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Lord Denning's influence on contract formation in Singapore—an overdue demise?

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ABSTRACT
In a series of inconsistent decisions by the Singapore courts on contract formation in continuing negotiations cases, Lord Denning's broad approach—which does away with the traditional offer and acceptance analysis—appears to have been simultaneously adopted and rejected. This article suggests that the continued uncertainty in Singapore regarding the scope of application of the traditional approach and Lord Denning's approach arises from a conflation of both as being substantially similar. This article further argues that both approaches are conceptually and practically distinct. A better way forward for Singapore law in the area of contract formation in continuing negotiations cases, having regard to developments in English law and a comparative study of various approaches taken in international instruments and jurisdictions around the world, is to affirm the traditional approach as the default rule, subject to displacement in exceptional situations.

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1. Introduction

The Singapore courts, in determining questions of contract formation, have espoused the importance of ensuring that the 'reasonable expectations of honest men are not disappointed'.[1] To this end, it is well-established that the test of agreement is an objective one.[2] However, in the sphere of determining whether an agreement has been reached in the face of continuing negotiations, the principles of law in Singapore relating to *what* constitutes an objective intention to contract are not as clear and well-settled as desired.

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[1]*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 (Singapore Court of Appeal (SGCA)) [40].

[2]The objective test of agreement is in fact partly objective and partly subjective: *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 2 SLR(R) 440 (SGCA) [32]. See also Andrew Phang Boon Leong (gen ed), *The Law of Contract in Singapore* (Academy Publishing 2012) paras 03.006–14.

The conventional starting point is that 'the concepts of offer and acceptance constitute the objective manifestations of an intention to contract'.[3] Offer and acceptance have thus traditionally been the tools of analysis to ascertain if a contract has been validly formed[4] (the traditional approach). However, this analysis arguably does not lend itself easily to application in continuing negotiations cases. Such cases typically involve a convoluted course of negotiation between the parties regarding the terms of their agreement, which eventually results in parties undertaking performance.[5] This renders it potentially difficult to identify a clear instance of offer and acceptance in order to define whether there was an agreement at all and on what terms. Battle of the forms cases may well be said to overlap with or to constitute a sub-set of this category: such cases occur where parties exchange standard form contracts with substantially different terms and subsequently fall into disagreement as to whose standard terms govern the agreement between them.

Due to these difficulties, the traditional approach was rejected by Lord Denning in favour of an approach that simply calls on the court to

> examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards.[6] (Lord Denning's approach)

To the extent that Lord Denning's approach did away with the long-standing concepts of offer and acceptance, this represented a departure from the prevailing jurisprudence on contract formation.[7]

Lord Denning's approach has been frowned upon by the English courts and its scope of application has been narrowed significantly to only rare and exceptional situations.[8] In contrast, a survey of Singaporean jurisprudence reveals that the position in Singapore is far murkier in the realm of contract formation concerning continuing negotiation scenarios. The Singapore Court of Appeal (SGCA), which is the highest court of the land, has on separate occasions endorsed and rejected Lord Denning's approach when determining agreement in the face of continuing negotiations between parties. In a series of seemingly irreconcilable decisions, Singapore courts have also given

[3]Phang (n 2) para 03.006.
[4]Phang (n 2) para 03.006.
[5]Where the continuing negotiations are broken off and do not result in performance, the issue becomes whether good faith obligations are engaged. Such cases are not the subject of this article.
[6]*Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5 (UK Court of Appeal (UKCA)) 10. See also *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965, [1979] 1 WLR 401 (UKCA), 404; *Gibson v Manchester City Council* [1978] 1 WLR 520 (UKCA) (*Gibson (CA)*), 523–24.
[7]Hugh Beale (gen ed), *Chitty on Contracts*, vol 1 (32nd edn, Sweet & Maxwell 2015) para 2-118 characterises Lord Denning's approach as an 'outright rejection' of the traditional approach.
[8]See *Gibson v Manchester City Council* [1979] 1 WLR 294, 297 (UK House of Lords (UKHL)) (*Gibson (HL)*). See also *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209.

differing pronouncements on the applicable approach and at times have endorsed Lord Denning's approach but applied the traditional approach. Thus the case law in Singapore on contract formation evinces a continued tension between the traditional approach and Lord Denning's approach, with considerable uncertainty as to the relationship between both approaches and the continued applicability of Lord Denning's approach.

This article suggests that the troubling state of law in Singapore is attributable to the local courts' conflation of both the traditional approach and Lord Denning's approach as being substantially similar. In contrast to the prevailing judicial attitude in Singapore, it is argued that both approaches are conceptually and practically distinct. This piece assesses the relative merits of both approaches with reference to a variety of factors (such as the ability to cohere with existing principles of contract law, give effect to parties' intentions, and provide certainty in commercial relationships). The article then suggests, having regard to recent developments in English law[9] in this area and a comparative study of different approaches taken by international instruments and various jurisdictions around the world, that the best way forward for the development of Singapore law is to affirm the application of the traditional approach as the default framework for finding agreement in continuing negotiation situations, but to allow the courts in exceptional situations to displace this approach with a broader inquiry directed at the parties' intentions as evinced through their overall conduct and correspondence.

2. Background

It is a well-established principle of contract law that contractual formation is determined objectively. However, two competing approaches exist in the application of the objective test.

2.1. The traditional approach

Parties' intentions have traditionally been determined through the twin concepts of offer and acceptance.[10] It is a trite principle of law that: (a) an offer is 'an expression of willingness to contract on specified terms made with the intention (actual or apparent) that it is to become binding as soon as it is accepted by the person to whom it is addressed'; (b) an acceptance means 'a final and unqualified expression of assent to the terms of an offer'; and (c) no agreement is formed if the reply attempts to vary the offer terms or

[9]It is worth noting that the Singapore legal system has traditionally had its roots in English law; even today, as Singapore seeks to grow an autochthonous body of law, Singapore courts continue to rely heavily on the English position as persuasive authority.

[10]Phang (n 2) para 03.006.

introduces new terms.[11] This approach has been described as the 'mirror image' rule for finding existence of an agreement.[12]

2.2. Lord Denning's approach

However, in a series of three judgments Lord Denning espoused an alternative interpretation of the objective test.

The first judgment was the English Court of Appeal (UKCA) decision of *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons*.[13] The buyers of cotton disagreed with a provision in the sellers' contracts of purchase which specified India as the only destination of the cotton, and cabled the sellers to clarify whether the cotton could be shipped to other ports. The sellers agreed by cable that they would ship the cotton to other ports provided that the payment was made in foreign currency. Satisfied, the buyers returned the signed contracts to the sellers, but neglected to amend the 'Destination India' provision in the contracts. Subsequently the sellers refused to ship to destinations other than India, although the evidence showed that the sellers were constrained by restrictions imposed by the authorities, but otherwise considered themselves bound by contract to ship to other destinations.

Applying the traditional approach, Lord Justice Browne held that the sellers' cable was a counter-offer which the buyers accepted by returning the signed contracts; however, the signed contracts must be read with the cables, such that there was a contract on terms of the signed contracts as modified by the cables. With respect, the interpretation taken by Browne LJ appears to be somewhat artificial—it is arguable that no contract ought to have been found because the purported acceptance was not a mirror image of the counter-offer. This artificiality, coupled with the Court's reluctance to decide that there was no contract where businessmen had already acted on the basis that there was a contract between them, could have been the trigger for Lord Denning to depart from the traditional approach and to espouse his first formulation of his novel approach to formation:

> In considering this question, I do not much like the analysis in the text-books of inquiring whether there was an offer and acceptance, or a counter-offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards.[14]

[11] Beale (n 7) paras 2-003, 2-026, 2-031.
[12] Corneill A Stephens, 'Escape from the Battle of the Forms: Keep It Simple, Stupid' (2007) 11 Lewis & Clark Law Review 233, 237.
[13] *Port Sudan Cotton* (n 6).
[14] *Port Sudan Cotton* (n 6) 10. Notably Lord Denning, applying his wider approach, arrived at the same conclusion at which Browne LJ applying the traditional approach did.

Applying this principle to the facts in *Port Sudan Cotton*, Lord Denning reached the same conclusion but on the basis that the sellers' cable agreeing to ship to other ports was 'obviously acceptable'[15] to the buyers, so there was no need for the buyers to specifically cable their agreement.

Lord Denning next applied this approach in *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd*.[16] The essence of the dispute in *Butler Machine* was whether a price variation clause was part of the terms of the contract. The seller's quotation included the price variation clause, but this was missing in the buyer's order form. The buyer's order form included a tear-off acknowledgement form stating that a signature and return accepted the terms and conditions thereon. The seller duly returned the acknowledgement form, but with a cover letter stating that delivery would be in accordance to the terms in the original quotation. When the seller invoked the price variation clause to claim a price increase due to a delay in the buyer's acceptance of the delivery, the buyer argued that the clause was not part of the contract. The key issue before the CA was when the contract was concluded, and on what terms.

Plainly there were discrepancies between the documents exchanged by parties that would pose difficulties to the 'mirror image' rule under the traditional approach. Yet a finding of no contract would have been a setback to parties' commercial expectations, given that the machine had already been built on the basis that the contract subsisted. The majority, applying the traditional analysis, held that a contract had indeed been reached on the buyers' terms, as the seller's return of the acknowledgment form had the effect of accepting the buyer's counter-offer without the price variation clause. Therefore, the seller's accompanying cover letter had no contractual effect.[17] While one may argue that the majority had simply made an evidential finding that the seller had objectively accepted the buyer's terms and given up on the price variation clause when he returned the acknowledgement form, resulting in a mirror image, in truth, the majority had to utilise 'a rather strained interpretation of the facts' to find agreement.[18] This may have been the reason that Lord Denning once again declined to apply the traditional approach, declaring that it was 'out of date' for such cases. He advocated that the better way would be to glean from all the documents and from parties' conduct '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'.[19] Applying this wider approach, Lord Denning held that considering the documents as a whole, the crucial

[15] *Port Sudan Cotton* (n 6) 10.
[16] *Butler Machine* (n 6).
[17] *Butler Machine* (n 6) 406 (Lawton J) 408 (Bridge LJ).
[18] Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 87.
[19] *Butler Machine* (n 6) 404.

document was the seller's acknowledgement of the buyer's order form. Thus he was of the view that this document made it clear that the contract was on the buyer's terms, which did not include the price variation clause.

The final case in which Lord Denning had the opportunity to elaborate upon his approach to contract formation was the CA decision in *Gibson v Manchester City Council*.[20] At issue was whether a contract had been concluded between two parties who had engaged in continuing negotiations. In deciding the applicable principles for this case, Lord Denning reiterated that there was no need to look for strict offer and acceptance; rather, if the correspondence and parties' conduct showed an agreement on all material terms that was intended to be binding, that sufficed to form a binding contract in law.[21] Applying this principle to the facts, Lord Denning held that the correspondence between the parties, together with their subsequent conduct, showed that 'the parties were agreed and intended the agreement to be binding'.[22] His Lordship held that it was plain that the parties had agreed to all material terms and thus found that there was a concluded contract which could support an order of specific performance.

The preceding cases demonstrate that Lord Denning's approach to contract formation broadens the scope of enquiry that the court takes in determining whether a contract has been formed. It has been pointed out that the 'mirror image' rule under the traditional analysis tends to result in the conclusion that there is no contract, given that discrepancies can frequently be found between each side's terms, which may be contrary to parties' expectations particularly if they have already acted on the supposed contract.[23] Instead of taking an arguably technical interpretation of whether the facts fit within the strict framework of offer and acceptance, particularly in cases where it may have been felt that a finding of no contract would have defeated parties' legitimate commercial expectations, Lord Denning advocated a more flexible examination of the correspondence between the parties and their conduct to determine if there had been agreement on all material terms. Thus, Lord Denning's approach represents a departure from the traditional approach to the extent that it reduces the significance of the concepts of offer and acceptance as tools of analysis in contract formation. At this point, it suffices to note that Lord Denning's approach was formulated mainly in the context of situations where the traditional analysis may not have lent itself easily to application, such as continuing negotiations (including battle of the forms) cases. Lord Denning's approach may thus be seen as a reaction to the perceived rigidity of the traditional approach. The conceptual

[20] *Gibson (CA)* (n 6).
[21] *Gibson (CA)* (n 6) 523–24.
[22] *Gibson (CA)* (n 6) 524.
[23] McKendrick (n 18) 86.

distinctions between Lord Denning's approach and the traditional approach will be explored in Section 4 of this article.

2.3. The present position in English law on Lord Denning's approach

Lord Denning's proposal of a broader approach to contract formation has not found favour in the English courts. It first met with stern disapproval when the decision in *Gibson (CA)* was appealed to the House of Lords. In overturning the CA's decision, Lord Diplock in *Gibson v Manchester City Council*[24] asserted that 'it was by departing from this conventional approach [the traditional approach] that the majority of the Court of Appeal was led into error'.[25]

More recently, the CA in *Tekdata Interconnections Ltd v Amphenol Ltd*[26] confined Lord Denning's approach to the rare and exceptional situation where there was a very clear course of dealing between the parties which showed that the parties intended some other terms to apply—terms which would not have been part of the contract if the traditional approach were to be adopted.

There has been academic suggestion that Lord Denning's approach has found favour in the UK Supreme Court (SC) decision of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG*[27] (*RTS Flexible Systems*) (a decision which was published shortly after but without reference to *Tekdata*) on the basis that the Court did not identify any particular words or actions constituting offer and acceptance, but looked at the entire evidence to decide that essential agreement had been reached.[28] Respectfully, *RTS Flexible Systems* is at best weak authority for such a proposition, for two reasons. First, the specific inquiry before the court was the effect of the 'subject to contract' clause on the existence of agreement. As a matter of law, 'subject to contract' clauses raise difficulties relating to completeness of agreement and intention to create legal relations.[29] *RTS Flexible Systems* involved a draft contract that was 'subject to contract', although no contract was eventually executed. It was in this connection that the court held that if matters had ended there, the draft contract would not be binding because of the 'subject to contract' clause—and not because the parties had not reached agreement—although

[24] *Gibson (HL)* (n 8).
[25] *Gibson (HL)* (n 8) 297.
[26] *Tekdata* (n 8) 302.
[27] [2010] UKSC 14.
[28] Richard Stone, 'Forming Contracts without Offer and Acceptance, Lord Denning and the Harmonisation of English Contract Law' [2012] 4 Web Journal of Current Legal Issues <www.bailii.org/uk/other/journals/WebJCLI/2012/issue4/stone4.html> accessed 27 February 2017.
[29] Edwin Peel (ed), *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015) (Peel 2015) para 4-009: 'An agreement may be made "subject to contract", either expressly, or by implication. Such an agreement is incomplete until the details of a formal contract have been settled and approved by the parties'; Beale (n 7) para 2–125: 'Agreements "subject to contract" are normally regarded as incomplete until the terms of a formal contract have been settled and approved by the parties'.

on the particular facts a binding contract was found nonetheless.[30] Secondly, the SC did not address itself to any question of how the traditional approach and Lord Denning's approach should apply, which one would have expected had the court been minded to overrule the clear endorsement of the traditional approach as set out in *Gibson (HL)*.

It is also significant that the English High Court in the recent decision of *Caroline Gibbs v Lakeside Developments Ltd*[31] did not perceive *RTS Flexible Systems* as adopting Lord Denning's approach. *RTS Flexible Systems* was first cited as authority for the proposition that the court ought to look at the entire correspondence to determine if a contract has been concluded in the course of correspondence. The Court then applied the offer and acceptance framework to determine whether a contract had so been concluded on the entire correspondence. Thus, the traditional approach was considered the right one to continue to apply.

With this background, we turn to examine how the Singapore courts have—inconsistently—applied and rationalised both the traditional approach and Lord Denning's approach.

3. Analysis of the inconsistencies in Singapore case law

Singapore courts have generally applied the traditional approach to determine the existence of agreement, whether in continuing negotiations cases or otherwise. The SGCA abruptly and decisively departed from this pattern in an important decision, *Projection Pte Ltd v Tai Ping Insurance*[32] (*Projection*). This was the first case to endorse and apply Lord Denning's approach in Singapore. Yet less than a decade later, the SGCA in *Gay Choon Ing v Loh Sze Ti Terence Peter*[33] (*Gay Choon Ing*) disapproved of Lord Denning's approach and signalled that the traditional approach should apply. Curiously, the SGCA made no reference to *Projection*. It also went on to comment that the traditional approach and Lord Denning's approach were substantially similar. Thus, in the wake of *Projection* and *Gay Choon Ing*, both approaches remain potentially applicable in Singapore law and, as a result, the state of the law in this area continues to lack certainty and clarity.

3.1. Projection and its associated difficulties

Projection concerned an insurer and insured party who were involved in continuing negotiations over the quantum of insurance payout, in the course of which the parties entered into oral negotiations for a settlement sum. During

[30] *RTS Flexible Systems* (n 27) [60], [61].
[31] [2016] EWHC 2203 (Ch).
[32] [2001] SGCA 28.
[33] [2009] SGCA 3.

the negotiations, the insured requested that the settlement sum be increased to S$553,560.98 but the insurer was unwilling to agree. Several weeks later, the insurer wrote to the insured, referring to the previous discussion, and agreeing to adjust the sum payable to S$553,560.98. The letter enclosed a discharge form which the insured duly signed and returned. The insurer later denied that any compromise agreement had been entered into and claimed that even if its letter constituted an offer, it had not been accepted in accordance with its terms. The central issue was thus whether an agreement had been reached between the parties. The SGCA found that there was an agreement as the receipt of the insurer's letter signalled that parties had arrived at a clear compromise on the settlement amount to be paid.[34] The discharge voucher was simply an acknowledgment and its execution could not have an effect on the validity or existence of the agreement.[35]

In reaching its decision, the SGCA observed that it is settled law that the objective test is applied in determining if the parties have reached agreement.[36] However, the SGCA then went on to assert more controversially that 'the parties were involved in continuing negotiations … over a period of time. In such cases, the traditional analysis of offer and acceptance is not really helpful in determining the true position'.[37] The SGCA then took the opportunity to affirm Lord Denning's approach as stated in *Port Sudan Cotton* and *Butler Machine*. The Court also cited a passage from A G Guest (gen ed), *Chitty on Contracts*, vol 1 (27th edn, Sweet & Maxwell 1994) (Chitty on Contracts 1994) as expressing a 'similar view'[38] to Lord Denning's approach:

> Continuing negotiations. When parties carry on lengthy negotiations, it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all. *The court must then look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If so, there is a contract even though both parties, or one of them, had reservations not expressed in the correspondence.*[39]

How should the effect of *Projection* on Singapore law be interpreted? One might conceivably postulate that the SGCA did not reject the traditional analysis entirely but was merely encouraging a less rigid way of applying it by looking at the entire context of negotiations. This view is unconvincing for

[34] *Projection* (n 32) [20].
[35] *Projection* (n 32) [21].
[36] *Projection* (n 32) [15].
[37] *Projection* (n 32) [16].
[38] *Projection* (n 32) [18].
[39] A G Guest (gen ed), *Chitty on Contracts*, vol 1 (27th edn, Sweet & Maxwell 1994) para 2-017 (emphasis by the court in *Projection*). See also the equivalent passage in Beale (n 7) para 2-027.

two reasons. First, from the language of the judgment,[40] the SGCA clearly regarded the approaches as *alternatives*, of which Denning's approach ought to be preferred as it was ostensibly more helpful than the traditional analysis in continuing negotiations cases. There was also no discussion of balancing or harmonising both approaches, as one would have otherwise expected. Secondly, the factual analysis was substantially aligned with Lord Denning's approach, instead of reflecting an inquiry to determine the presence of offer and acceptance.[41]

Therefore, the better view is that the SGCA was introducing the application of Lord Denning's approach to continuing negotiations cases as an *alternative* to the traditional framework in Singapore law.[42] It is surprising, however, that the SGCA would endorse Lord Denning's approach in Singapore law without addressing the English authorities (which, although non-binding, are persuasive) that had expressed grave doubts about Lord Denning's approach.[43]

More fundamentally, it is doubtful that proper conceptual justification exists for the SGCA preferring Lord Denning's approach to the traditional approach in continuing negotiations cases. It appears that the SGCA was influenced by its view that Lord Denning's approach enjoys academic support, given that the Court had identified the above-quoted passage from Chitty on Contracts 1994 in support of Lord Denning's approach. The passage appears to have been interpreted to mean that a court ought to look at the entire correspondence to decide whether parties had agreed upon all material terms, *without* having to construe the correspondence using the offer and acceptance framework. It is respectfully suggested that the SGCA's interpretation of this passage of Chitty on Contracts 1994 requires reconsideration. The passage properly construed was meant to highlight the difficulty in identifying the precise timing of offer and acceptance. It is precisely *within* the context of the traditional approach that the learned author cautioned that a court should look at the entire correspondence (and not at any one point in the negotiations) to find agreement. Indeed, immediately following the quoted passage, the learned author used the language of the traditional approach in his assertion that '[t]he court will look at the entire course of negotiations to decide whether an *apparently unqualified acceptance* did in fact conclude the agreement';[44] this would avoid the court finding a contract based on

[40] *Projection* (n 32) [16].
[41] See further discussion at Subsection 4.3 below.
[42] Phang (n 2) at para 03.113 supports this view:

> However, it should be mentioned that the Court of Approach in *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* did, interestingly enough, endorse the approach adopted by Lord Denning MR in *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd.*

[43] See Subsection 2.3 above.
[44] Guest (n 39) para 2-018 (emphasis added).

what may ostensibly appear to be an agreement when viewed in isolation. Further, the continuing negotiations cases noted in the passage from Chitty on Contracts 1994[45] consistently applied the traditional analysis in construing the entire correspondence. It is also noteworthy that continuing negotiations cases were not listed in a separate category of cases that the learned author regarded as exceptions to a general requirement of offer and acceptance.[46] Thus it is suggested that the SGCA's endorsement of Lord Denning's approach is not supportable by Chitty on Contracts 1994.

A further difficulty arises from *Projection*. While the SGCA preferred Lord Denning's approach, it did not dictate that Lord Denning's approach must be used to the exclusion of the traditional approach in continuing negotiations cases. Therefore, *Projection* left open both the traditional approach and Lord Denning's approach as applicable options. It is unfortunate that the SGCA did not provide guidance on the type of continuing negotiations cases in which the traditional approach may continue to be applicable. It is also unclear what type and extent of negotiations will amount to a continuing negotiation situation where the choice between both approaches must potentially be made. In sum, through the adoption of Lord Denning's approach based on questionable legal justifications, *Projection* introduced a significant degree of uncertainty into the law governing contract formation in Singapore, at least in continuing negotiations cases.

3.2. Gay Choon Ing

After nearly a decade of intervening judicial confusion,[47] an opportunity arose in *Gay Choon Ing* for the SGCA to clarify the law once and for all. A key issue on appeal was whether the parties had entered into a valid compromise agreement. The parties, Loh and Gay, were business partners of a company. For various reasons the parties' relations soured, although they eventually agreed in mid-October 2004 to resolve their dispute. At the end of October 2004, the parties signed a Points of Agreement (POA) for Loh to sell to Gay certain shares held on trust. Loh (on behalf of the company) and Gay also signed a waiver letter which provided that Gay would leave the company with a mutual waiver of claims between Gay and the company as against each other (Waiver Letter).

The SGCA held that a valid compromise agreement had been formed. The contemporaneous execution of the POA and Waiver Letter, which were concluded at a crucial point when the parties expressed a desire to resolve the dispute, marked the crystallisation of the ongoing negotiations between

[45]Guest (n 39) para 2-017, note 94. See also Beale (n 7) para 2-027, note 146.
[46]Guest (n 39) para 2-079. See also Beale (n 7) para 2-117–18.
[47]See the cases discussed at Subsection 3.3 below.

both parties into a legally binding agreement that settled their existing disputes.[48]

In reaching this finding, the SGCA observed that the traditional approach was 'probably the approach that has hitherto been adopted in the Singapore context'.[49] While acknowledging that the technical nature of the traditional approach may have prompted Lord Denning's approach, the SGCA regarded Lord Denning's approach as 'rather radical'[50] and highlighted that it has been neither adopted nor advocated by the English courts but was in fact rejected in *Gibson (HL)*.[51] The SGCA also affirmed Lord Diplock's observation in *Gibson (HL)* that a contract made by exchanges of correspondence between parties are not exceptional types of contract that fall out of the traditional analysis framework.[52] Against this background, the SGCA expressly concluded that the traditional approach is the correct approach to apply:

> Whilst it is true that the court concerned must examine the whole course of negotiations between the parties, this should be effected in accordance with the concepts of offer and acceptance. What *is* required, however, is a less mechanistic or dogmatic application of these concepts and this can be achieved by having regard to the *context* in which the agreement was concluded. Looked at in this light, the traditional approach is not, in substance at least, that different from the broad approach advocated by Lord Denning.[53]

Gay Choon Ing has thus made clear that the traditional approach is to be applied to construe the entire correspondence, and this is to be done with the context of the contract being borne in mind rather than in a 'mechanistic or dogmatic' fashion. Thus it provided some clarification of the correct approach to be adopted in Singapore law. Two aspects however require further clarification.

First, it is not clear what precisely the SGCA meant when it said that the traditional approach (when adopted in a context-sensitive manner) 'is not, in substance at least, that different' from Lord Denning's approach. Perhaps the SGCA meant either that both approaches are conceptually similar or that the approaches generally lead to the same practical result. With respect, both suggested interpretations require reconsideration. This issue will be discussed in further detail in Section 4 of this article.

The second aspect of the decision in *Gay Choon Ing* that calls for clarification concerns the continued relevance of *Projection*'s endorsement of Lord Denning's approach. In affirming the traditional approach over Lord

[48] *Gay Choon Ing* (n 33) [77].
[49] *Gay Choon Ing* (n 33) [63], referring to *The Master Stelios* [1982–1983] SLR 39 (Singapore Privy Council) and *Pac-Asian Service Pte Ltd v Westburne International Drilling Ltd* [1986] SLR 390 (Singapore High Court (SGHC)).
[50] *Gay Choon Ing* (n 33) [61]–[62].
[51] *Gay Choon Ing* (n 33) [63].
[52] *Gay Choon Ing* (n 33) [52], citing *Gibson (HL)* (n 8) 297.
[53] *Gay Choon Ing* (n 33) [63] (emphasis in original, internal citation omitted).

Denning's approach, the SGCA in *Gay Choon Ing* notably did not refer to the case of *Projection*. This has resulted in two potentially inconsistent SGCA authorities. It remains unclear whether Lord Denning's approach has been unequivocally rejected in favour of the traditional approach or whether it remains open to courts to choose between both approaches as alternatives; if the latter holds true, then the uncertainties raised by *Projection* still require resolution. Further, this raises the question of what courts should do in the event that both approaches lead to conflicting outcomes.

*3.3. Continuing confusion pre- and post-*Gay Choon Ing

Following *Projection*, the Singapore courts have demonstrated inconsistencies in articulating and applying Lord Denning's approach, both pre- and post-*Gay Choon Ing*.

In several decisions, the courts have articulated that Lord Denning's approach should apply to protracted negotiations, but have then incongruently analysed the facts using the traditional approach.[54] Indeed, the SGHC in *Lim Koon Park v Yap Jin Meng Bryan*[55] curiously suggested a 'modified' traditional approach in continuing negotiations, ie 'an objective test will be applied, *albeit* with some modifications to the traditional analysis of offer and acceptance', although this was unnecessary given that *Gay Choon Ing* had already endorsed the traditional approach.[56] On appeal, the SGCA did not comment on the correctness of the 'modified' traditional approach, but cited a passage from Edwin Peel (ed), *Treitel on the Law of Contract* (13th edn, Sweet & Maxwell 2011)[57] (Treitel) which was the equivalent passage from Chitty on Contracts 1994 that had been referred to in *Projection*.[58] Leading Singapore commentators have suggested that the SGCA's endorsement of the passage from Treitel raises the issue of whether Lord Denning's approach or the traditional approach should be applied in continuing negotiations.[59] These commentators answer this question by referring to *Gay Choon Ing* for the position that the traditional approach should apply, although there may be no real difference between the traditional approach and Lord Denning's approach. They also comment that the SGCA's endorsement of the passage in Treitel 'seems to suggest that it is indeed difficult to draw a sensible distinction between the traditional approach and Lord

[54]Overseas Union Insurance Ltd v Turegum Insurance Co [2001] SGHC 147; Smartbus Pte Ltd v Yeap Transport [2011] SGHC 129 (Smartbus); Lim Koon Park v Yap Jin Meng Bryan [2012] SGHC 159 (SGHC) (Lim Koon Park No 1 (SGHC)); [2013] SGCA 41 (Lim Koon Park No 2 (SGCA)).
[55]Lim Koon Park No 1 (SGHC) (n 54).
[56]Chee Ho Tham, Pey Woan Lee and Yihan Goh, 'Contract Law' (2012) 13 Singapore Academy of Law Annual Review of Singapore Cases 182 para 12.7.
[57]Edwin Peel (ed), *Treitel on the Law of Contract* (13th edn, Sweet & Maxwell 2011) para 2-017.
[58]*Projection* (n 32) [18].
[59]Chee Ho Tham, Pey Woan Lee and Yihan Goh, 'Contract Law' (2013) 14 Singapore Academy of Law Annual Review of Singapore Cases 221 para 12.5.

Denning's approach'.[60] With respect, the difficulties identified above do not arise if this article's proposed interpretation of the equivalent passage from Chitty on Contracts 1994 is adopted, namely that the passage does not mark a departure from the traditional approach but merely clarifies that a court must look at the whole correspondence in applying the traditional approach. If so, the SGCA's present endorsement of the passage in Treitel does not indicate its validation of Lord Denning's approach. On this view, it is also difficult to see why affirming that passage should indicate that it is hard to draw a distinction between both approaches.

The ambiguity post-*Projection* was also apparent in a different scenario in *Asirham Investment Pte Ltd v JSI Shipping (S) Pte Ltd*[61] (*Asirham Investment*). The parties had signed a tenancy agreement and the issue was whether the signed agreement was valid and binding. The learned judge cited *Projection* for Lord Denning's approach and held that the tenancy agreement was valid and enforceable since it contained all the material terms.[62] It is not entirely clear why or how Lord Denning's approach was used to arrive at the decision. Given that there was a signed agreement, there was no need for the Court to employ Lord Denning's approach (or, for that matter, the traditional approach) to deduce the *existence* of that agreement, even if the signed agreement may have arisen from protracted discussions; where parties have reduced their agreement to writing, the written agreement is 'the sole and almost conclusive proof of their agreement'[63] and any formation issue in dispute usually relates only to certainty or completeness.[64] It could be that the Court had applied Lord Denning's approach not to determine the existence of the agreement, which was clear, but to determine whether the terms of agreement were sufficiently complete and certain for the agreement to be valid and binding. Alternatively, Lord Denning's approach may have been used to determine *both* the existence and validity of agreement. In any case, *Asirham Investment* appears to extend the application of Lord Denning's approach beyond what may originally have been contemplated in *Projection*.[65]

Most recently, in *Sintalow Hardware Pte Ltd v OSK Engineering Pte Ltd*,[66] the plaintiff contended that 'the court should adopt a holistic approach in considering the conduct of the parties over the period during which negotiations took place rather than insisting on clear-cut evidence of offer and

[60]Tham, Lee and Goh (n 56) para 12.5.
[61][2007] SGHC 171 (SGHC).
[62]*Asirham Investment* (n 61) [10].
[63]Yock Lin Tan, 'Writing and Signature in the Constitution and Proof of Contracts' [2003] Singapore Journal of Legal Studies 333, 337.
[64]Michael Furmston and G J Tolhurst, *Contract Formation: Law and Practice* (OUP 2010) para 1.19.
[65]This point is further discussed under Subsection 4.2 below.
[66][2016] SGHC 104.

acceptance'.[67] The plaintiffs' submission presented a false dichotomy that the learned judge did not address herself to even though it ought to have been clear, post-*Gay Choon Ing*, that the holistic approach is not an alternative to the traditional analysis of offer and acceptance, but provides the context in which to apply this analysis.

4. Evaluation of the law

The present state of the law in Singapore regarding the test for formation in continuing negotiations cases can be stated thus. The incorporation of Lord Denning's approach in Singapore law by the SGCA in *Projection* introduced considerable uncertainty into the law governing contract formation. In *Gay Choon Ing*, the SGCA took steps towards clarifying the law by signalling a judicial preference for the traditional approach. However, the SGCA's comment that Lord Denning's approach and the traditional approach are the 'same in substance' encourages one to think that the two approaches are not materially different, and perhaps even can be used interchangeably. With respect, the present state of Singapore law does not accurately reflect the distinctions between the two approaches, and introduces uncertainty as to the continued validity of Lord Denning's approach. This can create confusion with regard to the applicable approach to determine the existence of an agreement in continuing negotiations cases.

In the following subsections, this article will argue that, in contrast to the view of the SGCA in *Gay Choon Ing*, the two approaches are distinct from each other both conceptually and practically. Since the approaches are distinct, the question arises as to which approach should be preferred. To answer this question, this article assesses both approaches comparatively, with regard to factors such as commercial certainty, ability to uphold parties' intentions, and coherence with principles of contract law, and suggests that several cogent reasons exist for preferring the traditional approach over Lord Denning's approach. For completeness, this article will also survey several alternative solutions to the difficulties of finding agreement in contract formation and offer observations on their applicability to Singapore law.

4.1. Conceptually distinct tests for the existence of an identifiable agreement

The first point to be made is that both approaches are distinct as to the nature and extent to which parties' assent to the same terms is required for agreement to be found. The traditional approach imposes a legal test that requires

[67] *Sintalow Hardware* (n 66) [18].

coincidence of offer and acceptance for an agreement to exist. To satisfy this test, there must be a final and unqualified assent to the terms of an offer; an attempt to accept an offer on new terms not contained in the offer may be a rejection accompanied by a counter-offer.[68] In contrast, Lord Denning's approach considers whether the parties have reached agreement upon all material terms. Even if one party rejects certain terms or counter-proposes terms, parties are bound as long as they are found to have consented to the terms that are considered material. This departure from the 'mirror image' rule would have deleterious effects on legal and commercial certainty, and has been criticised as giving too little guidance to lawyers and judges regarding how to determine the existence of an agreement.[69]

The main difficulty lies in the lack of clarity as to what constitute 'material points' which must be agreed upon for a contract to be formed under Lord Denning's approach, and what constitute residual terms that do not have an effect on contract formation and may be replaced through reasonable implication by the courts. Notably, Lord Denning himself did not address the core question of how such 'material points' should be identified. Such categorisation of terms has been described as 'arbitrary and liable to produce much litigation'.[70] Its open-ended nature can also leave judges vulnerable to accusations of backward reasoning, as it may lead to the perception that judges can adjust their interpretation of the documents to achieve the results they deem desirable.[71] It is suggested that a possible way to determine what is 'material' under Lord Denning's approach is to apply the same threshold that governs certainty and completeness under the traditional approach, ie an agreement will not be regarded as a binding contract if essential matters, without which the contract is too uncertain or incomplete to be workable, remain to be agreed upon.[72] Another possible alternative would be the method adopted by the United Nations Convention on Contracts for the International Sale of Goods (CISG), which identifies as material terms relating to price, payment, quantity and quality of the goods, place and time of delivery and the extent of liability of one party to the other. Applying either alternative, a case could well be made that in *Butler Machine* the price variation clause was sufficiently material such that there should have been no finding of a contract, given that the parties were not agreed as to the term of price.[73] After all,

[68]Beale (n 7) paras 2-026, 2-031, 2-097.
[69]Ewan McKendrick, 'The Battle of the Forms and the Law of Restitution' (1988) 8(2) Oxford Journal of Legal Studies 197, 198.
[70]Rick Rawlings, 'The Battle of Forms' (1979) 42(6) The Modern Law Review 715, 719; François Vergne, 'The "Battle of the Forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods' (1985) 33(2) The American Journal of Comparative Law 233, 243.
[71]Edward J Jacobs, 'The Battle of the Forms: Standard Term Contracts in Comparative Perspective' (1985) 34(2) The International and Comparative Law Quarterly 297, 303. See also Stone (n 28).
[72]*Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd* [2010] SGHC 144 [28].
[73]On the other hand, it been suggested that a distinction may be drawn between the initial agreement to price as a material point and a price variation clause as a non-material point: McKendrick (n 18) 87.

Lord Denning considered that if the difference in terms is so material that it would affect the price, then the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller.[74]

In contrast, the traditional approach has the advantage of abundant case law and commentaries to clarify the nuances of applying it in different contexts. Its chief merit has been described as its ability to provide 'a degree of certainty which is both desirable and necessary in order to promote commercial relationships'.[75] The English courts have also acknowledged the continued applicability of the traditional approach in cases which do not appear immediately amenable to such an analysis, for the sake of achieving certainty of principle.[76] Commentators have argued that this clarity is achieved at the expense of flexibility, which is particularly problematic in continuing negotiations cases, where it is difficult to identify a clear instance of offer and acceptance.[77] However, as has been emphasised by the SGCA in *Gay Choon Ing*, the traditional offer and acceptance analysis can and should be applied in a context-sensitive manner to do justice in such cases.

4.2. Conflation of the existence of an agreement with certainty and completeness of its terms

The second distinction between both approaches lies in the relationship between the existence of an agreement and its certainty and completeness. It is well-established that the agreed terms must be sufficiently certain and complete for an agreement to amount to a binding contract.[78] As such, 'unless all the material terms of the contract are agreed there is no binding agreement'.[79]

Under the traditional approach, it is *after* an identifiable agreement has been found that the court considers whether the material terms have been agreed upon such that the contract is certain and complete.

On the other hand, the focus in Lord Denning's approach on determining upfront if there is agreement upon all material terms appears to conflate the determination of the *existence* of an agreement with the certainty and

[74] *Butler Machine* (n 6) 405.
[75] *Tekdata* (n 8) [25] (Dyson LJ).
[76] *Virulite LLC v Virulite Distribution Ltd and another* [2014] EWHC 366 (QB). The English courts have also applied the traditional approach in a flexible manner: see *Hyde v Wrench* (1840) 3 Beav 334, 49 ER 132 (QB); *Felthouse v Bindley* (1862) 11 CB (NS) 869, 142 ER 1037; *Brogden v Metropolitan Railway Co* (1877), 2 App Cas 666 (UKHL); *Stevenson, Jacques, & Co v McLean* (1880) 5 QBD 346. See also M H Ogilvie, 'Surely the Next to Last Shot in the Battle of the Forms!' (2011) 51 Canadian Business Law Journal 307, 313.
[77] Stephens, 'Escape from the Battle of the Forms' (n 12) 239.
[78] Peel 2015 (n 29) para 2-078: 'An agreement is not a binding contract if it lacks certainty, either because it is too vague or because it is obviously incomplete.'
[79] *Foley v Classique Coaches Ltd* [1934] 2 KB 1 (UKCA) (*Foley*) 13, cited with approval in *Grossner Jens v Raffles Holdings Ltd* [2003] SGHC 290 [14], *Smartbus* (n 54) [43], *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] SGHC 187 [32]; *Harwindar Singh s/o Geja Singh v Wong Lok Yung Michael* [2015] SGHC 132 [14].

completeness of its *terms*. The decision in *Asirham Investment* discussed above certainly suggests that Lord Denning's approach was applied to decide the existence of agreement together with the certainty and completeness of its terms.[80] Such a conflation sits uneasily with existing legal principles which allow the courts to rectify contracts that satisfy the element of agreement but are incomplete or vague.[81] Reconciling this body of case law with Lord Denning's approach is problematic—how does one identify in Lord Denning's approach whether an agreement exists which can be 'cured' by the courts? Applying Lord Denning's approach to determine whether there has been agreement on all material terms merely begs the question as to the completeness of the material terms. Such conceptual difficulties do not exist under the traditional approach, under which the existence of an agreement will first be determined before considering the certainty and completeness of its terms. Thus, clarity of analysis and legal principle lean towards the traditional approach in this respect.

4.3. Potential to lead to different outcomes

As to the practical differences, it is suggested that both approaches in fact have significant potential to lead to opposite outcomes—although even if the approaches are said to generate similar outcomes, it is important to be aware of the underlying conceptual differences in order for the law in this area to be developed and rationalised on a principled basis.

The decisions in *Gibson (CA)* and *Gibson (HL)* briefly referred to above[82] provide such an example. The facts were that the council initially decided to allow tenants to purchase houses but later reversed its policy. Prior to the reversal, the council had sent a letter with instructions to Mr Gibson to return an enclosed application form if he wanted to make a formal application to buy the house. Mr Gibson returned the form duly completed except for the purchase price which was left blank. Before the form was processed, the council reversed their policy. The dispute was whether Mr Gibson and the council had entered into a binding contract. The majority of the CA held that there was a concluded contract. Lord Denning MR, who was in the majority, applied his broad approach and found that the correspondence between the parties, together with their subsequent conduct, showed that parties had agreed to all material terms and had intended the agreement to be binding.[83]

[80] See Subsection 3.3 above.

[81] Noteworthy cases which reflect these principles include *G Percy Trentham Ltd v Archital Luxfer Ltd* (1993) 1 Lloyd's Rep 25 (UKCA); *Nicolene Ltd v Simmonds* (1953) 1 QB 543 (UKCA); *Foley* (n 79); *Hillas (WN) & Co Ltd v Arcos Ltd* (1932) 43 Lloyd's Law Rep 359 (UKHL).

[82] See Subsections 2.2 and 2.3 above.

[83] *Gibson (CA)* (n 6) 523–25 (Lord Denning). The other majority judge, Omrod LJ, adopted a similar approach to Lord Denning, although the learned judge also looked at the matter using the offer and acceptance analysis and arrived at the same conclusion.

The CA's decision was reversed on appeal to the HL. Lord Diplock, delivering the leading judgment, disagreed forcefully with Lord Denning's approach and held that the traditional approach should apply. Notably, Lord Diplock pronounced rather severely that 'it was by departing from this conventional approach that the majority of the CA was led into error'.[84] Applying the traditional analysis, it was held that the council's letter was worded in a manner that did not amount to an offer and thus could not possibly be accepted to form a legally binding contract.[85] Therefore there was no binding contract.

Projection itself provides another illustration. Returning to the facts of that case, the SGCA applied Lord Denning's approach to find a valid compromise agreement on the basis that the insurer's letter (which offered to pay the sum earlier sought by the insured at oral negotiations) showed that parties had reached a compromise on the settlement amount to be paid. However, the outcome may well have been different if the traditional approach had been used. While much depends on the precise facts and evidence, if the insured's request was characterised as an offer that had been rejected by the insurer's unwillingness to assent at the negotiations, there would have been no standing offer capable of being accepted by the insurer's subsequent letter and therefore no agreement.

4.4. Adopting Lord Denning's approach—wider implications for contract law

Accepting Lord Denning's approach may have wider implications than expected for contract law in general. It is difficult to see what principled reason justifies applying different tests of agreement to continuing negotiation situations and regular negotiation cases. The distinction between the two is arguably a matter of difference in degree and not a difference in kind. Certainly, some continuing negotiations cases are amenable to the traditional offer and acceptance analysis. The hazy boundaries between both cases exacerbate the inherent ambiguity of Lord Denning's approach and the danger of excessive judicial latitude. For instance, on the facts of *Projection*, the negotiations between parties were not so lengthy or complicated that it was difficult to analyse the correspondence using the traditional approach. This leads one to query whether the SGCA's willingness to apply Lord Denning's approach was prompted by a desire to find agreement where both parties had assented to the same settlement figure, and where an application of the traditional approach may not have achieved the same result. In this vein, it should also be pointed out that Lord Denning's judgment

[84] *Gibson (HL)* (n 8) 297.
[85] *Gibson (HL)* (n 8) 302.

in *Gibson (CA)*,[86] where the learned judge applied his broader approach, has been criticised thus: 'In the range of possible negotiations Gibson was well towards the simple end. Lord Denning's judgment reflects a feeling that councils should not behave like this. But if that is to stand it needs a quite different conceptual basis.'[87]

Further, it must be noted that Lord Denning, in espousing his approach, did not confine it to the narrow category of continuing negotiations cases—indeed *Butler Machine* itself was not such a case. Rather, Lord Denning's approach was quite clearly intended to apply generally in contract law. This was probably the reason for caution that 'such an outright rejection of the traditional analysis is open to the objection that it provides too little guidance for the courts (or for their parties or for their legal advisers) in determining whether an agreement has been reached'.[88] As a result, accepting Lord Denning's approach may entail the abandonment of a substantial body of jurisprudence regarding the formation of contracts—a body of law that has been carefully refined through the contribution of decades of judicial wisdom and legal scholarship.

However, overturning an established body of jurisprudence is not an insurmountable obstacle and, indeed, ought to be undertaken if there exist sufficiently cogent and principled reasons for doing so. On behalf of Lord Denning, it may be argued that the traditional approach disappoints parties' expectations by assigning implicit assumptions about their intentions which may not accord with their actual intentions, and by ignoring the actual meeting of their minds.[89] In the battle of the forms context, for example, parties may be surprised to find out that the entirety of their contract is contained in the standard terms of the 'last shot' fired, rendering their prior exchanges nugatory. Such results may be contrary to business expectations and ignorant of the modern realities of commerce, where continuing negotiations are often conducted without strictly heeding the technical concepts of offer and acceptance. Consequently, an argument may be made in favour of a more fluid approach alive to commercial realities in contract formation, as compared to an approach requiring the mechanistic application of technical rules.[90] Thus when faced with situations that potentially are not

[86] *Gibson (HL)* (n 8).

[87] Furmston and Tolhurst, *Contract Formation: Law and Practice* (n 64) para 2.11 (emphasis added). See also Michael Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (16th edn, OUP 2012) 87–93 on various other steps that may be employed by the courts to address problems arising in inchoate contracts.

[88] Beale (n 7) para 2-118.

[89] Giesela Ruhl, 'The Battle of the Forms: Comparative and Economic Observations' (2003) 24 University of Pennsylvania Journal of International Economic Law 189; Stephens, 'Escape from the Battle of the Forms' (n 12); Corneill A Stephens, 'On Ending the Battle of the Forms: Problems with Solutions' (1991–1992) 80 Kentucky Law Journal 815; Andre Corterier, 'A Peace Plan for the Battle of the Forms' (2006) 10 International Trade & Business Law Review 195.

[90] A similar trend may be observed in the context of the doctrine of consideration as well. See *MWB Business Exchange Centres v Rock Advertising Ltd* [2016] EWCA Civ 553.

amenable to an offer and acceptance analysis to find agreement, it is indeed tempting to conclude that the traditional approach is not capable of accommodating the concerns of commercial realities and upholding parties' intentions within the framework of offer and acceptance rules, without doing violence to these rules. However, it is suggested that caution must be taken to maintain a proper perspective. The offer and acceptance framework is easily applicable in the majority of cases—indeed, as has been pointed out above, the facts in *Gibson* and *Projection* were sufficiently simple to be analysed within the traditional framework—and it is only in exceptional situations that the traditional approach finds difficulties in application. Overhauling the doctrine of offer and acceptance in response to the difficulties of applying the traditional approach in certain limited situations would appear to be a disproportionate response.

In specific situations where it may be difficult to determine agreement through an offer and acceptance analysis, such as in particularly complicated continuing negotiations cases, it is suggested that the better approach would be to view such situations as *exceptions* to the general rule.[91] Such was the approach taken by the CA in *Tekdata*. The facts of *Tekdata* gave rise to a classic battle of the forms scenario—a situation usually hostile to the application of the offer and acceptance approach. Tekdata Interconnections Ltd purchased connectors from Amphenol Ltd. Tekdata Interconnections Ltd subsequently claimed that certain connectors were delivered late and were not fit for the purpose or of merchantable quality, thus breaching the terms of their contract, which they submitted to be based on the purchase order terms. In response, Amphenol Ltd argued that their contract was based on the terms contained in their acknowledgement of the purchase order, which excluded or limited their liability for any breach of contract. At first instance, it was found that on the traditional offer and acceptance analysis, a contract would have come into existence upon Amphenol Ltd's acknowledgement of the purchase. If no other documents passed between the parties, and if Tekdata Interconnections Ltd took delivery of the connectors, the contract would thus be on Amphenol Ltd's terms. However, due to various countervailing factors, the judge held that the parties had always intended Tekdata Interconnections Ltd's terms to apply, and found that the contract between the parties was based on those terms.

Amphenol Ltd appealed the decision to the CA where Longmore LJ affirmed the traditional approach as the default analysis for contract formation. Notably, however, he accepted that the traditional approach could be displaced if the documents passing between the parties and their

[91] See also Stone (n 28) which suggests that the traditional analysis will be favoured where there is a clear trail of correspondence but that Lord Denning's more flexible analysis is to be adopted in more complex cases, particularly where negotiations are not in writing.

conduct show that they intended some other terms to apply.[92] Should the traditional offer and acceptance approach be displaced, the court must then consider the documents exchanged and the overall conduct of the parties to determine if there has been an agreement, and on what terms. Emphasising that it would be very difficult to displace the traditional approach, Longmore LJ reiterated the uncertainty involved in abandoning the traditional analysis, and added that there must be a clear course of dealing between the parties for the traditional analysis to be displaced.[93] Applying the law to the facts, it was held that the present case did not provide sufficient reason to displace the traditional approach, and that it was correct to use the traditional approach to resolve the case. As a result, the CA allowed the appeal, holding that the contract between the parties was on Amphenol Ltd's terms.

The effect of the decision in *Tekdata* is to characterise Lord Denning's approach as an exception to the traditional approach, only to apply in the exceptional situation where the parties have displayed an objective common intention through a clear course of dealing to displace the traditional offer and acceptance analysis and apply some other terms to their agreement.[94] This approach has merits which commend itself over the present ambiguity in Singapore law on this issue. First, *Tekdata* acknowledges the conceptual differences between Lord Denning's approach and the traditional approach, which is abundantly clear from the CA's characterisation of Lord Denning's approach as an exception to the traditional approach, rather than being substantially similar to the traditional approach. Second, *Tekdata* sets out a clear position regarding the relationship between Lord Denning's approach and the traditional approach, enhancing legal clarity as to the scope of application for each approach. Third, and crucially, *Tekdata's* approach establishes the traditional offer and acceptance approach as the default framework for the courts to determine the existence of agreement, but allows for the application of a broader analysis should the parties' intentions clearly point against a result which would be arrived at through the traditional approach. This targeted approach to specific situations would strike a desirable balance between certainty in the regulation of business relationships and flexibility to do justice to parties' intentions, rather than upending the law of contract formation as Lord Denning's approach otherwise would.

As a side note, it may be argued that an issue with *Tekdata's* approach is that its provision for a course of dealing or other documents passing between the parties to vary the terms of the written contract may conflict

[92]*Tekdata* (n 8) [11].
[93]*Tekdata* (n 8) [21].
[94]Ogilvie (n 76) 313.

with evidentiary rules that restrict the admissibility of evidence prior to or subsequent to the agreement to vary the terms of the contract.[95] In Singapore law, this restriction applies with particular force if the contract in question is a standard form or commercial contract.[96] However, the SGCA has allowed the courts to look at extrinsic evidence to determine whether the parties intended to embody their entire agreement in a written contract, subject to a presumption that 'a contract which is complete on its face was intended to contain all the terms of the parties' agreement'.[97] This extrinsic evidence can include prior negotiations and subsequent conduct, as long as the evidence is 'relevant, reasonably available to all the contracting parties, and relates to a clear or obvious context'.[98] Although the SGCA has opined that such evidence will generally be inadmissible due to a failure to meet these three requirements,[99] it is possible that exceptional circumstances such as those described in *Tekdata* may justify the admission of such evidence.

4.5. Alternative approaches

For completeness, it is worth noting that a variety of solutions have been offered to address the difficulties in applying the traditional approach, particularly in battle of the forms situations. One is a slight modification of the traditional approach—the framework of offer and acceptance remains generally applicable, except that a distinction is drawn between material and non-material modifications. As an example of this approach, the CISG allows replies that are not identical to the terms of the offer to be construed as valid acceptances, provided that the modifications do not materially alter the terms of the offer.[100] Modifications relating to price, payment, quantity and quality of the goods, place and time of delivery and the extent of liability of one party to the other are considered to be material under the CISG. Another alternative solution has been characterised as the 'knock-out' solution, which is encapsulated in the approach taken by the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles)—a contract is deemed to be concluded on the basis of the agreed terms, and any terms differing between the offer and acceptance are eliminated from

[95] Evidence Act (Cap 97, 1997 Rev Ed) ss 93 and 94. See *Prenn v Simmonds* [1971] 3 All ER 237 (UKHL) 240 for justifications for this position.
[96] *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27 [132(a)].
[97] *Zurich Insurance* (n 96) [132(b)]. The UK position is moving closer to this position as well, as exemplified in *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38 [33].
[98] *Zurich Insurance* (n 96) [132(d)], cited in *Goh Guan Chong v AspenTech Inc* [2009] SGHC 73 [55]–[57].
[99] *Zurich Insurance* (n 96) [132(d)].
[100] Art 19(2), United Nations Convention on Contracts for the International Sale of Goods, 1489 UNTS (1988) (CISG). Notably, the CISG has force of law in Singapore through the Sale of Goods (United Nations Convention) Act. Contracts falling under the scope of the CISG will be governed by this approach, unless the parties expressly exclude the application of the CISG.

the concluded contract.[101] The US Uniform Commercial Code can be said to have adopted a similar solution as well.[102] Yet another solution is the 'first shot' approach. As an illustration, Article 6:225(3) of the Dutch Civil Code provides that where there are two references to standard terms, the second reference is ineffective unless it explicitly rejects the terms in the first.[103] This effectively means that in a battle of the forms scenario, the content of the contract will be determined by the terms in the 'first shot'. A leading commentator has also suggested a 'best shot' rule as the ideal solution to incentivise contracting parties to take into account the opposing parties' concerns and move towards the fairest position.[104]

The comparative merits of these approaches have been the subject of a considerable body of literature,[105] and given that the present discussion focuses on the relationship between the traditional approach and Lord Denning's approach in continuing negotiations cases, a detailed evaluation of their merits falls beyond the scope of this article. Nevertheless, this article will venture the following observations. First, it should be noted that these approaches are applicable only to the specific situation of battle of the forms. Second, to the extent that some of these approaches would involve a far-reaching revision of contract law in Singapore (eg the approach suggested by the UNIDROIT Principles), it is suggested that even if such approaches should be deemed desirable for incorporation in Singapore law as an exception to the traditional rule in battle of the forms situations, it would be more appropriate to do so via legislative action rather than by judicial pronouncement. Third, these alternative approaches generally offer the chief merit of increased flexibility in the application of the rules of offer and acceptance, affording judges the ability to do justice to the agreement between the parties without being constrained by legal technicalities. The flexibility of these approaches also prevents parties seeking to escape a bad bargain from relying on immaterial inconsistencies to argue that there is no valid contract between the parties due to a failure of offer and acceptance. Although the Singapore courts have not explicitly adopted these approaches, it is suggested that applying the traditional approach with a cognisance of context, and allowing the traditional approach to be displaced by a broader

[101] Art 2.22, International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (1994). See also Ruhl (n 89) 207.

[102] United States Uniform Commercial Code § 2-207. See also Victor P Goldberg, 'The "Battle of the Forms": Fairness, Efficiency, and the Best Shot Rule' (1997) 76 Oregon Law Review 155, 160.

[103] Dutch Civil Code, Article 6:225(3) of Book 6. See also Nicole Kornet, 'Contracting in China: Comparative Observations on Freedom of Contract, Contract Formation, Battle of Forms and Standard Form Contracts' (7 February 2011) Maastricht European Private Law Institute Working Paper No 2011/06 <ssrn.com/abstract=1756750> accessed 28 February 2017.

[104] Goldberg (n 102) 166–71.

[105] John E Murray Jr, 'The Definitive "Battle of the Forms": Chaos Revisited' (2000–2001) 20 Journal of Law & Commerce 1; Ruhl (n 89); Ogilvie (n 76); Rawlings (n 70); Vergne (n 70); Stephens, 'Escape from the Battle of the Forms' (n 12).

assessment of parties' intentions in exceptional situations, will achieve a similar result without necessitating a substantial alteration of the jurisprudence on contract formation in Singapore.

Finally, it is suggested that one's view of the nature of objectivity in contractual formation may influence the approach one finds most persuasive to resolve the difficulties of finding offer and acceptance in continuing negotiations. It may be worth touching on this although it is not the focus of this article. The principle of objectivity can be traced back to the English case of *Smith v Hughes*[106] and has been affirmed by the SGCA on various occasions,[107] most recently in *R1 International Pte Ltd v Lonstroff AG*, where it was held that 'the law adopts an objective approach towards questions of contract formation and the incorporation of terms'.[108]

In the prevailing academic literature, there are differing views as to what exactly the 'objective' approach entails. The orthodox view accepted in the Singapore courts can be described as 'promisee objectivity', which calls for an objective evaluation of the promisor's conduct and statements from the point of view of a reasonable person in the promisee's position.[109] Although it is evidently impossible for the courts to determine what the parties' real subjective intentions are, the courts remain concerned with discerning a reasonable interpretation of the promisor's *actual* intentions. However, in the context of contractual interpretation, Sir George Leggatt has recently argued in an extra-judicial capacity that how the courts have actually applied the objective approach in practice is to interpret contractual documents 'as having the meaning which best explains why rational parties who were using the language of the contract to express a shared intention would have chosen that language'.[110] On this stronger view of objectivity, the relevance of the parties' own intentions is diminished, since an interpretation of the contract does not depend on what the parties actually meant, or what a reasonable person would have understood the parties to mean when the contract was made. This formulation of objectivity is potentially equally applicable to the context of contract formation as well.

To an adherent of the orthodox view of objectivity, an approach closely connected to determining a reasonable interpretation of the parties' *actual* intentions would likely be more convincing. The traditional approach, with its focus on an objective interpretation of what the parties *actually* intended, can be described as an example of such an approach. On the other hand,

[106](1871) LR 6 QB 597.
[107]*Zurich Insurance* (n 96) [125]–[126]; *Bakery Mart Pte Ltd (in receivership) v Sincere Watch Ltd* [2003] SGCA 36; *Projection* (n 32); *Tribune Investment Trust* (n 1) [39]–[40].
[108][2014] SGCA 56 [51].
[109]*Tribune Investment Trust* (n 1) [39]–[40]; *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin nee Tan* [2005] SGCA 19; Phang (n 2) para 03.006–03.014.
[110]George Leggatt, 'Making Sense of Contracts: the Rational Choice Theory' (2015) 131 Law Quarterly Review 454, 475.

adherents of Leggatt's stronger view of objectivity in contractual interpretation are likely to be drawn towards contract formation approaches which are more akin to an evaluation of what rational people who wanted to express a shared intention would have intended their language and conduct to convey. Approaches such as the 'knock out' rule and the 'best shot' rule would fall under this category, to the extent that they involve a value judgment of what rational parties would have intended in such circumstances, which may be divorced from the parties' *actual* intentions.

5. Conclusion—the way forward for Singapore law

This article's examination of the development of Singapore case law shows that the influence of Lord Denning's approach on contractual formation in continuing negotiations cases has waxed and waned with the evolution of Singapore jurisprudence. What remains constant is that the contractual principles underpinning the traditional approach and Lord Denning's approach, as well as the interaction between both approaches, have been plagued by inconsistencies and murky legal reasoning over the near-two decades since *Projection*, which remain unresolved. While *Gay Choon Ing* was an important move towards a clarification of the law, the failure to draw a distinction between both approaches gave rise to uncertainty as to the continued impact of Lord Denning's approach on contract law in Singapore.

This article has argued that the traditional approach and Lord Denning's approach to contract formation are distinct both conceptually and practically. In view of the distinctions between the two approaches, and with a view to the comparative development of English law, it has been suggested that the traditional approach is to be preferred. While Lord Denning's approach has the advantage of flexibility and ability to discern agreement in situations not amenable to the traditional offer and acceptance analysis, the traditional approach has the key advantages of certainty and coherence with principle. Thus it is suggested that the best way forward for the progression of Singapore law is to adopt the traditional approach as the default approach to contract formation in continuing negotiations cases—as the Singapore courts have done in regular negotiation cases—while according the courts a measure of discretion to displace the traditional approach in favour of a broader inquiry into the parties' intentions to determine the existence of agreement in exceptional circumstances.

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