

The Battle of Forms

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Abstract

United Nations Convention on Contracts for the International Sale of Goods (CISG) does not include the establishment of a contract with the counterparty of the standard contract, which includes the general terms of the transaction prepared in advance by the parties. In this case, conflicts arise between the parties when the general transaction conditions are included in the contracts that the parties have made in their own favors, and these conditions are not accepted by the counterparty. There are two completely opposite rules concerning the solution of these conflicts. The rules are “Last-Shot Doctrine” and “Knock-out Rule”. Both rules have their application areas. However, it is seen in the case law of courts and in the commercial life that the “Knock-out Rules” is preferred because it is more compatible with the wills of parties.

Keywords: CISG, general transaction conditions, conflict, Knock-out Rule, Last-Shot Doctrine.

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Introduction

General transaction conditions, to be applied in similar future contracts, mean provisions previously prepared by one of parties in order to present to the other party.¹ Integrating general transaction conditions into the contracts in the context of CISG by parties for their own favour and repudiation of these integration by other parties results in the battle of forms. CISG recognizes that confirmatory letters involving non-principle changes does not preclude the contracts from being established.² Confirmatory letters provide the determination of scope of verbally made contracts by summarising them. Conflicts derived from the settlement of general transaction conditions by confirmatory letter prepared subjectively by parties is not handled in the CISG.

¹ **AKİPEK, Şebnem**, Türk Hukuku ve Mukayeseli Hukuk Açısından Tüketicici Kredisini, Seçkin Pub., Ankara 1999, p. 224; **EREN, Fikret**, 6098 Sayılı Türk Borçlar Kanunu'na Göre Hazırlanmış Borçlar Hukuku Genel Hükümler, Yetkin Pub., 22 th Eds., Ankara, 2017, p. 215; **ATAMER, Yeşim**, Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi, Beta Pub., 2nd Eds., İstanbul 2001, p. 61; **SİRMEN, Lale**, “Tüketicici Sözleşmelerindeki Genel İşlem Şartlarının Değerlendirilmesi”, Türk Hukukunda Genel İşlem Şartları Sempozyumu, BTHAE., April 8 2011, p. 111; **HAVUTÇU, Ayşe**, Açık İçerik Denetimi Yoluyla Tüketicinin Genel İşlem Şartlarına Karşı Korunması, İzmir 2003, p. 74; **KUNTALP, Erden**, “Bankalar ve Genel İşlem Koşulları”, Türk Hukukunda Genel İşlem Şartları Sempozyumu, BTHAE., April 8, 2011, p. 84.

² **SCHLECHTRIEM, Peter / SCHWENZER, Ingeborg**, Kommentar zum Einheitlichen UN-Kaufrecht-CISG- Verlag C. H. Beck München 2004, Art. 19, N. 4; **SAĞLAM, İpek**, Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması Uyarınca Sözleşmenin Kurulması, XII Levha Pub., İstanbul 2013, p. 205.

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In case of a conflict among parties to a contract in the context of general transaction conditions, it is vitally important to create a consensus among them upon these conditions. Another solution is that the validity of general transaction conditions offered by parties would be based on customary rules and international commercial applications. For example, in a court decision, French seller and Canadian buyer made a verbal agreement on general transaction conditions concerning the sale of wine cork on the phone. French seller has added clauses in favour of French courts regarding what legal system would be applicable in each invoices. Buyer has filed a suit against French seller in a court in California. The court decided that the agreement concerning the principle elements made on the phone was valid and the clauses were in valid though French seller added clauses in favour of French law. The decision of the courts shows that the agreement was already established. Each requested clauses were offers that must be clearly accepted.³ In another case, seller wanted to make a reference to previous application and provisions by adding “previous transactions” into invoices. The court sustained that buyer was not bound by these clauses since buyer’s consent was not starkly received, seller tried to change the contract therefore the clauses added by the seller were not valid.⁴

As understood from the cases that when parties try to insert general transaction conditions into contracts they desire their interests to be

³ Sađlam, s. 206; CISG-Online 767

(<http://globalsaleslaw.org/content/api/cisg/urteile/767.htm>) (Accessed at 15.02.2018)

⁴ Sađlam, s. 207; CISG- Online 440

(<http://www.unilex.info/case.cfm?pid=1&do=case&id=336&step=FullText>

(accessed at 16.02.2018).

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maximised and this results in the battle of form.⁵ Parties never intend to diverge from their proposals and make no plan in that direction. They cite to their general transaction conditions when accepting proposals. In the case that the response given to the proposals include different conditions, this is accepted as another proposal and need the acceptance of respondent.⁶ There then exists different views concerning whether domestic law or CISG provisions are applicable.⁷ Those accepting the application of domestic laws argue that CISG has a mechanism for filling the gaps though it does not have explicit provisions and disagreement relates to the validity of the contract.⁸ This view does not gain recognition well enough. The battle of forms relates building a contract rather than validity of contract.

In case of a battle of form occurred among parties, pursuant to article 19/II of CISG, it is assessed whether the changes are substantial and if the changes are approved as substantial, the contract must be set up as valid.⁹

⁵ **Von MEHREN, Arthur Taylor**, “*The Battle of The Forms: A Comparative View*”, *American Journal of Comparative Law*, p. 38, 1990, p. 265 etc.; **LEETE, Burt A.**, “*Contract Formation Under The United Nations Convention On Contracts For The International Sale Of Goods And The Uniform Commercial Code: Pitfalls For the Unwary*”, *Temple International and Comparative Law Journal*, C. 163, S. 6, 1992, p. 212; **Schlechtriem/Schwenzer**, Art. 19, N. 19; **Sağlam**, p. 236..

⁶ **MURRAY, John E. Jr.** “*The Definitive ‘Battle of Forms’: Chaos Revisited*”, *Journal of Law and Commerce*, p. 20, 2000, (Shortened: Murray, Battle of Forms), p. 18.

⁷ **SCHLECHTRIEM, Peter / BUTLER, Petra**, *UN Law On International Sales, The UN Convention On The International Sale Of Goods*, Heidelberg 2009, p. 81; **Sağlam**, p. 236.

⁸ **Sağlam**, s. 237,

⁹ **Sağlam**, s. 239.

2. Solution Proposals as to Battle of Forms

It is important that CISG offers no solution proposals about ending the battle of forms. However, it is widely believed in accordance with article 19 of CISG that battles must be ended.¹⁰ There are two opposing views as to the solution of battle of forms: The first view asserts that article 4/I of CISG does not contain any provision about the validity of contracts, it is thus, CISG cannot be in question in ending battle of forms. According to this view, controversies among parties must be settled in pursuant to domestic law. The latter view argues that battles among parties can be ended by CISG, yet it is not clear what provision or provisions will apply to this.

A. Last-Shot Doctrine

According to one of views claiming that battles can be ended in accordance with CISG provisions, article 18-22 of CISG namely the provisions as to contracting should be accepted as a base. Last-shot doctrine to be applied in the determination of provisions for contracting.¹¹ Each sequential form is a counter claim against the

¹⁰ **VERGNE, François**, “*The ‘Battle of Forms’ under the 1980 United Nations Convention on Contracts for the International Sale of Goods*”, *American Journal of Comparative Law*, p.33, 1985, p. 233; **HONSELL, Heinrich**, *Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)*, 2. Aufl., Springer, Heidelberg 2010, Art. 19, N. 37; **STAUDINGER, Julius von / MAGNUS, Ulrich**, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)*, Art. 19, N. 20.

¹¹ **SCHWENZER, Ingeborg / MOHS, Florian**, “*Sözleşmenin Kurulması*”, *Milletlerarası Satım Hukuku, Milletlerarası Mal Satımına İlişkin Birleşmiş Milletler Antlaşması* (Editör: ATAMER, Yeşim), XII Levha Pub., İstanbul 2008, p. 97;

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previous one in the last-shot doctrine.¹² If the final form sent is accepted by the respondent without any reservation, the contract will be established. Thus, if one of the parties does not object to the modified or added general transaction condition, it is deemed to be accepted if it is partially or fully committed.¹³ Likewise, it is stated in article 18/I of CISG that any act expressing that the correspondent gave the approval to the client. Contract is to be established in the time of fulfilment. According to last-shot doctrine, if one of parties accepts the offer of the other party's general transaction condition in a clear statement, or act as toward that direction, the contract is accepted to be established.

Provisions in general transaction conditions created by parties who recognise other parties general transaction conditions are rejected. On the other hand, parties whose provisions concerning general transaction conditions are accepted are able to determine whole general transaction conditions. It is vital that the parties who send the last offer which is the last-shot is recognised as competent. For example, a buyer offers his own general transaction conditions. The seller then submits a counter proposal containing substantial changes and sent the goods. If the buyer receives the goods without any

Honsell/Dornis, Art. 19, N. 40; **Schlechtriem/Schwenzer**, Art. 19, N. 20; **Sağlam**, p. 242; **Staudinger/Magnus**, Art. 19, N. 23.

¹² **MURRAY, John E. Jr** . "An Essay On the Formation Of Contracts And Related Matters Under The United Nations Convention On Contracts For The Internationales Sale Of Goods" Journal of Law and Commerce, C.8, 1988, p. 8;

Schlechtriem/Butler, p. 81; **Sağlam**, s. 243.

¹³ **Murray**, Battle of Forms, s. 44; **Sağlam**, s. 243; **BIANCA, Cesare Massimo / BONELL, Michael** Joachim, Commentary on the International Sales Law, Giuffre - Mailand 1987 (Kısaltılışı: Bianca/Bonell/Yazar), Art.19, N. 2.5; **Schwenzer/Mohs**, p. 97; **Staudinger/Magnus**, Art. 19, N. 25.

rejection, it is implicitly assumed that the buyers accept the terms of contract and the contract is to be established from the moment of delivery.¹⁴

The last-shot doctrine has received criticism on issues that the doctrine is rarely applied and prioritises only one party's proposals, and it caused unfairness and paper waste, so on and so forth.¹⁵

B. Knock-out Rule

Knock-out rule developed in order for overcoming the deficiencies of the last-shot theory aims to filling the gaps in contracts by referencing CISG provisions.¹⁶ According to knock-out rule, provisions not conflicting one another exist valid but those which contradict are knocked down and pursuant to article 7/II of CISG¹⁷ reserve provisions will apply.¹⁸ If parties desire the contract to be valid, they all should abdicate conflicting provisions and the contract will continue with non-conflicting provisions. If there is still a contradiction among conflicting provisions, the provisions knock down too and CISG fills the gaps.¹⁹ Thus, parties will mutually act in

¹⁴ **Sağlam**, p. 244.

¹⁵ **Sağlam**, p. 246.

¹⁶ **Schwenzer/Mohs**, s. 98; **Schlechtriem/Butler**, p. 82; **Murray**, Battle of Forms, s. 7; **Sağlam**, p. 250.

¹⁷ CISG m. 7/II “*Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private -international law.*”

¹⁸ **Sağlam**, p. 250; **Schlechtriem/Schwenzer**, Art. 19, N. 20.

¹⁹ **Murray**, Battle of Forms, p. 7; **Schwenzer/Mohs**, p. 98; **Schlechtriem/Schwenzer**, Art. 19, N. 20; **Sağlam**, p. 251.

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accordance with the contract and implicitly abandon provisions that conflict with general transaction conditions and the gaps will be filled CISG provisions. Parties' statements in knock-out rule shall be interpreted according to article 8/III of CISG.²⁰

Knock-out rule had been applied in German Federal Court until 1970's yet later on, the last-shot theory has become valid one. The decision given in this direction by German Federal Court²¹ has become leading case for other courts. The case held by German Federal Court was between German seller and Dutch buyer about milk powder. When delivered goods in question were spoiled parties alleged their own general transaction conditions. German seller applied to the provisions reducing his liability while the Dutch buyer's general transaction conditions have more provisions in favour of seller according to the Court. In this case, a conflict occurred since the Dutch buyer kept silent about the German seller's general transaction conditions. The court held that conflicting general transaction conditions did not affect the validity of the contract, they made one another invalid.

Knock-out rule has been criticised because of the fact the rule brings different approach from the provisions under article 19 of CISG and it conflicts with provisions under article 7 of CISGH which settles

²⁰ CISG m. 8/III *"In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.."*

²¹ CISG-Online

651(<http://www.unilex.info/case.cfm?pid=1&do=case&id=766&step=Abstract>)(e.t.: 20.02.2018); **Sağlam**, p. 252-253.

uniform practices. It is however the knock-out rule is more decent when compared to last-shot theory in a couple of points:²² Knock-out rule does provide balance between the parties, it is more suitable for business life since the content of general transactions rules cannot be read.

There is another view concerning general transaction conditions that the new view entitled “firs-shot” claims that those parties who determine their transaction conditions first will have voices in determining contract conditions. Plus this, another view exist which claims that conflicts as to the parties’ general transaction conditions can be resolved pursuant to article 9 and 19 of CISG.²³ According to the last view, a contract shall be established when parties agree on objective-based elements, they may move away artile 19 of CISG by not applying to general transactions conditions they adopt.

C. Rules Accepted in Practice

Knock-out rule is much suitable one when battle of forms exist parties of contracts. The rule is preferred by many courts and cases have been held by taking this rule into account. Moreoever, this rule is preferred because it aims to keep contracts standing and it is compatible with the will of parties commercial applications.

²² **VERGNE, François**, “*The ‘Battle of Forms’ under the 1980 United Nations Convention on Contracts for the International Sale of Goods*”, *American Journal of Comparative Law*, p.33, 1985, p. 233; **von MEHLEN, Arthur Taylor**, “*The Battle of the Forms: A Comparative View*”, *American Journal of Comparative Law*, p. 38, 1990, p. 275; **Sağlam**, p. 251-256.

²³ **Schlechtriem/Schwenzer**, Art. 19, N. 42.

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Conclusion

Parties to a contract may intend to look for their own interests and restrict other parties' rights when they would like to include general transaction conditions into contracts and this lead to a conflict. There are different views as to what legal system including domestic law and CISG provisions will apply to the conflict. Contracts do not have any provisions regarding conflict resolution in response to conflicts regarding general transaction conditions. It is because that in early eras of these developments, there have not been enough international mechanism for these kinds of conflicts. There are two views concerning battle of forms: The first is last-shot theory which references general transaction conditions in the last stage and of which conditions are accepted by respondent. The latter is Knock-out rule claiming that conflicted conditions shall be knocked-out and the rest that are objective-based elements should be sustained. There are courts giving decisions in favour of both views but dominant view argues that knock-out rule is more fair for parties.

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