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Unrevised Section 2-207--Different Terms Revisited

Sidney Kwestel [\[FNa1\]](#)

Courts and commentators agree that unrevised [U.C.C. § 2-207](#), the “battle of the forms” provision, suffers from a lack of clarity. [\[FN1\]](#) However, that should not be a license to add to the murky waters, more particularly to adopt a rule--the knockout rule--that lacks support in the statutory scheme. Let us consider a hypothetical. B sends S a written offer to purchase 10 computers, Model No. 2100, at a cost of \$5,000 for a computer. The offer states: “you warrant that your Model No. 2100 computers have the same features and capabilities as your competitor's Model AB700.” The warranty is critical because the Model 2100 was worth only \$2,000 to B without the warranty. S sends a seasonable written acknowledgement that contains a definite expression of acceptance but adds: “S makes no express warranty and disclaims and excludes any express warranty.” Given these facts, has a contract been formed, and what are its terms? It is a classic battle of the forms dispute. More specifically, has a contract been formed on the terms offered or does the different express warranty term in S's acceptance knock out the express warranty in B's offer? For an answer, we first turn to unrevised [section 2-207](#), which provides in pertinent part:

- (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.

Courts are basically in agreement that under [section 2-207](#) if S's response constitutes a definite expression of acceptance a contract is formed under subsection (1) even though S's response states express warranty terms different from the express warranty terms in B's offer. [\[FN2\]](#) Courts part company, however, on the treatment of the different term in S's acceptance. As can be seen, subsection (1) refers to additional or different terms while subsection (2) only expressly covers additional terms. Courts have formulated three approaches to different terms. [\[FN3\]](#) One approach treats different terms the same as additional terms and therefore applies subsection (2) to different terms. Another approach disregards different terms contained in the acceptance since different terms are not mentioned in subsection (2) and thus are not construed as proposals that can become part of the contract. The third approach applies the “knockout” rule under which the conflicting terms on S and B's forms would knock each other out and would not be part of the contract.

The knockout rule seems to be premised on the assumption that the offeree's acceptance is treated as an acceptance only of the terms on which the documents in our hypothetical, B's offer and S's acknowledgement, agree. [\[FN4\]](#) This would mean that in our hypothetical the contract terms would not include the express warranty in B's offer.

However, on close analysis, it appears that [section 2-207](#) and general contract principles should preclude adoption of the so-called knockout rule and that Comment 6, [\[FN5\]](#) relied on by some courts, [\[FN6\]](#) does not support such a rule.

The starting point for any analysis must be the language of the statute itself. Subsection (1) of 2-207 clearly provides that “a definite and seasonable expression of acceptance... operates as an acceptance” even though it states different terms from those “offered or agreed upon.” The UCC does not define the word “acceptance.” Turning to contract law, [\[FN7\]](#) we know that an “acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” [\[FN8\]](#) Simply put, the offeree's definite expression of acceptance is nothing more than an expression of assent to the terms offered--and not to the terms of the offer minus the different terms. Nothing in contract law permits an offeree to selectively accept terms of the offer, and nothing in [section 2-207](#) or the comments indicates that the UCC was so radically departing from the effect of an acceptance, namely that it constitutes an assent to the terms offered.

To be sure, subsection (1) changes the common-law contracts mirror image rule. [\[FN9\]](#) In contrast to the mirror image rule, subsection (1) provides that a definite expression of acceptance that states additional or different terms from those offered is nevertheless an acceptance unless the offeree expressly conditions his acceptance on the offeror's assent to the different or additional terms. Thus subsection (1) gives an offeree two choices. The offeree can choose (i) to accept the terms offered or (ii) if the offeree does not want to assent to the terms offered unless additional or different terms contained in his acceptance become part of the contract, he can choose to expressly make his acceptance conditional on the offeree's assent to the additional or different terms. Subsection (1) does not give the offeree a third choice--to accept the terms of the offer with which the offeree agrees and to simultaneously reject the terms in that offer with which he differs. There appears to be no room to argue that an acceptance under subsection (1) is only an acceptance of the terms on which the offer and acceptance agree.

Thus, once the offeree sends an unconditional acceptance, he has chosen to form a contract that contains at the very least all the terms offered. Put differently, neither [section 2-207](#) nor the comments suggest that the UCC was in any way rejecting the contract law concept that the offeror is the master of the offer [\[FN10\]](#) and espousing a view that the offeror may be forced into a contract on terms different from those offered. [\[FN11\]](#) Thus the plain language of subsection (1) and contract law concepts would seem to bar the knockout rule.

In sum, courts adopting the knockout rule in effect are adopting a rule that flies in the face of a basic contract concept--that the offeror is the master of the offer--and the express language of subsection (1). Certainly if such a drastic departure from contract law principles were intended, it would have been clearly expressed in the statute or stated in a comment. [Section 2-207](#) was designed to change only the mirror image rule--not the concept that acceptance of an offer forms a contract that contains at least the terms offered.

For these reasons Comment 6 cannot be reasonably read as supporting a general knockout rule. Further, the result under Comment 6--that conflicting terms on confirming forms do not become part of the contract--stems from an application of [section 2-207\(2\)\(c\)](#) to those terms and not because of a knockout rule. Assuming that a buyer's confirmation form states a term different from those orally agreed upon, but the seller's does not, the different term on the buyer's confirmation would fall by the wayside. This is so because there is no basis in [section 2-207](#) or general contract law principles for the different term in the buyer's confirmation to have any effect on the oral terms the parties previously agreed upon. [\[FN12\]](#) Now take the case where neither the buyer nor the seller's confirmation has any term that differs from the terms the parties previously orally agreed upon but where B's confirmation has a term that conflicts with a term on S's confirmation. Each of the conflicting terms on the confirmations would be an additional term in relation to the parties' oral agreement. Such additional terms would be run through [section 2-207\(2\)](#) and, as Comment 6 states:

Where clauses on confirming 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.

What seems clear is that conflicting terms on the buyer's and seller's confirmations do not become part of the contract because of the application of [section 2-207\(2\)\(c\)](#) and not because Comment 6 creates and applies a so-called knockout rule. For this reason, Comment 6 speaks of the parties satisfying [section 2-207\(2\)\(c\)](#)'s notice of objection requirement rather than simply saying that the terms knock each other out or cancel each other.

Supporters of the knockout rule say that if this rule is not adopted, then the sender of the first form will have an unearned advantage. [\[FN13\]](#) To the extent that the sender of the first form is given an advantage that advantage stems from [section 2-207](#)'s rejection of the mirror image rule and the last shot doctrine. This advantage can be seen from [section 2-207](#)'s treatment of additional terms. An offeree's definite expression of acceptance that contains additional terms nevertheless constitutes an acceptance--not a rejection as under common law--and under subsection (1) a contract is formed on the offeror's terms. The offeree's additional terms, even if material, are treated under subsection (2) only as proposals for addition to the contract that was already formed by the offeree's acceptance. Further, under 2-207, such additional terms cannot become part of the contract against the offeror's will. First, material additional terms automatically fall by the wayside unless of course the offeror expressly agrees to them. [\[FN14\]](#)

And nonmaterial additional terms can only become part of the contract if the parties are merchants and the offeror does not object to them in a reasonable time. [\[FN15\]](#) As the first sentence of Comment 6 explains, “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.” Thus, under 2-207, as Professor Farnsworth aptly notes, “the advantage has shifted from the party that fires the last shot [\[FN16\]](#) to the one that makes the first offer.” [\[FN17\]](#) This advantage is a bit greater if the transaction is between consumers or between a consumer and a merchant. [\[FN18\]](#) In such a case, the additional terms, whether material or not, do not become part of the contract unless the offeror assents to them. In short, the UCC confers an advantage on the offeror when dealing with additional terms and there appears to be no indication that it did not intend to confer at least the same advantage when dealing with different terms in the offeree's acceptance.

[\[FN1\]](#). [Daitom, Inc. v. Pennwalt Corp.](#), 741 F.2d 1569, 39 U.C.C. Rep. Serv. 1203 (10th Cir. 1984). See [White and Summers, Uniform Commercial Code § 1-3 \(5th ed.\)](#); Calamari and Perillo, *Law of Contracts* § 2.21 (5th ed. 2003).

[\[FN2\]](#). [Daitom](#), 741 F.2d 1569; [Dorton v. Collins & Aikman Corp.](#), 453 F.2d 1161, 10 U.C.C. Rep. Serv. 585 (6th Cir. 1972); [Stemcor USA, Inc. v. Trident Steel Corp.](#), 471 F. Supp. 2d 362 (S.D. N.Y. 2006); [Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.](#), 98 Idaho 495, 567 P.2d 1246, 22 U.C.C. Rep. Serv. 25 (1977); [Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.](#), 58 Wis. 2d 193, 206 N.W.2d 414, 12 U.C.C. Rep. Serv. 794, 78 A.L.R.3d 619 (1973). See also [White and Summers, Uniform Commercial Code § 1-3 \(5th ed.\)](#) (“The language of subsection (1) contemplates contract formation by two quite different routes. Up to the comma is one route, call it Route A. After the comma is a second route, call it Route B”).

[\[FN3\]](#). [Northrop Corp. v. Litronic Industries](#), 29 F.3d 1173, 24 U.C.C. Rep. Serv. 2d 407 (7th Cir. 1994); [Daitom](#), 741 F.2d 1569; [Superior Boiler Works, Inc. v. R.J. Sanders, Inc.](#), 711 A.2d 628, 36 U.C.C. Rep. Serv. 2d 1031 (R.I. 1998). Everyone seems to ignore the Second Restatement of Contracts position that an unconditional definite expression of acceptance that contains additional or different terms nevertheless is operative as an acceptance and “[t]he additional or different terms are then to be construed as proposals for modification of the contract.” [Restatement Second, Contracts § 59](#), comment a (1981).

[\[FN4\]](#). [Vulcan Automotive Equipment, Ltd. v. Global Marine Engine & Parts, Inc.](#), 240 F. Supp. 2d 156, 49 U.C.C. Rep. Serv. 2d 743 (D.R.I. 2003); [Daitom](#), 741 F.2d 1569. See [White and Summers, Uniform Commercial Code § 1-3 \(5th ed.\)](#).

[\[FN5\]](#). Comment 6 reads as follows:

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 confirming 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 a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by

this Act, including subsection (2). The written confirmation is also subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement. [Comment 6 was amended in 1966].

[FN6]. [Daitom, 741 F.2d 1569; Southern Idaho, 567 P.2d 1246](#). See [White and Summers, Uniform Commercial Code § 1-3 \(5th ed.\)](#) (Professor White thinks that part of Comment 6 supports the view that conflicting terms on B's offer and S's acceptance cancel each other and that the UCC does not bar this result). Although Comment 3 states that “whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2),” White and Summers note that this part of Comment 3 “goes beyond the text except insofar as it applies to confirmations of a prior agreement.”

[FN7]. See [U.C.C. § 1-103](#) (the principles of law and equity supplement the UCC unless displaced by a particular UCC provision).

[FN8]. [Restatement Second, Contracts § 50 \(1981\)](#).

[FN9]. [Dorton, 453 F.2d 1161](#). See Calamari and Perillo, Law of Contracts § 2.21 (5th ed. 2003).

[FN10]. Farnsworth, Contracts § 3.21 (4th ed. 2004); [Restatement Second, Contracts § 29](#), comment a; [Restatement Second, Contracts § 58](#), comment a.

[FN11]. Farnsworth, Contracts § 3.21 (4th ed. 2004). After noting that the knockout rule would result in “a contract consisting, not of the offeror's terms, but of the terms as to which there is no conflict” supplemented by UCC gap fillers, Professor Farnsworth says: “there is, however, little reason to suppose that the drafters of the code intended such a startling departure from the notion that the offeror is the master of the offer.”

[FN12]. See [American Parts Co., Inc. \(Detroit Body Products Co. Division\) v. American Arbitration Ass'n, 8 Mich. App. 156, 154 N.W.2d 5, 6 U.C.C. Rep. Serv. 119 \(1967\)](#).

[FN13]. [Daitom, 741 F.2d 1569; Southern Idaho, 567 P.2d 1246; Reilly Foam Corp. v. Rubbermaid Corp., 206 F. Supp. 2d 643, 48 U.C.C. Rep. Serv. 2d 81 \(E.D. Pa. 2002\)](#). See [White and Summers, Uniform Commercial Code § 1-3 \(5th ed.\)](#).

[FN14]. [U.C.C. § 2-207\(2\)\(b\)](#).

[FN15]. See [U.C.C. § 2-207\(2\)](#).

[FN16]. Farnsworth, Contracts § 3.21 (4th ed. 2004) (“In disputes over some aspect of performance, traditional contract doctrine favors the party who fires the “last shot” in the “battle of the forms”).

[FN17]. Farnsworth, Contracts § 3.21 (4th ed. 2004).

[FN18]. [U.C.C. § 2-207\(2\)](#) applies only “between merchants.”

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