



Manufacturing Success: How to Win the 'Battle of the Forms' as Buyers or Sellers of Parts, Products and Raw Materials'

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Header Key



- Decaf = Everyone should know



- Regular = Some law to explain how it works



- Quadruple Shot = For geeks with a raging caffeine buzz, e.g., us



Key Takeaways



1. The “Battle of the Forms” decides the contract terms for the **sale of goods** between **merchants** absent a countersigned agreement
 - The “Battle of the Forms” **favors buyers** over sellers
 - The savvy seller takes advantage of potential buyer mistakes
2. The U.C.C.’s “Magic Language” matters -- a lot!
3. You must not inadvertently accept the other parties’ proposed terms
 - Do not mistakenly countersign the other side’s documents
 - Watch out for buying and selling portals
 - Be careful of informal email or text messages that could be found to be an acceptance
4. You should **reference and attach** your terms and conditions
 - Early and often
 - Every time



How Sales Contracts Are Formed



1. By signed agreement



2. By exchange of purchase and sale documents



3. By conduct



Contract by Signed Agreement

Best Case Scenario
No Battle of the Forms



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Countersigning



- Avoid the battle and win the war
 - There is no battle of the forms if the other side signs your form — you win!
 - Create forms that give you a chance
 - When possible, try to get it signed
 - Casual efforts often work best
 - Little risk in trying unless you have no leverage and invite a request that you sign the other side's form
 - Do not sign the other side's forms
 - Do not agree to other side's offer with simple email or text
 - Countersigning is even more important for purchases of services



Contract by Document Exchange

Main Arena for the Battle of Forms



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Contracts Formed by Exchange of Documents (Sale of Goods)



Purchase and sale documents:

Request for Quote, Quote, Purchase Order, Order Acknowledgement

Shipping documents, Invoice (usually too late)

When conflicts arise...

OFFER + ACCEPTANCE = CONTRACT

Offer:

- Typically Purchase Order
- Can be Quote if the terms are sufficiently definite to invite acceptance by simply saying “yes” (varies by jurisdiction)

Response to Offer:

- Typically Order Acknowledgment, but could be a Purchase Order if the Quote was sufficiently definite to constitute an Offer

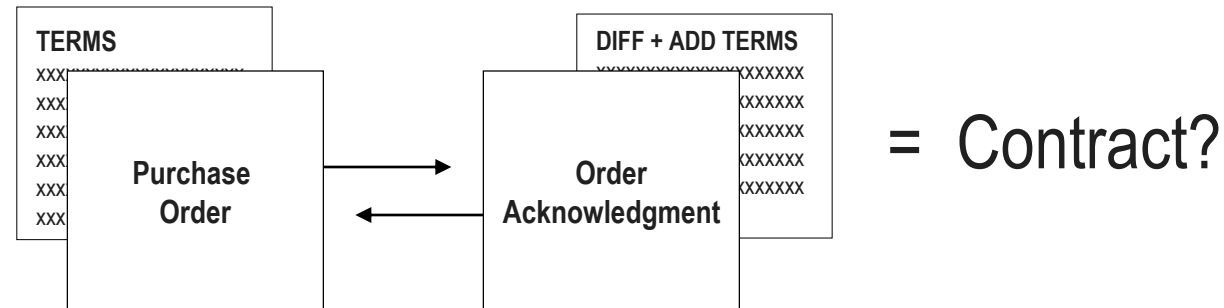


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Offer + Acceptance = Contract, Even if Terms Differ (Sale of Goods)



1. Is the response an acceptance or a counteroffer under UCC § 2-207(1)?



§ 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.



What Are Terms of Contract? (Sale of Goods)



2. If the offer is accepted, what are the applicable terms?

“BATTLE OF THE FORMS”

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.



Material vs. Non-Material Additions (Sale of Goods)



<u>Material Terms: OUT</u>	<u>Split Among Jurisdictions</u>	<u>Non-Material Terms: IN</u>
<p><u>Why:</u> Result in surprise/hardship</p> <p><u>Examples:</u></p>	<p>Limiting Remedy in a Reasonable Manner*</p>	<p><u>Why:</u> No unreasonable surprise</p> <p><u>Examples:</u></p>
<ul style="list-style-type: none"> • Price, quantity, quality • Choice of law • Disclaimer of warranty • Force Majeure? 	<ul style="list-style-type: none"> • Arbitration clauses • Attorneys fees <p>*In jurisdictions that follow the comments to UCC 2-718 AND 2-719</p>	<ul style="list-style-type: none"> • Limited (reasonable) time to complain • Credit terms within trade practice • Limited right to rejection for defects (within customary trade tolerances) • Interest





What About Different Terms? (Sale of Goods)

- Not the same everywhere
 - “**Majority Rule**” = Knock-out Rule; UCC gap fillers
 - “**Leading Minority Rule**” = Acceptor’s terms rejected; Offeror’s terms control!
 - “**California Rule**” (possibly also followed by New York) = different terms treated the same as additional terms; Acceptor’s material terms rejected; Acceptor’s non-material terms added





What About Different Terms? (Sale of Goods)

- Brain twisters and gambling
 - Jurisdiction can determine who wins —
Northrup Corp. v. Litronic Industries, 29 F.3d 1173 (7th Cir. 1994) (applying Illinois law)
 - Smart buyers avoid this problem by using 2-207(1) & (2)(a) & (c)
 - **Sellers face a dilemma:**
 - Default to gap fillers (not good)
 - Allow contract to be formed (either very good or very bad)



Contract by Conduct



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Contracts Formed by Conduct: No Additional Terms (Sale of Goods)



What happens when purchase and sale documents don't meet elements necessary to form contract (*i.e.*, no agreement on key terms or there is a counteroffer based on “expressly conditional” language of § 2-207(1))?

UCC § 2-207(3) provides:

- (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**.





The “Mirror Image Rule” (Services and International Goods)

- UCC § 2-207 does not apply to sales of services
- Common Law “**Mirror Image Rule**”
 - An acceptance that does not “mirror” the offer is deemed a counteroffer
 - Who fired the “last shot” before acceptance by performance?
- Courts look to mitigate
 - Course of performance
 - Industry practice
- Good forms won’t save you
- You must be vigilant about responding to seller’s documents
- Have countersigned agreements whenever possible
- International sale of goods is governed by Article 19 of the United Nations Convention for the International Sale of Goods (CISG) = “last shot” wins – more on this later



What Language Should a Buyer Use?



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Buyer: Magic Language for Front of Purchase Order



THIS PURCHASE ORDER IS **EXPRESSLY LIMITED TO**, AND **EXPRESSLY MADE CONDITIONAL ON**, SELLER'S ACCEPTANCE OF THE TERMS OF THE ORDER AND THE ATTACHED _____ PURCHASE ORDER TERMS AND CONDITIONS. (A COPY OF THE PURCHASE ORDER TERMS AND CONDITIONS IS AVAILABLE AT [INSERT URL].) BUYER **OBJECTS TO ANY DIFFERENT OR ADDITIONAL TERMS**.

Acknowledged and Accepted By Seller:

Name: _____

Date: _____



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What Language Should a Seller Use?



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Seller: Magic Language for Front of Quotation, Order Acknowledgment & Invoice



[THIS QUOTATION] or [SELLER'S ACCEPTANCE OF THIS ORDER] IS **EXPRESSLY LIMITED TO, ~~AND EXPRESSLY MADE CONDITIONAL ON,~~** BUYER'S ACCEPTANCE OF THESE TERMS AND THE ATTACHED _____ TERMS AND CONDITIONS. (A COPY OF THE _____ TERMS AND CONDITIONS IS AVAILABLE AT [INSERT URL].) SELLER **OBJECTS TO ANY DIFFERENT OR ADDITIONAL TERMS.**

Acknowledged and Accepted By Buyer:

Name: _____

Date: _____



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International Sales - CISG



- Article 19 – “Last Shot Rule”
 - Acceptance with different material terms = **counteroffer**
 - Virtually everything is “material” under the CISG
 - Performance after last form means that the last form wins
- Favors seller who sends order acknowledgment
 - Buyer must object **after** receiving counter offer
 - Requires buyer vigilance
- Opting out – the chicken and egg problem
 - CISG is a treaty signed by most industrial countries
 - Both parties’ forms must opt out
 - Buyer’s form **should** opt out
 - Seller’s form **should not** opt out



Practical Tips



Practical Tips

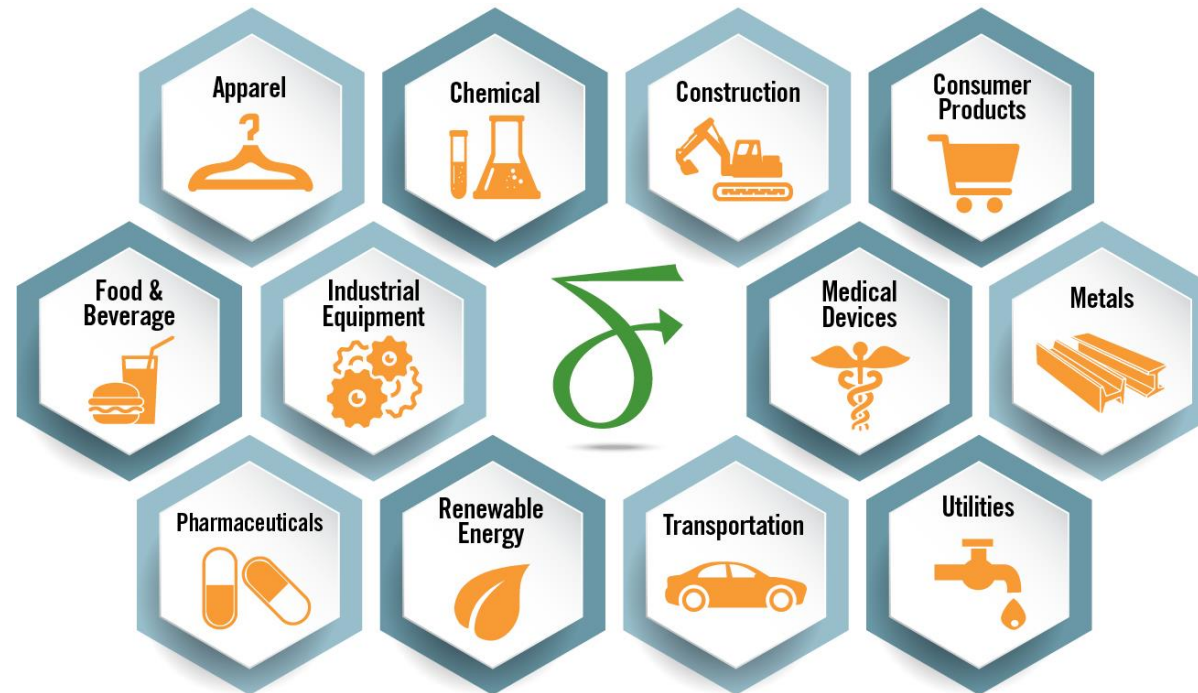


1. Review existing terms and conditions
 - ✓ Do you have standard Terms and Conditions?
 - ✓ Do those terms maximize your business advantage?
2. Review existing purchase/sale documents
 - ✓ Do they have the right magic language?
 - ✓ Do they properly incorporate your T&Cs?
3. Review existing purchase/sale processes
 - ✓ Do you have policies, practices, equipment and training in place to ensure that your T&Cs are universally used?
 - ✓ Do people on the front line understand how to avoid accidental acceptance?
4. Establish a triage plan for potential claims
 - ✓ Do your employees know who to contact when potential claims arise?
 - ✓ Does your legal department have the resources they need to decide whether to pursue a claim?
 - Ignoring or litigating to death are rarely the only options
 - Quick early analysis is key to making good business decisions



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Questions?

Please contact us any time with additional questions.

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