



Comparative Methodology: Contract Law

Autumn 2014

Scenario

A, a clothing manufacturer, orders a large quantity of cotton material from B, a fabric supplier. A's order note contains a clause providing that the contract will be concluded in accordance with the company's standard terms which are attached to the offer. These standard terms contain, among others, a clause providing that potential conflicts between the parties shall be solved through arbitration, with the seat of arbitration in London.

B, the supplier, sends a confirmation to A including the supplier's own standard terms to which he in turn makes reference. The latter contain a clause providing for arbitration with the seat of arbitration in Geneva.

For a while, the contract is performed without problems. When B sends A another 400.000 metres of cotton fabric, A alleges that these goods are not in conformity with the contract and refuses to accept them. B claims specific performance, or otherwise, an award of damages.

The parties don't reach an agreement and consider litigation. The question then is whether the case is to be brought before a state court or whether any of the standard terms containing an arbitration clause has become part of the contract between the parties.

Questions

Most legal systems reach the conclusion that a contract is formed once the parties have come to an agreement on the essential issues and once both parties have started to perform the contract, even if the standard terms used by the parties during the contract negotiations contain conflicting terms. The question then is whether any of the standard terms have become part of the contract, and if so, which ones.

1. How is the 'battle of forms' resolved according to the laws of England, France, Germany, the Netherlands, Estonia, the CISG, the Unidroit Principles and one more jurisdiction of your choice? Has the arbitration clause in the standard terms of A or the one included in B's standard terms been incorporated into the contract in the respective contract law systems?
2. How many different solutions can you identify with respect to the battle of forms in the material provided? Present them systematically and analyse the strengths and weaknesses of the different solutions.
3. Which solution do you find the most convincing taking into consideration the interests of the parties involved? Give reasons!

Materials needed: Reader "Exam Comparative Methodology: Contract Law (Autumn 2014) – Materials"

Bonus for active
participation.

Q1 is very concise,
Q2 is excellent,
Q3 is okay.

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Question 1

- England

- Battle of form: England gives two different solutions. In "Guthrie" (p. 3), the rule that applies is the "last shot theory", that came into force because of the seller's acceptance by conduct. In "Butler" however (pp. 3-7), the theory that's applied could be the "first last shot", because in the very last letter, there was no clear reference made to the standard terms; the only references were about the 'subject-matter'. This not being the case here, it's a last-shot theory.

- Arbitration clause: As on p. 8 of the materials, B answered saying they were to enter the contract under their condition. This answer should prevail, because the reference in it was not only about the "subject-matter", but it was made for the purpose of reiterating important terms. Furthermore, the contract has been applied under those conditions for a while.

Therefore, the clause of B should prevail.

result for the
case?
London / Geneva?

- France

- Battle of form: The French solution is the so-called "Knock-out theory", following B's counter-offer. B made a counter-offer that was accepted, because A didn't answer to it and performed the contract. However, "it in the case of conflict between clauses found in the (...), the 2 propositions cancel each other out (p. 12 § 122)".

- Arbitration clause: Since there is a difference between the general conditions of A & B none of these should apply to the conflict; it should be judged under a state court (Cour de cassation - last sentence - p. 9)

- Germany

- Battle of form: The German law says that, in case of doubt, the contract shall not be entered into (§154(1)). However, the doctrine (p. 15; §305; nr 82) states that "dispite the lack of agreement" the contract is concluded if it has been executed. There is then a knock-out of §154 through §306(2).

- Arbitration clause: as mentioned above, the knock-out rule's effect is that statutory provisions shall apply. However, this theory (German law) doesn't tell us whether A/B arbitration clause applies or if it should be judged under a state court.

§154 and §306 are not directly linked; some more explanations to the knock-out rule in German contract law would be good

- Netherlands:

Art. 6:225 states that a counter-offer is made if the conditions differ. However, the Art. 6:225(3) states that the 2nd reference (B's) is without effect if the 1st standard terms are not explicitly rejected (first-shot theory).

Therefore, B's terms are not included & A's (harder arbitration) are, because of the lack of explicit rejection.

- Estonia:

§40(2) states that a party has to explicitly reject it before it has been entered into, or just after, which

was not the case here. The party cannot reject it if the contract has been performed.

40(1) opts for the knock-out theory has been entered into but with differences.

✓ Again, it doesn't tell us which rule to apply, just that the law applies instead of the conflicting terms.

- CLSG (itself)

Art. 19(2) CLSG tells us that if the difference between offer & counter-offer doesn't materially alter the contract, the counter-offer should be an acceptance except in case of special (explicit) rejection. Otherwise, the provision of the answer (B) shall apply (last shot theory). Therefore, it should be judged in Geneva by lack of explicit rejection.

↑
very good

- CLSG-DE

G. "Germany"

- CLSG-USA

Americans apply a last-shot interpretation of the CLSG (p. 31). Therefore, the terms to apply are those "embodied in the last offer (...) made prior to a contract being formed."

Which one
is the correct
interpretation?

Therefore, B's choice (Geneva) shall apply.

- Unidroit principle

The application for battle of forms is the knock-out doctrine (p. 37), providing that a contract is concluded on everything the parties have in common. However, if

✓ doesn't tell us what clause shall prevail instead of those in conflict (London? Geneva? State court?)

- Free choice: Switzerland

Swiss courts apply the knock out theory as long as the problem is not essential (20-p. 18 + p. 19 translation). For the parts that are knocked out, statutory law shall say which jurisdiction should prevail. However, the materials do not give us the Swiss procedure. (This is the case for all "knock-out ~~out~~ countries")

Question 2

There are 3 theories:

- First shot theory:

like the Butler case says it (p. 6), "the battle is won by the man who gets the blow first" (p. 6). However, Netherlands is the only country that has this rule written in its law. (Art. 6:225(3) - p. 17).

? ⊕ It eases the expectation to match the offer and therefore gives a legal certainty to the contract.

- Generally, the rejection of the offer has to be specifically made; therefore, it increases the diligence of the parties.

? ⊖ There is generally no bargaining, as this should be the core of business.

- It's a kind of "black or white" arbitrary choice, without possibility to make a counter-offer on just one point.

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- The last shot theory:

"The battle is won by the man who puts forward the latest terms and condition; if it is not objected to by the other party, he may be taken to have agreed to them" (Butler p.68).
It is therefore the most restrictive application of the offer and acceptance theory. However, it might be appropriate if the parties clearly indicate that the adoption of their standard terms is an essential condition (Unidroit; p.36; §3).
This theory is applied by England (Wales) & the American interpretation of the CISG.

⊕ - Since it is a very strict rule, it gives a legal certainty on the determination of the contractual terms.

- As for the first shot theory, it requires the parties to be diligent.

? - Finally, it is a good protection when standard terms are an essential part of the contract.

⊖ - There are chance that people do not even know there is a conflict before coming to court.

- Furthermore, it would be arbitrary only to choose the last standard terms and act in bad faith to question the conclusion of a contract based on secondary thoughts.

- It also ignores the realities of the modern commerce, because it is not in favour of the validity of contracts; indeed, if you do not want troubles, there has to be a perfect match of on every point.

- The knock-out theory:

We found that this theory keeps (generally) what is in common with the two parties, ~~to~~ knocking out the differences between the offeror & the offeree.

- ⊕ - The parties execute the contract, even if there was not an agreement on all the points (business goes on).
 - Therefore, the will to contract is secured (animus contrahendi).
 - The parties' common intents are therefore "protected".

- ⊖ - The main disadvantage we found to this theory is that, at least in the materials, we do not know what to apply instead of the knocked-out parts: - Statutory law?

- Find the intention of the parties?

- Organise a new set of discussions?

- Furthermore, looking for the minimum global agreement might not be easy.

This theory is supported by "everybody" but Netherlands, England/Wales & the American interpretation of the CISG.

Question 3:

Considering the interests of the parties, we are in favour of the knock-out theory.

Indeed, this theory is the one that is the most frequently used, because it preserves the animus contrahendi & is in favour of the everyday business.

Furthermore, in this precise case, the contract has already been entered into & executed for a certain period of time; therefore, it would be too late to cancel everything

exclusion

You don't have to
cancel everything.

that has already been made because of a problem that
might never arise under other circumstances.

Finally, it would be ~~bad~~ fair to to start disadvantage one
party or the other ~~by so~~ because of standard terms, especially
when they have already discussed and executed the contract
on the same level of equality.