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# Winning the Battle of Forms

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### Background: Common Law vs. Uniform Commercial Code

Common Law  
Rigid, formulaic approach: Are there objective indicia that the parties have satisfied the formal elements of a contract?

Uniform Commercial Code  
Emphasis on the practicalities of commercial practice: Is there substantive intent to form a contract?

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### Common Law or UCC? (i.e., Goods or Services?)

<ul style="list-style-type: none"> <li>• Security System</li> <li>• Software</li> <li>• Heavy Equipment</li> <li>• Storage "Pods"</li> </ul>	<ul style="list-style-type: none"> <li>• Modular Construction</li> <li>• Turnkey Projects</li> <li>• Building Automation Systems</li> </ul>
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...any of the above, plus:

- + Installation Services
- + Engineering/Design Services
- + Monitoring Services

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**Common Law or UCC? (cont'd)**

Analytical Frameworks

- Predominant purpose/factor test
- Gravamen of the dispute
- Component approach
- Application by policy/analogy

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**Common Law or UCC? (cont'd)**

Analytical Frameworks

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**Contract Formation**

UCC § 2-204(1): Contract may be made in any manner sufficient to show that an agreement exists

- Expressly including conduct by both parties (§ 2-204(1))
- Including by email or other electronic exchange of documents
- Including if material terms are left open (§ 2-204(3)) – generally other than quantity

Offer and acceptance are still required, but at least with respect to acceptance the UCC has relaxed the requirements.

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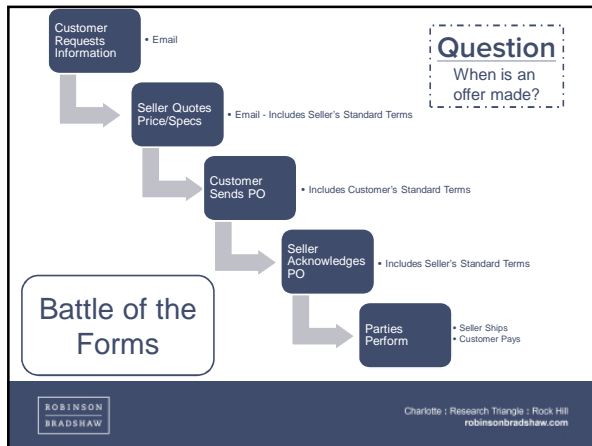
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**“Gap-Filling”**

If the parties have sufficiently manifested an intent to enter into some form of agreement, the law, the parties' conduct and even industry standards will supply the necessary terms:

- General principles of equity and contract law (§ 1-103)
- Obligation of good faith (§ 1-304)
- Course of dealing, course of performance and usage of trade (§ 1-303)
- Parol evidence, under some circumstances (§ 2-202)
- Default provisions of the UCC – including consequential damages

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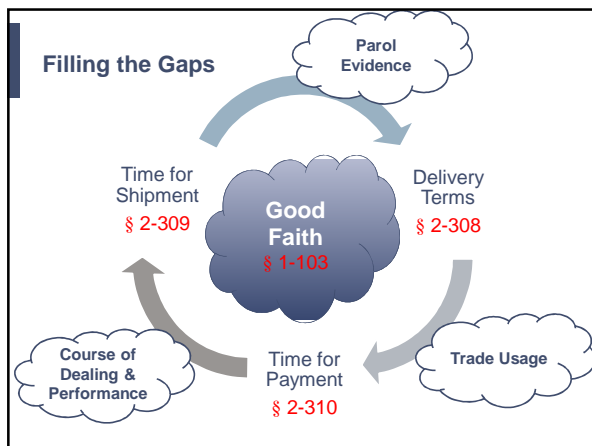
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### Acceptance: What's Required

§ 2-206(1)(a): Unless otherwise indicated, an offer may be accepted "in any manner and by any medium reasonable under the circumstances"

- Definite and seasonable expression of acceptance
  - Typically of a written offer
- Written confirmation
  - Typically of an oral agreement
- Performance

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### Additional Terms in Acceptance or Confirmation: Let the Battle Begin!

Common law:

"Mirror image" rule: Acceptance must exactly mirror terms of offer; if it does not, you have a counter-offer, not a contract.

- The prevalence of printed forms in modern commercial practice rendered this impractical.

"Last shot" rule: The contract was formed when one of the parties started performance, with that performance deemed an objective manifestation of assent to the last terms received by that party.

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### Additional Terms in Acceptance or Confirmation: Let the Battle Begin! (cont'd)

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

- (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
  - (a) The offer expressly limits acceptance to the terms of the offer;
  - (b) They materially alter it; or
  - (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

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### Counter No More (or at Least Less)

**§ 2-207(1):**

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

This deals with two situations:

- Oral or informal agreement followed by one or both parties sending formal memoranda ("written confirmations") embodying the agreed terms plus additional/different ones, or
- Writing intended as acceptance adds to or changes terms of the offer (i.e., in the exchange of printed PO and acceptance forms)

The intent is to change the common-law rule that the insertion of additional/different terms resulted in a counter-offer – i.e., no contract.

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### Limits to § 2-207(1)

Some "acceptances" contain terms so different as still to constitute counter-offers under the UCC:

- different price
- different quality
- different quantity
- different delivery terms (maybe)

("dickered" versus "nickered" terms)

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### What Terms Are in the Contract? (Additional Terms)

**§ 2-207(2):**

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

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

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### What is a “Material” Alteration?

Term	Material?
Complaints must be made in time materially shorter than customary or reasonable	Y
Disclaimer of standard warranty	Y
Enlargement of <i>force majeure</i> provision	N
Fixation of reasonable time for complaints within customary limits	N
Seller may cancel if buyer fails to satisfy any invoice when due	Y
Setting of seller's credit terms within range of trade practice	N
Requirement for higher guaranty of deliveries where usage of trade allows greater quantity leeway	Y
Limitation on right of rejection for defects within customary trade tolerances or other clause limiting remedy "in a reasonable manner"	N

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### What is a “Material” Alteration?

Term	Material?
Indemnification provision	Y
Arbitration provision <i>*In S.D.N.Y.</i>	N*
Choice of law provision	Y

Beware: Prior dealings can affect whether terms are material.

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### What Terms Are in the Contract? (Different Terms)

Two Possibilities:

- **Knockout Rule:** Offeree's and Offeror's conflicting terms "knock out" each other, which means neither party's preferred terms are included in the contract.
  - > Majority rule
  - > Jurisdictions include NY, IL, PA
- **Fallout Rule:** Offeree's conflicting terms "fall out," which means the Offeror's preferred terms are included in the contract.
  - > Minority rule
  - > Jurisdictions include SC, GA\*, NC\*\*

*\*In dicta*

*\*\*In UCC commentary, and only if material*

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## What Happens After Terms Are Knocked Out or Fall Out?

- Comment 3:  
If the other party [later] expressly agrees to the term, it then becomes part of the contract.
  - The rub, part 1: Can agreement ever be manifested by conduct?
  
- Gap-fillers under the UCC supply missing contract elements
  - The rub, part 2: The “filler” may be substantially identical to one of the terms rejected (e.g., implied warranty)

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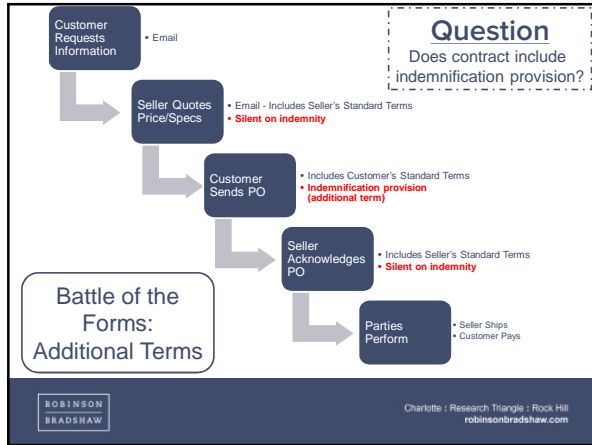
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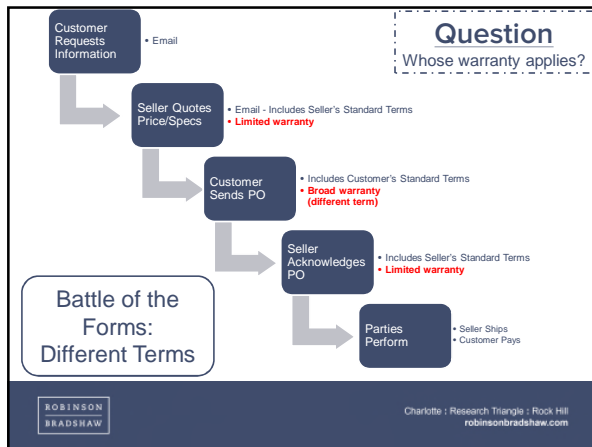
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### Conditional Acceptance

If you are the offeree, conditional acceptance can be a good strategy for making sure your terms don't get excluded.

- Practice Tip: Language expressing conditional acceptance should be very precise. One court found that the following language was not a conditional acceptance:

"This contract reflects in its entirety all details as agreed between the parties . . . Any changes must be in writing and accepted by both parties."

Better: "If this document is considered an acceptance of an offer, such acceptance is conditioned on [Buyer's] agreement to all terms hereof."

- Practice Tip: If you send a written confirmation, this strategy is not available to you.

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### Risks of "Conditional" Acceptance

- No written contract at all
  - May have contract by conduct under § 2-207(3)
  - Even if the original offeror performs, you may not have the benefit of the common-law "conduct acceptance" that would give you the terms of your counter-offer
- Unknown, possibly unfavorable gap-fillers

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### Risks of "Conditional" Acceptance (cont'd)

#### § 2-207(3): Contract By Conduct

"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."

Note that if the parties have no writings, whether there is a contract should be analyzed under § 2-204 instead of § 2-207(3).

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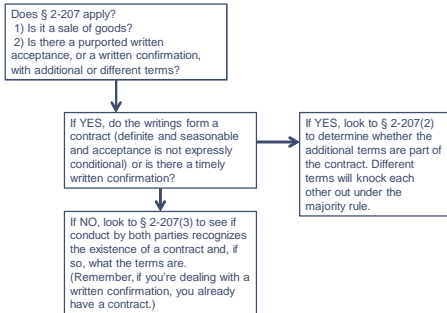
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## § 2-207: Recap



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## Strategies to Win the Battle

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Offeror Sends PO or Offer to Sell

**Option 1- Include your terms in acknowledgment**

BestCo Acknowledges

Parties Perform

- Under the majority rule, terms that conflict or materially alter the contract do not become part of it – but you do have a contract
- Additional terms that do not materially alter the contract become part of it

**Scenario 1:**  
BestCo as offeree  
(typical when seller)

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**Option 2 - Include your terms and condition contract on acceptance of these terms**

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    graph TD
      A[Offeror Sends PO or Offer to Sell] --> B[BestCo Acknowledges]
      B --> C[Parties Perform]
  
```

- If the offeror does not accept all of the terms, there is no contract (risks losing the deal)
- But the parties may proceed to behave as if there is a contract, in which case:
  - ✓ contract contains terms on which the writings agree and
  - ✓ UCC's gap-filling provisions fill in the other terms (which can be bad for the seller)

**Scenario 1:**  
BestCo as offeree  
(typical when seller)

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**Option 1 – Rely on § 2-207(2)(b) to exclude additional terms in the acceptance**

```

    graph TD
      A[BestCo Sends PO or Offers to Sell] --> B[Offeree Acknowledges]
      B --> C[Parties Perform]
  
```

- Result may be fine as long as the objectionable provisions of the offeree's acknowledgment would constitute material additions
- But note:
  - Immaterial additional terms will become part of the agreement
  - In a majority of jurisdictions, different terms will knock each other out

**Scenario 2:**  
BestCo as offeror  
(typical when buyer)

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**Option 2 – Give notification of objection to additional terms within “a reasonable time” under § 2-207(2)(c)**

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    graph TD
      A[BestCo Sends PO or Offers to Sell] --> B[Offeree Acknowledges]
      B --> C[Parties Perform]
  
```

- This puts the burden on BestCo to review the terms, recognize which are objectionable and give the notice
- It is unclear what effect this has on different terms, and whether it can prevent the majority knockout rule from applying

**Scenario 2:**  
BestCo as offeror  
(typical when buyer)

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BestCo Sends PO or Offers to Sell

**Option 3 – Have the offer expressly limit acceptance to the terms of the offer**

Example: "BestCo rejects any additional or inconsistent terms [offered by][contained in any acceptance or other writing from] Supplier at any time"

```

    graph TD
      A[BestCo Sends PO or Offers to Sell] --> B[Offeree Acknowledges]
      B --> C[Parties Perform]
  
```

- This may be interpreted to mean that if the acceptance contains additional or different terms, those terms fall out and the result is a contract on BestCo's terms
- Or.... including this limitation may result in no contract at all, or not having a contract until one party begins performing, at which point gap-fillers will be inserted

**Scenario 2:**  
BestCo as offeror  
(typical when buyer)

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### Making Sure You Win the Battle

**Optimal option: If the contract is sufficiently important, negotiate the terms.**

*"It is unfortunately that the drafters [of the UCC] did not more adequately design 2-207 for the terrain upon which it was ultimately to do battle. . . . Under the present state of the law, we believe that there is no language that a lawyer can put on a form that will always assure the client of forming a contract on the client's own terms."*

-- White, Summers & Hillman, *Uniform Commercial Code*, Section 2:20

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### Best Practices – Ask the Right Questions

- Does Article 2 apply to this transaction? (Is this a sale of goods?)
- Will our terms govern?
  - Are we offeror or offeree?
  - Whose form was the offer?
  - What terms are additional? Are they material?
  - If the majority rule will apply to different terms, what terms are different?
  - Is either form conditioned on acceptance to its terms?
- Should we negotiate this out and sign a better deal, thereby avoiding the Battle altogether?

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