

Principles of Contract Formation in American Law

When the Parties' Writings Do Not Conform: United States and International Implications

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Abstract

In the area of contracting, it is always safer to agree completely on all material (important) contract terms before performance is made or tendered—that is, either before payment is tendered or goods are shipped or accepted. However, in this less than perfect world, parties will frequently begin performance even before the terms of a deal have been completely worked-out. This article will provide a discussion and statutory solution to the problem as seen in the Uniform Commercial Code Section 2-207. In addition, the article takes the discussion to the international contracting stage by referencing the United Nations Convention on Contracts for the International Sale of Goods.

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Part I¹

1. Introduction

Consider this scenario.

Helen Grill operates a home patio center in Brick, New Jersey. She sends a purchase order to the Kurtz Corporation (located in Overton Park, Kansas) on February 10, 2013. It reads:

¹ We are indebted to Professor Jon Romberg of the Seton Hall University School of Law for providing an outline of the key issues.

“We wish to order 400 indoor-outdoor carpet cleaning mini-machines. Price (as per your on-line advertising) is \$60.00 per unit; seller to pay freight and insurance; payable in 120 days from receipt of goods, with no interest charge. Shipping date is on or about February 22, 2013.”

Three days later, Kurtz replies (via their pre-printed form acknowledgment):

“Thank you for your order. We are prepared to fill it and thank you for your business. We are happy to confirm the following:

- 400 indoor-outdoor carpet mini-machines;
- PRICE: \$60 per unit/kit;
- ITEMS DISCOUNTED: Buyer to pay freight and insurance;
- 400 bottles of carpet cleaning solution to be included at \$16.00 per bottle;
- NOTE: CASH OR CREDIT CARD PAYMENT WITHIN 10 DAYS OF RECEIPT; thereafter, a three percent adjustment will be added to the price and a three percent fee will be added per month until balance is paid.”

A bit strapped for customers (and cash) Kurtz ships the kits the next day along with the cleaning solution. The buyer received the goods a few days later on February 18, 2013, and places them in her showroom warehouse, awaiting the start of the spring season, believing that she will have three months to pay the bill. When a bill arrives twelve days later in the mail, Helen places it in the “120 day pay file,” believing that she has this time to pay the bill. Opening the bill around the first of May, she notices that it includes charges for freight and insurance, as well as the three percent adjustment for non-payment within the ten day period and the charges for the cleaning solution, which, by the way, she had no intention to order. Helen calls you (her attorney) to try to straighten out this “mess.”

This problem is most typical under American contract law and implicates what has become known as the “battle of the forms”—a situation in which the acceptance of an offer was not made on precisely the same terms as was the offer to purchase. It implicated the *mirror image* rule of the common law which meant that the offeree’s terms became those of the contract, obligating the offeror (here, Helen Grill) to perform under the terms in the offeree’s communication. By *accepting the goods*, Helen had accepted the terms contained in Kurt’s communication. (Generally, e.g. Hakes, 2011).

The writers of the Uniform Commercial Code (which applies generally to the sale of goods) attempted to bring some regularity into these situations where the expectations of the parties varied so drastically and where both parties may have believed in good faith that their position was both legally and ethically correct. Black’s Law Dictionary explains that: “In its original version, U.C.C. § 2-207 attempted to resolve battles of the forms by abandoning the common law requirement of mirror-image acceptance and providing that a definite expression of acceptance may create a contract for the sale of goods even though it contains different or additional terms.” (Black’s Law Dictionary 162 (8th ed. 2004).

However, UCC Section 2-207, which had been offered as the solution to the problem of the “battle of the forms,” is perhaps the most misunderstood and misapplied section of the entire Uniform Commercial Code. As noted in a discussion referenced by UNDROIT (1995), it has not provided the “panacea” or solution it was intended to bring. Commentators have weighed in and Professor E. Allan Farnsworth of the Columbia University Law School stated as follows: “After nearly 40 years of experience with the section, the only thing clear about the section is that it remains unclear . . . a section that raises as many questions as it answers.” (Farnsworth, 1990, p. 262). Another commentator, Professor Caroline Brown, stated: “The section has become an enigma....” Professor Brown continued: “There should be no doubt

that 'chaos' is an accurate characterization of the state of law in the 'battle of the forms' arena." (Brown, 1991, p. 894). Its defects derive "partly because of the numerous situations it was designed to address and the many more it has been used to address, and partly because of a judicial reluctance to apply the statute too literally." (Viscasillas, 1998, pp. 97-155, citing Williston, 40th ed. 1990, p. 142). Professors Scott and Krause (3rd ed. 2002, p. 285) go one step further when they describe the text of 2-207 as "obscure, ambiguous, or otherwise muddled."

Perhaps the best place to start this discussion would be by quoting from the text of the statute itself:

“§ 2-207. Additional Terms in Acceptance or Confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

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

Professors Darr and Ostas frame the legal argument as follows:

“Section 2-207 attempts to answer three questions. First, does the exchange of conflicting forms constitute a binding contract? Second, if a binding contract exists, what are its enforceable terms? Third, if the exchange of forms does not establish a contract, but the parties nonetheless perform, what are the terms of the contract established by conduct? Unfortunately, judicial interpretations of section 2-207 vary widely, making the answers to these questions far from clear.” (Ostas & Darr, 1996, p. 403).

2. Overview of the Common Law Approach and that of Section 2-207

The drafters of Section 2-207 were uncomfortable with the common law “mirror image” rule which required that an acceptance must exactly match an offer in order to form a contract because they thought it produced unfair and often unexpected results. Because the writings of the parties rarely agreed (each party may have sent its offer or purported acceptance on its own pre-printed form, containing at least slightly differing terms), in a typical “real world” scenario as exemplified in the dispute between Helen Grill and the Kurtz Corporation, application of the mirror image rule meant that a contract was usually formed on the terms of the last document (often referred to as the “last shot”) sent. (Scott & Kraus, 3rd ed. 2002, pp. 284-285). Under the common law *last shot* rule, "the terms of the party who sent the last form, typically the seller, would become the terms of the parties' contract." (Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 99 (3d Cir. 1991)).

Under a common law analysis, the last document sent by Kurtz would legally constitute a *counter offer* the offer that could be accepted by Helen Grill either by a promise to perform or by actual performance. The subsequent performance by the other party (either shipping the goods or accepting the goods, depending on which party sent the last writing) constituted acceptance by performance of the other party's written offer.

In reality, of course, the “last shot” rule favored the seller over the buyer because the buyer had usually sent the first document (as above) in the form of a purchase order form, filled in with specific details of the purchase sought. At this point, the seller would respond to the buyer's purchase order by sending a form acknowledging the order. Since this form usually didn't exactly match the terms in the order form, it was *not* an acceptance, but was instead considered as a rejection and a counteroffer. (Restatement (2nd) of Contracts, 1981, Section 59). Under usual commercial practices, and armed with a purchase order, the seller would ship the goods. If the buyer then accepted the goods that had been shipped, the buyer had legally agreed to (by performance) the terms of the seller's counteroffer.

The “mirror image” rule had several consequences. Since the parties had exchanged non-identical writings in which they had expressed their intent to be bound, a strict application of the common law rules meant that no contract had actually been formed on the basis of either party's writing because the writings did not exactly mirror each other. In this context, the parties would perform (by the seller shipping the goods and the buyer accepting them) and a contract would be formed pursuant to the terms of the party who sent the last writing—usually the seller. However, what would happen if one side decided to withdraw from the agreement before performance had occurred? The party who had withdrawn was able to avoid its obligation by pointing to the mirror image rule, arguing that no binding contract had in fact been formed.

Section 2-207 was intended to address both issues: to recognize the possibility of an acceptance arising from a non-identical writing, and perhaps more importantly, to eliminate the “last-shot” rule which would determine which parties' contract terms would govern.²

3. Application of the Subsections of 2-207

It is important at the outset to note that two distinct situations are contemplated by 2-207(1):

1. If the parties have exchanged writings consisting of an offer and a non-identical expression of acceptance that purports to form a contract; or
2. If the parties enter into an oral agreement, or an agreement formed by informal correspondence, followed by a written confirmation of that agreement sent by one or both of the parties purporting to restate the terms of the agreement, but this confirmation contains terms that are either *additional to* or *different from* terms of the purported contract. (*See*

² This article does not deal with the amendments to Article 2 which were proposed in 2003—2005 because no states have adopted these amendments and in 2011, the sponsors of the amendments withdrew the amendments from consideration. For a discussion of these amendments and for a discussion of the history of the original Article 2, see Fred Miller, *Symposium: Amended Article Two: Reversing the Curse?: Introduction:: What Can We Learn from the Failed 2003-2005 Amendments to UCC Article 2?* 52 S. TEX. L. REV. 471 (2011). Professor Miller has been a Uniform Law Commissioner from Oklahoma for thirty-six years. The text of the proposed amended version of section 2-207 is found in the Glossary. Professors Scott and Krause state that the proposed amendments were designed to deal with the “extensive litigation and inconsistent holdings that were prompted, at least in part, by often ambiguous and impenetrable language of the original version of § 2-207.” (Scott and Krause, 3rd ed. 2002, p. 293). They then add: “Are the proposed amendments to § 2-207 an improvement?” (*Id.* at 294).

Comment 1 to Section 2-207).

Subsection 2-207(1) addresses the issue of contract formation by essentially changing the mirror image rule. Section 2-207(1) explains when an intended acceptance—the UCC states it in terms of an *expression of acceptance*—will operate as an acceptance, thus resulting in the formation of a contract, even if the purported acceptance contained terms additional to or different from the original offer—unless the expression of acceptance is conditioned on the other party’s assent to the additional or different terms. In that case, the expression of acceptance it will not be construed as an acceptance, but instead will be considered as an “old fashioned” counteroffer. In contrast, under the common law, the exchange of such non-identical documents would always be considered as an offer and a rejection, and a counteroffer.

It is also important to note that the purported acceptance is *not* an acceptance in the sense that the common law required it to be. The writers of the Code made it clear that this expression of acceptance *operates as an acceptance*, but will have the same legal effect as an acceptance under the common law.

Subsection 2-207(2) resolves the question whether a contract is formed on the basis of the terms found in the original offer, or if the contract contains the additional or different terms stated in the purported acceptance. Subsection 2-207(2) contains a number of rules to resolve that issue, which are set forth more fully below.

Subsection 2-207(3) addresses the situation in which a contract is not formed by the parties’ writings, but the parties nevertheless behave as if a contract has been formed. Rather than follow the “last-shot” rule, subsection 2-207(3) recognizes that a contract has been formed by *conduct* (performance) under these circumstances. Section 2-207(3) delineates the rule for determining the terms of a contract that has been formed by conduct rather than the parties’ writings. The contract consists of the terms on which the parties’ writings agree, plus any terms that are implied by law under the U.C.C. (e.g., the implied warranty of merchantability found in Section 2-314), unless such a warranty has been specifically disclaimed by the parties’ writings.

4. Detailed Explanation and Analysis of Section 2-207(1)

Assuming that an offer had been made (see, e.g. *Carlill v. Carbolic Smoke Ball Co.*, Q.B. 256 (C.A.) (1896)), if the offeree expresses assent to the offer (a “definite and seasonable expression of acceptance”), a *contract is formed* even if the acceptance contains additional or different (i.e., non-identical) terms not found in the original offer. This is clearly a change from the mirror image rule of the common law, which treated an expression of acceptance containing either different or additional terms as a rejection of the original offer and instead as a counteroffer. There are circumstances, however, where the “purported acceptance” will not be treated as an acceptance.

First, when the offeree’s response is not a true “expression of acceptance” of the offer. Consider this example: The Kurtz Corporation responds to Helen Grill’s offer to purchase by stating: “We acknowledge your order, which we intend to fill, but we can’t confirm the purchase until tomorrow when we are able to determine if sufficient inventory exists.” Kurtz has not accepted the offer; Kurtz has simply noted that Helen Grill has made an offer that it intends to accept. Under *Lefkowitz v. Great Minneapolis Surplus Store* (251 Minn. 188, 86 N.W.2d 689 (1957)), it appears that the parties are still in negotiations and have not come to any agreement.

A second example may be helpful. The buyer sends a purchase order to the seller. The Kurtz

Corporation responds that it “confirms the purchase of the 400 carpet cleaning mini-machines at a price of \$75.00 each.” Kurtz has in all likelihood made a counteroffer, because even though his response is phrased as if it’s an acceptance, it varies fundamentally from the terms of the offer as to the price—regardless of apparent intent to accept.

A third and more common situation deals with the “*unless*” language that appears at the end of 2-207(1). Subsection 2-207(1) states that even if an offeree makes an “expression of acceptance” in which they purport to accept an offer, if the offeree expressly conditions that purported acceptance on the offeror’s assent to the additional or different terms and makes what the drafters of Section 2-207 labeled as a “conditional acceptance,” the response will be treated as a counteroffer. This occurs because the offeree is only willing to enter into the contract if the offeror assents to the additional or different terms. In this case, it is clear that because of the “*unless*” language, the offeree is not agreeing to be bound by the terms of the original offer.

In interpreting this section of the UCC, a majority of courts have held that a response to an offer that purports to accept the offer will only be treated as “expressly conditioned” (and thus not an acceptance but a rejection and a counteroffer) if it contains *clear and explicit language* to the effect that it is a conditional acceptance—meaning that the offeree doesn’t intend to be bound without the assent to the different or additional terms.

Consider these examples. Helen Grill sends a purchase order for 400 carpet cleaning mini-machines at \$60.00 per unit, for shipment on or about February 22, 2013. Seller responds: “I am willing to accept your offer, but only if you agree to change the shipping date from February 22, 2013 to March 3, 2013.” Although this is an expression of acceptance, it is, in fact, a “conditional acceptance” and a counter offer, and thus does not form a contract under 2-207(1).

In example number two, Helen Grill sends a purchase order for 400 carpet cleaning mini-machines at \$60.00 per unit, for shipment on or about February 22, 2013. The seller responds: “I accept your offer, and will ship on March 3 rather than on February 22, 2013.” This is an expression of acceptance—but not a conditional acceptance, because acceptance has not been expressly conditioned on further assent. This communication thus forms a contract under 2-207(1), even though it states a different shipping date. However, whether or not that term becomes part of the contract will be resolved under 2-207(2)).

4.1. Oral Agreement Followed by a Written Confirmation

In some cases, parties will enter into an oral agreement and then later one or both parties will follow that oral agreement by sending a *written confirmation* of the oral agreement, restating terms more formally. Under these circumstances, a contract has already been formed. The issue will revolve around determining the terms of that contract, and if the written confirmation contains additional or different terms from those previously agreed to in the oral agreement.

In general terms, the terms contained in the confirmation that reflect the original oral agreement are part of the contract because, just as under the common law, they are a “mirror image” of each other. However, if the confirmation contains additional or different terms not agreed to orally, whether these terms become part of the agreement will be determined 2-207(2).

Note that once an oral agreement has been made, it is not possible at this point to have a conditional acceptance (i.e., a counteroffer), because the contract has already been formed by the oral agreement. Whether the parties entered into an oral agreement is a question of fact

that is governed by the common law and not by 2-207. (E.g., Hunter, Shannon, Amoroso & O'Sullivan- Gavin, 2010, pp. 88-90). So, just how do we treat these additional or different terms?

5. How Do We Treat Additional or Different Terms?

Assuming that a contract has been formed—either by an expression of acceptance, or by an oral agreement followed by written confirmation—do any of the additional or different terms found in the expression of acceptance or in the written confirmation become part of the agreement under 2-207(2)?

The text of 2-207(2) draws a distinction between “additional” and “different” terms. A term found in an acceptance (or in a confirmation) is “different” if it contradicts or materially qualifies (alters) an express term found in the offer (or contradicts a term of the oral agreement, in the case of a confirmation). For example: “I will purchase 400 carpet cleaning mini-machines at \$60 per unit, for shipment on or about February 25, 2013.” The seller sends back the following communication: “We will ship 400 carpet cleaning mini-machines at \$60 per unit, on May 10, 2013.” Shipment on May 10 is a different term from that contained in the purchase order-offer to buy.

A term is “additional” if it adds to or supplements the terms of the offer or oral agreement, but does not conflict or limit the terms of that offer or agreement. For example, “I will purchase 400 carpet cleaning mini-machines at \$60 per unit, for shipment on or about February 25, 2013.” The seller send back the following communication with an additional term: “I am confirming your order of 400 carpet cleaning mini-machines at \$60 per unit, with shipment on or about February 25, 2013. Payment must be made by electronic transfer into account XXXXXX 5678.” Payment by electronic transfer is an additional term.

5.1. Effect of an “Additional” Term in an Expression of Acceptance or Confirmation

Section 2-207(2) determines whether an additional term (or terms) in the expression of acceptance or confirmation become part of the agreement. The determination whether a party is or is not a merchant is crucial. Section 2-104 defines “merchant” as follows:

“(1) "Merchant" means a person that deals in goods of the kind or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction or to which the knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that holds itself out by occupation as having the knowledge or skill.”

If the agreement is *not* between merchants (for example, one or both parties is a consumer rather than a merchant) the additional terms do *not* become part of the agreement at this point, unless the other party, usually the original offeror, later accepts the proposed addition to the contract as a modification to the contract.

Consider this example: Anna Kasper, a housewife, contacts the seller in order to purchase an individual carpet cleaning mini-machine for \$90 (its retail value). The seller responds by mailing a written confirmation which requires payment by certified check and then ships the kit to the Anna. The seller’s additional term requiring payment by certified check will not be part of the contract under 2-207(2) (unless the consumer actually later communicates to the seller her willingness to accept that clause as a contract modification).

If the offer and the confirmation which contained the additional term were sent *between*

merchants, the additional term presumptively *will become part of the agreement*—unless one of the three circumstances found in 2-207(2)(a), (b), or (c) applies:

- 2-207(2)(a): If the original offer contained express language limiting acceptance to the terms of the offer (sometimes referred to as a “take-it-or-leave-it offer”), the additional terms do not become part of contract under 2-207(2)(a);

For example, the following language would represent a clear indication of a “take-it-or-leave-it offer” in a communication between a merchant-buyer offeror and a merchant-seller offeree: *“This order is conditioned on Seller’s acceptance of the terms hereof. Any additional or different terms contained in Seller’s acknowledgment are expressly objected to and shall not be deemed to be a part of the contract between the parties.”* If the merchant-offeror expressly limits acceptance to the terms of the offer in this or similar manner, then the contract may be formed under 2-207(1), even if additional terms are stated in the expression of acceptance, but those additional terms do not become part of the contract under 2-207(2)(a).

- 2-207(2)(c): If the offeror gives notification of objection to the additional term, the additional terms do not become part of the contract under 2-207(2)(c);

For example, consider the following language from the merchant-offeror: “I have just received your confirmation of my order of last Wednesday. I noticed that you have added the term that payment must be by certified check. I will pay in cash.”

- 2-207(2)(b): If the additional term “materially alters” the offer, then under 2-207(2)(b), the additional term will not become part of the offer—even if the merchant-offeror does not raise any objection to inclusion of the term.³

When does a term in an expression of acceptance or confirmation of an oral agreement *materially alter* the offer or oral agreement? The official comments to UCC 2-207 provide guidance: Comment 4 sets forth clauses which ordinarily will be considered to materially alter the offer:

“Examples of typical clauses which would normally “materially alter” the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer’s failure to meet any invoice when due; a clause requiring that

³ In a twist of irony, one of the first case dealing with this section of 2-207, *Roto-Lith, Ltd. V. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962) the first circuit misapplied the rule. In *Roto-Lith*, the buyer (Roto-Lith) sent a purchase order to Bartlett, who responded with an acknowledgment that included language which purported to limit Bartlett’s liability. The court held that this term was, in fact, a material alteration of the contract. Roto-Lith did not object. The court held that a “response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an ‘acceptance ... expressly ... conditional on assent to the additional ... terms.’” (*Id.* at 500.) The court, however, did not apply the standard under 2-207 but instead reverted to a common law analysis. It concluded that Roto-Lith had “accepted the goods with knowledge of the conditions specified in the acknowledgment [and thereby] became bound.” (*Id.*) In precise terms, the *Roto-Lith* court concluded that the defendant’s acceptance was conditional on assent by the buy to the new terms and therefore constituted a counteroffer rather than an acceptance. When Roto-Lith accepted the goods with knowledge of Bartlett’s conditions, it had accepted the counter offer. Thus, Bartlett’s terms governed the contract. Roto-Lith has been much criticized and in fact, was overruled in *Ironics, Inc. v. Elmwood Sensors, Inc.* (110 F.3d 184 (1st Cir. 1997.))

complaints be made in a time materially shorter than customary or reasonable.

Comment 5 sets forth clauses that normally are not considered to amount to a material alteration:

“Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).”

Many courts use the reference in Comment 4 to “surprise or hardship if [the terms] are incorporated [into the contract] without express awareness by the other party” as a guide to determining materiality. Thus, a term in an expression of acceptance will materially alter the offer if it results in *either*:

- *Surprise*: the term would unreasonably result in surprise to the offeror, because the terms *would not reasonably be expected to be in the acceptance*; or
- *Hardship*: the term would impose an unreasonable hardship or burden on the offeror, because it is *unreasonably more burdensome* than the terms of the offer itself.

It is interesting to note that in the case of an arbitration clause, a determination will “depend on whether arbitration would be outside the scope of ‘trade practice’ or beyond what appears to be ‘customary or reasonable.’” This appears to be a more generalized evaluative standard. (Rau, 2011, p. 532). For example, Professors Scott and Krause state that in discussing a questionable mandatory arbitration clause, noted that “such clauses are generally regarded as being material alterations to the proposed agreement.” (Scott & Krause, 3rd ed. 2002, p. 293, citing *Schulze and Burch Biscuit Company v. Tree Top, Inc.*, 831 F.2d 709 (7th Cir. 1987)).

5.2. Effect of a “Different” Term in an Acceptance or Confirmation

Let us begin this section by quoting from Judge Posner in *Northrop Corporation v. Litronic Industries* (29 F.3d 1173 (1994)). (For the sake of reading continuity, all internal footnotes have been omitted but may be found in the accompanying footnotes.)

Judge Posner writes:

The Code does not explain, however, what happens if the offeree's response contains different terms (rather than additional ones) within the meaning of section 2-207(1). There is no consensus on that question.⁴ We know there is a contract because an acceptance is effective even though it contains different terms; but what are the terms of the contract that is brought into being by the offer and acceptance? One view is that the discrepant terms in both

⁴ See James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE 33-36 (3d ed. 1988); John E. Murray, Jr., *The Chaos of the 'Battle of the Forms': Solutions*, 39 VAND. L. REV. 1307, 1354-65 (1986).

the nonidentical offer and the acceptance drop out, and default terms found elsewhere in the Code fill the resulting gap. Another view is that the offeree's discrepant terms drop out and the offeror's become part of the contract. A third view, possibly the most sensible, equates "different" with "additional" and makes the outcome turn on whether the new terms in the acceptance are materially different from the terms in the offer--in which event they operate as proposals, so that the offeror's terms prevail unless he agrees to the variant terms in the acceptance--or not materially different from the terms in the offer, in which event they become part of the contract.⁵ This interpretation equating "different" to "additional," bolstered by drafting history which shows that the omission of "or different" from section 2-207(2) was a drafting error,⁶ substitutes a manageable inquiry into materiality⁷ for a hair-splitting inquiry into the difference between "different" and "additional." It is hair-splitting ("metaphysical," "casuistic," "semantic," in the pejorative senses of these words) because all different terms are additional and all additional terms are different."

Courts are split on how to analyze different terms in the expression of acceptance or confirmation under 2-207(2). Courts generally apply one of three approaches:

One view is that different terms do not become part of the agreement under 2-207(2) because the text of 2-207(2) expressly states that it applies to *additional terms* and does not mention different terms. Under this interpretation, the contract is formed under 2-207(1), and the different terms are simply not part of the contract. The offeror's original terms thus govern.

Some courts and commentators rely on Comment 3 to 2-207 to argue that different terms should be subject to the same analysis as additional terms under 2-207(2). (E.g., *Steiner v. Mobil Oil Corporation*, 20 Cal. 3d 90 (1977)). Comment 3 states: "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2)." Under this approach, the offeree's different terms can potentially become part of the contract under 2-207(2) *if* they do not materially alter the offer. Even if this approach is followed, it would be somewhat unusual for a different term to become part of the agreement because a different term would be more likely than not to be considered to be a material alteration because it directly conflicts with the other party's terms—unless a term, though indisputably different from the offer, is fairly unimportant, and thus, even though different, wouldn't impose unreasonable surprise or hardship on the offeror.

Finally, some courts have employed what has come to be known as the "knock out" rule. Under this rule, if the offer and expression of acceptance contain different terms, those different terms "knock each other out" of the agreement.⁸ As a result, *neither* the offeror's term nor the offeree's different term is part of the agreement. Under this approach, the contract consists of the terms on which the offer and acceptance agree, plus any terms that may be implied as a matter of law under the U.C.C. (such as the implied warranty of merchantability found in UCC 2-314), unless the parties writings agree otherwise.

⁵ John L. Utz, *More on the Battle of the Forms: The Treatment of 'Different' Terms Under the Uniform Commercial Code*, 16 U.C.C.L.J. 103 (1983).

⁶ Utz, *supra*, note 4 at 110-12; Murray, *supra*, note 4 at 1355.

⁷ *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d at 1336-37; *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715 (7th Cir.1987); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of Section 2-207*, 68 VA. L.REV. 1217, 1246 (1982).

⁸ *See, e.g., Daitom, Inc. v. Pennwalt Corporation*, 741 F.2d 1569 (10th Cir. 1984). Professor Victor Goldberg offers a criticism of the knock out rule in *The "Battle of the Forms": Fairness, Efficiency, and the Best Shot Rule*, 76 OR. L. REV. 155 (1997).

6. Formation and Construction of a Contract Formed Not by the Writings of the Parties but by Performance: “An Old-Fashioned Implied-in-Fact Contract”

Section 2-207(3) controls the formation and construction of the terms of a contract when the parties’ writings do not form a contract, but where the conduct of the parties is sufficient to warrant recognition that a contract has in fact been formed.

Take this example. The buyer’s pre-printed or boilerplate offer form contains a clause stating: “Acceptance is expressly limited to the terms of the offer.” In response, the seller’s boilerplate pre-printed acceptance form states: “This acceptance is expressly conditional on Buyer’s assent to the additional terms of this acceptance.” Thus, even under the liberal contract formation principles of 2-207(1), the parties’ writings have not formed a contract. However, in reality, the parties intended to form a contract, despite the fact that the parties have not created a written contract under 2-207(1) because of differences in the pre-printed forms they exchanged.

In such situations, the parties may believe they have created a binding contract, and they both behave as if they have formed a contract by providing the agreed-on performance or perhaps by making substantial preparation for performance. In such situations, under 2-207(3), a contract *has* been formed by the parties’ conduct—even though the writings of the parties do not otherwise establish a contract under 2-207(1).

If the contract is formed by performance under section 2-207(3) rather than by the writings under 2-207(1), then 2-207(3) also provides the rule for determining the terms of the contract that has been formed in that manner. The terms of the contract formed by performance under 2-207(3), determined under the “knock-out” rule, consist of the terms on which the documents the parties exchanged are in agreement (for example, the additional and different terms of *both* parties’ writings are “knocked out” of the k), *plus* other terms implied under the U.C.C., including:

- Terms incorporated by the parties’ course of performance, found in UCC 2-208;
- Terms incorporated by the parties’ course of dealing, found in UCC 1-205;
- Terms incorporated by usage in the relevant trade, found in UCC 1-205;
- Terms incorporated because they are generally applicable under U.C.C. Art. II, Parts III-VII such as the U.C.C. provisions relating to implied warranties and contractual remedies. (The text of Sections 2-208 and 1-205 may be found in the Glossary.)

PART II

7. The “Battle of the Forms” and the CISG: Are the Rule for International Contracting Any Clearer?

The United Nations Convention on Contracts for the International Sale of Goods, more commonly known as the CISG, governs *international* commercial contracts for the sale of goods. (UN Document Number A/CONF 97/19). The CISG may be seen as a corollary or a parallel to Article 2 of Uniform Commercial Code, which governs *domestic* transactions in goods within the United States. The CISG, however, has a unique “international character” which has at its base a view that there is “. . . the need to promote uniformity in its application and the observance of good faith in international trade.” (CISG art. 7(1)). Interestingly, the CISG regulates contracts for *sale of goods* (Article 1(1) CISG) without precisely defining this term. A definition, however, may be seen in its negative or delimiting implications. Specifically, the CISG does *not* govern contracts for the sale of rights such as industrial

property rights (e.g., copyrights, patents, and trademarks), contracts for the sale of real property, the shares of a corporation, or the purchase of a company (Hungarian Chamber of Commerce Court of Arbitration, Award dated December 20, 1993, V b 92 205).

The CISG was finalized in Vienna, Austria in 1980. As noted by Maria del Pilar Perales Viscasillas (1998), “During the CISG development process, many nations were represented. In contrast, only 62 nations participated in the Diplomatic Conference on the New Uniform Sales Law; 22 were European or other developed Western States, 11 socialist, 11 South-American, 7 African and 11 Asian countries. Adopted by countries that account for over two-thirds of all world trade in goods, a wide spectrum of legal cultures has made the CISG the law of the land: from developing countries to the developed, from free market economies to countries with planned economies, and Civil as well as Common Law legal systems.” The United States ratified the CISG in December 1986, and the Convention became effective in January 1988, upon the ratification of its eleventh signatory party.

As of February 2012, 78 countries have ratified the convention. The list of ratifying countries includes many of the major trading partners of the United States, including China, Japan, Germany, Canada, Mexico, France, as well as most of the nations of Latin America and the European Union. The list of U.S. trading partners who have not acceded to the CISG, however, includes several major non-signatory parties such as Brazil, Hong Kong, India, South Africa, Taiwan, and the United Kingdom. British reluctance to accede sign on to the treaty may partially be explained by its historical “common law” tradition and its general reluctance to accept civil or statutory law as the basis of its core legal system in the area of commercial transactions.

Under the legal system of the United States, the CISG is considered to be a *self-executing treaty*, meaning that no further congressional action was required to make the provisions of the CISG binding on U.S. courts. (See *Chicago Prim Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 897 (7th Cir. 2000)). Thus, whenever parties to an agreement for the international sale of goods are from two different signatory states, the CISG will automatically provide the governing substantive law, not the UCC—unless the parties have expressly *opted-out* of the CISG pursuant to Article 6.

The text of the CISG should be consulted for clarity. It reads:

Article 1

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

- when the States are Contracting States; or
- when the rules of private international law lead to the application of the law of a Contracting State.

The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

This Convention does not apply to sales:

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

7.1. Default Applicable Law

What is clear is that the CISG has become in effect the “default applicable law” (Kokoruda, 2011) when parties from two different signatory countries execute an agreement for the sale of goods. However, there is an *opt-out provision* found in Article 6. Opting out of the CISG must be done expressly rather than by implication.

Because the CISG is the substantive law of a signatory country, a standard *choice of law* provision (a term of a contract in which the parties specify that any dispute arising under the contract shall be determined in accordance with the law of a particular jurisdiction) in an international sales agreement between parties from different signatory countries is *not* ordinarily sufficient to opt out of the CISG. Specific language will be required such as: “*The Uniform Law on the Formation of Contracts for the Sale of Goods, based upon the United Nations Convention on Contracts for the International Sale of Goods, shall not be applicable.*” (See *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 58 F. Supp. 2d 925, 927).

Christopher Kokoruda (2011), an expert in international commercial arbitration, points out that there are two primary reasons to consider the question of the applicability of the CISG. First, the CISG may directly impact on a party's *choice of forum* (i.e., whether a case will be heard in either a state or a federal court). Second, there are many important substantive legal differences between Article 2 of the UCC and the CISG. One of these differences relates to UCC2-207.

Concerning the choice of forum, since the CISG is essentially a “federal” law (a treaty), it provides for *federal* subject-matter jurisdiction under 28 U.S.C. § 1331. Thus, unlike causes of action brought under Article 2 of the UCC where a plaintiff has the choice of proceeding in either a federal or state court upon meeting “threshold requirements,” a claim under the CISG does not require complete diversity of citizenship (involving citizens from two different states) and an amount in controversy exceeding \$75,000 in order to bring a case to a federal court. Thus, the CISG creates a direct private right of action in a federal court for breach of the international sales agreement if the CISG applies. (See *BP Oil Int'l Ltd. v. Empresa Estatal Petroleosde Ecuador*, 332 F.3d 333 (5th Cir. 2003)).

7.2. Tracking Differences

There are some important differences between the CISG and the UCC. Among the CISG's most important substantive differences from the UCC include the method of contract formation, principles of contract construction and interpretation, the abandonment of a writing requirement (statute of frauds), and the applicability of the parol evidence rule. One of these differences has direct applicability to the discussion concerning “different and additional terms.”

7.3. The CISG and the Battle of the Forms

Let us begin by citing to the CISG. Article 19 of the CISG states:

"(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modification is a rejection of the offer and constitutes a counter-offer."

"(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance."

"(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially."

The CISG appeared to some to be a compromise as to the treatment that should be accorded a purported acceptance that contains different or additional terms from the offer. The drafters of the CISG obviously were aware of the problems posed by the so-called "battle of forms." In fact, the Secretariat had proposed an alternative solution that provides for an effective acceptance when the additional or material terms *are not materially different than the offer*. (Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods, [1977] 8 Y.B. UNCITRAL 90, 100, annex II, U.N. Doc. A/CN.9/128/1977).

First, the proposed alternate stated the traditional rule that a purported acceptance modifying, adding to, or limiting the original offer is a rejection of that offer. However, the drafters then proposed that when terms are contained in a printed form that materially alters the offer, the terms *become part of the contract unless they are objected to without delay*. The commentary to this proposal assumed that "employees of both parties will rarely, if ever, read and compare the printed terms. All that is of importance to them are the terms which have been filled in on the forms." Since the parties will normally act as though there is a contract, the proposal provides a solution as to what the actual terms of the contract are when there is performance. While this approach differs from the U.C.C., it was at least more of a recognition that an actual deal had been struck, providing for a contract when the parties, although not in agreement on all terms, actually manifest an intent to be bound. However, the drafters of Article 19 rejected the proposed alternate in favor of the traditional mirror image rule. (Report of the Working Group on the International Sale of Goods on the Work of its Eighth Session, [1977] 8 Y.B. UNCITRAL 73, 82, U.N. Doc. A/CN.9/128/1977).

While it may be said that the drafters were interested in providing a direct and practical solution to the problem of the "battle of the forms," the legislative history of Article 19 indicated that in the end, drafters decided that a material alteration to the offer should constitute a rejection regardless of whether any such term was contained in printed form.

Although the text of Article 19(2) allows for material terms which do not "alter the terms of the offer," Article 19(3) then defines *materiality* in broad terms, and includes the *price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes*. In a practical sense, it might be difficult to think of *any* additional or different term would *not* materially alter the offer. Thus, the CISG seems clearly to take an approach closer to the traditional mirror image rule than the philosophy of the U.C.C. At least with regard to the "battle of forms," the implications of Article 19 are quite clear: *the party sending the last form will be the one whose terms prevail*.

What would be the practical effect of applying the CISG to our initial factual situation? Let's say that the Kurtz Corporation (a German company) receives a purchase order (an offer) from a U.S. buyer, Helen Grill, Inc., that (1) expressly provides for the law of the state of New Jersey (i.e., the UCC) and (2) contains certain a term or terms that Kurtz finds objectionable. To avoid being bound by these objectionable terms, Kurtz must expressly make his acceptance conditional on the buyer's accepting his terms. It would not be enough to send back an acceptance containing different terms.

However, now suppose that Kurtz receives a purchase order that contains objectionable terms but does not *expressly provide* for application of the UCC. Then the CISG would apply, since both parties are from CISG countries, and Kurtz may send back an acceptance that changes the terms of the original purchase order. Kurtz, however, must be aware that he will take the risk of his changes being found to be "material alterations" which would then invalidate the entire contract.

8. Some Practical Tips Relating to the CISG

- First, it is important to ascertain if either or both of the parties to the contract are signatories to the CISG as the CISG could automatically apply to your contract in the absence of an effective "opt-out" provision.
- Review the provisions for each particular contract to determine if the CISG or the UCC offers any advantages or disadvantages, depending on the specifics of the agreement. These considerations may vary with the type of contract, goods, and parties involved. Special attention must be paid to terms relating to price, payment, quality and quantity of goods, place and time of delivery, extent of liability, and provisions for settlement of any dispute that might arise—as these are the critical in the discussion of the applicability of Article 19 of the CISG.
- If the parties do not wish the CISG to apply, that intention must be specifically stated in the contract. Recall the words used earlier: "*The Uniform Law on the Formation of Contracts for the Sale of Goods, based upon the United Nations Convention on Contracts for the International Sale of Goods, shall not be applicable.*" In that case, an express choice of law provision should be included.
- Even though not required by the CISG, be certain that all contracts are found in writing and make the writing as specific as possible.
- Do not begin performance, pay for goods, or accept goods unless it is clear to both sides that there has been an agreement as to precise contract terms and that the agreement is "clear, definite, and explicit and leaves nothing further for negotiation."

9. Some Parting Thoughts

What is obvious is that creating a contract—be it domestic or international—is a very difficult process. Even though there is a very strong impetus on the part of a seller to begin performance and deliver the goods, and on the part of the buyer to accept the goods and begin putting them to their intended use, it might be wiser to resist the temptation and wait until it is completely clear that the parties have actually agreed on all material terms. Because of the confusion surrounding the application of UCC 2-207 and the outstanding issues relating to the CISG Article 19, in the long run, the time spent in assuring accuracy, mutuality, and specificity would be well spent.

Glossary:

Test of an offer: In *Lucy v. Zehmer*, the court noted, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning

of his words and acts.” (*Lucy v. Zehmer*, 196 Va. 493 (1954)). The test has been directly formulated as follows: “Would a reasonable man conclude that an offer had been made?”

The question has also been formulated in *Lefkowitz v. Great Minneapolis Surplus Store* as follows: “.. if the writing “clear, definite, and explicit and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract.” (*Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188, 86 N.W.2d 689 (1957)).

§ 2-208. Course of Performance or Practical Construction

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

§ 1-205. Course of Dealing and Usage of Trade

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

Proposed Amendment to § 2-207, Terms of Contract: Effect of Confirmation

Subject to Section 2-202, if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains additional to or different from those in the contract being confirmed, the terms of the contract are:

- (a) terms that appear in the records of both parties;
- (b) terms, whether in a record or not, to which both parties agree; and
- (c) terms supplied or incorporated under any provision of this Act.

Cases

- [1] BP Oil Int'l Ltd. v. Empresa Estatal Petoleos de Ecuador, 332 F.3d 333 (5th Cir. 2003).
- [2] Carlill v. Carbolic Smoke Ball Company, Q.B. 256 (C.A.) (1896).
- [3] Chicago Prim Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 897 (7th Cir. 2000).
- [4] Daitom, Inc. v. Pennwalt Corporation, 741 F.2d 1569 (10th Cir. 1984).
- [5] Hull 753 Corp. v. Elbe Flugzeugwerke GmbH, 58 F. Supp. 2d 925, 927 (N.D. Ill. 1999).
- [6] Hungarian Chamber of Commerce Court of Arbitration, Award dated December 20, 1993, V b 92 205.
- [7] Ionics, Inc. v. Elmwood Sensors, Inc., 110 F.3d 184 (1st Cir. 1997).
- [8] Lefkowitz v. Great Minneapolis Surplus Store, Inc., 251 Minn. 188, 86 N.W.2d 689 (1957).
- [9] Lucy v. Zehmer, 196 Va. 493 (1954).
- [10] Northrop Corporation v. Litronic Industries (29 F.3d 1173 (7th Cir. 1994).
- [11] Roto-Lith, Ltd. V. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962).
- [12] Schulze and Burch Biscuit Company v. Tree Top, Inc., 831 F.2d 709 (7th Cir. 1987).
- [13] Steiner v. Mobil Oil Corporation, 20 Cal. 3d 90 (1977).
- [14] Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 99 (3d Cir. 1991).
- [15] Union Carbide Corp. v. Oscar Mayer Foods Corp., 947 F.2d 1333 (7th Cir. 1981).

References

- [1] D.G. Baird and R. Weisberg, Rules, standards and the battle of the forms: A reassessment of section 2-207, *Virginia Law Review*, 68(1982), 1217-1262.
- [2] C.N. Brown, Restoring peace in the battle of the forms: A framework for making uniform commercial code section 2-207 work, *North Carolina Law Review*, 69(1991), 893-944.
- [3] A. Farnsworth, *Farnsworth on Contracts*, (1990), Aspen.
- [4] V. Goldberg, The battle of the forms: Fairness, efficiency and the best shot rule, *Oregon Law Review*, 76(1997), 155-171.
- [5] R.A. Hakes, Focusing on the realities of the contracting process- An essential step to achieve justice in contract enforcement, *Delaware Law Review*, 12(2) (2011), 95-119.
- [6] R.J. Hunter, Jr., J.H. Shannon, H.J. Amoroso and S. O'Sullivan-Gavin, *The Legal Environment of Business: A Managerial and Regulatory Perspective*, (2010), Mason, Ohio: Cengage.
- [7] C.C. Kokoruda, The UN convention on contracts for the international sale of goods- It's not your father's uniform commercial code, *Florida Bar Journal*, 85(June) (2011), 103-105.

- [8] F. Miller, Symposium: Amended article two: Reversing the curse? Introduction: What can we learn from the failed 2003-2005 amendments to UCC article 2? *South Texas Law Review*, 52(2011), 471-591.
- [9] J.E. Murray, Jr., The chaos of the battle of the forms: Solutions, *Vanderbilt Law Review*, 39(1986), 1307-1385.
- [10] D. Ostas and F. Darr, Redrafting UCC section 2-207: An economic prescription for the battle of the forms, *Denver University Law Review*, 73(1996), 403-424.
- [11] A.C. Rau, Arbitral power and the limits of contract: The new trilogy, *American Review of International Arbitration*, 22(2011), 435-550.
- [12] Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods, (1977), 8 Y.B. UNCITRAL 90, 100, annex II, U.N. Doc. A/CN.9/128/1977.
- [13] Report of the Working Group on the International Sale of Goods on the Work of its Eighth Session, (1977), 8 Y.B. UNCITRAL 73, 82, U.N. Doc. A/CN.9/128/1977.
- [14] American Law Institute, *Restatement (2nd) of Contracts*, (1981), American Law Institute.
- [15] R.E. Scott and J.S. Kraus, *Contract Law and Theory (3d ed.)*, (2002), Lexis-Nexis.
- [16] UNCITRAL Secretariat official records, Available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.
- [17] J.L. Utz, More on the battle of the forms: The treatment of 'Different' terms under the uniform commercial code, *Uniform Commercial Code Law Journal*, 6(1983), 103-112.
- [18] M.P. Van Alstine, Consensus, dissensus and contractual obligation through the prism of the uniform international sales law, *Virginia Journal of International Law*, 37(1996), 1-105.
- [19] M. del Pilar Perales Viscasillas, Battle of the forms under the 1980 United Nations convention on contracts for the international sales of goods: A comparison with section 2-207 UCC and the UNIDROIT principles, *Pace International Law Review*, 10(Summer) (1998), 97-155.
- [20] West, *Black's Law Dictionary (8th ed.)*, (2004), West Group.
- [21] J.J. White and R.S. Summers, *Uniform Commercial Code (3d ed.)*, (1988), Westlaw.
- [22] S. Williston, *Williston on Contracts (4th ed.)*, (1990), Westlaw.