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Contract Formulation Under Article 2 of the Uniform Commercial Code

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Today, Article 2 of the Uniform Commercial Code is the principal statute governing sales of goods in every state except Louisiana. Although the article made fundamental changes in the law of sales, it did not totally displace common law principles. Indeed, some provisions of the statute codify common law rules. The shortcoming of the statute, however, is that it is not self-executing; it is silent on some issues and ambiguous as to others. Under these circumstances courts have resorted to common law, citing Article 1, section 1-103, which provides that the principles of law and equity may supplement the Code unless such principles are displaced by particular provisions.

2. Article 2 applies to transactions in goods. U.C.C. § 2-102. Goods are defined in U.C.C. § 2-105 as all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

The term “transaction” is not defined, but it is now clear that the term has broader application than to the traditional true sale. For an analysis of the reach of Article 2 principles into a variety of subjects including leases of real estate and service contracts, see Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 FORDHAM L. REV. 447 (1971).

3. U.C.C. § 1-103 reads: “Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.”
This article is an examination of the principles of offer and acceptance for the formation of the sales contract as established in sections 2-204, 2-205, 2-206 and 2-207 of the Code and an outline of the common law rules preserved either through codification or incorporation via section 1-103. In making this examination it is at once apparent that the Code leaves many issues unanswered.

The question arises whether courts should incorporate common law principles in existence at the time the Code was adopted or common law principles that were subsequently developed by the Restatement (Second) of Contracts. This question, which is discussed in the paragraphs that follow, is complicated by certain factors. First, Article 2 rejects some of the common law rules of offer and acceptance and creates new principles which the drafters thought were more consistent with modern business practices. Second, although many of the common law rules of offer and acceptance have remained unchanged over time, others have changed significantly under the influence of Article 2.

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4. U.C.C. § 2-301, which provides that "[t]he obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract," makes it clear that the law of sales is based on the law of contracts.

5. "Article 2—Sales, of the Uniform Commercial Code may very well be called 'the businessman's article.' It attacks, for the first time, many of the technical rules of contract law whose application has disappointed the reasonable expectations and frustrated the intentions of the businessman in commercial transactions." Davenport, How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law, 19 Bus. Law. 75 (1963). Although many of the Article 2 sections were drafted for the purpose of modernizing existing business law, the article applies to both merchants and nonmerchants. It does, however, contain thirteen sections which are applicable only to merchants. The term "merchant" is defined in U.C.C. § 2-104(1) to mean:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. See also Llewellyn, Why We Need the Uniform Commercial Code, 10 U. Fla. L. Rev. 367 (1957).

6. The authors of the second Restatement are primarily responsible for the development of the new common law rules for the formation of contracts. The influence of Article 2 on the Restatement (Second) is clear. Compare, e.g., U.C.C. § 2-206 with Restatement (Second) of Contracts §§ 29, 31 & 63 (1973).
The Offer

Common Law

The common law has always recognized that a contract is formed by the manifestation of mutual assent. In other words, it is the expression of the parties' intent through words and conduct as understood by a reasonable person that is controlling. The actual or secret intent of the parties is immaterial. Assent usually takes the form of an offer made by one person, the offeror, and an acceptance by the other, the offeree.

An offer is defined as a promise which requests performance, forbearance or a promise as an exchange. The promise need not be expressed in words, but may be communicated by conduct. As a promise, the offer is a commitment made by the offeror of future action or inaction.

To determine whether the requisite intent to make an offer exists, a number of factors are considered, including the terms used in the proposal, its subject matter, the relationship of the parties and the circumstances surrounding the transaction. If


A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

8. Restatement of Contracts § 22 (1932); Restatement (Second) of Contracts § 22 (1973).

9. The first Restatement defined an offer as a "promise which is in its terms conditional upon an act, forbearance, or return promise being given in exchange for the promise or its performance." Restatement of Contracts § 24 (1932). The second Restatement modifies this rule on the ground that an offer may be an offer of a performance, to be exchanged either for a return promise or a return performance. It defines an offer as "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 § 24 (1973).


11. Restatement of Contracts § 2 (1932); Restatement (Second) of Contracts § 2 (1973).

intent to make an offer is not established, the proposal merely constitutes preliminary negotiations, a statement of future intent or an invitation to deal. Such a proposal does not confer upon the party to whom it is made the legal power of acceptance.

The Code

Article 2 continues the principle that the essential element in the formation of a contract is objective mutual assent expressed through an offer and an acceptance. Such assent may be communicated through words or conduct. Although the term "offer" is used in three sections of Article 2, it is not defined and courts have resorted to the common law definition. The fact that Article 2 does not define the term "offer" is not surprising. The concept of an offer as a promise or commitment of future action or inaction is fundamental to contract law. It is a concept which cannot be changed. The failure to define the term merely indicates the drafters' intention to maintain this traditional concept.

The Code also continues the view of the common law that the presence or absence of intent to contract is to be determined by the consideration of various factors including the language used in the proposals and the circumstances surrounding the transaction. However, at pre-Code law, if all

For an extensive discussion of the factors which are used to determine whether a proposal constitutes an offer, see J. Murray, Contracts § 24 (2d rev. ed. 1974).

13. U.C.C. § 1-201(3) provides that the term "agreement" means "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208)." U.C.C. § 1-201(11) states that "'contract' means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." See, e.g., Bradford v. Plains Cotton Coop. Ass'n., 539 F.2d 1249 (10th Cir. 1976); Earl M. Jorgensen Co. v. Mark Constr., Inc., 540 P.2d 978 (Hawaii 1975); Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 369 A.2d 1017 (1977).

14. U.C.C. § 2-204(1) provides that "[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." The comment observes that the purpose of subsection (1) is to continue the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise.


17. U.C.C. §§ 1-201(3) & 1-201(11). In addition, U.C.C. §§ 1-205 and 2-208 specifically provide for the relevance of course of performance, course of dealing and usage of trade.
material terms\textsuperscript{18} were not included in the proposal, the courts were reluctant to conclude that the requisite intent to make an offer existed. This reluctance extended to proposals which provided that the parties would agree in the future on essential terms. Such agreements to agree, it was said, indicated a lack of present intent to be bound and were therefore unenforceable.\textsuperscript{19}

This pre-Code view was troublesome, particularly as it applied to business transactions. Indefiniteness in such transactions may occur in one of several ways. Frequently, parties arrive at an agreement in a piecemeal fashion and after a lengthy series of negotiations. Although the parties intend to be bound, they inadvertently fail to specify all terms. In addition, it is not unusual for parties not to specify essential terms, such as price, at the time the agreement is made because performance is to occur in the distant future. Under these circumstances, they do not want to be bound in the future by terms established at the time of contracting. It is also common in some industries that the parties are not able at the time of entering into an agreement to set all terms. It is understood by them that the terms will be established according to prevailing industry standards during the performance of the agreement.

The Code recognizes business realities and rejects the strict common law view. Subsection 2-204(3) provides that a contract for sale does not fail for indefiniteness if the parties have in-

\textsuperscript{18} Material terms include price, quantity, quality, time and place for delivery, and time of payment.

\textsuperscript{19} Smith v. Chickamauga Cedar Co., 263 Ala. 245, 82 So. 2d 200 (1955) (agreement to furnish logs in quantity deemed "feasible and economical"); Willmott v. Giarraputo, 5 N.Y.2d 250, 184 N.Y.S.2d 97, 157 N.E.2d 282 (1959) (agreement that "the payment of interest and amortization of principal shall be mutually agreed upon at the time of entering into a more formal contract"); Varney v. Ditmars, 217 N.Y. 223, 111 N.E. 822 (1916) (promise to pay "a fair share of my profits"). For a detailed textbook discussion of the problem of indefiniteness at pre-Code law, see J. Murray, \textit{Contracts} § 27 (2d rev. ed. 1974).
tended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. Thus, the fact that one or more essential terms is missing or is to be agreed upon in the future will not inevitably signify lack of intent. Indefiniteness is one factor to be considered in conjunction with others. The comment to the section adds that commercial standards on the point of "indefiniteness" are intended to be applied. That is, the nature and commercial needs of the industry involved must be taken into consideration in determining whether a proposal which does not include all material terms nevertheless manifests intent to be bound. Accordingly, an agreement void for "indefiniteness" in one factual context may be adequate in another.

**Termination of the Power of Acceptance**

Once it is established that an offer has come into existence and that the power of acceptance has been created, the question becomes one of determining what events terminate this power. At pre-Code law, the most common events were the counteroffer, rejection, lapse of time, revocation and death of either party. Revocation did not end the power of acceptance until it was received by the offeree. It could be manifested

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20. U.C.C. § 2-204(3) provides: "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." An extensive list of cases is cited in 3 M. BENDER, U.C.C. SERVICE § 3.03(1) (1975).

Article 2 contains a number of sections which fill in the gaps which the parties have left open. Clearly the most important section is U.C.C. § 2-305 (open price term). Others include U.C.C. § 2-306 (output, requirements and exclusive dealing agreements); U.C.C. § 2-307 (delivery in single lots or several lots); U.C.C. § 2-308 (absence of specified time for delivery); U.C.C. § 2-309 (absence of specific time provisions; notice of termination); U.C.C. § 2-310 (open time for payment); and U.C.C. § 2-311 (options and cooperation respecting performance).

21. In Bornstein v. Somerson, 341 So.2d 1043 (Fla. 1977) the court noted that "[d]espite its common use, this Purchase Agreement and Contract could, in another factual context, be held void for indefiniteness . . . . We would suggest that the nature of the citrus industry requires many factors to be left open in sales contracts for future crops." Id. at 1048 n.10. See also Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975) (despite open terms, contract conforms to acceptable practice in the cotton trade). The comments to U.C.C. § 2-204 also state that the more terms the parties fail to include, the less likely it is that they intend to be bound.

22. RESTATEMENT OF CONTRACTS § 35 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 35 (1973). Other less common means of terminating the power of acceptance are incapacity of the offeror and nonoccurrence of any condition of acceptance under the terms of the offer.

directly to the offeree or indirectly as where the offer was for the sale of an interest in real or personal property and the offeree before exercising the power of acceptance received reliable information that the offeror had sold or contracted to sell the interest to another.\textsuperscript{24} Similarly, a rejection or counteroffer terminated the offeree's power of acceptance only upon receipt by the offeree.\textsuperscript{25} Death of the offeror, on the other hand, ended the power of acceptance without notice to the offeree.\textsuperscript{26}

The Code, with one exception, does not attempt to specify these events. The exception is section 2-207, which applies whenever a response to an offer does not comply exactly with the terms of the offer. This section is discussed below. However, it should be observed at this point that section 2-207 does not eliminate the possibility that a response to an offer which varies the terms of the offer will create a counteroffer. Thus, in Article 2 transactions, courts must resort to common law to determine what events terminate the power of acceptance and the point in time such events are effective. These principles have remained substantially unchanged over time,\textsuperscript{27} and whether courts resort to pre-Code or post-Code statements of the rules will not generally affect the conclusion drawn on a particular question.

**The Firm Offer**

It is not unexpected that the drafters did not alter, with the exception of section 2-207, the common law rules relating to the events which terminate the power of acceptance. Such rules are known within the business community and operate in most circumstances without producing harsh results. However, frequently in business transactions, the offeror promises to keep

\textsuperscript{24} Restatement of Contracts § 42 (1932). See, e.g., Dickinson v. Dodds, Court of Appeal, 2 Ch. D 463 (1876). The draftsmen of the second Restatement have extended the scope of this section as follows: “An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and offeree acquires reliable information to that effect.” Restatement (Second) of Contracts § 42 (1973).

\textsuperscript{25} Restatement of Contracts § 39 (1932); Restatement (Second) of Contracts § 39 (1973).

\textsuperscript{26} Restatement of Contracts § 48 (1932). Section 48 of the second Restatement preserves the rule, although comment a observes, “This rule seems to be a relic of the obsolete view that a contract requires a ‘meeting of minds’ and it is out of harmony with the modern doctrine that a manifestation of assent is effective without regard to actual mental assent.”

\textsuperscript{27} But see note 24, supra.
his offer open. The classical common law view was that such a promise was not enforceable against the offeror in the absence of consideration and the offeror could withdraw the offer at any time prior to acceptance.\(^{28}\)

The drafters recognized that the common law rule was inequitable because it could cause the offeree hardship.\(^{29}\) Section 2-205 was created to remedy the situation.\(^{30}\) The comments\(^{31}\) to this section suggest that its purpose is to give effect to the deliberate intention of a merchant to make binding his assurance to keep the offer open. Several points about this section should be observed.

The section does not attempt to define the term "offer" but presupposes that an offer has been made.\(^{32}\) The offer must be made by a merchant.\(^{33}\) Unfortunately, in some instances, this term has been a troublesome one to apply,\(^{34}\) and it may be expected to create some uncertainty in the application of section 2-205. The offer may be made either to a merchant or to a nonmerchant.

The offer must be in a signed writing\(^{35}\) and contain an assur-
ance that it will be held open. The writing which contains the assurance may also be on a form supplied by the offeree. However, to protect the offeror from inadvertently signing such a term, it is necessary that the clause be called to the offeror's attention and that he separately authenticate it. The purpose of the signature is to indicate the deliberate intention of the merchant to make the offer irrevocable whether that signature is contained on the offeror's own form or one supplied by the offeree. A formal signature is not always required, however, to establish the requisite intent. "Signed" also includes authentication, which could consist of the initialing of the clause involved.\(^{38}\)

The option lasts for the time stated or, if no time is stated, for a reasonable time. However, in no event does the period of irrevocability exceed three months.\(^{39}\) If the parties stipulate a period longer than three months, the option is ineffective for the time exceeding the three months. The comments, however, recognize that the option may be renewed although it is unclear whether the renewal date commences to run for the time of renewal or from the end of the original period. The three month time period may not be satisfactory to parties who at

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36. The cases suggest that the term "assurance" has not created the difficulties that were predicted when Article 2 first appeared. See, e.g., 3 M. BENDER, U.C.C. Service § 4.03(2) (1975) which states that

as time goes on, there will undoubtedly be contest over the qualification of various language under the requirement that it "give assurance." An offer reciting that it is "open," "will remain open," or that "this is firm" should qualify.

But whether such language as "For a twenty day period we will sell to you . . ." is sufficient is less clear.

There have been very few cases to date which have involved U.C.C. § 2-205. In none of them has a difficult interpretation issue of language arisen. See, e.g., E.A. Coronis Assoc. v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (1966) wherein the court rejected the contention that the language "We are pleased to offer . . ." created a firm offer.

37. U.C.C. § 2-205, comment 4.

38. U.C.C. § 2-205, comment 2.

39. Neither the section nor the comments suggest how the time period is to be computed when a specified period (e.g., 30 days) is provided for the offer to remain open. The ambiguity may be avoided by the parties if the assurance includes a specific date and time at which the option is to terminate.

40. U.C.C. § 2-205, comment 3.
the time the offer is made wish to establish a longer period.

The question arises as to whether in such an event, the merchant-offeror and offeree may use the common law firm offer or option contract supported by consideration. At common law, the firm offer supported by consideration remained effective against the parties for as long as the parties specified. The comments to section 2-205 suggest that the section was not intended to pre-empt this traditional common law device in transactions involving a merchant-offeror. It is thus available for use by the merchant-offeror and the offeree in the event they wish the period of irrevocability to exceed three months. In addition, since section 2-205 is applicable only when the offer is made by a merchant, nonmerchants must resort to the common law firm offer supported by consideration to create an irrevocable offer.  

THE ACCEPTANCE

The offer creates the power of acceptance in the offeree. The exercise of that power according to the terms of the offer constitutes the acceptance and is the manifestation of assent required to create the contractual relationship. Article 2 has two principal sections which establish rules of acceptance.  

41. At common law, the power of acceptance under an option contract is not terminated by rejection, counteroffer, revocation or by death or incapacity of the offeror unless the requirements are met for the discharge of a contractual duty. RESTATEMENT (SECOND) OF CONTRACTS § 35A (1973). The Code is silent on the question of whether the power of acceptance under a firm offer made pursuant to section 2-205 is terminated by any of these events. It is submitted that the answer should be in the negative.

42. The application of the section to situations other than those where the assurance is contained in a written signed offer or on a form supplied by the offeree is not clear. For instance, an oral offer which includes a promise to keep the offer open and is subsequently confirmed in a signed writing which includes the assurance should satisfy the statute. An assurance in a signed writing which is made after the offer has been made should also be binding. In each case, the merchant has deliberately intended to make the offer irrevocable, inducing reliance by the offeree. The fact that the section's technical requirements are not met should not, it is submitted, preclude a finding that the offeror is bound.

43. Acceptance is defined by the RESTATEMENT (SECOND) OF CONTRACTS § 52(1) (1973) as the “manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” But see RESTATEMENT (SECOND) OF CONTRACTS § 55 (1973).

44. According to early common law rules, a contract came into existence at a determinable moment in time. U.C.C. § 2-204(2) modifies this rule. It provides: “An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.” The comment explains that this subsection is directed primarily to the case where the correspondence exchanged between parties
first is section 2-206 which is concerned with the manner\textsuperscript{45} and medium\textsuperscript{46} of acceptance. The second is section 2-207 which applies whenever the response to an offer does not correspond exactly to the terms of the offer. These two sections will be discussed separately in the paragraphs that follow. In each instance, it is necessary to briefly outline the common law rules in existence at the time Article 2 was drafted. Such an outline will provide a more complete understanding of the Code sections and the reasons for the drafters' rejection of certain common law rules.

\textit{Common Law}

At common law, the offeror was considered the master of his offer. He could prescribe in what manner and by what medium the power of acceptance was to be exercised. With respect to manner, the common law rule was that the offeror bargained for either a return promise as acceptance or for performance or forbearance. If the offeror bargained for a return promise, the giving of the return promise by the offeree created a bilateral contract. The promise did not have to be expressed in words, but could be communicated by conduct\textsuperscript{47} and even by silence in some circumstances.\textsuperscript{48} If the offeror bargained for performance or forbearance, the completion of the requested performance or forbearance created a unilateral contract. The distinction between unilateral and bilateral contracts was fundamental in that an attempt by the offeree to accept in a manner other than that prescribed by the offer did not bind the offeror. If the offeror bargained for performance or forbearance, a return promise was ineffective as an acceptance. If the offeror requested a return promise and the offeree performed or tendered performance without making the promise, such performance or tender was ineffective as an acceptance unless it was completed during the period allowed for accepting by return

\textsuperscript{45} Manner refers to the requested performance, forebearance or promise to be given in exchange for the offer.

\textsuperscript{46} Medium refers to the means of transmission used to communicate the acceptance.


\textsuperscript{48} \textit{Restatement of Contracts} § 72 (1932).
promise. It is sometimes difficult to determine whether a unilateral or a bilateral contract was invited since offers are frequently ambiguous. Common law presumed, therefore, that an offer requested a bilateral contract. This presumption was adopted because the bilateral contract immediately and fully protected both parties since each is bound upon the giving of the return promise by the offeree.

Where performance or forbearance constituted the acceptance, notice from the offeree that he had completed the requested performance or forbearance was not generally required. Two exceptions, however, were recognized. The first was created when the offeror requested notice. The second exception arose where the offeror had no adequate means of ascertaining with reasonable promptness and certainty that the performance or forbearance had taken place. Under these circumstances, the offeree was under a duty to exercise reasonable diligence to notify the offeror. Failure to provide notice discharged the duty of the offeror. That is, notice was not essential to create the contract, but lack of notice discharged the offeror’s duty. The rule that mandatory notice did not constitute a part of the acceptance was based on the view that the offeror had bargained for acts, not words, and that therefore the contract came into existence upon completion of the performance.

Where the offeror looked forward to a bilateral contract, notice of acceptance by the offeree was required except if the offeror dispensed with it or under the circumstances the offeree’s silence or inaction constituted acceptance. The requirement that notice be given was based on the view that a promise involves communication. Notice was therefore consid-

49. Id. at § 63.
51. Restatement of Contracts § 31, comment a (1932).
52. Id. at § 56. See, e.g., Carlill v. Carbolic Smoke Ball Co., (1893) 1 Q.B. 256.
53. Restatement of Contracts § 56 (1932); 1 WILLISTON, CONTRACTS § 69 (3d ed. 1957).
54. Restatement of Contracts § 56, comment a (1932). A minority view which has been applied to guaranties of future advances is that notice constitutes a part of the acceptance. See 1 WILLISTON, CONTRACTS § 69A (3d ed. 1957).
55. See, e.g., Lloyd & Elliott, Inc. v. Parke, 114 Conn. 12, 157 A. 272 (1931); 1 WILLISTON, CONTRACTS § 70 (3d ed. 1957).
56. Restatement of Contracts § 72 (1932).
ered an essential part of the acceptance and was effective only upon receipt by the offeror.

In time, however, the courts developed the rule, commonly referred to as the "mailbox rule" that in cases where an acceptance was sent by mail or otherwise from a distance, the acceptance was effective on dispatch, provided it was properly addressed and was sent by the medium stipulated or, in the absence of a stipulated medium, by an authorized medium. If the offeree used means of transmission which were not authorized, the acceptance was effective on receipt provided it was received by the offeror within the time in which an acceptance sent in an authorized manner would have been received.

The traditional view was that revocation or withdrawal of the offer by the offeror could occur at any time before acceptance took place. Where the offer looked forward to a bilateral contract, the power to revoke terminated when the offeree communicated the return promise to the offeror or in cases where the mailbox rule applied, the instant the acceptance was dispatched, provided the acceptance was properly addressed and authorized means of transmission were used. If an unauthorized medium was employed, the power to revoke ceased at the instant the acceptance was received. The principle that the offer could be revoked before acceptance could create hardship for the offeree where a unilateral contract was requested. Since the offeror had bargained for a completed act and was therefore entitled to receive it, the traditional view was that the power to revoke continued up to the point that the act was complete. In time, courts developed theories to justify the view that the


58. RESTATEMENT OF CONTRACTS § 67 (1932).

59. The first Restatement defined authorized medium as that medium used by the offeror or that medium customary in similar transactions at the time when and the place where the offer is received. RESTATEMENT OF CONTRACTS § 66 (1932).

60. RESTATEMENT OF CONTRACTS § 68 (1932).

61. Id. § 41.

62. See note 57, supra.

63. RESTATEMENT OF CONTRACTS §§ 41 & 68 (1932).

64. See, e.g., Smith v. Cauthen, 98 Miss. 746, 54 So. 844 (1911); Stensgaard v. Smith, 43 Minn. 11, 44 N.W. 669 (1890); Biggers v. Owen, 79 Ga. 685, 5 S.E. 193 (1888).

65. One such view was to hold that a bilateral contract arises when the offer starts to perform. See, e.g., Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 97 P. 1086 (1902); Wright v. Mary Galloway Home for Aged Women, 186 Miss. 197, 187 So. 752 (1939).
offeror's power terminated upon the start of performance. The first Restatement of Contracts justified this view on the theory that the main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given or tendered, the offeror will not revoke his offer. Part performance or tender furnished consideration for the subsidiary promise and thereby created an option contract which bound only the offeror. The offeree was not bound to complete performance. The offeror's duty to perform was conditional, however, upon the completion of the requested forbearance or performance by the offeree.\(^6\)

Thus, pursuant to section 45 of the first Restatement, the giving of part performance or tender of the requested exchange created an option contract which terminated the offeror's power to revoke. In theory and effect, it was similar to the firm offer supported by consideration. Its scope of application was more limited, however, in that it applied only to the offer for a unilateral contract. The firm offer, on the other hand, was applicable to offers which looked forward to either a unilateral or bilateral contract. In time, a new method of creating an irrevocable offer was recognized. The first Restatement adopted the principle of promissory estoppel in section 90.\(^6^7\)

Traditionally, this principle was applied to make only gratuitous promises enforceable, but in time the courts held that an offer was made irrevocable by substantial action in reliance if that action was such that the offeror had reason to foresee it as a result of his offer. Reliance usually took the form of preparations to perform the required exchange.\(^6^8\) Such reliance did not have to be part of the bargained for consideration. It must

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6. Another theory used in cases in which a series of acts were requested was to construe the offer as bargaining for the initial act as the acceptance. The subsequent acts were then construed to be conditions precedent to the offeror's duty to perform. See, e.g., Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917).

67. Section 90 of the first Restatement provides: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

68. One of the first and most influential cases to apply promissory estoppel in a construction bidding context to an offer which had induced reliance was Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958).
be observed, however, that this use of promissory estoppel was not widely accepted at first. Traditionally, it was presumed that the function of contract law was to protect the expectations of the parties. The notion that detrimental reliance was a protected interest was new to contract law and viewed with scepticism. In time, the scepticism would disappear.\(^9\)

The Code

The Code was introduced when these traditional rules of acceptance prevailed. Although the Code continues the rule that acceptance must objectively manifest intent to contract,\(^70\) it does make dramatic changes in the principles of acceptance. These changes were made in response to the criticism of the common law classification of contracts into two categories, unilateral and bilateral,\(^71\) and the rule that for an acceptance to be effective, it must mirror the terms of the offer. In changing the common law rules, the Code has discarded the terms unilateral and bilateral and substituted "performance" or "promise" to describe the manner of acceptance.\(^72\)

Section 2-206\(^73\) provides principles of acceptance which are

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70. See, e.g., Lewis v. Hughes, 276 Md. 247, 346 A.2d 231 (1975) (fact that purchaser-offeree thought the contract was still being negotiated and that he had a subjective but unexpressed desire to impose conditions on the terms of payment irrelevant in face of objective manifestation of assent). But see Restatement (Second) of Contracts § 55 (1973).


72. See, e.g., U.C.C. § 2-206.

73. U.C.C. § 2-206 provides:

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of
applicable to most transactions involving sales of goods. Unfortunately, the provision is ambiguous and confusing because it is subject to numerous interpretations. At this point one observation about interpretation should be made. It has been suggested that the terms "manner" or "medium" contained in section 2-206(1)(a) are identical in meaning and refer to the means of transmission used to communicate the acceptance. This interpretation is supported by the first comment to the section. It is the only comment which attempts to explain section 2-206(1)(a) and refers solely to the question of whether an acceptance made by correspondence must be communicated by the same means of transmission as that used by the offeror. The second and broader interpretation is that medium refers to the means of transmission while manner refers to the requested performance or promise.

Assuming the broad interpretation is adopted, the introductory phrase suggests that manner or medium may be stipulated either by language contained in the offer or by circumstances surrounding the transaction. If the language or surrounding circumstances are ambiguous, section 2-206(1)(a) provides that the offeree may choose to accept in any reasonable manner and by any reasonable medium. In recognizing that the offeror is entitled to insist on a particular manner or medium, the Code retains the common law principle that the offeror is master of his offer.

acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

74. U.C.C. § 2-206, comment 1. It should also be observed that section 2-206(2) refers to "mode of acceptance" in describing performance. The term "mode" is not used in section 2-206(1). It might be suggested, therefore, that the term "manner" does not refer to the bargained-for performance or promise but is identical in meaning to the term "medium." This suggestion supports the narrow interpretation.

75. In addition to medium, the offeror may also prescribe other aspects of the power of acceptance, including time and place. Restatement (Second) of Contracts § 61 (1973). It is not unusual in business transactions, for instance, for the offer or order to expressly stipulate that it is not binding on the principal until accepted by him. See, e.g., Antonucci v. Stevens Dodge, Inc., 73 Misc. 2d 173, 340 N.Y.S.2d 979 (1973) (offer contained statement that the offer would not become binding until accepted by the dealer or his authorized representative, acceptance to be signified by the signature of the dealer, the dealer's manager or other authorized signature). Such statements may, however, merely constitute suggestions which do not preclude other reasonable means of acceptance. See, e.g., McAfee v. Brewer, 214 Va. 579, 203 S.E.2d 129 (1974) (offer calling for acceptance by return of a signed copy of the offer did not preclude acceptance by letter).
The broad interpretation constitutes a radical change of pre-existing rules. As observed above, at pre-Code law, the offeror was viewed as bargaining for either a return promise or for performance. In cases of doubt it was presumed that a bilateral contract was intended. The broad interpretation, which gives the offeree the opportunity to choose the manner of acceptance in the event manner is not prescribed, is consistent, however, with business expectations. Therefore, it is reasonable to assume that this is the interpretation the drafters intended. Indeed, in business transactions, the offeror with rare exception is indifferent as to whether acceptance occurs by promise or by performance. Insistence on a particular manner of acceptance is rare. Concern is focused on achieving the objective of the agreement, namely, the purchase and sale of goods. Although there has been extensive academic discussion of the two interpretations, it now appears that the courts have accepted the broad interpretation.

UNAMBIGUOUS OFFERS—MANNER AND MEDIUM

If the language of the offer or surrounding circumstances unambiguously prescribe a particular manner of acceptance, the question arises as to when acceptance occurs and whether notice of acceptance is required. Neither section 2-206 nor other sections of Article 2 provide principles for resolving these issues, and therefore courts must resort to common law. However, as observed above, pre-Code rules provided that the offeror looked forward to either performance or a promise as acceptance. It did not recognize the principle that the offeror could choose not to prescribe manner thereby giving the offeree the choice to accept in any reasonable manner.

The Code recognizes this principle and in so doing necessitates a redefinition of the principles of acceptance under these


Some courts do not discuss the interpretation difficulties posed by section 2-206. They appear unconcerned, however, as to whether acceptance takes the form of a return promise or performance. These cases suggest that section 2-206(1)(a) has had a liberalizing effect. See, e.g., Earl-M. Jorgensen Co. v. Mark Constr., Inc., 540 P.2d 978 (Hawaii 1975); Austin v. Montgomery, 336 So. 2d 745 (Miss. 1976).
circumstances. Resort to pre-Code rules to fill the gaps created by the Code in this area would be fruitless. Fortunately, the second Restatement adopted, with minor variation, the Code’s scheme of acceptance and has developed principles which may be applied to those situations the Code fails to address.\textsuperscript{78}

Accordingly, in a sale of goods transaction, if language or circumstances unambiguously prescribe performance as the manner of acceptance, section 45 of the second Restatement applies.\textsuperscript{79} This section, which was developed from the first Restatement’s section 45, retains the traditional principle that where the offer prescribes performance as the manner of acceptance, the contract does not come into existence until completion or tender of the invited performance. However, it provides that an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it. The option contract creates an irrevocable offer that binds only the offeror. The offeree, on the other hand, is not bound to complete the requested performance. The offeror’s duty of performance created under the option contract is conditional on completion or tender of the requested performance in accordance with the terms of the offer.

Section 56 of the second Restatement is applicable for determining under what circumstances notice of acceptance by performance is required. This section continues the prevailing common law principles. In other words, notice is not required unless requested by the offeror, or the offeree has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty. If the offeror does not have adequate means, then the contractual duty of the offeror is discharged unless the offeree exercises reasonable diligence to notify the offeror, the offeror learns of

\textsuperscript{78} RESTATEMENT (SECOND) OF CONTRACTS §§ 29, 31, 45, 56, & 63 (1973). It is not possible to discuss in this article all the differences that exist between the language of the second Restatement sections and the language of the Code. For an extensive analysis, see Murray, Contracts: A New Design for the Agreement Process, 53 CORNELL L. REV. 785 (1968).

\textsuperscript{79} RESTATEMENT (SECOND) OF CONTRACTS § 45 (1973) reads in full as follows:

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

(2) The offeror’s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
the performance within a reasonable time, or the offer indicates that notification of acceptance is not required.80

In the case where a promise is invited as acceptance, the Code continues the common law principle that the promise need not be expressed in words. It may be implied from the conduct of the offeree and even by silence under some circumstances.81 The Code is silent, however, on the question of whether notice of acceptance is essential to make the acceptance effective. The second Restatement does provide that notice is necessary to make such acceptance effective unless the silence or inaction of the offeree operates as an acceptance or the offeror dispenses with notice.82 Pursuant to section 1-103, these rules will apply to Code transactions as well. The question arises whether such notice is operative only upon receipt by the offeror.

Section 1-201(38) suggests that the Code adopts the common law mailbox rule for cases where acceptance is to be mailed or otherwise sent from a distance. Accordingly, if the offeror has prescribed or surrounding circumstances indicate a particular medium of acceptance and the offeree complies and properly addresses the acceptance, it is effective on dispatch and terminates the offeror's power of revocation. If the acceptance is not sent in accordance with the prescribed medium, the same section provides that the acceptance is nevertheless effective when sent, provided it is received within the time that a seasonably dispatched acceptance using the stipulated medium would normally have arrived. The Code principle alters

80. U.C.C. § 2-206(2) might be interpreted to alter this result. That is, it might be interpreted to apply when performance is prescribed as well as when performance is chosen as a reasonable medium of acceptance. At least one court appears to have adopted this interpretation. See Petersen v. Thompson, 264 Or. 516, 506 P.2d 697 (1973). It is submitted that this interpretation is incorrect since the language "performance is a reasonable mode of acceptance" suggests performance as one alternative among others. It does not imply performance as the only mode of acceptance.

81. U.C.C. § 2-204(1). The comment states that the purpose of this subsection is to continue the common law policy of recognizing any manner of expression of agreement, oral, written or otherwise. The subsection thus incorporates via section 1-103 the common law rules which establish the circumstances under which silence constitutes acceptance. See Restatement (Second) of Contracts § 72 (1973). In addition, this section has been used extensively in a number of cases and has been interpreted to apply when conduct constitutes the agreement as well as when conduct evidences a prior agreement. See, e.g., Bradford v. Plains Cotton Coop. Ass'n, 539 F.2d 1249 (1976) (conduct evidences offer and acceptance); Harlow & Jones, Inc. v. Advance Steel Co., 424 F. Supp. 770 (1976) (conduct evidences prior agreement).

82. Restatement (Second) of Contracts § 57A (1973).
the common law principle cited in the first Restatement section 68, which provided that under these circumstances the acceptance was not effective until received.

If, on the other hand, a particular medium is not stipulated or the offeror merely suggests a medium, section 2-206(1)(a) expressly adopts the principle that the offer may be accepted by “any reasonable medium under the circumstances.” Accordingly, if the acceptance is to be mailed or sent from a distance, and the medium is not prescribed, the acceptance is effective on dispatch provided the means of transmission is reasonable. If an unreasonable means is employed, the acceptance would nevertheless be effective on dispatch if in accordance with the rule stated in section 1-201(38).

The Code alters the common law rule, which as observed above, required that the acceptance be dispatched in an authorized manner. The Code’s rejection of the common law “authorization” test appears to be motivated by the drafters’ concern that the test lacked the flexibility needed for business practice and could not be expanded to apply to new media of communication. 83

Determining the moment in time when the acceptance by promise or by performance is effective is crucial for two reasons. First, it is the point in time when the contract comes into existence. Second, the acceptance terminates the offeror’s power of revocation. However, as observed above, the power to revoke may terminate before acceptance occurs. Thus, the parties may create a firm offer by the giving of consideration or pursuant to section 2-205. In addition, if the offeror prescribes performance as the manner of acceptance, an option contract is created pursuant to section 45 of the second Restatement when the offeree tenders or begins the invited performance or tenders a beginning of it. This option contract also terminates the power of revocation as observed above. In time, the courts at common law recognized that section 90 of the first Restatement, when applied to offers which induced substantial and foreseeable reliance in the form of preparations to perform, would also create an irrevocable offer. 84 The second Restatement approved this use of promissory estoppel and created

83. U.C.C. § 2-206, comment 1.
section 89(B)(2)^85 which states the application of section 90 to an unaccepted offer. Section 89(B)(2) is applicable to Code transactions via section 1-103; therefore, offers which prescribe a manner of acceptance are subject to becoming irrevocable pursuant to this section. Section 90 continues to be applicable to other types of cases.\(^\text{86}\)

As the comments\(^\text{87}\) to section 89(B)(2) explain, the section is chiefly important where the offeree must undergo substantial expense, forego alternatives, or undertake substantial commitments in order to be in a position to accept. The option created by section 89(B)(2) differs from the previously mentioned option contracts in that it does not necessarily result in full scale enforcement of the contract.\(^\text{88}\) The 89(B)(2) option contract is binding only to the extent necessary to avoid injustice. Thus, the section contemplates flexibility of remedies depending on a number of factors, including the formality of the offer, the degree of fault on the part of the offeror and the relative bargaining position of the parties.\(^\text{89}\)

**Ambiguous Offers—Manner and Medium**

If language or circumstances do not unambiguously prescribe the manner or the offeror merely suggests a particular manner, the Code adopts the rule in section 2-206(1)(a) that the offeree may choose to accept in any reasonable manner. As

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85. *Restatement (Second) of Contracts* § 89B(2) (1973) provides:

(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

86. Section 90 continues to be applicable to gratuitous promises, including charitable subscriptions and promises to procure insurance.


88. See text accompanying notes 20-42 and 79, *supra*.


For jurisdictions which accept the second Restatement, section 89B(2) is the appropriate section to apply to offers which induce substantial and foreseeable reliance. Section 89B(2) has several advantages. First, it makes clear that substantial and foreseeable preparations to perform may be sufficient to create an option contract. Second, it allows for flexibility of remedies by providing that the option contract is binding to the extent necessary to avoid injustice. The first Restatements' § 90 does not expressly provide for such flexibility in that it states that the promise is binding "if injustice can be avoided only by enforcement of the promise."
a practical matter, this rule will usually give the offeree the choice to accept by either performance or promise.\textsuperscript{90} Section 2-206(1)(b) states this rule for contracts which require prompt or current shipment.\textsuperscript{91} That is, an offer to buy goods for prompt or current shipment is interpreted as allowing acceptance by prompt or current shipment or by a prompt promise to ship. Even language such as "ship at once" does not normally envisage a single manner of acceptance.\textsuperscript{92} In addition, section 2-206(1)(b) reverses the common law rule that a contract comes into existence only if the goods shipped by the offeree-seller conformed to the terms of the offer. The common law rule benefited only the offeree-seller and gave him the opportunity to perpetrate what was commonly referred to as the "unilateral contract trick."\textsuperscript{93} If the seller shipped nonconforming goods and the offeror-buyer sued for breach of contract, the offeree-seller could defend on the ground that no contract had been formed. Pursuant to section 2-206(1)(b) if the goods shipped are nonconforming the offeree-seller is deemed to have accepted and to have breached at the same time. However, if the offeree-seller seasonably notifies the buyer that the shipment is intended merely as an accommodation, the shipment does not operate as an acceptance or as a breach and buyer has no action for breach of contract.

If the offeree is empowered to choose between acceptance by promise or by performance, the question arises as to when acceptance occurs and whether notice of acceptance is required. The Code does not provide principles of acceptance for the


\textsuperscript{91}"Shipment" is used in section 2-206 in the same sense as in section 2-504. Unfortunately, the terms "prompt" or "current" are undefined and may create uncertainty as to whether a case falls within the scope of section 2-206(1)(a) or (1)(b). It is unclear for instance whether the terms "prompt" or "current" were intended to convey the same meaning or different meanings. In addition, although it appears that the element of time is the crucial factor in deciding if an offer is for prompt or current shipment, it is uncertain whether time is also to be considered in light of the transaction, the nature of the industry and the relationship of the parties, including their past dealings. The term "current," for instance, might be interpreted to require that such factors be considered.

\textsuperscript{92}U.C.C. § 2-206, comment 2.

case when the offeree chooses to accept by promise. However, the same rules that apply to the case where a promise is prescribed as the manner of acceptance will apply to this situation as well. On the other hand, if the offeree elects to accept by performance and acceptance by performance is reasonable, section 2-206(2) applies.

Section 2-206(2) provides that the beginning of performance is acceptance of the contract. The beginning of performance is construed as assent to the terms of the offer and therefore as signifying a promise to be bound by its terms. The result is a bilateral contract to which both parties are bound immediately.

The section also provides that notice of acceptance must be given within a reasonable time when the offeree chooses to accept by performance. If the offeree fails to notify the offeror within a reasonable time, the offeror may treat the offer as having lapsed before acceptance. Since an offer can lapse only if acceptance has not occurred, the statute and accompanying comments support the view that notice constitutes a part of the acceptance.

The view that notice is required upon acceptance and constitutes a part of the acceptance is consistent with the

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94. The Restatement recognizes that the rules which apply when a promise is prescribed as the manner of acceptance will also apply when a promise is merely requested. See Restatement (Second) of Contracts §§ 57A & 64 (1973).

95. Comment 3 to U.C.C. § 2-206 observes that the beginning of performance can be effective as acceptance only if it unambiguously expresses the offeree's intention to engage himself.

96. Restatement (Second) of Contracts § 63 (1973) reads:

(1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender of beginning of the invited performance or a tender of a beginning of it is an acceptance by performance.

(2) Such an acceptance operates as a promise to tender complete performance.

The Restatement also creates a bilateral contract by virtue of the promise contained in section 63(2). However, section 63 adopts a radically different position on whether notice of acceptance is required.

97. U.C.C. § 2-206, comment 3 provides in part: "[I]t is essential that notice follow in due course to constitute acceptance." Several statements in the comment appear confusing. These statements read: "Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance." It is submitted that these statements mean nothing more than that the offeror may choose to prescribe performance, in which case the start of performance creates an option contract under § 45 of the second Restatement or he may choose not to prescribe manner, in which case the start of performance creates the contract under U.C.C. § 2-206(2).
fact that a bilateral contract comes into existence upon the beginning of performance. Nevertheless, this view has been criticized and rejected by the second Restatement. The criticism centers on the possibility that under the section an offeror could revoke the offer after the offeree has started performance but before he has given notice.\textsuperscript{98} Such a result is inequitable and harsh. The second Restatement has adopted the view that if the offeree chooses to accept by performance, the same rules for notice apply as when the offeree is required by language or circumstances to accept by performance. Thus, pursuant to section 56 of the second Restatement, no notification of acceptance by the offeree is necessary unless requested by the offeror or the offeree has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty.

The Restatement rule is based on the idea that although the act of performance operates as a return promise, the acceptance is to be treated as an acceptance by performance rather than as an acceptance by promise. Although it has been suggested that the Restatement rules on notice should be applied to Code transactions when the offeree chooses to accept by performance, it has been difficult for the courts to ignore the plain language of the section.\textsuperscript{99}

In the event the offeror is indifferent as to the manner of acceptance, the acceptance will usually be the event which terminates the power of revocation. Such power may, however, terminate at a point earlier in time. Thus, the parties may create a firm offer by the giving of consideration or pursuant to section 2-205.

In addition, pursuant to section 89(B)(2) of the second Restatement, an ambiguous offer may become irrevocable to the extent necessary to avoid injustice when the offeree substantially and foreseeably relies on the offer. These methods of creating option contracts are the same methods that are avail-


\textsuperscript{99} See, e.g., Farley v. Clark Equip. Co., 484 S.W.2d 142 (Tex. Civ. App. 1972) where the court observed that even assuming arguendo that an offer had materialized, the offeree who had started to perform had failed to give notice of acceptance as required under section 2-206(2)(b). See also Stockard v. Vernon Co., 9 UCC Rep. Serv. 1067 (Okla. App. 1971) (notice of acceptance pursuant to subsection 2-206(2) given by offeree).
able in the event the offeror prescribes a particular manner of acceptance.100

**Acceptance or Counteroffer—Section 2-207**

One of the most troublesome rules at common law was that a response to an offer which did not mirror or correspond exactly to the terms of the offer was a counteroffer and therefore ineffective to create a contract.101 The rule was particularly harsh for large commercial enterprises which frequently concluded business transactions by means of printed forms. It was not unusual that these printed forms did not mirror each other’s terms and even though the parties to the transaction were of the opinion that they were bound by a contractual relationship, there was in fact no contract.102 Section 2-207 was created to remedy this situation.103 This section is intended to

100. The option contract created pursuant to § 45 of the second Restatement is not available under these circumstances, however, since this section applies only in the event that the offeror prescribes performance as the manner of acceptance.

101. This principle was sometimes called the “mirror image rule.” See, e.g., Roun saville v. Van Zandt Realtors, Inc., 247 Ark. 749, 447 S.W.2d 655 (1969); Shell Oil Co. v. Kelinson, 158 N.W.2d 724 (Iowa 1968); Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915). Some courts avoided the application of the rule by holding that the additional or different statement contained in the acceptance would have been implied in fact from the offer. See, e.g., Milliken-Tomlinson Co. v. American Sugar Ref. Co., 9 F.2d 809 (1st Cir. 1925).

102. Section 2-207 is intended to avoid this result and to give effect to the intention of the parties. Comment 2 observes, “Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract.”

103. Section 2-207 provides:

(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.

The cases and law review commentaries are cited and discussed in Barron & Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 Cleve. St. L. Rev. 171.
apply to any situation where the response to an offer does not conform exactly to the terms of the offer and regardless of whether one or both parties is a merchant.

The comments suggest that the section was intended to apply primarily to two typical situations. The first occurs when the parties have entered into an agreement either orally or by informal correspondence and subsequently, one or both parties sends a formal memorandum which includes the terms agreed upon but adds terms not previously discussed. The second situation occurs when a written response to an offer which is expressed and intended as an acceptance adds further minor suggestions or proposals, such as “Ship by Tuesday” or “rush.” Under these circumstances, section 2-207 applies for the purpose of determining whether a contract has come into existence and, if so, what the terms of the contract are.

In determining whether there is a contract, section 2-207(1) provides that an expression of acceptance operates as an acceptance and thereby creates a contract, even though the expression contains different or additional terms. That is, the inclusion of different or additional terms in a response does not necessarily create a counteroffer. To operate as an acceptance, the expression must be definite and seasonable and not conditional on assent to the new or different terms. In other words, if the response objectively manifests an intent to accept in accordance with common law and Code principles outlined above and if it is not expressly conditional, the response constitutes an acceptance and a contract based on the terms originally agreed upon results.

Whether the additional terms included in the response become part of the agreement depends upon the provisions of section 2-207(2). Section 2-207(2) provides that the additional terms are to be construed as proposals for additions to

(1975). See also Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643 (5th Cir. 1975); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); In re Doughboy Indus., Inc., 17 App. Div.2d 216, 233 N.Y.S.2d 488 (1962); W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (1964); 3 M. BENDER, U.C.C. SERVICE (1975); WHITE & SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE (1974). White & Summers compare section 2-207 to “the amphibious tank that was originally designed to fight in the swamps but which was ultimately sent to fight in the desert.” Id. at 24.

104. U.C.C. § 2-207, comment 1.

105. There has been extensive debate as to whether section 2-207 (2) includes “different” as well as “additional” terms. Subsection (1) uses both terms while subsec-
the contract. In transactions involving only one merchant or between consumers, such proposals do not become part of the contract unless separately agreed to by the parties. On the other hand, in transactions between merchants, the proposals become part of the contract unless the offer expressly limits acceptance to the terms of the offer, the proposals materially alter the contract, or notification of objection to the proposals has already been given or is given within a reasonable time after notice of them is received.

Comment 3 suggests that the drafters intended that both additional and different terms were to be included. For a list of cases in which the issue is discussed, see Barron & Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171, 187 (1976).


107. The term “material” is not defined in the Code. However, comment 4 to U.C.C. § 2-207 provides examples of clauses which are material. It reads,

Examples of typical clauses which would normally “materially alter” the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by canny, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer’s failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.

Comment 5 offers examples of clauses which are not material. It states,

Examples of clauses which involve no element of unreasonable surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller’s exemption due to supervening clauses beyond his control, similar to those covered by the provision of this Article on merchant’s excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for subsale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller’s standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance “with adjustment” or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).

For a criticism of the Code’s examples, see 3 M. Bender, *U.C.C.Service* § 3.03(1) (1975). The question of whether the inclusion of an arbitration clause in the response to an offer constitutes a material variance has been extensively litigated. Such a clause is not mentioned in either comment 4 or comment 5. Compare Gaynor-Stafford Indus. v. Maeco Textured Fibers, 52 App. Div. 2d 481, 384 N.Y.S.2d 788 (1976) (arbitration clause not a material variance) with In re Barclay Knitwear Co., 8 UCC Rep. Serv. 44 (N.Y. Sup. Ct. 1970) (arbitration clause is a material variance).
The question arises as to whether section 2-207(1) abolishes the common law counteroffer. The answer is in the negative. A counteroffer may still be created in one of several ways. Subsection (1) of section 2-207 provides that the offeree may expressly condition the acceptance on assent to the additional terms. A response containing such a condition is in effect a counteroffer.\(^{108}\) A counteroffer may also be created under section 2-207(1) in the absence of such a condition where the response fails to manifest an intent to accept and therefore does not qualify as a definite and seasonable expression of acceptance.\(^{109}\)

In the event the exchanged writings do not establish a contract under section 2-207(1), as in the case where the acceptance constitutes a counteroffer, but there is conduct by both parties which recognizes the existence of a contract, section 2-207(3) applies. This section provides that the terms of the contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under other sections of Article 2.\(^{110}\)

**Conclusion**

The principles of offer and acceptance that apply to transactions for the sale of goods are derived from two sources: the common law, including the second Restatement, and Article 2. As observed, Article 2 preserves many common law rules that were thought by the drafters to be consistent with business practice and custom. However, some pre-Code rules were thought to be inconsistent, and were therefore changed. In some cases the pre-existing law was radically altered.

The consequence is that the lawyer must know two sets of rules. However, mere knowledge of the common law and Code

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108. There has been debate over the question of what language qualifies to make the acceptance expressly conditional on the offeror's assent. Compare Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972) with Roto-lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962).

109. For a discussion on the issue of when a response fails to manifest intent to accept, see WHITE & SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-2 (1972).

principles is insufficient. The lawyer must know how to integrate the common law with the Code. Attorneys must realize that in certain instances it is consistent with Code principles to use either pre-Code or post-Code common law rules to supplement the Code while in other instances, it is necessary to supplement with rules created after the Code was adopted and stated in the second Restatement. Only when the Code is properly supplemented does it provide complete and integrated principles of offer and acceptance for the formation of the sales contract.

Despite its obvious shortcomings, the Code generally has had a liberalizing effect on the principles governing the formation of the sales contract. This effect will continue as long as the lawyer approaches Article 2 with an understanding of its purposes and its relationship to common law.