The battle of forms: a comparative analysis

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Abstract

The battle of forms is a contract law problem caused by the use of conflicting standard terms and conditions by parties during the negotiations phase of a transaction. According to the traditional mirror image approach to offer and acceptance every time a party seeks to introduce its own standard terms, it amounts to a counter-offer with the result that the party who gets the last shot in, will win this battle of forms. Most legal systems have recognised that this is an unsatisfactory solution to the problem and a number of different solutions have been developed to resolve the issue. In this article the various approaches adopted in the American Uniform Commercial Code, the German Bürgerliches Gesetzbuch, the Unidroit Principles International Sale of Goods, 1980 are discussed in comparative perspective in order to arrive at a reasoned proposal for the solution that should ideally be adopted. It is proposed that the last shot rule should be rejected and the knock-out approach should be favoured.

Introduction

In a recently reported German case¹ a Dutch buyer ordered milk powder from a German supplier. The German company’s letter of confirmation contained a clause stipulating that the company sold exclusively pursuant to their general terms and conditions. This clause was in conflict with the standard purchasing conditions referred to by the Dutch buyer and prima facie rejected the application of the buyer’s standard conditions.

This case is a classic illustration of the so-called battle of forms problem by which one contractual party seeks to impose its own set of standard terms in an opportunistic fashion on the other party. Courts in all legal systems experience difficulty in resolving this issue on the basis of general principles of contract. The point of departure in most legal systems is that contractual relationships are determined by the principle of party autonomy, ie parties are free to construct their contractual relationship according to their needs and requirements, with only public policy limiting this freedom. The agreement of the parties is based on their subjective consensus tempered by some form of the reliance approach.

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It is usually only required that the parties reach consensus on the *essentialia negotii* for a valid and binding contract to come into being.²

This approach has come under considerable pressure from the standard terms phenomenon which has become very widely used in all forms of commercial contracts during the course of the 20th century.³ It is usually argued that these general terms and conditions embody a vast number of auxiliary legal issues which are indispensable in most transactions. These terms are usually incorporated by reference without actual consensus on their specific content ever being reached between the parties.⁴ The author of the standard terms usually attempts to construct them to reflect its own interests rather than those of both parties. They therefore tend to be one-sided and often unfair.⁵ Abuses resulting from this mechanism has led to judicial and legislative intervention in many countries.⁶

The battle of forms problem of course arises where both parties refer to their standard terms in their documentation as a matter of course. It can be assumed in the vast majority of cases involving international transactions where parties are using conflicting standard terms, that it is the intention of parties to conclude the transactions with or without the standard terms. Despite their widespread use, the issues dealt with in standard terms are mostly of an ancillary nature and do not go to the root of the transaction. The prime interest of the parties is focused on the transaction itself and not on the side-issues contained in the

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⁴Hondius n 3 above at 300; H Kliege *Rechtsprobleme der allgemeine Geschäftsbedingungen in wirtschaftswissenschaftlicher Analyse unter Berücksichtigung der Freizeichnungsklausel* (1966); Wolf, Horn & Lindacher n 3 above at *Einf* par 3–4; Eiselen n 3 above at 103–104.
⁵Raiser n 3 above at 21–23, 93; K Llewellyn 'The standardization of commercial contracts in English and continental law' 1939 *Harv LR* 701; Kötz n 3 above at A26-27; Wolf, Horn & Lindacher n 3 above at *Einf* par 2, 3–4; JR Harker 'Imposed terms in standard form contracts' 1981 *SALJ* 16; Eiselen n 3 above at 25, 30-34, 103-104; KE Mroch *Zum Kampf gegen unlauteren Geschäftsbedingungen* (1960) 4.
standard terms. It is usually only when the parties become involved in litigation that the standard terms assume any kind of importance.\(^7\)

This article will analyse the approaches used and propagated in respect of different legal systems and instruments in comparative perspective. The following legal regimes will be considered in order to formulate an acceptable approach and solution to the battle of forms problem: the Vienna Convention for the International Sale of Goods ('CISG'), the UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles'), the American Uniform Commercial Code ('UCC'), and the German Bürgerliches Gesetzbuch ('BGB').

\(^7\)Heinrichs & Bassemge n 3 above par 1; WF Lindacher Kommentar Einl par 1-3; P Schlosser 'Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingungen (AGBG)' in M Martinek (ed) J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch (13ed 1998); Einl par 1–4; Eiselen n 3 above at 108–109.

The American UCC Approach

Introduction

The American Uniform Commercial Code (‘UCC’) was drafted as a codification of commercial law to apply uniformly between commercial parties throughout the United States. It aimed at attacking major legal problems with comprehensive solutions. It has been universally accepted by the different states except Louisiana. Article 2 UCC deals with Sales and Part 2 of that article specifically deals with formation issues.

The UCC’s point of departure is that the agreement or consensus between the parties is of prime importance in establishing the rights and obligations of the parties.83 It also recognises the reality of the contractual process by giving due regard to additional terms included in the acceptance in §2-207.

Conclusion of contract pursuant to §2-207(1)

The drafters of the UCC – in attempting to find a solution for the battle of the forms – clearly intended to abandon the traditional common law concept of the mirror image rule, which was considered too rigid and to produce unforeseeable outcomes.84 Consequently, it was substituted by §2–207 UCC which allows for the conclusion of the contract despite a clash of standard terms when the parties express a clear will to be contractually bound.85 This is subject to only one exception, namely when a party makes its acceptance expressly conditional on assent to the other side’s modifying terms. However, the contract can still be concluded where both sides’ subsequent conduct recognises the existence of the contract.

§2–207 UCC deliberately separates the issue of consensus from the problem of the actual content of the contract. It reads as follows:

62–207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from

83§2–204.
85Murray n 79 above at 28 describes the intention of Karl Llewellyn as the principal draftsman of art 2 UCC to acknowledge that the ‘‘parties thought they had a ‘‘closed deal’’ and that one should therefore ‘‘recognize that deal rather than some tortured amalgam of a deal that neither party would recognize, concocted from technical rules of monistic, Willistonian contract law’’.’
those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
- the offer expressly limits acceptance to the terms of the offer;
- they materially alter it; or
- notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Conduct by both parties which recognises the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this Act.

§2–207(1) states the prerequisites for the valid conclusion of a contract in the case of an acceptance or a confirmation that contains additional terms. Its ratio is that the conclusion of a contract has to be acknowledged when the parties' behaviour shows that they consider the negotiations to have been concluded successfully, in other words when they assume the existence of a contract.\(^86\) This has to be regarded as a clear break with the mirror image rule since the contract no longer depends primarily on an acceptance that is the mirror image of the offer, but rather on a definite and seasonable expression of acceptance indicating consensus.\(^87\) Consequently, the last-shot doctrine as a product of the mirror image rule has also been rejected in the UCC.\(^88\)

The general rule of UCC §2–207(1) is, however, subject to an exception. It provides that the definite and seasonable\(^89\) expression of acceptance is not regarded as an acceptance when it expressly requires assent to the added terms as a precondition for the agreement. The objective of this provision is to provide a safeguard to the offeree when it generally agrees to the essentialia negotii contained in the offer, but nevertheless wants its standard terms and conditions to become part of the contract.\(^90\) This becomes clear when one considers the meaning of UCC §2–207(2)(b). This provision states that contracts, which are deemed to be validly concluded under Paragraph 1, do not include the additional

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\(^86\)See Official comment 3 to §2–207 UCC.


\(^88\)Perales Viscasillas n 31 above at V A 2, sees in this respect the last-shot doctrine being ‘inverted [by] a type of first-shot doctrine’; according to A von Mehren ‘The “battle of the forms”: a comparative view’ 38 (1990) American Journal of Comparative Law 265 279 ‘§2–207 gives the “last-shot” advantage – except occasionally with respect to non-material terms – to the offeror while the counter-offeror enjoyed the advantage at the common law’.

\(^89\)§1–204(3) states: ‘An action is taken “seasonably” when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time’.

terms when these terms materially alter the contract. Hence, UCC §2–207(2)(b) would have little purpose or meaning if an acceptance including material alterations were to hinder the conclusion of the contract.

However, the exception that the acceptor can make its acceptance expressly conditional on assent to the additional or different terms has created problems concerning the interpretation of the offeree’s statement when its language is not clear enough. The controversy among scholars and the courts started with the famous Roto-Lith case. In its ruling the federal circuit court argued that the mere fact of a reply containing material with ‘additional conditions unilaterally burdensome upon the offeror’ is sufficient to prove the conditional nature of the acceptance. However, in later decisions courts have usually imposed stricter requirements as to a sufficiently clear reservation of the offeree’s acceptance in order not to jeopardise the ‘deal is on’ philosophy on which §2–207(1) is based. The existence of an expression of acceptance is usually answered in the affirmative unless the offeree clearly indicates that the validity of his acceptance is subject to the other side’s consent to the additional or different terms by tracking the language of the statute.

In the case where the offeree has a sufficiently clear ‘expressly made conditional clause’ in his set of standard terms, no valid conclusion of the contract is reached. In the decision Dorton v Collins and Aikman the court ruled that ‘when no contract is recognised under Subsection 2–207(1) (...) the entire transaction aborts at this point’. However, if the parties reach a binding agreement pursuant to UCC §2–207(1), then the next question that arises deals with the content of the contract.

Content of contract pursuant to §2–207(2)

When a contract has been validly concluded in terms of UCC §2–207(1), even though the reply contains terms additional to or different from the terms of the offer, then the second paragraph deals with the question whether or not these modifying terms become part of the agreement.

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91 The decision of the court was highly criticised by a number of scholars: White & Summers n 90 above at 26ff; Murray n 79 at at 11 28, who states the ‘opinion (of the court) unwittingly destroys §2–207 which expressly allows for material alterations in an otherwise definite and seasonable expression of acceptance’; for a list of US decisions which reject Roto-Lith, Ltd vs Bartlett & Co 297 F 2d 497, 500 (1st Cir 1962) as a reliable precedent, see idem, fn. 137; Von Mehren n 88 above at 280ff.

92 Roto-Lith Ltd vs Bartlett & Co n 91 above.

93 Von Mehren n 88 above at 280ff; for a clause which was deemed to meet the requirements of §2–207(1), see Perales Viscasillas n 31 above at at fn 62 citing C. Itoh & Co v Jordan Int’l Co, 552 F 2nd 1228 (7th Cir 1977): ‘the acceptance by the seller ... is expressly made conditional on assent to the additional or different terms below indicated and to the preprinted on the reverse side of the document. If these terms and conditions are not acceptable, the buyer should notify it at once.’

94 See Dorton v Collins and Aikman Corp, 453 F 2d 1166; Von Mehren n 88 above at 288.

95 See Official Comment 3 to §2–207.
In this respect, UCC §2–207(2) is based on the principle that the contract is regarded to have been concluded on the basis of the terms and conditions as provided in the offer. In terms of subsection 2, additional terms are merely deemed to be proposals for additions to the contract. These proposals automatically become part of the contract, unless they are subject to one of the three exceptions listed in subsection 2 (a)–(c) set out above.

Scholars have created various theories as to the question of how to deal with acceptances containing different terms. Some commentators wish to exclude the conflicting terms and therefore argue in favour of a knock out approach, which they attempt to justify with reference to Official Comment 6. Others rely on the wording of UCC §2–207(2) in terms of which different terms are not considered to be proposals for additions to the contract. Consequently, proponents of this view regard the contract to be governed exclusively by the terms the offeror.

Despite this controversy concerning the treatment of different terms, the application of the exceptions provided for in subsection 2 seems to be comparatively unproblematic. In terms of subsection 2(a) additional terms do not become part of the contract when the offer expressly states that the reply to it must accept its terms in total. This provision gives the offeror the possibility of ensuring that the contract is concluded solely on the basis of his terms and conditions. The exception can therefore be seen as the counterpart of the ‘expressly made conditional’ clause in subsection 1.

The exception in subsection 2(b) then deals with additional terms that materially alter the contract. Since the term ‘material’ is not defined in the UCC, the courts have had to develop a catalogue of alterations that are deemed to change the offer in a material respect. In this respect the courts have found helpful guidance in Official Comment 4, which says that a material alteration has to ‘result in surprise or hardship if incorporated without express awareness by the other

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97Perales Viscasillas n 31 above at VA3a; problematically, UCC §2–207 (2) (unlike subsection 1) only refers to an acceptance with an additional term and does not mention different terms; that is why some commentators criticised the construction of UCC §2–207 very harshly: See eg JE Murray ‘A proposed revision of section 2–207 of the Uniform Commercial Code’ (1986) 6 Journal of Law and Commerce 344; ‘the ramifications [of the unclear language of §2–207] are so broad as to be called the nuclear accident of art 2’; DG Baird & R Weisberg ‘Rules, standards, and the battle of the forms: a reassessment of §2–207’ 1986 University of Virginia Law Review 1224 states that ‘2–207 is a statutory disaster whose every word provides problems in construction’.
98Since a broad discussion of the various theories would go beyond the scope of this paper, only the two main approaches will be summarised briefly. For a more comprehensive description of the various theories, see Von Mehren n 88 above at 284ff.
99White & Summers n 90 above at 34 (opinion of Professor White).
100Id at 35 (opinion of Prof Summers).
101Van Alstine n 44 above at 114.
party' and which then gives examples for such a clause. On the basis of Official Comment 4 the courts have therefore been able to create guidelines that allow for a precise classification of the most widely used standard terms in the categories of material and non-material alterations.

Finally, an additional term is not deemed to have become part of the contract when the offeror has objected to it in advance, or when he does so within a reasonable time after he has obtained knowledge of the additional term.

**Contract formation pursuant to §2-207(3)**

In terms of UCC §2-207(3) a contract can be concluded by conduct when the parties' behaviour evidently expresses recognition of the contract's existence. As Official Comment 7 points out, this is usually the case when the parties mutually perform their contractual obligations. Furthermore, the parties can acknowledge the existence of the contract 'in any manner sufficient to show agreement'.

For subsection (3) to apply, it is necessary that the contract not be regarded as already having been concluded by virtue of subsection (1). Consequently, UCC §2-207(3) plays an important role in situations where the conclusion of the contract under UCC §2-207(1) fails either because there is no definite and seasonable expression of acceptance, or due to the existence of an 'expressly made conditional' clause. Moreover, the parties need to have exchanged written declarations of will. In these circumstances UCC §2-207(3) admits the existence of a valid contract and states that its content should be formed by the corresponding terms of the parties' writings together with any supplementary terms contained in any other provision of the UCC. This knock-out approach clearly breaks with the traditional last-shot doctrine of the common law.

The prevailing view among American scholars is that an acceptance that contains any form of alteration to the offer is not transformed into a counter-offer merely because it is made conditional on the other side's consent to the additional or different terms. Another opinion, however, considers such an acceptance to be a counter-offer, but one that can only be accepted by means of an explicit oral or written declaration of intention.

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102 Among others the comment mentions clauses that shortens considerably the customary time for complaints concerning the stipulated quality of the purchase goods or clauses that disregard the standard warranties 'as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches'.

103 Van Alstine n 44 above at 117.

104 Official Comment 7 to §2-207(3) states: 'In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made.'

105 See UCC §2-204(1).

106 Von Mehren n 88 above at 288ff.

107 See G Travaloio 'Clearing the air after the battle: reconciling fairness and efficiency in a formal approach to the UCC section 2–207' (1983) 33 Case Western Reserve L Rev 327, 343; Von Mehren n 88 above at 289.
Obviously, UCC §2–207(3) does not allow for the conclusion of a contract according to the last-shot principle that favours the party last referring to its standard terms. On the contrary, pursuant to UCC §2–207(3) the contradictory clauses are excluded from the contract and substituted by the so-called 'gap fillers', that is, the non-mandatory provisions of the Uniform Commercial Code.

**Conclusion on the UCC**

From this exposition it is clear that the UCC contains a solution for the battle of forms problem which is very similar to that reached in the UNIDROIT Principles. Party autonomy is preserved to the extent that where a party gives a clear indication that it is insisting on the inclusion of its standard terms, consensus cannot be reached unless the counter-party expressly agrees to that inclusion. In other cases where the parties have both referred to the inclusion of their conflicting standard terms, the standard terms are applied on a knock out basis by accepting only those terms which are non-conflicting and appear in both sets of standard terms.

**The German BGB Approach**

**Introduction**

The German Bürgerliches Gesetzbuch of 1896 is a codification of the Roman-Germanic ius commune that applied in Germany prior to that date but as influenced by the pandectist legal tradition. The law of contract, and more specifically the law of sale, is contained in Book 2. As this codification predates the general usage of standard terms of agreements, it is not surprising that it does not specifically address this issue. As the Bürgerliches Gesetzbuch was drafted at a time when parties were used to negotiate their contracts personally, the issue simply did not exist back then.

In order to catch up with the complexity and demands of a modern trade culture that concentrates on the standardised production of goods and services the Code of General Terms and Condition (AGBG) was enacted in 1976. However, the battle of forms issue was not addressed. A proposal of the Upper House of the Federal Government (Bundesrat, BT-Drucksache 7/3919 page 47) to integrate a provision providing that contradictory standard terms do not impede the validity of the contract but will not form part of it, was rejected by the Federal Government. It was argued that the AGBG should not be overloaded with detailed provisions dealing with the prerequisites for integrating standard terms and conditions in commercial contracts.\(^{108}\)

Consequently, in German law the battle of forms problem was initially dealt with on the basis of the application of the general principles of contract law, namely §150 which deals in turn with additions added to a purported acceptance and at a later stage by the application of §154(2) which deals in turn with the essentials necessary for the conclusion of a contract.

Initial approach

The first solution of the battle of the forms problem by the German courts was based on the application of §150(2) of the German Civil Code (BGB) which reads as follows:

150(2). An acceptance with amplifications, limitations or other alterations is deemed to be a refusal coupled with a new offer.

The German Federal Court (Bundesgerichtshof or BGH), as well as lower courts, deemed an acceptance with reference to one’s own standard terms to be a rejection of the offer and the constitution of a counter-offer. This was simply a reliance on the mirror image rule. When the offeror did not object to the counter-offer but, for instance, accepted the delivery of the purchase goods, in other words when the parties started to perform their obligations, this was considered to constitute an agreement to conclude the contract on the basis of the offeree’s terms and conditions. Accordingly, the party that fired the ‘last-shot’ finally succeeded in assuring that the contract was governed by its own standard terms. The result was that the seller usually prevailed with his terms over the terms of the buyer.

Current approach in respect of formation

However, in 1973 the BGH changed its approach fundamentally. In its decision of 26 September 1973, it ruled that a contract had been concluded despite the fact that the parties had used contradictory standard terms in their communications. Importantly, it held that neither the seller’s nor the buyer’s terms should form the content of the contract. Although the BGH did not expressly say it intended to abandon its traditional approach, the court nevertheless indicated that it was inclined to find a solution for conflicting standard terms that was not exclusively based on §150(2) BGB.

In subsequent decisions the BGH changed its perspective in so far as it tried to solve the battle of the forms mainly on the premise of §154(1). This provision reads:

154(1). As long as the parties have not agreed upon all points of a contract upon which agreement is essential, according to the declaration...
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of even one party, the contract is, in case of doubt, not concluded. An understanding concerning particular points is not binding, even if they have been noted down.

The new approach in the BGH declares that an open dissent between the parties’ declarations results in the contract not being concluded, unless there are indications to the contrary. The court assumes the existence of such indications in situations where the parties clearly show that they recognise the conclusion of the contract and their contractual obligations irrespective of the contradictory standard terms. In this respect an agreement on the essentialia negotii is sufficient.

In this approach the BGH limits the application of §150(2) to those cases where the parties clearly show their objection to the other side’s terms. In other words, the BGH relies on the rigid application of §150(2) only in situations where the offeror expressly or implicitly rejects the offeree’s standard terms and conditions by referring to its own exclusion or defence clause. According to the BGH this reference is recognised as an anticipated objection. However where there are indications that the parties recognise the existence of the contract, it is taken to be a waiver of the insistence on the defence clause with the result that a contract is deemed concluded.

The leading view within the commentaries, however, objects to this approach by the BGH. Many scholars refuse to solve the battle of the forms problem on the basis of §150(2). They want to apply §154 exclusively, independent of the existence and the type of defence clause in the offeror’s set of terms.

According to this view, the crucial question is whether or not the parties agreed on the essentialia negotii and thereby expressed their belief that the ‘deal is done’. When this can be answered in the affirmative, the contract should be taken to have been validly concluded at the moment the offeree accepted the offer (and not only when the parties commenced their performance). This approach wants to restrict the application of §150(2) only to the ‘rare cases where one party unambiguously declares’ that it does not want to be bound by any other terms and conditions than its own. A mere reference to one’s exclusion or defence clause is deemed insufficient to express this intention. The party has to raise the objection specifically either orally or in writing, during the negotiations. These commentators argue that it is only in these exceptional

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120 Schlechtriem n 68 above fn 17 (translation is available at: http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem5.html; Ulmer et al n 108 above at n 98 and fn 291; P Schlosser n 7 above at §2 AGBG n 83; some of the appellate courts have also taken this view: OLG Köln 1980 Der Betriebsberater 1237,1239; OLG Hamm 1983 Der Betriebsberater 1814; however, in favour of the BGH approach: Wolf, Horn & Lindacher n 3 above at §2 n 74.
121 Ulmer et al n 108 above at §2 n 99; however see W Hefermehl in W Erman Handkommentar zum Bürgerlichen Gesetzbuch mit Einführungsgetzen, AGBG (11ed 2004) §305 n 54 who takes the opposite stance.
circumstances that §154(1) comes into play and the contract is deemed not to have been concluded due to a lack of indications to the contrary.¹²²

**Current approach in respect of content**

Once one has accepted the validity of the contract, the question on what the content of the contract comprises, arises. In this respect the BGH in its decision of 20 March 1985 clearly stated that the non-mandatory provisions of the BGB did not prevail over the corresponding terms in the parties’ sets of rules. On the contrary, the correlating terms and conditions became fully part of the contract’s content.¹²³ Whether or not two terms in fact match, had to be examined by means of an objective interpretation of the respective terms. Irrespective of the terms’ wording, the court had to determine the parties’ common will bearing in mind that they originally had the intention to enter into an agreement not on the basis of the statutory law, but on the ground of divergent standard terms.¹²⁴

However, there is agreement among scholars that when investigating this common will, the courts must not assume that the parties would have agreed on the common minimum. This would lead to unjust results, for instance when parties fix certain time limits within which they bind themselves to a certain obligation in their standard terms. Assuming that the terms of the party with the shorter period of time also comprises the interest of the counter-side, would be unjustifiably privileged.¹²⁵

In contrast to the corresponding terms, conflicting clauses are deemed to knock each other out and consequently do not become part of the contract. Under the provisions of §306(2) they are replaced by the residual rules of the BGB.¹²⁶

These situations, however, must be clearly distinguished from a case where one party expressly regulates a specific aspect in its standard terms which is not dealt with in the terms of the other side. Here again, the validity of the clause will depend on the intention of the counter-side. The court must interpret the party’s intention and determine if it assented to the incorporation of the clause. This can, for instance, be assumed when the clause complies with a trade usage¹²⁷ or has

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¹²³ BGH Neue Juristische Wochenschrift 1985, 1839; in the German terminology this is called the ‘Prinzip der Kongruenzgeltung’.
¹²⁴ Ulmer et al n 108 above at §2 n 102.
¹²⁵ Id at §2 n 102.
¹²⁷ Ulmer et al n 108 above at §2 n 104; however, according to Erman-Roloff Handkommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen, AGBG §305 n 55 and Schlosser n 7 above at §2 AGB n 83 terms which are only part of one party’s set of terms can never become part of the contract.
to be regarded as a benefit for the other side. This assessment is deemed to be independent of the existence of a defence clause.\textsuperscript{128}

**Conclusion on German law**

It is clear that German law has moved from an initial position where the mirror image rule was strictly enforced, to a position where effect is given to the actual consensus of the parties. Where there is a clear indication that one or both parties subjectively insists on the inclusion of their standard terms, there is no contract. However, where there are inclusion clauses, but none of the parties specifically insists on their exclusive application, correlating terms will be deemed to be part of the contract, while conflicting terms are knocked out or excluded.

By the application of the general principles contained in §150(2) and §154, German law has consequently arrived at a position which is very similar to the solutions contained in the UNIDROIT Principles and the UCC.\textsuperscript{129}