BATTLE OF THE FORMS – AN UNSOLVABLE ISSUE?

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Modern day contracts have reached a stage wherein a simple conversation or a single document does not usually form a final contract between parties. The complexity of transactions/deals entered into and the awareness of parties of complications that may arise in the future has led to there being a long negotiation process for the formation of a final contract even after an initial agreement was reached. This is because there is a difference for a businessman in clinching a deal and settling on the terms of that deal.[1] However, from the legal perspective this raises great problems as most statutes talk about finality of contracts in a single stage and fail to recognise that most contracts take several days to negotiate. Even in this negotiation stage, all the negotiating parties look after their personal interests, often leading to several disagreements as to what the terms of the contract should be. This leads to several amendments being made to a term sheet or just several forms being sent to and from one party to another. An exchange of several forms makes it extremely difficult to tell when an offer was made and when the same was accepted which eventually leads to two major questions in law, a) whether a contract was actually formed and if there is a contact in place then b) what are the terms of the contract? These questions summarise the issue under discussion in this paper i.e. 'battle of the forms'. Multiple jurisdictions have come up with methods to combat this problem and answer the above questions which are imperative for the purposes of contract law all over the world. Therefore, in this paper we shall look at the different methods used to combat this issue in different countries and determine if the same are viable solutions.

The first instance in which the issue of 'battle of the forms' can be found is in the common law case of *Hyde v. Wrench*[2]. In this case an initial offer of £1000 was made by the defendant to which the plaintiff replied offering £950 which was rejected by the defendant and then the plaintiff wished to accept the initial offer of £1000. The court to this stated that the initial offer

[1] Edward J. Jacobs, 'The Battle of the Forms: Standard Term Contracts in Comparative Perspective' [1985] 34(2) ICLQ 297, 316.
[2] [1840] 3 Beaven 334.

cannot be revived because the offer made by the plaintiff was a counteroffer which amounted to a rejection of the initial offer. This was undoubtedly the correct holding when considered purely on the facts of this case. Lord Langdale himself in the case states that in the specific circumstances of the case, the counteroffer amounted to a rejection of the initial offer.[3] However, over the years common law has ignored this aspect of the case and neglected that there could be a situation where a counter proposal was put forward while reserving the right to accept the initial offer later and was not a rejection of the said offer. As a result, the principle that has been derived from the case is that "any reply to an offer which is itself capable of being an offer but which adds a term to, or changes or removes a term in the original offer, is a counteroffer"[4] and since it is a counteroffer, it is treated as a rejection of the initial offer. There are certain exceptions to this principle of common law but often 'battle of the forms' cases do not fall under the head of these exceptions. The use of the above principle can be seen in the case of *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd.*[5] Herein, both the parties acted to solve the problem of the 'battle of the forms' and each of them included a clause so that their respective terms prevail. The seller's form included a clause that said that the seller's terms would prevail over any other terms. Similarly, the buyer sent an order with different terms which had an acknowledgement slip attached to it which also included that the terms of the buyer would prevail. The acknowledgement slip was signed by the seller in this case which made it pretty clear that the buyer's terms were to be followed and the signature of the seller acted as the acceptance of a counteroffer. The Court of Appeal in this case cited *Hyde v. Wrench* and in doing so enforced the principle set out therein that a counteroffer would result in the destruction of the first offer including all of the terms it sets out. However, Lord Denning in the case made further observations where he stated that the signing of the acknowledgement slip confirmed the formation of the contract but it did not confirm the terms on which such contract was formed.[6] In doing so, he created the 'last shot' rule wherein he said a contract is concluded when the last form is received without objection or some action is taken towards enforcing the contract by the recipient of the last form.[7] Further, he said that the terms of the contract would depend on a case to case basis and could be the terms of the last form, first form or a conjoined interpretation of both the forms. He shifted away from the common law rule of a contract being formed only when there is perfect agreement between both parties and also

[3] ibid.
[4] *Edward* (n1).
[5] [1972] 42 M.L.R. 715.
[6] Giesela Ruhl, 'The Battle of the Forms: Comparative and Economic Observations' [2003] 24 UPJIL 189,224.
[7] *Butler* (n5).

created a new paradigm delving upon what the terms of that contract would be. A new rule was formed which relaxed the requirements in the previous 'mirror image' rule by a small margin. However, both the 'mirror image' and 'last shot' rules are said to be unrealistic as it is extremely rare that both parties entering into a contract would agree on each and every term and even if they do, it will take years to reach this point. India partly being a common law country seems to give effect to these rules and section 7 of the Indian Contract Act, 1872 supports this derivation as it states that acceptance should be "absolute and unqualified."[8] This suggests that a contract would not come into effect until there is an agreement on all terms between the parties, giving rise to the same problems. Further, Section 8 of the Act states that "performance of the conditions of the proposal is an acceptance of the proposal"[9], which hints that the Indian legal system follows the 'last shot' rule.

Due to the 'last shot' rule being dated, it is important to look at alternate solutions, one of which is the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). The CISG sought to tackle the issue of the 'battle of the forms' in Article 19. A look at Article 19(2) suggests that it differs from the 'last shot' rule as it treats a reply to an offer which has additional terms to it as an acceptance of the first offer as long as it does not materially alter the terms of the offer.[10] Hence, it is not considered as a rejection of the offer as per the common law principle and *consensus ad idem* to all the terms is not required. This would be considered a good shift, although, Article 19(3) of the CISG makes this attempt redundant as it includes within the definition of materiality almost all the terms that could possibly be included in a contract. Since, any additional term is considered as a material change, it would not constitute an acceptance and as a result of this it can be said that the CISG ends up promoting the 'last shot' rule.

Unlike the CISG a more positive approach can be seen through the Uniform Commercial Code ("UCC") that is followed in the U.S.A. The UCC tackles the issue in discussion through Section 2-207. Sub-section (1) of the same is on similar lines to Article 19(2) of the CISG as it states that an acceptance can include additional or different terms in a reply to an offer as long as the reply to the offer is not dependent on the acceptance of these additional or different terms by the original offeror.[11] It can be said that sub-section (1) answers when a contract would come

[8] The Indian Contract Act, 1872, sec. 7.
[9] ibid., sec. 8.
[10] The United Nations Convention on Contracts for the International Sale of Goods, 2010, art. 19.
[11] The Uniform Commercial Code, sec. 2-207(1).

into effect and intends to bind parties even in situations where a perfect agreement between the parties has not been reached. In doing so, it drifts away from the common law principle. Sub-section (2) on the other hand delves into the question as to what the terms of the existing contract would be. Here, all additional terms would be treated as suggestions to be included in the contract and in the case of merchants be automatically included in the contract unless, they are objected to by the first offeror, the offer was made subject to acceptance of his/her own terms or the additional terms cause a material alteration to the contract.[12] Herein, material alteration is not defined like in CISG, leaving it open for interpretation and not ruling out an additional term on the face of it just because it deals with a particular subject matter. Further, it is important to note that sub-section (2) only refers to additional terms and the 'different terms' used in sub-section (1) is left out for the purposes of subsection (2). This has intentionally been done to ensure that conflicted terms are rejected because the parties are in disagreement with each other.[13] Courts have also held to the effect that different terms cancel out each other and are substituted with standard terms from the UCC.[14] This interpretation has lead to the formation of the 'knock out' rule which seems to be an improvement as compared to the old common law rule. Although, the 'knock out' rule is problematic as well because the UCC necessarily wants a contract to exist in most cases barring exceptional circumstances which could be seen positively but at this point the contract will be formulated by courts and law, disregarding the needs and wants of the parties to the contract in the process wherever there is a disagreement. If this happens to a great extent, it can be questioned whether the parties actually want the contract to exist or not in the first place. Sub-section (2) also goes against the general basis of contract law which implies that silence is not acceptance, by stating that if there are no objections then the same will be treated as acceptance.[15] Regardless of this, the 'knock out' rule at the moment is the best solution out there and has been accepted by countries like Germany and France in different capacities.

The UNIDROIT Principles of International Commercial Contracts ("PICC") and Principles of European Contract Law ("PECL") have adopted the 'knock out' rule in their own ways. Article 2:208 of the PECL follows the guidance of the UCC to the extent that additional or different terms are made part of the contract as long as it does not materially alter the terms of the offer.[16]

[12] ibid., sec. 2-207(2).
[13] M.G. Shanker, 'Contract by Disagreement? (Reflections on UCC 2-207)' [1976] 81 Commercial L.J. 453.
[14] *Giesela* (n6).
[15] *Edward* (n1).
[16] Principles of European Contract Law, art. 2:208.

Therefore, a similar leeway of disagreement leading to a contract is given by the PECL as the UCC. Further, the PECL in Article 2:209 states that in case of conflicting general conditions only the ones which are common in substance would prevail.[17] This is a good solution, although what goes on to replace the rejected conditions needs to be considered as was done by the courts of the U.S.A. when it came to the UCC. The PECL also combats the criticism of the UCC mentioned above as it gives the parties an option not to be bound by contracts constructed by courts and law upon indication in advance or within a reasonable time.[18] However, this option to not be bound cannot be exercised in the standard terms and must be given separately[19], putting an additional burden on the parties. The PICC too provides this option in Article 2.1.22 and has a similar construction as that of Article 2:209 of the PECL. Therefore, a similar critique stems from the PICC as well.

From the above it is evident that all the solutions over the years lack something. There is no perfect solution to the problem of 'battle of the forms'. The 'knock out rule' is the most realistic and is gaining momentum as stated above but even then any of the principles or statutes individually fail to provide an optimum solution. Perhaps, the best solution would be a combination of the UCC along with the option for the parties to opt out from being bound by a contract that in its true sense is not constructed by them. Further, another point of view would be that the option to opt out of a contract should not exist at all or should not be at the discretion of one party because it might be an easy way for people to avoid any liability arising towards them. I believe this is a topic which will always be under scrutiny and is one of the reasons why a perfect solution has not been reached. There may be new attempts at this issue in the future but even then it is difficult to solve this issue so is the nature of problem at hand.

[17] ibid., art. 2:209.
[18] ibid.
[19] *Giesela* (n6).