Section 2-207 of the US Uniform Commercial Code

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With the adoption of the Uniform Commercial Code (UCC) in all states but Louisiana in the 1950–60s, the US extensively modernized its contract formation law, and, in particular, the Common Law offer-acceptance rule. The revised offer-acceptance formula is now embodied in Section 2-207 of the UCC. It provides a set of rules tailored to deal primarily with transactions where both parties — in the exchange of offer and acceptance — use printed forms (a practice generally referred to as "the battle of forms"). On the basis of legislative and scholarly material on the issue, this article attempts to establish the underlying purposes and intended functioning of the Code offer-acceptance formula.[1]

1. The US offer-acceptance rule at the turn of the century

1.1 The mirror-image rule

Under US law, the offer-acceptance rule was commonly known as the "mirror-image rule".[2] Under this Common Law principle (i. e., case-law developed principle), a response to an offer was effective as an acceptance only if the terms of the reply exactly matched

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[2] Some of the US commentators who have discussed the mirror-image rule include Baird/Weisberg, Rules, Standards, and the Battle of Forms: A Reassessment of par. 2-207, 68 Va.L.Rev. 1217,1231 (1982); Barron/Dunfee, Two Decades of 2-207: Review, Reflection and Revision, 24 Clev. State L.Rev. 171,175 (1975) [hereinafter Barron/Dunfee]; Corbin, Corbin on Contracts, One Volume Edition, p. 130-142 (1952); Davenport, How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts of Contract Law, 19 Bus.Law. 75,76 (Nov.1963); Farnsworth, Farnsworth on Contracts, Volume 1, p. 258-262 (1982); Formation of a contract-acceptance, 105 U.Pa.L.Rev. 836,850 (1957); Gedid, A Background to Variance Problems Under the Uniform Commercial Code: Toward a Contextual Approach, 22 Duq.L.Rev. 595 (1984); Lipman, On Winning the Battle of Forms: An Analysis of Section 2-207 of the Uniform Commercial Code, 24 Bus.Law. 789,791 (1969) [hereinafter Lipman]; Nordstrom, Handbook of the Law of Sales p. 92-93 (1970); Note, Contract Draftmanship Under Article Two of the Uniform Commercial Code, 112 U.Pa.L.Rev. 564,567 (1964); Note, Contractual Interactions and the Uniform Commercial Code, 89 Yale L.J. 1396,1405 note 46 (1980); Resnick, Conflicting Boiler Plate - Effect of the Uniform Commercial Code, 18 Bus.Law. 401,402 (Jan.1963); Wagner, Offer and Acceptance, 11 Vill.L.Rev. 95 (Fall 1965); Willinston, Selections From Willinston on Contracts, p. 91-93 (1938).

those of the offer. Any attempt to add to, subtract from or change the terms of the offer turned the offeree's response into a counteroffer.

The alleged virtue of the mirror-image rule was that it promoted certainty between the parties and judicial predictability. The rule encouraged the parties to fully negotiate every aspect of the proposed deal, since no contract would be formed unless the terms of the offer and the acceptance matched exactly. In the ideal case, the offer would not even be subject to negotiation, but accepted ”in blanc” by the offeree, thus leaving no room for ambiguity regarding the terms of the contract.[3]

In many cases, the exchange of written communications between the parties did not result in an enforceable contract. Only offers and counteroffers were made, none accepting the previous offer. At this point, each party could walk away from the proposed deal without risking adverse legal consequences. However, in the large majority of these cases the parties proceeded with the transaction. The seller shipped the goods and the buyer accepted and paid for them. Thus, when disputes later arose regarding the exact terms of the contract, the performance by both parties compelled the courts to conclude that they had entered into a binding agreement.

Many courts applied the so called ”last shot” rule on this fact-situation. The contract was considered to be on the terms of the party who sent the last counteroffer, which was then accepted by the other party's performance.

1.2 Theory versus reality

The mirror-image rule is since long ago an outdated concept. It is based on a static, unrealistic conception of the 18–19th century face-to-face commercial dealings. The rule very much stands as a symbol of an era when the law was still deemed to be exclusively a science (positivism). According to this judicial philosophy, the law of all contracts could be reduced into a few generalized principles into which any fact situation would fit.

In theory, this rigid and rule-oriented approach was still dominating US contract formation law long into this century. Both the Uniform Sales Act (1906) and the Restatement of the Law of Contracts (1932), the purpose of which were to codify Common Law developed contract principles, restated the mirror-image

[3] It was said that the offeror was ”the master of his offer”. The offeror was entitled to receive from the offeree exactly what his offer demanded in precisely the manner it prescribed.

concept in its purest form, notwithstanding that it had long ago become invalidated by a changing society.[4]

However, if the mirror-image rule was still alive and potent in theory, it slowly crumbled in practice. Many courts showed an amazing ability to do justice despite the doctrinal handcuffs of this concept. The exceptions to the rule accumulated and finally reached such a level of sophistication and self-sufficiency that the courts seldom referred to the mirror-image rule in their opinions.

2. The Uniform Commercial Code

2.1 General legislative background

In 1944, the initiative was taken to draft a comprehensive model Uniform Commercial Code, the purpose of which was generally to replace many of the commercial principles developed under Common Law. The first official text of the Code was published in 1952.[5] Various parts of the UCC have since then been revised several times, and the last "new" official text was promulgated in 1978.[6]

The sales article of the Code (Article 2) modified a number of old contract principles and signified a major step away from the aforementioned orthodox rule-oriented approach. The drafters main goal were to adapt the law on contracts to modern commercial practices. More consideration was given to economic, social, moral and ethical factors. Rigid and dogmatic rules had to give way to more flexible rules and principles based on good faith, conscionability and commercial reasonableness.[7] But the most

[4] See, e. g., the Restatement of contracts (1932); Section 59: "Except as this rule is qualified by par. 45,63,72, an acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested." Section 60: "A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer."

[5] The Code is divided into 11 substantive Articles: Article 1, General provisions; Article 2, Sales; Article 2A, Leases; Article 3, Commercial Paper; Article 4, Bank deposits and Collections; Article 4A, Fund Transfers; Article 5, Letters of Credit; Article 6, Bulk Transfers; Article 7, Warehouse Receipts, Bills of Lading and other Documents of Title; Article 8, Investment Securities; Article 9, Secured Transactions; Sales of Accounts and Chattel Paper. The UCC in whole represents the greatest legislative effort ever conducted in the United States. Today, the Model Code has been adopted in all US states except for Louisiana, which has chosen to adopt only certain Articles of the Code.

[6] About the legislative history of the UCC; See White/Summers, Uniform Commercial Code p.1 (2d.1980); Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U.Miami L.Rev. 1 (1967); Braucher, Legislative History of the Uniform Commercial Code, 58, Colum.L.Rev. 798 (1958).

[7] Note that the Code has not made Common Law obsolete. While the Code displaces Common Law to the extent the Code is applicable to the particular transaction, it has a more limited scope of application. First, it applies only to transactions involving the sale of goods. Second, certain concepts, principles and areas of Common Law (capacity to contract, estoppel, fraud, mistake, the definition of offer, the consideration doctrine etc.) have not been regulated or

remarkable change would be the abandonment of the mirror-image rule. The enactment of the Code signified a formal farewell to a principle that had governed US contract formation law for centuries.

2.2 The new Code approach

The UCC attempts an exhaustive re-evaluation of commercial dealings.[8] The drafter's main objective has been to revise the law of commercial sales transactions to conform with established commercial practices and to give effect to the reasonable expectations of the parties. This means that the Code will recognize a deal as closed if the parties at the time of contracting manifest the intention that it should be closed.[9] At first sight, it may appear that the Code approach is more subjective in character than that of the mirror-image rule. Not so. First, "the real intention of the parties" is still to be established objectively. Second, the written manifestation is still an important source in discovering the actual bargain, but will no longer be considered as a unity and as such representative of the party's intent.

To achieve this objective the UCC makes a distinction between "agreement" and "contract", and the emphasis is clearly upon the former. The agreement relates to the factual bargain of the parties "as found in their language or by implication from other circumstances including Course of Dealing or Usage of Trade or Course of Performance...".[10] The contract "means the total legal obligation which results from the parties' agreement...".[11] Thus, while the parties can be in a situation of having an agreement but no contract (i. e. that the parties have expressed a willingness to be legally bound by a deal, without having full knowledge of its contents), the reverse can never be true.

The attention is initially focused on the agreement.[12] Did the parties actually intend to agree? The Code approach differs in this respect from that of Common Law in a number of ways. First, the Code explicitly states that the parties' intention to agree can be manifested in *any* manner, including conduct by both parties.[13] Second, the precise time of contract formation must not be

only partially regulated under the Code. Common Law continues to apply insofar as these supplemental bodies of law and general principles are involved.

[8] This section is based primarily on two articles: Murray, The Chaos of the "Battle of Forms": Solutions, 39 Van.L.Rev. 1307,1311-1315 (1986) [hereinafter Murray, Chaos]; Mooney, Old Kontract Principles and Karl's New Code: An Essay on the Jurisprudence of Our New Commercial Law, 11 Vill.L.Rev. 213,221-229 (1966).

[9] See Comment 2 to Section 2-207.

[10] Section 1-201(3).

[11] Section 1-201(11).

[12] See Section 2-204(1).

[13] Section 2-204(1) and Section 2-207(3).

established.[14] Third, an intention to be legally bound by the deal may be found, notwithstanding that several material terms are missing.[15] Fourth, the fact that the terms of the agreement fail to agree will not necessarily preclude a finding that the parties intended to agree.[16] Fifth, the manner and medium of acceptance are irrelevant as long as they are reasonable.[17]

If the reasonable inference from the parties' words (oral or written), conduct or other circumstances is that they wanted to be legally bound by the deal, then, they will be bound, and the Code will provide, if necessary, a large number of terms to help transform this agreement into a contract containing the terms reasonably expected by the parties.[18]

Another novelty introduced by the Code to counterbalance and discourage bad business behavior is the imposition of a good faith standard on the parties to the transaction. Article 2 contains a special merchant's definition of good faith under which good faith in that article means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".[19] This standard is subjective, but contains also an objective element. It focuses not only on the parties' state of mind, but requires also a certain minimum of decency, fairness and reasonableness in the performance of the contract obligations.

In sum, instead of focusing on the parties distinctive promises (the offer and the acceptance), the Code elaborates with a single concept - *agreement*. Once an agreement can be traced between the parties, the Code is ready to help them set up a *contract* in accordance with their reasonable expectations, without necessarily feeling bound by the parties' written expressions. This does not mean that the Code no longer recognizes that the parties may contract through the exchange of offer and acceptance. But, by emphasizing that the essential basis of contracting is *agreement*, the Code says that a contract will not fail because of possible

[14] Section 2-204(2). This is an inherent requirement of the mirror-image rule, since the moment of formation determines what terms are included in the contract.

[15] Section 2-204(3). It follows implicitly from the gap-fillers of the Code and the Statute of Frauds (Section 2-201) that the only indispensable clause is the quantity term which, however, need not be finalised (compare output and requirement contracts, Section 2-306).

[16] Section 2-207(1). See infra at 3.1.

[17] Section 2-206(1).

[18] A missing term can be supplied by one of the Code's gap-fillers (for example, Section 2-305 applies if the contract is silent regarding the price of the goods). Besides the gap-fillers, other Sections that can aid in ascertaining the terms of the contract are Section 1-205 (Course of Dealing and Usage of Trade), Section 2-208 (Course of Performance), Section 2-202 (The Parol Evidence Rule), Section 2-207 (Additional Terms in Acceptance and Confirmation) and Section 1-103 (Common Law).

[19] Section 2-103(1)(b). For a definition of "merchant", see Section 2-104(1) and (3).

deficiencies or inconsistencies in the parties' promises, where the parties express an overall intention to be bound and the Code requirements of good faith and commercial reasonableness are met.

3. The offer-acceptance rule under the Code

3.1 UCC SECTION 2-207(1) - "UP TO THE COMMA"

3.1.1 Intent rather than form

Section 2-207(1) provides as follows:[20]

"*A definite and seasonable expression of acceptance or 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* [emphasis added], unless acceptance is expressly made conditional on assent to the additional or different terms."[21]

The Subsection "up to the comma" states the seemingly radical proposition that a nonconforming reply is neither a counteroffer nor a rejection of the offer but an acceptance, if the reply is a definite and seasonable expression of acceptance.

It is generally contended that the express intent of the draftsman in enacting Section 2-207(1) has been to reject the Common Law mirror-image rule and its underlying maxim that any significant difference in the terms of the purported acceptance must turn the acceptance into a counteroffer.

Although this contention is true in principle, the novelties proffered by this Section are not as substantial as some commentators seem to believe. The offer-acceptance formula itself is retained intact, and the Common Law definitions of these

[20] Section 2-207 provides in full: "A definite and seasonable expression of acceptance or 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. 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. 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."

[21] Note that this Section applies not only to the classical offer and acceptance situation, but also to the situation where an oral agreement is followed by "one or both of the parties sending formal memoranda embodying the terms so far agreed upon and adding terms not discussed" (Comment 1 to Section 2-207). The issues relevant to confirmations will not be considered in this article.

concepts are still controlling.[22] The offeror can still be considered as "the master of his offer" in that the question whether the acceptance is a "definite and seasonable expression" is dependant on the contents of the offer. Even the "ribbon matching" concept itself is still very much alive. Only the scope of its application has been diminished.[23]

A more accurate statement of the drafter's intent can be found in Comment 2 to Section 2-207:

"Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract."

If the parties intended to be bound by the agreement at the time of its making, the law will give effect to that contractual intent, notwithstanding conflicting provisions in the parties' documents. The key element under Section 2-207(1) is the objective intent of the parties — whether the parties intended to agree — not the contents of the parties' manifestations.

This approach is also expressly endorsed by Section 2-204(1). It states that a contract can "be made in any manner sufficient to show agreement". As previously noted, the Code, as distinguished from Common Law, makes a distinction between agreement and contract.[24] Agreement refers to the parties bargain-in-fact while the contract refers to the total obligation which results from the agreement. A binding deal under the Code requires only that the actual bargain show the existence of agreement (actual or presumed assent). The parties must neither consider nor agree upon every aspect of the contract before the deal can be considered as closed. It is sufficient that they have reached some form of understanding, objectively indicating that they consider themselves bound to the deal, notwithstanding nonconforming terms.

[22] For example, Henson commences his analysis of Section 2-207 stating that "the concepts of offer, acceptance and consideration, which play a major role in first year Contracts courses in law schools, are downgraded in significance". Henson, The law of Sales, p.1 (1985). However, a valid agreement under Section 2-207 still requires both an offer and acceptance. The offer is not defined under the Code so the Common Law definition, that an "offer is 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" (Restatement (Second) of Contracts, Section 24), is still good law under the Code. The Common Law definition of acceptance is likewise retained. The offeree must objectively manifest an intent to agree. What has changed under the Code, however, is the method of establishing this assent.

[23] See Murray, Section 2-207 of the Uniform Commercial Code: Another Word about Incipient Unconscionability, 39 U.of Pitt.L.Rev. 597,604 (1978) [hereinafter Murray, Incipient Unconscionability]; Corbin, Corbin on Contracts, One Volume Edition, Supp. p. 178 (1989).

[24] See supra at 2.2.

The critical question under Section 2-207(1) is whether the offeror should reasonably understand the offeree's reply to be a closed deal regardless of the existence of new terms.

The same question may be formulated from the offeree's point of view. Did the offeree express a definite and seasonable acceptance of the offer, nothwithstanding new terms. There is no reason to assume that the two questions could yield different results. The test to be applied is objective and based upon an evaluation of all the circumstances of the transaction. The real issue under Section 2-207 is not whether a reasonable offeror or offeree should consider the deal as closed, but whether the parties considered it as closed. However, in defining the test, most commentators nevertheless seem to focus on the offeror. It appears to be a Common Law (mirror-image rule) legacy to isolate the offeror as the focal point of the test.[25]

This question of fact must be decided in the light of all the surrounding circumstances including Course of Dealing, Usage of Trade and Course of Performance.[26]

But does not this mean that the very essence of the mirror-image rule, the requirement of conforming manifestations, has been repudiated? The answer to this question is both yes and no.

3.1.2 The modern contract

Section 2-207 is based on a modern commercial reality; the extensive use of printed forms (containing boilerplate) in the contract formation process. In most cases, these printed forms are neither understood nor read by the parties. The contract is formed by an exchange of two or more forms, the contents of which, except for a few bargained terms, almost never conform. In addition, and this is probably the most important factor to remember in analyzing Section 2-207, the parties are usually aware that their written manifestations do not correspond. They prefer, however, to proceed in the face of the nonconforming manifestations, because the transactional cost — in terms of time, money and the importance of good business relations — of additional negotiations to settle the differencies is too high. Recognizing these changes, Section 2-207 is based on the

[25] See, e. g., Hawkland, who consistently uses the offeror as the focal point of the test. Uniform Commercial Code Series, Volume 2 p.103 (1984). Murray uses the two tests interchangeably without making any distinction. Murray, Intention Over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts, 37 Fordham L.Rev. 317,334,338 (1969) [hereinafter Murray, Intention].

[26] UCC Section 1-201(3).

rebuttable presumption that parties neither read printed forms nor regard them as controlling.[27]

The modern contract formed with printed forms results in fact in two separate contracts: one negotiated (dickered) contract and one unnegotiated contract containing boilerplate.[28] The former is primarily governed by the mirror-image formula adopted by Section 2-207(1). The latter is to the extent possible ignored by this Subsection and considered irrelevant to the question whether an agreement has been formed.[29] Dickered terms are to be treated in one way, boilerplate in another. Consequently, it becomes necessary to properly define each group of terms and to distinguish them from each other.

3.1.3 Dickered terms versus boilerplate

A term is generally considered "dickered" when it has been subject to negotiations between the parties. A term is negotiated as soon as one of the parties consciently insists on its inclusion in the contract. It does not mean that the term must be orally negotiated or that the opposing party must approve of it. However, the term must be expressed in a way clearly indicating that it has been subject to individual consideration. On the other hand, boilerplate are normally found in the parties' printed forms. These terms have usually not been mentioned in any preliminary negotiations, and the parties are in most cases unaware of their contents.

3.1.3 Dickered versus material terms

It is also important not to confound dickered terms with material terms. If a term is material to one of the parties, he usually makes sure that it is included and particularized in his offer or acceptance. Such conduct is sufficient to make the term dickered, and the other party's assent to it is (in most cases) thereafter required to form a binding agreement. Following this reasoning, most terms in the printed forms could be considered immaterial to the parties.

However, the distinction between material and dickered terms takes on a different meaning when something in the transaction goes wrong. Suppose the goods are damaged in transit or do not meet the buyer's expectations. Suddenly, some of the standardized terms are unquestionably material to the parties. One form

[27] Murray, The Realism of Behaviourism Under the Uniform Commercial Code, 51 Oregon L.Rev. 269,280 (1972) [hereinafter Murray, Behaviourism].
[28] Llewellyn, The Common Law Tradition p. 371 (1960); Taylor, U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality, 46 U.C.L.R. 419,427 (1977) [hereinafter Taylor].
[29] "It is only in case of the boilerplate being different between the offer and the acceptance that the counteroffer rule is abolished." Corbin, Corbin on Contracts, One Volume Edition, Supp. p. 178 (1989).

excludes all warranties, the other expressly provides for extensive and detailed warranties. It is tempting to conclude that, because of the material differencies, no contract was ever formed. But such a conclusion would defeat the purpose of Section 2-207. If the warranty term was not considered at the pre-contractual stage (so as to make it dickered), it should play no role in the determination of whether the parties intended to agree. Any other conclusion would be illogical, assuming that the controlling formula is the intent of the parties at the time of contracting.

This distinction between negotiated and material terms is expressly supported by Section 2-207. It follows from the wording of Subsection (2)(b) that a reply which materially alters the offer can be a definite expression of acceptance. It states that, between merchants, additional terms in a definite acceptance automatically become part of the contract unless "they materially alter it". In other words, an acceptance which differs materially from the offer is still capable of being converted into an agreement. However, the material terms deviating from the offer fall out of the contract.[30]

3.1.5 The rule of presumption

In deciding whether or not the offeree's reply is "a definite and seasonable expression of acceptance", it is thus necessary to compare the acceptance with the offer. The acceptance must still match the offer with respect to the dickered terms. It is unlikely that a judge will find an intent to agree if the acceptance differs in every respect from the offer. However, as mentioned previously, Section 2-207 makes a distinction between dickered terms and boilerplate (bargained for and unbargained for terms). Where offer and acceptance conform with respect to the dickered terms, the presumption is that an agreement has been entered into between the parties even though the acceptance contains boilerplate additional to or different from those of the offer.[31] The presumption is not without logic. The parties have agreed upon all the terms consciently considered during the negotiations.[32] Section 2-207 assumes that fine print is not read or at least not

[30] A somewhat confusing statement can be found in Comment 1 to Section 2-207. It states that the Section is intended to deal with the situation when the acceptance "adds further minor suggestions or proposals". The implication seems to be that the Section applies only to an acceptance containing immaterial additional terms. The Comment must nevertheless be ignored, if Section 2-207(2)(b) is not to be deprived of all meaning. See Lipman, 24 Business Lawyer 789,794,795 (1969); Barron/Dunfee, 24 Clev. State L.Rev. 171,181 (1975).

[31] Under Common Law the presumption was rather the reverse. An reply containing nonconforming terms was presumed to be a counteroffer unless the offeree made it clear that the nonconforming terms were mere proposals not intended to affect the validity of the acceptance. Murray, Chaos, 39 Van.L.Rev. 1307,1324 (1986).

[32] Murray, Incipient Unconscionability, 39 U.of Pitt.L.Rev. 597,605 (1978).

considered controlling. The parties would in most cases consider the deal as closed notwithstanding knowledge of inconsistencies in the forms.

On the other hand, where the manifestations of the parties diverge not only with respect to boilerplate but also with respect to one or more dickered terms, the presumption is rather the opposite. This is partly in line with mirror-image concept. To enforce this agreement would most probably defeat the parties' reasonable expectations. If the offeror is willing to sell a piece of machinery for $ 10 000 and the offeree "accepts" the offer stating the price at $ 8 000, the reply cannot, in commercial understanding, be deemed as "a definite expression of acceptance".[33] But what was an uncompromising rule under Common Law, is a rebuttable presumption under the Code. Section 2-207 is ready to consider any evidence, not only the face of the written manifestations, in the search for the "real" intent of the parties.

Hence, it follows that the mirror-image formula is still applicable under Section 2-207. Its scope, however, is limited to the dickered terms and the formula is no longer the sole controlling factor in the determination whether the parties have entered into an agreement.[34]

3.1.6 Evidence rebutting the presumption

Having concluded that, unless other circumstances indicate otherwise, inconsistent dickered terms do affect the validity of agreement, but that boilerplate do not, it becomes necessary to define the situations where these presumptions may be successfully rebutted by other evidence.

The total commercial setting of the transaction may suggest that the parties' intentions differed from those legally presumed. Course of Dealing or Usage of Trade may indicate that the parties usually consider the deal as closed although the price term of the acceptance differs from that of the offer. It may be the custom of the particular industry to refer price disputes to an impartial third-party body for resolution. Where the parties to a disputed transaction, notwithstanding nonconforming price terms, have previously performed under the contract, such evidence often suggests that they considered the deal as closed at the time of its

[33] I. d. Note that Section 2-204(3) does *not* offer a short-cut solution to the present example. It is true that this Subsection, when applied in conjunction with Section 2-305 (Open Price Term), may provide a missing or unsettled price term. Both Sections require, however, that the parties intend to agree in spite of disagreement on the price. As already mentioned, the parties are presumed not to consider the deal as closed if the forms differ with respect to a dickered term.

[34] Compare Corbin, Corbin on Contracts, One Volume Edition, Supp. p. 178 (1989); Murray, Incipient Unconscionability, 39 U.of Pitt. 597,604 (1978).

making. Similarly, a conflicting boilerplate in the offeree's printed form may be considered as dickered and thereby influence the issue of formation, if the custom of the particular trade suggests that the parties do not contract without it. Other extrinsic evidence, such as telephone calls, separate letters and other oral or written expressions extraneous to the written forms, may also aid the court in identifying the intention of the parties.

A more controversial question is in what situations a printed term — absent extrinsic evidence — can overcome the presumption of being non-controlling to the issue of formation. The Code assumption is that the parties neither read nor regard printed terms as controlling. Where, for example, a printed clause in the acceptance states that "this acceptance is expressly made conditional on assent to the additional or different terms",[35] there are two good reasons to ignore it. First, the offeror (as well as the offeree) has probably not read it. Second, even if he has read it, he is in many cases unable to understand its legal implications.[36] If the right printed term, containing the right language and displayed in the right manner could automatically affect the legal classification of the acceptance, one would open the door to "magic" phrases and words in the printed forms. Such approach would undermine the whole philosophy of Section 2-207(1). It is the intent, not the form, that should be controlling.[37]

Notwithstanding the aforementioned arguments, the question remains to be answered. May the printed language itself without the support of surrounding circumstances break the presumption? The answer is probably yes. It is possible to imagine a situation where the printed language itself may reach a "dickered" status. If a clause on the front page of the seller's "acceptance" and next to the dickered terms states in bold letters that "*this is not an acceptance, but a counteroffer. Buyer must expressly agree to all terms in the document*", the judge may be justified in concluding that the reply is a counteroffer. It is difficult to imagine that the parties would overlook such a conspicuous clause. The placing and style of the term and the language used force reasonable parties to take notice of it, notwithstanding its character.[38]

[35] Section 2-207(1) "after the comma". See infra at 3.2.
[36] A survey conducted by Murray showed that not a single corporate sales agent out of 5 000! was able to properly identify the legal implications of his own forms. See Murray, Chaos, 30 Van.L.Rev. 1307,1317 note 47 (1986).
[37] See Murray, Behaviourism, 51 Ore.L.Rev. 269,282 (1972).
[38] See Baron/Dunfee, 24 Clev. State L.Rev. 171,182,184 (1975). Even though a printed term has been classified as dickered, other circumstances may show that the parties nevertheless intended to agree.

3.1.7 The interrelationship between Sections 2-204, 2-206 and 2-207

Finally, a few words should be said about the interrelationship between Section 2-207, Section 2-206[39] (Offer and Acceptance in Formation of Contract) and Section 2-204.[40]

Section 2-204(1) can be considered as the foundation-stone of Article 2. It emphasizes that the parties may enter into a contract in any manner sufficient to show agreement. Every contract must satisfy the requirements of Section 2-204 to be binding under the Code. Contracts formed under Section 2-207 are no exceptions. Even though a definite expression of acceptance need not fully correspond to the offer, it must manifest an intention to agree. Considering the broad application of Section 2-204(1) and the wording of Section 2-207(1), it is tempting to conclude that the issue of formation is to be decided under Section 2-204, and that Section 2-207 only comes into operation once it has been established that the acceptance is definite, notwithstanding new terms. The function of Section 2-207 would then exclusively be to provide a mechanism to transform the non-conforming forms into a single contract. This approach, however, underestimates the scope of this Section. Section 2-204(1) addresses contracts in general formed under the Code and states that such every contract must contain an agreement (as defined in 1-201(3)). Section 2-207, on the other hand, addresses a particular contract formation method — contracts formed by the exchange of offer and acceptance. Recognizing the peculiarities of this method, it provides extra guidelines, specificly tailored for this particular situation, on how to identify an agreement. To establish whether the parties entered into an agreement, it is therefore necessary to apply the two Sections concurrently.

Another issue concerns the relationship between Section 2-207 and Section 2-206. Can the latter provide any assistance to the former as to the question of formation? The answer is no. Section 2-206 states what is technicly required to make a valid acceptance. In short, it says that, unless the offer clearly indicates otherwise, an

[39] Section 2-206 provides in full: "(1) Unless otherwise unambiguously indicated by the language or circumstance (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstance, (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 reasonably 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. "

[40] Section 2-204 provides in full: "(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."

offer can be accepted in any manner and by any medium reasonable in the circumstances. For example, if the offer was made orally, the Section states that the acceptance can be made by mail, if that particular mode of response is reasonable in the circumstances. It does not comment on the contents of the acceptance. Section 2-206 answers the question *how* an acceptance can be made, not whether the response actually amounts to an acceptance.[41]

3.2 SECTION 2-207(1) - "AFTER THE COMMA"

3.2.1 Form rather than intent?

Subsection (1) of 2-207 is restated here:

"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 [emphasis added]*."

The wording of the second clause and its interrelationship with the first clause is not entirely clear. The Subsection seems to provide two different ways for the offeree to make a counteroffer.

As follows from the analysis above, the offeree can make a traditional counteroffer under the first clause by inserting different dickered terms in the response, which in most cases would preclude a finding that it is a definite expression of acceptance. If such a response meets the requirements of a valid offer, it becomes a counteroffer (in accordance with Common Law principles made applicable through Section 1-103). However, another possibility seems to be provided by the Subsection itself in the second clause. The offeree can make a counteroffer by inserting a term stating that the other terms of the response must be expressly assented to by the original offeror before a binding contract can arise. By citing the statutory language in the response, the otherwise valid and definite acceptance is automatically transformed into a counteroffer.[42]

[41] See, Note, Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of Forms, 30 U.of Chi.L.Rev. 540,545-547 (1963); Murray, Intention, 37 Fordham L.Rev. 317,327 (1969).

[42] This is basically the approach taken by Barron/Dunfee and Travalio. As an additional requirement, both emphasize that the "assent clause" must not only track the statutory language, but also be conspicuous. Consequently, in their view, the Code provides its own counteroffer rule. See Barron/Dunfee, 24 Clev. State L.Rev. 171, 206-207 (1975); Travalio, Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207, 33 Case West.Res.L.Rev. 327,361-363 (1983) [hereinafter Travalio].

This interpretation of the language of the second clause is clearly unacceptable, but not necessarily unreasonable in point of language:

”A definite...acceptance...is...an acceptance...unless [the definite] acceptance is expressly made conditional on assent to the additional or different terms.”

In other words, although the offeree expresses an intent to agree, this contractual intent must be ignored where the response contains a term making it ”expressly conditional”. The consequences of such an interpretation would be fatal. Not only would it open the door to ”intent-free magic phrases”, but this interpretation would expressly authorize the execution of written manifestations that ”look like acceptances, but taste like counteroffers”. In addition, the very foundation of Section 2-207 — as expressed in Section 2-204(1) — would be violated, since the underlying purpose of the Section is to recognize intent rather than form.

3.2.2 The legislative history of the ”expressly conditional” clause

An exploration of the legislative history of the statute does shed some light on the matter. The text of 1952, which was the first official text of Section 2-207 of the Code, did not contain the ”expressly conditional” clause. Subsection (1) of 2-207 read as follows:

”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.”

Of course, the original intent of the draftsman was not to preclude the offeree from making a counteroffer. If the reply could not be considered as definite, it was either a rejection or a counteroffer. These issues, i. e., the classification of the non-acceptance, were left to be determined by Common Law through Section 1-103 of the Code. In an attempt to avoid the possibility of misunderstanding, Comment 2 to Section 2-207 nevertheless emphasized that the existence of any additional terms did not interfere with the question of formation, ”unless the acceptance [was] made conditional on the acceptance of the additional terms”. Thus, a slightly different version of the ”expressly conditional” clause could originally be found in the Comments.

During the New York Law Revision Commission hearings in 1954, Professor Llewellyn (the chief coordinator of the draft-work of the UCC), when asked about the ”expressly conditional” phrase in the Comment, explained that they simply wanted to emphasize that an acceptance conditioned upon the acceptance of additional terms was not a ”definite and seasonable expression of acceptance but [was] an expression of a counteroffer”. Llewellyn found it unnecessary to move that ”expressly conditional” clause into the text of the statute, because, in his view, it followed anyway from the word ”acceptance” in the statutory text that a reply could not be expressly conditioned upon the acceptance of additional terms and a definite acceptance at the same time. However, Llewellyn also (with justification) feared that moving the ”expressly conditional” clause into the statute could allow obsolete mirror-image principles to find their way into Section 2-207 through the backdoor.[43]

The clause was finally added to the official text in 1958 for the very same reason — to make clear that the offeree retained the right to make a counteroffer on his own terms.[44]

3.2.3 Common Law counteroffer

If the intent of the draftsman was to emphasize the offeree's continued right to make a counteroffer, then why not just say so? As stated by Murray, "[a]n ”acceptance” which is ”expressly made conditional on assent to the additional or different terms” is the opposite of ”acceptance” in the traditional sense of that term; it is, quite literally, non-acceptance.”[45]

It appears that the drafter lifted the ”expressly conditional” clause from the Comment into the statute itself without realizing that the context of the two clauses of Subsection (1) gave the ”expressly conditional” clause a new meaning.

To make more sense, the Subsection would need to be restructured into two separate sentences. The first clause should be left untouched as a separate sentence, and the second clause could read as follows:

”A reply to an offer, which is expressly made conditional on assent to additional or different terms, is a counteroffer.”[46]

[43] State of New York, 1954 Law Revision Commission Report, Hearings on the Uniform Commercial Code 116-119,180-183. See also Murray, Chaos, 39 Van.L.Rev. 1307,1322-1324 (1986).

[44] A.L.I., 1956 Recommendations of the Editorial Board for the Uniform Commercial Code p. 28. See also Note, Nonconforming Acceptances, 30 U.of Chi.L.Rev. 540,544 (1963); Murray, Intention, 37 Fordham L.Rev. 317,324 (1969).

[45] Murray, Intention, 37 Fordham L.Rev. 317,325 (1969).

[46] The mere substitution of ”reply” for ”acceptance” in the ”expressly conditional” clause, as suggested by Prof. Murray, is not sufficient to dissolve the inconsistencies of the Subsection. It would rather add to the confusion, since the Subsection in one and the same sentence would elaborate with two

It is thus fair to conclude that the purpose of the second clause of Subsection (1) is exclusively, in spite of the confusing phraseology, to state the offeree's continued right to make a Common Law counteroffer. The purpose is not to provide a statutory formula (”magic phrase”) that, if cited by the offeree, could turn a definite acceptance into a counteroffer, regardless of intent.

3.2.4 The Common Law counteroffer concept in the Code environment

Unfortunately, neither the ”correct” interpretation of the ”expressly conditional” clause, as inspired by the legislative history of the Subsection and the underlying theory of the Code to recognise intent rather than form, nor the proposed redraft of the two clauses resolve all issues under Subsection (1).

Suppose the offeror sends a purchase order containing primarily printed terms and a few dickered terms regarding the price, the description of the goods, the quantity, etc. The offeree responds by sending a standard acknowledgement form, the dickered terms of which coincide with the offer except on the issue of price. The offeree expressly states in his form that the acceptance is made conditional on the offeror's assent to a higher specified price. Two conclusions are reasonable in the light of these circumstances. First, the forms most probably diverge in every major respect except to the dickered terms agreed upon. Second, if no other circumstances indicate otherwise, the disagreement on the price will turn the purported acceptance into a counteroffer. Suppose now that the original offeror upon receipt of the counteroffer contacts the offeree and expressly agrees on the price modification, what then has he accepted?

According to the wording of the second clause of Subsection (1) *and* the counteroffer concept as defined by Common Law, the original offeror accepted the complete counteroffer, including the printed terms of the acknowledgement form. The counteroffer extinguished the original offer, and the former was (unintentionally) accepted in blanc by the original offeror. According to the spirit and underlying theory of the Code and Section 2-207(1), the original offeror is still providing the offer and has only accepted the new price term. The two original written manifestations remain unaffected by the parties additional negotiations on the price. The new price-term is lifted into the forms, converting them into an agreement. However reasonable

different concepts (”acceptance” and ”reply”) as if they were interchangeable: ”A definite...acceptance...operates as an acceptance...unless the reply is expressly made conditional...” See Murray, Incipient Unconscionability, 39 U.of Pitt.L.Rev. 597,610 (1978).

the latter interpretation may be, clear statutory language nevertheless requires that the former interpretation prevail.

The Common Law counteroffer was based on an ”all or nothing” approach. Either the offeree accepted all the terms of the offer or he rejected them all. The offeree could not accept 29 terms and reject 1. The rejection of a single term was equivalent to a rejection of the whole offer, and the response turned into a counteroffer. The only terms still subject to negotiation were those of the counteroffer. Section 2-207(1) adopts this approach without reservation. Even though the Code provides additional guidelines on how to make a counteroffer, the consequences of the counteroffer are still entirely governed by Common Law; i. e., total rejection coupled with a new offer.[47]

The mirror-image rule under Common Law assumed that any negotiation would be concentrated only around one set of terms. The offeror, being the ”master of his offer”, was expected to provide all the terms of the proposed deal, and if the offeree's response contained a different price term, thereby transforming it into a counteroffer, the original offeror in fact accepted his own terms except for the modified price term. The ”loss” of his original offer did not adversely affect his position. The same ”loss” in a ”battle of form” situation is more painful to the original offeror, since he is not here accepting his own terms but for the price, but accepting an almost entirely different set of terms.

In the example above, the offeree has not insisted on the inclusion of all his terms — only on a different price term — but that will be the consequence of his counteroffer.

The original offeror is in fact always a looser as soon as the offeree makes a valid counteroffer. In the example, it would not help the original offeror if he attached a new set of the same printed terms to a written acceptance of the new price term. He is now considered to be the offeree, and every term materially different to the new offer will fall out of the contract under Subsection (2) of section 2-207.[48] Of course, it can be argued that one should not waste too many tears on the original offeror in such a case. He was never aware of being ”the master of his offer”, i. e., that his printed terms were primarily controlling under Section 2-207(2)(b). He just happened to send the first form. It is not more unjust or less arbitrary to give preference to the printed terms of the counteroffer, than it was to give preference to the terms of the original offer in the first place. After all, the original offeror obtained everything he expressly bargained for. There is no disagreement with respect to the dickered terms. However, the

[47] See, e. g., White & Summers, Uniform Commercial Code p. 39 (2d.1980).
[48] See infra at 3.3.3.

original offeror should bear in mind that the legal consequences of agreeing to a modification of one (dickered) term is that he will agree to all terms (including printed terms) of the counteroffer. The only way to recapture the lost advantage, i. e., to make his terms control again, is to make a new counteroffer.

3.3 UCC SECTION 2-207(2)

3.3.1 Common Law logic revived

Section 2-207(2) provides as follows:

> "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."

Subsection (2) of 2-207 comes into operation only when an agreement has been formed under Subsection (1) of 2-207. The latter provides that an acceptance can be definite and binding although it contains additional or different terms from those of the offer. In such circumstances, it is the task of the former to determine what terms are to be included in the contract.[49]

Under Subsection (1), the parties have exchanged offer and acceptance without reaching agreement on all its terms. Nevertheless, the parties have entered into a binding deal. The underlying theory is that any nonconforming terms of the parties' manifestations that have not been considered during the bargaining process should not be allowed to affect the question of formation. The agreement will be enforced as long as the parties are in agreement on all terms consciently considered during the negotiation process.

Consequently, when the remaining divergencies between the offer and the acceptance are to be sorted out under Subsection (2), this Subsection will be dealing only with terms as to which the parties have no particular intention.

It is true that a contract can be formed under Subsection (1) even though the parties' manifestations differ with respect to dickered terms. Previous dealings, Usage of Trade, or other circumstances may show that the parties considered the deal as closed, notwithstanding disagreement on a dickered term. They may have previously referred the dispute to an impartial third party body for

[49] Note that Subsection (2) is in no way related to Subsection (3). If an agreement formed under Subsection (3), the same Subsection provides its own set of rules to establish the terms of the contract.

resolution, or settled the issue through continued negotiation during the performance stage, etc. Needless to say, to apply Subsection (2) to an unsettled dickered term would lead to unacceptable results. It would basically mean that the offeror's dickered term would always control by application of Subsection (2)(b). There is no justification to favour either side in such a dispute. Where the circumstances show that the parties intended to agree, notwithstanding disagreement on the dickered term, the same circumstances will usually provide the best method to resolve the issue. For example, if the parties have previously resolved the dispute following certain guidelines, the court should follow the same guidelines in settling the present dispute. Alternatively, the conflicting terms should cancel out, and the disputed term should instead be supplied by the Code.

These terms are usually, if not always, found in the printed portion of each party's written manifestation. As mentioned previously, the Code presumes that they are not read nor considered controlling by the parties. In addition, many parties cannot even legally classify — in terms of offer and acceptance — their own written expression. Whether the seller or the buyer sends the first form is often purely fortuitous. Case law has also showed that many parties use the same form regardless of whether they (legally) act as offerors or offerees.

Considering these circumstances, when the terms of the agreement, formed under Subsection (1), are to be identified under Subsection (2), there is no reason to favor either party of the transaction. This is not, however, the approach taken by Subsection (2).

Subsection (2) clearly and unconditionally retains the Common Law maxim that the offeror is the ”master of his offer”. Regardless of whether the transaction involves merchant or non-merchant relations, the terms of the offer are primarily controlling. If the offeror is a non-merchant, the new terms contained in the acceptance are to be construed as proposals for addition to the contract.[50] To become part of the contract, the offeror must explicitly assent to the new terms. The rule is almost equally rigid ”between merchants”.[51] Only new immaterial terms of the acceptance can become part of the contract.[52] However, the offeror can exclude them as well by taking the action required under Subsections (2)(a) or (2)(c).[53]

Once a contract has been formed under Subsection (1) of 2-207, the offeree is basically without legal rights. What makes his situation even worse is that there is nothing he can do at the time

[50] ”Merchant” is defined in Section 2-104(1).
[51] The concept ”between merchants” is defined in Section 2-104(3).
[52] Subsection (2)(b) of 2-207. See infra at 3.3.3.
[53] See infra at 3.3.4-3.3.5.

of formation to obtain an advantage or to neutralize the advantage given to the offeror under Subsection (2). True, he can make his "acceptance" expressly conditional and prevent the formation of a contract.[54] But, he had better not fail in his attempt to qualify the acceptance, because, if he does, he is doomed under Subsection (2).

The offeror, on the other hand, besides being automatically favoured under Subsection (2)(b), has a number of options available during the formation process to obtain an advantage should the negotiations lead to an agreement under Subsection (1). He can insert a clause in his offer that expressly limits acceptance to the terms of the offer (Subsection (2)(a)), or he can object to any potential new terms before he has even received the acceptance (Subsection (2)(c)). If he has failed to take any action before the receipt of the acceptance, he has still another chance to object to the terms of the acceptance after receipt (Subsection (2)(c)).

Several commentators seek to justify the consequences of Subsection (2) arguing that it would be unfair to bind the offeror to terms, especially material terms, that he has not agreed upon. If a new (printed) material term of the acceptance would become part of the contract, the reasonable expectations of the offeror would be defeated. A similar argument is that the offeree has less reason to believe that his terms will control, because, as distinguished from the offeror, the offeree has already received a form (offer) from the offeror, and should know that his written manifestation hardly conforms with the offer. If the offeree nevertheless sends a nonconforming definite acceptance, he has none but himself to blame if his terms thereafter fall out of the contract under Subsection (2).[55] These views, however, disregard why the case is to be resolved under Subsection (2) in the first place.

With regard to the first argument, the offeror has no "reasonable expectations" with respect to his printed terms. Neither has the offeree. If they had, the case would never reach Subsection (2). If one or both of the parties actually had any expectations with respect to one or several printed terms of their manifestations and these terms are non-conforming, the court would most probably have to conclude that no contract has been formed. The parties never intended to agree. If the case reaches Subsection (2), it is because the nonconforming terms of the offer and the acceptance were never considered (material) during the

[54] The second clause of 2-207(1), see supra at 3.2.
[55] See, e. g., White & Summers, The Uniform Commercial Code p. 34 (2d.1980); Murray, Chaos, 39 Van.L.Rev. 1307,1361 (1986).

bargaining process.[56] These terms never influenced the parties' opinion on whether they considered the deal as closed at the time of its making. It is therefore erroneous to argue that the offeror's ”reasonable expectations” would be defeated if a material term of the acceptance would be given effect under the contract. Except for the terms actually negotaited and agreed upon, the offeror is most probably not even aware of the terms of his own offer or of those of the acceptance.

The other argument is based on the same misunderstanding. It is true that the offeree has already received a form when he sends his acceptance. But, in his view, the acceptance corresponds completely with the offer. He has made sure that his acceptance conforms to the negotiated individualized terms of the offer. The printed terms were never part of the factual bargain. Again, if they were, no contract would be formed, and the case would never fall under Subsection (2). The average sales or purchase agent does not possess the skills necessary to properly understand the legal implications and consequences of the exchange of printed forms. He sends a copy of ”Sales and Conditions” to the other party only because the legal department of the corporation has told him to do so. The ”Sales and Conditions” received with the offer does not mean more to the offeree than his own printed form. The average offeree gladly executes both the form-offer and the form-acceptance, and sends it all back to the offeror to indicate that he considers the deal as closed. Considering these realities, the argument that the offeree should know that his acceptance is non-conforming, and that he should pay the price for that knowledge, does not hold water. He has no knowledge at all with respect to the printed non-negotiated terms.

One can therefore already conclude that Subsection (2) of 2-207 is far from a legislative success.[57] Too many of the old mirror-image principles were incorporated into the Subsection (2). When read in conjunction with Subsection (1), Subsection (2) appears as a contradiction. The former recognizes that the mirror-image rule assumptions that the offeror provides all the terms of the contract and is willing to contract only on his own terms are obsolete. Nevertheless, under the latter, these assumptions are given new life. The offeror is suddenly back in the king's seat ruling as though nothing has happened. The offeree accepted, so he must

[56] Most printed terms only become material and important to the parties when disputes arise. Until then, they are gladly ignored by the parties to the transaction.

[57] Note that Subsection (2) applies also to the situation where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending confirmations. The issues related to the ”confirmation” situation are very much different, so the criticism raised here is not applicable to that situation.

have accepted something. Consequently, he accepted all the terms of the offer. This is Common Law logic revived. But, it is wrong. The offeree did not express acceptance to one term more than did the offeror. The approach of Subsection (2) is arbitrary, unfair to the offeree, and actually revives assumptions discarded under Subsection (1).

3.3.2 Does Subsection (2) deal with different terms?

One issue often raised by the US commentators is the question whether Subsection (2) applies also to ”different” terms. While Subsection (1) states that a definite acceptance operates as an acceptance even though it contains ”...terms additional to or different from...” those of the offer, Subsection (2) adresses only ”additional” terms. The implication is that the ”different” terms of the acceptance can never become part of the contract. However, this interpretation is, even though it has its followers, the least supported in case law and among the commentators. Invoking Comments, legislative history, underlying Code policies, and even the statutory text itself, judges and commentators have presented several alternative solutions on how to treat ”different” terms under Subsection (2).

Before addressing this issue, it is necessary to clarify the distinction between ”different” and ”additional” terms. As will be seen below, this is not an easy task.

At first sight, the distinction seems obvious. An ”additional” term adds something to the offer, while a ”different” term contradicts a term already existing in the offer. Where the offer contains a warranty provision and the acceptance a warranty disclaimer, the latter term is clearly different. On the other hand, if the offer is silent on the matter, the warranty disclaimer is rather additional. However, it can well be argued that the offer in the latter case contains an implied warranty provision, supplied by the Code's gap-fillers.[58] The offeror may take for granted that the Code provisions govern the transaction, and, therefore, does not bother to include them in his offer. Must the warranty provision be expressed in the offer to make the warranty disclaimer in the acceptance ”different”? The same argument can be made with respect to the acceptance. If the offer contains a warranty disclaimer and the acceptance is silent on the matter, does the acceptance contain an implied ”different” warranty provision?

Consider also the following example. Suppose that the offer is silent with respect to arbitration, but that the acceptance contains an arbitration term. Is the arbitration term ”additional” or

[58] See, e. g., Utz, More on the Battle of Forms: The Treatment of “Different” Terms Under the Uniform Commercial Code 16 UCC L.J 103,116 (1983) [hereinafter Utz].

”different”? One is inclined to consider it as ”additional”, because the offer is silent on the matter, and the Code gap-fillers do not contain a forum provision. But, the offeror may have failed to include an arbitration provision because he assumed that any dispute would be resolved by the courts.[59] It is unlikely that an offeror would insert an express provision stating that any dispute has to be resolved under the state judicial system. That is a matter of course, if the offer is silent with respect to arbitration. Thus, one can consider the arbitration clause as ”different” without lending oneself to unreasonable arguments. Again, the same argument can be made with respect to the acceptance. If the offer contains an arbitration provision, and the acceptance does not, is there an implied ”different” non-arbitration provision in the acceptance?

A similar and pertinent question is whether terms should be read into the offer and the accpetance by implication from the Usage of Trade or from the prior dealings of the parties?

Another complication arises where the acceptance includes a term that expands a term of the offer. Suppose that the acceptance contains a delivery term that does not contradict the delivery term of the offer, but regulates it in more detail. ”Additional” or ”different”? One can unquestionably argue in either way.

Those who argue that Subsection (2) makes a distinction between ”different” and ”additional” terms must come up with a workable solution on how to distinguish between them. Until then, the better way seems to be to treat these terms as a unity. The issue would then be reduced to the question of whether the acceptance contains ”new” terms from those of the offer.

The majority of the commentators belive that no distinction should be made under Subsection (2) between ”additional” and ”different” terms.[60] Consequently, in non-merchant relationships, ”new” terms contained in the acceptance are construed as mere proposals, and, between merchants, these terms become part of the contract unless they fall out by application of Subsections (2)(a), (2)(b), or (2)(c).

This interpretation is not only supported by the difficulty of distinguishing between ”different” and ”additional” terms, but also by Comment 3 to Section 2-207, which expressly states that Subsection (2) applies to both ”additional” and ”different” terms.[61]

[59] See Nordstrom, Handbook of the Law of Sales p. 99 (1970).
[60] See, e. g., Murray, Chaos, 39 Van.L.Rev. 1307,1354-1365 (1986); Utz, 16 UCC L.J. 103,115-117 (1983); Barron/Dunfee, 24 Clev. State L.Rev. 171,187-188 (1975); Lipman, 24 Bus.Law. 789,802 (1969); Alderman, A Transactional Guide to the Uniform Commercial Code, Second Edition p. 21 note 54 (1983).
[61] Comment 3 states as follows: ”Whether or not additional or different terms will become part of the agreement depends upon the provisions of Subsection (2).”

Other arguments have also been raised in support of the "equal treatment" approach. Utz argues that the omission of the word "different" under Subsection (2) is due only to a printing error![62] Murray emphasizes that if the Code provisions, including Usage of Trade and Course of Dealing, are to be read-in to the offer, the scope of application of Subsection (2) would be severely limited. Almost every term in the acceptance would be classified as "different". In addition, he argues that the statutory language itself indicates that Subsection (2) applies also to "different" terms. Subsection (2)(b) states that the non-conforming terms become part of the contract unless they materially "alter" it. The common definition of "alter" is "to change, to make different".[63] Alderman points out that this is almost a "non-issue", because a "different" term in the acceptance will be incorporated only where it does not materially alter the contract under Subsection (2)(b) of 2-207.[64] Finally, it should be mentioned that two states, Iowa and Wisconsin, have swiftly resolved the issue by adding the word "different" to the statutory language of Subsection (2).[65]

There are, however, two other schools of thought concerning the treatment of "different" terms. Both assume that a distinction can be made between "additional" and "different" terms, but none of them has really addressed the issue.

The first school argues that the language of Subsection (2) is to be taken literally. Different terms automatically fall out of the contract unless expressly assented to by the offeror. The argument is that the drafter easily could have inserted the word "different" if they intended Subsection (2) to apply to both categories of terms.[66] In addition, nonconforming terms in the acceptance are "construed" as proposals for addition to the contract.[67] Summers finds it difficult to construe a "different" term as such when the offer already includes a contrary term.[68] It is also argued in support of this interpretation that the "different" terms automatically fall out of the contract under Subsection (2)(c). The offeror has in fact objected to them in advance if the "different" terms conflict

[62] Utz, 16 UCC L.J. 103,111,112 (1983).
[63] Murray, Chaos, 39 Van.L.Rev. 1307,1364,1365 (1986). All the examples given in Comment 4 to Section 2-207 of clauses that would materially alter the contract are "different", because the Comment seems to imply that the corresponding Code provisions are to be read-in to the offer. See further Murray above, pages 1361-1362.
[64] Alderman, A Transactional Guide to the Uniform Commercial Code, Second Edition p. 21 note 54 (1983).
[65] Wis. Stat. Section 402.207 (1964) and Iowa Code Ann. Section 554.2207 (1967).
[66] See Summers' view in White & Summers, Uniform Commercial Code p. 32 (2d.1980]; Dusenberg, Contract Creation, 34 Bus.Law. 1491,1488 (1979); Taylor, 46 U.C.C.L.R. 419,434 note 44 (1977).
[67] Section 2-207(2).
[68] White & Summers, Uniform Commercial Code p. 32 (2d.1980).

with terms expressly set out in the offer.[69] Following this reasoning, one could add that a ”different” term always represents a material alteration of the offer, and would therefore fall out under Subsection (2)(b) of 2-207.

The second school of thought applies by analogy Comment 6 to Section 2-207.

Comment 6 to Section 2-207 states in pertinent parts: ”If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on conforming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in Subsection (2) is satisfied and the conflicting terms do not become part of the contract. The contract then consists of the terms originally expressly agreed to, terms of which the confirmations agree, and terms supplied by this act, including Subsection (2) [...].”

Different terms between the offer and the acceptance cancel out, and the acceptance is an acceptance only of the terms on which the forms agree. By inserting conflicting terms in the forms, each party is assumed to have objected to the other party's contrary terms under Subsection (2)(c) of 2-207. The terms ”knocked out” of the contract are then replaced by relevant Code gap-fillers.

This solution, proposed by White, has gained considerable popularity in case-law.[70] The approach is appealing, because it becomes irrelevant who sends the first form. The clearly unearned advantage otherwise given to the offeror under Subsection (2) is neutralized.[71]

However, unless a workable and fair distinction between ”different” and ”additional” terms can be made, this approach would produce little more than arbitrary results. The most obvious argument against this solution is that is has no statutory support. Nothing in the text offers it support, and Comment 6 to Section 2-207 is concerned only with conflicting terms in confirmations.

It appears reasonable to conclude that the ”no distinction” approach is the only method that works in practice, considering the difficulty of distinguishing ”different” or ”additional” terms, and it will be assumed that this is the proper method to follow

[69] See Taylor, 46 U.C.C.L.R. 419,434 note 44 (1977).

[70] White & Summers, Uniform Commercial Code p. 33-34 (2d.1980). Although White is generally considered as the ”founder” of this solution, the idea of applying Comment 6 to ”different” terms was originally raised by Weeks in the early days of the Code. See Weeks, “Battle of the Forms” under the Uniform Commercial Code, 52 Ill.Bar J. 660,665 (1964).

[71] See supra at 3.3.1.

when the discussion now turns to Subsection (2)(b) of Section 2-207.

3.3.3 Section 2-207(2)(b)

Subsection (2)(b) states that "new" terms in a definite acceptance under Subsection (1) will be incorporated unless they materially alter the contract (i. e., the offer). A term materially altering the offer is a counteroffer with respect to that particular term. It can become part of the deal only if the (original) offeror expressly assents to its inclusion in the contract.[72]

A "new" term that does not materially alter the offer is automatically accepted by silence. However, even immaterial "new" terms fall out of the contract if the offeror object to their inclusion.[73]

A "new" term is deemed to materially alter the offer if its incorporation into the contract without express awareness by the other party would result in "surprise or hardship".[74] The material term does not have to be oppressive in character to be excluded under Subsection (2)(b). It appears sufficient that the "new" term is an "unexpected" addition to the contract.[75]

The issue of materiality is dependant on several factors. The amount involved and size of the transaction, the nature of the marketplace, the interrelationship between price and other terms of the contract (e. g., a low price may justify a warranty disclaimer), Course of Performance, Course of Dealing, and Usage of Trade.[76]

There is a certain danger of referring to Course of Dealing when the issue of materiality is to be decided. Barron/Dunfee argue that if the disputing parties in the past have included the variant term in the contract, it would be difficult for the offeror to claim that its inclusion will result in undue surprise.[77] However, the parties may previously have entered into hundreds of identical contracts without ever reading each other's printed forms. It is purely

[72] Consequently, the offeror does not accept a "new" material term by conduct under Subsection (2)(b), if he, without objection, accepts performance.

[73] Sections 2-207(2)(a) and 2-207(2)(c). See infra at 3.3.4-3.3.5.

[74] Comment 4 to Section 2-207.

[75] Do Sections 2-207(2)(b) and 2-302 (unconscionability) basically deal with the same type of clauses? Comment 4 to Section 2-207 discusses clauses causing "surprise and hardship". Comment 1 to Section 2-302 discusses clauses causing "oppression and unfair surprise". Murray seems to argue that the underlying philosophies of both Sections are identical, and that they strike down against the same type of clauses [Murray, Chaos, 39 Van.L.Rev. 1307,1321,1322 (1986)]. It appears, however, that a clause could materially alter the offer under Subsection (2)(b) without being deemed to be unconscionable under Section 2-302. A warranty limitation may be considered as a material alteration under Subsection (2)(b) without even coming close to the level of unconscionability under Section 2-302.

[76] Comments 4 and 5 to Section 2-207 provide examples of terms in the acceptance which do and do not materially alter the contract. It follows from the examples that "new" terms conflicting with Usage of Trade are considered to be material alterations. In other words, even where the offer is silent on the matter, relevant trade usage is to be read-in to the offer. "New" terms in the acceptance consistent with Usage of Trade do not materially alter the offer.

[77] Barron/Dunfee, 24 Clev. State L.Rev. 171,193 (1975).

fictional to argue that prior dealings in such a case indicate that the offeror has acquiesced in the inclusion of the variant term.

The commonly suggested rationale of Subsection (2)(b) is the right of the offeror not to be bound to a "material" term to which he has not agreed. "Binding the offeror to a contract containing a material term not found in the offer would bind him to a bargain he never made..."[78] The law must not impose a "new" material term on the offeror that would unfairly surprise the offeror or otherwise materially change the character of the offer. The Subsection is, pursuant to the Common Law notion that the offeror is the master of his offer, focused on the offeror and his traditional right to control the terms of the contract. As previously stated, however, this Common Law inspired reasoning is out of date. It disregards the contract formation realities of today. The policies behind the mirror-image rule are obsolete in relation to the unbargained for (printed) terms of the parties' manifestations, and those are the terms subject to treatment under Subsection (2)(b).

3.3.4 Sections 2-207(2)(a) and 2-207(2)(c)

These rules provide additional means by which the offerror can control the terms of the offer. Under Subsection (2)(b), all "new" material terms of the acceptance automatically fall out of the contract. Subsections (2)(a) and (2)(c) offer an opportunity to the offeror to exclude the remaining "new" immaterial terms of the acceptance.

This can be achieved in three different ways:

1. The offeror can insert a clause in his offer requiring the acceptance to conform exactly with the offer (Subsection (2)(a));
2. The offeror can give notification of objection to any "new" terms before the actual receipt of the acceptance (first clause of Subsection (2)(c)); or
3. The offeror can give notification of objection to any "new" terms within a reasonable time after the receipt of the acceptance (second clause of Subsection (2)(c)).

a) The distinction between Subsections (2)(a) and the first clause of (2)(c)

It is difficult to draw a clear line between Subsections (2)(a) and the first clause of (2)(c). It is hard to imagine a situation where Subsection (2)(a) is applicable, but not the first clause of Subsection (2)(c). The most logical distinction between the rules (if such a distinction can or should be made at all) would seem to

[78] Murray, Chaos, 39 Van.L.Rev. 1307,1361 (1986).

be that Subsection (2)(a) is concerned with clauses in the offer that object to all potential "new" terms in the acceptance, while the first clause of Subsection (2)(c) is concerned with clauses that identify one or more terms of the offer to which the acceptance must conform.

It seems less likely that the purpose is to distinguish between the modes of objecting to "new" terms. For example that Subsection (2)(a) would apply to objections expressed in a formalized way in the offer, while the second clause of Subsection (2)(c) would apply to objections raised more informally (orally or in a cover letter, etc.). An oral objection, regardless of form and mode of expression, to all "new" terms made before the receipt of the acceptance would (if it could be proved) undoubtly be covered by Subsection (2)(a).

b) The legal consequences

An issue of more importance concerns the possible legal consequences that should follow from the clauses discussed above. A clause — whether or not dickered — stating that "the offer expressly limits acceptance to the terms stated therein" (2)(a), or that "the offeror objects to any different or additional terms of the acceptance" (2)(c) could be interpreted in two different ways.

First, it could make the offer "expressly conditional" on assent to all its terms.[79] Consequently, a response containing "new" immaterial terms would not constitute an acceptance, and no agreement would be entered into under Subsection (1). Second, it may not affect the validity of the agreement entered into under Subsection (1), but the "new" immaterial terms of the acceptance would be excluded from the contract under Subsections (2)(a) and (2)(c).

The statutory text clearly favors the latter interpretation. If such clauses could prevent a nonconforming response from being a "definite" acceptance, Subsections (2)(a) and (2)(c) would never come into application. The application of Subsection (2) presupposes the existence of an agreement and deals only with whether "new" terms in the acceptance will become part of the contract. The underlying purpose of Subsection (2) is to secure the offeror's right to control the terms of the contract. If the offeree does not wish to contract on the offeror's term, he must make his acceptance "expressly conditional". If he does not, he will have to obey to the terms of the offer.

This interpretation is logical considering the wording of Subsection (2). However, the results produced by this interpretation are both arbitrary and unfair to the offeree. For the

[79] Compare the *offeree's* right to make his acceptance "expressly conditional" on assent to any new terms under the second clause of Subsection (1) of 2-207.

reasons already stated above, there is no reason to favor the offeror under Section 2-207.[80] Nevertheless, the offeror is unconditionally and unjustifiably favoured under Subsection (2). He does in fact fully control the terms of a contract of which he has no knowledge. Subsection (2)(a) and the first clause of Subsection (2)(c) add their share to this injustice. By inserting a clause in the offer stating that his printed terms are to govern the contract, the offeror gets it all. Regardless of whether the offeree assents to the unnegotiated terms of the offer, a contract is formed containing solely the offeror's printed terms. On the other hand, where the same clause instead is found in the acceptance, i. e., if the offeree makes his acceptance "expressly conditional" pursuant to the second clause of Subsection (1), no contract is formed unless the offeror expressly accepts all the terms of the acceptance. Why should not the offeror and the offeree be treated equally? Both parties are using exactly the same method to incorporate unnegotiated printed terms into the contract.

The offeror should of course have the same possibility as the offeree to make his printed terms govern the contract. But, if it really is important to the offeror that his printed terms control the deal, no contract should be formed unless the offeree unconditionally accepts all the terms (including the printed terms) of the offer. In addition, such a clause limiting the acceptance to the terms of the offer should have to be negotiated in the same way as any other dickered clause of the offer.[81] In other words, this clause should form part of the dickered part of the contract. Otherwise, it should be given no effect.

Subsection (2)(a) should therefore rather form part of Subsection (1) of 2-207, and be treated in the same manner as the "expressly conditional" clause of Subsection (1). As to the first clause of Subsection (2)(c), it should, following this reasoning, consequently also be moved to Subsection (1). However, assuming that the first clause of Subsection (2)(c) applies to objections focused on particular terms of the (not yet received) acceptance, it seems that it would then become superfluous. If the acceptance contains terms to which the offeror has already objected, the offer and acceptance diverge with respect to dickered terms, and no contract would arise anyway. The first clause of Subsection (2)(c) would not be needed to achieve that result.

3.3.5 The second clause of Subsection 2-207(2)(c)

Does the second clause of Subsection (2)(c) merit the same criticism as the others under Subsection (2)? The answer is yes.

[80] See supra at 3.3.1.

[81] The offeror's right to demand a conforming acceptance is also documented by Section 2-206(1)(a). It states that if the offeror unambiguously indicates an exclusive manner of acceptance, no acceptance will result unless the offeree accepts in the stipulated manner.

The purpose of this rule is likewise to secure the offeror's right to control the printed terms of an agreement entered into under Subsection (1). Subsection (2)(c) gives the offeror — after receipt of acceptance — un unjustified opportunity to object to and exclude the offeree's immaterial unnegotiated terms in the acceptance *without risking the deal itself.*

The essence of this rule is otherwise not without merit; i. e., the right provided to the offeror to object to unacceptable printed terms in the acceptance, where objection is given within a reasonable time after receipt. However, this right to object should not be given to the offeror on the basis that he has a right to control the printed terms of the contract, but simply because he is the recipient of the last document exchanged between the parties.

It is in most cases impossible to ascertain the exact importance the offeror attaches to his printed terms until he has received the response. The position of the offeror becomes clear only after he has received the response. If the response reproduces the dickered terms of the offer, contains no ”assent clause”, and no action is otherwise taken by the offeree indicating that he attaches specific importance to his printed terms, the offeree's intention is basically clear. He intended to agree, notwithstanding conflicting terms in the offeror’s written manifestation. If the offeror does not object to the response within a reasonable time after the receipt, it is fair to conclude that he also considers the deal as closed. On the other hand, where the offeror within the stated time limit (reasonable time) objects to one or more printed terms of the response, he has strongly indicated that he considered some of his printed terms to be part of the factual bargain. Because the manifestations differ with respect to dickered terms, *no contract should be formed* between the parties unless the offeree accepts the terms of the objection. Both the offeror and offeree should at this point be able to walk out of the deal.

If the offeree sends an acceptance indicating that he attaches no importance to his printed terms, why should also he, as suggested, be given the right to turn down the objection and walk out of the deal? As distinguished from the offeree, the offeror has at least (by objecting) emphasized that he wants one or several of his printed terms to control. If he is the only one that cares, why not just let the offeree's terms (covered by the objection) fall out of the contract? The answer is simple. The objection puts the offeree into a corner. He must now make a choice: ”It is either my warranty term or your warranty term”. As long as the parties do not object to each other's printed terms, each party can at least hope that his warranty term will control the transaction in case of dispute. When the offeree receives the objection, he will probably contact his superiors and ask them whether they are willing to go ahead with the transaction even where it is *clear* that the offeror's warranty term will govern the contract. The objection consequently changes the offeree's situation considerably. The printed terms are unimportant only as long as they are not contested, because the

offeree believes (or at least hopes), with or without justification, that his printed terms control. But if offeror forces the offeree to choose, the offeree should have the same right as the offeror to say NO.

Is not the consequence of this proposal that the offeror very much controls the terms of the contract? The answer is yes, but at least, by objecting, the offeror will risk the whole deal. If the offeree refuses to accept the demands embodied in the objection, not only the offeror, but also the offeree can safely walk out of the contract. The way the second clause of Subsection (2)(c) now works, the offeror can wipe out the offeree's printed terms of the acceptance without risking the deal itself.

3.4 UCC Section 2-207(3)

3.4.1 Agreements formed by conduct

Section 2-207(3) provides as follows:

"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."

In many cases, the exchange of written manifestations does not create a contract under Subsection (1). Nevertheless, the parties assume that a contract has been formed and begin performance in accordance with the agreed negotiated terms of the parties' manifestations. If a dispute subsequently arises the court — in particular when the parties have fully performed — usually considers itself compelled to conclude that an agreement has been formed by conduct. Consequently, it becomes necessary to ascertain the terms of the contract.

Many contracts formed under Subsection (3) fail to produce an agreement under Subsection (1) because of the existence of a negotiated assent clause in the offeree's form.[82] The disputes are mostly focused on one or several unbargained for terms of the agreement. For example, the offer contains an extensive warranty provision and the acceptance a warranty disclaimer. These conflicting terms, located in the printed portion of the parties' manifestations, have never been considered during the negotiation process. The parties have performed in the face of these (and other) inconsistencies. They are satisfied having reached agreement on a few essential terms of the deal. However, the unnegotiated warranty terms have become important because

[82] See supra at 3.2.

something has gone wrong. The products do not live up to the expectations of the buyer-offeror, and the offeror brings an action for damages. Is there a contract with or without warranties?

Pre-Code law would often have found a contract without warranties by applying the mirror-image rule and the so called "last-shot" rule.[83] Because the offeree's response (materially) differed from the offer, the response converted into a counteroffer, which was accepted by the original offeror through the acceptance of performance. Contracts formed under Common Law by the parties' conduct were therefore often governed by the terms of the counteroffer (the last-shot).

The language of Subsection (3) of Section 2-207 rejects the Common Law last-shot rule. In the example above, the result under Subsection (3) would basically be as follows. The conflicting warranty terms cancel out (the writings do not agree on warranties), and the relevant warranty provision is supplied by the Code. Contrary to the result under Common Law, the contract would contain a warranty provision (Sections 2-313 to 2-315).

Section 2-207(3) comes into application only where the written manifestations of the parties have failed to form an agreement under Subsection (1).[84] Subsection (3) is derived from Section 2-204(1), which provides that "a contract for the 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". However, the scope of Subsection (3) is more limited. It presumes the existence of two written manifestations that failed to produce an agreement.

3.4.2 Conduct required to form an agreement

Subsection (3) requires that conduct by *both* parties indicate the existence of an agreement. The exchange of written manifestations is undoubtly "conduct" by both parties. However, the Subsection seems to require that the parties perform in accordance with the agreed terms of the parties' manifestations. It is difficult to imagine that any form of pre-performance conduct could bring Section 2-207(3) into application. On the other hand, the parties must not necessarily have fully performed. The joint action probably need not amount to actual delivery, acceptance and payment of the goods as long as the conduct of each party clearly indicates to the other that he considers himself bound to an agreement.[85]

[83] See supra at 1.1.
[84] Where an agreement has been entered into under Subsection (1), the terms of the contract are established under Subsection (2) of 2-207.
[85] Barron/Dunfee, 24 Clev. State L.Rev. 171,198 (1975); Leary/Frisch, Is revision due for Article 2, 31 Vill.L.Rev. 399,430 (1986) [hereinafter Leary/Frisch].

3.4.3 The terms of the contract

The purpose of Subsection (3) is to provide a rule that favours neither party. The contract formed by conduct consists of the terms on which the writings agree together with any supplementary provisions of the Code (gap-fillers). All nonconforming terms of the parties' manifestations are "knocked out" of the contract. As indicated in the warranty example above, where a contract has been formed under Subsection (3), and conflicting warranty terms are found in the parties' writings, the terms cancel out, and the contract is considered to be silent on the subject-matter. The relevant warranty term is then supplied by the Code.

At first glance, Subsection (3) appears to be neutral. Neither the terms of the offeror nor those of the offeree will govern the contract. However, where one instead reasons in terms of seller and buyer, it becomes clear that the buyer is the real winner under Subsection (3). The gap-fillers of the Code will primarily provide the "missing terms" of the contract, and they are generally considered "buyer-friendly" (in particular with respect to warranties, buyer's rights on improper deliveries and buyer's remedies).

The seller's position will somewhat improve if Course of Performance,[86] Course of Dealing[87] and Usage of Trade[88] are to be included in "the supplementary terms" under Subsection (3).[89] Most commentators also seem to favour their inclusion.[90] Quite upsetting results appear to follow, if one chooses not to include them. Suppose, again, that the buyer-offeror's form contains a warranty provision using the Code formulation, and that the seller-offeree's form contains a warranty limitation, but that the latter is consistent with local trade custom. If Usage of Trade would not be included under Subsection (3), the warranty term consistent with Usage of Trade would actually be "knocked out" of the contract.[91]

The reasonable approach to follow in providing the terms of the contract under Subsection (3) seems to be to look first to Course of Performance, then to Course of Dealing, and finally to Usage of Trade. Consequently, where the offer is silent with respect to warranties and the response contains a warranty limitation

[86] Section 2-208.
[87] Section 1-205.
[88] Section 1-205.
[89] There is no good reason why they should not be covered by Subsection (3). Sections 1-205 and 2-208 are clearly "provisions of this act" (see Subsection (3) in fine).
[90] See, e.g., Barron/Dunfee, 24 Clev. State L.Rev. 171,198 (1975); Leary/Frisch, 31 Vill.L.Rev. 399,431 (1986); Travalio, 33 Case West.Res.L.Rev. 327,372 (1983); Hawkland, Uniform Commercial Code Series, Volume 2 p. 109 (1984). However, case law has so far ignored Course of Performance and Course of Dealing when dealing with Subsection (3) of 2-207.
[91] See Leary/Frisch, 31 Vill.L.Rev. 399,431 (1986).

consistent with trade custom (or if both writings are silent on warranties), the writings agree on warranties, because applicable trade usage is read-in to the offer. Only where Usage of Trade provides no guidance should the court turn to the traditional Code gap-fillers for help. This approach would improve the seller's position, and the contract formed under Section 2-207(3) is more likely to be a non-preferential one (as intended by the drafters). It would also better correspond to the reasonable expectations of the parties.[92]

3.4.4 Subsection (3) and the ”last-shot” rule (acceptance by performance)

Having outlined how Section 2-207(3) functions, or rather, how it should function, one important question still merits an answer. Does Subsection (3) fully reject the ”last-shot” rule, or is there still room for this rule to work within Subsection 2-207?[93]

As has already been stated in sections 3.1.1 and 3.2.3 above, the court should recognize only negotiated counteroffers under Subsection (1). Such counteroffers can arise in 2 different ways:

a) where the offeree's response contains a variant dickered term (usually related to price, delivery, quantitiy, description of the goods, etc.); or

b) where a dickered term in the offeree's response makes the ”acceptance” expressly conditional on assent to the ”new” terms contained in the response.

The contention that the court should recognize only clear-cut counteroffer, i. e., responses formulated in such a way that a reasonable offeror should be aware of the offeree's intention to make a counteroffer, may in fact undermine the very basis of Subsection (3).

Subsection (3) is based on the assumption that the parties mistakenly believe that they have a contract prior to performance, notwithstanding conflicting (dickered) terms in the parties' manifestations and that there is no reason, in such circumstances, to favour either party with respect to terms which have not been considered during the negotiation process. However, where the original offeror is or should be aware that the response is in fact a counteroffer, and he performs without objection, has he not then accepted the terms of the counteroffer by his conduct?

[92] As pointed out by Leary/Frisch, the advantage of using terms consistent with Usage of Trade as a gap-filler source is that they are ”less apt to suffer from obsolescence over time” than the other gap-fillers of the Code. They also argue that the provisions of form contracts drafted by representatives of sellers and buyers of a particular trade should be considered consistent with Usage of Trade. 31 Vill.L.Rev. 399,436 (1986).

[93] Regarding the Common Law last-shot rule, see supra at 1.1.

Arguments in favor of this contention have been raised by several commentators. Murray argues in a number of articles that the scope of Section 2-207(3) is much more limited than courts and commentators have been willing to admit.[94] His view is supported also by Alderman and Summers.[95]

a) Murray's example

Murray offers the following example: "In response to an offer to buy 1000 widgets at $ 5 each, the seller-offeree replies: I must receive $ 7 each for my widgets and I am willing to supply them on that basis. I realize that you need the widgets now and, therefore, I am shipping them today. If you do not wish to pay $ 7 each for them, do not accept them when they arrive."[96]

Murray argues that if the buyer-offeror is consciously aware of the terms of the counteroffer, and that the seller-offeree is willing to contract only on these terms, by accepting performance, the former should be bound to the terms of the counteroffer.[97]

To apply Subsection (3) to this case would seem to be inappropriate. The seller-offeree has not only made a clear counteroffer, he has also expressly stated why he is delivering the goods before he has obtained the buyer's assent to the new term. The buyer can hardly accept the delivery and assume that the conflicting price terms will be "knocked-out" under Subsection (3), and replaced with the equivalent gap-filler provision (Section 2-305), which only requires the buyer to pay "a reasonable price" for the goods.

If we should recognize only negotiated counteroffers under Subsection (1), which means that a reasonable offeror should be aware of the status of the response, should not the original offeror know that acceptance of performance is equivalent to an acceptance of the terms of the counteroffer? With respect to Murray's example above, the answer is yes. The Common Law last-shot rule should come into play in this example. However, as will be seen below, to apply the last-shot rule where the original offeror performs without objection in the face of a negotiated counteroffer, may in certain cases defeat the reasonable expectations of the parties.

[94] Murray, Intention, 37 Fordham L.Rev. 317,336-337 (1969); Murray, Incipient Unconscionability, 39 U.of Pitt. L.Rev. 597,620,649-650 (1978); Murray, Chaos, 39 Vand.L.Rev. 1307,1334-1343 (1986); Murray, A Proposed Revision, 6 J.of Law and Comm. 337,347-350 (1986).

[95] Alderman, A Transactional Guide to the UCC, Volume 1 p. 22 note 55 (1983); White & Summers, Uniform Commercial Code p. 40 (2d.1980).

[96] Murray, Intention, I. d.

[97] Murray, Intention, I. d.

b) Assent clauses and performance

Suppose that the seller-offeree's response conforms to the offer with respect to the dickered terms, but contains a negotiated assent clause (in accordance with Section 2-207(1)). Subsequently, the parties perform without further communication on either side. Has the buyer accepted the counteroffer by conduct (by accepting delivery)? Murray would probably answer this question in the affirmative. The buyer knew or should have known that the response was a counteroffer. Nevertheless, he accepted delivery and paid for the goods. Consequently, he knew or should have known that his conduct amounted to an acceptance of the terms of the counteroffer. If the buyer really was unwilling to contract on the terms of the counteroffer, he should have refrained from accepting delivery. However, why focus only on the buyer-offeror? The seller-offeree made a counteroffer, but nevertheless delivered the goods to buyer before he obtained an express acceptance. If he was really serious about his counteroffer, the seller should should have refused to perform until he had obtained a clear assent from the buyer-offeror to his "new" terms.[98]

Notwithstanding that the seller-offeree made a negotiated counteroffer, the circumstances of this example standing alone should not be sufficient to bring the last-shot rule into application rather than Subsection (3) of 2-207. Both parties are to blame for the confusion in the present situation, and the buyer-offeror cannot be said to have clearly accepted the counteroffer by conduct unless additional circumstances point in that direction.[99]

The use of the "assent clause" is a disguised method to make printed unnegotiated terms of the offeree's manifestation enforceable. Note that only the assent clause itself is dickered. The offeree relying on the "assent clause" can happily remain ignorant of his own printed terms and may nevertheless make them govern the contract, if they can be accepted by conduct by the other party. One should be reluctant to find an acceptance by conduct in such situations unless the recipient of the counteroffer clearly indicates that he is accepting the counteroffer through his conduct (performance). In case of any doubt, these cases should rather be governed by Subsection (3).

[98] In Murray's example in the text above, the seller-offeree clearly states in his counteroffer why he has initiated performance in the face of the counteroffer, how the counteroffer can be accepted (see Section 2-206(1)(a)), and how the buyer-offeror can reject the counteroffer, despite the initiated performance.

[99] The situation may change if the seller instead acts as the offeror. Suppose the buyer-offeree makes a clear-cut counteroffer, and the seller without further objections delivers the goods to buyer. Now, it is the recipient of the counteroffer that takes the first step. Is it possible for the buyer-offeree, in the absence of other circumstances, to interpret the immediate delivery as anything else than as an acceptance of the counteroffer?

c) ”Limited” counteroffer and performance

Consider also this example. The seller-offeree's response conforms to the dickered terms of the offer, except for the price, and also contains a set of ”new” printed terms. The parties perform without further objections. Subsequently, a dispute arises as to the quality of the goods. The offer contains a printed (unbargained for) warranty provision and the acceptance a printed (unbargained for) warranty disclaimer. The seller-offeree's response is (unless other circumstances indicate otherwise) logically a counteroffer. By accepting performance, does the buyer-offeror accept the new price term? Possibly, yes. He is not only aware that the response is a counteroffer (at least with respect to the price), but he is also aware of its specific contents (the new price). The seller offeree has had the last word with respect to the dickered term. If buyer-offeror accepts delivery without objecting to the new price term, it is not unreasonable to conclude that he has accepted the price modification. Does he also accept the non-dickered portion of the counteroffer including the disclaimer? Since the counteroffer is not a divisible concept, one seems compelled to answer yes also to this question.[100] However, it is difficult to argue that the buyer-offeror by his conduct clearly expresses assent to the (unnegotiated) printed terms of the counteroffer. They have never been part of the bargain. The seller-offeree has never brought them into the focus of the negotiations, as was done with the price term. They just happened to be part of the counteroffer. The fact remains, however, that counteroffers can be accepted or rejected only as a unity.

From a legislative point of view, the better way to deal with this issue would be, considering the underlying philosophy of Subsection 2-207, to apply the last-shot rule to the price term and Subsection (3) to the unnegotiated part of the counteroffer. While dickered terms of the counteroffer thus could be accepted by performance, unnegotiated terms of the counteroffer should be governed by Subsection (3) of 2-207 (unless other circumstances can justify an application of the last-shot rule in such a case).

3.5 Concluding remarks

In revising the old rigid Common Law offer-acceptance formula, the drafters have attempted to conform the new Code offer-acceptance formula to established commercial practices. While the basic characteristics of the Common Law formula (i. e., the offer, acceptance and counteroffer concepts) have been retained, the objective of the drafters has been to rid the Code version of all

[100] Compare supra at 3.2.4.

rigid and dogmatic elements. To achieve this objective, the Code formula puts the emphasis on intent rather than form.

While few commentators challenge the approach taken by the Code drafters on Section 2-207, most agree that they did not fully succeed in their task. Too many outdated Common Law principles survived the revision of the formula. Some of these were explicitly adopted by the drafters, others found their way into the Code formula through the backdoor. The drafters have also had difficulty reconciling retained Common Law principles with new Code principles.

Despite the criticism raised in the foregoing analysis, there is no doubt that the UCC Section 2-207 is far more realistic and well adapted to modern commercial dealings than the discarded Common Law "mirror-image" rule. It also has to be born in mind that US contract formation law under the Code is much more than UCC Section 2-207. The key Section of the Code on contract formation is Section 2-204.[101] Every contract — also contracts finalized under Section 2-207 — must satisfy the requirements of Section 2-204 to be binding under the Code. Furthermore, besides the two previously mentioned Sections, the Code contains a set of additional Sections focused on the contract formation process.[102] Therefore, to fully understand and to be able to comprehensively assess the contract formation rules under the Code, it would be necessary to study these rules together in a single context.

[101] See supra at 3.1.7.
[102] Sections 2-201, 2-202, 2-205, 2-206, 2-208, 2-209 and Common Law principles made applicable through Section 1-103.