

**TITLE: Revisiting the Battle of the Forms: A Case Study  
Approach to Legal Strategy Development**

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1. Introduction

**1** Historically Speaking, the approach of English common law courts' to the law of contracts was aimed at creating certainty and predictability in the law. Yet the formalistic application of legal doctrine, ostensibly to protect the freedom of contract, frequently ended in harsh results.<sup>1</sup> Over time, the courts began to develop a more balanced approach through increasing recourse to equitable-like precepts such as "substance over form", true construction of the contract, and the "reasonable expectations of the parties".<sup>2</sup> As a result, it is now widely acknowledged that English and subsequent Canadian common law courts are more flexible in the resolution of contractual disputes. A flexible approach is to be preferred, largely because strict adherence to conventional contractual principles can lead to untailed, formulaic decisions often divorced from the particular facts at issue.<sup>3</sup>

**2** Notwithstanding its acceptance as a positive step in the evolution of the common law of contracts, flexibility has, however, the potential to create an environment where opportunity-seeking mischief can thrive -- particularly where flexibility results from, at least in part, lack of clarity in the law or inconsistency in its application.<sup>4</sup> This exploitative mischief is increasingly being recognized as a form of "legal strategy".<sup>5</sup> To date, corporate legal strategy theory is being advanced and developed mainly in the international forum, particularly from American and European perspectives. One of the goals of this paper is to add to the international business perspective and to the development of legal strategy theory through reference to Canadian law.

**3** While its precise definition has not yet emerged,<sup>6</sup> legal strategy can be broadly understood as "strategy rooted in the perception that the law, the court, legal rules and procedure, etc. can be readily manipulated so as to achieve a specific outcome."<sup>7</sup> This definition's focus on the perception

of law as manipulable is critical as it is from this particular vantage point that the strategist is able to identify the opportunities inherent in a legal framework or process. The more complex, contradictory or inconsistent the legal framework or process,<sup>8</sup> the more potential exists for the development and implementation of legal strategy due to an increased opportunity for the strategic manipulation of law. Additionally, it is important to note that current studies in law and management further expand on how the law and its diverse components are being proactively incorporated into the strategic management of the corporation. Indeed, it is becoming increasingly accepted internationally that, far from acting as a constraint, the law is being "anticipated, analysed and organized" with respect to a company's business and economic agendas and corporate projects.<sup>9</sup>

**4** The area of contract law described as the battle of the forms is a perfect example of an area of law where the legal rules and their application are complex, contradictory, and/or inconsistently applied. Indeed, the battle of the forms problem has been recognized as among the most "difficult problems for contract doctrine to resolve" and in some jurisdictions, has been described as "chaos"<sup>10</sup> thus increasing opportunities for the strategic manipulation of the law.

**5** The classic battle of the forms typically arises when a buyer and seller exchange conflicting standard forms<sup>11</sup> and commence performance of the contract. The parties appear to have a contract, "but on what terms?"<sup>12</sup> Legal solutions to the battle of the forms dilemma have ranged from the development of the common law doctrine known as the "performance doctrine", which simplifies the matter by downplaying rigorous application of contract law fundamentals like intention and consensus ad idem,<sup>13</sup> to solutions that lie in restitution,<sup>14</sup> to attempts to legislate it away.<sup>15</sup>

**6** This is what makes the battle of the forms dilemma particularly interesting from a legal strategy point of view. There exists both tension and conflict in the law as to how a battle of the forms is to be, or should be, addressed. Such tension and conflict provide fodder for the development of opportunistic corporate behaviour. Such behaviour means that the management of the company is driven by exploitation of the law. It also has the potential to signal to the court and its officers that legal strategies could be at play. While the practical relevance of legal strategies to the strategies employed by judges in resolving disputes is a question for another day, express acknowledgement of the potential for legal strategy in the first instance<sup>16</sup> is arguably a step towards the development of policies capable of directly addressing corporate legal strategies and beginning the process of distinguishing acceptable strategies from the unacceptable.

**7** Accordingly, this paper begins by reviewing the seminal 1979 English Court of Appeal case *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corp. (England) Ltd.*<sup>17</sup> from which the battle of the forms lexicon emerged -- "last shot", "first blow", and "shots fired on both sides".<sup>18</sup> The objective of this review is to explore these linguistically persuasive concepts from a strategic perspective and briefly identify their potential for stimulating perhaps the most rudimentary of all strategic legal behaviour -- the simplification of legal abstractions.<sup>19</sup>

**8** Second, the paper explores the battle of the forms from a legal management perspective by

conducting a detailed examination of Canadian battle of the forms case-law,<sup>20</sup> which, under the strategic vernacular proposed by Roquilly, can be described as a form of "legal monitoring".<sup>21</sup> This review thus seeks to both extract the Canadian courts' overall attitude towards Lord Denning's battle of the forms as a legal norm and elicit key strategic factors based on the outcomes of the cases. The review here is extensive in order to accurately draw out all themes, attitudes, and factors, relevant to formulating a legal strategy.

**9** These factors are then organized into a legal strategy schematic which might be utilized by a strategist to identify risks, threats, and opportunities. The purpose of this kind of organization is to provide one example of how a company might transform elements of the external legal landscape into internal resources which might improve its competitive advantage.<sup>22</sup> The external legal environment is not homogenous, meaning that case-law does not take account of the entire relevant external legal environment. For example, as will be discussed later, the U.N. Convention for the International Sale of Goods<sup>23</sup> (or CISG) is often ignored by the courts, though it is arguably relevant. The CISG is therefore also considered as an example that injects flexibility into the law and thus offers further opportunity for legal strategy.

**10** This paper does not delve into the ethical considerations of legal strategy or attempt to delineate the line between the acceptable and the offensive strategy. This paper simply advances a strategic analysis of recent Canadian battle of the forms case-law, as a discrete area of law, in order to uncover the strengths and weaknesses of various strategic approaches which might be used to achieve desired outcomes. One benefit of expressly undertaking this kind of explicit reverse causality examination<sup>24</sup> is that it can assist regulators and legislators in identifying where the potential to manipulate a specific legal rule into supporting an unintended or undesirable corporate activity exists. It may also, over time, assist in the development of the best possible balance or "policy mix" for regulators that might "best limit the opportunities for companies to strategically manipulate rules."<sup>25</sup>

## 2. A Source for Legal Strategy: *Butler Machine Tool v. EX-Cell-O Corporation*

**11** In *Butler Machine Tool*, the English Court of Appeal had occasion to consider the following dilemma: Ex-Cell-O sought to purchase a machine from Butler. Butler included a price variation clause in its sales quotation which was covered by a further stipulation that "these terms and conditions shall prevail over any terms and conditions in the buyer's order."<sup>26</sup>

**12** Ex-Cell-O sent in a purchase order incorporating its own terms which did not contain a price variation clause (among various other differences). The order further requested that the seller detach and return a portion of the order form and sign it as express acceptance of the purchaser's terms [the "acknowledgement"]. Butler complied with Ex-Cell-O's request, returning the signed acknowledgement, but also sent a covering letter stating that its acceptance was in accordance with its own earlier quotation.<sup>27</sup>

**13** Butler then attempted to charge Ex-Cell-O an additional amount in accordance with its price

variation clause for a rise in costs between the time when the order was given and the agreed upon delivery date. Ex-Cell-O disputed the increase arguing that its terms and conditions governed the contract and did not include the price variation clause. While the court was unanimous in finding that Ex-Cell-O's form was to prevail, the majority so held on the basis of the traditional method of analysis of offer and counter-offer, that is, the order was a counter-offer which was accepted by the signed acknowledgement.<sup>28</sup> Lord Denning agreed but also reflected on the limitations of the conventional rules of offer and acceptance and expressed the following alternative approach:

**14** In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date. This was observed by Lord Wilberforce in *New Zealand Shipping Co Ltd v. A M Satterthwaite* [1974] 1 All ER 1015 at 1019-1020, [1975] AC 154 at 167. The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them. As Lord Cairns LC said in *Brogden v. Metropolitan Railway Co (1877)* 2 App Cas 666 at 672: ... 'there may be a consensus between the parties far short of a complete mode of expressing it, and that consensus may be discovered from letters or from other documents of an imperfect and incomplete description.'<sup>29</sup>

**15** Applying this guide, it will be found that in most cases when there is a 'battle of forms' there is a contract as soon as the last of the forms is sent and received without objection being taken to it. That is well observed in *Benjamin on Sale*. The difficulty is to decide which form, or which part of which form, is a term or condition of the contract. In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest term and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them. Such was *British Road Services Ltd v Arthur V. Crutchley & Co. Ltd* per Lord Pearson; and the illustration given by Professor Guest in *Anson's Law of Contract* where he says that 'the terms of the contract consist of the terms of the offer subject to the modifications contained in the acceptance'. That may however go too far.<sup>30</sup>

**16** Lord Denning continues on to apply this "guide"<sup>31</sup> and expanding on his very evocative metaphor, identifies three (3) possible outcomes of this "battle of the forms":

In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest term and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them. ...

In some cases, however, the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back and the buyer orders the goods purporting to accept the offer on an order form with his own different terms and conditions on the back, then, if the difference is so material that it would affect the price, the buyer ought not to be

allowed to take advantage of the difference unless he draws it specifically to the attention of the seller...

There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication.<sup>32</sup>

**17** These outcomes form Lord Denning's battle of the forms lexicon -- respectively comprised of "last shot", "first blow" and "shots fired on both sides". This terminology has received mixed reception and Lord Denning's assertions have been criticized as fundamentally departing from traditional doctrine of formation of contract.<sup>33</sup>

**18** On the contrary, however, a thoroughgoing review of traditional contract doctrine identifies that Lord Denning was not really departing radically from either principles or themes already considered by earlier courts applying the more orthodox rules. Indeed, the Lord Denning articulation is arguably founded on the interplay of other well-settled traditional contractual concepts, namely those related to: knowledge and notice,<sup>34</sup> reasonableness, materiality and unconscionability,<sup>35</sup> and the relevance of parties' conduct including objections to terms or the lack thereof.<sup>36</sup>

**19** In any event, the point here is to demonstrate the impact of the ordering or simplifying of legal concepts into, for example, catchphrases like "battle of the forms", "last shot" or "first blow" in combination with hasty or superficial reliance on (or rejection of) such simplified concepts by jurists. Our argument is that this creates legal voids, either real or perceived, due to a lack of either legal knowledge or appropriate dissemination of information. This in turn opens the door to strategies of optimization and the manipulation of outcomes.<sup>37</sup>

**20** Hence, Lord Denning's battle of the forms lexicon has been both accepted and rejected with almost equal enthusiasm. For example, the last shot scenario has been referred to as the "last shot rule" or "last shot doctrine"<sup>38</sup> and has also been possibly too easily equated with the "performance rule" noted above.<sup>39</sup> In other cases, the framework has been outright rejected in substance<sup>40</sup> or distinguished by the courts on a variety of different grounds.<sup>41</sup> Either way, from a strategies perspective, the vulnerability of the law is revealed -- complexity, haziness and perceived inconsistencies in the law or its application, encourages the simplification of legal abstractions, which in turn permits the law to be more readily manipulated toward a desired outcome. Ironically, notwithstanding the creation of opportunities for legal strategy, as we shall see from the case-law canvassed below, the courts themselves also take full advantage of this haziness or flexibility in the law in order to achieve particular desired results.

### 3. Canadian Battle of the Forms Case-Law Summary<sup>42</sup>

### 3.1. Last Shot

#### 3.1.1. British Columbia

Cariboo-Chilcotin Helicopters Ltd. v. Ashlaur Trading Inc. 2006 (BC Court of Appeal)<sup>43</sup>

**21** Issue: Whether a handwritten notation on pricing added unilaterally to the bottom of a form was a term of the contract when notice of it had not been explicitly brought to the attention of the other party.

**22** Facts: The Plaintiff, Cariboo-Chilcotin, entered into an agreement to provide helicopter logging services with the owner of some logging rights. The Defendant Ashlaur was the broker with respect to the transaction. The Plaintiff drafted, signed, and sent a form to the owner which set out pricing terms for the collection of wood. After signature by the owner, the form was sent to the Defendant who also signed and returned the document but added a handwritten qualification that only certain species of logs at certain grades would be accepted. The Defendant later refused to pay for any non-conforming logs and the Plaintiff sued.

**23** At trial, the judge characterized the dispute as a battle of the forms and held that because the Defendant failed to bring the material change concerning the species and grade restriction specifically to the attention of the Plaintiff, the case was to be won by the man who got the "blow in first", i.e. the Plaintiff.<sup>44</sup>

**24** The trial judgment was overruled on appeal on the basis that the Plaintiff had accepted the handwritten qualification by conduct and that notice of the qualification had been sufficient.

**25** Regarding acceptance by conduct, the Court of Appeal relied on the objective tests related to intention and reasonable expectation:

- The test of intention is objective and is based on what can be reasonably construed from conduct;<sup>45</sup> and
- If conduct is such that a reasonable man would believe that party A consented to the terms and on that belief, party B entered into an agreement with party A, party A will be bound as if he had intended to agree to the terms.<sup>46</sup>

**26** As such, the Plaintiff's conduct of ignoring the handwritten qualification and subsequent dissemination of the final contract including the handwritten note, gave rise to the Defendant's reasonable belief that the Plaintiff was consenting to the additional term and thus the Plaintiff was

bound.<sup>47</sup>

**27** With respect to sufficiency of notice, the Court of Appeal held that it was not open to the Plaintiff to simply ignore the handwritten note because: (i) there was no ambiguity as to the meaning of the notation within the logging industry<sup>48</sup> and (ii) it could not have escaped anyone's notice.<sup>49</sup>

**28** While the Court of Appeal intimated that the circumstances of this case were in favour of the "man who fires the last shot" the Court stated that the Butler Machine Tool case was of limited assistance in any event because the "contract at bar was not on a standard form but created especially for this job".<sup>50</sup> Hence, the court did not completely tie itself to the battle of the forms analysis instead asserting its finding on "well settled contractual principles" related to the objective test of intention, acceptance by conduct, and reasonable expectations. It should be noted again however, that these principles coincide with the principles articulated by Lord Denning after reflecting on the shortcomings of the traditional analysis of offer, counter-offer, rejection, acceptance and so forth, an analysis this court also chose not to pursue.

### 3.2. First Blow

#### 3.2.1 British Columbia

Repap British Columbia Inc. v. Electronic Technology Systems 2002 (BC Supreme Court)<sup>51</sup>

**29** Issue: Whether terms and conditions extending liability contained in purchase orders were part of a repair agreement when the party to be bound by these terms had not been given actual or constructive notice and otherwise did not assent to the terms.

**30** Facts: The Defendant was hired by the Plaintiff to repair the Plaintiff's turbine generator in 1993 and 1994. The parties' dealings were primarily conducted by telephone whereby the Defendant would commence repair work after being given a purchase order number by the Plaintiff. The Plaintiff would follow up by mailing a hardcopy of the relevant purchase order. The hardcopy purchase orders contained extension of liability terms and conditions but they were frequently sent to the wrong address. When the turbine later failed, the Plaintiff sought to rely on its extension of liability terms located on the hardcopy purchase orders.

**31** The court found that the Plaintiff's terms could not apply on the basis that:

- i. Both parties understood that deal was confirmed upon provision of the purchase order number, hence, the subsequent terms came too late;<sup>52</sup> and
- ii. Notice of terms had not been given. The Defendant was not and could not have been aware of the terms and conditions because the purchase orders

were mailed to the wrong address. If the purchase orders were received at all, it was usually after work had commenced or been completed. Therefore, the Plaintiff had not brought notice of the terms specifically to the Defendant's attention. Despite the fact that the parties had a previous course of commercial dealings where similar purchase orders were utilized, the court found that because the parties always considered themselves bound upon the issuance of the purchase order number, the prior dealings had not demonstrated notice.<sup>53</sup>

**32** The court however found that where the work was pursuant to proposals delivered by the Defendant to the Plaintiff, the work was governed by the Defendant's limitation or exclusion of liability clauses where referred to by the proposal. Accordingly, the court found that in those circumstances, the Plaintiff had actual notice of the Defendant's exclusionary terms.<sup>54</sup>

**33** In making its decision, the court described the elusive nature of the problem posed by the battle of the forms<sup>55</sup> stating that the law in the area of standard form disputes is complex and difficult to apply.<sup>56</sup> The court set out and/or acknowledged inter alia the following principles:<sup>57</sup>

On Notice:

- i. the court requires standards of notice when there are particularly onerous terms;<sup>58</sup>
- ii. unless a standard form document is signed, terms must be brought to the notice of the contracting party before the time the contract is made, otherwise it will be of no effect;<sup>59</sup>
- iii. a previous course of dealings between parties may be relevant to notice if actual knowledge and consent to terms imposed is shown. A term cannot be implied against a party if the term was unknown to them.<sup>60</sup> "Without knowledge there is nothing".<sup>61</sup> Accordingly, terms can be incorporated into a contract when:
  - each party has led the other to believe that their respective rights and liabilities are pursuant to a document that has been consistently used in their previous transactions;<sup>62</sup> and
  - they are the common and usual terms of a business or industry, provided adequate notice is given and they are

available on request.<sup>63</sup>

On Reasonable Belief and Conduct:

- i. The judicial task is not to discover the actual intentions of each party: it is to decide what each was reasonably entitled to conclude from the attitude of the other;<sup>64</sup>
- ii. "The courts task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings and conduct of the other";<sup>65</sup>
- iii. The task involves a consideration of the conduct of a party as a whole and asking the question, "Would a reasonable person in the position of one party believe the other party to be assenting to a particular set of terms?"<sup>66</sup>

**34** After setting out case-law identifying the principles of offer, counter-offer, and acceptance of counter-offer, the court stated that there are no rigid rules to be applied.<sup>67</sup> In analyzing the court's application of the legal principles as summarized above, it becomes apparent that the court identified notice as the critical component of the case. Its decision centered around an objective assessment of the parties' conduct. According to the court, "little thought was given by either party to their own terms and conditions or those of the other party".<sup>68</sup>

**35** The court therefore took a firm position with respect to the relationship between knowledge and the incorporation of terms. It appears that for this court, nothing short of actual knowledge and consent is sufficient when it comes to incorporating terms and conditions set out on unsigned standard forms.<sup>69</sup> This is important to point out because such an approach refutes the performance doctrine and decreases a party's ability to successfully make simplistic constructive notice arguments based on prior course of dealings or industry standards. This in turn decreases the likelihood that terms on forms provided subsequent to formal acceptance will be incorporated into the agreement and enhances the importance of the identification of formal acceptance in any argument about the terms of the agreement.

**36** Notwithstanding the foregoing however, the court clearly advocated a flexible approach. In this case, the battle of the forms test was again simply applied as part of an overall inventory of legal principles related to intention, consensus, acceptance by conduct, and the reasonable belief or expectations of the other party.

### 3.2.2. Ontario

Tywood Industries Ltd. v. St. Anne-Nackawic Pulp & Paper Co. Ltd. 1979 (Ont. High Court)<sup>70</sup>

**37 Issue:** Whether an arbitration clause on the reverse side of a buyer's purchase order form was a term of the agreement when the buyer's requested acknowledgement of acceptance was not signed or returned by the seller.

**38 Facts:** In this case, the Plaintiff seller, upon the request of the Defendant buyer, provided a quotation for storage tanks with its terms and conditions on the reverse. The buyer responded to the quotation with a purchase order containing its own terms and conditions one of which was an arbitration clause. The buyer's purchase order also requested that the seller return an "acceptance copy" of the purchase order. The seller did not sign or return the requested copy of the purchase order to the buyer and delivered the tanks.

**39** When the buyer stopped payment because of alleged deficiencies, the seller brought an action. The buyer sought to enforce its arbitration clause and brought a motion for a stay of proceedings. In rendering its decision, the court labeled the dispute a battle of the forms<sup>71</sup> and applied the following test from *Kendall v. Lillico*<sup>72</sup>:

**40** The court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other.<sup>73</sup>

Additionally, the court relied on the following extract from S. M. Waddams, *The Law of Contracts* (1977):

**41** There are several signs of flexibility in the present structure of the law. One is the interconnection of notice requirements with the reasonableness of the terms sought to be incorporated. Another is the examination of the course of previous dealings in determining whether terms are incorporated. A third, and more general, trend that may prove to be the most significant of all is the development of doctrines of unconscionability.<sup>74</sup>

**42** In declining to grant the stay, the court found that the arbitration clause was not clearly established as a term of the agreement because inter alia:

- the conduct of both parties demonstrated that neither had considered any terms other than those on the face of the documents<sup>75</sup> (that is, those with respect to specifications and price);
- the buyer did not draw the seller's particular attention to the arbitration clause; and
- the buyer did not complain when the seller failed to return the requested acknowledgement.<sup>76</sup>

**43** The approach taken in this case resonates with Lord Denning's overall approach in *Butler Machine Tool* whereby one assesses the documents and conduct of the parties to determine whether they have reached agreement on all material points.<sup>77</sup> Clearly, this case is not an example of the last shot rule, since the court found that the conduct of the parties indicated that the arbitration clause did not form part of their agreement. Additionally, recalling that the last shot rule supports the last form sent without objection, which in this case was the buyer's form, it appears that the buyer's terms might have fared better if the buyer had not requested an acknowledgement of terms, assuming of course that the seller remained silent. Failing to return a requested acknowledgement may indicate objection to the proposed last shot and might therefore require that the party asserting the last set of terms take additional steps (e.g. complain or seek further acknowledgement) in order to avoid being construed as having accepted the first blow.

**44** Accordingly, this case supports Lord Denning's "first blow" in that here, the buyer purported to accept the offer on its own terms but then failed to bring notice of its material change of terms to the attention of the other party.

**45** On the other hand, the court found that neither of the parties had truly turned their respective minds to the terms and conditions on the reverse side of the documents. As such, some commentators view this case as perhaps fulfilling Lord Denning's third scenario, that is, "shots fired on both sides" whereby the terms and conditions of both parties are to be construed together and reconciled where possible and conflicting and contradictory terms "scrapped" and replaced by reasonable implication.<sup>78</sup> It must be kept in mind however, that the court in this case was not called upon -- or simply chose not to -- imply terms that might be "expected" in these types of commercial transactions.<sup>79</sup> In this case, the court gave more weight to the conduct of the parties and indicated that the parties were simply more concerned with the "consummation of the deal" than its terms.<sup>80</sup>

*Chateau Des Charmes Wines Ltd. v. Sabate, USA Inc., 2005 (Ont. Master)*<sup>81</sup>

**46** Issue: Whether a forum selection clause contained in a packing slip accompanying goods was a term of the contract or an attempt to modify terms already formed.

**47** Facts: In this case, the Plaintiff, a Canadian wine producer, ordered corks from the Defendant by telephone. The Plaintiff erroneously believed it was contracting with the Defendant's California-based subsidiary. A packing slip accompanying the corks stipulated that any disputes were to be settled in France.<sup>82</sup> The Plaintiff accepted the order of corks as well as two subsequent orders.

**48** The corks proved to be tainted and the Plaintiff brought an action against the Defendant in California who challenged the jurisdiction of the court as *forum non conveniens*. The Plaintiff then brought its action in Ontario which was again challenged by the Defendant as not being the proper jurisdiction on the basis that its forum clause applied.

**49** The court held that the contract was formed orally prior to the shipment of corks and therefore

the forum clause located on the Defendant's packing slip or invoice was not a part of the agreement of the parties, at least with respect to the first shipment:

**50** It is unreasonable to suggest that the plaintiff, having ordered the product (and presumably having not ordered whatever closures it would otherwise have used) would have to refuse delivery in order to avoid terms unilaterally inserted into the documents.<sup>83</sup>

**51** The court did however find that the two subsequent shipments were new contracts and as such were subject to the forum clauses contained in their respective packing slips/invoices on the basis that the Plaintiff now had notice of the forum selection clause. The court held: "At that time, the plaintiff knew or ought to have been aware of the vendor's terms of sale."<sup>84</sup> Additionally, the court implied that the plaintiff might be fixed with the knowledge as forum clauses are common:

**52** Parties involved in international commerce are obliged to read carefully and such clauses are hardly startling. That rationale supports the defendants with respect to the later contracts.<sup>85</sup>

**53** The court held that the contract was governed by the U.N. Convention for the International Sale of Goods.<sup>86</sup> Because the court found that this was an oral agreement not based on an exchange of forms, it ultimately held that this was not a battle of the forms. However, because the court found that the two subsequent shipments were pursuant to the standard terms included with the first shipment, it is arguable that a battle of the forms existed with respect to them. In any event, while the court found that the forum selection clause did apply to the two later agreements, it ultimately declined to grant the stay of the Ontario action on the basis that the factors in favour of continuing the action in Ontario outweighed those in favour of the other jurisdiction.<sup>87</sup>

**54** This case demonstrates that if one can prove a prior oral agreement, then "last shot" terms sought to be relied upon may not be incorporated as they arise subsequent to formation and/or are simply outside the scope of battle of the forms arguments. Additionally, this case also demonstrates the counter-argument that, where terms arise subsequent to contract formation, they can form part of the agreement if it can be shown that a party has knowledge or notice of the terms through commonly understood industry or commercial standards. Accordingly, with respect to the first shipment of corks, this case may be said to have been a "first blow" as the jurisdiction clause was found to be material, and the Plaintiff was found to have lacked sufficient notice of it. With regard to the second and third shipments of corks, however, this case can be said to support a "last shot", as it was held that the packing slip in the first shipment of corks was sufficient notice of the jurisdiction clause in subsequent contracts.

*Guiliani v. Invar Manufacturing 2007 (Ont. Superior Court)*<sup>88</sup>

**55** Issue: Whether a forum selection clause located on the back of the seller's invoice formed part of the contract when there were prior dealings between principals that established essential terms.

**56** Facts: In this case, the Plaintiff purchaser sued for breach of contract, negligence, and

misrepresentation in Ontario for deficient machinery manufactured by the Defendant in Italy and installed in the Plaintiff's Ontario facility.

**57** The Defendants brought a motion *inter alia* to set aside service of the statement of claim and stay the Ontario proceedings asserting its reliance on a forum and choice of law clause naming Italy as the proper forum. This clause was contained on the reverse of the Defendant's invoice for advance payment that had been issued to the Plaintiff.

**58** In refusing to grant the stay, the court looked at the conduct of the parties and documents exchanged and, relying on *Butler Machine Tool*, held that the contract had been formed by the parties' respective senior executives prior to the issuance of the invoice:

**59** This provision, whatever the intention of the defendants, did not form part of the contract between the parties. The essential terms were agreed to in the course of the discussions on March 16, 2004, and are contained in the March 16, 2004, document that was subsequently signed by Mr. Sprenger for the defendants. It contained no reference to the jurisdictional issue. The fact that there were numerous other details that had to be (and were) determined subsequently does not change the fact that a binding contract between the parties had been formed then. The stipulation on the back of the invoice did not form part of the contract agreed to between the parties, which had already been formed.<sup>89</sup>

**60** Despite the fact that both parties expected their own standard terms and conditions would form a part of the contract, they had only succeeded in agreeing to the essential terms because they failed to specifically discuss or negotiate their respective standard terms.<sup>90</sup>

**61** The court also rejected the Defendant's argument that the Plaintiff had notice of its standard terms and conditions through quotations with similar terms sent to the Plaintiff during earlier negotiations. Knowledge of the terms from previous documents passing between the parties will not make the terms part of the contract unless there has been acceptance. This restricts, to a certain extent, the counter-argument identified above in the *Chateau v. Sabate* case that subsequent terms might form part of the agreement when a party has knowledge of the terms through commonly understood industry or commercial standards.

**62** In sum, the court concluded that the contract between the parties did not include any choice of jurisdiction provision on the basis that *inter alia*:

- The provision sought to be included was subsequent to formation;
- Acceptance must be unequivocal and communicated to the offeror; and
- It was not within the reasonable expectations of the parties that the contract

was formed simply on the basis of exchanges of documents given the extensive negotiation and discussion between the parties over a period of time. The court wrote:

... it cannot be considered to be fair or within the reasonable expectations of these parties that either side would be able to insert terms which had not been agreed to into the contract after the fact. It is true that there were numerous details that had not been decided in March 2004. These too were addressed by way of continuing discussions and negotiations, and may well have had the effect of adding to or altering in some ways the original provisions. This is likely to be the norm in complex contracts for the design and manufacture of machinery, such as the subject contract, that take place over time. That, however, is very different from unilaterally adding or changing terms by including them in forms which are primarily designed for other purposes (such as invoices).<sup>91</sup>

**63** This decision was affirmed on appeal.<sup>92</sup>

### 3.3. Shots fired on both sides

#### 3.3.1. Ontario

General Refractories Co. of Canada v. Venturedyne Ltd. 2002 (Ont. Superior Court)<sup>93</sup>

**64** Issue: Whether standard terms and conditions in conjunction with an "entire agreement clause" could apply and override performance guarantees specifically negotiated by the parties.

**65** Facts: The Plaintiff "Grefcan" purchased a prototype friction press (an industrial brick-making machine) from the Defendant in 1982. Performance of the press had yet to be proven in a production setting so the Plaintiff requested and received specific performance guarantees<sup>94</sup> from the Defendant during negotiations between senior representatives from both firms.<sup>95</sup> The specific performance guarantees were reduced to writing by the Defendant in a quotation provided to the Plaintiff after the negotiations.

**66** After some additional negotiations, the Plaintiff Grefcan decided to purchase the machine and sent a purchase order to the Defendant along with a first installment cheque which was subsequently cashed by the Defendant. The purchase order contained Grefcan's standard terms and conditions and stated on the front that acceptance of the order constituted a legal contract subject to conditions on the reverse side, the purchase order also requested prompt written acknowledgement of acceptance.

**67** The Defendant sent its Acknowledgement of the Plaintiff's purchase order with its own standard terms and conditions on the back including a standard 12 month warranty limitation clause. The Defendant's earlier Quotation had also set out that the specific performance guarantees listed in the quotation were "understood to fall within" the Defendant's standard warranty provisions. Thus, although the Defendant's terms arrived after the "crystallization" of the terms of the contract, the Defendant's standard 12 month warranty provision was included in the contract because it had been referenced in the Defendant's Quotation.

**68** From the time of delivery, the press failed to operate properly and the Plaintiff requested further assurances from the Defendant. The Defendant provided the requested assurances and continued to provide assistance, support, maintenance, and parts at no charge. After two years of continuous problems with the press, the Plaintiff demanded a refund of the purchase price and commenced an action for breach of contract.

**69** The Defendant defended on the basis inter alia that the one-year standard warranty clause contained on the reverse side of its acknowledgement applied and that the Plaintiff was outside of the warranty period.

**70** The Plaintiff argued that the Defendant's standard terms and conditions could not override the performance guarantees specifically negotiated by the parties and that the standard warranty was in addition to the negotiated terms.

**71** The court held that the contract incorporated the performance guarantees and that the terms and conditions on the back of the Plaintiff's purchase order applied along with the Defendant's standard warranty provision found on the back of the Defendant's acknowledgement referred to in both the Defendant's Quotation and in the Plaintiff's purchase order.

**72** Although the court found that the standard warranty was part of the contract, it further held that the warranty was not intended by the parties to supersede the specifically negotiated performance guarantees on the basis that:

- the term, based on its wording and prior transactions, appeared to apply only to the sale of parts and not to large capital expenditures;<sup>96</sup>
- where senior management has negotiated an agreement on certain terms it is not reasonable to conclude that the parties intended to change the transaction by using standard terms and conditions expressed by administrative staff involved in shipping and delivery;<sup>97</sup>
- the only reasonable inference that could be made, based on the parties' words and conduct, was that the performance guarantee was to "stand on

top" of the standard warranty and not be subject to the 12 month limit;<sup>98</sup>  
and

- if the standard warranty was applicable, then, in any event, the Defendant was estopped from relying on it, because in providing repeated assurances, the Defendant represented to the Plaintiff that it would not rely on its strict rights in the future.<sup>99</sup>

**73** While this result alone is useful in that it assists with the identification of factors that limit a battle of the forms -- namely, the effect of prior agreements between principals and the application of the doctrine of promissory estoppel -- other aspects of the case are of equal assistance in identifying when the battle of the forms analysis is most suitably conducted.

**74** For example, before the court could examine the dispute from a battle of the forms perspective, it was necessary for it to overcome certain evidentiary hurdles that arose from the Defendant's "entire agreement" clause contained in its Acknowledgement.<sup>100</sup> Exclusion clauses can operate to preclude evidence of prior statements or collateral agreements.<sup>101</sup> Therefore, unless courts can see their way around such clauses, it is generally not open to the court to identify contractual terms based on the prior negotiations and conduct of the parties.

**75** The court skirted the effect of the exclusionary clause at two levels: First, the court observed that when contractual terms are ambiguous, extrinsic evidence can be led to assist in finding the true intention of the parties.<sup>102</sup> In so doing, the court permitted itself to look at the factual matrix of the agreement and opened the door to a battle of the forms analysis.

**76** Second, the court applied the basic rule of acceptance -- that acceptance needs to be absolute and unequivocal<sup>103</sup> -- and found that as soon as the Defendant tendered the Plaintiff's cheque, the terms and conditions of the contract had crystallized. As such, the Defendant's Acknowledgement was tantamount to a "ratification" of the material terms of the agreement and did not change any of the contractual obligations between the parties.<sup>104</sup>

**77** This point on crystallization and timing of acceptance is important in that it illuminates the potential arguments against application of the last shot "rule" and/or performance doctrine: if acceptance can be found prior to the last document being sent (as also observed in the *Chateau v. Sabate* case discussed above<sup>105</sup>), then terms in that document will arrive subsequent to formation and not form part of the contract unless they can be otherwise implied -- for example, via prior commercial dealings or recognized industry standards, notwithstanding that these arguments will not always be successful.<sup>106</sup>

**78** With respect to the battle of the forms analysis specifically, the court looked at the documents exchanged, the conduct of the parties,<sup>107</sup> and in particular, focused on whether the parties had adequate notice of one another's respective standard terms and conditions.

**79** In finding that the Plaintiff had knowledge of and had accepted the Defendant's standard warranty, the court pointed to the incorporation by reference of the Defendant's terms on the Plaintiff's purchase order. The parties' extensive prior commercial dealings indicated a familiarity with the Defendant's standard terms, and the court stated that had the Plaintiff intended to exclude the standard terms it would have done so expressly.<sup>108</sup> In finding that the Defendant knew or "ought to have known" of the existence and application of the Plaintiff's standard terms and conditions,<sup>109</sup> the court pointed to: the text alerting to the conditions which was clearly legible and not hidden in any way;<sup>110</sup> the parties' extensive prior commercial dealings; and the general knowledge of commercial parties that documents of this type usually contain standard contractual terms.<sup>111</sup> For the court therefore, the Defendant's written Acknowledgement and cashing of the Plaintiff's cheque constituted acceptance of those terms.<sup>112</sup>

**80** This case therefore also draws further attention to and/or expands on the following key concepts:

- i. While notice of standard terms and conditions is always required, it can be constructive notice and based on an objective assessment of whether it is reasonable to believe that the party ought to know the terms exist;<sup>113</sup>
- ii. The more onerous a particular term is (for example, a very broad exclusionary clause) the more prominently it must be "brought home to the other party";<sup>114</sup>
- iii. Even when there is knowledge or awareness of standard terms, either by sufficient notice, prior commercial relationship, or industry standards, that awareness will not override the foundational principle regarding the protection of reasonable interests. That is, the terms of a contract will only ever be those which can be reasonably implied and the meaning of those terms will be construed so as to be consistent with the parties' reasonable understanding of them.

**81** Because the court incorporated aspects of both parties' terms and conditions, the case supports a shots fired on both sides approach. Although the Defendant's standard 12-month warranty was found to form a part of the contract between the parties, the nature of the negotiated performance guarantees rendered the warranty clause redundant either on the grounds that such guarantees would otherwise be empty, or because the defendant was estopped from relying on them.

Sherwood v. Triad Industries Inc. 2003 (Ont. Superior Court)<sup>115</sup>

**82** Issue: Whether an exclusionary clause contained in the standard terms and conditions of a quotation was a term of the agreement when a purchase order with its own standard terms and

conditions was subsequently issued.

**83** Facts: The Plaintiff Sherwood entered into negotiations for the manufacture and purchase of automated gas leak testing machinery from the Defendant.

**84** After lengthy negotiations and a number of requests for quotations and quotations passing back and forth between the parties, the Defendant sent a final quotation which, like all the previous quotations, contained in its standard terms and conditions on the reverse side an exclusionary clause for delays and consequential damages.<sup>116</sup>

**85** The Plaintiff "accepted" the final quotation<sup>117</sup> and "produced" a purchase order, only the face of which was received by the Defendant.<sup>118</sup> The Plaintiff later sent a full copy of the purchase order containing its own terms and conditions on the reverse side along with a deposit cheque to the Defendant. Upon receipt of the purchase order, the Defendant began building the machine.<sup>119</sup> It is not clear from the judgment whether work commenced before or after the Defendant's receipt of the Plaintiff's standard terms and conditions, which, as mentioned had not been provided with the first purchase order.

**86** When the machine failed to meet certain specifications, the Plaintiff cancelled the purchase order and commenced proceedings for breach of contract seeking a return of its deposit and other damages.

**87** The Defendant sought to rely on its exclusionary clause and argued inter alia that the issuance of the Purchase Order was acceptance of its final quotation.<sup>120</sup> The Defendant relied on Butler Machine Tool methodology requesting that the court look to all of the correspondence passed between the parties in order to get a sense of the agreement they had entered into.<sup>121</sup>

**88** Ultimately, the court avoided an express battle of the forms analysis. It found instead that the Plaintiff was not, in any event, entitled to damages that might have been excluded by the Defendant's exclusionary clause. Hence, the court did not state whether the exclusionary clause contained in the standard terms of the Defendant's Quotation formed part of the contract. The court did, however, find that the parties had entered into an enforceable agreement as evidenced by the Plaintiff's purchase order<sup>122</sup> and stated that the Plaintiff had "accepted" the Defendant's quotation<sup>123</sup> on a date prior to the production of the full purchase order, perhaps suggesting that the Defendant's terms governed the agreement. On the other hand, the court also canvassed certain terms and conditions located on the back of the Plaintiff's purchase order<sup>124</sup> which were received after its acceptance of the Defendant's quotation. Consequently, this case demonstrates the uncertainty articulated by Lord Denning in his judgment in Butler, "No doubt a contract was then concluded. But on what terms?"<sup>125</sup>

**89** While this case does little to advance the understanding of how a battle of the forms analysis should be conducted, it reflects a shots fired on both sides sentiment.<sup>126</sup>

### 3.4. Rejection of Battle of the forms Framework in favour of the "Traditional" Rules

#### 3.4.1. British Columbia

*Bakers Helper Bakery Inc. v. Tony's Fine Foods 2002 (BC Supreme Court)*<sup>127</sup>

**90** Issue: Whether standard terms on a Canadian seller's invoice sent with or immediately following the shipment of baked goods were part of the agreement between the seller and its U.S. buyer.

**91** Facts: In this case, the British Columbia-based Plaintiff bakery contracted with the Defendant U.S. buyer through the Plaintiff's agent for the manufacture and sale of baked goods. The commercial arrangement between the parties was such that the Defendant would send an order for baked goods to the Plaintiff's agent who in turn would send a purchase order to the Plaintiff. Upon receipt of a purchase order from the agent, the Plaintiff would bake and then ship the goods directly to the Defendant in California. The standard shipping terms at issue were on the Plaintiff's invoice sent with or immediately following the shipment of baked goods. A dispute arose over unpaid monies and the Plaintiff bakery sued the Defendant purchaser in British Columbia. The Defendant inter alia brought an application to declare service ex juris invalid.

**92** In its argument, the Plaintiff bakery appeared to rely on the "last shot" concept from *Butler Machine Tool* arguing that the invoice (containing transportation terms which would assist in its jurisdiction argument) sent with or following the shipment of goods was the contract between the parties.<sup>128</sup>

**93** While the court acknowledged the "last shot" concept it also set out the principle that "the documents must be considered as a whole."<sup>129</sup> The court went on to examine the document exchange and concluded that offer and acceptance occurred when the Defendant's order was accepted by the Plaintiff's agent and therefore contract formation occurred prior to the mailing of the invoice.<sup>130</sup> Accordingly, the additional terms on the invoice came too late, being unilaterally added by the Plaintiff subsequent to contract formation.<sup>131</sup>

**94** The court relied on this finding (that is, that the contract had already been formed) to come to the conclusion that this case could not be a negotiation or battle of the forms<sup>132</sup> even though the court appeared to be applying the principles articulated by Lord Denning in *Butler Machine Tool*.<sup>133</sup> Rather, according to the court, this was a case of simple offer and acceptance with the invoice doing nothing but confirming the terms of the order. Unfortunately, the judgment does not consider any principles or arguments related to the effect of a prior course of dealings, knowledge, and/or notice of terms. The facts suggest that these types of arguments could have been made. Additionally, although the facts could support the application of the performance rule, it was not considered in the case.

**95** While it is tempting to conclude that this case supports a "first blow" approach, it might be erroneous to do so. The "first blow" approach arises out of an analysis of the materiality of the

terms at issue and whether sufficient notice was provided. In this case, this approach leads to the following questions: (i) how material was the Plaintiff's forum selection clause, and (ii) did repeated delivery of such a clause with the requested baked goods provide sufficient notice?

**96** As noted above, these ideas were not canvassed by this court therefore one can only logically conclude that the court is relying more heavily on traditional principles of offer and acceptance despite the apparent resort to facets of the Butler Machine Tool decision.<sup>134</sup>

### 3.4.2. Ontario

Hershey Canada Inc. v. Solae, LLC 2007 (Ont. Superior Court)<sup>135</sup>

**97** Issue: Whether the forum selection clause on the reverse of an order confirmation was a term of the agreement when the purchase at issue was subject to a supply agreement that had been negotiated by an agent of the parent company.

**98** Facts: The Plaintiff purchaser and Defendant supplier had an arrangement whereby pursuant to an annual supply agreement negotiated by its parent company, the Plaintiff would fax purchase orders to the Defendant for the supply of lecithin to be used by the Plaintiff in the manufacture of chocolate as needed. Upon receipt of a purchase order, the Defendant would fax an order confirmation to the Plaintiff and ship the requested amount followed by an invoice. Both the order confirmation and invoice referred to "Conditions of Sale" located on the reverse of the documents which included limitation of liability and forum selection clauses.

**99** When the Defendant supplied contaminated product, the Plaintiff commenced an action against the Defendant in Ontario. The Defendant brought a motion to stay the action asserting the forum selection clause found in its "Conditions of Sale". The Defendant argued that each purchase order was an offer and each order confirmation was a counter-offer which was then accepted by the Plaintiff's conduct. Accordingly, the Defendant argued that each individual shipment should be viewed as an individual contract.<sup>136</sup> Additionally, the Defendant argued that although the "Conditions of Sale" were absent from the faxed order confirmation at issue, they nonetheless formed part of the bargain because the conditions had been part of the regular past practice between the parties.<sup>137</sup>

**100** In dismissing the motion to stay, the court looked at the objective intentions of the parties, their conduct and the documents passing between them and concluded that the Defendant's "Conditions of Sale" were not part of the contract because the purchase agreement at issue was governed by the larger supply arrangement. The purchase order simply "pulled" on the supply arrangement which triggered the shipment of the product.<sup>138</sup>

**101** The court found that formation of a binding contract had occurred when the supply arrangement was negotiated and agreed to by the authorized agents of the parties prior to the individual shipments of lecithin. Consequently, there was no consideration given by the Defendant

for the Plaintiff to accept the Defendant's later terms and conditions.<sup>139</sup>

**102** Additionally, even if consideration could be found, it was not reasonable for the Defendant to view the Plaintiff's employee responsible for sending the purchase order and receiving the order confirmation as a person with the authority to bind the Plaintiff to the significant contractual obligations contained in the Defendant's Conditions of Sale.<sup>140</sup> The absence of agreement with respect to the dates of delivery and quantities of individual shipments did not prevent formation of a binding contract.<sup>141</sup>

**103** The court stated:

In *General Refractories Co. of Canada v. Venturedyne, Ltd.* Himel J. makes the following statement which I find to be apt:

It is my view that where senior management has negotiated an agreement on certain terms, it is unlikely that the parties intended to change the transaction by using standard terms and conditions expressed by the administrative staff involved in the shipping and delivery of the press.<sup>142</sup>

**104** This case is interesting due to the strength of the Defendant's argument that its terms should form part of the agreement on account of the consistent prior dealings between the parties. However, the court granted more weight to the agreement between principals suggesting that no amount of notice of additional terms can alter an agreement when the terms are relayed by administrative staff. Therefore, while it is again tempting to categorize this case as a simple "first blow" example, that categorization would be inaccurate as materiality of terms and notice appear to have been rendered moot due to the crystallization of the prior oral agreement.

### 3.4.3. Nova Scotia

*Pino v. Wal-Mart Canada Inc. and Produits Cari-All Inc.* 1999 (N.S. Supreme Court)<sup>143</sup>

**105** Issue: Whether a limitation of liability clause contained in an invoice for supply of shopping carts applied when the supply was subject to a master agreement negotiated and signed by principals of the respective companies.

**106** Facts: Pino brought an action against the Defendants Wal-Mart and Produits Cari-All for an injury allegedly caused by a shopping cart manufactured by Produits Cari-All while shopping at Wal-Mart. Pino's action was dismissed and Wal-Mart sought an indemnity from Produits Cari-All for its legal costs pursuant to a broad indemnity clause contained in a master agreement made between principals of their respective companies.<sup>144</sup>

**107** Produits Cari-All argued *inter alia* the "last shot rule" and put forward the position that its final invoice to Wal-Mart for the shopping carts was a counter-offer accepted by Wal-Mart. The invoice contained a condition limiting its liability to the cost of the cart. Produits Cari-All also argued in the alternative that the parties had not reached consensus *ad idem* with respect to the indemnity clause and was therefore not be enforceable.<sup>145</sup>

**108** The court rejected the arguments stating that, "This is not a situation where one can apply the last shot doctrine or argue the battle of forms or argue that there was no consensus *ad idem*."<sup>146</sup> The court held that the limiting condition could not apply on the basis that the master agreement was signed by the principals of each company and that Produits Cari-All could not unilaterally change the agreement after delivery of the carts. The court further indicated that the condition could not apply as Wal-Mart effectively had had no notice of it since it was a unilateral change.<sup>147</sup>

**109** While this case is very brief, it again demonstrates what seems to be the simplest -- yet perhaps most potent argument against the battle of the forms doctrine altogether -- that is, the finding of an earlier agreement under traditional contract doctrine. If one were to rely on the courts indication that notice of terms is required, then this case might also be an indicator of a "first blow" scenario.

*Black v. 2168826 Nova Scotia Ltd. (c.o.b. Dexter's Autohaus) (N.S. Supreme Court)*<sup>148</sup>

**110** Issue: Whether a term, unilaterally inserted by the purchaser on the bill of sale stipulating that the sale of a car was subject to a favourable inspection by a mechanic, formed part of the contract of sale.

**111** Facts: The Plaintiff Black had been in the market for a used car for several months. On Thursday June 14th, an agreement for the sale of a car was reached. The Plaintiff Black alleged that on the 14th he had indicated to the salesman Burke, and the business manager Warner, that he wished to further test drive the vehicle in question and have it inspected by a mechanic. On the 14th, the Plaintiff Black placed \$3000 down either as a down payment on the agreement, or as a deposit on the car for the weekend test-drive.

**112** Papers governing the transaction were drawn up by the business manager Warner and ready for signing on Friday the 15th. The papers had already been signed on behalf of the dealership by Warner when presented to the Plaintiff Black by Burke to sign. The Plaintiff, realizing that there was no provision making the sale subject to a satisfactory inspection by his mechanic added the following clause to the bill of sale in the presence of the salesman, Burke:

**113** Deal subject to a satisfactory inspection having been completed by the Buyer on/before July 19, 2005. If not satisfactory then Buyer is at liberty to declare the deal null and void with Buyer's deposit returned without having been cashed before July 19/2005.

**114** Burke testified that he did not respond to the Plaintiff's insertion of the inspection clause and further testified that when he was contacted by the manager of the dealership and told that the

condition was neither acceptable nor relevant he did not communicate this to the Plaintiff.

**115** When the payment and the signed agreement were returned to Warner for processing, she noticed the additional clause that had been inserted by the Plaintiff. She informed the used car manager of the presence of the clause and was later advised by him that the clause was not relevant. She did not contact the Plaintiff to inform him that the Dealership did not agree to his additional term.

**116** Title in the vehicle was transferred to the Plaintiff before he drove away. In addition, plates from his old car were placed on the new one.

**117** Over the weekend, on his way to pick up his son, the Plaintiff swerved to miss a bear emerging from some woods and destroyed the car. Unable to get the car inspected, the Plaintiff declared the sale void and demanded a refund of his deposit and payment. The Defendants contended that they did not agree to the clause that had been inserted by the Plaintiff, making the sale subject to inspection.

**118** The trial judge held that the battle of the forms analysis from the *Cariboo v. Ashlaur*<sup>149</sup> case was not applicable in this instance because the parties had been negotiating face to face, however; it should be recalled that the battle of the forms doctrine was not found to completely apply in *Cariboo* because the parties there were not dealing with a standard form. The judge held that all of the terms fundamental to the contract had been agreed to on the 14th, and that title in the vehicle had been transferred prior to his insertion of the subject to clause on the 15th. The trial judge held that the Plaintiff was the registered owner of the vehicle at the time of the accident.

**119** As such, this case seems to very cursorily apply the traditional analysis whereby the point of contract formation was identified prior to the insertion of the inspection clause despite the notice given the defendant of the additional term, and the failure of the defendant to object to its inclusion. The trial judge did not analyze the objective intentions of the parties, or what each would reasonably have been entitled to believe the other had agreed to.

### 3.5 Preliminary Observations

**120** It becomes clear from the case-law reviewed that the courts are disinclined to apply the battle of the forms framework vigorously. Perhaps this is in part due to the lack of clarity regarding how or when to apply this "doctrine" or perhaps the courts genuinely view it as not having application to the particular facts at hand. Whatever the case, the following themes can be observed:

**121** If the forms exchanged are not "standard forms" the courts' preference is to resolve the dispute via the "well settled" contractual principles of intention; acceptance by conduct, reasonable expectations, and so forth.<sup>150</sup>

**122** This preference may arise in part out of a perception that the "last shot" scenario is a static and

formidable rule.<sup>151</sup> Clearly this cannot be the case as *Butler Machine Tool* does not articulate it as a stand-alone rule. That is to say, the operation of the battle of the forms framework can for example, transform a "last shot" into a "first blow" when issues such as materiality of terms and sufficiency of notice arise. Hence Lord Denning's judgment incorporates inter alia other well-settled contractual principles (apparently perceived by some courts to only arise under the more traditional or orthodox approach) in its search for agreement through the conduct of the parties and the documents passing between them.

**123** The disinclination for an actual battle of the forms "doctrine" or indeed "last shot rule" is further evidenced by courts' apparent enthusiasm for finding acceptance, contract formation or "crystallization" prior to the exchange of standard/subsequent terms.<sup>152</sup> This result raises the following question: If one can successfully demonstrate that the agreement occurred prior to the exchange of forms/terms, will it ever be the case that terms can be added subsequent?

**124** According to the case-law reviewed, parties can be bound by terms arriving post-formation, post-acceptance, or post-crystallization if the party sought to be bound had knowledge or notice of those terms either through a prior course of dealings or through industry familiarity. It must however be kept in mind that it is nonetheless still open to argue that the standard terms, even those identified through a prior course of dealings, were not intended by the parties to apply in the circumstances at issue. For example when:

- i. parties have expressly or impliedly objected to the terms;<sup>153</sup>
- ii. parties have clearly not turned their minds to the terms;<sup>154</sup> and
- iii. a party has knowledge of terms but did not equivocally accept the terms or communicate acceptance.<sup>155</sup>

**125** Nonetheless, the courts are equally clear that it is also not appropriate for parties to simply ignore standard terms particularly when clauses, like forum selection clauses, are common industry standards.<sup>156</sup> Hence, the question of whether a detailed oral agreement between principals (agents notwithstanding), for example, is a complete shield against the incorporation of standard terms remains, as yet, untested.<sup>157</sup>

**126** It is however prudent to recall that this question should always also be assessed from an objective standpoint i.e. the task is to ask the further question, "...would a reasonable person in the position of one party believe the other party to be assenting to a particular set of terms?"<sup>158</sup> Furthermore, if standard terms are sought to be excluded, perhaps the only approach that can be considered reasonable is to do so expressly.<sup>159</sup>

#### 4. The U.N. Convention for the International Sale of Goods: Additional Considerations

**127** The United Nations Convention for the International Sale of Goods also known as the "Vienna Convention" or CISG creates a uniform body of international commercial sales law.<sup>160</sup> Canada is a contracting state to the CISG and the CISG has been incorporated into the sales law of every province and territory in Canada.<sup>161</sup> The CISG is intended to be an exhaustive regulation and should apply to most international sales of goods agreements of contracting parties unless they have expressly excluded its application.<sup>162</sup> Although the primary focus of this paper is on legal strategy with respect to the common law and battle of the forms, it is important to expressly note that the common law is but only one legal risk/opportunity up for consideration. Accordingly, the CISG is briefly discussed below to identify some of its potential influence on the development of a battle of the forms strategy.

**128** For example, the CISG sets out its own perspective on contract formation<sup>163</sup> and the battle of the forms which provides under Article 19<sup>164</sup> 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 counter-offer.

(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 orally to the discrepancy 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, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

**129** Article 19(1) appears to simply set out the traditional common law position regarding rejection of offer and counter-offer which is not necessarily desirable since it potentially allows an offeree to argue that no contract exists on the basis that the terms are different, even after performance has begun or when third parties have become involved. Article 19(2) however overcomes this strict consequence by stating that the reply will not be a rejection of the offer if the additional or different terms are not objected to by the first offeror and do not materially alter the offer. In other words, the CISG appears to support a last shot approach provided that the modifications in the counter-offer do not materially alter the offer<sup>165</sup> and the offeror remains silent.

**130** While the CISG may not at first seem to add much more for consideration than that already discussed in the context of the common law, from a legal strategy standpoint, the following

observation can be made: under the CISG, it seems permissible for one party to unilaterally modify the parties' understanding by adding/modifying terms even when the modifying party might know that the other party does not agree to those terms and despite a prior course of dealings, provided that the variations/additions are not "material" -- refocusing future disputes on the meaning of materiality in this context. Thus to a certain extent, the CISG might be used to overcome certain limitations in the common law assuming that its application has not been expressly disavowed by the parties by contract.

**131** Furthermore, a second layer of complexity<sup>166</sup> (and therefore potential strategic opportunity) is added because Canadian domestic courts have failed to properly apply the CISG, if at all.<sup>167</sup> Of the eleven (11) cases canvassed above, five involved international contracts for the sale of goods, but only two (2) mentioned the CISG.<sup>168</sup> Indeed, Canadian courts have been heavily criticized for ignoring the CISG entirely or simply equating it with domestic sales law.<sup>169</sup> While an examination of why the courts treat the CISG in this manner is beyond the scope of this paper, it is interesting to point out that this type of unpredictable, inconsistent, or non-application of the law can result in the emergence of types of strategies connected to the management of legal margins:<sup>170</sup> when a norm is not applied objectively or predictably it encourages parties to employ risk calculations to determine whether they should comply with the norm. Additionally, inconsistent application of legal norms encourages abusive behaviour that seeks advantage in unpredictability. For example, it can provide support for or advantage to a non-compliant company to pressure another party into accepting a less than favourable settlement rather than to struggle to assert their strict legal rights.

**132** In sum, the CISG attempts to provide a potential solution to certain common law difficulties, as briefly discussed. However, its treatment by the Canadian courts also has the potential to support unintended or undesirable strategies and to subvert the law to business agendas.

## 5. Developing a Battle of the Forms Legal Strategy

**133** The foregoing review of the Canadian battle of the forms case-law and academic commentary<sup>171</sup> supports the preliminary observation that there exists an inter-connection between the timing of the agreement, the parties' conduct and authority to bind, notice, and the materiality/harshness of terms sought to be included.<sup>172</sup> This basic observation could be illustrated as in Figure 1 below:

Figure 1: Interconnection of Factors  
Relevant to a Battle of the Forms

[Editor's note: Figure 1, Interconnection of Factors Relevant to a Battle of the Forms, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or [service@lexisnexis.ca](mailto:service@lexisnexis.ca) and request the following document: 9asp021.doc.]

**134** Although this observation might be informative in a general sense, it lacks sufficient precision to allow it to move from the legal dimension into the management dimension. Accordingly, a firm

interested in transforming the results of its legal monitoring into a tangible legal capability might further organize results as follows:

Figure 2: Transforming Legal Dimension into Management Dimension

Factors that can hinder a "last shot"

1. forms or documents used are not standard forms;
2. terms arrive subsequent to formation:
  - a. prior agreement;
  - b. prior oral agreement between principals (note parol evidence hurdles);
3. additional/modification terms are material or onerous:
  - a. insufficiency of notice;
  - b. actual knowledge required;
  - c. unconscionability;
4. explicit or implied objection to terms, including unreturned/unsigned request for acknowledgement of terms; and consumer agreements.

Factors that can assist a "last shot":

1. conduct:
  - a. acceptance by conduct;
  - b. ignoring a requested acknowledgement;
  - c. performance doctrine;
2. sufficiency of notice of terms:
  - a. constructive notice only required;
  - b. extensive prior consistent course of dealings; long-term relationships, relational context
  - c. common industry practice, standards or norms;
3. agency/authority to bind;

4. commercial agreements; and

5. CISG (for non-material terms).

Factors that can hinder a

Factors that can assist a

"first blow"

1. conduct:
  - a. acceptance by conduct;
  - b. ignoring a requested acknowledgement;
  - c. performance doctrine;
2. sufficiency of notice of terms:
  - a. constructive notice only required;
  - b. extensive prior consistent course of dealings; long-term relationships, relational context
  - c. common industry practice, required; standards or norms;
3. agency/authority to bind;
4. commercial agreements; and
5. CISG (for non-material terms).

"first blow"

1. forms or documents used are not standard forms;
2. terms arrive subsequent to formation:
  - a. prior agreement;
  - b. prior oral agreement between principals (note parol evidence hurdles);
3. additional/modification terms are material or onerous:
  - a. insufficiency of notice;
  - b. actual knowledge
  - c. unconscionability;
4. explicit or implied objection to terms, including unreturned/unsigned request for acknowledgement of terms; and consumer agreements.

**135** A firm, desirous of improving its specific legal capability in the form of its legal instruments (for example purchase orders containing its standard terms and conditions),<sup>173</sup> might then strategically integrate results by organizing legal data into a visualization that can permit the identification of risks, threats and opportunities:

### Figure 3: Strategic Management Sphere

[Editor's note: Figure 3, Strategic Management Sphere, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or [service@lexisnexis.ca](mailto:service@lexisnexis.ca) and request the following document: 9asp021.doc.]

**136** Once risks, threats and opportunities are identified, it is simply a matter of determining what action to take, if any.

**137** Roquilly offers one formalized approach to strategically increasing a company's competitive edge: canvass all possible actions that a firm can take in light of the gathered information<sup>174</sup> and

implement strategies in line with the company's business agenda -- after all, once legal risks are identified, whether or not they are perceived as risks or opportunities is dependent on the company's specific business objectives and the attitudes of its decision-makers.<sup>175</sup> Accordingly, a proactive firm that wishes to improve its chances at having its standard terms incorporated into an agreement might canvass the dark grey area of the strategic management sphere and identify potential strategic opportunities. Similarly, a firm that wishes to reduce the chances of the other side's standard terms being incorporated might look for opportunities inherent in the light grey area of the sphere.

**138** The decision to proceed with a strategy of course carries a certain amount of risk, the level of which can, to a certain extent, be assessed by contrasting the proposed strategy against the court's actual treatment of the legal norms at issue. For example, the schematic seems to indicate that it will be more common for terms to be included than excluded (areas in dark grey), which echoes the sentiment surrounding the battle of the forms doctrine, i.e. more often a last shot will prevail under the traditional counter-offer rule. However, as identified in Figure 4 below, the case-law canvassed indicates otherwise -- the courts in the case-law examined were less likely to allow the last set of terms shuttled to prevail.

Figure 4: Summary of Cases

Last Shot	First Blow	Both Sides	Rejected (reasons)
Cariboo-Chilcotin BCSC Chateau (later shipments)	Repap  Tywood  Chateau (1st shipment) Guiliani	General Refractories Sherwood	Baker's Helper (prior agreement) Hershey's (prior agreement)  Pino (prior agreement) Black (face to face dealings) Cariboo-Chilcotin BCCA (not a standard form)

**139** Thus, a firm desirous of ensuring its latest terms and conditions prevail but only relying on the alleged strength of a "last shot rule" (including one based on traditional counter-offer rule and acceptance by conduct) seems more likely to fail than to succeed. Furthermore, a previous course of dealings between the parties seems to do little to support the last set of shuttled terms unless there has been express acceptance of these terms. One solution here might be to add a request for acknowledgement of terms to the purchase order form, which if signed or ignored by the other side could support the inclusion of the purchase order terms and conditions. But this must be weighed

against the risk that the court could find, and apparently leans toward finding, a prior agreement (thus reducing the chance of incorporation of subsequent terms) as well as the risk that the other party will ignore the requested acknowledgment. Thus, a better result might be more likely if an acknowledgement of terms is not requested.

**140** There is always the risk that a "last shot" can be transformed into a "first blow", on the basis of factors that a company is unable to foresee or largely control -- for example, the parties' conduct or a later court interpretation regarding prior agreement or crystallization. A company might therefore be better able to secure the application of its terms and conditions and reduce risk if it itself proceeds by way of a "first blow" through incorporation of all relevant factors identified, for example by employing:

- agreement between principals:
- early use of an entire agreement clause;
- terms establishing that employees receiving documents do not have authority to bind;
- the automatic generation of express objection to subsequently shuttled documentation which should be an effective shield regardless of whether the additional terms are immaterial or material; etc.

**141** Interestingly, from a game theory perspective,<sup>176</sup> a pro-active "first blow" assault (one that employs, in advance, the factors identified), arguably brings the incorporation of standard terms closer to a zero-sum situation, that is, that the company's gains in having its terms govern the agreement are balanced by the other company's losses in not having its terms apply.<sup>177</sup> This situation is brought about because the strategy outlined above effectively ties up the facts that would otherwise be available to the court to interpret which set of terms should apply. This is particularly so if the court uses the objective test of intention, "would a reasonable person in the position of one party believe the other party to be assenting to a particular set of terms?"<sup>178</sup>

## 6. Conclusion

**142** To summarize, complexity in the law allows for the development of legal strategies. Such strategies include those that take advantage of a lack of clarity and those that seek advantage in flexibility arising out of haziness, plurality and inconsistency. The battle of the forms is one area of law where such complexity exists thus making it an area of law conducive to the development of legal strategies and internalization of the law into the strategic management of a firm.

**143** The ability to transform the external legal environment into an internal capability or legal resource can assist in increasing the long-term competitive advantage of a company because it allows a company to obtain a position more favourable than its competitors. One way to achieve this transformation is through a process of legal monitoring, whereby, for example, specific factors or elements linked to achieving or avoiding a certain outcome can be extracted from relevant case-law. Once identified, elements can be visualized in order to expose risks, threats, and opportunities.

**144** This type of legal dissection for competitive purposes is all well and good, but what of the rule of law? Flexibility in the law need not increase complexity in the law to the extent that it becomes a bar to the identification, understanding, and equitable application of contractual principles. Rather, flexibility, when identified, can itself be routinely scrutinized via a principled approach thereby increasing its utility in and in keeping with the objectives of the common law legal system.

**145** As can be observed from the case-law outlined above, courts and counsel alike seem to inconsistently apply the principles articulated by Lord Denning in *Butler Machine Tool*. This appears to have been caused by a rather messy state of affairs involving a history of attractive, frequently mentioned but loosely defined terminology surrounding Lord Denning's *Butler Machine Tool* judgment.

**146** "Last shot doctrine" is arguably distinct from "performance doctrine", and neither phrase can fairly be said to, of themselves, accurately encapsulate the analysis advanced by Lord Denning. "First blow", and "Shots fired on both sides", Lord Denning's own additions to the battle terminology,<sup>179</sup> are not as catchy as "last shot" as can be observed from the dearth of Canadian firms claiming the "first blow" or to have achieved a "shots fired on both sides" outcome. Terminology aside however, Lord Denning's analysis is useful.

**147** Such analysis, rather than replacing the "traditional" or "orthodox" analysis, can be said to embody it. When a document inserts additional terms into an agreement, it may be necessary to examine the "whole of the correspondence passing between the parties". Such an analysis will bear upon both the materiality of the additional terms, and the amount and type of notice given to the other party of the additional term(s). When it is then unclear from the parties' dealings what terms are to prevail -- as can be seen from the case-law examined this will happen rarely -- it may be necessary for the court to imply reasonable terms.

**148** The battle of the forms analysis, once accepted as a formulation of the traditional doctrine, does not need to be superficially distinguished away on its facts and does not need to provide opportunity for legal strategies that take advantage of such simplification. Rather, it can be seen as a useful framework for solving contractual interpretation problems in the real world where, most frequently, A does not accept B's terms in a clear and forthright manner.

**149** It is hoped that the above has helped to illustrate how hazy law -- such as the battle of the forms doctrine -- and flexible law -- such as the inconsistent application of the CISG -- can give rise

to legal strategy. In addition to demonstrating the development of a legal strategy using the battle of the forms as a case study, it is also hoped that this paper provides a starting point for helping the court to become more attuned to the potential for corporate legal strategy by identifying certain circumstances and factors that encourage such strategies. Increasing awareness and discussion in this area is critical to the development of policies to identify and address unacceptable corporate activity, particularly in this age of global complexity.

\* \* \*

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\* \* \*

#### Notes

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1 For example, see Lord Denning in *George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd.*, [1983] QB 284 (C.A); *aff'd* [1983] 2 AC 803, [1983] 2 All ER 737, (H.L) describing the courts support of exclusionary clauses by "big concerns" as a "bleak winter for our law of contract" with reference to *Thompson v. London Midland and Scottish Rly. Co.*, [1930] 1 KB 41, [1929] All ER Rep 474 (in which there was exemption from liability, not on the ticket, but only in small print at the back of the timetable, and the company were held not liable) and *L'Estrange v. Graucob Ltd*, [1934] 2 KB 394, [1934] All ER Rep 16 (in which there was complete exemption in small print at the bottom of the order form, and the company were held not liable).

2 *Ibid.* See also *Scammell v. Ouston*, [1941] A.C. 251. (H.L.); *Gibson v. Manchester City Council*, [1979] 1 W.L.R. 294 (H.L.); *Henry Kendall & Sons v. William Lillico & Sons Ltd.* [1969] 2 A.C. 31 at 125 [*Kendall v. Lillico*]; and *Tilden Rent-a-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont.C.A.) [*Tilden v. Clendenning*].

3 See discussion in S. M. Waddams, *The Law of Contracts* 5th ed. (Aurora, Ontario: Canada Law Book, 2005) at para. 78 [Waddams]; See also J. D. McCamus, *The Law of Contracts* (Toronto, Ontario: Irwin Law Inc., 2005) at 66 [McCamus].

4 See generally, A. Masson, "The Origin of Legal Strategies" in A. Masson and M. J. Shariff eds., *Legal Strategies* (Springer-Verlag: Germany, 2009) forthcoming [Masson].

5 While legal academics and practitioners have long been comfortable with the notion of litigation and evidentiary strategies as forms of legal strategy, the notion of corporate legal strategy has been historically rejected as a true legal strategy on the basis of a perception that corporate economic or business planning simply addresses and incorporates the law as part of the cost of doing business. "Under this view, the corporation regards the law as a necessary restriction in respect of firm business such that all it can do is try to make the best out of a restrictive situation and seek advantage from within the superior legal framework." This perception is flawed however in that it is based on an assumption that corporations view the law as "static and supreme". Rather, examinations of current corporate behaviour indicate that there exists a view that the law can be manipulated. Indeed, many companies are adopting "a 'legal management approach' whereby long-term business strategies are formulated through active assessment of the interaction of legal systems, processes and players. Hence, while there has been some academic resistance to the existence of true corporate legal strategy, it is clear that corporations are engaging in legal strategy premised on the view that the law is malleable." See A. Masson and M. J. Shariff, "Preface" in A. Masson and M. J. Shariff eds., *Legal Strategies* (Springer-Verlag: Germany, 2009) forthcoming [Masson and Shariff].

6 See Masson and Shariff, *Ibid.*

7 *Ibid.*

8 See for example A. Masson *supra* note 4, who describes inter alia legal strategy opportunities that arise out of: "hazy law" where the normative environment is filled with legal voids because of legal actors' absence of knowledge leading to the simplification of abstractions; "crazy law" where contradictions in norms due to legal pluralism results in optimization strategies through a process of "filling-up"; and "flexible law" where norms are not applied as they should be or their application produces effects other than those that can be predicted by the law; See also M. J. Shariff, M. Pomrenke and V. Hilder, "Perspectives on Legal Strategy and Alternative Dispute Resolution" in A. Masson and M. J. Shariff eds., *Legal Strategies* (Springer-Verlag: Germany, 2009) forthcoming and discussion on first order or traditional legal strategies that arise out of the existence of choice between different processes [Shariff, Pomrenke and Hilder].

9 See C. Roquilly, "From Legal Monitoring to Core Competency: How to Integrate the Legal Dimension into Strategic Management" in A. Masson and M. J. Shariff eds., *Legal Strategies* (Springer-Verlag: Germany, 2009) forthcoming at section 1 [Roquilly]; See also C. E. Bagley, "Winning Legally: The Value of Legal Astuteness" (2008) 33(2) *Academy of Management Review* 378 and her discussion on how the "law and the tools it offers are an enabling force that legally astute management teams can use to manage the firm more effectively." [Bagley].

10 See Ben-Shahar Omri, "An Ex-Ante View of the Battle of the forms: Inducing Parties to

Draft Reasonable Terms" (2005) 25 *International Review of Law and Economics* 350 at 350 [Omri]; Also see discussion in Kevin C. Stemp, "A Comparative Analysis of the "Battle of the forms", (2005) 15 *Transnational Law & Contemporary Problems*, 243 [Stemp].

11 Battle of the forms disputes frequently centre around terms related to jurisdiction, choice of laws and forum selection, limitation of remedies, limitation of liability, scope of warranty, exclusionary clauses, or cost variation clauses.

12 See *Butler Machine Tool v. Ex-Cell-O Corp.*, [1979] 1 All ER 965 (C.A.) per Lord Denning MR at 967 para. j [*Butler Machine Tool*].

13 The "performance rule" provides that where there is performance immediately after receipt of a set of terms, the performing party is deemed to have accepted those last shuttled terms. For example see *British Road Services Ltd v. Arthur B. Crutchley and Co. Ltd.* [1967] 2 All E.R. 785 aff'd [1968] 1 All ER 811 (C.A.) [*British Road Services*].

14 For the alternative argument that no contract has been reached and should be approached on the basis of mistake or restitutionary principles such as quantum meruit and unjust enrichment see, for example, discussions in *The Ontario Law Reform Commission, Report on the Sale of Goods* (1979), vol. 1 at 85 [OLRC 1979 Report, vol.1]; Also see Ewan McKendrick, "The Battle of the Forms and the Law of Restitution" (1988) 8(2) *Oxford JL of L.S.* 197.

15 See, for example, the *United Nations Convention on Contracts for the International Sale of Goods* (1980), C.T.S. 1992/2; 19 I.L.M 671; 1489 U.N.T.S. 3 [CISG] and the American Law Institute's *Uniform Commercial Code* [UCC].

16 See, for example, legal strategy with respect to arbitration clauses and the avoidance of class action law suits in Shariff, Pomrenke and Hilder *supra* note 10.

17 *Butler Machine Tool*, *supra* note 12.

18 *Ibid.* at 968.

19 See Masson *supra* note 6 and *supra* note 10 and discussion on "hazy law".

20 Examination conducted by searching cases mentioning "battle of the forms" or "Butler Machine Tool" and determining how Canadian common law courts address battle of the forms arguments.

21 See discussion on the necessity of legal monitoring by a company in order to identify risks, threats, and opportunities in Roquilly *supra* note 9 at 2.1.2.

22 See discussion in Roquilly *supra* note 9 at 3.

23 CISG supra note 15. The CISG has developed a uniform set of rules that inter alia addresses international battles of the forms.

24 According to S. Woog in "La Strategie du Creancier (Daloz, 1997), "strategies are fond of reverse causality" whereby the strategy is revealed by first identifying the objective to be reached and then tracking the law backwards to identify the legal norm that will support it.

25 See Masson supra note 6.

26 Butler Machine Tool supra note 12 at para. 967b.

27 Ibid., at 967, para. g.

28 See judgments by Lawton L.J. and Bridge L.J. Butler Machine Tool, Ibid. at 969-71; Note: The court did not accept that the reference to the original quotation in the cover letter accompanying the acknowledgement was a counter-offer as from a business perspective, the "language has no other effect than to identify the machinery and to refer to the prices quoted" and further that if it was indeed a counter-offer, there was likely no acceptance of it in the terms of the original quotation.

29 Ibid. at para. 968d.

30 Ibid. at 968-69. Authors' emphasis.

31 Ibid.,968 at para. f.

32 Authors emphasis. For discussion of a similar principle described in American legal discourse as the "knock-out" rule, see Douglas G. Baird & Robert Weisberg, "Rules, Standards, and the Battle of the forms: A Reassessment of s. 2-207" (1982) 68 Va. L. Rev. 1217 at 1247; Also see William S. Dodge, "Teaching the CISG in Contracts"(2000) 50 J. Legal Educ. 72, 82 (2000); Also see Charles Sukurs, "Harmonizing the Battle of the forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods" 34 Vanderbilt Journal of Transnational Law (2001) 1481 at 1490 [Sukurs].

33 See for example Edward J. Jacobs, "The Battle of the forms: Standard Term Contracts in Comparative Perspective" (1985) 34(2) International and Comparative Law Quarterly 297 at 303 [Jacobs].

34 For example, the more frequently a party has previously encountered the standard terms and conditions at issue, the more likely the court will find that the party has been given sufficient notice, See Kendall v. Lillico supra note 4 at 113; See also L'Estrange v. Graucob Ltd., [1934] 2 K.B. 394 (C.A.) at 403; Parker v. South Eastern Railway Company, (1877) 2 C.P.D. 416 (C.A.); Thornton v. Shoe Lane Parking Ltd., [1971] 2 QB 163, [1971] 1 All ER

686, [1971] 2 WLR 585, [1971] 1 Lloyds' Rep 289, [1971] RTR 79 [Thornton v. Shoe Lane]; Union Steamship Co. v. Barnes, [1956] S.C.R. 842.

35 Whether notice is reasonable and sufficient is ascertained from the perspective of whether a reasonable person would conclude that the terms were to be incorporated into the contract. Additionally, reasonableness will also be assessed from the perspective of whether the term itself is reasonable. Indeed, the more onerous or unreasonable the term, the more exacting the notice standard that will be imposed by the court. See Thornton v. Shoe Lane *Ibid.*; J. Spurling Ltd v. Bradshaw [1956] 1 W.L.R. 461 (C.A.); See also Smith v. Hughes (1871), L.R. 6 Q.B. 507 at 607; [1956] 1 W.L.R. 461 [Smith v. Hughes]; Neuchatel Asphalte Co. Ltd. v. Barnett, [1957] 1 All E.R. 362, [1957] 1 W.L.R. 356 (C.A.) at 360; For further discussion on the connection between unreasonableness and notice requirements and how unconscionability shifts the focus from the terms of the contract to questions of enforceability, see Waddams, *supra* note 5 at paras. 66 and 488.

36 See for example, Kendall v. Lillico, *supra* note 4 at 113 and British Road Services *supra* note 13.

37 For further discussion see Masson *supra* note 6 at 2.2.2.

38 See, for example, Black v. 2168826 Nova Scotia Ltd. (c.o.b. Dexter's Autohaus), 2008 NSSC 274 at para. 30 [Black v. 2168826]; Pino v. Wal-Mart Canada Inc. 38 B.L.R. (3d) 130, 1999 CarswellNS 477 at paras. 5-6 [Pino v. Walmart], and McCamus *supra* note 5 at 60. The seeming acceptance of a Canadian last shot rule may be attributable in part to the American and European enthusiasm for the rule. For discussion of the American last shot rule, see Sukurs, *supra* note 34 at 1485. Also see generally Henry D. Gabriel, "The Battle of the forms: A Comparison of the United Nations Convention For the International Sale of Goods and the Uniform Commercial Code" (1994) 49 Bus. Law Journal 1053.; Also see discussion in Stemp, *supra* note 10. Also see Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Germany: Sellier, 2007) at 93.

39 *Supra* note 15. See for example OLRC 1979 Report, vol.1 *supra* note 16 at 82, note 29. For performance rule see British Road Services *supra* note 13. Lord Denning's articulation might be considered broader than the performance rule due to his assessment and incorporation of additional factors to be considered such as knowledge, notice, materiality, objection, and reasonableness.

40 For example, some commentators have described Lord Denning's approach as "turning the law on its head" because it expressly separates formation of contract from knowledge as to terms of the contract. See for example Jacobs *supra* note 35 at 303.

41 Many courts explicitly reject the application of Lord Denning's battle of the forms framework for a variety of different reasons including carving out exceptions on the basis of

agency law -- for example see *Hershey Canada Inc. v. Solae, LLC* [2007] O.J. No. 3215, 159 A.C.W.S. (3d) 819, 2007 CarswellOnt 6370 (Ont. S.C.J.) [*Hershey Canada v. Solae*] -- or distinguishing the facts so as to have it not apply -- for example, not a standard form, see *Cariboo-Chilcotin Helicopters Ltd. v. Ashlaur Trading Inc.* 2006 BCCA 50, 14 B.L.R. (4th) 1 [*Cariboo v. Ashlaur*] or dealings were in person, see *Black v. 2168826* supra note 40.

42 Review of all battle of the forms cases in Canada as of May 1, 2009, with the exception of *JK Campbell & Associates Ltd. v. Lahr Construction Ltd.* [1987] B.C.J. No. 1567, a tendering case. Cases were searched as outlined supra at note 22.

43 *Cariboo v. Ashlaur* supra note 43; Also see similar case, *STMicroelectronics Inc. c. Matrox Graphics Inc.*, 2007 QCCA 17842007 CarswellQue 11978.

44 *Cariboo v. Ashlaur*, 2005 BCSC 178 at para. 63.

45 *Ibid.* at para. 20 citing *Saint John Tug Boat Co. Ltd. v. Irving Refinery Ltd.* (1964), 46 D.L.R. (2d) 1, [1964] S.C.R. 614 at 621-22.

46 *Ibid.*, at para. 20 citing the judgment of Lord Blackburn in *Smith v. Hughes*, supra note 37 at 607.

47 The court did not canvass traditional contract principles as to whether this was a variation to the contract supported by consideration or whether this was a counter-offer that killed the original offer.

48 *Ibid.*, at para. 22.

49 *Ibid.*, at para. 17.

50 *Ibid.*, at para. 19.

51 2002 BCSC 539, 112 A.C.W.S. (3d) 1055, 2002 CarswellBC 843 (B.C.S.C.) [*Repap v. Electronic*].

52 *Ibid.*, at paras. 40-43, and 86 for example.

53 *Ibid.*, at paras. 40-3 and 71-7 for example.

54 *Ibid.*, at paras. 73-7, 83, 97, 102, 108 for example.

55 *Ibid.*, at para. 14.

56 *Ibid.*, at para. 11.

57 *Ibid.*, at paras. 11-21.

58 Ibid., at para. 11(a) citing W.R. Anson, *supra* note 69 at 159-160.

59 Ibid., at para. 11(b) citing Anson, *supra* note 109 at 61 and *Levison v. Patent Steam Carpet Cleaning Co.* (1977), [1978] Q.B. 69 (Eng. C.A.).

60 Ibid., at para. 11(c) citing *Western Processing & Cold Storage Ltd. v. Hamilton Construction Co.* (1965), 51 D.L.R. (2d) 245 (Man. C.A.) and *McCutcheon v. MacBrayne Ltd.*, [1964] 1 W.L.R. 125, [1964] 1 All E.R. 430 (H.L.) at 437.

61 Ibid.

62 Ibid., at para. 11(d) citing *Kendall v. Lillico*, *supra* note 4.

63 Ibid., at para. 11(e) citing *Circle Freight International Ltd. v. Mideast Gulf Exports* [1988] 2 Lloyd's Rep. 427 (Eng. C.A.), at 433.

64 Ibid., at para. 11(f) citing *British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.*, [1975] Q.B. 303 (C.A.).

65 Ibid., at para. 15 citing *Tywood Industries Ltd. v. St. Anne-Nackawic Pulp & Paper Co.* (1979), 100 D.L.R. (3d) 374 (Ont. H.C.) [*Tywood v. St. Anne*].

66 Ibid., at para. 21 citing S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book, 1993) at 53-54.

67 Ibid., at paras. 18 and 21 citing *Ocean Falls Corp. v. Worthington (Canada) Inc.*, [1986] B.C.J. No. 810 (B.C. S.C.).

68 Ibid., at para. 40.

69 See also S.M. Waddams, "The Effect of Unsigned Writings in the Formation of Sales Contracts: 'The Battle of the forms' and Related Questions" (1974) Ontario Law Reform Commission, Sale of Goods Project, Research Paper No. II, 1. [Waddams 1974 Report] at 11.

70 *Tywood v. St. Anne* *supra* note 67.

71 Ibid., at para. 6.

72 *Supra* note 4.

73 *Supra* note 72.

74 Ibid.

75 Ibid., at para. 7.

76 Ibid.

77 Ibid.

78 Ibid.; Also see discussion in McCamus, supra note 5 at 62-3.

79 Tywood v. St. Anne supra note 67 at para. 7.

80 Ibid.; For further discussion on how parties often consciously do not negotiate terms in order to get the deal done see Waddams 1974 Report supra note 71, the relevant portions of which are largely reproduced in Waddams supra note 5 at para.63.

81 [2005] O.J. No. 4604, 2005 CarswellOnt 5271 (Ontario Master) [Chateau v. Sabate].

82 Ibid., at para. 11.

83 Ibid., at paras. 29 and 14.; This case therefore also rejects the performance doctrine.

84 Ibid., at para. 30.

85 Ibid., at para. 30.

86 Ibid at para. 29; Also See the CISG supra note 15.

87 Ibid at paras. 45 and 31.

88 (2007) 52 C.P.C. (6th) 129, 2007 CarswellOnt 5922 (Ont. S.C.J) [Guiliani v. Invar].

89 Ibid at para. 10.

90 Ibid at para. 11.

91 Ibid. at para. 13. Authors' emphasis.

92 See Guiliani v. Invar Manufacturing, 2008 ONCA 256, 2008 CarswellOnt 1884, (Ont. C.A.).

93 110 A.C.W.S. (3d) 1157, 2002 CarswellOnt 36 (S.C.J.) [General Refractories v. Venturedyne].

94 The performance guarantees related to lifetime of the press, support, and ongoing service and repair for 15 years.

95 Supra note 95 at para. 25.

96 Ibid. at para. 153-54.

97 Ibid. at para. 153.

98 Ibid. at para. 155.

99 Ibid. at para. 157.

100 Ibid. at paras. 56 -79 where the court outlines the objective principles of contract interpretation, the parol evidence rule, rules pertaining to extrinsic evidence, the failure to call witnesses and adverse inferences to be derived therefrom, and conflict of terms.

101 Ibid. at para. 63.

102 For further detailed discussion on admissibility and exceptions to the parol evidence rule see, *Gallen v. Allstate Grain Co. Ltd.* (1984) 9 D.L.R. (4th) 496.

103 Ibid. at para. 85 citing *Dawson v. Helicopter Exploration Co.* [1955] S.C.R. 868, [1955] 5 D.L.R. 404 (S.C.C.).

104 Ibid. at para. 97.

105 *Chateau v. Sabate*, supra note 82.

106 See *Repap v. Electronic*, supra note 53 and court holding that prior course of dealings did not demonstrate sufficient notice; See also discussion in *Tywood v. St. Anne*, supra note 67 and acceptance requirement.

107 *General Refractories v. Venturedyne*, supra note 94 at para. 87.

108 Ibid. at para. 92.

109 Ibid. at paras. 93 and 96.

110 Ibid. at paras. 84 and 80.

111 Ibid. at para. 96.

112 Ibid. at para. 87-8

113 Ibid. at para. 96.

114 Ibid. at para. 93; For further discussion on reasonable notice and onerous or harsh exclusion clauses, see *Tilden v. Clendenning* supra note 4 and *Karroll v. Silver Star Mountain Resorts Ltd.* (1986) B.C.L.R. (2d) 160.

115 [2003] O.J. No. 4668, 2003 CarswellOnt 4125 (Ont. S.C.J.) [Sherwood v. Triad].

116 Ibid. at para. 40.

117 Ibid. at para. 38.

118 Ibid. at para. 40.

119 Ibid. at para. 41.

120 Ibid. at para. 40.

121 Ibid. at para. 128.

122 Ibid. at paras. 79 and 84.

123 Ibid. at para 38.

124 See for example, Ibid. at para. 82.

125 Supra note 12.

126 Supra note 126 at para. 129.

127 2002 BCSC 388, 2002 CarswellBC 679 (B.C.S.C.) [Bakers Helper v. Tony's].

128 Ibid. at para. 15.

129 Ibid. at para. 17.

130 Ibid. at para. 20.

131 Ibid. at para. 20; See also Chateau v. Sabate supra note 82; Tywood v. St. Anne supra note 67; General Refractories v. Venturedyne supra note 94.

132 Bakers Helper v. Tony's ibid. at para. 20.

133 Ibid. at paras. 15-20.

134 Ibid. at para. 17.

135 Hershey Canada v. Solae supra note 43.

136 Ibid. at para. 24.

137 Ibid. For similar (and successful) argument, see Chateau v. Sabate supra note 82.

138 Ibid. at paras. 28 -35.

139 Ibid.

140 Ibid. at para. 35.

141 Ibid. at para. 32.

142 Ibid. at para. 37.

143 Pino v. Wal-Mart supra note 40.

144 Ibid. at para. 1.

145 Ibid. at para. 5.

146 Ibid. at para. 6.

147 Ibid. at para. 8.

148 Black v. 2168826 supra note 43.

149 Supra note 43.

150 See for example, Cariboo v. Ashlaur, Ibid. at para. 21.

151 See for example McCamus supra note 5 at 60-1 describing how under the orthodox analysis first blow arises only in "exceptional circumstances" and where an exchange of forms is followed by performance, the likely outcome is "last shot". See also Murphy & Sons Ltd v. Johnston Precast Ltd (formerly Johnston Pipes Ltd), [2008] EWHC 3024 (TCC) (QB) at para 84.

152 See for example Repap v. Electronic, supra note 53; Bakers Helper v. Tony's, supra note 128; Hershey Canada v. Solae, supra note 43; Guiliani v. Invar supra note 89; and Pino v. Wal-mart supra note 40.

153 See for example, Tywood v. St. Anne, supra note 67.

154 Ibid.; Also see Waddams 1974 Report, supra note 71.

155 Guiliani v. Invar supra note 89.

156 See for example, Chateau v. Sabate, supra note 82; This position also connects to the principle from Smith v. Hughes supra note 37 that if a seller is aware that a buyer has made a mistake as to terms -- i.e. the terms on which the seller is prepared to sell -- the seller is

obligated to bring this mistake to the attention of the buyer or else risk that the buyer's terms will be imposed. See also *Hobbs v. Esquimalt and Nanaimo Railway* (1899) 29 S.C.R. 450, [1899] S.C. J. No. 13 (S.C.C.).

157 See facts in cases, *General Refractories v. Venturdyne*, supra note 94; and *Hershey Canada v. Solae*, supra note 43.

158 Supra note 63.

159 Supra note 110; Also see Omri, supra note 12 for discussion of a proposed "best shot rule" as a form of incentive to urge parties to draft better documents. See also A. Swan, *Canadian Contract Law* 2d ed, (2009) at 307 note 82 regarding automobile manufacturing industry purchase orders which are presented as governing documents and offered on a "take it or leave it" basis.

160 The CISG came into force on January 1, 1988 and has since been ratified by eleven states including Canada and the United States.

161 International Sale of Goods Act, R.S.N.W.T. 1988, c. I-7; S.N.S. 1988, c. 13; R.S.P.E.I. 1988, c. I-6; C.C.S.M. c. S11; S.N.B. 1989, c. I-12.21; R.S.O. 1990, c. I.10; R.S.N.L. 1990, c. I-16; R.S.B.C. 1996, c. 236; R.S.Y.2002, c.124.; International Sale of Goods Contracts Convention Act, S.C. 1991, c.13.

162 See CISG supra note 17, Article 6.; For further discussion on derogation from application of the CISG, see J. S. Ziegel and C. Samson, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods in CISG Annotated (Pace Law School, 1981), online: <[www.cisg.law.pace.edu/cisg/text/ziegel6.html](http://www.cisg.law.pace.edu/cisg/text/ziegel6.html)>.

163 See CISG supra note 17, Articles 14-19.

164 Authors' emphasis. See also the UCC, supra note 15, para. 2-207.

165 See CISG supra note 17, Article 19(3) for what might be considered material changes to the offer.

166 Under the Masson framework, this would be considered "flexible" law, where a legal norm is not applied consistently or as it should be. See Masson, supra note 6 and note 10.

167 See J. Anthony Van Duzer, who noted that there continues to be a "lamentable state of ignorance" in cases involving the CISG in "The Adolescence of the United Nations Convention on Contracts for the International Sale of Goods in Canada", Paper presented to the Canadian Bar Association, International Law Section Annual Conference May 2001, online: Pace Law School CISG Database <[www.cisg.law.pace.edu/cisg/biblio/vanduzer2.html](http://www.cisg.law.pace.edu/cisg/biblio/vanduzer2.html)>. See also James M. Klotz, Peter J. Mazzacano & Antonin I.

Pribetic, "All Quiet on the CISG Front: Guiliani v. Invar Manufacturing, the Battle of the Forms, and the Elusive Concept of Terminus Fixus" (2008), 46 C.B.L.J. 430. .

168 Chateau v. Sabate, Guiliani v. Invar, General Refractories v. Venturedyne, Bakers Helper v. Tony's, and Hershey Canada v. Solae involved international contracts. Only Chateau considered and applied the CISG, while General Refractories recognized that the treaty did not apply to contracts formed prior to 1992. See also Klotz, *Ibid*.

169 *Ibid*; see also for example, Brown & Root Services Corp. v. Aerotech Herman Nelson Inc. 2002 MBQB 229 aff'd 2004 MBCA 63.

170 See Masson *supra* note 6.

171 See for example, comment in McCamus *supra* note 5 at 66 about unpredictability of common law resolution to the battle of the forms dilemma; See also note 71.

172 See Waddams, *supra* note 5 at para. 78.

173 See discussion in Roquilly *supra* note 9 at 1 discussing the work of N. Argyris and K. J. Mayer who describe contract design as a firm capability.

174 See Roquilly *supra* note 9 at 2.2. Roquilly identifies the possible reactions to threats as follows: refusal (acceptance of the constraint); confrontation (deliberate transgression of the law); circumvention (seeking of alternative legal solutions); modification (reduce or transform risk into opportunity); acceptance (accept risk because the legal environment offers poor security). Roquilly also identifies that the possible reactions to opportunities are either to take advantage of the opportunity or not, the latter reaction possibly due to management that is risk-averse.

175 *Ibid*.

176 "Game theory, like all economic modeling, works by simplifying a given social situation and stepping back from the many details that are irrelevant to the problem at hand. The test of a model is whether it can hone our intuition by illuminating the basic forces that are at work but not plainly visible when we look at an actual case in all its detail. The spirit of the enterprise is to write down the game with the fewest elements that captures the essence of the problem." See D. G. Baird, R. H. Gertner, and R. C. Picker, "Game Theory and the Law" (England: Harvard University Press, 1994) at 7.

177 *Ibid*. at 317: "A game in which the increase in the payoff to one player from one combination of strategies being played relative to another is associated with a corresponding decrease in the payoff to the other. If we sum the payoffs that all the players receive under each combination of strategies, we find that this sum is the same. One player does better only

if another player does worse."

178 It should always be kept in mind however, that there exist additional tools which permit the court to avoid the rules of the battle of the forms game when persuaded that the overall behaviour of our corporate player is unacceptable, for example, on the basis of estoppel, public policy, unconscionability, or fraud.

179 The original terminology has been attributed to jurisprudence from the United States in relation to its Uniform Commercial Code. See L. S. Aspey "The Battle of the Forms" (1958) 34 Notre Dame Law Review 556.