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The Long Awaited Official Overhaul of UCC Section 2-207: An Essay on the Limited of Improvement

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THE LONG AWAITED OFFICIAL OVERHAUL OF U.C.C. SECTION 2-207: AN ESSAY ON THE LIMITS OF IMPROVEMENT

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I. INTRODUCTION

The American Law Institute and the National Conference of Commissioners on Uniform State Laws amended Article 2 of the Uniform Commercial Code in 2003.[1] One of the most urgent and challenging tasks the sponsoring organizations undertook in amending the Sales Article of the Code was to revise U.C.C. section 2-207, the "battle of the forms" section that will live in infamy.

> (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.
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> (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:
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> (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 provision of this Act.[2]

In revising the original statute (hereinafter often referred to as U.C.C.-O section 2-207), the drafters decided to move the rule stated in U.C.C.-O section 2-207(1) to revised section 2-206(3) (hereinafter often referred to as U.C.C.-R section 2-206(3)) in amended Article 2, so that all of the standards governing formation of a contract for sale by acceptance of an offer are now collected in U.C.C.-R section 2-206. U.C.C.-R section 2-206(3) provides that "[a] definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer."[3]

In the sponsoring organizations' proposed amendment of Article 2, revised section 2-207 (hereinafter often referred to as U.C.C.-R 2-207) replaces

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1. UNIF. COMMERCIAL CODE § 2-101 *et seq.* (amended 2003), 1 U.L.A. 370 (Supp. 2005) [hereinafter U.C.C.-R].

2. UNIF. COMMERCIAL CODE § 2-207 (2000 official text), 1A U.L.A. 208 (Supp. 2005) [hereinafter U.C.C.-O].

3. U.C.C.-R § 2-206(3), *supra* note 1.

subsections (2) and (3) of U.C.C.-O section 2-207. The sole province of U.C.C.-R section 2-207 is to identify the terms of a contract for the sale of goods.

> 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 terms 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
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> (c) terms supplied or incorporated under any provision of this Act.[4]

The language of U.C.C.-R sections 2-206(3) and 2-207 and the proposed Official Comments to those sections[5] improves upon the language of U.C.C.-O section 2-207 and its Official Comments. Adoption of the revised statutes will make much of the case law and scholarly commentary interpreting the original statute (mercifully) obsolete. Despite that improvement, however, the language of U.C.C.-R sections 2-206(3) and 2-207 still does not provide sufficiently clear and thorough guidelines for resolving the questions of sales contract formation and content that those sections address.

The following essay provides an initial evaluation of revised U.C.C. sections 2-206(3) and 2-207.[6] Part of the evaluation identifies the many ways in which language of the revised statutes improves upon the language of their predecessor. The evaluation also suggests how the text of U.C.C.-R sections 2-206(3) and 2-207 might be further revised or interpreted in order to provide needed guidance when (and if) the revised statutes are adopted. A more informed evaluation of revised sections 2-206(3) and 2-207 must await the adoption of Amended Article 2 by state legislatures and the generation of case law interpreting those particular statutes.

II. REVISED SECTION 2-206(3)

In the 2003 amendment of the Sales Article, revised U.C.C. section 2-206(3) replaces original U.C.C. section 2-207(1). All of the standards governing formation of a contract for sale by the process of offer and acceptance are contained in revised section 2-206 of Amended Article 2, leaving all questions concerning identification of the terms of a sales contract to be resolved under revised section 2-207.

Unlike its predecessor, U.C.C.-R section 2-206(3) applies only when an offeree's response to an offer is communicated "in a record." According to section 2-103(1)(m) of amended Article 2, as well as section 1-201(31) of amended Article 1, "'record' means information that is inscribed on a tangible

4. U.C.C.-R § 2-207, *supra* note 1.

5. U.C.C.-R § 2-206 cmts. 2 and 3, *supra* note 1; U.C.C.-R section 2-207 cmts. 1-5, *supra* note 1.

6. *See also* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.21, at 332-333 (3d ed. 2004); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.21, at 106-107 (5th ed. 2003); James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723 (2004).

medium or that is stored in an electronic or other medium and is retrievable in perceivable form."[7] Because of this limitation on the scope of U.C.C.-R section 2-206(3), when an offeree's verbal response to an offer is not contained in a record, the determination of whether that response constitutes an acceptance of the offer must be made by applying supplementary principles of law under U.C.C.-R section 1-103(b).[8] On the other hand, application of U.C.C.-R section 2-206(3) is not restricted to situations in which the parties have exchanged records or commercial forms. An offer need not have been made in a record in order for an offeree's "definite and seasonable expression of acceptance in a record" to operate as an acceptance of that *unrecorded* offer under revised section 2-206(3).[9] Thus, although the scope of U.C.C. section 2-206(3) is not restricted to cover only those situations in which the parties have *done battle* by exchanging commercial forms or records, it is restricted to cover only those situations in which the offeree's response to an offer, however that offer was made, is contained in a record.

Like existing U.C.C. section 2-207(1), U.C.C.-R section 2-206(3) provides that "[a] definite and seasonable expression of acceptance . . . operates as an acceptance . . . ."[10] Whether an "expression of acceptance in a record" is "seasonable" depends upon whether the record was dispatched[11] or received[12] within the time specified in the offer or, when the offer does not specify a deadline for acceptance, within a reasonable time after the offer was made.[13] Whether "a . . . seasonable expression of acceptance in a record" is "definite" enough to operate as an acceptance under revised section 2-206(3) is a more challenging question.

The text of U.C.C.-R section 2-206(3) does not provide a test for determining whether an expression of acceptance in a record is sufficiently "definite" that it "operates as an acceptance" when the record contains terms that are not identical to the terms of the offer. Revised Comment 2 to U.C.C.-R section 2-206 suggests that in order for an expression of acceptance in a "responsive record" to operate as an acceptance under subsection (3), it "must . . . be reasonably understood as an 'acceptance' and not as a proposal for a different transaction."[14] Revised Comment 3 provides a negative statement of

7. U.C.C.-R § 1-201(31), *supra* note 1; U.C.C.-R § 2-103(1)(m), *supra* note 1.

8. "Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law . . . supplement its provisions." U.C.C.-R § 1-103(b), *supra* note 1.

9. U.C.C.-R § 2-206(3), *supra* note 1.

10. *Id.*

11. "Unless the offer provides otherwise, . . . an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (2005).

12. "[A]n acceptance under an option contract is not operative until received by the offeror." *Id.* § 63(b). Moreover, an acceptance is not effective until received by the offeror if the offer so provides. *Id.* § 63(a) pmbl.

13. "An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time." U.C.C.-R § 1-205(b), *supra* note 1. *See* RESTATEMENT (SECOND) OF CONTRACTS § 41(1) (2005) ("An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.").

14. U.C.C.-R § 2-206 cmt. 2, *supra* note 1. Revised Official Comment 2 indicates that the drafters

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the test.

> A purported expression of acceptance containing additional or different terms would not be a "definite" acceptance when the offeree's expression clearly communicates to the offeror the offeree's unwillingness to do business unless the offeror assents to those additional or different terms. This is not a definite acceptance since the offeree's expression makes it clear that the offeree is not "accepting" anything; but rather that the offeree is indicating a willingness to do business only on the offeree's terms and that the offeree is awaiting the offeror's assent to those terms.[15]

Consistent with both of these statements of the test in the revised comments, it is submitted that an offeree's responsive "expression of acceptance in a record"[16] ought to be sufficient to support a determination that a contract has been made when that response would justify a reasonable offeror in understanding that the offeree has communicated a willingness to close an agreement immediately rather than an insistence that the offeror assent to the offeree's variant terms before a contract can be concluded.[17] Revised section 2-206(3) uses the same adjective ("definite") that U.C.C.-O section 2-207(1) uses in identifying the kind of "expression of acceptance" that "operates as an acceptance." An appropriate standard governing this method of contract formation should be flexible, but it should not be needlessly vague and conclusory. The language of revised section 2-206(3) would be improved if the adjective "definite" were deleted and the text instead referred to "[a] seasonable expression of acceptance in a record *that communicates a willingness to close an agreement immediately*. . . ." This suggested language provides an affirmative statement of the negative standard stated in revised Comment 3. A responsive record that indicates the offeree is awaiting the offeror's assent to the offeree's variant terms does not communicate a willingness to close an agreement *immediately*. But an offeree's expression of acceptance in a record should be considered sufficiently definite to conclude a contract when that response communicates the offeree's willingness to close an agreement immediately despite any divergence between each party's set of proposed terms.

It is unfortunate that revised section 2-206(3), like original section 2-207(1), uses the word "acceptance" twice in referring to materially distinguishable matters. The language used in both versions of the statute is confusing, if not downright circular. According to that language, an "*expression* of acceptance" can operate as an "acceptance." (emphasis added). Revised Comment 3 to U.C.C.-R section 2-206 provides the following guidance: "[A]n expression of acceptance can operate as an *acceptance* (i.e., *create a contract*)

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regarded this test as consistent with the test stated in Official Comment 2 to original section 2-207: "Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract." U.C.C.-O § 2-207 cmt. 2, *supra* note 2.

15. U.C.C.-R § 2-206 cmt. 3, *supra* note 1 (emphasis added).

16. U.C.C.-R § 2-206(3), *supra* note 1.

17. *Compare* Charles M. Thatcher, *Sales Contract Formation and Content-An Annotated Apology for a Proposed Revision of Uniform Commercial Code § 2-207*, 32 S.D. L.REV. 181, 191 (1987) ("an offeree's seasonable response constitutes an acceptance if it would clearly reveal to a reasonable offeror an intention to close an agreement immediately more than a competing insistence that the parties deal exclusively or at least in part on the offeree's divergent set of proposed terms.").

even though it contains terms that are not identical to those in the offer."[18] It should not have been necessary to explain in a Comment the different meanings the drafters meant to ascribe to the word "acceptance" that appears twice in the text of the statute. The language of the amended statute should be further revised (or at least interpreted) in such a way as to eliminate (or ignore) this drafting error. The phrase "expression of acceptance in a record" should be retained, but the subsequent reference to "an acceptance" should be interpreted as follows in order to conform to the explanation provided by Revised Comment 3: "A . . . seasonable expression of acceptance in a record . . . is *sufficient to conclude*[19] *a contract*[20] . . . ."

Revised section 2-206(3) deletes the unnecessary and confusing reference to "a written confirmation" that appears in the text of U.C.C.-O section 2-207(1). A confirmation of an existing contract cannot "operate[s] as an acceptance" of an offer. An offer proposes the formation of a contract in the future; a confirmation acknowledges the existence of a contract that has already been formed in the past. On the other hand, in determining the terms of a contract, U.C.C.-R section 2-207 does take account of the situation in which "a contract formed in any manner is confirmed by a record . . . ." Unlike original section 2-207(1), revised section 2-206(3) deals exclusively with the question of whether an offeree's verbal response to an offer is sufficient to conclude a contract.

Revised section 2-206(3) retains the language of original section 2-207(1) which refers to "terms additional to or different from" the offer[21] or the offered terms.[22] The shortcomings of this description of variant terms in an offeree's response have been demonstrated elsewhere.[23] There is no meaningful distinction between "terms additional to" and "terms . . . different from" the terms of the offer. A contract that includes "additional terms" is a "different" contract than one that does not contain those terms.[24] Moreover, the phrase does

18. U.C.C.-R § 2-206 cmt. 3, *supra* note 1 (emphasis added).

19. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 24 (2005) (defining an "offer" as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will *conclude* it") (emphasis added).

20. *Compare id.* (defining an "offer" as an invitation to conclude a "bargain" rather than a *contract*). Restatement (Second) of Contracts section 24 uses the word "bargain" rather than the word "contract" in defining an offer because not all "contracts" qualify as "bargains" under the Restatement (Second) definition of those terms. *See id.* §§ 1 (defining "contract" as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"); 3 (defining "agreement" as "a manifestation of mutual assent on the part of two or more persons," and defining "bargain" as "an agreement to exchange promises or to exchange a promise for a performance, or to exchange performances"); and 17(2) (stating that "whether or not there is a *bargain a contract* may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94") (emphasis added). By material contrast, U.C.C.-R section 1-201(b)(12) defines a "contract" as "the total legal obligation that results from the parties' agreement . . . ," and U.C.C.-R section 1-201(b)(3) defines an "agreement" as "the *bargain* of the parties in fact . . . ." (emphasis added). Under these Code definitions, the basis for any "contract" is a "bargain." As Revised Comment 3 to U.C.C.-R section 2-206 indicates, an offeree's response to an offer is sufficient to create a "contract" if it satisfies the elements of U.C.C.-R section 2-206(3).

21. U.C.C.-R § 2-206(3), *supra* note 1.

22. U.C.C.-O § 2-207(1), *supra* note 2.

23. *See, e.g.*, Charles M. Thatcher, *Sales Contract Formation and Content – An Annotated Apology for a Proposed Revision of Uniform Commercial Code § 2-207*, 32 S.D. L. REV. 181, 208-9 (1987).

24. According to revised Comment 2 to U.C.C.-R section 2-206, in order for a responsive record to conclude a contract, it "must still be reasonably understood as an acceptance and not as a proposal for a

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not appear to take account of the situation in which the offeree's responsive record contains *fewer* terms than the offer. Revised Comment 3 provides a helpful translation of the phrase "terms additional to or different from the offer." It provides: "an expression of acceptance can . . . create a contract . . . even though it contains terms that are not identical to those in the offer."[25] The Comment 3 description of variant terms in an offeree's responsive record is more comprehensive and less confusing than the U.C.C.-R section 2-206(3) description of such terms as being "additional to or different from the offer." It is more comprehensive because it covers the situation in which the offeree's responsive record contains fewer terms than the offer. It is less confusing because it does not suggest that there is any meaningful distinction between the situation in which the offeree's responsive record contains a *larger number* of terms than the offer – "terms additional to . . . the offer – and the situation in which the terms contained in the offeree's responsive record *conflict with* the terms of the offer – "terms . . . different from the offer." Moreover, it is unclear from the language of U.C.C.-R section 2-206(3) whether an express term contained in an offeree's record should be regarded as a term "additional to the offer" when the offeree's term expresses a term that is inferred in the offer. It is also unclear whether a term contained in an offeree's record qualifies as an "additional" or a "different term" when the offeree's term conflicts with an implied term of the offer. All of these pointless inquiries would be avoided if the reference in U.C.C.-R section 2-206(3) to "terms additional to or different from the offer" were changed to "terms that are not identical to the terms of the offer."

Revised section 2-206(3) improves upon the language of its predecessor by deleting the unnecessary and confusing exception (or "proviso") to the affirmative rule of U.C.C.-O section 2-207(1): "unless acceptance is expressly made conditional on assent to the additional or different terms."[26] The exception was apparently included in order to preserve the offeree's power to make a counter-offer.

But if the offeree's response would not have justified a reasonable offeror in understanding that the offeree had indicated a willingness to close an agreement immediately, then the offeree's "expression of acceptance" would not have been sufficiently "definite" to operate[] as an acceptance" in the first place. The proviso to U.C.C.-O section 2-207(1) has spawned a numbing case law. It has also encouraged drafters to include in commercial forms "conditional assent clauses" tracking the language of that proviso in order to compel the conclusion that any expression of acceptance in those forms does not operate as an acceptance. Revised Comment 3 to U.C.C.-R section 2-206[27] indicates that an offeree's "purported expression of acceptance" containing variant terms would not qualify as a "definite" expression of acceptance, and therefore would not be sufficient to create a contract, if it "clearly communicates to the offeror the

different transaction." U.C.C.-R § 2-206 cmt. 2, *supra* note 1 (emphasis added).

25. U.C.C.-R § 2-206 cmt. 3, *supra* note 1 (emphasis added).

26. U.C.C.-O § 2-207(1), *supra* note 2.

27. *See supra* text accompanying note 15.

offeree's unwillingness to do business unless the offeror assents to [the offeree's variant terms]."[28] The Comment then makes the parenthetical remark that "[t]his result is consistent with the [proviso in] former Section 2-207(1)."[29]

The last matter addressed in revised Comment 3 to U.C.C.-R section 2-206(3) is whether the language of an offer might prevent an offeree's otherwise "definite . . . expression of acceptance in a record" from concluding a contract.

> In a situation in which the offer clearly indicates that the offeror is unwilling to do business on any terms other than those contained in the offer, and the offeree responds with an expression of acceptance that contains additional or different terms, a court could also conclude that the offeree's response does not constitute a definite expression of acceptance.[30]

The standards governing acceptance of an offer stated in subsection (1) of U.C.C.-R section 2-206 are qualified by an introductory exception – "Unless otherwise unambiguously indicated by the language or circumstances . . . ."[31] Official Comment 3 seems to suggest that the standard governing the verbal acceptance of an offer stated in subsection (3) of U.C.C.-R section 2-206 might be qualified by a similar exception – "Unless the offer clearly indicates that the offeror is unwilling to do business on any terms other than those contained in the offer." That suggestion is reinforced by revised Comment 2 to U.C.C.-R section 2-207.

> Terms in a record that insist on all of that record's terms and no other terms as a condition of contract formation have no effect on the operation of [revised] section [2-207]. When one party insists in that party's record that its own terms are a condition to contract formation, if that party does not subsequently perform or otherwise acknowledge the existence of a contract, [and] if the other party does not agree to those terms, the record's insistence on its own terms will keep a contract from being formed under Sections 2-204 or 2-206 . . . .[32]

Notwithstanding these suggestions in the revised Comments, the text of U.C.C.-R section 2-206(3) is not qualified by an introductory exception. The probable reason why the drafters decided not to include such an exception in the text of revised section 2-206(3) is that such an indication in the offer should not necessarily foreclose a determination that an offeree's expression of acceptance containing variant terms is sufficiently "definite" to operate as an acceptance of the offer.

The language of U.C.C.-R section 2-206(3) should be revised or interpreted in such a way as to retain all of the improvements that the revised statute makes on the language of U.C.C.-O section 2-207(1) while meeting all of the above criticisms of the revised text. The proposed revision or interpretation of U.C.C.-R section 2-206(3) would read as follows (changes being indicated with ellipses and italics): "(3) A . . . seasonable expression of acceptance in a record *that*

28. U.C.C.-R § 2-206 cmt. 3, *supra* note 1.
29. *Id.*
30. *Id.* (emphasis added).
31. U.C.C.-R § 2-206(1), *supra* note 1.
32. U.C.C.-R § 2-207 cmt. 2, *supra* note 1.

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communicates[33] *a willingness to close an agreement immediately*[34] *is sufficient to conclude a contract*[35] . . . even if it[36] contains terms *that are not identical to the terms of* the offer.

III. REVISED SECTION 2-207

In the 2003 amendment of Article 2, revised U.C.C. section 2-207[37] replaces original U.C.C. section 2-207(2)[38] and (3).[39] Revised section 2-207 addresses a single question: What are the terms of a contract for sale? Questions regarding the formation of a sales contract are resolved under sections 2-204, 2-205, and 2-206 of amended Article 2.

The terms of a contract for sale are supposed to be determined under revised section 2-207 irrespective of the manner in which the contract was formed. According to revised Comment 1, U.C.C.-R section 2-207 "applies to all contracts for the sale of goods, and it is not limited only to those contracts where there has been a 'battle of the forms.'"[40] Moreover, revised Comment 2 to U.C.C.-R section 2-207 indicates that the statute "applies only when a contract has been created under another section of this Article. The purpose of this

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33. Official Comment 3 to U.C.C.-R section 2-206 states that "[a] purported expression of acceptance" that contains variant terms would not be sufficiently "definite" to close an agreement "when the offeree's expression clearly *communicates*" that the offeree is unwilling to do business unless the offeror assents to the offeree's variant set of terms. U.C.C.-R § 2-206 cmt. 3, *supra* note 1 (emphasis added).

34. *Id.* An offeree's expression of acceptance in a record is *not* sufficient to conclude a contract when it "clearly communicates to the offeror the offeree's *unwillingness to do business unless the offeror assents to* [the variant terms contained in the offeree's record.]." *Id.* (emphasis added).

35. *Compare* U.C.C.-R section 2-206(3), under which "[a] definite and seasonable expression of acceptance in a record *operates as an acceptance* . . . ." U.C.C.-R § 2-206(3), *supra* note 1 (emphasis added).

36. Official Comment 3 to U.C.C.-R section 2-206 indicates that the antecedent of the pronoun "it" is "an expression of acceptance" and not the record in which that expression of acceptance is communicated. U.C.C.-R § 2-206 cmt. 3, *supra* note 1.

37. U.C.C.-R section 2-207, *supra* note 1.

> 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 terms 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.

Id.

38. U.C.C.-O § 2-207(2), *supra* note 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.

Id.

39. U.C.C.-O § 2-207(3), *supra* note 2.

> 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 provision of this Act.

Id.

40. U.C.C.-R § 2-207 cmt. 1, *supra* note 1.

section is solely to determine the terms of the contract."[41]

Despite the drafters' intention that the terms of a contract of sale are to be determined under revised section 2-207 without regard to the manner in which the contract was formed, that portion of the text which indicates the scope of the statute's application is unduly restrictive. According to the scope portion of the revised text, the terms of a sales contract are to be determined under revised section 2-207 in only three situations: (i) when "conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract;" (ii) when "a contract is formed by an offer and acceptance; or (iii) [when] a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed . . . ." Under this language, revised section 2-207 does not apply to an unconfirmed contract formed in some manner other than the manners identified in parts (i) and (ii) of the statute.

The text of revised section 2-207 is narrower in scope than the text of revised section 2-204(1). Revised section 2-204 addresses contract formation in general. According to subsection (1) of revised section 2-204,

> A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of a contract, the interaction of electronic agents, and the interaction of an electronic agent and an individual.[42]

It is hard to believe that the drafters of amended Article 2 intended that the terms of a sales contract were not to be determined under revised section 2-207 when a contract was "made"[43] or "formed,"[44] though not confirmed, as the result of "the interaction of electronic agents, . . . the interaction of an electronic agent and an individual agent," or any other conduct of the parties that might be "sufficient to show agreement."[45]

If the terms of all sales contracts are to be determined under revised section 2-207, then the text of the amended statute should be revised or interpreted to

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41. U.C.C.-R § 2-207 cmt. 2, *supra* note 1.
42. U.C.C.-R § 2-204(1), *supra* note 1 (emphasis added).
43. *Id.*
44. U.C.C.-R § 2-207(iii), *supra* note 1.
45. Revised U.C.C. section 2-204(4) provides:

> Except as otherwise provided in Sections 2-211 through 2-213, the following rules apply: (a) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements. (b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement, and the individual has reason to know that the actions or statement will (i) cause the electronic agent to complete the transaction or performance; or (ii) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.

Id. Official Comment 5 to revised section 2-204 states that revised subsection (4)(b) "does not . . . provide for a determination of what terms exist in the agreement. *That question is governed by* [revised] *Section 2-207.*" U.C.C.-R § 2-204 cmt. 5, *supra* note 1. The only provision in amended Article 2 that deals specifically with the terms of "[a] contract formed by the interaction of an individual and an electronic agent" is revised U.C.C. section 2-211(4), which qualifies revised section 2-207 as follows: "A contract formed by the interaction of an individual and an electronic agent under Section 2-204(4)(b) does not include terms provided by the individual if the individual had reason to know that the agent could not react to the terms as provided." U.C.C.-R § 2-211(4), *supra* note 1.

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apply without restriction – irrespective of the manner in which the contract was formed. Although part (iii) of the revised statute does refer to "a contract formed in any manner," that part applies only to a contract that "is confirmed by a record . . . ." Contracts formed in some manner other than by the parties' recognitive conduct (part (i) of revised section 2-207) or by offer and acceptance (part (ii) of revised section 2-207) are not always "confirmed," let alone confirmed "by a record." Thus, a contract formed by "the interaction of electronic agents" or by "the interaction of an electronic agent and an individual" might not be "confirmed in a record" *after* the contract is made. A contract can also be made at a formal closing between parties that conducted extensive negotiations culminating in the execution of a formal document or record.[46] Any such contract is not formed by offer and acceptance,[47] and the parties need not act as if they recognize the existence of such a contract following the closing in order to support a finding that a contract was made at closing. The document the parties sign at the closing might be regarded as *concluding* a contract rather than *confirming* a contract that was made before the closing. The terms of an unconfirmed sales contract formed in these manners, or in any other manner sufficient to show agreement, must be determined under revised section 2-207.

The other deficiency in the scope portion of revised section 2-207 is the reference to a confirmatory record that contains terms "additional to or different from" those in the contract being confirmed. The phrase is just as objectionable in U.C.C.-R section 2-207 as it is in U.C.C.-R section 2-206(3), and for the same reasons.[48] Section 2-207(iii) should therefore be revised or interpreted to apply when a confirmatory record contains terms that are *not identical to*[49] the terms *of*[50] the contract being confirmed.

Revised section 2-207 indicates how the terms of a contract for sale, however formed, are to be determined:[51] "[T]he 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."[52] Unlike original section 2-207(2),[53] U.C.C.-R section 2-207 does not indicate what effect, if any, is to be given to terms that

46. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.5, at 207-08 (3d ed. 2004).

47. *Id.* at 207.

48. *See supra* text accompanying notes 21-25.

49. *Compare* U.C.C.-R § 2-206 cmt. 3 *supra* note 1. "[A]n expression of acceptance can . . . create a contract . . . even though it contains terms that are not identical to those in the offer." *Id.* (emphasis added).

50. As indicated by the caption ("Terms *of* Contract") (emphasis added) and other language in the text of revised section 2-207 ("the terms *of* the contract are: . . .") (emphasis added), it is preferable to refer to the terms "of" the contract being confirmed than to the terms "in" the contract being confirmed. As indicated by the language of revised section 2-207(a) and (b), it is appropriate to use the preposition "in" when the reference is to terms that do or do not "appear" *in* a record. *See* U.C.C.-R § 2-207, *supra* note 1.

51. U.C.C.-R § 2-207 cmt. 2, *supra* note 1. "The purpose of this section is solely to determine the terms of the contract." *Id.*

52. U.C.C.-R § 2-207, *supra* note 1.

53. "The additional terms [stated in a definite and seasonable expression of acceptance or in a written confirmation which is sent within a reasonable time] are to be construed as proposals for addition to the contract" and "become part of [a] contract" between merchants unless one of the exceptions to the validating rule of subsection (2) applies. U.C.C.-O § 2-207(2), *supra* note 2.

were proposed in one or more of the parties' transactional communications but that do not qualify as terms of the contract under part (a), (b), or (c). In the absence of any such indication, such proposed terms do not affect the rights and obligations of the parties to the contract, although they may become the basis for contract modification.

One of the most important ways in which revised section 2-207 improves upon original section 2-207 is that under the revised statute neither party enjoys a substantive advantage based solely upon whether that party "fired" the first or the last "shot" in an exchange of transactional communications. As indicated by Comment 2 to revised section 2-207,

> When forms are exchanged before or during performance, the result from the application of this section differs from the prior Section 2-207 of this Article and the common law in that this section gives no preference to either the first or the last form; the same test is applied to the terms in each.[54]

Although that same revised Comment indicates the terms of an offer "may" become terms of a contract formed by "a straightforward acceptance of [that] offer,"[55] acceptance of an offer does not necessarily *ensure* that *all* terms appearing in a record containing the offer will qualify as terms of the resulting contract.

Revised section 2-207(a) states a rule under which "terms that appear in the records of both parties" qualify as "terms of the contract." This language of the revised statute replaces the language in the second sentence of original section 2-207(3), under which "the terms of [a] . . . contract [established by conduct of both parties which recognizes the existence of a contract] consist of those terms on which the writings of the parties agree . . . ." The language of revised section 2-207(a) is preferable to the language of its predecessor in several respects. "[T]erms that appear in the records of both parties" are terms of the contract under U.C.C.-R section 2-207(a) without regard to how the contract was made. By contrast, the rule stated in the second sentence of original section 2-207(3) applies only when a contract is established by conduct of both parties which recognizes the existence of a contract. U.C.C.-R section 2-207(a) might apply to contracts formed by such conduct,[56] but it might also apply to contracts formed in some other manner. The rule stated in revised section 2-207(a) is not limited to terms that appear in the "writings" of the parties; it applies more generally to terms that appear in the "records" of both parties. The language of original section 2-207(3) personifies the "writings" of the parties by referring to cases in which such writings "agree" on terms. The *writings of* the parties do not "agree" on terms; the *parties* agree on terms that *appear* in their writings. Moreover, "terms that appear in the records of both parties" qualify as terms of the *contract*

54. U.C.C.-R § 2-207 cmt. 2, *supra* note 1.

55. "Terms of a contract *may* be found . . . from a straightforward acceptance of an offer, and an expression of acceptance accompanied by one or more additional terms *might* demonstrate the offeree's agreement to the terms of the offer." *Id.* (emphasis added).

56. "If . . . parties exchange records with conflicting or inconsistent terms, but conduct by both parties recognizes the existence of a contract, subsection (a) provides that the terms of the contract are terms that appear in the records of both parties." U.C.C.-R§ 2-207 cmt. 3, *supra* note 1.

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under revised section 2-207(a) even if such terms might not qualify as terms of the parties' underlying *agreement* – their bargain in fact. If a particular term appears in the records of both parties, but that term was not the subject of negotiation and neither party consciously adverted to the identical or equivalent term in the other party's record before a contract was concluded, then neither party can be said to have "agreed" to include the other party's terms in the contract. Nevertheless, equivalent or matching terms that appear in the records of both parties qualify as terms of the contract because each party unilaterally expressed assent to those terms by including them in each party's record.

Revised section 2-207(b) makes the most significant change in and improvement upon original section 2-207 and the common law governing how terms of a contract are determined. U.C.C.-R section 2-207(b) provides that "the terms of the contract [include] . . . terms, whether in a record or not, to which both parties agree . . . ." This language provides a flexible standard that must be applied on a case-by-case basis in determining what terms the parties agreed to under the individual circumstances surrounding their dealings with one another. The question whether the parties agreed to a particular term is one of fact to be resolved by the trier of fact. The uncertainty inherent in the application of such a flexible standard on an ad hoc basis can be expected to deprive commercial parties of any substantive advantage they might have achieved by careful draftsmanship of their commercial forms or records.

Thus, for example, the trier of fact could find under U.C.C.-R section 2-207(b) that an offeree agreed to all the terms appearing in an offeror's record when the offeree accepted an offer made in that record. According to Comment 3 to revised section 2-207,

> Terms of a contract may be found not only in the consistent terms of records of the parties but also from a straightforward acceptance of an offer, and an expression of acceptance accompanied by one or more additional terms might demonstrate the offeree's agreement to the terms of the offer.[57]

The same Comment also acknowledges that when an offeree accepts an offer by performance, the offeree could be found to have agreed to all the terms in the offer.

> [A]n offeree's performance is sometimes the acceptance of an offer. If, for example, a buyer sends a purchase order, there is no oral or other agreement, and the seller delivers the goods in response to the purchase order – but the seller does not send the seller's own acknowledgment or acceptance – the seller should normally be treated as having agreed to the terms of the purchase order.[58]

On the other hand, revised section 2-207(b) qualifies both the common law rule and the rule implicit in the structure of original section 2-207 that the terms of any contract formed by acceptance of a written offer at least prima facie include

57. U.C.C.-R § 2-207 cmt. 3, *supra* note 1.

58. *Id. Cf.* U.C.C.-R § 2-206(1)(b) ("an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming . . . goods . . . .").

all terms that appear in any such offer. A contract may be formed by offer and acceptance when the parties exchange commercial forms. Comment 2 to revised section 2-207 supports the proposition that terms appearing only in an offering form will not necessarily qualify as terms of the contract resulting from the offeree's acceptance of that offer. "When forms are exchanged before or during performance, the result from the application of this section differs from the prior Section 2-207 of this Article and the common law in that this section gives no preference to either the first or the last form; the same test is applied to the terms in each."[59] Even when the parties do not exchange commercial forms or records, but the offeree instead responds to an offer made in a commercial form or record by giving the offeree's blanket assent to that offer, the offeree might be found under U.C.C.-R section 2-207(b) not to have agreed to every term that appears in the offeror's record.

Under such a flexible and fact-sensitive standard as revised section 2-207(b) provides, neither party can be assured of enjoying a substantive advantage regarding the terms of a contract simply because that party managed to send the first or the last transactional communication. The factual question of whether both parties agreed to any particular term cannot be avoided by careful draftsmanship of commercial forms or records.[60] Revised section 2-207(b) thus reduces the incentive for parties to jockey for position or to do "battle" with their commercial forms.

The text of revised section 2-207(b) acknowledges that both parties may agree to terms whether those terms appear in a record or not. Moreover, according to revised Comment 3, terms that appear in the records of both parties and that qualify as terms of the contract under revised section 2-207(a) may be supplemented or even qualified by terms that appear in only one of the records if the parties by their nonverbal conduct manifested mutual assent to such variant terms.[61]

Again, Comment 3 to revised section 2-207 indicates that the standard provided by U.C.C.-R section 2-207(b) may on occasion qualify the rule stated in U.C.C.-R section 2-207(a).

In a rare case the terms in the records of both parties might not become part

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59. U.C.C.-R § 2-207 cmt. 2, *supra* note 1.

60. Thus, for example, the question whether a seller's "terms attached to the goods, or in or on the container in which the goods are delivered" qualify as terms of the contract even when the buyer did not see those terms before paying for and taking delivery of the goods can only be resolved under revised section 2-207(b) by considering all the circumstances surrounding the transaction. Official Comment 5 to U.C.C.-R section 2-207 states that Amended Article 2 takes no position on that question.

61. Comment 3 provides:

> If . . . parties exchange records with conflicting or inconsistent terms, but conduct by both parties recognizes the existence of a contract, subsection (a) provides that the terms of the contract are terms that appear in the records of both parties. But even when both parties send records, there could be nonverbal agreement to additional or different terms that appear in only one of two records. If, for example, both parties' forms called for the sale of 700,000 nuts and bolts but the purchase order or another record of the buyer conditioned the sale on a test of a sample to see if the nuts and bolts would perform properly, the seller's sending a small sample to the buyer might be construed to be an agreement to the buyer's condition. It might also be found that the contract called for arbitration when both forms provided for arbitration but each contained immaterially different arbitration provisions.

U.C.C.-R § 2-207 cmt. 3, *supra* note 1.

of the contract. This could be the case, for example, when the parties contemplated an agreement to a single negotiated record, and each party submitted to the other party similar proposals and then commenced performance, but the parties never reached a negotiated agreement because of the differences over crucial terms. There is a variety of verbal and nonverbal behavior that may . . . suggest agreement to another's record. This section leaves the interpretation of that behavior to the discretion of the courts.[62]

The determinative inquiry under revised section 2-207 is: What terms did the parties agree to include in their contract? If, despite the appearance of an identical term in the records of both parties, it is clear from a consideration of all the parties' bargaining behavior that they did not agree to include that term in their contract under revised section 2-207(b), the term is not a term of their contract.

As acknowledged by Comment 4 to revised section 2-207,[63] terms that are part of the parties' agreement[64] and that are therefore included in the contract under revised section 2-207(b) include any terms that may be inferred from a relevant course of performance,[65] course of dealing,[66] or usage of trade.[67] Terms derived from any of those sources are terms of the contract.[68] Moreover, "[i]f the members of a trade . . . or . . . the contracting parties . . . expect to be bound by a term that appears in the record of *only one* of the contracting parties, that term is part of the agreement" under revised section 2-207(b).[69] Revised Comment 4 adds the caveat that "repeated use of a particular term or repeated failure to object to a term on another's record is not normally sufficient to establish a course of performance, a course of dealing or a trade usage.[70]

Revised section 2-207(b) would be clearer if it referred to "terms, whether *they appear* in a record or not, to which both parties *manifested assent in any manner* . . . ." Addition of the reference to terms that do or do not "*appear*" in a

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62. *Id.*

63. "An 'agreement' may include terms derived from a course of performance, a course of dealing, and usage of trade." U.C.C.-R § 2-207 cmt. 4, *supra* note 1.

64. U.C.C.-R section 1-202(b)(3) defines "agreement" as "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303." U.C.C.-R § 1-201(b)(3), *supra* note 1.

65. U.C.C.-R section 1-303(a) defines a "course of performance" as:

> a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

U.C.C.-R § 1-303(9), *supra* note 1.

66. U.C.C.-R section 1-303(b) defines "course of dealing" as "a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C.-R § 1-303(b), *supra* note 1.

67. U.C.C.-R section 1-303(c) defines "usage of trade" as "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." U.C.C.-R § 1-303(c), *supra* note 1.

68. U.C.C.-R § 2-207 cmt. 4, *supra* note 1.

69. *Id.* (emphasis added).

70. U.C.C.-R § 2-207 cmt. 4, *supra* note 1. *Accord* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 104 (3d Cir. 1991).

record is clearer than the reference in the text of U.C.C.-R section 2-207(b) to "terms, whether in a record or not" and is consistent with the reference in U.C.C.-R section 2-207(a) to "terms *that appear* in the records of both parties . . . ."[71] "[T]erms to which both parties *manifested assent in any manner*" is more informative than the reference in the text of U.C.C.-R section 2-207(b) to "terms . . . to which both parties *agree* . . . ."[72] Parties "agree" to terms by manifesting mutual assent to them in any reasonable manner.

Revised section 2-207(c) completes the list of contract terms by including "terms supplied or incorporated under any provision of this Act."[73] This language restates the reference in the second sentence of original section 2-207(3) to "any supplementary terms incorporated under any other provisions of this Act."[74] The reason for the reference in the revised text to "terms *supplied or* incorporated under any provision of this Act" is not indicated in the Comments to revised section 2-207.[75] The drafters apparently meant to distinguish between terms *supplied* and terms *incorporated* under provisions of the Code, but the nature of any such intended distinction is unclear.[76] Perhaps the drafters meant to distinguish between supplementary terms that may be "supplied" under the gap-filler provisions of the Code when the agreement of the parties fails to address a particular matter that has become a subject of dispute,[77] and *mandatory* terms that are "incorporated" under various provisions of the Code and that *qualify* the terms of the parties' agreement.[78] Perhaps the distinction is analogous to the often elusive difference between "interpretation" – ascertaining the meaning of an agreement or a term of an agreement[79] -and "construction" – determining the *legal effect* of the parties' agreement.[80] Terms may be "supplied" under Code provisions in *interpreting* the parties' words and other conduct; terms may be "incorporated" under Code provisions in *construing* the parties' agreement. Perhaps the words "supplied" and "incorporated" are supposed to be synonymous - or perhaps the conjunction "or" is being used as a

71. *See* U.C.C.-R § 2-207(a), (b), *supra* note 1.

72. U.C.C.-R § 2-207(b), *supra* note 1 (emphasis added).

73. U.C.C.-R § 2-207(c), *supra* note 1.

74. U.C.C.-R § 2-207(3), *supra* note 1.

75. U.C.C.-R § 2-207(c), *supra* note 1 (emphasis added).

76. *See* U.C.C.-R § 2-207, *supra* note 1.

77. *See, e.g.*, U.C.C.-R §§ 2-305(1)(a), *supra* note 1 (open price term), 2-306(2) (obligations under an exclusive dealing contract), 2-308 (place for delivery), and 2-309(1) (time for shipment or delivery). Compare RESTATEMENT (SECOND) OF CONTRACTS § 204 (2005) ("When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is *supplied* by the *court*.") (emphasis added).

78. *See, e.g.*, U.C.C.-R §§ 1-302(b), *supra* note 1 ("The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement"), 2-302(1) (effect of a court's so limiting the effect of any unconscionable term as to avoid any unconscionable result may be to incorporate a mandatory term into the contract).

79. U.C.C.-R § 1-201(b)(3), *supra* note 1 (indicating how the "agreement" of the parties can be found). *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 200 (2005) ("Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.").

80. U.C.C.-R § 1-201(b)(12), *supra* note 1 (defining "contract" as "the total legal obligation that results from the parties' agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.") *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § cmt. c (2005) (distinguishing "interpretation" from "a determination of the legal effect of words or other conduct.").

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"coimplicative."[81] Whatever the drafters' intent might have been, any matter "supplied or incorporated" under the Code is described as a "term" of the contract under revised section 2-207(c), even though amended Article 1 of the Code defines "term" more narrowly as "a portion of an *agreement* that relates to a particular matter."[82] Despite these minor uncertainties and misgivings, the text of revised section 2-207(c) is serviceable.

IV. CONCLUSION

The language of revised sections 2-206(3) and 2-207 in the 2003 amendment of U.C.C. Article 2 cures most of the deficiencies in the language of original section 2-207. The determinative inquiries under both of the revised statutes are factual. Determining whether an "expression of acceptance in a record operates as an acceptance" under revised section 2-206(3) depends on whether it communicates the offeree's intention to close an agreement immediately. Determining the terms of a contract, however formed and when (if ever) confirmed, requires an examination of terms that appear in the records of both parties under revised section 2-207(a), and an identification of the particular matters to which both parties manifested assent under revised section 2-207(b).[83] Terms of the contract identified under revised section 2-207(a) and (b) may be supplemented or qualified by provisions of the Code under subsection (c).[84]

Despite the many improvements, the language of amended sections 2-206(3) and 2-207 can be further improved. To recapitulate, that language should be revised or interpreted as follows:

§ 2-206. Offer and Acceptance in Formation of Contract

. . .

(4) A . . . seasonable expression of acceptance in a record *that communicates a willingness to close an agreement immediately is sufficient to conclude a contract* even if it contains *terms that are not identical to the terms of* the offer.

§ 2-207. Terms of Contract; Effect of Confirmation.

. . .

(2) Subject to Section 2-202, if (i) *a contract is formed in any manner sufficient to show agreement . . . ,* or (ii) a contract formed in any manner is confirmed by a record that contains terms *not identical* to those *of* the contract being confirmed, the terms of the contract are:

(a) terms that appear in the records of both parties;

(b) terms, whether *they appear* in a record or not, to which both parties *manifested assent in any manner*; and

81. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.8, at 271 (acknowledging the ambiguity between the use of the word *or* "as a disjunctive" (P *or else* Q) and as a coimplicative (P, *that is to say* Q)").

82. U.C.C.-R § 1-201(b)(40) (emphasis added).

83. U.C.C.-R § 2-207(a), (b), *supra* note 1.

84. U.C.C.-R § 2-207(c), *supra* note 1.

(c) terms supplied or incorporated under any provision of this Act.

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