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EUROPEAN CONTRACT LAW AND THE PROBLEM OF MODIFIED ACCEPTANCE: IS THERE ROOM FOR A UNIFIED APPROACH?

Abstract

Rules on contract formation applicable to cases where modified acceptance of an offer has been made are rather settled in civil transactions. This article examines the possibility of a unified approach when dealing with the formation of different types of contracts in European contract law. The discussion hence focuses on rules relating to modified acceptance applicable to B2B, B2C, G2C and G2B transactions notwithstanding whether such rules are part of European legislative instruments or of current European legal projects for unification or harmonization. Two general conclusions are drawn. The first confirms the applicability of general contract law rules notwithstanding the specifics of a particular transaction. The second finds that traditional contract law rules based on the 'mirror-image' doctrine are more adequate than current rules.

Keywords: *consent, contract formation, "mirror-image" doctrine, modified acceptance*

I. THE PROBLEM

While comparative contract law has developed and applied the traditional contract formation process in terms of offer and acceptance, this model has not always functioned in practice.[1] The offer-acceptance process has been criticised in literature due to its technicality and inability to cover the plethora of modes in which an agreement can be reached. More substantial approaches are therefore proposed in order to counterbalance the technicality of the offer-acceptance process. The institute of modified acceptance has been developed to serve such ends. Rules on modified acceptance significantly shift the traditional 'mirror-image' doctrine, which supposes that an acceptance must be unqualified because an offeree's communication that varies the terms of the offer is a rejection and a subsequent counteroffer.[2] In the broader sense of legal policy, rules on modified acceptance are drafted in order to support and implement the so-called *favor contractus* principle that essentially demands a contract be concluded as much as possible in cases where some manifestations of consent are found. Although such an approach may seem reasonable at first glance, the practice has drawn attention to problems that arise due to the

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[1] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd ed, Oxford University Press 1998) 356-357.

[2] Guenter Treitel, *The Law of Contract* (11th ed, Sweet & Maxwell 2003) 19.

contract being concluded in cases where the existence of consent can be seriously brought into question.

One may certainly argue that current socio-economic relations promote the *favor contractus* principle in cases where formation issues are raised. The needs of prompt and efficient trade and swift transfer of values have hence directed courts or arbitrators to find a contract in cases where the parties are in dispute on the mere existence of a contract due to concerns on consent. In other words, such disputes are settled on a contractual terrain and courts or arbitrators subsequently impose obligations on the parties in terms of what they find as the consent of the contract. The *favor contractus* principle, therefore, requires that cases where contracts are not found, due to formation concerns, should be avoided. Dealing with relevant issues outside the rules of contract law seems inefficient, especially if the parties have started the performance. Modified acceptance rules serve such ends. The manner of their impact on contract formation is rather interesting because they construe offeree's communications in very broad terms and it ultimately results in a regulation that establishes a possibility of finding a contract where the 'mirror-image' doctrine would fail to do so.

This article examines the feasibility of general legal solutions on modified acceptance only relating to the state of current legal rules and developments in European contract law. Discussions on the relevant comparative legal approaches are omitted. What this article tries to do is to offer discussions and provide conclusions on the possibility of unified common legal rules applicable for all types of transactions, notwithstanding whether they are commercial, consumer, G2C or G2B. The problem of modified acceptance, after being identified, is examined in Section II of the article by distinguishing the application of modified acceptance rules to mentioned types of transactions under the rules of European contract law. Rules on modified acceptance in B2B transactions are taken as the basic model and are subsequently scrutinised in terms of their suitability for B2C, G2C and G2B transactions. Section III discusses the possibility of a unified approach in European contract law for all the types of transactions concerned. Bearing in mind such discussions, Section IV provides conclusions not only on the possibility of a unified approach but also on its adequacy for remedying the conceived shortcomings of the 'mirror-image' doctrine.

II. APPLICATION TO DIFFERENT TYPES OF TRANSACTIONS

1. Commercial Transactions (B2B)

Divergences present in comparative law[3] have induced international rule-makers, first under the auspices of UNIDROIT and then in the UN system (UNCITRAL) to find common ground for sales contracts involving the relevancy of more than one legal system. The 1980 United Nations Convention on Contracts for the International Sale of Goods ('CISG') is the final product of such a joint effort. Although not strictly a European source, the CISG has had a great influence on the state of European contract law. Its rules are therefore indispensable for establishing the idea and the effects of the modified acceptance mechanism in European contract law.

The CISG generally follows the 'mirror-image' doctrine. A purported acceptance of an offer that contains additions, limitations or other modifications amounts to a rejection of the offer and constitutes a counteroffer (Article 19(1)). On the other hand, under Article 19(2) CISG, the non-materially altering terms of the acceptance become part of the contract on offeror's silence, ie

[3] Michael Aubrey, 'The Formation of International Contracts, with Reference to the Uniform Law on Formation' (1965) 14 International & Comparative Law Quarterly 1011, 1015-1016.

where he does not object without undue delay. The 'mirror-image' doctrine is therefore rejected, but only where the purported acceptance contains terms which modify the offer or differ from it in non-material terms. Where the modified acceptance contains materially altering terms the 'mirror-image' doctrine resurfaces and the offeree's communication is construed as a counteroffer, which may be subsequently accepted or rejected. By following the *favor contractus* principle, the practice has often found that in such situations a contract is formed by conduct where the original offeror starts performance of the contract. This is the so-called 'last shot' rule deemed as applicable in terms of Article 18(3) CISG. The contract is formed on the terms of the counteroffer. This general idea is also implemented in the Principles of European Contract Law ('PECL'). The 'mirror-image' doctrine is the starting point (Article 2:208(1) PECL) but is subsequently rejected on non-material modifications which become part of the contract on offeree's silence (Article 2:208(2) PECL). The offeror or the offeree may preclude such a result (Article 2:208(3) PECL) and the contracting process consequently stops. Where a counteroffer is found due to materiality of modifications, the 'last shot' rule may be applied under Article 2:204(1) PECL.

The influence of the *favor contractus* principle is hence quite noticeable. Setting aside the acceptance containing non-material modifications where the CISG and the PECL have based their rules on the silence argument, the practice has abundantly used the performance argument when finding a contract on the 'last shot' rule. Such is also the case where conflicting general conditions are involved, which is the case of the so-called 'battle of the forms'. Under the CISG, the 'last shot' rule applies to the battle of the forms,[4] although the application of the so-called 'knock out' rule has also been argued for.[5] Due to obvious shortcomings, Article 2:209(1) PECL rejects the 'mirror-image' doctrine and finds a contract on those general conditions' terms of both parties that are common in substance. This is actually the 'knock out' rule claimed for and sometimes applied under the CISG. The need for a special rule on the battle of the forms arises because while traditional contract formation mechanisms of offer and acceptance presuppose that the offeree has drawn attention to the offeror on the discrepancy between their communications, this can hardly be true when general conditions are used.[6]

The use of general conditions is particularly relevant for commercial transactions because it exhibits the importance of usages and practices. In any case, the proper incorporation of general terms in parties' communications is a prerequisite for dealing with the battle of the forms. Because the CISG does not address the issue directly, the prevailing opinion is that the incorporation should be dealt with under Articles 8, 14 and 18 CISG while the validity of general conditions is settled under applicable domestic law. General conditions would, therefore, be incorporated under the CISG if the intention to incorporate party's general conditions is apparent to the other party and they have been supplied or made available in another way.[7] Case law has

[4] Franco Ferrari, 'Article 19' in Stefan Kröll, Loukas Mistelis and Maria del Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (C.H. Beck 2011) 289-290.

[5] Peter Schlechtriem, 'Article 19' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary of the UN Convention on the International Sale of Goods (CISG)* (2nd ed, Oxford University Press 2005) 242-244. It should be noted that the 'knock out' rule has also been favoured under the CISG-AC Opinion No. 13: Inclusion of Standard Terms under the CISG <cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_13.pdf> accessed 4 July 2020.

[6] Rodolfo Sacco, 'Formation of Contracts' in Arthur Hartkamp *et al* (eds), *Towards a European Civil Code* (2nd ed, Kluwer 1998) 198.

[7] Peter Huber, 'Introduction and General Issues' in Peter Huber and Alastair Mullis, *The CISG: A New Textbook for Students and Practitioners* (Sellier 2007) 30-33.

found that standard terms referred to in the offer are binding on the offeree only where the standard terms have been attached to the offer or the offeree was otherwise in a position to know of their contents.[8] A mere reference to general conditions was also found to be sufficient.[9] In broader terms, usages or previous dealings between the parties may also lead to a conclusion that a party has referred to its general conditions.[10] Here, taken as a general prerequisite for application, a party 'should have known' that the other party is dealing under its general conditions.

Pursuant to Article 2:104(1) PECL, contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. It is important to note that, under Article 2:104(2) PECL, terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document. Those rules apply in commercial transactions as well. On the other hand, if an established practice exists between the parties a mere reference may suffice while usages may also lead to a situation where general conditions are binding upon a party even without referring to them.[11] Bearing all this in mind, a party must have had the opportunity to acquaint itself with other party's general conditions. The opportunity itself differs and there are various means to establish it in given commercial surroundings.

2. Consumer Transactions (B2C)

As can be seen, the CISG has had a significant influence on the PECL.[12] It should also be pointed out that the PECL, as **s**oft-law, may also be applicable to consumer transactions. The rules of the PECL have further significantly influenced the rules of the Draft Common Frame of Reference ('DCFR').[13] Although the DCFR is not a legislative text, its rules offer an insight in the European perspective where modified acceptance is concerned. The same can be said for the rules of the proposed Common European Sales Law ('CESL'),[14] although withdrawn. The DCFR (Articles II.-4:208 and II.-4:209) and the CESL (Articles 38 and 39) regulate the issues of modified acceptance and the battle of the forms in a substantially identical manner as the PECL. The only difference is that Article 38(2) CESL supplies a non-exhaustive list of presumptive material modifications, which is obviously inspired by Article 19(3) CISG. It can, therefore, be concluded that, when the European perspective is concerned, the rules on modified acceptance in

[8] BGH, 31 October 2001, CISG-online 617.

[9] OGH, 17 December 2003, CISG-online 828. On case law, in more detail, see Maria del Pilar Perales Viscasillas, 'Comments on the Draft Digest relating to Articles 14-24 and 66-70' in Franco Ferrari, Harry Flechtner and Ronald A Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Sellier 2004) 265-270.

[10] Carole Murray, David Holloway and Daren Timson-Hunt, *Schmitthoff's Export Trade: The Law and Practice of International Trade* (11th ed, Sweet & Maxwell 2007) 66-67.

[11] Ole Lando and Hugh Beale (eds), *Principles of European Contract Law: Parts I and II* (Kluwer 2000) 149-150.

[12] Stefano Troiano, 'The CISG's Impact on EU Legislation' in Franco Ferrari (ed), *The CISG and its Impact on National Legal Systems* (Sellier 2008) 376-379.

[13] Study Group on a European Civil Code and Research Group on EC Private Law (*Acquis* Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (outl ed, Sellier 2009).

[14] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11 October 2011, COM(2011) 635 final.

B2C transactions are identical to those applicable to commercial transactions.[15] One may speak, however, of some specifics due to the need for consumer protection.

The incorporation of standard terms is an issue that is relevant for the ends of consumer protection. Under Article 70 CESL, the reference to general conditions seems to suffice where commercial transactions are concerned.[16] On the other hand, the mere reference is not sufficient for consumer transactions also bearing in mind Article 13(1)(d) CESL. Such a conclusion can also be drawn under Article II.-9:103(1) DCFR. Incorporation problems are particularly sensitive in consumer matters because of information asymmetry concerns. European contract law has made an effort to remedy such problems by redacting the so-called 'opportunity to read' rules which are comparable to the common law 'duty to read' as stated, for eg, in *Upton v Tribilcock.*[17] 'Opportunity to read' rules follow the logic of the pre-contractual disclosure duty imposed on traders. Such rules are particularly developed in EU consumer legislation (Articles 5 and 6 of the Consumer Rights Directive).[18] Similar rules also exist under the DCFR (Articles II.-3:102 to II.-3:104) and the CESL (Articles 13 to 22).

Pre-contractual disclosure rules may, at first glance, be considered relevant in relation to formation rules. This is so because Article 6(5) of the Consumer Rights Directive provides that the information referred to in Article 6(1) of the Consumer Rights Directive, ie the compulsory information that should be provided to the consumer, form an integral part of the distance or off-premises contract and cannot be altered unless the contracting parties expressly agree otherwise. The provision, as seen, has two limitations. First, it applies only to distance and off-premises contracts and not to 'other' contracts where the obligation for providing pre-contractual information also exists under Article 5(1) of the Consumer Rights Directive. The second limitation is that the provision obviously applies only when the required pre-contractual details are actually given. If they are not or are false or misleading, formation issues do not arise. Finally, it must be said that legal remedies for breach of the pre-contractual disclosure obligation are left to national laws of EU Member States, pursuant to Article 23 of the Consumer Rights Directive. There are certain remedies covered by the Consumer Rights Directive, as the case regarding the time limits for the exercise of the so-called withdrawal right under Article 10 of the Consumer Rights Directive,[19] but it is not the primary applicable legal remedy as it stands as a general possibility for the consumer in distance and off-premises contracts under Article 9(1) of the Consumer Rights Directive.

Current developments have also created the so-called 'rolling' contracts or 'shrink-wrap' agreements entered into on pre-drafted terms that the user accepts by opening or using the already acquired product. Setting aside the legal nature of such contracts, traditional rules do not generally treat an offeree's silence as acceptance, by itself. The mere tearing of the shrink-wrap by the user is therefore not an appropriate act of acceptance. His use of the product, on the other hand, may infer acceptance by conduct. One may therefore certainly inquire whether the offer is actually made in the store when the price and the good are determined or a more detailed offer is

[15] Evelyne Terryn, 'Article 38' in Reiner Schulze (ed), *Common European Sales Law (CESL): Commentary* (Nomos 2012) 202. On the battle of the forms, such cases are very unlikely in consumer transactions.

[16] Marco Loos, 'Art. 70-71: Incorporation and Making Available of Standard Contract Terms' in Aurelia Colombi Ciacchi (ed), *Contents and Effects of Contracts: Lessons to Learn From The Common European Sales Law* (Springer 2016) 185.

[17] 91 US 45 (1875).

[18] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L 304/64.

[19] See also Article 42(2) CESL and Article II.-3:109(1) DCFR.

due so the contract would be formed on that offer.[20] Under section 112(a) of the 1999 Uniform Computer Information Transactions Act ('UCITA'), as a model law passed only in Virginia and Maryland, a person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review[21] the record or term or a copy of it authenticates the record or term with intent to adopt or accept it or intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term. Modified acceptance is also possible and such cases are covered under sections 204 and 205 UCITA.[22] The problem may thus also be approached on the supposition that where the provider of a product has supplied it on the previous solicitation his terms may well amount to modified acceptance or a counteroffer.[23]

Some further specifics related to e-contracting also exist. Pursuant to Article 11(1) of the E-Commerce Directive,[24] Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means and the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them. On the receipt of e-mails, in technical terms, it is enough for the e-mail to enter the addressee's server.[25] E-contracting may also be problematic from the aspect of sufficient reference to contract terms when entering an e-contract. Thus, in *Specht v Netscape*[26] it was found that a so-called browse-wrap, where contract terms are referenced through a hyperlink on a web page, is not binding because the reference is not obvious enough.

Specific rules on consumer protection, in relation to the modified acceptance problem, do not seem to amount to special effects. Incorporation issues do offer some safeguards from non-transparent general conditions but the practical consequence is that they are not properly incorporated so modified acceptance issues do not arise. Rules on pre-contractual disclosure may be relevant, at first glance, especially when deciding whether an offer not containing all required information is sufficiently definite. On the other hand, the structure of legal remedies for breach of pre-contractual duties (Articles II.-3:109, II.-7:201, II.-7:205 and (even) II.-7:207 DCFR; Articles 29, 42, 48 and 49 CESL), notwithstanding the economic soundness of such rules[27] or the (further) erosion of party autonomy by redistributive measures,[28] suggests that the contract would ultimately stand on formation rules. In addition, the binding effects of pre-contractual

[20] Colin P Marks, 'Not What, but When Is an Offer: Rehabilitating the Rolling Contract' (2013) 46 Connecticut Law Review 73, 113-117.

[21] See s 113 UCITA and particularly s 113(c) thereof.

[22] John E Murray Jr, 'The Definitive 'Battle of the Forms': Chaos Revisited' (2000) 20 Journal of Law and Commerce 1, 36-41.

[23] Compare Rob Schultz, 'Rolling Contract Formation under the UN Convention on Contracts for the International Sale of Goods' (2001-02) 35 Cornell International Law Journal 263, 282.

[24] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1.

[25] Wolfgang Hahnkamper, 'Acceptance of an Offer in Light of Electronic Communications' (2005) 25 Journal of Law and Commerce 147, 150.

[26] 306 F3d 17 (2d Cir 2002).

[27] Gerrit De Geest and Mitja Kovac, 'The Formation of Contracts in the Draft Common Frame of Reference' (2009) 17 European Review of Private Law 113, 127-131.

[28] Horst Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR' (2009) 5 European Review of Contract Law 109, 121-130.

statements[29] present in European contract law (Article 2(2)(d) of the 1999 Consumer Sales Directive,[30] Article 6(5) of the Consumer Rights Directive, Article II.-9:102 DCFR, Article 69 CESL and Article 6:101 PECL) certainly influence the content of a transaction in terms of enforcement of party's rights acquired under certain statements but do not seem to influence contract formation in terms of modified acceptance. Finally, rules on e-contracting also do not seem to shed new light on the matter.[31]

3. G2C Transactions

G2C transactions generally cover areas where public entities and authorities offer goods, but mostly services, to citizens who may or may not be defined as consumers in terms of consumer law. In some cases, private entities may also be involved. One may speak of public services, services of general interest, services of general economic interest, etc.[32] The Services Directive[33] covers such services in EU law, although some exceptions exist.[34] Even though the competence of the EU in the sectors of health and education,[35] social services,[36] etc may be questioned, the issue concerned here is the application of general contract law rules to G2C transactions where services are generally provided for on a contractual basis. EU rules do not seem to question the general application of contract law rules where G2C transactions come into play. Only issues similar to those of B2C transactions may therefore arise. Such may be the case, for example, when a patient gives informed consent to medical intervention. Government intervention plays a significant role where the provision of services to citizens is concerned but this does not mean that modified acceptance issues do not arise. They are to be settled, *per analogiam*, by rules on B2C transactions.

4. G2B Transactions

G2B transactions cover interactions with economic entities on the supply of goods or the provision of services. Such interactions are undertaken to satisfy the needs of public authorities although special rules may also provide for an extension to private entities that provide public services. In most cases, we speak of public procurement transactions although even then exceptions to the necessity to undertake a public procurement procedure may exist. Concessions and public-private partnerships may also be involved. In any case, as with G2C transactions,

[29] Reiner Schulze, 'Precontractual Duties and Conclusion of Contract in European Law' (2005) 13 European Review of Private Law 841, 852-855.

[30] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12. This is also the case with Article 7(1)(d) of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L 136/28, as it also is with Article 7(1)(b) of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

[31] Daniel Keating, 'Exploring the Battle of the Forms in Action' (2000) 98 Michigan Law Review 2678, 2712-2713.

[32] See European Commission, A Quality Framework for Services of General Interest in Europe, 20 December 2011, COM(2011) 900 final.

[33] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

[34] See Maria Wiberg, *The EU Services Directive: Law or Simply Policy?* (T.M.C. Asser Press 2014).

[35] See Laura Nistor, *Public Services and the European Union: Healthcare, Health Insurance and Education Services* (T.M.C. Asser Press 2011).

[36] See Caroline Wehlander, *Services of General Economic Interest as a Constitutional Concept of EU Law* (T.M.C. Asser Press 2016).

general contract law rules do apply because goods are supplied, services are rendered and cooperation is established on a contractual basis. In a public procurement procedure, applying to tender may certainly be construed as an offer in contract law terms while the tender may be deemed as an invitation to treat. Of course, public procurement law uses different terminology.[37] An offer may be accepted, notwithstanding the administrative provisions of public procurement regulation, with modifications. General contract law rules will therefore apply. Such a conclusion may be held to oversimplify the issues concerned. One may argue that a public procurement contract is not deemed concluded until signed, so the decision on selecting the best offeror may still not put parties on contractual terrain. Administrative rules may also hold the contract concluded contrary to public procurement procedures null and void. On the other hand, this is so not because of improper formation but rather due to breach of the same administrative rules that should have been applied. The Remedies Directives[38] also, fail to provide a clear resolution to the nullity issue. The CJEU[39] has likewise worked on resolving the issue. Although mentioned in the literature that the annulment of the administrative act for awarding of a public procurement contract leaves the contract without a legal basis,[40] the question is actually whether the basis for the contract is nonetheless consent, albeit reached by infringement of administrative rules. This author is not convinced that formation rules are bypassed by special rules on public procurements. Nullity may certainly follow, as a consumer contract may also be avoided for breach of pre-contractual information duties, but it is still properly formed. Modified acceptance issues are therefore to be settled, *per analogiam*, by rules on B2B transactions.

III. DISCUSSION ON THE CURRENT STATE OF EUROPEAN CONTRACT LAW

European projects on contract law are subject to many limitations, subjective and objective. The so-called 'spillover effect' of the CESL serving as a 'toolbox for judges',[41] even if it had been adopted, seems less probable as time passes. Of course, it is rather easier to make such a conclusion from this perspective. What ultimately remains is that mayor codification projects are useful from an academic perspective but have little practical relevance. The capacity of the EU legislator emanating in the optional character[42] of the CESL is simply an example of the obstacles present. Truth be told, the European legislator is substantially confronted with impediments not much different from those encountered when drafting rules that are to be applicable despite different legal traditions. The positive experiences of the CISG still seem to resonate in comparative and international contract law. It has therefore been suggested that UNCITRAL should continue where it left off with the CISG and formulate a 'general contract

[37] William S Curry, *Government Contracting: Promises and Perils* (CRC Press 2010) 22-26.
[38] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76/14.
[39] Case C-314/01 *Siemens v Hauptverband* [2004] ECR I-02549.
[40] Christopher H Bovis, *EU Public Procurement Law* (Edward Elgar 2007) 375.
[41] Martijn W Hesselink, 'A Toolbox for European Judges' (2011) 17 European Law Journal 441.
[42] Simon Whittaker, 'The Proposed 'Common European Sales Law': Legal Framework and the Agreement of the Parties' (2012) 75 Modern Law Review 578, 596-603.

law' that would nevertheless be applicable only in commercial transactions.[43] The feasibility of covering B2C transactions is disputed because national laws differ significantly. On the other hand, this was also the case with commercial sales before UNIDROIT and UNCITRAL performed their work.

Historically, international standard contracts have played a significant role in the unification of commercial law.[44] In the meantime, however, standard contracts have continuously ceased to be model contracts that are, more or less, neutral and have become parties' mechanism for contracting on their own terms. Rules embedded in international legal instruments have therefore become the most suitable vehicle. Of course, every legal instrument has its shortcomings due to the particular socio-economic relations in which it has been drafted. The same can be said for the CISG especially bearing in mind its international character and the need to find proper solutions in spite of different legal traditions.[45] Returning to the point, the issue is, therefore, to establish whether the same can be done for consumer contract law, at least in a European perspective. The CESL may have missed the mark but an optional instrument providing a so-called 'blue button' developed mainly for online sales under which the display of a blue icon that entails that a sale has been entered under EU law[46] is still e feasible solution in consumer matters.

Previous discussions certainly raise some questions on the scope and the content of codification-directed projects. Finding and fixing a problem may offer the rule-maker more time and perspective on the problem without bothering to build a system that may be better but ultimately unrealistic. When focused on a concrete problem as, for example, pre-contractual disclosure, the problem-solver may be better equipped to draft a clear rule and certainly try to outline a proper solution for its enforcement. By regulating multiple rights, especially where consumers come into play, and not providing for proper remedies, the European legislator has put itself in its current position. All those concerns are ultimately relevant where modified acceptance comes into play. The review of available rules on B2B, B2C, G2C and G2B transactions reveals that the approach may seem unified but this may be so due to the lack of a system. Further, the structure of European contract law and the content of EU instruments show that while common rules are developed they are not part of EU legislation.

Finally, it has to be ascertained whether the lack of a system creates only an illusion of uniformity. The way of dealing with information asymmetry in European contract law may be a good indication on the matter. The availability of terms in advance does nothing to improve their content or even to help consumers make informed decisions. Even more, the existence of an *ex ante* opportunity to read reduces the chance of finding certain terms unconscionable *ex post*. Alternative modes such as contract rating and labelling are hence proposed.[47] In all fairness, it is hard to conclude that informed decisions are not influenced by 'opportunity to read' rules. Empirical studies on the readability of insurance contracts have shown that readability increases the trust and confidence of consumers in the sense that it increases their expectations of the

[43] Ingeborg Schwenzer, 'Regional and Global Unification of Contract Law' in Mary Keyes and Therese Wilson (eds), *Codifying Contract Law: International and Consumer Law Perspectives* (Ashgate 2014) 51-55.

[44] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1968) 17 International & Comparative Law Quarterly 551, 557-565.

[45] Ingeborg Schwenzer and Florian Mohs, 'Old Habits Die Hard: Traditional Contract Formation in a Modern World' (2006) 6 Internationales Handelsrecht 239, 246.

[46] Hans Schulte-Nölke, 'EC Law on the Formation of Contract: from the Common Frame of Reference to the 'Blue Button'' (2007) 3 European Review of Contract Law 332, 348-349.

[47] Omri Ben-Shahar, 'The Myth of the 'Opportunity to Read' in Contract Law' (2009) 5 European Review of Contract Law 1, 20-27.

claim. It is interesting, on the other hand, that only partial evidence suggesting that reading ease also increases consumers' willingness to engage in legal action in the case of subsequent claim denial was found.[48] The non-finding of a direct effect of reading ease on the party's willingness to engage in conflict is quite interesting. Such studies, therefore, at least for this author, only confirm what a lawyer would instinctively know or deduce from experience. Pre-contractual disclosures have also been found to be 'quixotic' so a process of so-called 'term substantiation' through which sellers would learn whether their consumers held accurate beliefs about the terms of their agreement is suggested. Sellers could enforce unexpected and unfavourable terms only if they are disclosed in a 'warning box' that has government-provided standard borders.[49] Insights into comparative approaches also show that the imposing of a duty to read does not seem to solve the problem[50] because parties probably will continue not to do so. At the end of the day, existing rules on contract formation still seem to be sufficient to cover modern contracting practices. Consumer contracts certainly require rules to ensure that actual informed consent exists, but the contract is ultimately formed on general contract law rules.

IV. CONCLUSIONS

1. Adequacy of New Rules

Previous discussions offer grounds to conclude that while European contract law has attempted to correct many problems present in practice, those rules have eventually been without a substantive effect on contract formation; modified acceptance being included. Rules related to B2B and B2C transactions are based on identical presumptions while those on G2C and G2B transactions reveal that an intrinsic need for special rules on modified acceptance where different types of transactions come into play cannot be stated. Claims related to the 'formation of consumer contracts' or the emergence of the so-called 'public contract law' can thus be ultimately brought into question. Formation rules remain the same in a unified manner. The adequacy of current rules is another issue. A unified approach may be functional on current rules but what this author would like to do is take a step back and examine the feasibility of rules and concepts preceding the existing and finally establish the possibility of a unified approach under such rules and concepts. The subject matters of concern are hence not only issues relating to uniformity but also those relating to adequacy. In other words, even if current rules can be treated as common ones, the issue of uniformity may have been better served by other rules, although also common ones.

It is evident that the sources of European contract law have followed the logic of the CISG while further expanding the issue on the battle of the forms. The 'mirror-image' doctrine has been overruled on silence arguments in cases where the modified acceptance contains non-material modifications. Even where the 'mirror-image' doctrine remains applicable, practice has demonstrated reverence to the *favor contractus* principles when finding a contract on the 'last shot' rule by using the performance argument. General interpretation principles, contrary to the categorical expression that modified acceptance terminates the effect of the acceptance, may lead

[48] Willem H Van Boom, Pieter Desmet and Mark Van Dam, ''If It's Easy to Read, It's Easy to Claim': The Effect of the Readability of Insurance Contracts on Consumer Expectations and Conflict Behaviour' (2016) 39 Journal of Consumer Policy 187, 195-196.

[49] Ian Ayres and Alan Schwartz, 'The No-Reading Problem in Consumer Contract Law' (2014) 66 Stanford Law Review 545, 579-595.

[50] Avery Katz, 'Your Terms or Mine?: The Duty to Read the Fine Print in Contracts' (1990) 21 RAND Journal of Economics 518, 536.

to a conclusion that by claiming acceptance subject to certain modifications the offeree actually concedes that the offer is 'still on the table'.[51] The CISG, the PECL, the DCFR and the CESL essentially accept such interpretational approaches. On the other hand, although it may be true that the 'mirror-image' doctrine does not concern the effects of a modified acceptance but only decides on what modified acceptance is, the *favor contractus* principle inserts itself almost imperceptibly. Because offer and acceptance are ultimately parts of the coordination process, the 'mirror-image' doctrine does provide answers on contract formation. Under the 'mirror-image' doctrine, an acceptance with modifications is thus a modified acceptance that cannot amount to contract formation on its terms. What remains to be dealt with is whether rules on modified acceptance overruling the 'mirror-image' doctrine are adequate in broader contract law surroundings.

The *favor contractus* principle, as applied in practice, induces courts and arbitrators to find that a contract is formed as fully as possible. It may be true that, in practice, the parties more frequently dispute the content of a contract and not its formation.[52] It may also be 'fortunate that problems arising out of the 'battle of the forms' do not arise more frequently considering that legal science has not yet found a satisfactory modus to decide what the parties have 'agreed' when they have consummated a transaction on the basis of the routine exchange of inconsistent forms'.[53] Nevertheless, such conclusions seem too formal because a party may well be expected not to dispute the contract under the presumption that it is entered into on its own terms. Bargaining may well be a 'noncooperative game' in terms of the economic analysis of law.[54] A party will strive to impose its terms even if this cannot be considered rational behaviour bearing in mind that a party 'lives' from the conclusion and subsequent performance of contracts. If finding a contract on a party's terms becomes less probable during the dispute, a party may well question the formation. Such a claim logically strives/aspires/ arises from this party's perceptions and one cannot automatically find that the party is acting in bad faith even in performance is undertaken. Imposing a contract on the parties in such cases is thus artificial because courts and arbitrators ultimately establish a legal fiction. Finding that no contract is formed and directing parties to other legal institutes, as those of the law of unjust enrichment, may not always be 'as harsh a consequence as may appear'.[55]

2. Returning to the 'mirror-image' Doctrine

A contract is ultimately found where the parties are under agreement and other legal conditions for entering into a contract are met. The agreement, itself, is based on parties' consent. Much has been said in legal theory about the importance of consent in contract law. So-called promise theories have been overruled in favour of the so-called consent theory[56] although promises do not displace the role of consent.[57] Setting such discussions aside, no one negates that when people

[51] Melvin A Eisenberg, 'Expression Rules in Contract Law and Problems of Offer and Acceptance' (1994) 82 California Law Review 1127, 1161-1166.
[52] Roy Goode, *Commercial Law* (3rd ed, Penguin 2004) 73.
[53] John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (2nd ed, Kluwer 1991) 228.
[54] Avery Katz, 'The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation' (1990) 89 Michigan Law Review 215, 293.
[55] Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (6th ed, Clarendon Press 2005) 55-56.
[56] See, for eg, Randy E Barnett, '...And Contractual Consent' (1993) 3 Southern California Interdisciplinary Law Journal 421, 433-437.
[57] Patrick S Atiyah, *Promises, Morals, and Law* (Clarendon Press 1991) 177-184.

consent they make an agreement that is more than a sum of its parts because parties promise jointly.[58] On the other hand, indeed, contract law has always been somewhat artificial on finding consent. Because no contract is ever complete, its gaps are supplemented by default rules. The issue is discussed at length in literature in order to establish the best approach when drafting default rules or deciding on the approach undertaken by courts in a particular case.[59] Legal literature has tried to settle such issues by proposing how the concept of consent may influence the types of default rules that should be used for filling contractual gaps.[60] Furthermore, the so-called relational theory that focuses on parties' behaviour through time[61] has been proposed. Finally, some eclectic approaches have also been proposed.[62] One may well suggest that such phrasing on the different approaches oversimplifies the issue and this author is glad to concede.

Nonetheless, the debate on default rules may rightly be criticised from a predominantly legal viewpoint.[63] Law has functioned for millennia on some basic ideological stances notwithstanding different socio-economic relations. This author would not claim that the influence of socio-economic relations is overstated but only that they have been constant because parties have wanted essentially the same thing: to have a contract based on their needs that are finally expressed as a joint intent. If courts or arbitrators cannot find such a situation, then they should not find that a contract is properly formed. The 'mirror-image' doctrine falls within such parameters and this author does not identify sufficient need for its abandonment. Contracts have always been formed on the so-called 'areas of agreement'.[64] The 'mirror-image' rule should, therefore, be restated and used as the basic concept when deciding that a contract has actually been formed. Silence arguments are therefore rejected as fictitious. Furthermore, performance arguments amounting to the 'last shot' rule are also rejected due to artificiality that finds consent where it is not present.

Legal rules must be functional and not excessively rigid. Real-life poses challenges to be dealt with. This author would not go as far as proposing that a so-called 'dynamic contract law' has emerged by opposing many traditional presumptions.[65] Such contentions, although interesting and correct on many issues seem farfetched in supposing that the modern contract law is something entirely new. Even where some traditional offer-acceptance mechanisms do not work, like the cases where communication is not sufficiently definite to be an offer, they apply *per analogiam*. Contract law has never attempted to reduce reality to its frameworks but has

[58] Hanoch Sheinman, 'Agreement as Joint Promise' in Hanoch Sheinman (ed), *Promises and Agreements: Philosophical Essays* (Oxford University Press 2011) 380-384.
[59] Russell Korobkin, 'The Status Quo Bias and Contract Default Rules' (1998) 83 Cornell Law Review 608.
[60] Randy E Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 Virginia Law Review 821, 894-897.
[61] Robert E Scott, 'A Relational Theory of Default Rules for Commercial Contracts' (1990) 19 Journal of Legal Studies 597, 613-615; Jay M Feinman, 'Relation Contract and Default Rules' (1993) 3 Southern California Interdisciplinary Law Journal 43, 54-58.
[62] C A Riley, 'Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency' (2000) 20 Oxford Journal of Legal Studies 367, 389-390.
[63] Dennis Patterson, 'The Pseudo-Debate over Default Rules in Contract Law' (1993) 3 Southern California Interdisciplinary Law Journal 235. See also Steven J Burton, 'Comment on Professor Patterson's Pseudo-Debate over Default Rules in Contract Law' (1993) 3 Southern California Interdisciplinary Law Journal 303; Lawrence B Solum, 'The Boundaries of Legal Discourse and the Debate over Default Rules in Contract Law' (1993) 3 Southern California Interdisciplinary Law Journal 311.
[64] Morris G Shanker, 'Contract by Disagreement (Reflections on UCC 2-207)' (1976) 81 Commercial Law Journal 453, 458.
[65] Melvin A Eisenberg, 'The Emergence of Dynamic Contract Law' (2000) 88 California Law Review 1743.

worked to establish rules which would be applicable thorough time and on changing socio-economic relations. Exceptions have always existed so courts and arbitrators may well find a contract in minimalistic terms but only as an account of parties' intentions and on the so-called essential terms. A flexible solution which deduces that a contract is made on intent and commitment to be bound while 'knocking out' non agreed terms and supplementing its content with usages, established practice, statutory rules, etc[66] is well advised. Such an approach is particularly reasonable and sound[67] but it still does not clearly state the impact of the *favor contractus* principle, neither in terms of policy nor in terms of the law. The restated 'mirror-image' doctrine should, therefore, be the starting point of every formation analysis. On the other hand, where sufficient agreement on essential terms is found, as an account of parties' intentions, supplementation by default rules may also be artificial but in a significantly lesser degree than under modified acceptance rules.

3. Final Remarks

What finally remains is to ascertain the adequacy of the model proposed above for the different types of transactions discussed. The 'mirror-image' doctrine would function well in commercial transactions by not imposing contracts contrary to parties' expectations. Usages and established practices, on the other hand, could provide grounds for concluding that the parties have agreed sufficiently in order to conclude a contract. A 'knock out' rule would function well because incentivising the parties to act in a certain manner is actually one of the tasks of contract law, in ideological terms. Economic arguments do play a role but not a determining one. In consumer transactions, the 'mirror-image' doctrine would also serve to incentivise traders not to impose potentially unfair terms on consumers, particularly where the consumer makes the offer. Not finding a contract on the 'last shot' rule or applying the 'knock out' rule where sufficient agreement on essential terms is found would function well, for example, where 'rolling' contracts are concerned. In current EU consumer contract law,[68] this may serve as an additional tool for unfair terms control. On G2C and G2B transactions, the discussion above has shown that particularities of such transactions are not sufficient to discard formation rules of general or traditional contract law. One may question the applicability of the 'mirror-image' doctrine in G2B contracts, for eg, in terms of finding a counteroffer, but contracting by breaching administrative rules should be (and actually is) settled under different legal remedies, contractual or not. Not finding a G2B contract under the 'mirror-image' doctrine may also be tempting as it addresses many of the (legitimate) administrative concerns.

As shown above, specifics relating to particular types of transactions do exist; special rules on modified acceptance are however not necessary. General contract law rules on formation apply notwithstanding whether the 'mirror-image' is overruled or not. The need of imposition of various protective mechanisms in B2C transactions certainly remains but reviewed rules demonstrate that such problems may be dealt with by using other legal institutes. Form contracts are thus not illegitimate *ipso facto*; if not for other reasons then because the acceptor indicates his 'assent to be legally bound' while 'law does not, and should not, bar all assumptions of risk'.[69]

[66] Corneill A Stephens, 'Escape from the Battle of the Forms' (2007) 11 Lewis & Clark Law Review 233, 260-264.
[67] Charles M Thatcher, 'Sales Contract Formation and Content: An Annotated Apology for a Proposed Revision of Uniform Commercial Code 2-207' (1987) 32 South Dakota Law Review 181, 248-251.
[68] Stefan Grundmann, 'A Modern Standard Contract Terms Law from Reasonable Assent to Enhanced Fairness Control: A View on Digital Environments and Post-Transaction Assent' (2019) 15 European Review of Contract Law 148, 156-158.
[69] Randy E Barnett, 'Consenting to Form Contracts' (2002) 71 Fordham Law Review 627, 634-636.

The question, on the other hand, is whether the law should permit enforcement of 'grumbling' acceptances in surroundings where actual consent is ultimately brought into question. Legitimate concerns also exist in G2C transactions. Here also, such concerns should be settled under different legal rules. A good example is the refusal of providers of services to enter into contracts. The solution, on the other hand, seems to lie not in rules concerning the formation of contracts, *sensu stricto*, but in rules concerning compulsory contracting.

This author suggests that a unified approach is quite possible and functional, although by applying the primary concept established by the 'mirror-image' doctrine. The article intentionally omits civil transactions although the 'mirror-image' doctrine is primarily developed under such transactions. Such an approach was undertaken in order to establish and review the predominant specifics of B2B, B2C, G2C and G2B transactions in terms of modified acceptance and then to draw conclusions on the possibility of a unified approach without 'muddying the waters' at the outset. Concerning the accepted approach, one sided views and approaches may finally prove useful if one consults, opposes and finally states a claim[70] which, despite being held as rejecting an other's view or approach, leaves an author either comfortable with his own arguments or, ideally, enriched by new perspectives on the issue. At the end of the day, this article may seem unfruitful since the author himself is not convinced of the significance of harmonization or unification issues in an EU context; at least where contract law is concerned. Some claims related to G2C and G2B transactions may also be found to be speculative. On the other hand, two things seem to stand out. The first is that general contract law rules still play a significant role in all types of transactions and are thus enabling the existence of a unified approach due to their functionality. The second is that traditional contract law rules seem more adequate to deal with the problems of modified acceptance in relation to new rules, irrespective of the inventiveness of the latter.

The issue of modified acceptance, in terms of the possibility for a unified approach, has therefore been used to ascertain its feasibility when applying it to B2B, B2C, G2C and G2B transactions. When all is said and done, the best solution is, therefore, to focus on the consent in terms of the 'mirror-image' doctrine. If it were properly applied, one would not speak of the adequacy of modified acceptance rules for B2B, B2C, G2C and G2B transactions but merely of the consent that ultimately results in the contract's enforceability. Consent issues will be settled in terms of the 'mirror-image' doctrine and a person, notwithstanding whether it is a consumer, a trader or a public authority will not be bound by terms that it does not find acceptable. Other appropriate legal remedies, of course, remain.

[70] Randy E Barnett, 'The Virtues of Redundancy in Legal Thought' (1990) 38 Cleveland State Law Review 153.