



Battle of Forms under the CISG and Turkish Law

“Knock-out” rule versus “last shot” rule

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Under the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) the issue of incorporation of standard terms may come up in practice in various scenarios such as by either simply referring to their existence during the negotiations or when both parties try to insert their own standard terms into the contract. However, standard terms cannot be incorporated once the contract is concluded. From that moment on, their incorporation is possible only by way of modifying the contract by agreement pursuant to Article 29 of the Convention. That being said, when each party attempts to incorporate its own standard terms into the contract before the formation of contract takes place, almost inevitably those standard terms will include contradicting provisions. Hence such situation gives rise to discrepancies between offer and acceptance and results in the difficulty to make out from the facts which set of standard terms should prevail; as generally called as “battle of forms”.¹

¹ SCHWENZER, I., & MOHS, F., “Old Habits Die Hard: Traditional Contract Formation in a Modern World”, In *Internationales Handelsrecht* (6:2006) 239-246. Retrieved on 22 September 2016, from: <http://www.cisg.law.pace.edu/cisg/biblio/schwenzler-mohs.html>

The Advisory Opinion² explicitly deals with this issue and expresses that under the CISG such a conflict shall be settled by the “knock-out” rule; rather than “last shot” rule, which together constitute the two main approaches towards the subject. This is also the solution adopted under the Principles of International Commercial Contracts (“PICC”) Article 2.1.22.

According to the “last-shot” rule, a reply with material modifications is a rejection of an offer and constitutes a counter offer pursuant to Article 19; when such counter-offer is also replied with a response containing material alterations to it, such counter-offer terminates upon rejection; and there appears a brand new offer (second counter-offer); and it goes and on like this until one party commences performing the contract. Herein, performance indicates assent to the last submitted offer; thus is deemed as an acceptance pursuant to Article 18(1).³ However, it is argued that this approach is not suitable to govern cross-border commercial reality where each party insists on its own terms and it is not always clear who has sent the last form which may give rise to unpredictable solutions for the parties.⁴ It is because of this reason, Advisory Council has adopted “knock-out” rule according to which *“a contract is concluded on the basis of the negotiated terms and of any standard terms which are common in substance, unless one party clearly indicates in advance, or later on but without undue delay objects to the conclusion of the contract on that basis.”* Therefore, standard terms which are common in both sides’ forms become binding on the parties whereas the contradicting terms “knock out” one another; and do not become part of the contract.⁵ For the terms which are “knocked out”, the provisions of the CISG fill in the gaps; hence agreement of the parties are given precedence pursuant to Article 6 of the Convention.

² CISG-AC Opinion No. 13, Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013.

³ VURAL, B., “Formation of Contract According to the CISG”, In Ankara Bar Review 2013/1. Retrieved on 12 September 2016 from: <http://www.ankarabaru.org.tr/siteiler/AnkaraBarReview/tekmakale/2013-1/5.pdf>

⁴ Ibid.

⁵ SCHWENZER, I., & MOHS, F. (2006).

According to Advisory Opinion No. 13, a party may exclude the application of “knock-out” rule by explicitly indicating in advance that it will not be bound by any other standard terms than its own. However, plausibly, such indication shall not be deemed valid where it is communicated by way of squeezing it within one’s standard terms.

Under Turkish Commercial Code No: 6102, Article 20 and the following, it is explicitly regulated what standard terms entail and are their effects. Accordingly, standard terms are those unilaterally drafted by one party for the purpose of incorporating them in the future contracts that are similar in content. Turkish Law also embraces the knock-out rule.⁶

Under English Law, on the other hand, the issue of battle of forms is addressed within the framework of general rules on offer and acceptance. As seen, terms of offer and acceptance must be mirror image of each other’s in order for a contract to be concluded under English law. In that respect, English law settles disputes which are arisen in relation to battle of forms in accordance with the “last-shot” rule.⁷

Should you have further questions on contract formation under the CISG and the [Turkish commercial law](#), please do not hesitate to contact us at info@guzeloglu.legal

⁶ BUYUKSAGIS, E (2015). Borçlar Kanunu ve Viyana Satım Sözleşmesi Perspektifinden Çelişen Genel İşlem Şartları [The Battle of the Forms under the Turkish Code of Obligations and the CISG], in *Uluslararası Antalya Üniversitesi Hukuk Fakültesi Dergisi* 2015: I, pp. 156-157.

⁷ RÜHL, G., “The Battle of the Forms: Comparative and Economic Observations”, In *University of Pennsylvania Journal of International Law*, 24:1, 2003, p.191. Retrieved on 24 October 2015 from: [https://www.law.upenn.edu/journals/jil/articles/volume24/issue1/Ruhl24U.Pa.J.Int'lEcon.L.189\(2003\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume24/issue1/Ruhl24U.Pa.J.Int'lEcon.L.189(2003).pdf)