SCOTTISH LAW COMMISSION

CONSULTATION PAPER (PARTS 1 AND 2)

CONTRACT LAW - EXCHANGE OF STANDARD TERM FORMS IN CONTRACT FORMATION

LAW REFORM PROPOSALS

SCOTTISH LAW COMMISSION

CONSULTATION PAPER (Part 1)

CONTRACT LAW - EXCHANGE OF STANDARD TERM FORMS IN CONTRACT FORMATION

LAW REFORM PROPOSALS

These papers are released for comment and criticism and do not represent the final views of the Scottish Law Commission

SCOTTISH LAW COMMISSION

CONSULTATION PAPER (Part 1)

CONTRACT LAW - EXCHANGE OF STANDARD TERM FORMS IN CONTRACT FORMATION

LAW REFORM PROPOSALS

Introduction

1. The purpose of this consultation paper is to elicit comments from businessmen, as well as from lawyers, on a law reform proposal of the Scottish Law Commission which relates to the law governing the practice of contractual dealing through the exchange of standard-term business forms. The problem under consideration relates to a concern that the traditional law of contract formation does not appear to function well in respect of the modern usage of standard forms in everyday routine transactions. In particular, under the application of existing common law, a businessman's standard terms of contract not only may be totally ineffective, but also may be ousted and replaced by the standard terms of another party, even although this was never intended by the original businessman and despite conditions in his own standard form designed to prevent such an eventuality. The proposals which will be presented relate to potential reform of the law of Scotland, but as any such change would also have implications for those trading in jurisdictions within the United Kingdom other than Scotland, consultation is being made on a wide basis.

2. The subject-matter of this consultation paper has its context in a wider review of the law of contracts being undertaken by the Scottish Law Commission. A report, to be submitted to Government, is currently in the process of preparation.

Present Law

3. The problem under consideration is popularly referred to as "the battle of the forms" and can arise when two parties have agreed on certain basic terms for a transaction but have not specifically negotiated the detailed terms of a contract, and have reached this limited state of agreement through the exchange of business forms on the front of which are the agreed basic terms of the particular transaction, but on the reverse of which are their respective printed standard terms. The standard terms of each party's printed forms will probably conflict in many respects and, on being exchanged, will therefore not represent a negotiated and agreed compromise but rather the unresolved statement of conflicting interests. Under these circumstances, where no agreement has been worked out regarding the detail of the printed terms, albeit that there may be agreement in respect of the unprinted terms of the specific transaction, no legally binding contract will have been concluded in the face of unresolved differences between the standard terms.

4. The above result would arise because the law of contract formation demands (under both Scots and English law) that, in order for an offer to be effectively accepted, the acceptance should be in unqualified terms and reflect the offeree's intention to be contractually bound by the terms of the offer. If a purported "acceptance" does not match the terms of the offer, it does not constitute an acceptance, but instead is regarded in law as a counter-offer and a rejection of the offer which would then cease to have effect. As companies normally draft their standard term forms heavily in favour of themselves, an exchange of these conflicting forms, without further negotiation and agreement will usually not produce a legally binding contract.

5. On the other hand, if on receipt of another party's standard form, performance is rendered such that this conduct may be construed as an acceptance of the terms of that form, the law may recognise the existenc of a contract. If a contract is recognised at all its terms would be only those of one party, however - i.e. the terms of the party whose standard form happened to have been delivered immediately prior to the conduct from which acceptance of those terms may be inferred. One party' terms will then be enforced in their entirety, even although the first party's standard form may have expressly sought to exclude the applicatio of anyone else's terms. The evidence used to suggest abandonment by that party of his own terms in favour of those of another may be no stronger than his silent conduct. It can be seen that, given the varied circumstances in which business may be initiated, it may often be more a matter of chance than of calculated design that determines which party's terms are to prevail.

6. In other words, unless a standard form is expressly accepted, in law it may not be as effective as might have been hoped. It may be the case that certain consultees already ensure that parties with whom they do business explicitly accept their standard terms, or they may conclude general agreements with regular trading partners, the terms of which will then govern the mass of individual transactions that follow. If either of the above practices is followed, then "the battle of the forms" may be avoided. The fact remains, however, that not all business deals are so organised or, even where a company normally maintains a system designed to avoid a "battle of forms", a "systems failure" may cause the problem to arise. It is in respect of those dealings where two sets of unnegotiated terms have been exchanged that this paper is concerned.

Law Reform

7. In most circumstances it is anticipated that businessmen will seek t settle contractual difficulties by means other than litigation. Where, however, resort has been made to legal rules to provide an answer, lack of clarity in the law may be an obstacle to the private resolution of dis putes. Additionally, in those residual cases where legal action is taker it may be argued that the law at present does not provide an appropriate answer for the "battle of the forms" problem. Of the potential legal solutions currently available, it may be asked whether it is reasonable either that no contract should be recognised at all, even after parties have acted and relied on there being a contract, or that one party's sma print terms should prevail exclusively as the terms of a contract, when this may never have been the intention of the other party - indeed his o standard terms will probably have stated the contrary intention in no uncertain manner. A more balanced result, which could attempt to remove the potential uncertainties and injustice associated with being deemed t have accepted another party's terms on losing a "battle of the forms", may appear desirable. Accordingly, it is suggested that it may be

possible to adapt the existing theory of the law to provide a more even-handed solution for this problem and, at the same time, to maximize wherever possible the effect of such actual agreement as may be shown to exist between transacting parties.

8. In essence, the above proposal would involve the courts being able to examine the communications of both parties in a "battle of the forms". The law could recognise and give effect to such agreement as may be proved to exist between parties, but at the same time the courts could be required to discount standard terms where there were material differences between the two sets of forms. The courts could also supply such additional terms (implied under law or the custom of the trade) as might be necessary to give a contract proper effect, or, as an alternativ as might be reasonable in the circumstances of the transaction.

9. A supplementary measure could also include provision whereby if ther were differences between an offer and a purported acceptance, but the differences did not appear to be "material", and the offeror did not object to them, a contract would come into existence whose terms would be those of the offer as modified by the acceptance. A non-exhaustive definition, or a set of guidelines, of what respectively would or could constitute a "material" difference could be included in any potential law reform measure.

10. Any legislative provision could be stated in broad terms and could apply to contract formation in general without the need to refer specifically to the use of standard term business forms. The provisional proposals for law reform, if implemented, should not change a lawyer's advice regarding the way in which a contract should be concluded if a businessman wishes his terms to govern his transactions, rather they are designed to provide a just means for dispute resolution when the need arises.

Provisional Proposals

11. The provisional proposals for law reform stated in general terms are as follows:

> 1. Subject to the following proposed rules no alteration should be made to the present rule that an acceptance, if it is effectively to conclude a contract, should meet the terms of the offer.
>
> (A) Where there are differences between the terms of an offer and those of a purported acceptance of it, but it is reasonable to infer from the conduct of the parties that they share an assumption that a contract between them has been concluded, a contract should be deemed to have come into existence. The terms of the contract should be those terms upon which the parties have agreed together with:
>
> (first alternative) such other terms as may be necessary to give the contract proper effect; or
>
> (second alternative) such other terms as may be reasonable.
>
> For the purposes of either alternative regard shall be had to:
>
> (i) the writings or other communications of the parties;

(ii) the conduct of the parties; and

(iii) such terms as may be implied by law.

(B) Where the purported acceptance of an offer contains additional or different terms which do not materially alter the terms of the offer that acceptance should effectively conclude a contract unless the offeror objects to those terms without undue delay. In this case the terms of the contract would be the terms of the offer as modified by the terms of the acceptance.

(First Option)

For the purposes of proposition (B) in deciding whether an additional or different term constitutes a material alteration of the terms of the offer, regard shall be had in particular to the price, the method of payment, the quality or quantity of goods, the place and time of delivery of goods, the time and manner for the provision of services, the extent of one party's liability to the other, the choice of law applicable and the mode of settlement of disputes.

(Second Option)

For the purposes of proposition (B) any additional or different term relating to the price, method of payment, the quality or quantity of goods, the time and manner for the provision of services, the extent of one party's liability to the other, the choice of law applicable and the mode of settlement of disputes should be deemed to "materially alter" the terms of the offer. This rule, however, would not prejudice the right of the court to hold in the circumstances of the case that any other term of a purported acceptance would materially alter the terms of the offer.

2. Where the above proposed rules would apply any terms in the writings or other communications of any party which purports to negative or vary the effect of these rules should be void.

3. For the purposes of the above proposed rules the term "conduc should be taken to include silence on the part of one party in the knowledge of actings on the part of the other which are referable to an assumption by that other that a contract has been concluded between them.

12. Any provision on these matters would, of course, require to be translated into statutory form in a draft Bill.

QUESTIONS FOR CONSULTEES

13. (1) Do you approve of the provisional proposals outlined in paragraph 11 above?

(2) If your answer to the first question is wholly or partially in the negative, what alternative approach do you suggest

should be adopted? Where a preferred option has been stated comment would also be welcome in respect of the option not selected.

(3) Do you consider that there are any types of contracts in respect of which any of the above proposed rules would be inappropriate?

(4) Are there any further observations you would care to make?

NOTE: This paper is set out in general terms and consultees may also wish to discuss this matter with their lawyers before submitting comments. For those purposes, an additional paper with further legal analysis and discussion is attached. The Commission would be grateful if comments were submitted as soon as possible and not later than 31 May 1982.

These papers are released for comment and criticism and do not represent the final views of the Scottish Law Commission. All comments should be addressed to:

J C Mullin Esq
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

(Telephone: 031-668-2131)

SCOTTISH LAW COMMISSION

CONSULTATION PAPER (Part 2)

CONTRACT LAW - EXCHANGE OF STANDARD TERM FORMS IN CONTRACT FORMATION

Legal Background and Law Reform Proposals

This paper is released for comment and criticism and does not represent the final views of the Scottish Law Commission

CONSULTATION PAPER (Part 2)

INDEX

SCOTTISH LAW COMMISSION

CONSULTATION PAPER (Part 2)

CONTRACT LAW - EXCHANGE OF STANDARD TERM FORMS IN CONTRACT FORMATION

Legal Background and Law Reform Proposals

I INTRODUCTION

(a) The Problem

1. The Scottish Law Commission is currently engaged in the preparation of a report on the law of contract formation and its reform (see S.L.C. Consultative Memoranda Nos. 34 to 39 and in particular Memorandum No. 36). Following the general consultation on this area of law, one specific problem of contract formation has been brought to the Commission's attention following the English Court of Appeal case of Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation.[1] The problem there highlighted is popularly referred to as "the battle of the forms" and can arise when two parties have agreed on certain basic terms for a transaction, but have not specifically negotiated all the detailed terms of a contract, having reached this limited state of agreement through the exchange of business forms, on the front of which are the agreed basic terms for the particular transaction, but on the reverse of which are their respective printed standard terms of contract. These parties may consider that they have concluded a contract but, as more often than not there will be a conflict between the printed terms of the exchanged standard forms, or the purported acceptance will at least include terms additional to those originally offered, the law will probably not be able to support the parties in their belief - i.e. there will be no legally binding contract at that time. Where the parties proceed to act as if there were a contract in existence, a contract may then come into being - but on terms which may be very different from those anticipated certainly by one, if not both, of the parties, as will be explained. This aspect of the law was discussed in Memorandum No. 36, at paragraphs 29 to 31, but in light of legal developments since then the Commission has decided that further consultation should take place regarding new provisional proposals concerned with the "battle of the forms" problem.

2. The general rule of the law, at present, is that for an acceptance to be effective it must precisely meet the terms of the offer.[2] The simple exchange of conflicting standard forms will not, of itself,

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[1] [1979] 1 W.L.R. 401 (also [1979] 1 All E.R. 965).

[2] Bell's Principles (4th edn.) 77; Bell, Commentaries (7th edn., ed. McLaren) I, 344; and see Johnston v. Clark (1855) 18D 70. This rule is qualified to the extent that where the new term which the acceptance seeks to introduce is one which the law would in any event imply its expression in the acceptance will not prevent a contract's coming into existence. See Erskine v. Glendinning (1871) 9M 656 at p. 659 per Lord President Inglis.

therefore produce a legally binding contract,[1] albeit that the parties involved may have intended to conclude a deal.

3. The transacting parties may, nonetheless, share a common belief that a contract of a particular kind is in existence and act on that basis, although each would probably have in mind a contract concluded on his own terms. Conduct of this nature may be construed as an implied acceptance of the last form exchanged between the parties and the law may then recognise and give effect to a contract on those terms. The terms of the contract would be those of only one party, however, i.e. those of the party firing the "last shot" in the "battle of the forms", even although the other party may never have intended this and despite the fact that he will have presented his standard terms first, which may even have included a clause such as:

> "Contracts are made with and orders are accepted by the company only upon and subject to the company's conditions of tender and contract as stated herein. Unless expressly accepted in writing by the company, any variations, qualifications or exclusions of any of these conditions shall be invalid and inoperative. The placing of an order with the company will constitute acceptance of these terms by the customer and these terms shall govern all work done, goods supplied and services rendered by the company."

At law, a communication which does not meet the terms of the offer will constitute a counter-offer and a rejection of the offer which thereby will cease to have effect. It will then be the counter-offer, and not the original offer, which will be open for acceptance, and acceptance may be inferred from conduct.[2]

4. An example of the above-noted analysis can be seen in the unreported Scottish case of Chilton Bros. Ltd. v. S. Eker Ltd (8th July 1980, Outer House, Lord Grieve). There, following a telephone conversation, a supplier of fabric sent to its customer an order form, already completed regarding the details of the order to be made but requiring the customer to acknowledge that the placing of the order and the supplier's acceptance thereof should be subject to the standard terms on the reverse side of the order form. This condition was contained in the body of the order form itself and also in a tear-off acknowledgement slip which was to be signed by both the customer and, in turn, the supplier. The slip read:

> "We acknowledge that our placing of this order and your acceptance thereof shall be subject to the terms and conditions appearing on the reverse of this order, which terms and conditions have been specifically drawn to our attention."

The customer ignored this order form and instead sent his own order asking for delivery of the fabric. No conditions were attached to this order other than one on the front of the form which stated that time was to be of the essence. This provision conflicted with certain of the

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[1] See Wylie & Lochhead v. McElroy & Sons (1873) 1R 41.

[2] See also, although in a different context, the case of Colquhoun v. Wilson's Trs. (1860) 22D.1035.

standard terms of the supplier, but the supplier, nonetheless, dispatched the fabric. The Lord Ordinary (Grieve) analysed the situation as follows:[1]

> "..... the circumstances here in my opinion fall to be regarded as the making of an offer by the pursuers on certain conditions being met by a counter offer by the defenders which did not accept any of these conditions but imposed one of their own, namely that time was of the essence of the contract, which struck directly at some of the conditions in those proposed by the pursuers. The pursuers made an offer to supply goods on certain conditions, the defenders met their offer by an order to supply these goods on different conditions and following that order the goods were supplied, thus completing the contract (Gloag on Contract 2nd ed. page 26)."

A contract was thus recognised to have been concluded, but on the limited terms of the customer who had fired "the last shot" with his own simple order.

5. Alternatively, a court might be prepared to recognise a binding contrac following a "battle of forms", if agreement was at least evident in respect of primary contractual obligations[2] between transacting parties, even although consensus may still be lacking regarding secondary obligations presented by each party, most of which will probably be contained in their printed standard terms. The court might then disregard those terms on which there was no agreement and instead imply such secondary obligations as the law might be able to provide, which, of course, might be different from those originally presented by either party. Indeed existing statute or common law may be unable to supply implied terms in respect of all matters on which there has been a conflict of terms. The court would probably only be prepared to adopt the above approach if it were satisfied that the conduct of the transacting parties was such as could provide evidence to prove that the parties had at least reached agreement on the basic terms of a particular contract. Gloag has described this as a less usual form of rei interventus[3] but has also noted that the courts may not always be

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[1] At pages 7 and 8 of the judgement. An alternative analysis might have been, it is respectfully suggested, that the supplier had merely tendered to his customer the draft of an offer (albeit that it would be an offer couched in terms prepared by the intended offeree) which the customer could then dispatch as an offer for acceptance by the supplier. Following this argument it could be stated that the customer ignored the draft offer and instead submitted his own offer which in turn was accepted by the supplier. This particular analysis would not show the case to be a classic example of a "battle of the forms", but it can be seen that examples of such problems could easily arise.

[2] "Primary obligations" being used in the sense of those terms in respect of which agreement is essential for the creation of a particular contract. What are essential terms may vary depending on the nature of the contract itself and its particular circumstances, see R & J Dempster v. Motherwell Bridge and Engineering Co. 1964 S.C. 308.

[3] See Gloag on Contract 2nd edn., p. 46.

prepared to recognise a contract by this means[1]. Where no contract is recognised, but where a party has carried out work at his expense for the benefit of another, and has not intended to do so gratuitously, he may find relief in the equitable remedy of recompense.[2] When a claim for recompense is made where no claim under contract would be competent, the amount of recompense will be calculated on a quantum lucratus basis, whereas a claim under contract would be assessed quantum meruit. These two different methods of calculation, if applied in respect of the same performance, may produce substantially different results.

(b) Need for Law Reform

6. A lawyer might be tempted to consider that any legal problems arising for the businessman in this context are those of his own creation, in that he should have been able to conclude a contract on agreed terms, and at the same time satisfy the traditional legal rules of contract formation. It may be worth asking, however, whether the demands of the law and legal practice are either realistic or reasonable for those commercial situations where "battle of the forms" problems are likely to arise. It may be that it is the law itself which requires reform.

7. Indeed it would appear that under existing common law it is not clear whether, following a "battle of forms" and related conduct by the parties concerned, a court would hold that:

(a) there was no contract;

or

(b) there was a contract, but based entirely on the terms last presented;

or

(c) there was a contract whose terms would be those on which the parties were agreed, disregarding those on which there was no agreement, the court supplying such additional terms as the law may be capable of providing.

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[1] See Wight v. Newton 1911 S.C. 762 where the Second Division of the Court of Session was prepared to recognise a binding contract, even although there remained dispute between the contracting parties over certain secondary obligations. The court deleted the conflicting terms and the parties' rights were left to be determined according to the common law, to the extent that that was possible. But cf. Buchanan v. Duke of Hamilton (1878) 5R (H.L.) 69 where a similar factual situation obtained and the House of Lords held that no contract had been concluded. Gloag states of those cases (op. cit., p. 47, n.3 "... it is submitted that no distinction is possible, except on the footing that in this branch of the law each case must depend on its own circumstances."

[2] See Lawrence Building Co Ltd v. Lanark County Council 1979 S.L.T. 2.

The last of these possibilities may have restricted application[1] and in respect of the first two it could be argued that in such circumstances a court should not be constrained to conclude, as traditional analysis might force it to do, either that there is no contract or, if there is, that it should be based exclusively on the standard terms of one party alone - especially when the other party's standard form may itself have expressly sought to exclude the application of any other terms and when there has been no stronger evidence, other than that of silent conduct, to suggest a new and contrary intention to that originally expressed.[2]

8. Demands for reform of this area of law were made in two relatively recent articles in the Journal of the Law Society of Scotland, where it is argued that:[3]

> "Without doubt, this is a matter in which legislative intervention is urgent and would be welcome and, 'abstruse' as the problems of a battle of forms may be, they still require an answer."

It may indeed be possible for the law to be adapted to deal with these problems which are likely to arise in commercial practice and to provide some means of resolving differences between transacting parties which may be just for both of them. Law reform with that objective need not affect commercial practice itself, but rather could introduce rules to respond to that practice.

9. Before considering any provisional proposals for law reform, the context of the problem and comparative law sources will be examined.

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[1] This approach may be limited to situations such as where the primary obligations of a contract have already been agreed on between two parties, talking over the telephone for instance, and later they exchange business forms which reflect the same agreement but which have conflicting standard terms printed on their respective reverse sides. The original agreement may be recognised and the court may supply further terms where these are needed, disregarding the conflicting or non-agreed terms of both parties. Even in such circumstances but where it is considered, however, that the oral communications do not in themselves constitute a contract, the court may instead apply an analysis of offer, counter-offer, and its acceptance through conduct, as it did in the unreported case of Chilton Bros. Ltd v. S. Eker Ltd (see paragraph 4, ante), thus making the last standard form delivered, or the "last shot", the decisive element in a "battle of forms".

[2] See footnote 1 at p. 16 post

[3] The Battle of the Forms" 1979 J.L.S. 375 at p. 377 and "The Battle of Forms - Postscript or Epitaph?" 1980 J.L.S. 69, both by A.D.M. Forte.

(c) Business Behaviour - The Context of the Problem

10. "Standard forms" and "standard terms" may be created and utilised in a number of different ways and for different purposes. For instance, certain associations may produce standard conditions of contract (e.g. R.I.B.A. or I.C.E. standard terms) for parties who are likely to engage regularly in certain types of contract. Such terms may be incorporated by agreement between parties to govern the details of a particular contract. Also, parties may themselves negotiate their own standard or "overriding" agreement, in the absence of any appropriate pre-prepared terms, to regulate all of their future dealings, if a regular course of trading is anticipated. Alternatively, standard forms may be drafted unilaterally with the intention that they alone should govern any contractual relationships. Indeed it may not be uncommon for one party to attempt to impose on another his own terms or the standard terms of some association. These terms may be printed in full on all documents presented to the other party, although this may not necessarily be the case, particularly if there are a large number of standard terms, and instead they may be introduced by means of a general reference to them on all such documents.

11. Although a party may seek the specific, unreserved acceptance of his standard terms,[1] in dealings with other commercial enterprises the reply received may include the other party's own standard terms of contract - a "battle of the forms" will have been set in motion. The parties may then either resolve their differences by negotiating an agreement, or they may leave the matter unresolved. If the latter course is in fact followed, but the parties later encounter difficulties in their business relationship, resort may be made to contractual terms, and the question will then arise as to whose standard terms are in law effective.[2]

12. In respect of business practice regarding the use of standard forms in contractual dealings, different experiences have been recorded. For example, on the question of the validity of certain assumptions

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[1] e.g. See Aluminium Industrie Vaassen BV. v. Romalpa Aluminium Ltd. [1976] 2 All E.R. 552., where the plaintiffs had required the original partnership they were trading with to sign a copy of their general conditions, which were deposited or registered with all district or county courts in Holland. The invoices used in business had a printed "epitome" of the general conditions printed on the back.

[2] An example of the way in which English courts have dealt with this issue is the case of B.R.S. v. Crutchley [1968] 1 All E.R. 811 where, over a course of dealing, the plaintiffs' drivers would normally hand to the defendants a delivery note which contained the words:
"All goods are carried on the (plaintiffs') conditions of carriage, copies of which can be obtained upon application to any office of the (plaintiffs)",
but in turn this delivery note would be rubber-stamped by the defendants with the words "Received under A.V.C. conditions". The delivery note which was considered thus to have been converted into a receipt note was handed to the plaintiffs' driver and he would bring his load into the warehouse. It was held that the defendants, by stamping the delivery note made a counter-offer and that by handing over the goods the plaintiffs' driver, on behalf of the plaintiffs, accepted that counter-offer". (See also [1967] 2 All E.R. 785 at p. 787 per Cairns J.).

that businessmen pay no attention to the fine print of each other's forms, but instead consider a contract to have been concluded whenever there has been agreement on the major non-standard terms of the deal, one writer has noted, from such empirical research[1] as has been conducted into the matter that:[2]

> "... there is no empirical evidence in England to support these assumptions and the only evidence existing suggests their falsity. Beale and Dugdale interviewed representatives of 19 firms of engineering manufacturers. From this limited sample two relevant pieces of evidence emerge about commercial attitudes to Battles of Forms. First, there was 'considerable awareness of the fact that in many cases an exchange of conditions would not necessarily lead to an enforceable contract.' Secondly, businessmen do not always ignore fine print. Rather, whilst certain items such as price and subject matter were always agreed expressly, the incidence of actual negotiation over standard conditions varied substantially. But 'in the majority of cases at least a few of the more important terms dealt with in the standard conditions would be discussed and agreed.' Clearly more research is required before the assumptions can be accepted."

13. Some different experiences have been recorded through research conducted by the Ontario Law Reform Commission in the course of the preparation of their report on the reform of sale of goods law and contracts for the sale of goods. A questionnaire was sent out to the Canadian Manufacturers Association - it being later estimated that 60% of the C.M.A. respondents had had some kind of experience of potential "battle of forms" conflicts.[3] The Commission commented on some of the replies received:

"Two contrasting businessmen's views about the value of such forms are worth citing. The first was expressed by a C.M.A. respondent in the following language:

> It has been my experience that the mechanics of buying and selling in the private sector in inter-company commerce are much the same the country over. The basis of the system is the exchange of printed Purchase Order Forms and Sales Order Forms. The creation of both forms follows a predictable pattern.
>
> The buyer's system engineer designs the front of the P.O. form such that all information required to communicate his needs are stated. His lawyer then fills up the back of the form.
>
> The seller's systems engineer designs the front of the S.O. form such that effect may be given the buyer's wishes. His lawyer also fills up the back of his form.
>
> The front of the forms is a manifestation of good communications; the back of the form is a manifestation of what your profession calls the adversary system, I believe.

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[1] See Beale and Dugdale "Contracts between Businessmen. Planning and the Use of Contractual Remedies" (1975) 2 British Journal of Law and Society 45.

[2] R. Rawlings "The Battle of the Forms" 1979 M.L.R. 715.

[3] Sale of Goods Report, 1979, at p.81, fn. 25.

> Fortunately, a conspiracy developed many years ago between Purchasing Agents and Sales Managers under which both agreed not to read the back sides of the other's form. Were it not for this layman's conspiracy, the economy of Ontario would doubtless be destroyed.

A second, and less sceptical, view appears in a manual prepared by another respondent for the guidance of its staff. This describes the use of standard forms as 'a practical way of handling thousands of orders per month for standard commercial items not involving systems or other special applications.'"

14. The situation may in fact be that business practice varies substantially with different market sectors, with different sizes and structures of company and with transactions concluded at different levels of corporate management. Consultees are invited, where appropriate, to describe the manner in which they conclude contracts where standard terms are used by either one or both parties.

15. The fact remains, however, that where companies do not resolve differences between their own proposed contractual terms and the terms of those with whom they intend to do business, legal problems will easily arise. Indeed it may be the case that the company official involved in concluding a contract has no authority from his employer to depart from the company's standard terms by concluding any form of negotiated agreement. Even with a strict internal system in a company requiring its staff to be aware of and to avoid "battle of the forms" problems, there can always be a "systems failure". Under such circumstances where a company has not fired the "last shot" in the "battle", it is likely that its standard terms will fail completely and those of the other party will prevail instead.

16. In an attempt to make law reform proposals which might adapt existing legal theory to produce a more balanced result than at present available when there is a conflict of standard forms, the English case of Butler Machine Tool Co., and some other comparative law examples of new approaches to this problem, taken from the U.S.A., Ontario and UNCITRAL (U.N. Commission on International Trade Law) will next be examined in order to highlight some of the legal difficulties which can, or could, arise and also to evaluate the attempts made by other legal systems to overcome such problems.

II COMPARATIVE LAW SOURCES

(a) England - The Butler Machine Tool Case[1]

17. The case involved a company which had made a quotation offering to sell a machine tool to prospective purchasers subject to certain printed terms and conditions, it being stated that "these terms and conditions shall prevail over any terms and conditions in the Buyer's order." The conditions included a price variation clause, the price of the goods to be that ruling at the date of delivery. The buyers in turn made an order but subject to certain terms and conditions which were substantially different from those put forward by the seller, and in particular made no provision for price variation. At the foot of

[1] [1979] 1 W.L.R. 401 (also [1979] 1 All E.R. 965).

the buyer's order there was a tear-off acknowledgement of receipt of the order stating "we accept your order on the terms and conditions stated thereon." The sellers completed and signed this acknowledgement, accompanying it with a letter which stated that the buyer's order was being entered in accordance with their revised quotations.

18. The sellers then delivered the machine tool late and, prior to delivery, also sought to make use of the price variation clause to the extent of increasing the price by £2,892. The buyers refused to pay this additional amount and therefore the sellers brought an action for payment of the increase which they claimed was due under the price variation clause contained in their original offer. The buyers contended that the contract had been concluded on their terms and that therefore it was a fixed-price contract. The court of first instance found for the sellers and the buyers appealed.

19. The appeal was successful, but although the judges of the Court of Appeal were unanimous in finding in favour of the buyers, their lordships did not all reach that conclusion by the same route of legal reasoning. In particular, although Lord Justices Lawton and Bridge based their judgments on a traditional analysis of offer and acceptance, Lord Denning M.R. ventured further, although this was not strictly necessary, and presented a new approach to the theory of contract formation, to be discussed further.

20. In the court of first instance the judge (Thesiger J.) had also adopted a novel approach to the problem. He considered that the clause, contained in the seller's original quotation, which provided "these terms and conditions shall prevail over any terms and conditions in the Buyer's order", was of the greatest importance. He was of the opinion that it was so emphatic a provision that it continued to apply throughout all subsequent dealings and that the buyer must be taken to have agreed to it.

21. In rejecting the above approach, Lawton L.J. stated:[1]

> "The modern commercial practice of making quotations and placing orders with conditions attached, usually in small print, is indeed likely, as in this case to produce a battle of forms. The problem is how should that battle be conducted? The view taken by Thesiger J. was that the battle should extend over a wide area and the court should do its best to look into the minds of the parties and make certain assumptions. In my judgment, the battle has to be conducted in accordance with set rules. It is a battle more on classical 18th century lines when convention decided who had the right to open fire first rather than in accordance with the modern concept of attrition".

He then continued to apply traditional theories of offer and acceptance and concluded that the buyer's response to the seller's offer was in no way an acceptance but in fact was a counter-offer, presenting the buyer's terms for acceptance and providing a tear-off acknowledgement slip for that purpose. He held that by completing and returning

[1] [1979] 1 W.L.R. 401 at p. 405.

the acknowledgement slip the sellers thus had accepted the buyer's terms. Lawton L.J. also observed:[1]

> "It is true, as counsel for the sellers has reminded us, that the return of that printed slip was accompanied by a letter which had this sentence in it: "This is being entered in accordance with our revised quotation of 23 May for delivery in 10/11 months." I agree with Lord Denning M.R. that, in a business sense, that refers to the quotations as to the price and the identity of the machine, and it does not bring into the contract the small print conditions on the back of the quotation. These small print conditions had disappeared from the story. That was when the contract was made. At that date it was a fixed price contract without a price escalation clause."

22. Bridge L.J. agreed with this reasoning and stated:[2]

> "... this is a case which on its facts is plainly governed by what I may call the classical doctrine that a counter-offer amounts to a rejection of an offer and puts an end to the effect of the offer."

23. Lord Denning tried a different approach. In doing so he stated that he found sympathy with the reasoning of the judge of first instance, although he eventually disagreed with his conclusion, and expressed the view that:[3]

> "In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date. This was observed by Lord Wilberforce in New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. [1975] A.C. 154, 167. The better way is to look at all the documents passing between the parties - and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points - even though there may be differences between the forms and conditions printed on the back of them. As Lord Cairns said in Brogden v. Metropolitan Railway Co. (1877) 2 App.Cas.666, 672:
>
> "... there may be a consensus between the parties far short of a complete mode of expressing it, and that consensus may be discovered from letters or from other documents of an imperfect and incomplete description; ..."
>
> Applying this guide, it will be found that in most cases when there is a "battle of forms", there is a contract as soon as the last of the forms is sent and received without objection being taken to it. That is well observed in Benjamin's Sale of Goods, 9th ed. (1974), p.84. The difficulty is to decide which form, or which part of which form, is a term or condition of the contract."

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[1] at p. 406.

[2] at p.407.

[3] at p. 404.

He foresaw three basic solutions for such a problem:

(1) The battle is won by the man who fires the last shot or, in other words, puts forward the latest terms and conditions. The reasoning would be that if these terms are not objected to by the other party, he may be taken to have agreed to them. However, neither Lord Denning, nor Bridge L.J., would go as far as to agree with the illustration provided by Professor Guest in "Anson's Law of Contract"[1] that "the terms of the contract consist of the terms of the offer subject to the modifications contained in the acceptance."

(2) The battle is won by the man who "gets the blow in first". This would occur in cases where a seller had made an offer at a stated price, subject to terms and conditions printed on the back of the offer, and the buyer has ordered the goods in purported acceptance of the offer, but on an order form which has its own terms and conditions stated on the back. For such situations Lord Denning contended that if the difference between the respective terms of both sets of forms was "so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller." (Emphasis supplied).[2]

(3) The outcome of the battle depends on the shots fired on both sides. In relation to this solution Lord Denning stated:[3]

"There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable - so that they are mutually contradictory - then the conflicting terms may have to be scrapped and replaced by a reasonable implication."

24. Lord Denning determined that in the resolution of such issues there was one overriding consideration to be borne in mind, however, and this was that an exchange of documents should always be considered as a whole when determining the terms of a contract. In this case he disagreed with the conclusion of the judge of first instance, although he had some sympathy for it, and held the buyer's tear-off acknowledgement slip, which had been signed and returned by the seller, was the decisive document. Accordingly, he recognised a contract but on the buyer's terms.

25. The Butler Machine Tool Co. case is not an ideal example of a "battle of the forms" problem - it merely contains some of the

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[1] 24th edn. (1975) at pp. 37-38.

[2] at p. 405.

[3] at p. 405.

ingredients for a conflict of contractual terms. Although the particular facts enabled the case to be resolved satisfactorily by the application of traditional theories of contract formation, at least by the majority in the Court of Appeal, the Master of the Rolls took the opportunity to propound new theories of contract formation and to present possible resolutions of the problem. It is open to doubt whether the Scottish courts would adopt any of the solutions Lord Denning has suggested in genuine cases of a "battle of the forms".

(b) The United States

26. In the United States a "ribbon matching" or "mirror image" rule of offer and acceptance, with certain minor exceptions, was applied under the common law of contract formation in a similar manner to that currently applicable in Scotland.[1] It was assessed, however, that this legal theory was insufficient to cope with the modern practice of the exchange of printed forms in purported contract formation. Section 2-207 of the Uniform Commercial Code was introduced to deal with this problem. Circuit Judge Celebrezze in the case of Dorton v. Collins and Aikman Corporation[2] commented on the section as follows:

> "... This section of the Code recognises that in current commercial transactions, the terms of the offer and those of the acceptance will seldom be identical. Rather, under the current "battle of the forms", each party typically has a printed form drafted by his attorney and containing as many terms as could be envisioned to favour that party in his sales transactions. Whereas as under common law the disparity between the fine-print terms in the parties' forms would have prevented the consummation of a contract when these forms are exchanged, Section 2-207 recognises that in many, but not all, cases the parties do not impart such significance to the terms on the printed forms .... Thus, under Subsection (1), a contract ..... (may be) recognised notwithstanding the fact that an acceptance.. contains terms additional to ... those of the offer ...."

A copy of Section 2-207[3] is attached as Appendix I to this paper. As will be discussed further, some commentators have argued that this provision has not proved successful in practice, but its terms are examined in the following paragraphs so that any provisional proposals herein contained can be evaluated in the full context of attempts to resolve this legal problem.

27. Under Section 2-207(1) a contract may be constituted by a timely acceptance of an offer, if it can be seen to be intended as an acceptance, despite the fact that "it states terms additional to or different from those offered or agreed upon". That is the first important difference between the Code and common law - the need for a mirror image acceptance is dispensed with. However, the offeree's position may be reserved, and the conclusion of the contract

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[1] See Scottish Law Commission Consultative Memorandum No. 36 at para. 29.

[2] 453 F.2d. 1161 at p.1166 (1972) (U.S. Ct. of Appeals, 6th Circuit).

[3] See also its accompanying official comments.

postponed, if "acceptance is expressly made conditional on assent to the additional or different terms." The contract then is concluded by the assent of the original offeror to the additional or different terms.[1] It may be asked, however, what the situation in law would be if, despite such a condition which is not followed by express assent, the subsequent conduct of the parties nonetheless indicates that they recognise a contract to be in existence. Under those circumstances, or where the writings of the parties do not otherwise establish a contract, Section 2-207(3) comes into play, giving effect to contractual terms in fact agreed to and also those provided by the Act itself.

28. Where an "acceptance" is not expressly stated to be conditional on assent to its additional or different terms, it will be effective to conclude a contract despite the fact that its terms may not "mirror" those of the offer. Section 2-207(2) will apply and "additional terms" will be treated as "proposals for addition to the contract" which become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) the additional terms "materially" alter the original offer; or

(c) notification of objection to them is received within a reasonable time.

In other words, unless (a) and (b) could be said to apply, additional terms become part of the contract if no objection has been made to them by the offeror within a reasonable time. Section 2-207(2) is further complicated, however, by a distinction between "additional or different"[2] and "conflicting" terms, which is introduced by the Code's Official Comment No. 6 to that Section. This distinction arises in relation to "written confirmations"[3] (as opposed to "seasonable expressions of acceptance" - see s.2-207(1)) and the commentary states that "where clauses on confirming forms sent by both parties conflict, each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract."[4]

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[1] "In order to fall within this proviso, it is not enough that an acceptance is expressly conditional on additional or different terms; rather, an acceptance must be expressly conditional on the offeror's assent to those terms." (emphasis in original, see Dorton, supra, at p. 1168. See also, C. Itoh & Co. Inc. v. Jordan Int'l. Co. 552 F 2d.1228 (1977) (U.S. Ct. of Appeals, 7th Circuit).

[2] On the face of it, Section 2-207(2) would appear only to apply in respect of "additional" terms, but official comment No. 3 indicates that the intention is to permit "additional or different" terms to become part of the contract.

[3] i.e. "where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed." - See Official Comment No. 1.

[4] Official Comment No. 6.

29. The way in which Section 2-207 might operate can perhaps be illustrated by examining a typical situation in which a "battle of the forms" could arise. For example, A Ltd. sends to B Ltd. an order for a certain quantity of goods at a certain price. The order is typed on A Ltd's. standard "order form" which has printed on it many clauses which are stated to be the terms on which alone A Ltd. makes the order. B Ltd. accepts the order by dispatching to A Ltd. its own standard "acceptance form" on which is to be found an equal number of printed clauses, which are stated to be the terms on which alone B Ltd. accepts the order. There are substantial differences between the clauses of the two forms. Under traditional rules of contract formation it probably would be held that no contract of sale had been concluded, at least, that is, until the goods had been delivered to and accepted by A Ltd. On that basis the terms of the contract would be those of B Ltd's. "acceptance form", A Ltd. being regarded as having by conduct accepted the counter-offer contained in B Ltd's. form. Under Section 2-207 a very different result would probably be reached.

30. First, in terms of U.C.C. Section 2-207, on the mere exchange of standard forms a contract would be recognised to have come into existence provided that B Ltd's. "acceptance form" satisfied the test of being "a definite and seasonable expression of acceptance." Since B Ltd's. order form contains no express stipulation that acceptance is conditional on assent to the additional or different terms a contract should be concluded on the "seasonable expression of acceptance" by B Ltd.

31. Secondly, although the aim of Section 2-207 is not only to recognise the existence of a contract on the exchange of differing printed forms, but also to take into account the terms of both sets of forms wherever possible, this latter aspect is qualified by Section 2-207(2)(a). A contract can be concluded on the exchange of standard forms, but the additional or different terms of the offeree will not become part of that contract if inter alia "the offer expressly limits acceptance to the terms of the offer" - and such a stipulation is in A Ltd's order form.[1] None of B Ltd's. terms, therefore, will become part of the contract, although receipt of his acceptance form will have been effective to conclude the contract.

32. If the writings of the parties do not establish a contract, then one is in the position of having to rely on Section 2-207(3) and demonstrate that conduct by both parties nonetheless shows recognition

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[1] See F.D. Lipman, "On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code" 1969 The Business Lawyer 789 at p. 802:

"The offeror can, however, exclude even those additional terms which do not materially alter the terms of the offer, by placing in his offer a provision that acceptance is limited to the terms of the offer or a provision objecting to any additional terms. If the offeror and offeree are not both merchants, the offeree's additional terms can never become a part of the contract, unless agreed to by the offeror. If the offeree wishes to avoid making a contract on the offeror's terms, he must avoid sending the offeror an Expression of Acceptance or Confirmation document, or make any acceptance contained in such documents expressly conditional on assent to the additional or different terms."

of the existence of a contract. The terms of that contract would then be those actually agreed on, plus supplementary terms provided by the U.C.C. itself.

33. Although Section 2-207 has attempted to provide some solution to the "battle of the forms" problem it has met with much adverse criticism, not least from the Ontario Law Reform Commission.

(c) Ontario Law Reform

34. In 1979, the Ontario Law Reform Commission published a report on the sale of goods and attached a draft Bill which, if implemented, would provide a reformed law of contract formation in relation to sales, and reform of the law on sale of goods itself. One of the problems of contract formation discussed was that of the "battle of the forms". U.C.C. Section 2-207 was examined to see if it could provide a useful model for the development of Ontario Law. The Commission stated:[1]

> "However meritorious the draftsmen's overall objectives may have been (and this too is a matter for serious debate), there is general agreement that Section 2-207 is not well drafted and that it raises as many issues as it solves. In the colourful language of White and Summers, the section is in one respect "like the amphibious tank that was originally designed to fight in the swamps, but was ultimately sent to fight in the desert". .... Even its friendlier critics admit that the section is 'one of the most important, subtle, and difficult in the entire Code'".

The Commission then proceeded to list the many problems of definition which abound in Section 2-207. It was concluded that Section 2-207(3) alone should be adopted:[2]

> "So long as the "agreement" is still executory and the parties have not proceeded beyond the exchange of forms, there is no undue hardship in applying existing rules of offer and acceptance and finding that there is no concluded agreement between the parties. The "mirror image" rule of acceptance may enable one or the other party to escape from a bargain that he no longer finds to his liking, but such cases do not appear to arise often in practice. In any event, it is always open to a court to find that the offeree did not intend to reject the offer, and that the variant terms in the response, if minor in character, were only in the nature of suggestions.
>
> It is different once the parties have proceeded to act as if there were a binding contract. Unless one were to argue that the transaction was a nullity, or at least voidable, on the grounds of mutual mistake (a proposition that few have entertained seriously), the court must construct the terms of the bargain on some realistic basis. This is what U.C.C. 2-207(3) attempts to do. It is not realistic to say that, because the last document in the exchange of writings contained the seller's

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[1] At page 83 of the Report on Sale of Goods.

[2] At page 84.

disclaimer clause, or other variant terms, the buyer must therefore be deemed to have assented to them when he accepted the goods.[1] The assumption would be clearly fictitious if the buyer's order form had rejected in advance any deviations not approved by him in writing. Should it make a difference that he did not exercise this measure of foresight?"

The Ontario Commission has expressed the wish that the law should adopt an attitude of evenhandedness in respect of the difficult problems which result from business behaviour and has recommended that subsection (3) of Section 2-207 could provide the most reasonable solution. The Commission concluded:[2]

"If sellers and buyers do not like the results, they can avoid them by insisting on explicit acceptance of their terms."

The draft Bill appended to the Ontario Law Reform Commission's report contains a provision in terms very similar to those of Section 2-207(3) of the American U.C.C.[3]

(d) Ontario Case Law

35. Meanwhile, a "battle of the forms" case has appeared, at a preliminary stage, before the Ontario High Court. The case was that of Tywood Industries Ltd. v. St. Anne-Nackawic Pulp and Paper Co. Ltd.[4] There the plaintiff, an Ontario manufacturing company, was invited by the defendant, a New Brunswick company, to tender for the sale of storage tanks. The defendant's invitation was on a form entitled "A Request for Quotation" which set forth the goods required and on the reverse side were 13 printed "Terms and Conditions", none of which dealt with arbitration. The plaintiff replied with a quotation in letter form, but the reverse side of the letter contained a list of 12 "Terms and Conditions of Sale", none of which made reference to arbitration, but the final condition of which read:

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[1] Professor Shanker is quoted on this point, "Contract by Disagreement'? (Reflections on UCC 2-207)" (1976), 81 Com.L.J. 453 at 454, n.13: "... there is a vast distinction (which the common law courts seemed to have overlooked) between one who receives goods from an original offer as opposed to one who receives goods under a counter offer. Most important, the recipient who receives goods under a counter offer simply has not received them in silence. Quite to the contrary, he originally was an offeror himself. And, in that original and prior offer, he loudly and clearly manifested the contractual terms which he expected and would agree to. Thus, to place this recipient in the same legal posture as the recipient who never had said anything during the transaction just plain ignores the actual facts."

[2] at page 85.

[3] viz. Clause 4.2(3), whose context is of course limited to contracts for the sale of goods. It states:
"Conduct by both parties which assumes the existence of a contract is sufficient to establish a contract of sale although the writings or other communications of the parties do not otherwise establish a contract, and in such a case the terms of the contract consist of those terms on which the parties have agreed together with any supplementary terms incorporated under any provision of this Act."

[4] 100 D.L.R. (3d) 374 (1980).

"12. No modification of the above Conditions of Sale shall be effective by our receipt or acknowledgement of a purchase order containing additional or different conditions."

36. Telephone and telex communications between the parties were to follow and a revised proposal was submitted by the plaintiff with its same 12 "Terms and Conditions" printed on the reverse. This led to the defendant sending two purchase orders to the plaintiff, both of which had standard "Terms and Conditions" on the back, the last of which stated that the law of the contract should be that of New Brunswick and that any disputes should be settled by arbitration according to New Brunswick law. The plaintiff's copy of that order was also alleged to have been marked "This order is accepted by the vendor subject to the terms and conditions on the face and reverse side of this order" and with the instructions to the vendor, "Mail acceptance copy of this order promptly giving definite shipment date." The purchase order was neither signed nor returned by the plaintiff to the defendant, but the goods were delivered. The defendants later alleged deficiencies in the operation of these purchases and stopped payment on the cheque for the third tank. When the plaintiff brought an action for the price of the goods sold, the defendant enrolled a motion to stay the court action pending arbitration of the matter.

37. The court was to refuse the motion to stay proceedings, Grange J. applying case authority which was jealous to retain court jurisdiction wherever possible. He also specifically identified the problem as a "battle of the forms" and went on to make some observations on the parties' business behaviour as he saw it:[1]

> "While the parties may have agreed to arbitration I am certainly not satisfied that this is so. I have the greatest doubt that the plaintiff put its mind to the question at all. Certainly it tried (perhaps not consciously) to impose its non-arbitrable condition upon the defendant when it quoted its price originally. It at no time acknowledged the supremecy of the defendant's terms. On the other hand, the defendant (again perhaps not consciously) did try to impose the arbitration term in the purchase orders, but it drew no particular attention to that term. Nor did it complain when the plaintiff failed to return the vendor's copy of the purchase orders with an acknowledgement of the terms sought to be imposed. This was a commercial transaction and terms might well have been expected, but the conduct of both parties seems to me to indicate that neither party considered any terms other than those found on the face of the documents (i.e., the specifications and the price) important. What was important to both was the consummation of the business deal that had been arranged between them."

The element of realism in Grange J's judgment may appear refreshing, but at the same time his statement tends to indicate the need for new reasoning to be adopted to take into account the additional legal problems which modern business practice presents. It may not prove possible for the common law alone to satisfy that need.

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[1] at page 377.

(e) UNCITRAL

38. On 10 April 1980 at a diplomatic conference in Vienna the United Nations Commission on International Trade Law finalised a Convention on Contracts for the International Sale of Goods. The Convention covers both contract formation and sale of goods law and is designed to replace the two Hague Conventions of 1964 which dealt with these topics.

39. Provision for the "battle of the forms" problem was originally made in Article 7 of the 1964 Hague Convention on a Uniform Law on Formation of Contracts, a copy of which, as found in Schedule 2 of the Uniform Laws on International Sales Act 1967, is attached as Appendix II. An adaptation of the U.L.F.'s example has been made in Article 19 of the UNCITRAL Convention, which appears as Appendix III to this paper.

40. One of the first aspects of Article 19 which may be noted is that it is radically different from Section 2-207 of the American U.C.C. In particular, Article 19 retains the "mirror image" rule as the general rule of offer and acceptance, but it also permits an exception to this basic provision, and recognises a purported acceptance as an effective acceptance in those cases where the differences introduced by such a communication do not materially alter the terms of the offer and the offeror has not objected to the disparities, which he must do "without undue delay" if he is to prevent the conclusion of a contract whose terms would be those of the offer with the modifications contained in the acceptance. This provision, although very similar to Article 7 of the U.L.F. does go further in that it provides some definition of those matters in respect of which a difference in a purported acceptance would be considered to alter the terms of the offer "materially". The general law would, of course, qualify these definitions by the application of the de minimis principle.

41. Under Article 19 of the UNCITRAL Convention, therefore, no contract will come into being either if the offeror objects to additional or different terms in an "acceptance", or, indeed, if such terms can be seen to alter "materially" the nature of the offer. This contrasts with U.C.C. Section 2-207 under which a contract is concluded whenever a purported acceptance has been made, even if it contains additional or different terms which materially differ from those of the offer. Whether the offeree's additional or different terms will be added to that contract will depend on the operation of Section 2-207(2). This is an important difference between the two sets of provisions and at least the UNCITRAL example can be seen to meet the criticism directed at U.C.C. section 2-207 by Professor John Honnold of Pennsylvania (who also headed the U.S. delegation at UNCITRAL) when he argued:

> "Why declare two parties married when they are still haggling at the altar?"

III LAW REFORM

(a) General

42. Having examined the problem of the "battle of the forms" from several angles, ultimately the question has to be asked whether law reform on this issue should be initiated, and if so, what specific rules should be adopted?

43. It can be argued that the problem the law faces in this instance is that its formal rules do not relate well to the modern business practices of contract formation which such rules are intended to regulate. It may b worthwhile re-emphasizing at this point that the existing law does not always achieve for business undertakings the legal objectives they may have in mind - i.e. their standard terms may not necessarily govern a particular contract, or they may not be given full legal effect. Indeed where parties have made no effort to resolve the differences in the contractual terms they have presented to each other, and both act on the assumption that there is a contract in existence, but again both assume that its detailed secondary obligations are couched in their own standard terms, inevitably one party is going to be seriously disappointed when a contractual dispute arises and resort is made to the law.

44. The businessman may not necessarily have been aware of the legal niceties of having to fire the "last shot" in the "battle" if his terms are to prevail - he may wrongly believe that his form is so effectively worded as to prevail in all circumstances. Alternatively, a party's attempt to fire the last shot may be foiled by the other party sending him an acknowledgement of receipt - the acknowledgement itself re-introducing the standard terms that were first presented. A simple "systems failure" in the conclusion of a contract may bring about an unintended result for a party otherwise aware of the "battle of the forms" problem.

45. It is perhaps worth noting, however, that even if a party's terms do apply, not all of them may be effective. The courts require, for instance that adequate notice, and thereby knowledge, be given of all[1] or certain terms if they are to form part of a contract - this would be particularly so in respect of arbitration or choice of jurisdiction clauses.[2] Additionally, a standard form contract would of course be subject to the controls against unreasonable exemption clauses, as provided for under

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[1] See McCutcheon v. MacBrayne 1964 S.C. (H.L.) 28, or at least there must be a consistent course of dealing whereby constructive knowledge of the terms may be inferred. See also McCrone v. Boots Farm Sales Ltd 1981 S.L.T. 103.

[2] See McConnel & Reid v. Smith 1911 S.C. 635.
In international contracts with problems of choice of jurisdiction clause see Colzani v. RUWA Polstereimaschinen (case 24/76) [1977] 1 C.M.L.R. 345 and Galeries Segoura v. Firma Rahim Bonakdarian (case 25/76) [1977] 1 C.M.L.R. 361 which illustrate past difficulties encountered under Article 17 of the Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgements, now amended by the Convention of Accession of 1978 - though as yet to be interpreted. See also Porta-Leasing GmbH v. Prestige International S.A. (case 784/79) [1981] 1 C.M.L.R. 135 and a commentary thereon in 1981 Eu. Law Rev. 63.

Section 17 of the Unfair Contract Terms Act 1977.[1] Although all of these requirements can assist the party whose standard conditions do not prevail, it can be seen that they are limited in their application and, of themselves, cannot provide a general solution for the "battle of the forms".

46. As mentioned before, many of the difficulties associated with a "battle of forms" can be avoided if parties in regular trading relationships conclude "overriding agreements" to govern the bulk of their future dealings. Alternatively, one party can ensure that the other specifically accedes to his standard terms by signing the relevant form itself or by signing a simple device such as a tear-off acknowledgement slip - as in the Butler Machine Tool Co. case. The fact remains, however, that this may not always be achieved and there may be many reasons why this is so. For instance the parties may not trade regularly with each other, or a company official may not be authorised to sign a tear-off acknowledgement slip so as to accept another company's standard terms. Shortage of time may also be a factor which does not permit a thorough examination or negotiation of secondary contractual terms.

47. Where the parties have not resolved their differences at the stages of contract formation, however, and where a contractual dispute has arisen, it is proposed that the law should be able to recognise, in an even-handed manner, any contractual relationship that has been established through the parties' dealings. It is suggested that it should be possible to maximise such actual agreement as exists between the contracting parties and at the same time remove the potential uncertainties and injustice that could arise under any existing notion which presupposes that there has been a meeting of minds in respect of all the detailed terms proposed by one party after an exchange of standard forms, even although it is highly likely that this will not have been the case. It is intended that law reform should not produce an upheaval in business practice, but rather should provide law that responds to that practice.

(b) Comparative Law Sources

48. In looking towards comparative sources as an aid for law reform the American U.C.C. Section 2-207 would not appear, as a whole, to offer much assistance. Commentators have been highly critical of its operation in practice and indeed it can be seen that, if used skilfully, its provisions can readily perpetuate a "battle of the forms" - though this time permitting the party firing the "first shot" to win.

49. The Ontario Law Reform Commission have selected, however, and slightly adapted, one specific aspect of U.C.C. Section 2-207 and have recommended it as a general solution for the problem, at least in relation to contracts for the sale of goods (i.e. Section 2-207(3) as redrafted in Section 4.2(3) of the Ontario draft Bill for a Revised Sale of Goods Act). That in effect states that, albeit the writings or other communications of transacting parties do not establish a contract (i.e.

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[1] Although commentators on the 1977 Act have questioned whether a contract, constituted through a "battle of the forms" and the actings of the parties, could be a standard form contract that was subject to the controls of Section 17. See "The Unfair Contract Terms Act 1977" by W.V.H. Rogers and M.G. Clarke, Note on Section 17.

there are material conflicts between them), nonetheless, if the conduct of both parties demonstrates that they have assumed the existence of a contract that will be sufficient to establish a contract. Importantly, the terms of that contract would be those on which there was actual agreement between the parties, together with such other terms as might be provided by the particular Act itself (i.e. in that context an Act governing contracts for the sale of goods).

50. Such rules could provide a legal approach which would recognise a common intention between transacting parties that at least they had entered a contractual relationship, if such an intention could be inferred from their conduct, even although they had not otherwise satisfied the normal rules of contract formation. It could be pointed out that under the present law a contract may be recognised following conduct from which acceptance of a counter-offer may be inferred. However, the important difference of the suggested approach of U.C.C. Section 2-207(3) would be that it would not be the terms of one party alone which would govern the contract - a balance could be struck between the interests of both parties where they had failed to negotiate or settle the details of a contract at an earlier stage in their dealings. Insofar as this balanced result might be considered a desirable objective for the law to achieve, Section 2-207(3) could be modified to meet the requirements of the more general context of Scots contract law. For instance, it could be stated that terms to be supplied to give substance to a contractual relationship could be taken from more than one source - the rules not being limited to one particular context. Additionally, it could be made clear that "conduct" by the parties, for the purposes of the proposed rules, could be passive or active. "Conduct" could, therefore, be taken to include silence on the part of one party in the knowledge of actings on the part of the other which are referable to an assumption by that other that a contract has been concluded between them.

51. The UNCITRAL example may also be worth consideration, although it deals with a different aspect of the "battle of the forms" problem. It concerns itself with the situation where a purported acceptance differs in its terms from those of the offer preceding it, but it does not "materially alter the terms of the offer". In such circumstances, and unless the offeror has objected to the additional or different terms of the acceptance without undue delay, a contract is concluded, the terms of which would be those of the offer as modified by the acceptance.

52. The UNCITRAL example may have its uses, but it is suggested that it would not, of itself, offer an adequate solution for all "battle of the forms" problems. In particular, it makes no provision for those cases where there are material differences between the terms of standard forms. It may be the case that the majority of standard forms are drafted so heavily in favour of the issuing company that in most instances a purported acceptance <u>will</u> in fact materially alter the terms of the offer. If that were to be the case, and the UNCITRAL provisions alone were in operation, one would not have progressed much further forward from the general common law rule and the "battle of the forms" could continue in many instances.

53. Taking into account the limited nature of the function of Article 19 of the UNCITRAL Convention, it could be used, nonetheless, in conjunction with rules such as those provided by U.C.C. Section 2-207(3)

for the purposes of law reform. The inclusion of a measure based on the UNCITRAL example could satisfy an additional objective of maximising the potential for recognition of a contract, whether the parties had exhibited conduct demonstrative of an intended contractual relationship or not, provided a purported "acceptance" of an offer did not "materially" alter its terms, even although the terms of the acceptance did not exactly match those of the offer.

54. This in turn of course creates the difficulty of defining what one means by "materially". An attempt to lessen this problem can be seen in UNCITRAL Article 19(3), which provides a non-exhaustive list of matters in respect of which differences between each party's terms will be held to be "material". By specifically defining particular differences as being "material" an attempt is made to add certainty to the rules which should govern "battle of the forms" problems. It may be possible to avoid litigation if disputing parties know that certain differences per se will be material and that therefore their effect need not be debated. An alternative approach, if a list defining certain differences as being "material" were to be considered unduly restrictive, might be to provide a list of guidelines indicating differences which would be likely to be "material".

55. The provisional proposals which follow contain provisions based on the UNCITRAL example supplementing a proposed rule based on U.C.C. Section 2-207(3). If consultees were to consider that the proposals derived from the UNCITRAL example add an unnecessary degree of complexity to any potential legal rules on the matter, it is suggested that a provision based exclusively on U.C.C. Section 2-207(3) should be adopted, in that it could be seen as sufficient in itself to deal with the principal problems likely to be encountered in practice. We would, of course, welcome any alternative suggestions from consultees.

(c) Additional Considerations

(i) Application of Proposed Rules

56. So far the discussion of the problem of an "acceptance" failing to match the terms of an offer has related to the case where standard term forms have been used by the transacting parties. Similar problems could arise in cases where what might generally be considered to be "standard terms" have not been used by either party, or have only been used by one party. Provisional proposals for law reform will therefore be stated in general terms. To restrict any proposals to the use of "standard term forms" alone could create serious problems of definition. If, however, consultees consider that certain kinds of contract should not be covered by any of the proposed rules, it would be appreciated if reasons were given explaining the need for particular exceptions.

(ii) Contracting Out

57. It is proposed that it be specifically stated, in any draft Bill which may follow, that it should not be possible to contract out of legal provisions designed to govern those aspects of contract formation discussed in this paper. This would remove any doubts whether or not contracting out might be achieved through a combination of provisions contained in separate standard forms. A prohibition of contracting out

would be without prejudice to parties being able to conclude an "over-riding agreement" to cover all of their future dealings. It is foreseeable that during any such business relationship, general-purpose stationery may be used in respect of individual orders. This stationery may have printed standard terms on its reverse side, but the exchange of such forms, with their apparent conflict of terms, should create no "battle of forms" problem given the full context of these dealings and, in particular, the presence of the over-riding agreement.

(iii) Supplying terms

58. The rule based on U.C.C. Section 2-207(3), proposed above, would entail a positive role for the law in the provision of terms required to govern and resolve a contractual relationship where parties have failed to do so themselves. However, it might be asked whether this suggestion would involve the courts in the making of contracts for businessmen, contrary to the general rule[1], or at least would involve them in a role outwith to their normal experience. It is thought, however, that such would not be the case.

59. First, the proposed rule would not involve the courts in the making of a contract, for in all instances a contractual relationship recognised by the parties would have to be established by means of reference to the parties' conduct, writings and other communications, before the court would have any further role to play.

60. Second, at present the courts in fact regularly supply terms to contracts in many different situations - providing terms implied under common law, statute or custom.[2] The theoretical basis upon which courts supplement contractual terms may be disputed and the extent to which

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[1] E.g. see Mathieson Gee (Ayrshire) Ltd v. Quigley 1952 S.C.(H.L.) 38 and Houldsworth v. Gordon Cumming 1910 S.C. (H.L.) 49.

[2] See Gloag on Contract, 2nd Edn. at pp. 286 to 318 and D.M. Walker Contracts and related obligations in Scotland, at paras. 22.1 to 22.43. Even where parties have negotiated a contract they may not foresee all potential contractual difficulties, or some terms may be ineffective. Regarding "battle of the forms" problems, the winning form may itself have few conditions, e.g. Chilton Bros. Ltd v. S. Eker Ltd, see para. 4. ante. In all of the above circumstances resort to the law for relevant terms is required.

certain courts may have done so can be controversial,[1] but it is undoubtedly a function which the courts are regularly required to undertak

61. In this context the case of Wight v. Newton[2] may be of interest. The Inner House of the Court of Session, having been satisfied that there was an agreement for a lease of property, albeit there was still a dispute between the parties regarding a repairs clause, nonetheless upheld the lease as binding, ordering its formal execution, but with the deletion of the disputed repairs clause, stating that the relevant obligations of repair were to be governed by the common law. In that instance the court was able to determine itself what the specific common law obligations were, but at the same time noted that, had it been necessary, they could have remitted the matter to a man of business or skill to settle the usual and necessary clauses on which there had been no specific agreement between the parties. It can be seen that this case goes some considerable way, in principle at least, towards the legislative solution which is being provisionally proposed in this paper.

62. Again, in the context of a "battle of the forms", it is the case that the court may be required to supply common law terms where contractual terms have been rendered ineffective through the application of the Unfair Contract Terms Act 1977. J. Adams has observed:[3]

> "Where the different terms are liable to fall foul of the Unfair Contract Terms Act 1977, because they fail the test of reasonableness it might be thought they could be ignored, but there is the conceptual problem that the Act does not deprive a term of its status as a contractual term, although it may render it ineffective. If therefore a seller responds to a standard term order on an invoice containing different, but by the Act ineffective, terms, the contract will nevertheless be on the seller's terms (assuming the buyer accepts the goods) rather than the buyer's. It will therefore presumably be on implied common law terms. That may in fact be a fair solution."

The proposals put forward for consideration thus only represent an extension of an existing and necessary process.

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[1] For instance see Lord Denning M.R. in Liverpool City Council v. Irwin and Anor. [1975] 3 All E.R. 658, 666, but see the case on appeal before the House of Lords [1977] A.C. 239, per Lord Wilberforce at p.257: "... he (Lord Denning) suggests that the courts have power to introduce into contracts any terms they think reasonable or to anticipate legislative recommendations of the Law Commission. A just result can be reached, if I am right, by a less dangerous route." and per Lord Salmon at p.262: "I cannot go so far as Lord Denning M.R. and hold that the courts have any power to imply a term into a contract merely because it seems reasonable to do so. Indeed, I think that such a proposition is contrary to all authority." The House of Lords was prepared, however, to imply "necessary" terms for the contract. Lord Denning has pursued the matter further in his book The Discipline of the Law where he states, after commenting on the Liverpool case, at pages 40-41: "In the circumstances I wonder if the Law Commission might be invited to consider this question: Is it right only to imply a term when it is "necessary" to effectuate the intent of the parties? Or is it permissible to imply it when it is "reasonable" so to do in order to do what is fair and just as between the parties?" See also the rest of that chapter, Chapter 4, The Construction of Contracts, pages 32 to 53.
N.B. References in these quotations are to the Law Commission for England and Wales.

[2] 1911 S.C. 762.

[3] J. Adams "The Battle of the Forms" 1979 L.Q.R. 481 at pp. 483-484.

63. In considering the function of the courts in this process, it may indeed be worth questioning[1] whether the supply of such terms as may be "necessary" to give a contract proper effect would be adequate to achieve just results for all problems which a "battle of the forms" might create. For instance, in the context of the supply of services, the offer might include a clause limiting liability in respect of the services to be supplied and the "acceptance" returned might also recognise a limitation of liability, but at a different level of limitation. In those circumstances, and presuming both provisions to be ineffective, should a court be obliged to disregard totally those terms and instead apply an unlimited liability? An alternative might be that the court should be able to fix such reasonable limit on liability as might be just in the circumstances of the particular transaction. It would be necessary to take into account the ineffective provisions of both standard forms in the assessment of those circumstances.[2]

64. In other words, if the function of the court in supplying terms to a contract were to be recognised formally in legislation, might not the interests of justice be best served if the court's power to do so were defined in the widest terms? It may be noteworthy that the American Law Institute's new Restatement (Second) on the Law of Contracts provides that when parties have made a bargain sufficiently defined to be a contract, but have not agreed on an essential term, the court will supply a 'reasonable' term.[3] Whether such an approach should also be adopted for this context is open for discussion, as are any other aspects of the provisional proposals for law reform which follow.

(d) Law Reform - Provisional Proposals

65. The provisional proposals for law reform stated in general terms are as follows:

> 1. Subject to the following proposed rules no alteration should be made to the present rule that an acceptance, if it is effectively to conclude a contract, should meet the terms of the offer.
>
> (A) Where there are differences between the terms of an offer and those of a purported acceptance of it, but it is reasonable to

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[1] See footnotes to para. 60 ante.

[2] Though in contracts for the sale of goods where a particular term would be implied by law, express agreement, or an equivalent would be required to exclude or vary its effect. See Section 55(1) of the Sale of Goods Act 1979, which states:
"55-(1) Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract."

[3] See Restatement (Second) Contracts at Section 204. See also the analysis of E. Allan Farnsworth in "Disputes over Omission in Contracts" 1968, 68 Columbia L. Rev. 860 on which Section 204 is based.

infer from the conduct of the parties that they share an assumption that a contract between them has been concluded, a contract should be deemed to have come into existence. The terms of the contract should be those terms upon which the parties have agreed together with:

(first alternative) such other terms as may be necessary to give the contract proper effect; or

(second alternative) such other terms as may be reasonable.

For the purposes of either alternative regard shall be had to:

(i) the writings or other communications of the parties;

(ii) the conduct of the parties; and

(iii) such terms as may be implied by law.

(B) Where the purported acceptance of an offer contains additional or different terms which do not materially alter the terms of the offer that acceptance should effectively conclude a contract unless the offeror objects to those terms without undue delay. In this case the terms of the contract would be the terms of the offer as modified by the terms of the acceptance.

(First Option)

For the purposes of proposition (B) in deciding whether an additional or different term constitutes a material alteration of the terms of the offer, regard shall be had in particular to the price, the method of payment, the quality or quantity of goods, the place and time of delivery of goods, the time and manner for the provision of services, the extent of one party's liability to the other, the choice of law applicable and the mode of settlement of disputes.

(Second Option)

For the purposes of proposition (B) any additional or different term relating to the price, method of payment, the quality or quantity of goods, the time and manner for the provision of services, the extent of one party's liability to the other, the choice of law applicable and the mode of settlement of disputes should be deemed to "materially alter" the terms of the offer. This rule, however, would not prejudice the right of the court to hold in the circumstances of the case that any other term of a purported acceptance would materially alter the terms of the offer.

2. Where the above proposed rules would apply any terms in the writings or other communications of any party which purports to negative or vary the effect of these rules should be void.

3. For the purposes of the above proposed rules the term "conduct" should be taken to include silence on the part of one party in the knowledge of actings on the part of the other which are referable to an assumption by that other that a contract has been concluded between them.

66. Any provision on these matters would, of course, require to be translated into statutory form in a draft Bill.

IV QUESTIONS FOR CONSULTEES

67. (1) Do you approve of the provisional proposals outlined in paragraph 65 above?

(2) If your answer to the first question is wholly or partially in the negative, what alternative approach do you suggest should be adopted? Where a preferred option has been stated comment would also be welcome in respect of the option not selected.

(3) Do you consider that there are any types of contracts in respect of which any of the above-proposed rules would be inappropriate?

(4) Are there any further observations you would care to make?

This paper is released for comment and criticism and does not represent the final views of the Scottish Law Commission. The Commission would be grateful if comments were submitted as soon as possible and not later than 31 May 1982. All correspondence should be addressed to:

J C Mullin Esq
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

(Telephone 031 668 2131)

ventists, 1971, 92 Cal.Rptr. 111, 14 C. A.3d 209.

In action by shareholders of corporate operator of restaurant business for breach by franchise corporation of contract to purchase all of plaintiffs' shares, evidence supported finding that plaintiffs had substantially performed conditions of offer to purchase prior to its rescission by defendant and that defendant's assumption of control and possession of the assets of plaintiffs' corporation was pursuant to the agreement to sell the stock. Lindquist v. Mr. Steak, Inc., 1972, 500 P.2d 75, 28 Utah 2d 201.

§ 2-207. Additional Terms in Acceptance or Confirmation

(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.

Official Comment

Prior Uniform Statutory Provision: Sections 1 and 3, Uniform Sales Act.

Changes: Completely rewritten by this and other sections of this Article.

1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or

the closing of an agreement adds further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called "acknowledgment") forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction. [Comment 1 was amended in 1966.]

2. Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different terms. [Comment 2 was amended in 1966.]

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

4. 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 witness 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 cannery, 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.

5. 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 causes 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 sub-sale, 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).

6. If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act, including subsection (2). The written confirmation is also subject to Section 2-201. Under that section a failure to respond permits enforcement of a prior oral agreement; under this section a failure to respond permits additional terms to become part of the agreement. [Comment 6 was amended in 1966.]

7. In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule. [Comment 7 was added in 1966.]

Cross References:

See generally Section 2-302.

Point 5: Sections 2-513, 2-602, 2-607, 2-609, 2-612, 2-614, 2-615, 2-616, 2-718 and 2-719.

Point 6: Sections 1-102 and 2-104.

Definitional Cross References:

"Between merchants". Section 2-104.

"Contract". Section 1-201.

"Notification". Section 1-201.

"Reasonable time". Section 1-204.

"Seasonably". Section 1-204.

"Send". Section 1-201.

"Term". Section 1-201.

"Written". Section 1-201.

Forms

Acceptance, acknowledgment of, see U.C.C. Forms § 2-207, Forms 1-3.

Acceptance expressly made conditional on assent to additional or different terms or both, see U.C.C. Forms § 2-207, Form 4.

APPENDIX II

Article 7

1. An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer.

2. However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance.

APPENDIX III

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.