II. – 4:209: Conflicting standard terms

(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting standard terms, a contract is nonetheless formed. The standard terms form part of the contract to the extent that they are common in substance.
(2) However, no contract is formed if one party:
(a) has indicated in advance, explicitly, and not by way of standard terms, an intention not to be bound by a contract on the basis of paragraph (1); or
(b) without undue delay, informs the other party of such an intention.

Comments

A. The battle of forms

Today's standardised production of goods and services has been accompanied by the standardised conclusion of contracts through the use of pre-printed supply and purchase orders. The pre-printed forms have blank spaces meant for the description of the performance, the quantity, price and time of delivery. All other terms are printed in advance. Each party tends to use terms which are favourable to it. Those prepared by the supplier, or by a trade organization representing suppliers, may, for example, contain limitations of liability in case of difficulties in production and supply or of defective performance, and provide that customers must give notice of any claim within short time limits. The forms prepared by the customer or its trade association, in contrast, hold the supplier liable for these contingencies, and give the customer ample time for complaints.

A special rule for this battle of forms is called for because it often happens that the parties purport to conclude the contract each using its own form although the two forms contain conflicting provisions. There is an element of inconsistency in the parties' behaviour. By referring to their own standard terms, neither wishes to accept the standard terms of the other party, yet both wish to have a contract. A party will only be tempted to deny the existence of the contract if the contract later proves to be disadvantageous for that party. The purpose of the rule is to uphold the contract and to provide an appropriate solution to the battle of forms.

Compared to the rules applied by those laws which still require offer and acceptance to be "mirror images" of each other before there can be a contract, this Article provides solutions which are much more likely to accord with the reasonable expectations of businesses and consumers who are not familiar with the technicalities of contract law. It does not, however, limit the freedom of the parties in any way. They remain free to state exactly what will or will not amount to offer and acceptance in their dealings.

B. Scope of the rule

The rule in the Article is not needed in every situation in which each party has a set of standard terms and these are not identical.

First, the parties may have so conducted themselves that only one set applies. This may happen because they have agreed explicitly that one set should govern their contract, for example when a party has signed a document which is to be treated as the contract, although in previous correspondence that party has referred to its terms of contract. It may also happen because one party fails to bring its standard terms to the other party's attention before or when the contract is concluded.

Secondly, the question as to which terms govern only arises when the standard terms are in real conflict. This is not always the case. It may be that one party's standard terms contain terms which are implied in any contract of that kind, or that they merely list technical specifications of the goods or services to be supplied or performed. Such clauses are often not at variance with the other party's standard terms, which may not contain any clauses on these points.

There is, however, a battle of forms even if only one party's terms contain provisions on an issue, when its terms deviate from the general rules of law, and it is to be understood that the other party meant the rules of law to cover the issue. Thus the rules in the Article will govern the situation where in its offer the supplier's general terms contain a price escalation clause and the buyer in its acceptance uses a form which says nothing about later changes in the price.

C. The solutions

Is there a contract? The Article provides that there may be a contract even though the standard terms exchanged by the parties are in conflict. This is an exception to the general rule on modified acceptance in the preceding Article. Under that Article, an acceptance which differs from the offer will be effective only if the differences are not material. Otherwise, the acceptance would be (i) a rejection of the offer and (ii) a new offer. It is true that, if the party who receives the new offer does not object to it and performs the contract, it will be deemed to have accepted that there is a contract. The difference made by the present Article, is that the contract may be formed by the exchange of standard terms, rather than only if and when the performance takes place.

Under the present Article, a party who does not wish to be bound by the contract may indicate so either in advance, or later.

If done in advance, this must be indicated explicitly and not by way of standard terms. Experience has shown that a party whose standard terms provide that there will be no contract unless those terms prevail (such a clause is often called a "clause paramount") often remains silent in response to the other party's conflicting terms, and acts as if a

contract had come into existence. The provision is often contradicted by the party's own behaviour. To uphold it would erode the rule.

A party, however, may prevent a contract from coming into existence by informing the other party, without undue delay after the exchange of the documents which purport to conclude the contract, of an intention not to conclude a contract.

Which terms govern? If despite a conflict between the two sets of terms, a contract does come into existence, the question is: which terms will apply? Until recently many legal systems would answer the question as follows: By performing without raising objections to the new offer, the recipient must be considered to have accepted the standard terms contained in the new offer (the "last shot" theory). Under another theory it is argued that a party which states that it accepts the offer should not be allowed to change its terms. Under this theory (the so-called "first shot" theory) the conditions of the first offeror prevail.

Under the present Article the standard terms form part of the contract only to the extent that they are common in substance. The conflicting terms "knock out" each other. As neither party wishes to accept the standard terms of the other party, neither set of standard terms should prevail over the other. To let the party which fired the first or the last shot win the battle would make the outcome depend upon a factor which is often coincidental.

It is then for the court to fill the gap left by the terms which knock each other out. The court may apply applicable rules of law to decide the issue on which the terms are in conflict. Usages in the relevant trade and practices between the parties may be particularly important here, for example if there is a usage of employing terms which have been made under the auspices of official bodies or standard forms promoted by some other neutral organisation. If the issue is not explicitly covered either by the law or by usages or practices, the court or the arbitrator may consider the nature and purpose of the contract and apply the standards of good faith and fair dealing to fill the gap.

Illustration 1
A orders some goods from B. A's order form says that the seller must accept responsibility for delays in delivery even if these were caused by *force majeure*. The seller's sales form not only excludes the seller's liability for damages caused by late delivery where there was *force majeure*, but also states that the buyer has no right to terminate for delay unless the delay is over six months. The delivery is delayed by *force majeure* for a period of three months and the buyer, who because of the delay no longer has any use for the goods, wishes to terminate the contractual relationship. The two clauses knock each other out and the general rules of law will apply: thus the seller is not liable in damages but the buyer may terminate for delay if the delay was fundamental.

The term "common in substance" conveys that it is identity in result not in formulation that counts. However, what is "common in substance" will not always be easy to decide.

Illustration 2
A sends B an order, which has on the back general terms providing, among other things, that any dispute between the parties will be submitted to arbitration in London. B sends A an acknowledgement accepting the offer. On the back of the acknowledgement is a clause submitting all disputes to arbitration in Stockholm. Although offer and acceptance have in common that they both refer to arbitration, the clauses are not "common in substance" and accordingly neither of the places of arbitration is agreed upon. But did the parties agree on arbitration?

A court might conclude that the parties preferred arbitration to litigation in any case and would then apply the normal rules on jurisdiction in civil and commercial matters to decide where the place of arbitration should be.

If, however, the court finds that the parties or one of them would only have agreed to arbitration if it was to be held at a certain place the arbitration clause may be disregarded and the court may then admit the action.

Notes

I. *Is there a contract?*

1. In most of those countries where the courts have addressed the battle of forms it seems to be held that a contract has come into existence by the offer and its purported acceptance unless the offeror objects to the purported acceptance without undue delay. Thus the contract is held to exist even before the parties have acknowledged it in any other way, for instance by tendering performance. This is also the position of some of the writers in the countries where there is no case law on the subject.
2. In countries where the classical rules on offer and acceptance govern the battle of forms, a contract only comes into existence when these rules so provide. Under the classical rules on the conclusion of contracts the contract may also come into existence when the parties treat it as concluded expressly or by conduct, for instance by performing the contract. This is the position in ENGLISH law, see *Sauter Automation Ltd. v. Goodman (Mechanical Services) Ltd.* (1986) 34 Building LR 81. See on PORTUGAL, *Ferreira de Almeida*, Texto e enunciado, 886 and on SPAIN, *Diez-Picaso* 211. In FRENCH and in BELGIAN law the contract is not formed unless both parties consider the conflicting terms as unessential, see von *Mehren*, Formation of contracts, 164; *Terré/Simler/Lequette*, Les obligations[6], no. 188; *Kruithof/Bocken/De Ly/De Temmerman*, TPR 1994, no. 99.
3. In sales governed by CISG part II, where the terms of the purported acceptance do not materially alter the terms of the offer, the acceptance will conclude the contract unless the offeror objects without undue delay, see art. 19(2). If the terms of the purported acceptance materially alter the terms of the offer, there is a counter-offer, and therefore no contract until the offeror has shown by statements or conduct that the counter-offer is accepted, for instance by performing the contract, see arts. 19(1) and 18(1), and in *Bianca and Bonell (-Farnsworth)*, CISG, art. 19, 2.3-2.6. The situation seems to be the same under the SLOVENIAN LOA § 29 which is identical to CISG art. 19, but there has not been any case law to support this.

II. Which terms govern?

(a) The "knock out" rule

4. The Article is in accordance with the UNIDROIT Principles art. 2.22, see Bonell, International Restatement 124 ff. The GERMAN courts have adopted a similar "knock out" principle. In most of the cases they have solved the conflict by applying the rules of law *(das dispositive Recht)* governing the issue, see BGH 20 March 1985, NJW 1985, 1838, BGH 23 January 1991, NJW 1991 1606, and Staudinger *(-Bork)*, BGB [2003], § 150 no. 18. Basically the same position has been taken by the AUSTRIAN courts, see OGH 22 September 1982, SZ 55/134 and OGH 7 June 1990, JBl 1991, 120; see also Rummel *(-Rummel)*, ABGB I², § 864a no. 3. Also, DANISH law appears to support this rule see *Bryde Andersen*, Grundlæggende aftaleret, 208 et seq., *Lando*, UfR 1988, B 1 and *Gomard*, Almindelig kontraktsret², 104. The ESTONIAN LOA § 40 corresponds to the present Article.
5. In FRENCH and BELGIAN law the contract is concluded provided the conflicting terms do not cover an essential element, "*cause déterminante*", of the contract, see *Terré/Simler/Lequette*, Les obligations⁶, nos. 188, 189, 366. It is held that in such cases no terms have been agreed and the rules of law will fill the gap, see *Mahé*, Conflit de conditions générales; *Delforge*, La formation des contrats, 488-489; *Stijns/Van Gerven/Wéry*, JT 1996, 715, no. 79.
6. In POLAND the "knock out" rule is reflected in CC art. 385⁴. It provides that a contract concluded between entrepreneurs who use conflicting standard terms remains valid, but does not include those provisions of the standard forms which are mutually contradictory. A contract is not concluded, however, if any party immediately declares that it does not intend to conclude such contract.

(b) The "last shot" theory

7. The last shot theory seems to be the prevailing view in ENGLAND, see *British Road Services Ltd. v. Arthur V. Crutchley & Co. Ltd. (No. 1)* [1967] 2 All ER 285, 287, although the outcome will depend on the exact facts, see *Butler Machine Tool Co. v. Ex-Cell-O Corp. Ltd.* [1979] 1 WLR 401, 817, CA and *Treitel*, The Law of Contract⁹, paras. 2-019-2-020. It is also the prevailing view in SCOTLAND, see *Stair*, The Laws of Scotland XV, § 636; *McBryde*, Law of Contract in Scotland¹, paras. 6.97-6.105
8. CISG arts. 18-19 seem to lead to the same outcome, both in cases where the conflicting terms of the acceptance materially alter the terms of the offer, see arts. 19(1) and 18(3), and when they do not, see art. 19(2), see Schlechtriem and Schwenzer *(-Schlechtriem and Schroeter)*, CISG⁴, art. 19 no. 19 and *Bianca and Bonell (-Farnsworth)*, CISG, art. 19, 2.3-2.6.

(c) The first shot rule

9. The DUTCH CC art. 6:225(3) provides that if offer and acceptance refer to different standard terms, the second reference is without effect, unless it explicitly rejects the applicability of the standard terms contained in the first reference. It appears that the explicit rejection must be one which the offeree communicates for the occasion and not one which only appears in the offeree's standard terms.
10. In the USA § 2-207 of the UCC provides a general rule on additional terms in acceptance or confirmation. It is the prevailing view that the result is similar to that of the Dutch CC. However, if the additional terms do not materially alter the terms of the offer, these additional terms will become part of the contract, unless the offer expressly limits acceptance to the terms of the offer or notification of objection has already been given or is given within a reasonable time after notice of them is received. Several authors have criticised the rules in § 2-207, see *von Mehren*, Formation of contracts, 157-180.

(d) The law is unsettled

11. In the law of several countries, statutory provisions on the conclusion of contracts do not address the issue or do not provide what the authors consider to be clear and satisfactory answers. There is no case law and the authors are sometimes divided.
12. There is no general rule in SPAIN, where the authors tend to favour the classical rules on offer and acceptance and on interpretation of contracts. This is also the position of the PORTUGUESE authors, but tempered by the good faith principle; see Frada de Sousa, 140 ff. There is no express rule in ITALY, where some authors favour the "*last-shot*" theory, while others are in support of the "*knock-out*" doctrine (see *Sacco and De Nova*, Il contratto III, 407). In CZECH law there is no specific rule on conflicting standard terms. So the general rules on conclusion of contracts apply.
13. Many authors assert that there can be no hard and fast rule which solves the conflict. The cases are to be decided individually. This is the attitude of the SWEDISH authors, see *Ramberg*, Allmän avtalsrätt⁴, 174 et seq.; *Göransson*, Kolliderande standardavtal, passim, who seems to favour the first shot theory; *Adlercreutz*, Avtalsrätt II⁴, 73; and *Hellner*, Kommersiell avtalsrätt, 50, who is not even sure what is the right approach, and who shows some sympathy for the last shot rule, a sympathy which *Ramberg*, Allmän avtalsrätt⁴, seems to share; see also *Bernitz*, Standardavtalsrätt⁶, 40.
14. The question is treated by the FINNISH author *Wilhelmsson*, Standardavtal², who seems to prefer the knock out principle, see pp. 79 f. *Hemmo*, Sopimusoikeus I, 170-178 is less willing to consider any of the alternatives as a main rule and emphasises the role of the merits of every particular case. Among DANISH authors, *Lando*, UfR 1988, B 1 and *Bryde Andersen*. Grunlæggende aftaleret, 210 favour the knock out principle; *Gomard*, Almindelig kontraktsret², argues for the last shot rule where the offeror treats the contract as concluded without objecting to the additional or different terms in the acceptance, while in other cases the rules of the law should apply, see p. 105; *Andersen and Nørgaard*, Aftaleloven², 74 seems to prefer the last shot rule.
15. In SLOVAKIA only the classical rules on offer and acceptance govern the battle of forms, as statutory provisions on the conclusion of contracts do not address this issue and there is no case law.