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by Sarah Howard Jenkins

Following the promulgation of the Uniform Commercial Code1 and the Restatement (Second) of Contracts with its broaden perspective on promissory estoppel, prescient sages of contract law and theory proclaimed, first, the irrelevance2 of contract and then its death.3 Friedman and Macaulay prophesied that standardized business procedures, social relationships, and shared norms and expectations nullified the necessity for contract law. Rather than establishing norms for commercial behavior, they asserted contract was an expensive tool for enforcement and sanctioning misbehavior.

And why is contract doctrine not central to business exchanges? Briefly put, private, between-the-parties sanctions usually exist, work, and do not involve the costs of using contract law either in litigation or as a ploy in negotiations. To begin with, business relationships rarely generate the kinds of problems considered by academic contract law. There is a constant pressure to standardize business and reduce recurring patterns to a routine. Routine and form create widely shared expectations so that people can understand who is to do what, quite apart from the words of a formal contract.4

For Friedman and Macaulay, external control over consensual agreements through the application of contract law was inconsistent and derogated from self-regulation based on “community” expectation that, in their view, more effectively controlled commercial contract behavior. But, time establishes that they were wrong. Although parties agree to arbitrate their

1 Promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, now the Uniform Law Commission, in 1952. [insert history]


4 Friedman & Macaulay, at 815.
disputes, contract law and prevailing usages and custom, modern Lex Mercatoria, rather than business and social norms and expectations govern the resolution of their disputes.\(^5\)

Seven years later, Grant Gilmore, a dean of contract law and theory, decried the doctrine of Consideration, the then prevailing doctrine for distinguishing enforceable and unenforceable promises. With the expansion and development of the theoretical basis for promissory estoppel\(^6\) and promissory restitution\(^7\) in the Restatement, Gilmore asserted that contract would be absorbed into torts:

> We are fast approaching the point where, to prevent unjust enrichment, *any benefit* received by a defendant must be paid for unless it was clearly meant as a gift; where *any detriment* reasonably incurred by a plaintiff in reliance on a defendant’s assurances must be recompensed.\(^8\)

Gilmore envisioned the convergence of substantive law so that no distinction between contract and tort existed.\(^9\) Gilmore was correct regarding the dethroning of Consideration as the sole test for determining enforceability of promises but wrong on his prediction that contract would be absorbed into torts. On the contrary, recovery based on promissory estoppel hasn’t proven to be the gold mine of expanded liability for promises that some expected.\(^10\) In their research on promissory estoppel, Professors Schwartz and Scott determined, from a random sampling of 108 cases, that thirty cases involved claims based on reliance occurring before agreement on terms.

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\(^5\) Citation

\(^6\) *RESTATEMENT* § 90.

\(^7\) Restatement §§ 82 - 86.

\(^8\) Gilmore, at 88.

\(^9\) *id.*

\(^10\) Cite to Gilmore
In 87% of these cases, courts denied the claims asserted whether based on promissory estoppel or quasi-contract.\textsuperscript{11}

Gilmore also erred in his augury that the demise of Consideration was also the death contract. Currently, 80 nations\textsuperscript{12} are contracting states to the United Nations Convention on Contracts for the International Sale of Goods,\textsuperscript{13} a convention defining the process for contract creation and delineating the obligations of the parties. Consideration isn’t mentioned and none is required;\textsuperscript{14} agreements between the parties need not be tested for either Consideration or causa.\textsuperscript{15} The Convention as a new promulgation reaffirms the relevance and vitality of contract, rejecting in part attempts in the UCC to expand contract liability.\textsuperscript{16} The Convention is being embraced by nations as part of the economic and technological revolution that has birthed global interdependence among nations. This article addresses from a comparative perspective the

\textsuperscript{11}Schwartz & Scott, \textit{Precontractual Liability and Preliminary Agreements}, 120 HARVARD L.R. 661 (2007). “Thirty cases raised the issue of reliance in the absence of any agreement by the parties regarding terms. These cases thus posed the question whether the plaintiff could recover reliance costs even though the parties had not reached any agreement. The courts did not find liability, whether based on promissory estoppel or \textit{quantum meruit}, in twenty-six, or approximately 87%, of the thirty preliminary negotiation cases.” \textit{Id.} at 672.

\textsuperscript{12}For a list of contracting states, nations who are parties to the treaty, visit www. uncitral.org.


\textsuperscript{15}Define

\textsuperscript{16}Compare U.C.C. 2-207 and CISG art. 19 discussed, \textit{infra}, text and notes at nn.____
requirements, objectives, and policies that govern contract formation of transactions in goods subject to the UCC and to the Convention.

Contract Formation – The Process: Common Law

Contrary to Gilmore’s prediction, first year law students attending U.S. domestic law schools continue to invest numerous hours studying contract, seeking to determine whether a communication is an offer, a manifestation of assent that a reasonable person in the recipient’s position would believe invites his or her assent and, if the assent is given, will conclude a contract. Communications such as “First Come, First Served” or “We offer Michigan fine salt in full car load lots of 80 to 95 barrels delivered to your city” are assayed. Guidelines such as the presence of language of commitment or undertaking, the definiteness of the terms, the number of parties to whom the communication is addressed are used by students to resolve the question of whether the first step in the process of contract formation, the making of an offer, has

17See, generally, Restatement (Second) of the Law of Contracts § 24 (1979) [hereinafter “Restatement”].

18Id. See also Restatement § 1.

19Restatement § 26, cmt. b; see also Interstate Indus., Inc. v. Barclay Indus., Inc., 540 F.2d 868 (7th Cir. 1976) (holding that where letter sent by seller to buyer advised buyer of availability of goods, specifically referred to its contents as a “price quotation,” contained no language which indicated that offer was being made, and failed to mention the quantity, time of delivery or payment terms, such letter did not constitute an “offer”); Bourke v. Kazaras, 746 A.2d 642 (Pa. Super. Ct. 2000) (holding that advertisement to which client responded was not an offer but merely an invitation to call bar association’s lawyer referral service for the purpose of entering into negotiations which might subsequently result in offer and acceptance).

20Lefkowitz v. Great Minneapolis Surplus Store, Inc., 251 Minn. 188, 86 N.W.2d 689 (1957) (holding that where offer in advertisement addressed to general public is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract); Zanakis-Pico v. Cutter Dodge, Inc., 98 Haw. 309, 47 P.3d 1222 (___) (holding that advertisements are generally not binding contractual offers, unless they invite acceptance without further negotiations in clear, definite, express, and unconditional language).

been achieved.\textsuperscript{22} This common law approach for determining whether an offer has been made supplements Article 2 of the Uniform Commercial Code unless displaced by the provisions of Article 2, including the underlying purposes and policies of the Article.\textsuperscript{23} Although the UCC abrogates the need for Consideration for some option contracts,\textsuperscript{24} and for modifications or discharge of contract occurring in good faith,\textsuperscript{25} the doctrine is not completely displaced and, therefore, remains applicable for the enforcement of a contract.

Must common law rules or similar rigid formalities be applied to cross border transactions for goods between parties with their places of business in nations that are signatories to the Convention? What law governs the determination of the existence of a contract, if the parties have opted-out of the Convention or remain subject to its provisions?

**Contract Formation – The Process: UCC**

Despite the rigid formalism of the common law,\textsuperscript{26} the UCC proclaims in section 2-204 that a contract may be formed in any manner sufficient to show the existence of a contract even though the moment of its making is indeterminable and one or more of its essential terms are

\textsuperscript{22} Interstate Indus., Inc. v. Barclay Indus., Inc., 540 F.2d 868 (7th Cir. 1976) (holding that an offer must be sufficiently certain to enable court to understand what is asked for and what consideration is sought for the promise).

\textsuperscript{23} U.C.C. § 1-103 (b). Article 2 of the Uniform Commercial Code has been codified in all but one state, Louisiana. [hereinafter “the Code”].

\textsuperscript{24} See U.C.C. § 2-205.

\textsuperscript{25} See U.C.C. § 2-209 (1).

omitted. Section 2-204 provides the first indication that the formalities of the common law are minimized by the UCC. It is evidence of a strong public policy favoring the recognition of a contract and the enlargement of contract liability. If the both parties intend to be bound and a reasonably certain basis for a remedy is present, a contract will not fail for indefiniteness. If the agreement is otherwise enforceable, this formless agreement will be enforced; the court will use default terms to supplement the agreement of the parties. However, an assessment of a party’s intention requires the application of the common law principles of mutual assent. Therefore, the renounced formalism remains applicable.

The common law determination of “intent to be bound is an objective one.” The nature

27 U.C.C. § 2-204. Formation in General. (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. See, e.g., Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 369 A.2d 1017 (1977) (holding that the verbal acceptance by subcontractor of general contractor's offer was reasonable in the circumstances, that subcontractor did so accept it, and that the conduct of the parties, particularly that of general contractor in delivering concrete and that of subcontractor in accepting and paying for it, recognized the existence of a contract).

28 Cf Gilmore, supra, n.__ at ___ (Holmes’ requirement of Consideration reflects a narrowing of liability for breach of one’s promises).

29U.C.C. § 2-204 (3).

30 CITATIONS

31 Winforge, Inc. v. Coachmen Indus., Inc., 691 F.3d 856 (7th Cir. 2012) (holding that since mutual assent was lacking, no enforceable contract was created); Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 369 A.2d 1017 (1977); Swanson v. Holmquist, 13 Wash. App. 939, 539 P.2d 104 (1975). See also U.C.C. § 1-103 (b). Applicability of Supplemental Principles of Law: Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.
of the objective inquiry under domestic law asks: would a reasonable person in the position of the recipient of the manifestation of assent – the words, the conduct, or a failure to act – believe that a commitment is being made.\textsuperscript{32} A party must intent the action taken and know or have reason to know that the other may infer an intention to be bound by the words, conduct, or failure to act.\textsuperscript{33} Subject to rules of avoidance\textsuperscript{34} for mistake, fraud, duress, or the like, actual mental assent by the offeror is not a requirement.\textsuperscript{35}

Unlike the broad pronouncement of Section 2-204 of UCC, the Convention states a fact intensive principle for the first stage of contract formation.\textsuperscript{36} A proposal is an offer if it is sufficiently definite, indicates the goods, expressly or implicitly fixes or makes provision for

\begin{itemize}
\item \textsuperscript{32} See generally, \textsc{Restatement} § 19 – Conduct as Manifestation of Assent: (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act. (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents. (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause. See also \textsc{Restatement} § 4 – How a Promise May Be Made: A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.
\item \textsuperscript{33} \textsc{Restatement} § 19 (2): The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
\item \textsuperscript{34} Distinguish common law doctrine of avoidance and the goods oriented remedy of Avoidance available to buyers in the convention.
\item \textsuperscript{35} \textsc{Restatement} § 19 (3): The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause. See also \textsc{Restatement} § 19, cmt. b.
\item \textsuperscript{36} CISG, art. 14: (1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.
\end{itemize}
determining the quantity and the price, and indicates the intention of the offeror to be bound. 37

Subject to one exception where the parties may have formed a contract without agreeing on the price,38 intent plus the material terms of subject matter, quantity, and price are required before a proposal is deemed an offer as the foundational step in contract formation.39 These terms may arise from communications between the parties or usages or practices established between

37 Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. et al [district court] Aug. 21, 2002, 98 CIV 961 RWS, (holding that the proposal was sufficiently definite as the "alleged contract clearly identifies the goods at issue, clathrate") (full text available at http://www.unilex.info/case.cfm?id=1&do=case&id=846&step=FullText); Cherry Stix Ltd. v. President of the Canada Borders Services Agency (International can be orally accepted); Trade Tribunal] Oct. 06, 2005, AP-2004-009 (holding that since an offer needs to be sufficiently definite and to show the offeror's intention to be bound in case of acceptance, acceptance becomes effective when it reaches the offeror) (full text available at http://www.unilex.info/case.cfm?id=1&do=case&id=1081&step=FullText); Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp. [district court] Sept. 27, 2007, 06-14553 (full text available at); 2007 WL 2875256 (finding that the seller's quote, being sufficiently precise, might be considered as an offer under CISG) (http://www.unilex.info/case.cfm?id=1&do=case&id=1224&step=FullText).

38 See CISG art. 55 and the text and notes, infra, at nn. ____.

39 Oberlandesgericht Frankfurt [OLG] Aug. 30, 2000, 9 U 13/00, English translation available at http://cisgw3.law.pace.edu/cases/000830g1.html (holding that the fax could not be considered as an offer because it did not contain the determinations as the nature of the goods and provisions for determining the quantity and the price, neither did the buyer know the plaintiff's intent nor could buyer be aware of what that intent was); Obergerichtshof [OGH] Mar. 20, 1997, 2 Ob 58/97m, English translation available at http://cisgw3.law.pace.edu/cases/970320a3.html (holding that a modification of the offer concerning the quantity of the goods which is exclusively favorable to the offeror would have to be considered non-material) [consider for Article 19]; Oberlandesgericht Hamburg [OLG] Jul. 04, 1997, 1 U 143/95 and 410 O 21/95, English translation available at http://cisgw3.law.pace.edu/cases/970704g1.html (holding that the fax sent by the French company constituted an offer since it was sufficiently definite as to type of goods, price and quantity, and it indicated the offeror's intention to be bound.); Cour de Cassation [] Feb. 07, 2012, 10-30912, English translation available at http://cisgw3.law.pace.edu/cases/120207f1.html (holding that although the parties had agreed that the basic price of the pears in Argentina (9 euros) would represent the "base" for the French company to start marketing the product, this did not mean that a minimum contractual price had been fixed); Handelsgericht St. Gallen (Intent) [] Dec. 05, 1995, HG 45/1994, English translation available at http://cisgw3.law.pace.edu/cases/951205s1.html (holding that intention of the offeror to be bound was to be derived from the terms 'order', 'we order' and 'immediate delivery' contained in the fax).
them.\textsuperscript{40} If the parties conclude a valid contract without a price, the Convention provides a gap filler for price.\textsuperscript{41} Thus, the Convention mandates greater detail and deliberateness in contract formation that the UCC. Given the likelihood of language and cultural differences, the adverse impact of different time zones and geographical distance on communications between the parties, the opportunity for confusion and misunderstanding increases, justifying greater precision for creating an offer, and, therefore, a heighten manifestation of assent is required for beginning the process of contract formation.\textsuperscript{42}

This factual requirement for the offer isn’t the sole distinction between the two legal regimes when addressing contract formation. Of significance is the determination of intention. Article 8 of the Convention establishes a subjective rather than objective assessment of intent in the first instance.\textsuperscript{43}

1. \textit{Subjective Intent – the Convention}

\textsuperscript{40} CISG art. 9: (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

\textsuperscript{41} CISG art. 55: Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

\textsuperscript{42} Citation (Secretariat Commentary)

\textsuperscript{43} CISG art. 8: (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.
To the amazement of most domestic legal professionals, Article 8 (1) declares as the standard for determining the intent of a contracting party – the party’s subjective intent, the subjective actual intent of the person whose statement or conduct is being interpreted rather than the understanding of a reasonable person in the other’s position. This emphasis on the actual, subjective, mental processes of the speaker or actor is substantially limited by the reasonable understanding other party. The speaker’s or actor’s subjective intent only governs the interpretation of the statements or conduct if the other party knew or could not have been unaware of the speaker/actor’s actual intent. Observe that the Convention allocates the risk of error or misunderstanding to the hearer/recipient. This is consistent with the general approach to error found in the Convention. Furthermore, issues of validity based on mistake, for example, are subject to the applicable domestic law as determined by the forum court’s private international law rules and are not within the scope of the Convention. A court or tribunal seeking to interpret the manifestations, words or conduct of the speaker/actor, may consider all relevant circumstances including “the negotiations, any practices which the parties have established between themselves, usages, and subsequent conduct.” Similarly, all relevant

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44 Citation

45 CISG, art. 27: Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

46 See generally CISG art. 4.

47 CISG art. 8 (3): In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.
circumstances are used for determining whether the hearer/recipient could not have been unaware of the speaker/actor’s actual intent. The determination of the hearer/recipient’s understanding, however, is an objective one. Likewise, all classes of evidence are admissible for determining the hearer/recipient’s understanding of the speaker’s actual intent; the listing of classes of evidence Article 8 is illustrative not an exhaustive one.

Article 8 governs the interpretation of statements and conduct by the parties for modification or termination of their agreement, declaration of revocation, and statements or conduct of offer and acceptance. Indeed, any statement or conduct that is relevant to the

48 See, e.g., Case No. X ZR 111/04, Germany: Bundesgerichtshof (November 27, 2007) (seller knew, or could not have been unaware that buyer’s real purpose of its proposed contract amendment was to conceal the real purchase price from its customers in Russia: buyer’s employees openly revealed this purpose at the time of the proposal and wording of the amendment indicated the buyer’s intention to recover the purchase price increase received by the seller in full; these circumstances, together with life experience, resulted in a reasonable conclusion that the seller was in the position to understand that the consulting fees in the contract amendment had been erroneously calculated.


50 CISG, art. 29: (1) A contract may be modified or terminated by the mere agreement of the parties. (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

51 CISG, art. 26: A declaration of avoidance of the contract is effective only if made by notice to the other party.

52 CISG, art. 8.
performance of an obligation or the assertion of any right under the Convention such as notices or other required communications regarding cure or delayed performance or missing specifications are subject to the standards of Article 8. Article 48 (3) appears to be an exception by expressing the meaning for any notice of performance given by the seller to the buyer after the date for performance or cure has passed. Any statement of performance is to be treated as a request by the seller for notice of buyer’s intent to accept the offer of cure.

Commentators have raised for deliberation the impact of Article 8 (1) on a party’s subjective intent not to be bound when that intention is contrary to the reasonable meaning of the words and conduct of the party. The infamous case of Lucy v. Zimmer immediately comes to mind for domestic parties and their counselors. The buyer, the seller, and seller’s wife were having drinks at a local tavern. Winking at his wife, the seller offered to sell their farm to the buyer. The buyer agreed to purchase the farm; a crudely drafted understanding was signed by both parties; and the buyer offered a binder or deposit which the seller declined. When sued for breach, the seller asserted he and his wife were only joking and, therefore, no contract was

53 Text of Secretariat Commentary on article 7 of the 1978 Draft [draft counterpart of CISG article 8][Interpretation of conduct of a party], cmt. 1: Article 7 [draft counterpart of CISG article 8] on interpretation furnishes the rules to be followed in interpreting the meaning of any statement or other conduct of a party which falls within the scope of application of this Convention. Interpretation of the statements or conduct of a party may be necessary to determine whether a contract has been concluded, the meaning of the contract, or the significance of a notice given or other act of a party in the performance of the contract or in respect of its termination. (emphasis added) (available at http://www.cisg.law.pace.edu/cisg/text/secmm/secmm-08.html; last viewed March 31, 2014).

54 CISG, art. 48 (3): A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

55 Citation


57 Citation
created between the parties. His actual subjective intent, the seller asserted, did not result in legal consequences. Ruling for the buyer, the court held that the reasonable understanding of the seller’s actions and words and not his subjective intent governed the effect of his words and conduct. If Lucy v. Zimmer had been a transaction for goods subject to the Convention does the outcome change? The short answer is: it depends! Was the buyer aware or could the buyer have not been unaware of the seller’s actual intent? If the buyer knew or could not have been unaware of the seller’s actual intent, no contract results. The buyer’s knowledge or understanding of the seller’s actual intent based on all the circumstances circumscribes the effect of the seller’s actual intent.  

Was the transaction that occurred at the tavern the first one between the parties or was this part of regularly occurring banter between two neighbors both knowing that neither was serious?

2. “Could not have been unaware” v. “Should have known”

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58 Text of Secretariat Commentary on article 7 of the 1978 Draft [draft counterpart of CISG article 8][Interpretation of conduct of a party], cmt. 4: Article 7 [draft counterpart of CISG article 8] cannot be applied if the party who made the statement or engaged in the conduct had no intention on the point in question or if the other party did not know and had no reason to know what that intent was. In such a case, article 7(2) [draft counterpart of CISG article 8(2)] provides that the statements made by and conduct of a party are to be interpreted according to the understanding that a reasonable person [of the same kind as the other party] would have had in the same circumstances (available at http://www.cisg.law.pace.edu/cisg/text/seccomm/seccomm-08.html; last viewed March 31, 2014).
3. **Subjective Intent and Contract Interpretation**

Although not expressly stated in the Convention, it is presumed that Article 8 governs the interpretation of contract provisions and terms as well.\(^{59}\) Consider the following hypothetical situation:

A Norwegian buyer visits a trade show in New York. While there she discusses with a U.S. seller her needs for insulation for rubber fishing boots that she manufactures. They discuss the materials used in manufacturing the boots and the different grades of insulation manufactured by the seller. The seller makes a specific recommendation of one of its products. The parties exchange business cards with contact information that included geographical location, telephone and fax numbers, and email addresses. Thereafter, the buyer ordered via fax on her business letterhead and the seller delivered to Norway the previously recommended insulation. The buyer used the insulation for her manufacturing process in Norway and distributed her output to the Scandinavian fishing industry. The insulation proved insufficient, resulting in cracks and ruptures in the boots, physical injury to the wearer, and liability for the buyer to her end users. The seller argues that it isn't liable for breach of an express or implied obligation of fitness.\(^{60}\)

Of concern is whether the seller was aware that the insulation was to be used in Norway and needed to be “fit” for winter weather there. Prevailing case authority holds\(^{61}\) that a seller is only obligated to provide goods that are fit for the buyer’s purposes at the place of their intended use if: 1) the standards are the same at the place of the buyer’s intended use and seller’s location; 2) the buyer has informed the seller of its intended use or special circumstances provide information

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\(^{60}\) This problem is a modification of the “Insulation Sold to Germany” problem appearing in and reprinted with permission of West Academic from Folsom, Gordon, and Spanogle, *International Business Transactions: Problem Oriented Coursebook* 75-76 (9th ed. 2009).

\(^{61}\) Austria (April 13, 2000); Medical Marketing, 1999 U.S. Dist. Lexis 7380 (E.D. La 1999).
on the location of the buyer’s intended use or the applicable standards;\textsuperscript{62} or 3) seller has a branch office in the place of buyer’s intended use so that seller knew or could not be unaware of the standards.\textsuperscript{63} Applying Article 8 (1) subjective standard to the facts of the hypothetical setting, the Norwegian buyer’s statement regarding the location of her business, the address on her business card, information shared when discussing her use of the insulation or in placing the order or communicating with the seller, the requested destination for the delivery of the goods support a conclusion that the seller could not have been unaware of the buyer’s intended use in Norway. Therefore, the seller was obligated to supply insulation that was fit for use in Norway.

4. \textit{Duration and Revocability of Offers}

Domestic common law of contracts provides that offers are effective upon receipt\textsuperscript{64} and any durational period commences upon receipt.\textsuperscript{65} Offers are generally revocable.\textsuperscript{66} Absent consideration or another validating device, a promise not to revoke the offer being made or an offer stating a duration period is a \textit{nudum pactum}, a naked promise or merely an offer to make a gift that is unenforceable.\textsuperscript{67} If the offer states a duration period for acceptance or a statement that it will not be revoked, the offer is revocable until accepted. The UCC modifies this result for the

\textsuperscript{62} Clout #202, France: Court of Appeals (Grenoble) (1996) (because of practices between the parties, Italian seller knew the goods were destined for the French market, French standard were applicable).

\textsuperscript{63} Medical Marketing, 1999 U.S. Dist. Lexis 7380 (E.D. La 1999).

\textsuperscript{64} Citation

\textsuperscript{65} Citation

\textsuperscript{66} Restatement § 42, cmt. a.

\textsuperscript{67} Id.
signed written offers or records bearing an electronic signature of a merchant that uses language such as “guaranteed,” “irrevocable” or “firm” that assures the offeree that the offer will not be revoked. Without consideration, these offers are irrevocable for the period stated but not longer than ninety (90) days. Absent language that provides evidence of an intent to make the offer “firm” language such as “open” or “good” should be treated as language of duration and the general rule of revocability should apply. Language must be expressive of a commitment not revoke, some heightened manifestation given the abrogation of the need for Consideration or estoppel to prevent revocation of an offer. The example used by the commentary to Section 2-205 to illustrate the application the effect of the section when the period of irrevocability is linked to the happening of a contingency supports this position. “If the offer states that it is ‘guaranteed’ or ‘firm’ until the happening of a contingency which will occur within the three month period, it will remain irrevocable until that event.” Here, language indicating a heightened manifestation is present. An offer with terms such as “good” or “open” even if in a

68 UETA § 2 (13): “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

69 UETA § 2 (8) “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

70 U.C.C. § 2-205.

71 U.C.C. § 2-205. Firm Offers: An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months . . . .

72 U.C.C. § 2-205, cmt. 3, “If the offer states that it is ‘guaranteed’ or ‘firm’ until the happening of a contingency which will occur within the three month period, it will remain irrevocable until that event.”

73 Id.
signed record by a merchant remains revocable.

Offers subject to the Convention are effective upon receipt.\(^{74}\) Consistent with the law governing domestic offers, offers are generally revocable and may be revoked if the revocation reaches the offeree before a contract is created either by an oral acceptance of the offer\(^{75}\) or performance constituting acceptance\(^{76}\) or if the revocation reaches the offeree before the acceptance is dispatched.\(^{77}\) Dispatch of an acceptance creates an irrevocable offer and not a contract. This modified “mailbox rule” is a compromise position between the general policy view of the revocability offers at Common Law and the general policy view of the irrevocability of offers recognized by Civil Law.\(^{78}\) However, the similarity between the treatment of offer in U.S. domestic law and the treatment of offers pursuant to the Convention ends here.

If an offer states that it is “open” for a stated period of time or a durational period is included in the offer or the offer includes a commitment not to revoke, or a statement that a

\(^{74}\) CISG art. 15: (1) An offer becomes effective when it reaches the offeree. (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

\(^{75}\) CISG art. 16 (1): Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

\(^{76}\) See CISG art. 18 (3).

\(^{77}\) CISG art. 16 (1): Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. See text and notes, infra, at nn. ___ for a discussion of acceptance by promise.

\(^{78}\) Text of Secretariat Commentary on article 14 of the 1978 Draft [draft counterpart of CISG article 16] [Revocability of offer], cmt. 5. (available at: http://www.cisg.law.pace.edu/cisg/text/secemm/secemm-16.html#1; last viewed March 29, 2014).
reasonable person would understand as meaning the offer is irrevocable,\textsuperscript{79} or if it is reasonable for the offeree to rely on the offer as irrevocable followed by actual reliance,\textsuperscript{80} an irrevocable offer is created for the duration stated. If none is stated, for a reasonable time.\textsuperscript{81} The Convention is only applicable to transactions between commercial parties. Therefore, the effect of Article 16 (2) is analogous to that of the UCC but without the formalities imposed by the UCC, protecting potential reliance by a commercial party who might be induced delay its acceptance or to undertake extensive investigations of the offer or the offeror or engage in negotiations with others for related inputs for its processes or otherwise change position because of the presence of such language. Article 16 (2) “reflects the judgement [sic] that in commercial relations, and particularly in international commercial relations, the offeree should be able to rely on any statement by the offeror which indicates that the offer will be open for a period of time.”\textsuperscript{82}

Because offers are only effective when they “reach” the offeree, an offer may be withdrawn even if, by its terms, it is irrevocable. However, the withdrawal must reach the offeree before or at the same time as the offer.\textsuperscript{83} The arrival of two conflicting manifestations

\textsuperscript{79} CISG art. 8 (2) & (3).

\textsuperscript{80} CISG art. 16 (2) (b): if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

\textsuperscript{81} Citations

\textsuperscript{82} Text of Secretariat Commentary on article 14 of the 1978 Draft \textit{[draft counterpart of CISG article 16] [Revocability of offer]}, cmt. 6. (available at: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-16.html#1; last viewed March 29, 2014).

\textsuperscript{83} CISG art. 15 (2): “An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.”
results in the absence of an intention to be bound.\footnote{See, generally, CISG art. 14 (1).} An offer subject to the Convention “reaches” the offeree as when it is made to the offeree orally or delivered by “any other means” to him personally or his place of business.\footnote{CISG art. 24: For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence. Adopted November 23, 2005, the United Nations Convention on the Use of Electronic Communications in International Contracts [hereinafter “Electronic Communications Convention”] defines the time of receipt as: the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.” Electronic Communications Convention art. 10 (2) (2005).} For electronic communications the determination of “time” the communication is delivered to the offeree should be made by using the relevant law governing electronic communications. This law might be the United Nations Convention on the Use of Electronic Communications in International Contracts\footnote{Adopted November 23, 2005, the United Nations Convention on the Use of Electronic Communications in International Contracts [hereinafter “Electronic Communications Convention”] defines the time of receipt as: the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee’s electronic address.” Electronic Communications Convention art. 10 (2) (2005).} or the Uniform Electronic Transactions Act,\footnote{UETA § 15 (b): Unless otherwise agreed between a sender and the recipient, an electronic record is received when: (1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and (2) it is in a form capable of being processed by that system.} or domestic legislation enacted by a nation based on the 1996 UNCITRAL Model Law on Electronic Commerce.\footnote{UNCITRAL Model Law on Electronic Commerce art. 15 (2): Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs: (i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at}
Convention, prevailing law governing electronic communication defines “receipt” as the time the transmission is retrievable by the offeree. Each of these regimes permits the parties to derogate or vary the definition by an agreement. Each imposes limits on information received at an information processing system other than that designated or used by the recipient: U.S. domestic law only recognizes a communication as received if the information is sent to the information processing system designated or used by the recipient, the Model Act deems information sent to an undesignated system as received when the data message is actually retrieved by the addressee; and the most modern, the Electronic Communications Convention, uses the time when the transmission is capable of being retrieved by the addressee at that address and the addressee is aware that the electronic communication has been sent to an address other than that designated.

Although offers subject to the Convention are effective when they “reach” the offeree, the time the durational period commences varies based on the medium used to communicate the offer. Unlike U.S. domestic law which commences the running of the duration of offers upon

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89 See notes __, __, and __, supra.

90 See note __, supra.

91 See note __, supra.

92 Citation

93 CISG art. 20 (1): A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the
receipt, the Convention makes a distinction based on the use of third party transmitters and a transmission of the offer by the offeror. For transmissions involving third parties such as telegrams, the duration commences when the information is “handed over” for transmission; for a mailing or the analogous use of express delivery service, on the date of the letter or the date on the envelope if the letter is undated. The likelihood that the offeree might discard the envelope and the potential failure of the offeror to record the date of mailing was the basis for selecting the date of the letter rather than the post marked or mailing date of mailing, both parties are likely to have retained the letter or its copy. If the offer is communicated by means of instantaneous electronic communication such as telephone, telex, email or text message, the duration commences the moment the offer reaches the offeree. Intervening official holidays and non-business day are included in calculating the expiration date. However, if the last day of the

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94 Caldwell v. Cline, 109 W. Va. 553, 156 S.E. 55 (1930). Citation

95 Citation.

96 CISG Art. 20 (1): A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.


98 CISG Art. 20 (1).

99 CISG art. 20 (2): Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address

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period falls on an official holiday or non-business day at the place of acceptance, the period is extended to the next business day.\textsuperscript{100} Care must be taken by the offeree to avoid assuming that official holidays and non-business days at its locale are identical to those at the location of the offeror or are relevant in calculating the expiration of the offer. The offeror’s location is the “place of acceptance” unless otherwise designated in the offer.\textsuperscript{101}

In assessing the varying approaches between U.S. domestic law and that of the Convention on irrevocable offers, the formalities imposed by domestic law are cumbersome, imposing a significant proof burden on the party asserting that the offer was irrevocable. These formalities may be justified by the abrogation of the historically required validating device of Consideration that satisfied cautionary and channeling functions of form,\textsuperscript{102} a cautionary function of guarding “the promisor against ill-considered action” and a “channeling or signalizing function, to distinguish”\textsuperscript{103} an enforceable transaction “from other types and from tentative or exploratory expressions of intention.”\textsuperscript{104}

of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

\textsuperscript{100} Id.


\textsuperscript{102} Restatement (Second) of Contracts § 75, cmt. a (“the fact of bargain also tends to satisfy the cautionary and channeling functions of form”).

\textsuperscript{103} Restatement (Second) of Contracts § 72, cmt. c.

\textsuperscript{104} Id.
As an autonomous harmonized legal regime without the historical precedent that supplements the UCC, the Convention operates with greater flexibility in recognizing the needs of commercial parties and the realities of trading across international boarders. However, the common law rule governing the calculation of any duration period by commencing the period on receipt regardless of the medium used to communicate the offer provides ease of application and avoids confusion. Although a fact sensitive determination, given the possibility of enormous geographical distance that might exist between parties and the corresponding period for non-electronic communications to travel that distance for mail or telegram delivery systems, the Convention protects the offeror from the risk of inordinate offer periods through the application of its rule. Given the burgeoning use of electronic communications and the availability of express mail, the receipt rule is likely to be applicable more often than not.

5. Acceptance

Unless the offeror unambiguously directs, Section 2-206 provides that acceptance may be made in any reasonable manner, promise or performance, and communicated by any reasonable medium -- letter, fax, smoke signal, or email.\textsuperscript{105} Supplemented by the common law rules

\textsuperscript{105} U.C.C. § 2-206. Offer and Acceptance in Formation of Contract: (1) Unless otherwise unambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances; (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 or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer. (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

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regarding acceptance, acceptance for contracts for the sale of goods is effective upon dispatch. Despite the contrary position of the Restatement Second on the Law of Contracts that acceptance by instantaneous communication should be treated as though the parties are in either other’s presence and, thereby subject to a receipt rule, prevailing authority hold that the dispatch rule, historically implemented for responses by mail, is applicable for communication by telephone, and telex. This application should be extended to email, fax, and text messaging, rather than the “when heard” or “received” rule that governs for parties dealing in each other’s presence to simplify the law and minimize confusion.

Rather than a dispatch rule for acceptance, the Convention requires receipt by the offeror before the expiration of the time fixed for an acceptance to be effective. Although an offer cannot be revoked by the offeror once the offeree has dispatched its acceptance, actual receipt of the acceptance is required for contract formation. Unless the circumstances

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106 U.C.C. § 1-103 (b).
107 RESTATEMENT 2ND OF THE LAW OF CONTRACTS § 64: Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other. (hereinafter RESTATEMENT).
109 CISG art. 18 (2): An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.
111 CISG art. 23: A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.
otherwise indicate a different result, acceptance of an oral offer is required immediately.\textsuperscript{112} Currently, no case authority addresses this rule or the substantially similar rule of the UNIDROIT Principles for International Contracts.\textsuperscript{113} An oral offer should include not only conversations when the parties are in each other’s presence but also communications by telephone and video conferencing.

As a result of the Convention’s receipt rather than a dispatch rule, the risk of delay or non-receipt is placed on the offeree rather than the offeror. Common law tradition allocates the risk to the offeror who, as master of the offer, could have required receipt of the acceptance before contract formation and has not done so. In so allocating the risk to the offeror, the contract was formed at the point of the objective manifestation by the offeree, binding both parties and nullifying the offeror’s power to revoke between the time of the offeree’s manifestation and the offeror’s receipt. This common law approach protected the offeree’s possible change of position in reliance on the anticipated contract.\textsuperscript{114} The Convention addresses these risks by prohibiting the offeror’s revocation of the offer after the acceptance is dispatched,\textsuperscript{115} while placing the risk of delay in transmission on the party best able to avoid or

\textsuperscript{112} CISG art. 18 (2): An oral offer must be accepted immediately unless the circumstances indicate otherwise.

\textsuperscript{113} UNIDROIT Principles of International Contract art. 2.1.7 (Time of acceptance): An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.


\textsuperscript{115} See text and notes, supra, at nn.__ for a discussion of the effect of the dispatch of the acceptance.

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minimize the delay, the offeree. However, the risk of aberrant or abnormal delay is minimized if the actual transmission bears evidence that if normal transmission had occurred the acceptance would have been received in a timely fashion. Article 21 makes such abnormally late acceptances effective unless the offeror gives prompt oral or promptly dispatches notice that the offer lapsed.\footnote{CISG art. 21 (2): If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.}

Unlike the dispatch rule of the common law, the receipt rule creates an opportunity for the offeree to withdraw its acceptance if the withdraw reaches the offeror before or at the same time as the acceptance.\footnote{CISG art. 22: An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.} An overtaking withdrawal of acceptance is effective. Such action by an offeree, subject to the domestic dispatch rule, is an impermissible attempted revocation of acceptance.\footnote{RESTATEMENT § 63.} It may be treated as a repudiation of the contract formed upon dispatch of the acceptance or, if the offeror chooses, may be treated as an offer to rescind the contract.\footnote{RESTATEMENT § 63, cmt. c.}

Both approaches to designating the effective point for the act constituting acceptance address problems inherent in any approach. The Convention’s use of one approach for all mediums of transacting results in certainty and predictability for offerees and their attorneys and minimizes confusion. Both approaches empower the offeror to conclude a contract by either
treatment the late acceptance as effective if followed by prompt notice\textsuperscript{120} or by treating the late acceptance as a counteroffer available for the offeror’s acceptance.\textsuperscript{121} The offeror’s inaction after receipt of a late acceptance gives effect to the terms of the offer, avoids the extension of liability when the conduct of the offeree in failing to act with greater promptness, maintains the offeror’s position of master of its offers. Both recognize that a rejection of an offer is effective upon receipt. Both authorize irrevocable offers, but, only the Convention empowers the offeree to reject an irrevocable offer before the period of irrevocability has expired in the absence of reliance on the rejection by the offeror.\textsuperscript{122} At common law, once an option contract was created conduct by an offeree constituting a rejection of the offer did not terminate the option absence reliance by the offeror on the rejection.

6. \textit{Battle of the Form – Distinguishable Theoretical Approaches}

No change of the common law rules by the UCC has generated as much discussion and angst as the promulgation and codification of UCC Section 2-207, battle of the forms.\textsuperscript{123}

\textsuperscript{120} CISG art. 21 (1): A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

\textsuperscript{121} Restatement § 70, Effect of Receipt by Offeror of a Late or Otherwise Defective Acceptance: A late or otherwise defective acceptance may be effective as an offer to the original offeror, but his silence operates as an acceptance in such a case only as stated in § 69. See also \textit{Id.}, cmt. b.

\textsuperscript{122} CISG, art. 17: An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror. Cf. Restatement § 37, Termination of Power of Acceptance Under Option Contract: Notwithstanding §§ 38-49, the power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.

\textsuperscript{123} U.C.C. § 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
Abrogating both the mirror image rule and the last shot rule, Section 2-207 authorizes the formation of a contract if the acceptance assents to the bargained for or dickered for material terms of price, quantity, subject matter, and delivery but introduces additional and/or different terms to the proposed exchange.\textsuperscript{124} With these new proposals, the acceptance does not mirror the offer but it isn’t treated as a counteroffer unless the communication expresses an unwillingness to go forward with the transaction in the absence of \textit{as sent} to the additional or different terms. If this condition isn’t included in the offeree’s purported acceptance, a contract is created based on the offeree’s assent to the bargained for terms and the boilerplate on the reverse side, if any, on the offeror’s form.\textsuperscript{125} When the parties are merchants, professional rather than casual buyers and sellers with knowledge of general business practices,\textsuperscript{126} Section 2-207 (2) is applied to determine 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.

\textsuperscript{124} U.C.C. § 2-207 (1).

\textsuperscript{125} See, \textit{e.g.}, Energy Mktg. Servs., Inc. v. Homer Laughlin China Co., 186 F.R.D. 369 (S.D. Ohio 1999) aff'd, 229 F.3d 1151 (6th Cir. 2000) (holding that when a transaction is between merchants, a differing form operates as an acceptance of the contract and the additional terms become part of the contract unless: (1) the offer expressly limits acceptance to the original terms; (2) the additional terms materially alter the contract; or (3) notification of objection to the additional terms has already been given or within a reasonable time after notice of them is received).

\textsuperscript{126} U.C.C. 2-104 (1) & (3), cmts. 1 & 2.
the impact, if any, of the offeree’s terms on the contract created by the offeree’s assent.127

Assume, however, that the offeree’s purported acceptance includes an explicit condition that the acceptance is conditioned on “assent” to the additional or different terms. This purported acceptance constitutes a counteroffer and this counteroffer may only be accepted by expressly assenting to the additional terms – conduct required by the express condition. Despite the creation of a counteroffer with the required conditional language and the failure of the other party to provide express assent to the additional or different terms, if the parties proceed with their transaction and both parties engage in conduct that manifests an intent to contract, such as the seller’s shipping and the buyer’s paying for the goods, a contract is formed.128 The terms of this contract are the terms upon which the writings previously exchanged by the parties agree and supplementary terms from the UCC gap-fillers.129 Formerly, the common law last shot rule, made the counteroffer the operative document, dictating the terms of the agreement. Section 2-207 renders the last shot rule ineffective and it is, thereby, abrogated.130 The party who transmits the last form no longer controls the terms of the agreement; the intent to be bound based on conduct following the exchange of forms is sufficient to create the contract. The exchanged forms provides some of terms upon which the parties were willing to contract and provide a reasonably certain basis for a remedy; these are terms and applicable default rules of

127 Citations
128 U.C.C. § 2-207, cmt. 7.
129 U.C.C. § 2-207 (3).
130 Citation
Article 2 are the terms of the contract. The operation of Section 2-207 demonstrates the substantive preference for contract formation by both the drafters who promulgated the section and legislatures who codified it. A contract is always formed if assent is given to the bargained for terms or conduct indicates assent to the bargained for terms. This preference or policy goal is consistent with other policy goals reflect in the UCC such as “keep the deal together”.

Several contemporary scholars assert that Section 2-207 (3) is also applicable if the offeree’s response to an offer is in fact a common law counteroffer, not a purported acceptance, and the parties proceed to perform. Here, they argue, the agreement, as determined by section 2-207 (3), are the terms upon which the parties agree and the supplementary gap-fillers. A counteroffer, a seasonable response that varies a dickered for or bargained for term of the offer, does not satisfy the condition precedent for the application of Section 2-207 (1); it is not a definite and seasonable expression of assent. Effect must be given to the intent of the offeree who is rejecting the offer and proposing an entirely different agreement by recognizing that a contract is being created on the offeree’s terms. Moreover, an offeree’s counteroffer is distinguishable from a communication that assents to the dickered or bargained for terms and demands assent to additional term or non-dickered for different terms.

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131 U.C.C. § 2-207.
132 See, e.g., U.C.C. §§ 2-609, -610 (b); U.C.C. § 1-308 (a).
133 See Restatement § 39, infra, for a definition of counteroffer.
134 Rusch & Sepunick, CITATIONS.
135 U.C.C. § 2-207(1).
136 Citation to Diatom and several others within the proviso.
The offeree who assents to the bargained for terms, assisting on assent to its non-dickered for terms should be allocated the risk of contract formation on the dickered for terms assented to if he/she failed to await the assent insisted upon and proceeds with performance.\footnote{Citation (consider Farnsworth & Itho case in the 6\textsuperscript{th} edition).} A communication that does not assent to the bargained for terms is not a “purported acceptance” and should not trigger the application of Section 2-207. In this instance, Section 2-204 rather than Section 2-207 should govern the agreement between the parties.\footnote{U.C.C. § 2-204 (1):__} Neither the legislative history nor the commentary suggests that the drafters intended to negate the viability of counteroffers with the promulgation and codification of Section 2-207.\footnote{Cite to the New York Law Commission review of article 2.} Some might argue that the introductory language of comment 7 to 2-207 support the position espoused by contemporary scholars. This language states:

> In \textit{many cases}, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.\footnote{U.C.C. § 2-207, cmt. 7 (emphasis added).}

This commentary addresses fully executed contracts and directs that for these fully executed contracts section 2-207 (3) is the operative rule when the writings of the parties do not establish a contract. It is, however, commentary and commentary to Section 2-207 that abrogates the mirror

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image rule of general contract law in two envisioned contexts: \(^\text{141}\) confirmation(s) of prior agreement and offer and acceptance when the acceptance “adds further minor suggestions or proposals”\(^\text{142}\) as additional or different terms. Neither the Section nor the comments are directed towards the abrogation of counteroffers as a juridical tool in the context of goods.

a. Battle of the Forms – The Convention

The theoretical construct of provision of the Convention that governs a battle of the forms is diametrically opposed to that of the UCC. Discussion and debate on March 18, 1980, during the 1980 Vienna Diplomatic Conference on former Article 17, \(^\text{143}\) now Article 19, establishes that the framework of Article of 19 was designed to achieve a balance between two competing goals, first, certainty and security in contact formation \(^\text{144}\) and, second, recognition of prevailing trade

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\(^\text{141}\)Id., cmt. 1 (“This section is intended to deal with two typical situations.”).

\(^\text{142}\) Id., cmt.1.

\(^\text{143}\) 1978 Draft of Article 17 which became current Article 19:
(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. 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, inter alia, 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, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.


\(^\text{144}\)1980 Vienna Diplomatic Conference, Summary of First Meeting Proceedings, March 18, 1980: 25. Mr. STALEV (Bulgaria), introducing his delegation’s amendment (A/CONF.97/C.1/L.91), explained that article 16(1) [became CISG article 18(1) ] and article 17(1) [became CISG article 19(1) ] established a fundamental rule and a rational principle, i.e., that there could be no contract without agreement by the parties on all points. However, that fundamental rule was almost nullified by the exceptions given in paragraphs 2 and 3: paragraph 2 gave an exception to paragraph 1, the first sentence of paragraph 3 an exception to paragraph 2, and the second sentence of paragraph 3 an exception to the first sentence, the result being that a contract could be concluded implicitly [sic] when there had been no agreement on the
practice that although minor changes are made to the offer the parties believe that a contract has been formed and perform it.\textsuperscript{145} The governing principle of the approach adopted by Convention is based on the general theory reflective of the “mirror image” rule. A reply to an offer that is a “purported” acceptance but contains additional or different terms is a rejection and a counteroffer.\textsuperscript{146} This principle is consistent with the general rule of domestic common law. The Convention does, however, modify the strict common law approach to counteroffers. Generally, at common law, counteroffers terminate an offer and unless the counteroffer is accepted, no contract results.\textsuperscript{147} The Convention recognizes one exception to this general rule. If the

\begin{quote}
26. His delegation therefore proposed that paragraphs 2 and 3 should be deleted and, if that proposal were not accepted, recommended that at least the last part of paragraph 3 from "unless the offeree . . ." should be deleted.
\end{quote}

\textsuperscript{145} 1980 Vienna Diplomatic Conference, Summary of First Meeting Proceedings, March 18, 1980: 28. Mr. SEVÓN (Finland) said that he could not agree to either of the proposals, since trade nowadays largely took place in the manner described in paragraphs 2 and 3.

29. Mr. MASKOW (German Democratic Republic) regretted that he could not support the United Kingdom and Bulgarian proposals since experience had shown that in trade practice minor changes were often made to the offer and that contracts were nevertheless considered as having been concluded and were performed. The only effect that the deletion of the paragraphs would have would be to make some contracts void which would nonetheless be executed, and that would cause serious difficulties. It would therefore be preferable to keep the existing text, even if it was not perfect. In any event, the problems which those provisions might give rise to were less serious than those which might arise if the provisions were deleted.

See Alejandro M. Garro, \textit{Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods}, 23 Int’l Law. 443, 462 (1989) (Article 19 compromise between “the strict socialist view that an acceptance that deviates from the offer amounts to a rejection, and the more flexible view of Western countries that considers the contract as concluded if the acceptance contains minor additions or limitations”).

\textsuperscript{146} CISG art.19 (1): A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

\textsuperscript{147} Restatement 39: (1) A counter-offer is an offer made by an offeree to his offeror relating to the same
additional or different terms in the purported acceptance are *immaterial* and the offeror does not object without delay, a contract is formed based on the offer as modified or supplemented by the *immaterial* additional or different terms of the acceptance.\(^{148}\) The communication is an acceptance.\(^{149}\) Debate and discussion at the Diplomatic Conference centered on the retention of this exception to the general rule and the inclusion of an additional exception which deemed terms that might otherwise be material as immaterial based on the offeree’s understanding of the offer or the practices between the parties.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. 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, inter alia, 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, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

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\(^{148}\) CISG art. 19 (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.

\(^{149}\) CISG art. 19 (2).
The Conference adopted the second alternative proposed by the Bulgarian delegate,\textsuperscript{150} eliminating the second sentence of subsection (3) that expanded the definition of “material” to include exceptions implied from circumstances.

The resulting provision distinguishes immaterial terms from material ones. Unlike the UCC, the Convention identifies following categories as material in its nonexhaustive list: “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.”\textsuperscript{151} Thus, the last shot rule continues to operate, to a limited extent, under the Convention.\textsuperscript{152} This fact is illustrated by the following hypothetical setting:

A French buyer reviewed the catalogue of an Illinois seller from whom the buyer had purchased equipment over a five-year period and located a freezer/cooler unit with a list price of $7500 and called the seller’s sales department. The representative discussed the buyer’s need and agreed that the selected unit was an appropriate selection. The parties discuss payments. The buyer then ordered ten units for its numerous restaurants for immediate shipping. The buyer was informed that once its credit and payment history were verified the seller would respond with its acknowledgment form. Thereafter, seller sent and the buyer received the seller’s acknowledgment form correctly stating the price and the items ordered by the buyer, that the equipment had been shipped, the anticipated delivery date, and a statement that the terms and conditions on the reverse side were terms of the agreement. These terms provided that: disputes were to be resolved by binding arbitration, the buyer must provide notice of any problem within twenty (20) days of receipt in order to qualify for a remedy, and that the laws of Illinois applied. The buyer did not respond.

\textsuperscript{150}1980 Vienna Diplomatic Conference, Summary of First Meeting Proceedings, March 18, 1980, ¶26, \textit{supra}, n. ___.

\textsuperscript{151}CISG art. 19 (3).

The buyer’s order was a proposal that constituted an offer;¹⁵³ the price and quantity were fixed at the time the order was placed.¹⁵⁴ The sharing of its credit information, the placing of its order and the request for immediate shipment were evidence of the buyer’s intent to be bound.¹⁵⁵ Article 14 directs that this communication is an offer.¹⁵⁶ The seller’s acknowledgment is a purported acceptance because it assents to the terms of price, quantity, and subject matter. However, it is also a rejection and a counteroffer. It does not operate as an acceptance. Material terms were included in the purported acceptance. These include the settlement of disputes by arbitration, the imposition of the duty to provide notice of quality problems within twenty (20) days as a condition precedent to remedial relief, and the designation of an applicable law.¹⁵⁷ The goods have been shipped. Assume that upon delivery to the buyer, the buyer takes possession of the goods. That conduct, absent circumstances indicating a contrary intent¹⁵⁸ such as notice that the goods are being held for the seller, if consistent with established practices between them.

¹⁵³ CISG art. 14 (1): A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. (2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

¹⁵⁴ Id.

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ CISG art. 19 (3).

¹⁵⁸ CISG art. 8 (1) & (2).
should constitute acceptance of the seller’s counteroffer. The seller’s counteroffer with the material additions will govern their transaction. Unlike the policy goal of the UCC to forge a contractual relationship upon assent to the bargained for terms, the Convention treats material modifications to the offer as a counteroffer only with assent to the counteroffer is a contract formed. Whether the governing law is the Convention or the UCC, commercial parties are likely to believe that a contract exists after the exchange in forms and perform. Only if a dispute arises will the question of formation arise. Rather than generating costly litigation or arbitration on whether a contract exits or whether the material additions are terms of the contract, resolution of the dispute is facilitated under the Article 19. The seller’s communication was a counteroffer that was later accepted. The cost of international litigation or arbitration, the difficulties in communications because of language differences, and likelihood of great physical distance between the parties support a policy goal that results in greater clarity of the governing terms rather than fostering contract with a later resolution of the governing terms. From its entry into force in 1988, only 129 cases are indexed for raising an Article 19 issue. The “Uniform Commercial Code 2-207 makes a major change in the traditional approach, which has reduced the possibility of reneging in the first type of situation [change in circumstances before performance], at the cost of increasing the likelihood of disputes in the second type of situation

159 CISG art. 18 (1): A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. See also CISG art. 18 (3): However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

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Despite the results afforded by the Convention, some courts reject the application of the limited last shot rule that the Convention imposes. Interpreting Article 19 with the goal of modernizing the Convention result in a deviation from the provisions of a promulgation that was not an attempt to replicate any existing domestic legal regime but to create an autonomous one by harmonizing disparate approaches to legal problems and to increase the predictability of the risks untaken. Interpreting the Convention consistent with the goals of the UCC or German domestic law to abrogate the mirror image rule and the last shot rule depart from a court’s duty to interpret the Convention as directed by Article 7: 1) consistent with its international character rather than permitting the analysis to be driven by local law and policy; 2) to promote uniformity in its application - thus, mandating review of opinions of courts and arbitral awards emanating from other contracting states; and 3) to encourage the observance of good faith in international trade. Most importantly, the court’s interpretation defeated the expectations of the nations who


162 CISG art. 7.
are contracting states to the Convention.

Unlike the UCC Section 2-207 that has spawned substantial litigation for determining the operation of the Section and resulting terms, retention of a modified mirror image rule and the last shot rule in Article 19 minimizes costly cross-borders litigation and fosters resolution of disputes because of the operation of the last shot rule. The last shot rule, although conservative, provides predictable results.163

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