



## Winning the “Battle of the Forms” Under Section 2-207 of the UCC



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**WINNING THE “BATTLE OF THE FORMS”  
UNDER SECTION 2-207 OF THE UCC**

**I. Introduction**

Companies that are engaged in the business of purchasing and selling goods understand the importance of being intimately familiar with Article 2 of the Uniform Commercial Code, 810 ILCS 5/2-101, *et seq.* (“UCC”). Article 2 governs, among other things, the formation of contracts for the sale of goods, offers and acceptances which contain different terms, interpretation of contracts that are missing some of their essential terms, modifications to contracts, and the acceptance and rejection of goods.

This article touches upon many of the issues surrounding contract formation under Article 2 with a focus on the “battle of the forms” – an issue that arises when the contracting parties’ respective offers and acceptances contain additional or conflicting terms. Section 2-207 of the UCC sets the guidelines for the “battle of the forms.” This article will examine the history, purpose and nuances of Section 2-207 as well as the cases interpreting it. It will also discuss the practical application of Section 2-207 with respect to specific terms and conditions typically found in purchase orders, invoices and other communications involved in the purchase and sale of goods. Lastly, this article will review some of the best practices to avoid initiating the “battle of the forms.”

**II. Applicability of Article 2 to Certain Transactions**

Article 2 governs contracts for the sale of goods.<sup>1</sup> A “contract for sale” includes “both a present sale of goods and a contract to sell goods at a future time.”<sup>2</sup> A “sale” consists of “passing title from the seller to the buyer for a price.”<sup>3</sup>

Section 2-105 defines “goods” as “all things...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 and things in action.”<sup>4</sup> Under certain circumstances, “goods” have been held to include, among other things, computer software<sup>5</sup>, scrap metal<sup>6</sup>, a surgical implant<sup>7</sup>, feeder pigs<sup>8</sup>, noise monitoring and radar equipment<sup>9</sup>, cars<sup>10</sup>, and a printing press.<sup>11</sup>

In some situations, a contract may contemplate both the sale of goods and services. In order to determine if the UCC applies to this type of “mixed” contract, courts look to the predominant purpose of the agreement.<sup>12</sup> Courts consider whether the transaction was predominantly one for the sale of goods with services incidentally involved, or was one for the rendition of services with the sale of goods incidentally involved.<sup>13</sup> There is no “hard and fast” rule for determining the predominant purpose of a contract; instead, the result depends upon the specific characteristics of each contract.<sup>14</sup> If the contract is predominantly one for the sale of goods, Article 2 will apply.

### **III. General Contract Formation Principles Under Article 2**

#### **UCC § 2-204: Formation of a Contract for the Sale of Goods In General**

Section 2-204 governs the general formation of contracts under Article 2.<sup>15</sup> A contract for the sale of goods may be made in any manner sufficient to show an agreement between the buyer and seller, but there must be a meeting of the minds.<sup>16</sup> Subject to Section 2-201 (as more fully explained below), Section 2-204 specifically allows parties to form a contract through conduct that recognizes the existence of a contract.<sup>17</sup> It also allows for the enforcement of a contract even though some of the contract terms are missing.<sup>18</sup>

#### **UCC § 2-206: Offer and Acceptance in Formation of a Contract**

Article 2 does not define the term “offer.” An offer arises from the language used by the parties and is present when an individual orders or offers to buy goods for prompt shipment.<sup>19</sup> Unless otherwise unambiguously indicated by the language of the offer, an offer will be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.<sup>20</sup> A seller’s shipment of goods is an objectively reasonable indication of the seller’s acceptance of the buyer’s offer.<sup>21</sup>

#### **UCC § 2-201: The Statute of Frauds**

Section 2-201 provides that contracts for the sale of goods in the amount of \$500 or more must be in writing and signed by the party against whom enforcement is sought.<sup>22</sup> This requirement is commonly known as the statute of frauds.

There are several exceptions to the statute of frauds. For example, if the contract is between merchants and a written confirmation of the contract sufficient against the sender is received and the receiving party has reason to know of its contents, it satisfies the writing requirement of Section 2-201(1).<sup>23</sup> However, if the receiving party provides written notice of objection to its contents within 10 days, the writing requirement will not be satisfied.<sup>24</sup> Other types of contracts are excepted from the writing requirement, such as those in which a manufacturer has substantially begun its manufacture of goods which are specially manufactured for the buyer and are not suitable for sale to others,<sup>25</sup> or one in which a party or the parties partially or fully performed their end of the bargain.<sup>26</sup>

### **IV. What Happens if the Parties Reach an Agreement for the Sale of Goods, But the Agreement is Missing Some of its Essential Terms?**

Generally speaking, the “UCC is remedial legislation that aims, where possible, to ameliorate some of the more striking inequities of the common law of contracts, such as the harsh common-law rules governing indefiniteness of a contract.”<sup>27</sup> To effectuate this goal, the UCC supplies “gap fillers” to fill in terms which are missing from a contract. The “gap fillers” can be found in several Sections of the UCC including, without limitation, Sections 2-305, 2-306, 2-307, 2-308, 2-309, 2-310, 2-312, 2-314, 2-504 and 2-509. Some of these provisions are explained below.

### **UCC § 2-305: Open Price Term**

Where the parties to a contract intend to be bound by the contract, but they do not agree on a price, Section 2-305 provides that the price will be “a reasonable price at the time for delivery.”<sup>28</sup> The “reasonable price” must be fixed in “good faith.”<sup>29</sup> Illinois courts have not gone to great lengths to clarify the meaning of “good faith” in the context of Section 2-305(2).<sup>30</sup> However, at least one court has suggested that bad faith can arise where a seller forced a buyer “to accept terms that had not been contemplated in the original contract and were not economically feasible for [the buyer].”<sup>31</sup>

### **UCC § 2-306(1): Quantity Defined as Output of the Seller or Requirements of the Buyer**

A contract for the sale of goods will not fail for lack of definiteness where the quantity is defined as either the output of the seller or the requirements of the buyer.<sup>32</sup> When the quantity is defined in such a manner, the buyer and seller must act in good faith – meaning that the seller’s output, and the buyer’s requirement, cannot be unreasonably disproportionate to any stated estimate or comparable prior output or requirement.<sup>33</sup> Consequently, a purchaser “cannot arbitrarily declare his requirements to be zero” without acting in bad faith and in violation of an otherwise valid requirements contract.<sup>34</sup> However, a buyer may reduce or eliminate its requirements when it had a legitimate business reason for doing so.<sup>35</sup>

### **UCC § 2-308: Absence of Specified Place for Delivery**

When a contract fails to specify a place for delivery, the place for delivery is the seller’s place of business or his residence unless the contract is for the sale of identified goods which at the time of contracting are in some other place, and, in that instance, that place is the place for delivery.<sup>36</sup>

### **UCC § 2-309: Absence of a Specific Time Provision**

When the parties fail to agree to the time for shipment or delivery, section 2-309(1) provides that the time shall be a “reasonable time.”<sup>37</sup> Whether a time is reasonable “depends on the nature, purpose, and circumstances of the action.”<sup>38</sup>

Where the contract provides for successive performances but is indefinite in duration, it is valid for a reasonable time but, unless otherwise agreed, the contract may be terminated at any time by either party.<sup>39</sup> This type of contract is referred to as a contract which is “terminable at will.”<sup>40</sup>

### **UCC § 2-310: Open Time for Payment**

The general rule is that, if a contract is silent as to when payment is due, payment will be due “at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery.”<sup>41</sup>

There are several exceptions to this general rule. For instance, where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment unless the invoice is post-dated and, in that event, the start of the credit period will be delayed.<sup>42</sup> The parties' course of conduct, such as the buyer's consistent payment of invoices 60 days after receipt of goods without objection from the seller, may also alter the time for payment.<sup>43</sup>

## **UCC § 2-312: Warranty of Title**

The default rule under Section 2-312 is that in every contract for sale, the seller warrants that it is conveying good title and that the goods are being delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.<sup>44</sup> Such warranties can be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.<sup>45</sup>

## **V. Section 2-207: What Happens When the Terms of the Acceptance are Different From the Terms of the Offer?**

In many commercial transactions, goods are shipped, accepted and paid for without any issue. Often times, however, when a dispute arises down the road, the parties come to the realization that their initial offer and acceptance conflicted on a few key provisions. At that point, the question becomes whether a contract was formed and, if so, on what terms. Section 2-207 aids the parties in answering these questions.

Section 2-207 is intended to deal with two typical situations.<sup>46</sup> One is where an agreement has been reached orally or by correspondence between the parties and is followed by one or both of the parties sending formal confirmations embodying the agreed upon terms and some additional terms which were not necessarily discussed.<sup>47</sup> The other situation is one in which a correspondence that is intended as a confirmation of the agreement adds further minor terms such as "ship by Tuesday" or "rush."<sup>48</sup> When these situations arise, so too does the so-called "battle of the forms."

## **UCC § 2-207(1): Does a Divergent Acceptance Create a Contract?**

Under the common law "mirror image" rule, a divergent offer and acceptance would not form a contract because the acceptance did not mirror the terms of the offer.<sup>49</sup> Section 2-207 is a significantly more liberal interpretation of the common law "mirror-image" rule that makes it easier for the parties to form a contract. The goal of Section 2-207 is to allow the parties to enforce their agreement, whatever it may be, despite discrepancies that may exist between an oral agreement and a written confirmation, and despite discrepancies between a written offer and a written acceptance, if the acceptance can be effectuated without requiring either party to be bound to a material term to which it did not agree.<sup>50</sup>

Section 2-207(1) provides that "[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."<sup>51</sup> Based on

this provision, a contract will be formed even if the response to the offer contains additional or different terms, as long as: (1) the acceptance is sent in a reasonable time frame; and (2) it constitutes a definite expression of acceptance.<sup>52</sup> The “reasonable acceptance” requirement merely echoes the common law rule that an offer can no longer be accepted if it is not done within an agreed upon time frame, or if no time frame is agreed, within a reasonable time.<sup>53</sup> The second requirement – an “expression of acceptance” – is an expression of intent to proceed with the deal or an expression of an understanding that the deal has “closed.”<sup>54</sup> When these elements are met, and the additional terms do not materially alter or change the bargain (as explained below), a contract will be formed which includes the additional terms.<sup>55</sup>

This rule is not without its exceptions. Where the accepting party expressly states that a contract will not be formed unless the offeror accepts the additional or different terms in the contract, there will be no meeting of the minds or formation of a contract unless and until the original offeror “assents” to the additional or different terms.<sup>56</sup> For this exception to apply, the requirement of assent must be imposed “expressly.”<sup>57</sup> The mere fact that a seller responds to an offer by enclosing its terms and conditions does not constitute a “requirement of assent.” To be deemed a requirement of assent, the seller must expressly make the contract conditional on the buyer’s assent to the additional or different terms.<sup>58</sup> A requirement of assent creates a counteroffer. If a seller or buyer is adamant about having its terms control, the best practice is to include in the offer or acceptance an acknowledgment form, which contains the following language, prior to commencing performance:

This acceptance is expressly conditioned on Buyer’s/Seller’s assent to the terms contained in this acceptance, including any additional or different terms.<sup>1</sup>

Often times, when a buyer or seller receives an acknowledgement form requiring that it assent to the additional or different terms, it will commence performance without signing the acknowledgment form, such as where a seller ships goods without expressly agreeing to the new terms contained in the buyer’s acceptance.<sup>59</sup> It is unclear under Illinois law whether such conduct constitutes sufficient “assent” to the additional or different terms.<sup>60</sup> An argument that it does is supported by Section 2-206(1), under which conduct can be deemed acceptance of an offer or, in the example above, acceptance of a counteroffer.<sup>61</sup> However, courts sitting outside of Illinois have held to the contrary – namely, that assent to new terms must be specific and unequivocal.<sup>62</sup> These courts reasoned that allowing conduct to bind the offeror to the new terms would reinstate the “last shot” rule in which the terms of the last form controlled – an approach that Section 2-207 has rejected.<sup>63</sup>

### **UCC § 2-207(2): How are “Additional” or “Different” Terms Treated?**

If a contract has been formed pursuant to Section 2-207(1), the next question is whether the divergent terms become part of the contract.<sup>64</sup> Under Section 2-207, any additional matter

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<sup>1</sup> However, as more fully explained below, this type of clause, standing alone, does not guaranty inclusion of the additional or different terms in the contract.



contained either in the writing intended to close the deal or a later confirmation is regarded as a proposal for an additional term which falls within subsection (2).<sup>65</sup>

Section 2-207(2) provides, in relevant part, that, in contracts “between merchants,” additional terms are to be construed as proposals for addition to the contract unless three conditions exist (as more fully explained below).<sup>66</sup> Section 2-104(3) explains that a contract is “between merchants” if “both parties are chargeable with the knowledge or skill of merchants.”<sup>67</sup> The term “merchant” applies to:

[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.<sup>68</sup>

While Section 2-207(2) is relatively clear as to the treatment of “additional” terms, the treatment of “different” terms is not quite as clear. There are three plausible approaches for addressing this issue.

The first approach instructs that “different” terms, in contrast to “additional” terms, will not be construed as “proposals for addition to the contract.”<sup>69</sup> Followers of this approach reason that the omission of any reference to “different” terms in Section 2-207(2) is intentional and, therefore, the language of Section 2-207(2) does not apply.<sup>70</sup> Courts that have adopted this approach appear to be in the minority.<sup>71</sup>

The second approach, which is followed by the majority of courts, reasons that the conflicting terms in the offer and the acceptance cancel each other out and are replaced by any standard UCC terms that address the subject matter of the terms that have been dropped.<sup>72</sup> This approach, often referred to as the “knock-out” rule, coincides with the comment 6 to Section 2-207.<sup>73</sup>

The third approach, sometimes referred to as the “most sensible approach,”<sup>74</sup> ignores the difference between “additional” and “different” terms in applying Section 2-207(2). Under this approach, “different” terms, just like “additional” terms, would be considered “proposals for addition to the contract” and would become part of the contract under the same circumstances as “additional” terms.<sup>75</sup> Some reason that Comment 3 to Section 2-207 lends support for the third approach. That Comment states that Section 2-207(2) governs “[w]hether or not additional or *different* terms will become part of the agreement.”<sup>76</sup>

It is unclear which approach the Seventh Circuit and Illinois courts follow. The Seventh Circuit has suggested that the third approach is the most sensible solution but has not definitively decided which approach to follow.<sup>77</sup> Relevant Illinois case law suggests that Illinois courts will likely adopt the majority view, under which the “different” terms in the offer and response would cancel each other out and would be replaced by the gap-filler provisions of the UCC.<sup>78</sup>

## **UCC § 2-207(2)(a) – (c): When Do Proposed Additional Terms Become Part of the Contract?**

Assuming that the new terms are considered proposals for additional terms under Section 2-207(2), the next question is whether those additional terms become part of the contract. If the contract is “between merchants,” then the proposed terms become part of the contract, unless one of three stated exceptions is triggered: (a) the offer expressly limits acceptance to the terms of the offer; (b) the proposed terms materially alter the contract; or (c) the recipient previously objected to inclusion of any additional terms or objects within a reasonable time after notice of the proposed terms was received.<sup>79</sup>

With respect to the first exception, the UCC permits any party to insist that the contract proceed only on its terms and not others. Section 2-207(1) provides this right to the offeree, whereas Section 2-207(2)(a) provides the right to the original offeror.<sup>80</sup> As discussed above, the exception is only triggered if the insistence is “expressly” stated.<sup>81</sup> To ensure that acceptance is limited to the terms of the offer, it is best practice to explicitly state so in the offer and refrain from performing unless the offeree expressly assents to the terms.

The second exception is triggered if the proposed terms “materially alter” the parties contract.<sup>82</sup> In Illinois, a term materially alters a contract if it would “result in surprise or hardship if incorporated without express awareness of the other party.”<sup>83</sup> Such alterations will not become part of the contract unless expressly agreed upon.<sup>84</sup>

In applying this exception, Illinois courts tend to focus almost exclusively, if not entirely, on the “surprise” element.<sup>85</sup> In one Illinois case, the surprise element was lacking because the additional shipping charge on the seller’s invoice clearly appeared on prior invoices, the buyer reviewed and paid the invoices, and the additional charge was customary in the industry.<sup>86</sup> On the other hand, inclusion of an exorbitant fee in the seller’s acceptance of a buyer’s purchase order was considered a surprise which could not be included in the contract without the buyer’s express acceptance.<sup>87</sup>

The Seventh Circuit’s interpretation of Illinois law is slightly different. Courts in the Seventh Circuit have held that a term can constitute a material alteration based on the hardship it imposes, even if surprise is absent.<sup>88</sup> In one case, the Seventh Circuit held that, despite the fact that the indemnification clause was included in 12 prior purchase orders, the term was a material alteration because it would impose an unreasonable economic hardship that the seller never expressly undertook.<sup>89</sup>

Other examples of clauses which have been held to “materially alter” a contract include the following: a clause disclaiming warranties,<sup>90</sup> a clause requiring a guaranty of 90% or 100% where the usage of the trade allows for greater leeway,<sup>91</sup> a clause reserving to the seller the power to cancel upon the buyer’s failure to meet any invoice when due,<sup>92</sup> a clause requiring that complaints be made in a time materially shorter than customary or reasonable.<sup>93</sup>

On the other hand, general speaking, terms are not deemed material alterations when they embody a provision of the UCC, are reasonable, fall within a range established trade practices, do not unreasonably limit the bargained-for deal, reflect standard and customary industry practices, or follow a course of dealing between the parties.<sup>94</sup> Some courts have held that the following clauses did not “materially alter” the contract: a clause setting forth and even enlarging slightly upon the seller’s exemption due to supervening causes beyond his control,<sup>95</sup> a clause fixing a reasonable time for complaints within customary limits,<sup>96</sup> a clause providing for interest on overdue invoices,<sup>97</sup> a clause limiting the right of rejection for defects,<sup>98</sup> and a clause providing that delivery was to be “ASAP” even though it was not discussed by the parties.<sup>99</sup> The Seventh Circuit has held that a seller’s confirmation, which included an arbitration clause not found in the buyer’s purchase order, was not a material alteration of the parties’ contract and stayed the proceedings pending arbitration because the addition of the arbitration clause was not an unfair surprise to the buyer where the parties had a prior course of dealing and the buyer had notice that an arbitration clause would likely be included in the confirmation.<sup>100</sup>

Finally, the third exception states that proposals for additional terms do not automatically become part of the contract where the offeror has objected, or objects within a reasonable time, to the terms.<sup>101</sup> Under this exception, where clauses in confirming forms sent by both parties conflict, it must be assumed that each party is objecting to the other’s conflicting clause.<sup>102</sup> Consequently, the notice provision is satisfied and the conflicting terms do not become a part of the contract.<sup>103</sup> The contract then consists of the terms to which the parties expressly agreed, terms on which the confirmations agree, and terms supplied by the UCC.<sup>104</sup>

In order to invoke this exception, some suggest including a provision in the initial offer which states that the “offeror objects to any additional or different terms that may be proposed or contained in any response to this offer.” However, it is unclear whether this type of boilerplate advance objection to additional terms will satisfy Section 2-207(2)(c). In order to ensure protection, it is best practice to timely review the response to the offer and assert express objections to any problematic terms.

### **UCC § 2-207(3): In the Absence of a Written Contract, The Parties Conduct May Form a Contract, But on What Terms?**

Often times, the parties ignore the fine print on the back of their forms and proceed with their transaction notwithstanding that fact that their forms did not create a binding contract. In those situations, the parties’ conduct may be sufficient to form a contract.<sup>105</sup>

Given that there is no written meeting of the minds, Section 2-207(3) explains 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 any other provisions of the UCC.<sup>106</sup> In other words, conflicting terms fall out of the contract while terms on which the parties expressly agree, “additional” terms that pass muster under Section 2-207(2), and any “gap-fillers” become part of the contract.<sup>107</sup>

The following example illustrates the practical application of Section 2-207(3). Buyer submits a purchase order which provides that the seller has made certain implied warranties, that

the seller may be liable in damages for breach of warranty, and that the seller may be liable for permissible damages, including consequential damages.<sup>108</sup> In response, the seller sends an acknowledgment form disclaiming these warranties and making acceptance of the purchase order expressly conditioned on the buyer's assent to the terms in the acknowledgment.<sup>109</sup> Although the acknowledgment creates a counteroffer pursuant to Section 2-207(1) and, therefore, prohibits formation of a contract, the buyer and seller ignore the acknowledgment form, the seller proceeds to manufacture the goods, and the buyer proceeds to accept and pay for the goods, all without regard to whether the parties' exchange of forms actually created a contract.<sup>110</sup> In this scenario, Section 2-207(3) knocks out the conflicting warranty and damages provisions and reverts the forms back to the UCC default position. This results in a contract which includes the full range of implied warranties, damages for breach, and consequential damages in appropriate cases.<sup>111</sup>

This example demonstrates that a seller cannot simply rely on a well-drafted acknowledgement form to disclaim warranties or liability. The seller should monitor the purchase order that has been received and, if it contains conflicting terms on which the UCC provides unfavorable default positions, the seller should refuse to proceed with the transaction until a suitable express agreement has been reached.

## **VI. Analysis of the Most Common Provisions Which Create a "Battle of the Forms"**

The most common "battle of the forms" issues arise from an offer or acceptance that does one or more of the following: (1) disclaims the seller's express and implied warranties; (2) limits the buyer's remedies (*e.g.* limiting remedies to repair and replace); and (3) excludes consequential damages. Assuming that these additional or different terms do not fall within the exceptions contained in section 2-207(2)(a) or (c) (where the offer expressly limits acceptance to the terms of the offer or where the terms have been objected to), the question becomes whether the terms constitute material alterations to the contract.

Although the UCC expressly allows disclaimers of implied warranties, Illinois courts have consistently held that such disclaimers constitute a material alteration because they cause surprise or hardship.<sup>112</sup> Illinois courts have not addressed whether warranty limitations constitute a material alteration but at least one Federal court applying Illinois law has found that warranty limitations should be treated the same way as warranty disclaimers. The prudent seller should ensure that the buyer has expressly assented to any modifications to its warranties to avoid being subject to the UCC's default warranty provisions.

Illinois courts are divided as to whether a limitation of a buyer's remedies or exclusion of consequential damages constitutes a material alteration within the meaning of Section 2-207(2)(b).<sup>113</sup> Comment 5 to Section 2-207 suggests that a term limiting or excluding a buyer's remedies is not a material alteration.<sup>114</sup> Similarly, Federal courts applying Illinois law have reached the conclusion that a provision in the response to an offer that restricts or excludes a buyer's remedies is not a material alteration of the contract.<sup>115</sup> This is not a surprising result considering that the UCC expressly permits limitations of remedies and exclusions of consequential damages.<sup>116</sup> Based on this interpretation of the UCC, it is best practice for a buyer who wishes to preserve the full range of default remedies under the UCC to carefully monitor the

terms of the seller's acknowledgment and promptly object to any unacceptable limitations of its remedies or right to damages.

## **VII. Best Practices to Avoid the "Battle of the Forms"**

The importance of careful contract drafting and administration should not be overlooked. Considering the results that can stem from the application of Section 2-207, buyers and sellers alike would be remiss to simply rely on the terms and conditions of their respective contract forms. It is tempting to assume that Section 2-207 will give effect to the probable or reasonable intent of the parties, or perhaps give effect to the terms in existence immediately before the parties commence performance. But, as discussed above, such assumptions can be fatal and can result in the inclusion of terms to which either the buyer or the seller did not agree. Parties to commercial transactions must, therefore, proceed with caution.

The best practice for avoiding a "battle of the forms" contains the following elements:

(1) Become Intimately Familiar with Article 2. Having an understanding of Article 2, and the courts' interpretation of its provisions, will provide invaluable guidance on how to structure contracts for the sale of goods;

(2) Carefully Drafted Contract Documents. Well-drafted contract documents (such as an offer, acceptance, and terms and conditions) are necessary for a seamless contract for the sale of goods. The contract documents should contain all necessary terms and conditions, including, if desired, an express acknowledgment providing that modifications to the terms and conditions will not be accepted; and

(3) Diligent Contract Administration. Even a well-drafted contract cannot substitute for diligent contract administration. The best practice is to create a set of procedures to review standard terms in the other party's forms and respond with express objections to any unacceptable terms prior to commencing performance. Although this practice may not be practical in all business situations, it will provide the most protection for your buyer or seller.

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<sup>1</sup> 810 ILCS 5/2-101, *et seq.* (West 2010).

<sup>2</sup> 810 ILCS 5/2-106(1).

<sup>3</sup> *Id.*

<sup>4</sup> 810 ILCS 5/2-105(1) (internal citation omitted).

<sup>5</sup> *Dealer Mgmt. Sys. v. Design Auto Group, Inc.*, 355 Ill. App. 3d 416, 420-421 (2nd Dist. 2005) (collecting cases).

<sup>6</sup> *Unisys Corp. v. Electronic Recovery*, 1995 U.S. Dist. LEXIS 18407, at \*8-9 (N.D. Ill. Dec. 7, 1995) (collecting cases).

<sup>7</sup> *Brandt v. Boston Sci. Corp.*, 204 Ill. 2d 640, 645 (Ill. 2003).

<sup>8</sup> *Shields Pork Plus v. Swiss Valley Ag Serv.*, 329 Ill. App. 3d 305, 315 (4<sup>th</sup> Dist. 2002).

<sup>9</sup> *Bruel & Kjaer v. Vill. of Bensenville*, 969 N.E.2d 445, 453 (2nd Dist. 2012).

<sup>10</sup> *Belsky v. Field Imps., Inc.*, 2013 U.S. Dist. LEXIS 154775, at \*10 (N.D. Ill. Oct. 29, 2013).

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- <sup>11</sup> *Koursa, Inc. v. Manroland, Inc.*, 2013 U.S. Dist. LEXIS 140375, at \*54 (N.D. Ill. Sept. 30, 2013).
- <sup>12</sup> *Brandt v. Boston Sci. Corp.*, 204 Ill. 2d 640, 645 (Ill. 2003); *Zayre Corp. v. S.M. & R, Co.*, 882 F.2d 1145, 1153 (7th Cir. 1989).
- <sup>13</sup> *Bruel, supra* (contract for noise monitoring and radar equipment was considered a transaction for the sale of goods despite the fact that the contract required the seller to deliver, assemble, install, test and make fully operational the equipment); *3Com Corp. v. Electronic Recovery Specialists, Inc.*, 104 F. Supp. 2d 932, 936 (N.D. Ill. Cir. 2000) (holding that the UCC applied because the agreement was primarily concerned with the sale of scrap metal; the disposal services were only incidental to the sale); *Republic Steel Corp. v. Pennsylvania Eng'g Corp.*, 785 F.2d 174, 181 (7th Cir. 1985) (holding that contract for sale of two furnaces that included engineering, design, and installation services was predominantly one for the sale of goods).
- <sup>14</sup> *Respect, Inc. v. Committee on the Status of Women*, 781 F.Supp. 1358, 1363-64 (N.D. Ill. 1992) (citation omitted).
- <sup>15</sup> 810 ILCS 5/2-204.
- <sup>16</sup> *Woodridge v. Bohnen Int'l, Inc.*, 60 Ill. App. 3d 692, 694 (1st Dist. 1978), citing *Euclid Eng'g Corp. v. Illinois Power Co.*, 79 Ill. App. 2d 145, 150 (4th Dist. 1967).
- <sup>17</sup> 810 ILCS 5/2-204(1).
- <sup>18</sup> 810 ILCS 5/2-204(3); *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 30 (1991); *Architectural Metal Sys. v. Consol. Sys.*, 58 F.3d 1227, 1230 (7th Cir. 1995).
- <sup>19</sup> 810 ILCS 5/2-206(1); *Fabrica De Tejidos Imperial v. Brandon Apparel Group*, 218 F. Supp. 2d 974, 977 (N.D. Ill. 2002) (where a reseller submitted 14 purchase orders to a supplier of clothing, each purchase order constituted an offer).
- <sup>20</sup> 810 ILCS 5/2-206(1)(a).
- <sup>21</sup> *Central Ill. Pub. Serv. Co. v. Atlas Minerals*, 146 F.3d 448, 450-51 (7th Cir. 1998).
- <sup>22</sup> 810 ILCS 5/2-201(1).
- <sup>23</sup> 810 ILCS 5/2-201(2).
- <sup>24</sup> *Id.*
- <sup>25</sup> 810 ILCS 5/2-201(3)(a); *Control Solutions, LLC v. Oshkosh Corp.*, 2012 U.S. Dist. LEXIS 109276, at \*24-27 (N.D. Ill. July 27, 2012) (collecting case in support of proposition that courts construe the term “substantial beginning” narrowly).
- <sup>26</sup> 810 ILCS 5/2-201(3)(c); *Anderson v. Kohler*, 397 Ill. App. 3d 773, 785 (2nd Dist. 2009); *Jannusch v. Naffziger*, 379 Ill. App. 3d 381, 385 (4th Dist. 2008).
- <sup>27</sup> *Whitwell v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 115825, at \*8 (S.D. Ill. Dec. 11, 2009).
- <sup>28</sup> 810 ILCS 5/2-305(1); *Industrial Specialty Chems. v. Cummins Engine Co.*, 902 F. Supp. 805, 809 (N.D. Ill. 1995).
- <sup>29</sup> 810 ILCS 5/2-305(2).
- <sup>30</sup> See 810 ILCS 5/1-201(20) (defining “good faith” as “honesty in fact in the conduct or transaction concerned”).
- <sup>31</sup> *Oshana v. Buchana Energy*, 2012 U.S. Dist. LEXIS 16920, at \*12-13 (N.D. Ill. Feb. 10, 2012), quoting *Milex Products, Inc. v. Alra Labs., Inc.*, 237 Ill. App. 3d 177, 189-90 (2nd Dist. 1992).
- <sup>32</sup> 810 ILCS 5/2-306(1).
- <sup>33</sup> *Id.*
- <sup>34</sup> *City of Cuba v. City of Canton*, 2011 Ill. App. Unpub. LEXIS 2541 at \*9-10 (3rd Dist. Oct. 18, 2011), quoting *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1341 (7th Cir. 1988).
- <sup>35</sup> *Chi. United Indus. v. City of Chicago*, 669 F.3d 847, 852 (7th Cir. 2012) (buyer reduction in requirement was not arbitrary because it was based on a reduction in demand for the buyer’s end product); *Schawk, Inc. v. Donruss Trading Cards, Inc.*, 746 N.E.2d 18, 25 (1st Dist. 2001) (holding that buyer, which reduced its requirements to zero, did not act in bad faith because it terminated the requirements contract due to severe declines in sales between 1991 and 1995 and the fact that it suffered an \$8 million loss when it determined to discontinue its business).
- <sup>36</sup> 810 ILCS 5/2-308; *Whitwell, supra*.
- <sup>37</sup> 810 ILCS 5/2-309(1).
- <sup>38</sup> 810 ILCS 5/1-205(a); *Miller v. Ron Smith Trucking, Inc.*, 2002 Bankr. LEXIS 1427, at \*20-21 (Bankr. C.D. Ill. Dec. 10, 2002) (acknowledging that whether acceptance or rejection of goods occurred in a “reasonable time” is a question of fact).
- <sup>39</sup> 810 ILCS 5/2-309(2).
- <sup>40</sup> *Jespersen v. 3M*, 183 Ill. 2d 290, 295 (1998) (explaining the rationale for Section 2-309(1) and (2) of the UCC).
- <sup>41</sup> 810 ILCS 5/2-310(a).
- <sup>42</sup> 810 ILCS 5/2-310(d).

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<sup>43</sup> *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 2012 U.S. Dist. LEXIS 115901, at \*15-16 (N.D. Ill. Aug. 15, 2012) (because the seller's internal accounting entries reflected that payments were due 60 days after the date of the invoice and the buyer paid prior invoices 60 days after receipt of the goods, the parties' course of conduct demonstrated that payment was due 60 days after receipt of the goods).

<sup>44</sup> 810 ILCS 5/2-312(1).

<sup>45</sup> 810 ILCS 5/2-312(2).

<sup>46</sup> 810 ILCS 5/2-207, cmt. 1

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 980 (1st Dist. 1997).

<sup>50</sup> *Alan Wood Steel Co. v. Capital Equip. Enters., Inc.*, 39 Ill. App. 3d 48, 55 (1st Dist. 1976).

<sup>51</sup> 810 ILCS 5/2-207(1).

<sup>52</sup> *Id.*

<sup>53</sup> 810 ILCS 5/1-205(b).

<sup>54</sup> 810 ILCS 5/2-207, cmt. 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; *McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 510 (1st Dist. 1980).

<sup>57</sup> *Id.*

<sup>58</sup> *See, McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 510 (1st Dist. 1980) (purchase order clearly stated that, when the order was accepted, the terms and conditions on the face and reverse sides would constitute the complete agreement between the purchaser and vendor and that no additional or different terms contained in the vendor's forms would be binding on the purchaser).

<sup>59</sup> Baker, *Contract Formation Under Article 2 of the UCC*, § 2.39 (IICLE 2013).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* citing 810 ILCS 5/2-206(1).

<sup>62</sup> *Id.* (collecting cases).

<sup>63</sup> *Id.*

<sup>64</sup> 810 ILCS 5/2-207(2).

<sup>65</sup> *Id.*, cmt. 2.

<sup>66</sup> 810 ILCS 5/2-207(2).

<sup>67</sup> 810 ILCS 5/2-104(3).

<sup>68</sup> 810 ILCS 5/2-104(1).

<sup>69</sup> 1 James J. White and Robert S. Summers, *UNIFORM COMMERCIAL CODE* § 2:10, pp. 81-89 (6th ed. 2012).

<sup>70</sup> *Id.*

<sup>71</sup> *See Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173, 1175 (7th Cir. 1994) (describing this approach as minority).

<sup>72</sup> Baker, *supra* at § 2.42.

<sup>73</sup> 810 ILCS 5/2-207, cmt. 6.

<sup>74</sup> *See Northrop*, 29 F.3d at 1175.

<sup>75</sup> *Id.*

<sup>76</sup> 810 ILCS 5/2-207 cmt. 3 (emphasis added).

<sup>77</sup> *See Northrop*, 29 F.3d at 1175.

<sup>78</sup> *Northrop Corp.*, 29 F. 3d at 1178; *Cloud Corp v. Hasbro, Inc.*, 314 F.3d 289, 295 (7th Cir. 2002); *Big Farmer, Inc. v. Agridata Resources, Inc.*, 221 Ill. App. 3d 244 (3d Dist. 1991); *see also* Baker, *supra* at § 2.43 (noting that the 7th Circuit has held (without citation) that Illinois courts have adopted the majority view even though the given paucity of actual Illinois case law on the issue and in dictum must be considered unsettled).

<sup>79</sup> 810 ILCS 5/2-207(2).

<sup>80</sup> Baker, *supra* at § 2.46.

<sup>81</sup> 810 ILCS 5/2-207(1)(a).

<sup>82</sup> 810 ILCS 5/2-207(1)(b).

<sup>83</sup> 810 ILCS 5/2-207 cmt. 4; *see also Trans-Aire Int'l, Inc. v. Northern Adhesive Co.*, 882 F. 2d 1254, 1260-1 (7th Cir. 1989).

<sup>84</sup> *Id.*

<sup>85</sup> *Trans-Aire Int'l*, 882 F.2d at 1262 citing *Barliant v. Follett Corp.*, 138 Ill. App. 3d 756, 762-63 (1st Dist. 1985); *see also Clifford-Jacobs Forging Co. v. Capital Engineering & Mfg. Co.*, 107 Ill. App. 3d 29, 33 (4th Dist. 1982).

<sup>86</sup> *Barliant, supra* at 762-63.

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<sup>87</sup> *Gord Indust. Plastics, Inc. v. Aubrey Mfg., Inc.*, 103 Ill. App. 3d 380, 385 (2d Dist. 1982).  
<sup>88</sup> *See, e.g. Trans-Aire Int'l, supra* at 1261-2.  
<sup>89</sup> *Id.* at 1263.  
<sup>90</sup> *See, e.g., Album Graphics, Inc. v. Beatrice Foods Co.*, 87 Ill. App. 3d 338 (1 Dist. 1980).  
<sup>91</sup> 810 ILCS 5/2-207, cmt. 4.  
<sup>92</sup> *Id.*  
<sup>93</sup> *Id.*  
<sup>94</sup> *See, e.g., Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709 (7th Cir. 1987) (the inclusion of an arbitration clause in a confirmation form is not a material alteration to a contract for the sale between merchants where the same clause appeared in confirmation clauses sent in each of nine similar previous transactions between the contracting parties).  
<sup>95</sup> 810 ILCS 5/2-207, cmt. 5.  
<sup>96</sup> *Id.*  
<sup>97</sup> *Id.*; *Extel Corp. v. Cermetek Microelectronics, Inc.*, 183 Ill. App. 3d 688, 692 (1st Dist. 1989).  
<sup>98</sup> 810 ILCS 5/2-207, cmt. 5.  
<sup>99</sup> *See Hessler v. Crystal Lake Chrysler-Plymouth, Inc.*, 338 Ill. App. 3d 1010, 1020 (2nd Dist. 2003).  
<sup>100</sup> *Schulze*, 831 F.2d 709.  
<sup>101</sup> 810 ILCS 5/2-207(1)(c).  
<sup>102</sup> 810 ILCS 5/2-207, cmt. 6.  
<sup>103</sup> *Id.*  
<sup>104</sup> *Id.*  
<sup>105</sup> 810 ILCS 5/2-207(3).  
<sup>106</sup> *Id.*  
<sup>107</sup> 810 ILCS 5/2-207, cmt. 6.  
<sup>108</sup> *Baker, supra* at § 2.40.  
<sup>109</sup> *Id.*  
<sup>110</sup> *Id.*  
<sup>111</sup> *Id.*  
<sup>112</sup> *Album Graphics, supra* at 347; *see also* 810 ILCS 5/2-207 cmt. 4.  
<sup>113</sup> *Album Graphics*, 87 Ill. App. 3d at 347 (a term limiting remedies is a term that alters a contract); *accord Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 713 (7th Cir. 1987); *Lakeside Feeders, Ltd. V. Chgo. Meat Processors, Inc.*, No. 95 C 3655, 1996 WL 396086 (N.D. Ill. July 12, 1996); *but see Intrastate Piping & Controls, Inc. v. Robert-James Sales, Inc.*, 315 Ill. App. 3d 248, 255 (1st Dist. 2000) (a clause limiting remedies would not materially alter the terms of a contract).  
<sup>114</sup> 810 ILCS 5/2-207, cmt. 5.  
<sup>115</sup> *See Southern Illinois Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co.*, 302 F. 3d 667, 675 (7th Cir. 2002).  
<sup>116</sup> 810 ILCS 5/2-719.