

## The Battle of the Forms

Ideally, buyers and sellers will conduct transactions via signed contracts in which each agree to all relevant contract terms. In the actual course of daily business, however, the parties involved often exchange conflicting documents. Buyers issue purchase orders containing one set of terms and conditions designed to protect their interests, and sellers issue acknowledgments with different terms and conditions designed to protect their interests.

These documents typically contain language that addresses every aspect of the transaction (terms and conditions of sale), some immediate information (such as time of payment, date of delivery and price) and some non-immediate terms (such as warranties and returns privileges). The non-immediate terms are usually dealt with by the fine print (also known as boilerplate) on the backside of the documents.

When disputes arise, which document prevails: the buyer's, the seller's or some third-party instrument? Section 2-207 of the UCC addresses this question. Generally, two main questions must be addressed:

1. When was the contract actually created (at time of order, of acknowledgement or some other point)
2. Which set of terms and conditions will take precedence?

In common law, the mirror image and last shot concepts decided these questions. If, for example, the seller's acknowledged terms were not identical to the buyer's purchase order, contract formation did not occur upon rendering of the purchase order. Rather, the seller's acknowledgment would constitute non-acceptance of the contract defined by the purchase order and a counteroffer under different terms. If the buyer then performed in a manner that indicated acceptance (i.e., made payment), the seller's acknowledged terms prevailed (hence the last shot concept). The flaw of the mirror image concept was that a buyer could invalidate a contract by failing to perform (i.e., by withholding payment), although courts often saw through this ploy and ruled against abusers. Likewise, the last shot doctrine seemed arbitrary—why should the last document sent constitute winner take all for the sender?

Section 2-207 (1) limited instances where non-acceptance could exist; the mere existence of differing or additional terms from the offered terms no longer constituted non-acceptance and counteroffer. Therefore, contract formation could now occur even if the purchase order terms and the acknowledged terms differed. This is not always the case. Where terms are significantly divergent (i.e., buyer offers to buy bowling balls, and seller offers to selling pong balls), non-acceptance may still exist. Also, counteroffer will be created in those instances where the following *magic language* appears in a contract: Acceptance is expressly made conditional on the offeror's assent to the additional or different terms contained in the acceptance.

If a contract has been formed despite differences, which terms prevail? In situations where there are additional terms in the acceptance document, those terms become part of the contract (unless offeror has included language similar to that above). If acceptance contains different terms, the courts will ignore both conflicting portions of the terms and so called UCC gap fillers will prevail. UCC gap fillers are the provisions of the UCC that cover the specific issue.

In cases where the terms are materially divergent or both parties use the magic language, there is no contract formation. However, in such cases, if both parties proceed to perform, a conduct-formed contract has been created and the prevailing terms will be those in which both set of documents agree. Where there is disagreement, the gap fillers prevail.

Obviously, most attorneys will recommend their clients include magic language in all contracts so as to negate the other party's conflicting terms. This elevates the importance of the gap fillers as the deciding instruments. Therefore, it is especially important for both sides to know how the appropriate sections of the UCC will impact them if a dispute should arise.

*(Note: The seller's terms of sale can also be set in its credit application, provided that the application is also a contractual agreement.)*

Source: *Principles of Business Credit*