Main Articles

The Battle of Forms Existence under Indonesian Contract Law: An Effort to Harmonise Development of International Sale of Goods Contract Law

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Abstract

The existence of foreign elements in an international business transaction causes the importance of the transaction to be transformed into an international business contract to ensure legal certainty for the contracting parties. Differences in legal systems cause differences in contractual traditions, often leading to a *battle of forms*. The existence of counter offers from the offeror and offeree back and forth causes a conflict regarding which forms to use, especially if there is a dispute in implementing international business contracts. The study results indicated that the CISG regulates the battle of forms with the First Shot Doctrine approach as an international convention regarding the international sale of goods contracts. Based on the practice of countries, this approach carries the mirror image rule so that it does not provide space for the parties and gives rise to 2 other approaches: The Last Shot Doctrine and the Knock-Out Rule. Indonesia has not ratified the CISG and regulates the battle of forms in the Civil Code, which is the source of contract law in Indonesia. Therefore, the Government of Indonesia must immediately ratify the CISG and amend the Civil Code (Book III), especially concerning part of the validity of contracts, contract formations and *the battle of forms* arrangements using the Knock-Out Rule approach, because it still carries the freedom of contract and good faith principle and follows the practice of countries in the field of international contract law.

Keywords: Battle of Forms, International Contract, CISG, Indonesia

I. INTRODUCTION

The diverse needs of the international community are increasing, so international business transactions meet these needs. The word "international" behind the phrase "business transaction" contains the meaning of being cross-border in nature, the transaction carried out not within one territory of the state only, as well as containing foreign elements. Foreign elements can be seen in the Primary Points of Contact (*hereinafter* PPC) in Private International Law. PPC factors determine whether an international event can be categorised as a private international law event. Several factors can be used: domicile/residence/permanent residence, domicile of legal entity, flag of aircraft/ship, and choice of law of the contracting parties.[1]

The existence of foreign elements in an international business transaction causes the importance of the transaction to be transformed into an international business contract to ensure legal certainty for the contracting parties. International business contract in this article means international sales contract. There are two kinds of international sales contracts: goods and services. According to Article 3 of the United Nations Convention on Contracts for the International Sale of Goods 1980 (*hereinafter* CISG), the object of international sales is not only goods but also services, which is called mixed contracts (goods and services). A mixed contract will fall into Article 3 of the CISG as long as the central part of the contract is not for services.[2]

International business contracts usually contain foreign elements in the form of differences in nationality, place of domicile of legal entities, place of contract object, place of contract signing, place of contract execution or place of market share.[3] Differences can influence these differences in legal systems. Different legal systems affect the contracting traditions of the contract's parties. For example, the First Party is an Indonesian citizen, and the Second Party is domiciled in Australia. Indonesia adheres to the Civil Law System, while Australia adheres to the Common Law System. The two legal systems have

[1]Ridwan Khairandy, *Pengantar Hukum Perdata Internasional* (Yogyakarta: FH UII, 2007), 26-28.

[2]CISG Advisory Council Opinion No.4, "Contract for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)," *Pace International Law Review* 17, no.1 (Spring 2005).

[3]Alexander D.J. Critchley, *The Application of Foreign Law in the British and German Courts* (United Kingdom: Hart Publishing, 2022), 31; Ronald Fadly Sopamena, "Choice of Law in International Business Contracts," *Balobe Law Journal* 2, no.2 (October 2022): 46.

different conditions for the validity of a contract and the interpretation of the occurrence of an agreement in a contract. Sometimes, the offeree changes the terms in the contract/offer sent by the offeror.

Each party has a standard term and sticks to their respective terms. If this situation occurs repeatedly and it is not clear whether the difference or change in the term is a rejection or acceptance, of course, it will cause problems such as: when does an acceptance/agreement occur between the parties; which statement is considered an acceptance/ agreement; whether the last statement of the offeree or offeror. This situation is often referred to as a battle of forms.

The regulation concerning agreements or contracts in Indonesia is in the Third Book of the Civil Code of Indonesia or *Buku III Kitab Undang-Undang Perdata* (*hereinafter* Civil Code of Indonesia). The Civil Code of Indonesia regulates the general principles of contract, the conditions for the validity of contract, the legal capacity of legal subjects who are allowed to make contracts, and the interpretation of agreements or contracts, including breach of contract on a national scale. The contractual provisions stipulated in the Civil Code of Indonesia are used as the legal basis for an international business contract when one of the parties relates to, or the provisions of private international law designate the Indonesian legal system.

The Civil Code of Indonesia does not regulate the battle of forms. At the same time, Indonesian nationals or transnational corporations established in Indonesia actively conduct international business transactions as outlined in international business contracts. The battle of forms must be completed so that international business contracts drawn up by the parties become clear, providing justice, benefits and legal certainty. Battle of forms is part of forming a contract; hence, it is essential to set a standard regarding the formation of contracts to prevent and resolve differences in terms that are the substance of international business contracts. In international contract law, several legal instruments regulate the battle of form, namely CISG, Unidroit Principles of International Commercial Contracts 2016 (*hereinafter* UPICC) and Principles of European Contract Law (*hereinafter* PECL). In this article, the discussion of the *battle of form* focuses on the provision regulated in CISG.

According to CISG, the regulation of battle of form is stipulated under Article 19, as follows:

> "(1)A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer; (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects discrepancy orally or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance; (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, the extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer."

Article 19 of the CISG is used by the contracting parties if there is a difference in the substance of the contract sent by the offeree or offeror. For instance, The German Federal Supreme Court decided the Powdered Milk case on 9 January 2002. This case occurred when the Buyer (Plaintiff), whose company was in the Netherlands, purchased 2,557 tons of powdered milk from the Seller (Defendant), whose company was in Germany. Powdered milk ordered by the buyer is resold to other companies, and it turns out that after processing, it has a rancid smell and tastes sour.[4]

The buyer indemnifies the company and asks the seller for compensation because it is his responsibility. When checked, there are different terms in the contract, and they have different meanings. The seller form contains a delivery confirmation clause: "*All sales are subject to general terms and conditions. Provisions that conflict with the general terms and conditions of the buyer are explicitly rejected and are not part of the contract*." The general provisions and requirements of the buyer contained in the sample and demands stated: "*Seller's liability for losses suffered (losses that will occur in the future) is limited to the nominal value stated on the delivery note, and it is the responsibility of the Seller to return the money that has been paid by the Buyer, at least part of it.*"[5] Indeed, this raises the issue of which terms/forms to use. Is the form sent last by the buyer or seller?

Based on the abovementioned, setting the standard battle of form becomes an integral part of preparing an international business contract to avoid

[4]Bundesgerichtshof [BGH] [Federal Court of Justice], Entsheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] (9 January 2002), http://cisgw3.law.pace.edu/cases/020109g1.html.

[5]*Ibid.*

differences in interpretation, which can lead to disputes between the contracting parties. Furthermore, Indonesia is one country that conducts many international business transactions. According to data from 10 primary trade partners in 2018, Tiongkok is in first place (Indonesia trade value US$ 72.66 billion), followed by Japan, Singapore, the United States of America, India, South Korea, Malaysia, Thailand, Australia, and Vietnam.[6] It shows many international business transactions between businesspeople or corporations from those countries with Indonesian nationals and corporations. For example, Silver artisans in Celuk Village, Gianyar Regency, produce many kinds of jewellery, such as rings, necklaces, and earrings. Their product has been exported to many countries, such as Germany, the United States of America, Australia, Thailand, China, Japan, Singapore, and Taiwan.[7] Other examples, since 2015, several coffee corporations in Aceh (PT Cahaya Mas Global Kopi (Luwak Coffee), PT PIM (Amoniak) and CV Oro Kopi Gayo (Arabica Coffee) export their products to Tiongkok.[8]

Unfortunately, the intensity of international business transactions in Indonesia does not yet have regulations regarding this issue, especially the mandatory legal instruments for Civil Law, namely the Civil Code of Indonesia. The Civil Code of Indonesia has stayed the same, while in the Netherlands, it has changed from four to ten books.

II. THE UNITED NATIONS CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS 1980 AS THE LEGAL BASIS CONCERNING THE BATTLE OF FORMS

II.1. History

International trade in the 20th century continues to develop not only between countries located on one continent but between countries on different continents

[6]Viva Budy Kusnandar, "Inilah 10 Mitra Dagang Utama Indonesia 2018," *databoks,* 27 May 2019, https://databoks.katadata.co.id/datapublish/2019/05/27/inilah-10-mitra-dagang-utama-indonesia-2018.

[7]"Perhiasan Perak dari Bali Tembus Pasar Global," Kemlu RI, accessed 21 October 2022, https://www.kemlu.go.id/colombo/id/news/21953/perhiasan-perak-dari-bali-tembus-pasar-global.

[8]Muhammad Farizal and M. Putra Iqbal, "United Nations Convention on Contract for the International Sale of Goods (CISG) dan Praktik Perdagangan Barang Internasional Antara Indonesia dan Republic Rakyat Tiongkok (Suatu Penelitian di Provinsi Aceh)," *Jurnal Ilmiah Mahasiswa Bidang Hukum Kenegaraan, Fakultas Hukum Universitas Syah Kuala* 4, no. 2 (2020): 105.

and with different legal systems. As stated by Honka: *"expanding trade will increase the number of international contracts therefore in the future, it is necessary to harmonise to handle contractual disputes"*.[9] The establishment of the CISG began with the issuance of two international buying and selling conventions, namely, The Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (*hereinafter* ULF) and the Convention relating to a Uniform Law for the International Sale of Goods (*hereinafter* ULIS) which came into force in 1972 but was not very successful in uniforming contract law because the substances regulated were too broadly inclined to favour the interests of industrialised countries. Therefore, the two conventions were only ratified by nine countries.[10]

This failure caused the United Nations in 1966 to form the United Nations Commission on International Trade Law (*hereinafter* UNCITRAL) to compile international trading conventions. In its development, UNCITRAL compiled an International Sale of Goods Convention: CISG. CISG is one of the international legal instruments in the private sector, which has succeeded in uniting two legal systems, namely civil and common law systems. UNCITRAL has a vital role in developing the international trade legal framework and has successfully done its function of harmonising and modernising the trade law tradition between the two legal systems.[11]

The CISG manuscript was finalised and validated at the United Nations Conference on Contracts for the International Sale of Goods, held in Vienna in 1980 and entered into force in 1988 after 11 (eleven) initiating countries ratified it.[12] The substance of CISG is the habits of traders/business actors originating from civil and common law systems, often referred to as *"lex mercatoria"*. The provision of CISG reflects the traditions of both major legal systems, namely the civil law system and the common law system. As of 24 September 2020, 94 countries have ratified the CISG, and Portugal is the last country to ratify the CISG.

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[9]Hannu Honka, "Harmonization of Contract Law Through International Trade: A Nordic Perspective," *Tulane European and Civil Law Forum Journal* 11 (1996): 113.

[10]Harry M. Flechtner, "United Nations Convention on Contracts for the International Sale of Goods Vienna, 11 April 1980," *legal.un,* accessed 30 August 2022, https://legal.un.org/avl/ha/ccisg/ccisg.html#:~:text=The%20CISG%20is%20a%20project,of%20Goods%20(ULF)%20and%20the.

[11]"Commission on International Trade Law," United Nations, accessed 30 August 2022, https://uncitral.un.org/.

[12]*Ibid*.

II.2. Scope of Application

CISG is an international convention which governs private matters. Even though CISG governs contracts of sale of goods between parties (individuals and corporations, it is still qualified as an international convention because it is drafted by States (members of the United Nations). According to Article 2 (1) (a) of the Vienna Convention on the Law of Treaties 1969 (*hereinafter* VCLT 1969): "treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Moreover, CISG fulfilled elements of an international convention/ treaty.

As a private international law convention, the CISG has characteristics different from public international law conventions. The legally binding capacity of the CISG as a private international law convention differs from that of a public international law convention. For instance, when Indonesia ratified the four 1949 Geneva Conventions, and its Additional Protocols 1977, which regulate war procedures, what weapons can be used, military objects, treatment of civilians and combatants, and war victims, all Indonesian nationals (hereinafter WNI) are subject to the fourth provisions of the Geneva Conventions and its additional protocols at the time of war. The Indonesian National Armed Forces (*hereinafter* TNI) are not allowed to attack the civilian population of the opposing country. The TNI must not make hospitals or schools in the territory of the opposing country the target of bombing/destruction. If there are Indonesian soldiers who violate these provisions, the soldiers individually can be held criminally responsible under international law. It differs from the CISG as an international private law convention. Although the constituent countries and signatories to the CISG ratify it into national law, it does not directly bind the respective country's citizens. According to Article 6, 12 and explanatory of the CISG: "The basic principal of contractual freedom in the international sale of goods is recognised by the provision that permits the parties (legal subjects of the international sale contract) to exclude the application of this CISG or derogate from or vary the effect of any of its provisions. This exclusion will occur, for example, if parties choose the law of the non-contracting State of the CISG or the substantive domestic law of the contracting state as the law applicable to

the contract. Derogation from the convention will occur whenever a provision in the contract provides a different rule from that found in the CISG."

That article refers to the principle of the autonomy of the parties or the freedom of the parties to determine terms/clauses in a contract to give autonomy to the parties who make the contract to use the CISG provisions or not in whole or in part at the time of drafting the contract or after that. The parties' desire not to apply the provision of CISG must be conveyed in accordance with Article 8 of the CISG, which is concluded through an express statement that the parties do not use the CISG in their contract, the choice of law from a State that is not a member of the CISG, a statement on the use of national legislation that replaces the CISG.[13]

Thus, when does the CISG apply to an international sale of goods contract? The answer is in Article 1, paragraph (1) of the CISG, which states that:

"This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

a. *When the States are Contracting States or*

b. *When the rules of private international law lead to applying the law of a Contracting State."*

From the abovementioned, the CISG provisions may apply to contracts whose place of business is not in the territory of a CISG member country but because it refers to the provisions of private international law, such as the principle of *lex loci contractus,* namely the legal system that applies to international contracts is a legal system where the contract is executed or the principle of *lex loci solutions*, namely: the applicable legal system is where the contract is executed. However, the provision of Article 95 of the CISG stated that: "*Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention*."

The CISG member countries not bound by Article 1 paragraph (1) (b) of the CISG are Armenia, China, Laos, Singapore, St. Vincent & Grenadines, Slovakia and the United States of America. Hence, for countries that declare themselves

[13]CISG Advisory Council Opinion No.16, "Exclusion of the CISG under Article 6," *CISG-AC,* 30 May 2014, http://cisgac.com/cisgac-opinion-no16/.

not bound by Article 1 paragraph (1) (b), the CISG will not apply the CISG if the place of business of the other party in the international sale of goods contract is not in the territory of the CISG member country. In other words, only if both parties have their place of business in the territory of a CISG member country as contained in Article 1 paragraph (1) (a) of the CISG.

According to the Article 2 of the CISG, it is stipulated that:

"This Convention does not apply to sales:

a. *of goods bought for personal, family or household use unless the seller, at any time before or after the contract, neither knew nor ought to have known that the goods were bought for any such use;*
b. *by auction;*
c. *on execution or otherwise by authority of law;*
d. *of stocks, shares, investment securities, negotiable instruments or money;*
e. *of ships, vessels, hovercraft or aircraft;*
f. *of electricity."*

Nevertheless, the provision of Article 3 CISG provides an opportunity for CISG to be able to apply to international sales of services contracts with a few conditions, namely:

(1) *"Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.*
(2) *This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services."*

Based on the abovementioned, paragraph (1) of Article 3 of the CISG regulates contracts that provide goods to be manufactured, while paragraph (2) regulates mixed contracts, which include the international sale of goods and services in one contract and the composition of the sales of goods is greater than the sales of services.

II.3. Fundamental Content

The CISG consists of several parts: the first part deals with the scope of its application, which has been briefly discussed in the previous part, and the second part deals with the formation of contracts. This section regulates the preparation of contracts, including if there is a battle of form in an international sale and purchase contract. The third part of the CISG regulates the sale and purchase of goods: what if there is a breach of contract, the obligations of the seller and the buyer, what if the goods sent/received are non-conformity goods, compensation, transfer of risk/responsibility and others.

In this study, the focus is on the arrangement regarding the *battle of form*. Therefore, other parts of the CISG should be reviewed in detail. As mentioned previously, Article 19 CISG regulates the *battle of form*, namely, a condition where the contracting parties use a standard contract form that contains differences that cause conflict in its implementation. Each party will try to force the use of the elements contained in the contract.[14]

Further, the provision of Article 14 paragraph (1) CISG stated that:

> *"A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the offeror's intention to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."*

Therefore, before the contract is agreed upon by the parties, it begins with an offer proposal from the offeror to the offeree, which contains the object of the contract (goods), the amount and the price. Of course, the offeror hopes that the offeree will accept the offer; in other words, there is an offer and acceptance. It can happen that acceptance from the offeree contains additional, modified terms/elements or restrictions on the offer proposal clause.

In order to overcome the situation of *a battle of forms*, CISG, through Article 19, has provided a solution. According to Article 19, paragraph (1) of the CISG is often referred to as the mirror image rule, which implies that an acceptance

[14]Jochen Bauerreis, "Arbitration in the Field of International Sale of Goods: A French Point of View in China-EU Law Series 5," in *International Sale of Goods a Private International Law Comparative and Prospective Analysis of Sino-European Relations,* ed. Nicolas Nord and Gustavo Cerqueira (Switzerland: Springer, 2017), 65.

of an offer must be the same or appropriate for every condition/element/clause contained in the contract offer to form a contract. An acceptance of a contract offer is a reflection of the offer itself.[15] Therefore, when the offeree sends a reply to the offeror containing additions, restrictions or modifications, it rejects the offer and provides a counteroffer to the offer made by the offeror.

Article 19, paragraph (2) of CISG is an exception to paragraph (1). The offeree's reply can be considered acceptance even though it contains additions or differences in terms/clauses as long as it does not change the subject matter of the offer. The offeror verbally expresses objections to changes or sends notes/replies to the offeree. Thus, the acceptance referred to in Article 19 paragraph (2) CISG) is a reply from the offeree containing additions, differences or modifications.

The explanation regarding the limitation of changes or modifications to the terms/clauses sent by the offeree on the offer given by the offeror is regulated in Article 19, paragraph (3) of the CISG. The changes or modifications are referred to as long as they are not regarding the price, payment, quantity and quality of goods, place and time of delivery, expanding or adding obligations to other parties or dispute resolution. Suppose there are no changes, additions or modifications as mentioned. In that case, it means that there is no change in the subject matter of the contract and is considered as acceptance of the offer from the offeror to the offeree.

The three paragraphs in Article 19 of the CISG still leave questions: first, what if the changes made by the parties to the terms/clauses in the offer or contract proposal are part of the general terms and conditions? General terms and conditions also called standard terms, are essential; they do not result from negotiations between the contracting parties. Refer to Article 2.1.19 of the UNIDROIT Principles of International Commercial Contracts: "Standard terms are provisions prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party." It does not matter how the standard terms are included in a contract, who drafts them, or how short or long the content is. Standard terms in a contract may be

[15]"*Guide to Article 19: Comparison with Principles of European Contract Law (PECL),*" Institute of International Commercial Law, accessed on 30 August 2022, https://iicl.law.pace.edu/cisg/page/guide-article-19-comparison-principles-european-contract-law-pecl.

drawn up by an organisation generally used in international buying and selling.[16] Second, international sale of goods contracts use boilerplate articles containing 3C (Choice of Law, Dispute Settlement, Choice of Forum).[17] Meanwhile, based on Article 19 paragraph (3) of the CISG, the addition, change or modification of the dispute settlement clause will change the subject matter of the offer or contract proposal, which means the offeree's rejection of the offer from the offeror. Third, each party prepares or designs a boilerplate article that provides benefits but risks causing conflict to the parties' general terms.

Conflicts of provisions, elements or standard terms between the parties that lead to a *battle of forms* are often ignored, and international business transactions are still carried out. An example of a standard terms case is the French Isea case. This case was submitted to the Court of Appeal of Paris on 13 December 1995. Mr. Caiato, a French importer (the buyer), sent order forms to the Italian Company Invermizzi (the seller). The buyer asked the seller to wrap the packings of biscuits, but the wrappings were defective; thus, Mr. Caiato sued the Italian Company. The order forms contained standard terms printed on the back but no incorporation clause on the front of the document.[18] Of course, this situation raises the question of whether a contract with the above conditions can be valid. If yes, which form, condition, term, or clause is valid? To solve the questions above, some expert opinions and practices of countries in resolving the battle of forms will be described.

III. POSSIBILITY SOLUTIONS TO SOLVE THE BATTLE OF FORMS

From several references related to *the battle of forms*, there are three approaches to resolving the problems between the parties when there is a *battle of forms* against their contract. The three approaches are the First Shot doctrine, the Last Shot doctrine, and the Knock-Out Rule.

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[16]CISG Advisory Council No 13, "*Inclusion of Standard Terms Under The CISG*," CISG-AC, 20 January 2013, http://www.cisgac.com/cisgac-opinion-no13/.

[17]Made Suksma Prijandhini Devi Salain, et.al., *Klinik Hukum Perancangan Kontrak Study and Experience* (Denpasar: Udayana University Press, 2016), 37.

[18]United Nations Commission on International Trade Law, "CASE LAW ON UNCITRAL TEXTS (CLOUT)," Austria: United Nations, 1998, https://digitallibrary.un.org/record/253508.

III.1. First Shot Doctrine

The Dutch used this approach to overcome the problem of the *battle of forms* regulated in Article 6:225 of The Dutch Civil Code (*hereinafter* DCC):

(1) *"The acceptance of an offer, made under different or additional conditions, is regarded as a new offer and as a rejection of the original offer."*

(2) *"Where a reply, that is intended as an acceptance, only differs from the offer on secondary issues, it will be a valid acceptance, which will form a binding agreement in accordance with the content of this acceptance, unless the offeror immediately objects against the differences."*

(3) *Where offer and acceptance refer to the application of different standard terms and conditions, the second reference is without effect if it does not explicitly rejects the application of the standard terms and conditions to which was referred firstly."*

Article 6:225 paragraphs (1) and (2) DCC show that an addition or change to the acceptance of the offer is considered a counteroffer unless the change is very slight or has no effect. There is no objection or rejection from the offeror. Meanwhile, Article 6:225 paragraph (3) of the DCC regulates the *battle of forms*. Suppose the offeree sends a reply of acceptance by changing the standard terms. In that case, the reply is considered ineffective. If there is no rejection statement regarding this matter, then return to the first standard terms or those contained in the offer proposal by the offeror.

III.2. Last Shot Doctrine

Unlike the first approach, the Last Shot doctrine carries the concept of offer and acceptance. Based on Article 19 paragraphs (1) and (3) of the CISG, if the offeree sends a reply to the offer proposal containing the boilerplate article or clause that changes the material or substance, the reply is not an acceptance but a rejection of the offer and counter offer. Moreover, if the offeror returns to reply to the form sent by the offeree by adding or changing the terms, the counteroffer from the offeree is rejected. It generates a new offer again from the offeror.

Those conditions could happen repeatedly, and the offeror and the offeree reply to each other until one of the contracting parties implements the contract.

The implementation of the contract by the party is recognised as an acceptance of the last counteroffer. According to Article 18, paragraph (1) of the CISG: "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence of inactivity does not in itself amount to acceptance." As is conducted in the form of implementation of the contract by the party, it shows that contracting parties agreed to the last form, which is submitted by the offeror or offeree.[19]

Based on the abovementioned, the Last Shot Doctrine approach recognises the formation of a contract when one of the parties has implemented the substance of the contract because the action taken is a form of acceptance of the last forms. The last party to submit and implement forms wins the *battle of forms* and makes the last submitted part (boilerplate) part of the contract.

For instance, a buyer from Belgium ordered a door that had to be manufactured by a seller from France according to the buyer's specifications. The seller sends a confirmation statement containing the general conditions on the back. The general conditions state that *"The seller must be informed if there is damage to the goods (door) within 8 (eight) days after delivery (the goods arrive in the hands of the buyer)"*. Long story short, the seller sends the goods (door) to the buyer. In this case, the confirmation letter from the seller is a counteroffer that is implicitly received by the buyer when he receives the goods.

The confirmation statement is common in international business transactions, which aims to put things agreed upon previously in written form as proof of what has been agreed upon to prevent differences in interpretation that may arise in the terms regulated in a contract. However, on the one hand, a confirmation statement may contain additions or changes to terms in the agreed contract. This raises a legal issue as to whether the position of the confirmation letter is in contract law. Which is more valid, the agreed contract or the confirmation statement sent later?[20]

To answer the legal issue, there are two different interpretations. First, according to practice in the legal system of Austria, Germany and Switzerland, when there is no reaction or confirmation from the recipient of the confirmation

[19]Kaia Wildner, "Art.19 CISG: The German Approach to the Battle of the Forms in International Contract Law: The Decision of the Federal Supreme Court of Germany of 9 January 2002," *Pace International Law Review* 20, no. 1 (Spring 2008): 5. (1-30)

[20]See "Guide to Article 19: Comparison."

statement containing the modified terms, it is considered acceptance so that the confirmation statement differs from offer and acceptance. Second, based on the legal system of common law countries, which refers to a court decision, a confirmation statement is considered a *battle of forms* because the changes or modifications of the terms in the letter create new conditions for the agreed contract. In other words, changing or modifying the terms in the confirmation statement is not accepted.[21]

In addition, the Last Shot Doctrine approach leaves uncertainty regarding who sends the final terms, whether the offeror, offeree/seller or buyer, making it difficult to determine the terms of the contract. Often, not only one party but both parties add or modify terms for their respective interests, rej, at the other party's terms, and state that they will not be included in the contract. Under such circumstances, it is difficult to deduce the implied desire of the other party from his actions.[22]

III.3. Knock-Out Rule

Drafting a contract is using the principle of freedom of contract. The CISG upholds the Principle of Freedom of Contract as stipulated in Article 6: *"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."* Hence, the CISG is flexible, providing space for Contracting States not to use conventions or reduce or modify conventions as mentioned in the previous section, the characteristics of private international law sources that are different from public international law sources. The flexibility of the CISG reflects the principle of freedom of contract, namely: (a) the parties are free to enter into or not to enter into a contract; (b) are free to determine with whom to contract; (c) free to formulate the substance of the contract, its implementation and requirements as long as it does not conflict with the law, public order and morality; (d) free to determine the form of the agreement (oral or written).[23]

[21]*Ibid.*

[22]See Wildner, "Art.19 CISG: The German Approach," 7.

[23]See Article 1338 paragraph (1) the Civil Code of Indonesia; H.S. Salim, *Hukum Kontrak: teori & Teknik Penyusunan Kontrak* (Jakarta: Sinar Grafika, 2006), 9.

On the one hand, the principle of freedom of contract, Article 6 CISG, allows the parties to make an offer and accept, change, add, reduce or modify the terms, including making a counteroffer. On the other hand, this freedom creates conflicts or *battles of forms*. The third Knock-Out Rule approach provides a solution to overcome the *battle of forms* by accepting essential things agreed upon by the parties in full in a contract and resolving conflicting terms by referring to the CISG provisions, the system, or the law that applies to the contract.[24]

Article 2.1.22 of the UPICC 2016 regulates the battle of forms and applies the approach of the Knock-out Rule as follows:

> *"Where both parties use standard terms and reach an agreement except on those terms, a contract is concluded based on the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract."*

Statement of Article 2: 202 paragraph (1) of the PECL also uses the Knock-Out Rule approach: *"If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance."* A similar provision also applied in Section 2-207 of the American Uniform Commercial Code/UCC (the last revision): *"If the parties have concluded a contract or recognise by their conduct its existence then the contents of the contract is formed of those terms which in the records of both parties appear or on which the parties agree."*

From the three legal instruments above, UPICC 2016, PECL and UCC show that the two major legal systems in the world, civil and common law, recognise and use the Knock-Out Rule as an approach that can resolve the *battle of forms*. Based on the practice in the German Federal Court through the Powdered Milk Case, the Judge decided the dispute using the Knock-Out Rule. Both parties agree to a contract containing different liability arrangements in case of damage to the milk powder sent. The seller has sent the powdered milk, and the buyer has made a payment. It turns out that the milk powder sent is damaged, so the buyer notifies the seller. The seller acknowledges the damage to the powdered milk but still uses his general conditions to compensate for the damaged milk

[24]"Last Shot vs. Knock Out – Still battle over the Battle of Forms Under the CISG," Institute of International Commercial Law, accessed 1 September 2022, https://iicl.law.pace.edu/cisg/scholarly-writings/last-shot-vs-knock-out-still-battle-over-battle-forms-under-cisg#31.

powder. The seller's general conditions differ from the amount of compensation contained in the general conditions of the buyer. The German Federal Court decided not to use general conditions regarding compensation from the seller and the buyer.[25] The seller cannot take advantage of the loss conditions experienced by the buyer or choose conditions that only benefit one party; instead, they must seek a fair solution for the seller and the buyer to avoid using conflicting terms.

The case abovementioned shows that both parties (the seller and the buyer) have fully implemented the international sale of goods contract; however, on the one hand, they have different general conditions for the nominal amount of compensation in case of damage to the milk powder, and this difference does not prevent them from carrying out the contract. Therefore, in this case, it does not matter whether the contract already exists or not, but rather the substance of the contract that results in a *battle of forms* due to the difference in terms made by the seller and the buyer.

IV. REGULATION CONCERNING BATTLE OF FORMS IN INDONESIA

Based on the description of the third approach, known as the Knock-Out Rule approach, when there is a *battle of forms*, the agreed terms are used, while the conflicting terms are removed from the contract, and a solution is sought by referring to the CISG provisions or national law. The CISG aims to create uniform international contract law (sales and purchase) by harmonising contract law traditions in civil and common law systems. Using the CISG as a source of law for the international contract sale of goods will make it easier for the parties to understand the law because there is no need to study the legal system of the other party. Harmonisation of international contract law facilitates international sales by providing contract law standards that are clearer and recognisable to the contracting parties.

Indonesia, one of the countries that actively conducts international contract sales of goods, still needs to ratify the CISG. Data for Indonesia's Main Bilateral Partner Countries as of July 2021, of which there are 6 (six) CISG Contracting States: China, Japan, Singapore, United States of America, South Korea and

[25]See Bundesgerichtshof [BGH] [Federal Court of Justice], Entsheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ].

Australia.[26] Refer to Indonesian Lawyers who represent Indonesia Corporations, the International sales contract which is made with foreign parties are from CISG contracting States (e.g. European Union, United States of America, Singapore, Australia and China) and tend to use the law from foreign parties that already adopted CISG as their national law[27]

The international sales contract is a part of international trade. In response, Indonesia prefers to ratify the CISG as a legal source of international contract sales. As an illustration of the case, a businessman in Indonesia enters into an international sale of goods contract with a businessman whose business is in Japan (Japan is one of the CISG member countries). The first possibility is that a business partner in Japan may require an international sale of goods contract with a party whose place of business is in the territory of a CISG member country. At the same time, Indonesia is not a CISG member country (in other words, an international sale of goods contract will not occur between them). The second possibility, based on the principles of Private International Law: *lex loci contractus*, *lex loci solutionis* or the place of the object of the contract or *lex rei sitae*[28] , which determines the Indonesian legal system as the applicable law in international sale of goods contracts, and it turns out that there are things in the CISG that are not regulated in the Civil Code of Indonesia (as a source of the law of contract in Indonesia), such as the *battle of forms*. Of course, this situation will make it difficult for businesspeople whose place of business is in the territory of Indonesia.

According to the Article 1320 of the Civil Code of Indonesia, it is stated that:

"In order to be valid, an agreement must satisfy the following four conditions:

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[26]Badan Kebijakan Fiskal Kementerian Keuangan Republik Indonesia, "Monitoring Ekonomi & Keuangan Negara Mitra Utama Bilateral Indonesia,", April 2023, accessed on 12 December 2022, https://fiskal.kemenkeu.go.id/files/monitoring-bilateral/file/1695996825_laporan_monitoring_mitra_bilateral_september_2023_rev1.pdf.

[27]Afifah Kusumadara, "Pentingnya Ratifikasi UN Convention on Contracts For The International Sale of Goods (CISG) oleh Pemerintah Indonesia," *Jurnal Forum Penelitian*, no. 2 (2006): 5; Dandy Aditya Qasthari, Huala Aldof, "Urgensi Ratifikasi United Nations Convention on Contracts for the Internationsal Sale of Goods (CISG) Vienna 1980 Terhadap Perkembangan Hukum Perjanjian Jual Beli Barang di Indonesia Dikaitkan dengan Akta Notaris," *Acta Diurnal Jurnal Ilmu Hukum Kenotariatan* 3, no.1 (2019):15.

[28]Furthermore, there are other principles to determine the applicable law under the international sales contract, namely the most character connection, the proper law of contract, mailbox theory, and acceptance theory

1. *there must be consent of the individuals who are bound thereby;*
2. *there must be capacity to conclude an agreement;*
3. *there must be a specific subject;*
4. *there must be an admissible cause."*

The Civil Code of Indonesia originates from France; however, because the Dutch colonised Indonesia for a long time, Indonesia has used the Civil Code until now based on the principle of concordance. In the Netherlands, the country that first brought the Civil Code (*Burgerlijk Wetboek*/BW), has changed the terms of forming a contract. Article 6: 217, paragraph 1 of the New DCC states: *"An agreement comes to existence by an offer and its acceptance."* This article shows a shift in the tradition of contracting from the civil law to the common law system. As is well known, offer and acceptance are conditions for drafting contracts in countries that adhere to the common law system.

Article 1320 of the Civil Code of Indonesia shows that there is no explicit mention that an agreement or contract is prepared based on offer and acceptance because BW was made by France, which incidentally has adhered to the civil law system since the time of Napoleon Bonaparte and has been in effect since 21 March 1804.[29] The Civil Code does not regulate offer and acceptance. Hence, there are no articles that regulate *the battle of forms*. Article 1321 of the Civil Code of Indonesia only states, *"No agreement is of any value if granted by error, obtained by duress or by fraud"*.

The Civil Code of Indonesia regulates the interpretation of an agreement from Articles 1342 – 1351; however, it does not include when there is a conflict of terms between the contracting parties. The following are some essential articles in the Civil Code of Indonesia which regulates interpretation:

1. Article 1342 of the Civil Code: *"If the wording of an agreement is clear, one shall not deviate from it by way of interpretation."*
2. Article 1346 of the Civil Code: *"If the wording is ambiguous, it shall be interpreted in a manner which is customary in the country or in the location where the agreement was entered into."*

[29]Asis Saefpoedin, *Beberapa Hal tentang Burgerlijk Wetboek* (Bandung: PT. Citra Aditya Bakti, 1990), 79.

3. Article 1349 of the Civil Code: *In the event of ambiguity, the agreement shall be interpreted against the party who stipulated something, and in favour of the party who has bound himself thereto."*
4. Article 1350 of the Civil Code: *"Regardless of the generality of the wording of an agreement, it shall cover the matters regarding which the parties clearly intend to enter into the agreement."*

The last provision mentioned emphasises that the interpretation of a contract or agreement is only based on the things stipulated in the contract or agreement. Businessmen from countries that adhere to the civil law system tend to use articles containing clauses: *"Any matter that has not been regulated in this agreement/contract will be further regulated."* Such clauses have positive and negative impacts on the contractual relationship of the contracting parties. The positive impact shows the flexibility of the contracting parties' relationship; therefore, the parties are free to add things that have not been regulated in the contract as long as there is an agreement between the parties. The negative impact shows that the contracts made need to provide legal certainty for the contracting parties and provide an opportunity to dismantle the substance of the contract. Businesspeople from common-law countries tend to dislike this clause because it creates ambiguity. A contract should have been considered and negotiated with substance. Hence, it protects the interests of the parties.

From the four articles concerning the interpretation abovementioned, if explored further, it can be used as the forerunner of the battle of forms solution, namely Article 1349 of the Civil Code of Indonesia that mainly regulated in the event there is doubt about the substance and meaning of the articles in a contract, the basis of interpretation used is the interests of both parties, for instance a middle way must be found, the loss suffered by the buyer is calculated because the goods sent are damaged and what is the fair nominal that seller must pay. The provision of Article 1349 of the Civil Code of Indonesia can be amended by adding regulations concerning the battle of forms.

As previously mentioned, the New DCC as the source of the Civil Code in Indonesia has been amended. Initially, it only contained 4 (four) books consisting of Book I on Individual, Book II on Assets, Book III on Contracts and Book IV on Evidence and Prescription. DCC has now turned into ten books, namely:

1. Book I Law of Persons and Family Law
2. Book II Legal Persons
3. Book III Property Law in General
4. Book IV Law of Succession
5. Book V Real Property Rights
6. Book VI Obligations and Contract
7. Book VII Particular Contracts
8. Book VIII Transport Law and Means of Transport
9. Book IX Intellectual Property
10. Book X International Private Law

DCC regulates the battle of forms in the provision of Article 6: 225 paragraph (3), which adheres to the First Shot Doctrine. Therefore, in a battle of forms, according to the Dutch system, the reply to an offer containing different terms has no effect; in other words, it is considered non-existent, so return to the first terms (an offer from the offeror). This article uses the mirror image rule adopted by Article 19, paragraph (1) of the CISG.

Indonesia, as an independent and sovereign country, is free to determine which approach will be used to regulate the battle of forms problem in its Civil Code, whether to follow the DCC or use another approach that is in accordance with the culture of its society, market share needs (where the business partners come from) and of course, practice countries. In the author's opinion, based on the principle of freedom of contract espoused in Article 6 of the CISG and the practice of countries related to the battle of forms, which can be seen in UNIDROIT, PECL, UCC, the Indonesian government should apply the third approach, namely the Knock-Out Rule.

This approach still assumes that the existing contract still uses the substance of the existing and agreed contract. When a battle of forms occurs, the conflicting terms are removed from the contract and resolved with a win-win solution (still referring to the CISG or national law as designated by the provisions of private international law), providing benefits for both parties.

Therefore, the Indonesian government should immediately take concrete steps to update its contract law provisions, both in national and international scope:

1. Immediately amend the Civil Code of Indonesia. Hence, it is adapted to the times, the needs of market share and stakeholders in the civil sector, as well as the practices of businesspeople in the international scope. Changes need to be made in contract law arrangements, from the legal requirements for contracts and the battle of forms to the provisions of private international law (until now, the Indonesian Private International Law Code has yet to be enforced).
2. It complemented the Civil Code of Indonesia amendment by ratifying the CISG as the only international convention governing the international sale of goods contracts. The aim of the CISG is the uniformity of international contract law to harmonise the contracting traditions of various legal systems in the world (especially civil law and standard law systems). The CISG, as a source of international contract law that enters the realm of private law, has its characteristics related to its binding power. As mentioned in the previous section, when a State ratifies the CISG, it does not automatically bind citizens or businesspeople whose place of business is in the territory of that state. In other words, the contracting parties are free to use or not to use the CISG as a source of contract law. This must be clearly stated in the contract concluded by the parties. Another freedom Article 6 of the CISG provides is that it is permitted to reduce, add or modify the articles in the Convention, including the reservations provided for in Article 92 of the CISG.

In addition, CISG and the Civil Code of Indonesia adhere to the same contracting principles, including:

i. Freedom of Contract (Article 6 CISG and Article 1338 of the Civil Code)
ii. Consensus (Article 23 CISG and Article 1321 as well as Article 1458 of the Civil Code)
iii. Good Faith (Article 7 ayat (1) CISG and Article 1338 of the Civil Code)
iv. Customary Principle (Article 9 CISG and Article 1339 of the Civil Code)
v. Principle of Transfer of Property Rights (Article 30 and 53 CISG as well as Article 1459 of the Civil Code)

V. CONCLUSION

The increasing needs of the international community have led to increased cross-border business transactions. This requires guaranteeing legal certainty by transforming these business transactions into international sales contracts. International sales contracts have a different character from national contracts. There is a link between at least two national laws with different legal systems that cause different traditions in concluding a contract. This difference often causes conflicting terms or *battles of forms*. When a *battle of forms* occurs, the parties will be confused to determine which standard term to use.

At the international level, one legal instrument regulates the *battle of forms*, namely CISG. The approach used by CISG to solve the *battle of forms* is the First Shot Doctrine. From the practice of countries, the First Shot Doctrine still does not provide a solution for the contracting parties involved in the *battle of forms* because it adheres to the mirror image rule. Hence, the offeree's addition or modification of acceptance is considered unacceptable. Experts in the field of international contract law offer 2 (two) other approaches to resolving the battle of forms, namely, the Last Shot Doctrine and the Knock-Out Rule. In its development, the Knock-Out Rule approach is more widely used because it still gives freedom to the parties to change the terms and find a way out of the difference based on the CISG or national law. Likewise, several private international law instruments use the Knock-Out Rule approach, namely UPICC, PECL and UCC.

Indonesia, one of the countries whose private legal subjects are (*natuurlijke person* and *rechtpersoon*) actively conducting international business transactions, has yet to ratify the CISG and has no arrangements regarding *the battle of forms* in the Civil Code of Indonesia. The conditions of the *battle of forms* cannot be avoided because the contracting parties have the right to add, subtract, or modify the substance of the contract. However, the changes cannot be carried out in an instance. It often creates conflicts between the parties, in which terms or forms are considered acceptance or agreement.

Therefore, in the future, the Government of Indonesia shall immediately amend the substance of the Civil Code to meet the times, the needs of stakeholders, and the practice trends of countries in international business

contracts. Moreover, the New DCC has changed to 10 books from 4 books; hence, several things need to be changed regarding contract law, starting from the contract's validity, the contract, the formation of the contract, including the completion of the *battle of forms* using the Knock-Out Rule approach.

In addition, the government complemented the Civil Code of Indonesia amendment by ratifying the CISG. Hence, its citizens or businesspeople whose companies are located in Indonesia can enter into international contractual relationships with companies located in the territory of CISG member countries, providing benefits and legal certainty guarantees for the contracting parties.

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