two things might happen: The other party might send its own standard terms back or it might not. In view of the contract terms, this means that either the party’s own terms will govern, or, if the other party responds by sending back its forms, the default rules will control the contract to the extent the forms are in conflict. The result is that each party has an incentive to draft terms that will maximize its own profit. If you are lucky and the other party does not respond by sending back its forms, your terms will govern. If you are unlucky and the other party sends back its forms, the contract will be controlled by the terms common in substance and the default rule of the law. The drafting of terms that do not maximize the joint profit of the parties does not run any risks save the possibility that someone will read the standard terms and refuse to transact on the objectionable terms.102 There are only potential gains.103 In cases where one party fails to send back its standard forms, under the knock-out rule, that party thus incurs the risk that the contract is governed by terms that only maximize the other party’s profit.

Even if it is not one party’s terms but the default rules of the laws that govern the contract, it is unlikely that the knock-out rule will maximize the joint profits of the parties. The reason is that default rules are not necessarily the most efficient rules to use for any given transaction.104 First of all, they may significantly undermine the common intention of the parties and the bargain

102 See Goldberg, supra note 3, at 162 (“There is no cost to a [party] in adding increasingly one-sided terms to its standard forms, save the possibility that someone will actually read the fine print and refuse to transact on the objectionable terms.”).

103 See Baird & Weisberg, supra note 3, at 1255-56 in view of the knock-out rule as applied under Section 2-207 U.C.C. (comparing the effects of the mirror image rule with Section 2-207 on contracting behaviors). See also Goldberg, supra note 3, at 162 (discussing the dearth of costs and the potential benefits of putting a party’s desired terms in a standard form).

104 See Baird & Weisberg, supra note 3, at 1249-51 (illustrating how the code’s “off-the-rack” terms are not always in the best interest of contracting parties); Daniel Keating, Exploring the Battle of the Forms in Action, 98 Mich. L. Rev. 2678, 2689-90 (2000) (“[T]he gap-fillers, while nice in the abstract, really do not work particularly well for any given deal.”).
they intended to strike. Assume, for example, that both parties' standard terms contain a clause providing for notice in case of non-conformity of goods; one clause states that notice has to be given within two months, the other indicates that the period shall be two months and fifteen days. Under the knock-out rule, the contradictory clauses knock each other out and are replaced by the default rules of the applicable law. As many national laws provide for a notice period that is much shorter than two months, application of the default rules would in this case lead to contract terms that are clearly against the will of both parties. Second, even if the default rules do not go against the intention of both parties, they might still encounter inefficiencies. Default rules, by their very nature, are applicable in many different situations to many different transactions. Therefore, it is natural that they fit some parties and some transactions better than others. For some transactions they provide efficient terms, for others they do not. Assume for example that in a sales contract the buyer can bear the risk of product failure more cheaply than the seller can. Therefore, it is more efficient if the sale is concluded without seller warranty. Most national laws, however, presume that the seller is better positioned than the buyer to bear the risk of product failure, and thus provide that goods are usually sold with a warranty.

Despite the disadvantages the last-shot rule incurs in view of the transaction costs, the last-shot rule also incurs one important economic advantage: It keeps transaction costs low because it applies a strict rule instead of a flexible standard to determine whether a contract has been formed and what the contract terms are. Unfortunately, the knock-out rule does not manage to preserve this economic advantage of the last-shot rule. Under the knock-out rule the question of whether a contract has come into

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105 Viscasillas, "Battle of the Forms," supra note 34, at 119-21 (noting statutory notice periods, arbitration agreements, and pricing agreements are a few examples where "the character of the intended bargain" may change).

106 See id. at 119 (describing the non-conformity of goods example that the Author discusses).

107 See id. ("Under many regimes the statutory notice period can be much shorter than the period provided in either of [the] clauses . . . . Such an application . . . . would seem to go against the will of both parties.").

108 See Baird & Weisberg, supra note 3, at 1249 ("A standard based on the principles of 2-207 may give parties to some transactions what they would have gotten had they spent more time and money bargaining.").

109 See id. at 1249-51 (giving an example illustrating default rules' potential inefficiencies due to warranty provisions).
existence is answered by looking for the mutually understood agreement of the parties rather than the formal identity of offer and acceptance of the parties. The knock-out rule, thus, applies a flexible standard rather than a strict rule to determine whether a contract has been formed. The obvious advantage of this approach is that it gives effect to the intention of the parties, generally fostering voluntary exchange. The disadvantage, however, is that the determination of whether a contract has been formed incurs higher transaction costs than under the last-shot rule. 110

3.2.3. Summary and Conclusion

In summary, the knock-out rule essentially incurs two valuable economic advantages. First, it fosters voluntary exchange by enforcing mutually understood agreements. Second, it keeps transaction costs low because it does not encourage an endless exchange of forms. Its disadvantages, however, are that it results in high transaction costs because it applies a flexible standard to determine whether a contract has been formed and because it fails to promote the most efficient contract terms.

As in the case of the last-shot rule, there is a strong correlation between the economic advantages and the disadvantage of the knock-out rule: It fosters voluntary exchange because it applies a flexible standard instead of a strict rule to decide about the formation of the contract. It avoids an endless exchange of standard forms because of the mechanism it applies to determine the contract terms. However, it is the exact same mechanism that fails to promote the most efficient contract terms. In the same way as the last-shot rule, the economic disadvantages that are incurred by application of the knock-out rule are the price it has to pay for the economic advantage.

In balancing the economic advantages and disadvantages of the knock-out rule, it becomes obvious that it provides for a considerably more efficient solution than the last-shot rule in battle of the forms cases. In particular, that it fosters voluntary exchange and does not encourage an endless exchange of standard forms makes it the superior approach in battle of the forms cases.

110 In the United States, this effect is reinforced by the fact that U.C.C. Section 2-207 is entirely complicated and unclear. The myriad problems it raises cause plenty of confusion and uncertainty among businesspeople, lawyers, and judges. It causes an increase in transaction costs not only because of its flexible standard, but also because of its complex, complicated, and confusing structure. U.C.C. § 2-207 (1994). See also discussion supra Section 2.2.1.
However, as the knock-out rule incurs high transaction costs because it fails to promote the most efficient contract terms, it does not seem to be a perfectly efficient solution for battle of the forms cases.

4. A NEW SOLUTION—BEST-SHOT RULE

None of the rules currently applied around the world to deal with battle of the forms cases constitute an efficient solution to the problem. Therefore, I propose a new solution that claims to be more efficient. It is a rule that takes the same approach as the knock-out rule in view of the formation of the contract but provides for a new mechanism to determine the contract terms.\footnote{The suggested rule is essentially based on Victor P. Goldberg’s proposal. See Goldberg, supra note 3. Goldberg, however, does not aim for an efficient solution for the battle of the forms, but for a fair one. For the sake of this Article, efficiency and fairness are assumed to be irreconcilable. The question of whether this is true or not is beyond the scope of this Article.}

Under the proposed rule, which might be called an “efficiency-based best-shot rule,”\footnote{Goldberg’s proposal might be termed a fairness-based best-shot rule.} a contract comes into existence even when offer and acceptance do not perfectly match. If the parties actually want to be contractually bound, a contract is formed. To determine the contract terms, the efficiency-based best-shot rule takes into account that the major flaw of the currently applied rules is that they do not encourage the parties to draft the most efficient contract terms. When faced with a battle of the forms case under the efficiency-based best-shot rule, the court must choose one of the standard forms of the parties, namely the one that is more efficient. The more efficient standard terms govern the transaction in its entirety. The other party’s standard terms are completely ignored. The advantage of using this method to determine contract terms is that each party has an incentive to draft efficient contract terms. As either side runs the risk of having its entire set of standard terms disregarded if it is not efficient, each party has an incentive to draft more efficient terms than the other party.\footnote{Cf. Goldberg, supra note 3, at 166 (making the same argument for his fairness-based best-shot rule).}

By giving the court the discretion to pick one or the other party’s standard form based on its overall efficiency, the efficiency-based best-shot rule effectively encourages the parties to draft efficient contract terms. Thus, the proposed rule not only fosters voluntary
exchange by enforcing mutually understood agreements, but also promotes the most efficient contract terms.

It is doubtful, however, whether the efficiency-based best-shot rule would work as intended. The problem that could prevent it from working is that its underlying assumption—that parties draft contract terms that are exclusively designed to maximize their own profit—does not seem to be entirely true. Reality shows that parties, even under the currently applied solutions to the battle of the forms, do not only think of their own profit when drafting standard terms. The question, therefore, is whether parties actually need a legal incentive in the form of the best-shot rule to draft terms that maximize the joint profit of both parties. One possible answer is that they do not because the assumption of rationality underlying the classic economic analysis of law does not accurately describe how people actually behave. In particular, Cass R. Sunstein argues that the decisions that people make are not only based on rational reasoning but also strongly influenced by social norms. Norms, he notes, are "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done." As applied to battle of the forms cases, social norms might dissuade parties from drafting terms that only maximize their own profit because they simply do not want to appear selfish. However, even if social norms help to prevent parties from drafting standard terms that maximize their profits alone, they probably do not make parties draft standard terms which are perfectly designed to maximize the joint profits of both parties and which thereby foster efficiency. Therefore, even if the assumption that people draft forms that only maximize their own profit is not entirely true, it is true enough to serve as justification for an efficiency-based best-shot rule.

Doubts remain, however, as to whether the efficiency-based best-shot rule promotes the desirable economic result of efficient contract terms with acceptable transaction costs. In contrast to both the last-shot rule and the knock-out rule, it applies a flexible standard to determine the terms of the contract, and by their very

114 See Keating, supra note 104, at 2701-02 (arguing that parties uniformly draft their forms to be as one-sided as possible in their favor).
116 Id. at 914.
117 Keating, supra note 104, at 2701-02 (explaining how parties uniformly draft their forms to be as one-sided as possible).
nature, flexible standards incur higher transaction costs than strict rules. Litigation costs especially are high under the efficiency-based best-shot rule: A court faced with a battle of the forms case must determine and compare the overall efficiency of both standard forms in every single case. In contrast, both the last-shot rule and the knock-out rule provide strict guidelines on how to determine the contract terms and thus make their application less costly. In view of the application, the efficiency-based best-shot rule thus involves transaction costs that are considerably higher than under both the last-shot rule and the knock-out rule.118 However, the method of determining the contract terms under the efficiency-based best-shot rule also serves to reduce transaction costs.119 If the best-shot rule works properly, the forms of the parties will be less divergent, and the stakes will therefore be smaller. The smaller the stakes, the less the parties will be willing to spend on litigation, so that, presumably, more disputes will be settled out of court. The number of trials will probably also decrease for another reason: As both parties know exactly what the choices of the court will be—the contract terms of either one party or the other—it is more likely that they will try to settle the dispute out of court instead of incurring the presumably high litigation costs. The argument that the resolution of a dispute, if it goes to court, will be more expensive than under the last-shot rule and the traditional knock-out rule, will therefore be outweighed by the decreased number of trials under the best-shot rule.

In sum, the efficiency-based best-shot rule incurs two enormous economic advantages: First, it fosters voluntary exchange; and, second, it promotes the most efficient contract terms. The price it has to pay for these advantages are the relatively high transaction costs incurred by its application. In balancing the economic disadvantages and advantages of this rule, the advantages by far exceed the disadvantages. The fact that the application of the efficiency-based best-shot rule incurs higher transaction costs than both the last-shot rule and the knock-out rule is by far outweighed by the fact that it fosters voluntary exchange and promotes the most efficient contract terms. They are additionally outweighed by the fact that its application decreases

118 Cf. Goldberg, supra note 3, at 169-71 (recognizing the same problem for his fairness-based best-shot rule).

119 Cf. id. at 170 (making the same argument for his fairness-based best-shot rule).
the number of trials. The efficiency-based best-shot rule, thus, constitutes a far more efficient solution in battle of the forms cases than either the last-shot rule or the knock-out rule.

5. SUMMARY

Around the world, two basic types of rules are applied to solve the problem of the battle of the forms: The last-shot rule and the knock-out rule. Unfortunately, neither of these rules perfectly promotes economic efficiency. The last-shot rule, currently applied in England and under the United Nations Convention on the International Sale of Goods, impedes voluntary exchange, fails to promote efficient contract terms and incurs relatively high transaction costs. The knock-out rule, applicable in the United States, Germany, France, under the UNIDROIT Principles of International Commercial Contracts, and the Principles of European Contract Law, does not manage to promote efficient contract terms.

It is therefore suggested that a new solution should be applied in battle of the forms cases: an efficiency-based best-shot rule. Under this rule, a court decides about the formation of the contract by looking for the bargain-in-fact of the parties and determines the terms of the contract by picking the most efficient standard form. As this rule essentially fosters voluntary exchange and the most efficient contract terms, it constitutes a far more efficient solution in battle of the forms cases than both the last-shot rule and the knock-out rule.