

CHAPTER TWO

CONTRACT FORMATION AND BASIC TERMS

Once you determine what law governs a particular transaction (such as the common law of contracts, UCC Article 2, or the CISG), the next step is to determine whether an agreement was formed, if the parties have already dealt with one another, or how to form one, if you are planning a future transaction. If an agreement was or will be formed, the next issue is to determine if that agreement is in fact enforceable. That is, does the agreement form the basis of an enforceable contract? In connection with this, you need to ascertain what the terms of the agreement are.

Lawyers, particularly transactional lawyers, need to be aware of the rules and principles that govern these three issues – formation, enforceability, and terms – bearing in mind that the different potentially applicable bodies of law are likely to have different rules on these subjects. From a transactional perspective, the lawyer wants to be able to advise his or her client what is required to have an enforceable agreement and, just as important, how to avoid entering into an enforceable agreement.

This Chapter considers formation, enforceability and some very basic terms issues under both UCC Article 2 and the CISG. With this basic understanding, Chapters Three through Five then examine additional rules on contract terms in UCC Article 2 and the CISG. Later in this book, in Chapter Eleven, we investigate how UCC Article 2A deals with these issues in the context of leases.

SECTION 1. CONTRACT FORMATION PRINCIPLES

A. CONTRACT FORMATION UNDER UCC ARTICLE 2

1. *Basic Concepts*

The place to begin any study of the principles of contract formation under the UCC is the definitions of “agreement” and “contract” in section 1-201. The two terms are related, but are different in several important respects. An *agreement* is the “bargain of the parties in fact.” That bargain is typically evidenced by the parties’ communications with each other. However, as suggested by the reference to course of performance, course of dealing, and usage of trade, their bargain may

also be evidenced by the parties' conduct (either in the transaction at issue or in prior transactions between them) or from their participation in a common trade. *See* UCC § 1-303.

The *contract* consists of the parties' legal obligations resulting from their agreement. This can be both less and more than their agreement. A contract encompasses more than the agreement from which it arises whenever the law adds a term to the parties' bargain. For example, the warranty of merchantability may arise as a matter of law if the seller is a merchant with respect to the kind of goods sold in the transaction. *See* UCC §§ 2-314, 2-316. Article 2 has a variety of other "gap filler" rules designed to add detail to the parties' agreement. *See, e.g.*, UCC §§ 2-307, 2-308, 2-309, 2-310, 2-312, 2-315.

The contract is less than the agreement whenever all or part of the agreement is unenforceable. Thus, for example, an agreement for the sale of contraband is not a contract because it is not enforceable. Neither is an agreement that fails to satisfy the statute of frauds. *See* UCC § 2-201. An agreement with an unconscionable term may not be enforceable at all or may be enforceable without the offending term. *See* UCC § 2-302(1). In either case, the parties' contract is something less than their agreement.

It is worth noting that both "agreement" and "contract," because they are based on the parties' bargain, are broader than what the common law would traditionally regard as a contract. For example, the Restatement (Second) of Contracts defines a contract as a "promise or a set of promises for the breach of which the law gives a remedy." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). Certainly the parties' bargain may consist of an exchange of explicit or implied promises. However, a bargain may also include the parties' consummated transaction. Consider the following.

Illustration

You go to a supermarket, select the items you want, proceed to the checkout counter, and pay for them. Arguably, at no time did either you or the store promise anything to the other. You tendered payment and completed a transaction, but arguably there were no promises. Thus, the common law would not regard this as a contract. The UCC does. There may not have been a promise, but there was a "bargain." Hence there was an "agreement." As long as there was no bar to enforceability – such as might be true if you were a minor purchasing cigarettes or alcohol – there would also be a "contract" within the meaning of the UCC.

At what point in time will the parties have engaged in enough discussion or conduct to create a “bargain in fact” which may be enforceable as a contract? The common-law construct with which you are familiar is that a contract is formed when there is an offer that is accepted, provided the promise is supported by consideration.¹ The rules regarding offer, acceptance, and consideration can be somewhat technical. They were no doubt explored in your contracts course, and that coverage will not be repeated here.

Article 2 begins with this common-law foundation to determine when a contract is formed. This reliance on the common law is evidenced by Article 2’s failure to provide a complete set of rules on contract formation. Therefore, the common-law principles of offer and acceptance remain important for transactions governed by Article 2. Article 2 then builds upon this common-law foundation. The common law provides general principles governing contract formation, with several provisions of Article 2 providing different rules on a few points. These different rules are needed, at least in part, to account for the fact that Article 2’s notion of a contract is based on the broader concept of a “bargain,” rather than the more narrow concept of a “promise.”

Article 2’s rules on contract formation are contained in sections 2-204 *through* 2-207, and the starting point for examining them is section 2-204. Subsection (1) provides that a contract can be formed in any manner sufficient to show agreement.² Thus, while the parties may engage in offer and acceptance, as under the common law, there is no need for the parties to follow the formalities of an offer and acceptance to form an agreement, the bargain in fact of the parties. Subsection (2) then adds that we need not be able to point to the precise moment of formation, as long as we have agreement. This accounts for the fact that when parties have actually engaged in offer and acceptance, it is usually fairly easy to identify those communications, but when their bargain is evidenced in some other manner, such as by performance, it may be difficult to identify the precise moment when they reached agreement. Subsection (3) then adds an extremely important rule. It allows for a contract to be formed even though one or more terms of the transaction are left open, as long as there is a reasonable basis for providing a remedy in the event of breach. This represents a substantial deviation from the common law, which

¹ See RESTATEMENT (SECOND) OF CONTRACTS §§ 3, 17, 22.

² For an example of the factual nature of this inquiry, see *E.C. Styberg Eng’g Co. v. Eaton Corp.*, 492 F.3d 912 (7th Cir. 2007).

typically conditions formation of a contract on the parties having reached agreement on all the material terms.³ In Chapters Three through Five we will examine the “gap filler” rules that UCC Article 2 uses to supplement an incomplete agreement.

These gap filler provisions are often critical to the requirement in section 2-204(3) that there be a “reasonably certain basis for giving an appropriate remedy” in order to create an enforceable agreement. Keep in mind that the need to resort to gap filler provisions arises only if the parties’ bargain, as supplemented by applicable usage of trade, course of dealing, and course of performance, does not deal with a particular term. At common law, which lacks gap filler provisions, enforceable contracts require agreement on all the material terms.

Now read section 2-205. Under the common law, the offeror may generally revoke an offer any time before the offeree has accepted. A promise to keep an offer open is normally enforceable only if supported by consideration (so that there is, in essence, an option contract).⁴ Section 2-205 provides an additional basis for making enforceable the promise to keep the offer open. Notice, this section does not purport to define what an offer is, and therefore implicitly relies on the common law to determine what qualifies as an offer.

Now read section 2-206. It too implicitly relies on the common-law rules regarding what constitutes an offer but contradicts old common-law rules on what qualifies as an acceptance. Specifically, paragraph (1)(a) abrogates the rules that presumed that an acceptance has to be sent in the same manner and medium as the offer.⁵ An offeror may still specify the manner and medium of an acceptance. Paragraph (a) does not abrogate the common-law rule that the offeror is “master of its offer,” it merely does away with the presumption that the acceptance must be transmitted in the same manner and medium as the offer. Paragraph (1)(b) does something more significant. It allows an offer to buy to be accepted either by a return promise or by performance: the shipment of goods. Even shipment of nonconforming goods can constitute an acceptance. By allowing the shipment of nonconforming goods to qualify as an acceptance, section 2-206 slightly modifies the common-law distinction between a counter-offer and an acceptance.⁶ Finally,

³ See RESTATEMENT (SECOND) OF CONTRACTS § 33.

⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 17(1). *Cf.* § 87.

⁵ Compare RESTATEMENT (SECOND) OF CONTRACTS §§ 30, 60, 65.

⁶ Compare RESTATEMENT (SECOND) OF CONTRACTS §§ 39, 59, 61.

subsection (2) gives the offeror the ability to treat the offer as lapsed if not notified of the acceptance within a reasonable time.⁷

Even though sections 2-204 through 2-206 provide rules regarding how a contract is formed, the parties are free to specify the circumstances that must exist in order to have an enforceable contract. *See* UCC § 1-302. For example, the parties may agree that they will not have a contract until both parties execute a writing containing all of the final terms.⁸ Thus, Article 2 does not alter the fundamental contract principle that the parties may expressly determine the manner in which they will form an enforceable contract. Remember that we are addressing contract formation assuming the transaction is covered by Article 2. Later on we will consider contract formation using CISG principles. Now it is time for a few problems.

Problem 2-1

- A. After reading Seller's catalogue of hi-fi equipment, Buyer orders a \$470 amplifier by completing the order form included in the catalogue and faxing it to Seller. Upon Seller's receipt of the fax but prior to acknowledgment or shipment, is there an agreement?
- B. Buyer faxes Seller an order for "1,000 lbs. of Grade A bananas at 25¢/lb., delivery by November 15, payment within 30 days after delivery."
 1. Seller faxes back a response that says, "Received your order. Expect to ship for delivery on November 10." Is there an agreement? If so, when is payment due?
 2. Instead of sending the response, Seller shipped Buyer 1,000 lbs. of Grade A bananas for delivery on November 10. Prior to delivery, is there an agreement? If so, what are the payment terms? What if Seller shipped apples instead of bananas?

⁷ Compare RESTATEMENT (SECOND) OF CONTRACTS § 56. *See also Scoular Co. v. Denney*, 151 P.3d 615 (Colo. Ct. App. 2006) (buyer's actions in reselling the goods was not the beginning of performance of the contract with the seller).

⁸ *See, e.g., Flanagan v. Consolidated Nutrition, L.C.*, 627 N.W.2d 573 (Iowa Ct. App. 2001).

C. Seller faxes Buyer the following:

Pleased to offer you 1,000 lbs. of Grade A cherries at 43¢/lb., delivery by November 15, payment within 30 days after delivery. E-mail or call me by end of the day if that's okay.

Buyer responds two days later with the following e-mail message:

That sounds great. Look forward to delivery.

Is there an agreement? What if, after receiving Buyer's response, Seller ships the cherries?

D. Seller faxes Buyer the following:

Pleased to offer you 500 lbs. of dates at 94¢/lb., delivery by November 15, payment within 30 days after delivery.

Buyer responds with the following message, also sent by fax:

Price too high. Can't buy for more than 68¢/lb.

Is there an agreement? What if, after receiving Buyer's response, Seller ships the dates?

Problem 2-2

Sedgwick manufactures and sells bolts for use in airplane manufacture. The bolts are customarily sold by "lot," a term based on total weight.

A. On March 1, after some negotiations with Butler, but before Sedgwick had manufactured any bolts for Butler, Sedgwick sent Butler the following form in the mail:

Will sell you ten (10) lots of No. 6 bolts for \$2,000 per lot. This offer will be held open until March 15.

On March 14, Butler telephoned Sedgwick to accept the offer, but before Butler could say anything, Sedgwick said, "That offer I sent you is off the table. I can't sell you the bolts for that price." Butler protested that Sedgwick had promised to keep the offer open. Butler then stated she accepted the offer. Has a contract been formed?

B. On April 1, after some negotiations with Barker but before Sedgwick had manufactured any bolts for Barker, Sedgwick sent Barker a signed letter that stated:

Will sell you ten (10) lots of No. 8 bolts for \$2,000 per lot. This offer will be held open until April 15.

At the bottom of the letter was a line for the buyer to signify acceptance by affixing a signature. Barker signed the form on that line and mailed the form back to Sedgwick on April 6. On April 10, Barker bought bolts from another supplier and called Sedgwick, leaving a message on the answering machine that he would not be buying any bolts from Sedgwick. Is there a contract between Sedgwick and Barker?

- C. On May 1, after some negotiations with Baxter but before Sedgwick had manufactured any bolts for Baxter, Sedgwick sent Baxter a preprinted form in the mail. The form had several paragraphs of standard sales terms. In the middle of the form was the following handwritten sentence:

Baxter will buy ten (10) lots of No. 7 bolts for \$2,000 per lot. This offer will be held open until May 15.

At the bottom of the form was a line for the buyer's signature. Baxter signed the form on that line and sent the form back to Sedgwick by mail on May 6. On May 10, Baxter bought bolts from another supplier and called Sedgwick, leaving a message on the answering machine that he would not be buying any bolts from Sedgwick. On May 11, Sedgwick called Baxter and purported to accept Baxter's offer to buy the bolts. Is there a contract between Sedgwick and Baxter?

- D. After negotiation with Baker regarding the bolts that Baker needed for the type of plane that Baker makes, Sedgwick started to retool her manufacturing process to produce those bolts. About a week after that retooling process was started, Baker called Sedgwick to tell her that he was buying the bolts from someone else. Sedgwick sued Baker for breach of contract, arguing that by starting the retooling process, she had begun the requested performance and thereby accepted the offer to buy that Baker had made during the course of their negotiations. Assume that Baker indeed made an offer to buy. Is Sedgwick correct?

Problem 2-3

Stable Earth, Inc., a manufacturer of fertilizer, and Brittany, a farmer, had done business with each other for five years. When fertilizer was needed, Brittany would call the Stable Earth order desk and order a specific quantity and quality of fertilizer. Stable Earth's order desk would send that

order to the warehouse, where personnel would ship the goods to Brittany by carrier, accompanied by a bill based on Stable Earth's current wholesale price. Frequently, Stable Earth would ship less or more than the amount Brittany ordered, depending upon what Stable Earth had on hand in the warehouse, but the deviation never exceeded 15%. The bill reflected the quantity actually shipped and Brittany invariably accepted and paid for what was actually shipped without objection. On July 10, during a time of price instability in the fertilizer market, Brittany used the website to order 500 bags of a specified fertilizer "for prompt shipment." The wholesale price on that date was \$18 per bag. On July 12, Stable Earth shipped 400 bags of fertilizer to Brittany and mailed an invoice for the wholesale price on that date, \$20 per bag. On July 15, while the goods were still in transit and the wholesale price was \$25 per bag, Stable Earth notified Brittany that the order had been rejected and diverted the shipment to Carl, who agreed to pay \$26 per bag. Brittany sued Stable Earth for breach of contract. Is there a contract between Brittany and Stable Earth? If so, what is the price per bag under the contract?

Problem 2-4

After reading Seller's catalogue of unique and expensive items, Buyer telephones Seller to order a brass eagle designed for mounting at the top of Buyer's flagpole. The price is \$675, which Buyer pays by giving Seller Buyer's credit card number. Seller's catalogue contains the following in fairly large print on the order form, just below Seller's phone number:

Seller warrants all its products will be as described in this catalogue. In the event of any problem with a shipment, customer must notify Seller in writing of such problem within 20 days of receipt or be barred from any remedy.

Prior to shipment, is there an agreement? If so, are the terms in the catalogue part of the agreement?

2. Battle of the Forms

The rules of sections 2-204 through 2-206 were arguably only minor variations from the prevailing common law when Article 2 was adopted in the 1950s and 1960s. The common-law rules today are generally in accord with these provisions

of Article 2.⁹ In contrast, section 2-207 was and remains a far more significant deviation of the common law. Consider this following typical scenario:

Illustration

Buyer sends Seller an order form which is an offer to buy. The form has on it numerous terms, including the description, quantity, and price of the desired goods. Seller responds by sending an order acknowledgment form which contains numerous terms, some different from those on the Buyer's form and some additional terms. The two forms match on the major transaction-specific terms: the description of the goods, quantity, and price.

At common law, Seller's responsive form was a counter-offer, not an acceptance. Thus, even though the parties may have thought they had an agreement – a likely situation given that neither party was apt to scrutinize and compare the terms on the two standardized forms – they did not. Accordingly, if at this point either reneged on their apparent deal, the other would have no legal recourse. On the other hand, if Buyer, thinking they had a deal, followed their communications by sending payment, Buyer would be deemed to have accepted Seller's counter-offer and a contract would be formed based on the terms in Seller's acknowledgment form. Alternatively, and probably more likely, if Seller (also thinking they had a deal) shipped the goods and Buyer accepted them, Buyer's conduct would again be an acceptance of the terms of Seller's counter-offer. Thus, in either case, the terms on Seller's form would control. Note, this result was not based on Seller's role in the transaction, but on the sequence of their communications. If Seller had sent the first offer and Buyer had responded with a form that included slightly different or additional terms, then subsequent performance by the parties would generate a contract based on the terms in Buyer's form. In short, the terms of the last communication before performance would be the ones that controlled. This was called the "last shot" rule, and most legal scholars thought it was arbitrary and produced a result that frequently bore no relationship to what the parties expected.

Section 2-207 tries to deal with this "battle of the forms" scenario. It does so by addressing two different but related issues: (1) when and how an agreement is formed; and (2) what the terms of the resulting agreement are. Unfortunately,

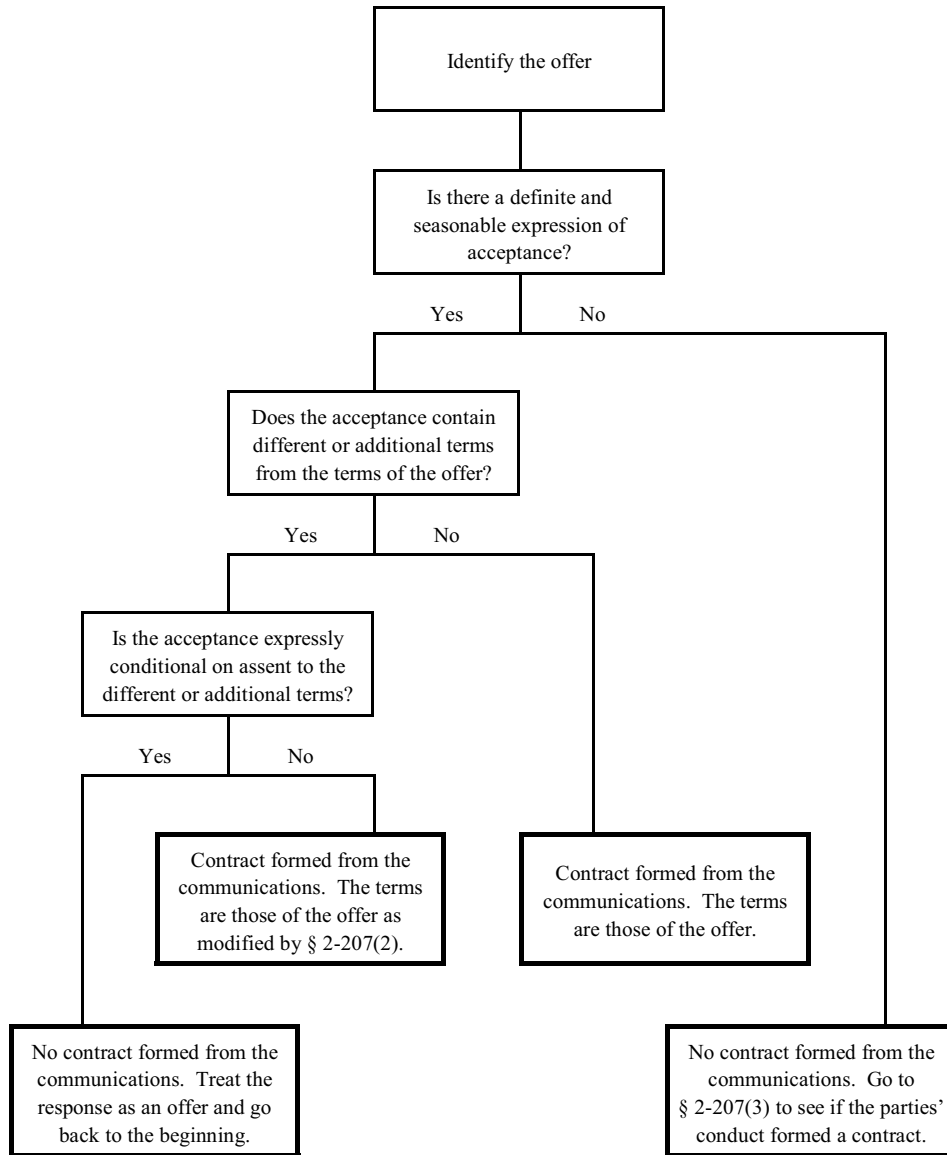
⁹ See RESTATEMENT (SECOND) OF CONTRACTS §§ 39, 58, 59, 61.

section 2-207 is a bit confusing and has generated a significant amount of litigation. To understand the issues that the section raises, you must understand how the section works. Read Section 2-207.

The most important thing to understand about section 2-207 is that each of its three subsections deals with something different. Subsection (1) deals with when the parties' communications form an agreement. It abrogates the common-law mirror image rule by allowing a response that contains different or additional terms to nevertheless function as an acceptance. Subsection (2) provides guidance on the terms of an agreement formed under subsection (1). Thus, subsection (2) applies only if there is an agreement formed under subsection (1). Notice, subsection (2) provides two different rules for dealing with additional terms in an acceptance, one rule for communications "between merchants" and another rule for all other situations. As to who is a merchant, *see* UCC § 2-104. Subsection (3) then deals with situations in which no agreement is formed under subsection (1). It provides rules for: (i) when agreements are created not through the parties' "writings" but through their conduct; and (ii) what the terms for such agreements are.

The flow chart on the next page is one way to diagram the basic steps in the analysis. Although not reflected in the flow chart, notice that subsection (1) applies to "confirmations" as well as acceptances. A confirmation differs from an acceptance in that it confirms a pre-existing agreement. In other words, whereas an acceptance might begin "I agree," a confirmation might begin, "as we have already agreed" or "this note is to memorialize our agreement that." *See* UCC § 2-207 cmt. 1. When you think about it in those terms, subsection (1) seems to be written in Orwellian doublespeak: "a written confirmation . . . operates as an acceptance." This bit of alchemy treats a confirmation – which under the common law would have little or no relevance to whether an agreement exists or what the terms of any agreement are – as if it were part of the offer and acceptance process.

Notice also that the flow chart does not cover most of subsection (2). That is partly to keep it simple and partly because there is disagreement over how subsection (2) applies to different terms. That disagreement is a function of some rather unfortunate drafting. Reread subsections (1) and (2) and comments 3 and 6. Then consider the case that follows. It is a classic.



DAITOM, INC. v. PENNWALT CORP.
741 F.2d 1569 (10th Cir. 1984)

William E. Doyle, Circuit Judge

[On September 7, 1976, the seller (Pennwalt), after negotiations with the buyer (Daitom), submitted a proposal for the sale of two rotary vacuum dryers with dust filters. The proposal was made in a typewritten writing to which pre-printed form conditions were attached and explicitly made part of the proposal. One term in the form conditions imposed a one year period after delivery within which Daitom could bring a law suit. On October 5, 1976, Daitom issued a purchase order, which consisted of a pre-printed form and 17 standard terms and conditions on the back. One of the terms of the “boilerplate” reserved to Daitom “all of its rights and remedies available at law.” Pennwalt delivered the goods in May, 1977 but, because the plant in which they were to be installed was under construction, left the crates outside. On June 15, 1978, the goods were finally installed and operated. Serious defects were discovered, of which Pennwalt was notified on June 17, 1978. When Pennwalt was unable to repair the defects, Daitom brought suit for breach of warranty on March 7, 1980. The trial court held, *inter alia*, that the one year limitation became part of the contract and, since the law suit was brought more than one year after delivery, granted a summary judgment against Daitom. On appeal, the judgment was reversed and the case remanded to the trial court.] . . .

C. The Writings and the Contract

The trial court concluded that the parties’ exchanged writings formed a contract. Thus, there was not a formal single document. Pennwalt’s September 7, 1976 proposal constituted the offer and Daitom’s October 5, 1976 purchase order constituted the acceptance.

It is essentially uncontested that Pennwalt’s proposal constituted an offer. The proposal set forth in some detail the equipment to be sold to Daitom, the price, the terms of shipment, and specifically stated that the attached terms and conditions were an integral part of the proposal. One of those attached terms and conditions of sale limited the warranties to repair and replacement of defective parts and limited the period of one year from the date of delivery for any action for breach of warranty.¹⁰

¹⁰ Paragraph 5 of the terms and conditions of sale stated in full (emphasis added):
6. WARRANTIES:

The proposal was sent to Kintech and forwarded to Daitom with a recommendation to accept the proposal. Daitom sent the October 5, 1976 purchase order to Pennwalt. This purchase order constituted an acceptance of Pennwalt's offer and formed a binding contract for the sale only pursuant to 2-207(1), despite the statement of terms additional to or different from those in the offer.¹¹ But these terms were not without meaning or consequence. However, the acceptance was not expressly conditioned on Pennwalt accepting these additional or different terms.

There is a provision which Daitom contends made the acceptance expressly conditional on Pennwalt's accepting the additional or different terms which

a. Seller warrants that at the time of delivery of the property to the carrier, it will be, unless otherwise specified, new, free and clear of all lawful liens and security interests or other encumbrances unknown to Buyer. If, within a period of one year from the date of *such delivery* any parts of the property (except property specified to be used property or normal wear parts) fail because of material or workmanship which was defective at the time of such delivery, Seller will repair such parts, or furnish parts to replace them f.o.b. Seller's or its supplier's plant, provided such failure is due solely to such defective material or workmanship and is not contributed to by any other cause, such as improper care or unreasonable use, and provided such defects are brought to Seller's attention for verification when first discovered, and the parts alleged to be so defective are returned, if requested, to Seller's or its supplier's plant. *No action for breach of warranty shall be brought more than one year after the cause of action has accrued*

SELLER MAKES NO OTHER WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF FITNESS OF THE PROPERTY FOR ANY PARTICULAR PURPOSE EVEN IF THAT PURPOSE IS KNOWN TO SELLER.

In no event shall Seller be liable for consequential damage.

b. Because of varied interpretations of standards at the local level, Seller cannot warrant that the property meets the requirements of the Occupational Safety and Health Act.

¹¹ The principal additional or different terms referred to the reservation of warranties. Specifically:

(8) WARRANTY. The Seller warrants that the supplies covered by this purchase order will conform to the specifications, drawings, samples, or other descriptions furnished or specified by buyer, and will be fit and sufficient for the purpose intended, merchantable, of good material and workmanship, and free from defect. The warranties and remedies provided for in this paragraph . . . shall be in addition to those implied by or available at law and shall exist notwithstanding [sic] the acceptance by Buyer of all or a part of this applies with respect to which such warranties and remedies are applicable.

appeared in the pre-printed, standard “boilerplate” provisions on the back of the purchase order. It stated:

Acceptance. Immediate acceptance is required unless otherwise provided herein. It is understood and agreed that the written acceptance by Seller of this purchase order or the commencement of any work performance of any services hereunder by the Seller, (including the commencement of any work or the performance of any service with respect to samples), shall constitute acceptance by Seller of this purchase order and of all the terms and conditions of such acceptance is *expressly limited to such terms and conditions, unless each deviation is mutually recognized therefore in writing.* (Emphasis added.)

This language does not preclude the formation of a contract by the exchanged writings pursuant to § 2-207(1). Nor does it dictate the adoption of a conclusion holding that as a result the acceptance provided the applicable terms of the resulting contract. First, it is well established that a contract for the sale of goods may be made in any manner to show agreement, requiring merely that there be some objective manifestation of mutual assent, but that there must be. There is not a contract until it takes place. *See* U.C.C. § 2-204; . . . Here there is such an objective manifestation of agreement on essential terms of equipment specifications, price, and the terms of shipment and payment, all of which took place before the machinery was put to any test. The purchase order explicitly referred to and incorporated on its front Kintech’s equipment specifications and Pennwalt’s proposal. But we are unwilling to hold such a typewritten reference and incorporation by Daitom brings the matter to a close. The acceptance and warranty terms as provided for by the above excerpted acceptance clause, does manifest a willingness on all essential terms to accept the offer and form a contract. . . . This was, of course, before an attempt was made to use the equipment.

Second, the boilerplate provision does not directly address the instant case. The purchase order is drafted principally as an *offer* inviting acceptance. Although this court recognizes that the form may serve a dual condition depending on the circumstances, the imprecision of language that permits such service detracts from Daitom’s argument of conditional acceptance.

Third, the courts are split on the application of § 2-207(1) and the meaning of “expressly made conditional on assent to the additional or different terms.”. . . . *Roto-Lith Ltd. v. F.P. Bartlett & Co., Inc.*, 297 F.2d 497 (1st Cir. 1962) represents one extreme of the spectrum, that the offeree’s response stating a term materially altering the contractual obligations solely to the disadvantage of the offeror

constitutes a conditional acceptance. The other extreme of the spectrum is represented by *Dorton v. Collins & Aikman Corporation*, 453 F.2d 1161 (6th Cir. 1972), in which case the court held that the conditional nature of the acceptance should be so clearly expressed in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction unless the additional or different terms are included in the contract. The middle of the spectrum providing that a response merely “predicating” acceptance on clarification, addition or modification is a conditional acceptance is represented by *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969).

The facts of this case, Daitom asserts, are not of a character that would suggest that there had been an unequivocal acceptance. The defendant-appellee was aware that the machinery had not even been tried. Once it was tried, it broke down in a very short time. It is hard to see a justifiable acceptance, Daitom asserts, when the buyer does not even know whether it works, and, in fact, learns after the fact, that it does not work. This fact alone renders the “contract” to be questionable.

The better view as to the meaning and application of “conditional acceptance,” and the view most likely to be adopted by Pennsylvania, is the view in *Dorton* that the offeree must explicitly communicate his or her unwillingness to proceed with the transaction unless the additional or different terms in its response are accepted by the offeror. . . .

Having found an offer and an acceptance which was not made expressly conditional on assent to additional or different terms, we must now decide the effect of those additional or different terms on the resulting contract and what terms became part of it. The district court simply resolved this dispute by focusing solely on the period of limitations specified in Pennwalt’s offer of September 7, 1976. Thus, the court held that while the offer explicitly specified a one-year period of limitations in accordance with § 2-725(1) allowing such a reduction, Daitom’s acceptance of October 5, 1976 was silent as to the limitations period. Consequently, the court held that § 2-207(2) was inapplicable and the one-year limitations period controlled, effectively barring Daitom’s action for breach of warranties.

While the district court’s analysis undertook to resolve the issue without considering the question of the application of § 2-207(2) to additional or different terms, we cannot accept its approach or its conclusion. We are unable to ignore the plain implication of Daitom’s reservation in its boilerplate warranties provision of all its rights and remedies available at law. Such an explicit reservation impliedly

reserves the statutory period of limitations; without such a reservation, all other reservations of actions and remedies are without effect.

The statutory period of limitations under the U.C.C. is four years after the cause of action has accrued. UCC § 2-725(1). Were we to determine that this four-year period became a part of the contract rather than the shorter one-year period, Daitom's actions on breach of warranties were timely brought and summary judgment against Daitom was error.

We realize that our conclusion requires an inference to be drawn from a construction of Daitom's terms; however, such an inference and construction are consistent with the judicial reluctance to grant summary judgment where there is some reasonable doubt over the existence of a genuine material fact. . . . When taking into account the circumstances surrounding the application of the one-year limitations period, we have little hesitation in adopting the U.C.C.'s four-year limitations reservation, the application of which permits a trial on the merits. Thus, this court must recognize that certain terms in Daitom's acceptance differed from terms in Pennwalt's offer and decide which become part of the contract. The district court certainly erred in refusing to recognize such a conflict.

The difficulty in determining the effect of different terms in the acceptance is the imprecision of drafting evident in § 2-207. The language of the provision is silent on how different terms in the acceptance are to be treated once a contract is formed pursuant to § 2-207(1). That section provides that a contract may be formed by exchanged writings despite the existence of additional or different terms in the acceptance. Therefore, an offeree's response is treated as an acceptance while it may differ substantially from the offer. This section of the provision, then, reformed the mirror-image rule; that common law legal formality that prohibited the formation of a contract if the exchanged writings of offer and acceptance differed in any term.

Once a contract is recognized pursuant to § 2-207(1), § 2-207(2) provides the standard for determining if the additional terms stated in the acceptance become a part of the contract. Between merchants, such *additional* terms become part of the resulting contract *unless* 1) the offer expressly limited acceptance to its terms, 2) the additional terms materially alter the contract obligations, or 3) the offeror gives notice of his or her objection to the additional terms within a reasonable time. Should any one of these three possibilities occur, the *additional* terms are treated merely as proposals for incorporation in the contract and absent assent by the offeror the terms of the offer control. In any event, the existence of the additional terms does not prevent a contract from being formed.

Section 2-207(2) is silent on the treatment of terms stated in the acceptance that are *different*, rather than merely additional, from those stated in the offer. It is unclear whether “different” terms in the acceptance are intended to be included under the aegis of “additional” terms in § 2-207(2) and, therefore, fail to become part of the agreement if they materially alter the contract. Comment 3 suggests just such an inclusion.¹² However, Comment 6 suggests that different terms in exchanged writings must be assumed to constitute mutual objections by each party to the other’s conflicting terms and result in a mutual “knockout” of both parties’ conflicting terms; the missing terms to be supplied by the U.C.C.’s “gap-filler” provisions.¹³ At least one commentator, in support of this view, has suggested that the drafting history of the provision indicates that the word “different” was intentionally deleted from the final draft of § 2-207(2) to preclude its treatment under that subsection.¹⁴ The plain language, comments, and drafting history of the provision, therefore, provide little helpful guidance in resolving the disagreement over the treatment of different terms pursuant to § 2-207.

Despite all this, the cases and commentators have suggested three possible approaches. The first of these is to treat “different” terms as included under the aegis of “additional” terms in § 2-207(2). Consequently, different terms in the acceptance would never become part of the contract, because, by definition, they would materially alter the contract (*i.e.*, the offeror’s terms). Several courts have adopted this approach. . . .

¹² Comment 3 states (emphasis added):

Whether or not *additional or different* terms will become part of the agreement depends upon the provision of subsection (2).

It must be remembered that even official comments to enacted statutory text do not have the force of law and are only guidance in the interpretation of that text. *In re Bristol Associates, Inc.*, 505 F.2d 1056 (3d Cir. 1974) (while the comments to the Pennsylvania U.C.C. are not binding, the Pennsylvania Supreme Court gives substantial weight to the comments as evidencing application of the Code).

¹³ Comment 6 states, in part:

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 The contract then consists of the terms expressly agreed to, terms on which the confirmations agree, and terms supplied by the Act, including subsection (2).

¹⁴ See D.G. Baird & R. Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1240, n.61.

The second approach, which leads to the same result as the first, is that the offeror's terms control because the offeree's different terms merely fall out; § 2-207(2) cannot rescue the different terms since that subsection applies only to *additional* terms. Under this approach, Comment 6 (apparently supporting a mutual rather than a single term knockout) is not applicable because it refers only to conflicting terms in confirmation forms following *oral* agreement, not conflicting terms in the *writings* that form the agreement. This approach is supported by Professor Summers. J.J. WHITE & R.S. SUMMERS, UNIFORM COMMERCIAL CODE, § 1-2, at 29 (2d ed. 1980).

The third, and preferable approach, which is commonly called the "knock-out" rule, is that the conflicting terms cancel one another. Under this view the offeree's form is treated only as an acceptance of the terms in the offeror's form which did not conflict. The ultimate contract, then, includes those non-conflicting terms and any other terms supplied by the U.C.C., including terms incorporated by course of performance (§ 2-208), course of dealing (§ 1-205), usage of trade (§ 1-205), and other "gap fillers" or "off-the-rack" terms (*e.g.*, implied warranty of fitness for particular purpose, § 2-315). As stated previously, this approach finds some support in Comment 6. Professor White supports this approach as the most fair and consistent with the purposes of § 2-207. WHITE & SUMMERS, *supra*, at 29. Further, several courts have adopted or recognized the approach. . . .

We are of the opinion that this is the more reasonable approach, particularly when dealing with a case such as this where from the beginning the offeror's specified period of limitations would expire before the equipment was even installed. The approaches other than the "knock-out" approach would be inequitable and unjust because they invited the very kind of treatment which the defendant attempted to provide.

Thus, we are of the conclusion that if faced with this issue the Pennsylvania Supreme Court would adopt the "knock-out" rule and hold here that the conflicting terms in Pennwalt's offer and Daitom's acceptance regarding the period of limitations and applicable warranties cancel one another out. Consequently, the other provisions of the U.C.C. must be used to provide the missing terms.

This particular approach and result are supported persuasively by the underlying rationale and purpose behind the adoption of § 2-207. As stated previously, that provision was drafted to reform the infamous common law mirror-image rule and associated last-shot doctrine that enshrined the fortuitous positions of senders of forms and accorded undue advantages based on such fortuitous positions. WHITE & SUMMERS, *supra* at 25. To refuse to adopt the "knock-out" rule and instead adopt

one of the remaining two approaches would serve to re-enshrine the undue advantages derived solely from the fortuitous positions of when a party sent a form. *Cf.*, 3 DUESENBERG & KING at 93 (1983 Supp.). This is because either approach other than the knock-out rule for different terms results in the offeror and his or her terms always prevailing solely because he or she sent the first form. Professor Summers argues that this advantage is not wholly unearned, because the offeree has an opportunity to review the offer, identify the conflicting terms and make his or her acceptance conditional. But this joinder misses the fundamental purpose of the U.C.C. in general and § 2-207 in particular, which is to preserve a contract and fill in any gaps if the parties intended to make a contract and there is a reasonable basis for giving an appropriate remedy. UCC §§ 2-204(3); 2-207(1); 2-207(3). Thus, this approach gives the offeree some protection. While it is laudible [sic] for business persons to read the fine print and boilerplate provisions in exchanged forms, there is nothing in § 2-207 mandating such careful consideration. The provision seems drafted with a recognition of the reality that merchants seldom review exchanged forms with the scrutiny of lawyers. The “knock-out” rule is therefore the best approach. Even if a term eliminated by operation of the “knock-out” rule is reintroduced by operation of the U.C.C.’s gap-filler provisions, such a result does not indicate a weakness of the approach. On the contrary, at least the reintroduced term has the merit of being a term that the U.C.C. draftpersons regarded as fair.

We now address the question of reverse and remand regarding Counts I and II. The result of this court’s holding is that the district court erred in granting summary judgment against Daitom on Counts I and II of its complaint. Operation of the “knock-out” rule to conflicting terms results in the instant case in the conflicting terms in the offer and acceptance regarding the period of limitations and applicable warranties cancelling. In the absence of any evidence of course of performance, course of dealing, or usage of trade providing the missing terms, §§ 2-725(1), 2-313, 2-314, 2-315 may operate to supply a four-year period of limitations, an express warranty, an implied warranty of merchantability, and an implied warranty of fitness for a particular purpose, respectively. The ruling of the district court on Counts I and II does not invite this kind of a broad inquiry, and thus, we must recognize the superiority in terms of justice of the “knock-out” rule. Consequently, the ruling of the district court on Counts I and II must be reversed and the matter remanded for trial consistent with this court’s ruling. . . .

BARRETT, CIRCUIT JUDGE, dissenting:

I respectfully dissent. Insofar as the issue of contract formation is concerned in this case, we are confronted with a “battle of the forms” case involving the interpretation and application of U.C.C. 2-207. I would affirm.

Pennwalt’s proposal of September 7, 1976, was an “offer.” It was submitted to Daitom in response to solicitations initiated by Daitom and it contained specific terms relating to price, delivery dates, etc., and its terms were held “open” for Daitom’s acceptance within 30 days. In my view, Daitom accepted the offer with its purchase order. That order repeated the quantity, model number, and price for the items as those terms appeared in the Pennwalt proposal and, by reference, it incorporated four pages of specifications attached to Pennwalt’s proposal or “offer.” The purchase order did contain some different and additional language from that contained in Pennwalt’s proposal. However, the Code has rejected the old mirror image rule. Thus, I agree with the district court’s finding/ruling that a contract was formed in the circumstances described.

I also agree with the district court’s conclusion that the terms of Pennwalt’s proposal constituted the “terms of the contract.” I do not agree, as Daitom argues, that its “acceptance” was made “conditional” upon Pennwalt’s assent to the additional/different terms set forth in Daitom’s purchase order. The court correctly found no such *express* condition in Daitom’s acceptance.

The “knock-out” rule should not, in my view, be reached in this case. It can be applied only if, as Daitom argues and the majority agrees, the “conflicting terms” cancel each other out. The “knock-out” rule does have substantial support in the law, but I do not believe it is relevant in this case because the *only* conflicting terms relate to the *scope* of the warranty. In this case, it is not an important consideration because, pursuant to the express time limitations contained in Pennwalt’s “offer,” Daitom lost its right to assert any warranty claim. There was no term in Daitom’s purchase order in conflict with the express one-year limitation within which to bring warranty actions. . . .

Questions

1. One source of the “knock-out rule” is section 2-207(3). Another is comment 6 to that section. Which of these did the court in *Diatom* rely upon? Does either apply according to its terms?

2. Do you agree with the *Diatom* court's decision to adopt the "knock-out rule"?

3. The other issue that the *Diatom* court addressed was when is a response that *purports* to be an acceptance "expressly made conditional on assent to the additional or different terms," so that it fails to qualify as an acceptance under section 2-207(1). Do you agree with the court's analysis of *Diatom*'s responsive form language?

4. The two issues directly confronted by the court in *Diatom* are merely two of several that frequently arise in connection with section 2-207. Other recurring issues include: (i) how to distinguish additional terms from different terms; and (ii) if one or more of the parties is not a merchant, and thus additional terms in the acceptance are merely "proposals for addition to the contract," whether assent to the proposals can be manifested by the failure to object. The *Diatom* court implicitly dealt with the first of these two issues as it concluded that it was dealing with different terms. Do you agree with the court's conclusion on this point? What is the dissent's point regarding that issue? For a different view of the effect of a reservation of rights clause, see *Robert Bosch Corp. v. ASC Inc.*, 195 Fed. Appx. 503 (6th Cir. 2006).

The effect of the knock-out rule is often to leave the parties with whatever default term would exist under Article 2's gap filler rules. In other words, the parties' conflicting terms cancel each other out, and the contract is formed using whatever term Article 2 would supply when the parties' communications are silent on the subject involved. If one assumes that Article 2's gap fillers are fair terms, then perhaps the knock-out rule makes sense. However, consider the following scenario:

Illustration

Salvage Company acquires goods from Insurer. The goods had been stored in a warehouse that was flooded during a storm. Insurer had paid its client the replacement value of the goods and then sold the goods to Salvage Company for a small fraction of their original value. Salvage Company examined the goods and discarded the ones that were obviously defective but is unable to readily determine which of the remaining goods are merchantable and which are not. Salvage Company then sends an e-mail message to Wholesaler, offering to sell the goods without any

warranty of merchantability or other warranty of quality. Wholesaler responds by sending Salvage Company a purchase order for the goods on Wholesaler's standard form. The form includes a provision that the seller warrants that the goods are merchantable. If the knock-out rule applies, Salvage Company will likely be making a warranty. *See* UCC § 2-314(1). Indeed, even if Salvage Company immediately reads Wholesaler's form, sees the problem, and calls Wholesaler to object, it is too late to change the terms of the contract (at least without Wholesaler's consent). The knock-out rule would have already bound Salvage Company to a term it expressly did not want.

Problem 2-5

- A. Buyer, a consumer, telephones Seller to get a price quote and delivery date for organic apples for Buyer to use in making homemade applesauce. Buyer makes clear to Seller that Buyer is in the process of shopping for a supplier and will get back to the Seller if the Buyer is interested. After the telephone call, Seller faxes to Buyer an offer to sell 10 bushels of Crispy Pink apples for \$10 per bushel, offer open until 5:00 p.m. that same day. Seller's fax contained an arbitration clause requiring binding arbitration of all disputes arising out of the agreement. Buyer sent Seller an e-mail message at 4:00 p.m. that same day stating that he would buy 10 bushels of Crispy Pink apples for \$10 per bushel, delivery by Nov. 15. Is there an agreement? If so, on what terms?
- B. After reading an advertisement, Buyer in Indiana telephones Seller in Illinois to order a sub-zero freezer designed for commercial use. The price is \$9,200, which Buyer pays using a major credit card. Prior to shipment, Seller mails Buyer an acknowledgment of the transaction that properly describes the item and price. It also indicates that the transaction is subject to all of the terms printed on the back of the form. These terms include:
- (i) In the event of any problem with a shipment, customer must notify Seller in writing of such problem within 20 days of receipt or be barred from any remedy.
 - (ii) The contract is to be governed by the law of the State of Illinois.

(iii) Any dispute arising out of this transaction shall be subject to binding arbitration.

(iv) All goods will be shipped using Careful Carriers, Inc.

Prior to shipment, is there an agreement? If so, on what terms?

- C. Buyer mails Seller a purchase order for 1,000 lbs. of green beans at \$78¢/lb., delivery by November 15, payment within 30 days after delivery. The purchase order indicates that the transaction is subject to all of the terms printed on the back of the form. One of these terms says: "Buyer objects in advance to any additional or different terms on Seller's acknowledgment or confirmation." Seller responds with an acknowledgment of the order which correctly restates the quantity, price, and delivery terms but indicates that, on the date of delivery, interest will start accruing on the outstanding balance due. Prior to shipment, is there an agreement? If so, on what terms?
- D. Buyer mails Seller a purchase order for 1,000 lbs. of honeydew melons at \$1.28¢/lb., delivery by November 15, payment within 30 days after delivery. Seller responds with an acknowledgment of the order which correctly restates the quantity, price, and delivery terms, but indicates that all disputes arising out of the transaction will be subject to binding arbitration. In addition, the acknowledgment states the following: "This acknowledgment is expressly conditional on Buyer's assent to the terms hereof." Prior to shipment, is there an agreement? If so on what terms? If not, and an agreement is created by performance, is the arbitration clause part of the agreement?
- E. Buyer mails Seller a purchase order for 1,000 gallons of vanilla ice cream at \$1.85/gal., delivery by November 15, payment within 30 days after delivery. The purchase order contains the following: "This purchase order is expressly conditional on assent to the terms hereof. Buyer objects in advance to any different or additional terms in any acceptance." Seller responds with an acknowledgment of the order which correctly restates the quantity, price, and delivery terms, but indicates that all disputes arising out of the transaction will be subject to binding arbitration. One week later, Seller ships the goods and Buyer accepts them shortly after delivery. Is the arbitration clause part of the agreement?
- F. Buyer telephones Seller to order 1,000 lbs. of jelly beans. During the conversation, which is very brief, they agree on a price and a delivery

date. Later that day, Seller mails Buyer a written acknowledgment that states, among other things, that:

- (i) In the event of any problem with the shipment, customer must notify Seller in writing of such problem within 20 days of receipt or be barred from any remedy.
- (ii) The contract is to be governed by the law of the State of Illinois.
- (iii) Any dispute arising out of this transaction shall be subject to binding arbitration.

The next day, before receiving Seller's acknowledgment, Buyer sends Seller its own acknowledgment of the transaction. Among other things, Buyer's acknowledgment states that:

- (i) Seller will correct any problem with the shipment within 3 days of receiving notice thereof from Buyer, which notice may come within any reasonable time, regardless of whether Buyer still has possession of the goods.
- (ii) Any dispute arising out of this transaction shall be subject to binding arbitration.

Prior to shipment, is there a contract? If so on what terms?

- G. Buyer, who operates a small business, sees an advertisement for personal computers made by Seller. Buyer writes to Seller stating the type of computer needed and the requisite components. Seller telephones Buyer and they agree on the computer and the price. Buyer gives Seller a credit card number and Seller charges that card for the price of the computer. Seller then ships the computer. In the box are two pages of standard terms, one of which commits the parties to arbitrate all disputes under ICC Rules in New York. The terms state in bold type: "Use of the computer will constitute an acceptance of these terms." Buyer uses the computer, which turns out to be unmerchantable. Buyer concedes that a contract was formed but argues that the arbitration clause was not part of the contract. What result?¹⁵

¹⁵ See *Stenzel v. Dell, Inc.*, 870 A.2d 133 (Me. 2005). Judge Easterbrook, concluded that even though the buyer paid for and the seller shipped the goods before the terms were disclosed, there was a "rolling contract" that was not concluded until the buyer used the goods and section 2-207 did not apply if only one party used a standard form. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997); *accord, Westendorf v. Gateway 2000, Inc.*,

Problem 2-6

- A. You represent Savanna Industries, a wholesaler of fine, colonial-style furniture to retailers throughout the country. Most of Savanna's customers telephone or fax in orders from Savanna's catalogue. Some of the faxed orders arrive on the customer's own purchase order form. Others are on the form that is included in Savanna's catalogue. Savanna is very proud of the quality of its furniture but over the years there have been a few, isolated problems. For these reasons, Savanna wants to be sure that all of its sales contracts: (i) include an agreement to arbitrate all disputes relating to the transaction; (ii) provide that the buyer must notify Savanna in writing of any problem with the goods sold within four months of delivery or be barred from any remedy; and (iii) limit Savanna's liability for defective goods to refund of the purchase price (*i.e.*, disclaim responsibility for consequential damages). Draft Savanna's acknowledgment form so that these terms will be part of Savanna's sales contracts.
- B. You represent Bountiful Merchandise, Corp., which owns department stores in several states. Bountiful purchases goods from many different suppliers. Most of Bountiful's purchases are made by completing one of Bountiful's own order forms and faxing the completed form to the

2000 WL 307369 (Del. Ch. 2000), *aff'd*, 763 A.2d 92 (Del. 2000) (table). This analysis was rejected in *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000), *dismissed for lack of subject matter jurisdiction*, 2000 WL 1372886 (D. Kan. 2000), *refusing to vacate first order*, 2001 WL 1568346 (D. Kan. 2001), in which the court held that the terms that came with the product were proposals for addition to the contract under section 2-207 and that the buyer did not expressly agree to that proposal. *But see Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. Sup. Ct. App. Div. 1998), where the court refused to apply section 2-207 to a transaction where the contract was not formed until the 30-day period had expired but held that the arbitration clause, because of the prohibitive cost involved in the arbitration, was substantively unconscionable.

Of course, there are a legion of law review articles on this issue. *See, e.g.*, Ronald J. Mann & Travis Siebeneicher, *Just One Click, The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984 (2008); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227 (2007); Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511 (2007); Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006); Stephen E. Friedman, *Improving the Rolling Contract*, 56 AM. U. L. REV. 1 (2006).

seller. Bountiful insists that all its suppliers: (i) warrant the merchantability of their goods and be responsible for all consequential damages; (ii) agree that payment will be due, without interest, 90 days after delivery; and (iii) agree that if they sell the same goods to anyone else at a lower price within six months after the sale to Bountiful, they will retroactively lower the price charged to Bountiful to the lowest price charged to anyone else, and promptly rebate the difference. Draft Bountiful's order form so that these terms will be part of Bountiful's sales contracts.

- C. Assume that Bountiful ordered goods from Savanna using the form you drafted in Part B. Savanna responded on the acknowledgment form you drafted in Part A.
1. Before shipment, is there a contract? If so, what are its terms?
 2. How, if at all, would the analysis of Subpart 1 change if Savanna shipped the goods and Bountiful accepted and paid for them?
- D. Based upon the above exercise, what methodology would you recommend to Bountiful to ensure that the terms it wanted were always a part of a contract, no matter how the contract was formed? Would you have a different methodology to recommend to Savanna to ensure that it would have the terms it wanted, no matter how the contract was formed?

The Article 2 revision struggled with the question of how to deal with the battle of the forms problem. Discussion of amended section 2-207 is in the Appendix. In essence, the issue is how to deal with the fact that businesses use standard forms to try to set terms of their contracts, in case something goes awry in a transaction. That being said, however, the vast majority of transactions are performed properly and nothing goes wrong. Thus, business people involved in the exchange of standard forms routinely pay no attention to the terms in the forms they give and receive. The only time the terms matter is if a dispute arises.¹⁶ Given that

¹⁶ Section 2-207 results in significant amounts of litigation. *See, e.g., Foamade Indus. v. Visteon Corp.*, 2008 WL 582566 (Mich. Ct. App. 2008); *Tacoma Fixture Co. v. Rudd Co.*, 174 P.3d 721 (Wash. Ct. App.), *review denied*, 190 P.3d 55 (Wash. 2008); *Coosemans Specialties, Inc. v. Gargiulo*, 485 F.3d 701 (2d Cir. 2007); *E.C. Styberg Eng'g Co. v. Eaton Corp.*, 492 F.3d 912 (7th Cir. 2007); *Robert Bosch Corp. v. ASC Inc.*, 195 Fed. Appx. 503 (6th Cir. 2006); *Roanoke Cement Co., L.L.C. v. Falk Corp.*, 413 F.3d 431 (4th Cir. 2005); *Marvin Lumber and Cedar Co. v. PPG Industries, Inc.*, 401 F.3d 901 (8th Cir. 2005);

operational construct, what legal principles should be used to determine whether a contract was formed from an exchange of forms? What legal principles should apply to determine the terms of such contracts?¹⁷

3. *Electronic Contracting and Assent*

An increasing percentage of sales contracting is conducted through electronic means. We do not mean merely through electronically transmitted communications, such as e-mail and fax. We mean also through computer-assisted technologies that obviate the need for a human representative of one or both of the parties involved. For example, one common practice with which you are no doubt familiar is for a customer to visit the website of the seller and order goods or services on line. In such situations, no human representative of the seller participates in the contract-formation process

Typically, two different methods are used to manifest assent in such transactions. In so-called “click-wrap” agreements, the person using a computer to conduct a transaction (typically the buyer) uses a mouse to click an “I agree” button after the terms of the agreement are displayed. This form of agreement is commonly used in the downloading or installation of software but it could just as easily be used in a sale of goods or a lease of goods.¹⁸ Another practice in the

Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440 (3d Cir. 2003); *Polytop Corp. v. Chipsco, Inc.*, 826 A.2d 945 (R.I. 2003) (per curiam); *Southern Illinois Riverboat Casino Cruises, Inc. v. Triangle Insulation and Sheet Metal Co.*, 302 F.3d 667 (7th Cir. 2002).

¹⁷ Lawyers (and law professors) love this issue and have produce extensive law review articles on it. See, e.g., Stephen W. Ranere, Note, *Charting a Course: How Courts Should Interpret Course of Dealing in a Battle-of-Forms Dispute*, 41 SUFFOLK U. L. REV. 671 (2008); Corneill A. Stephens, *Escape From the Battle of the Forms: Keep It Simple, Stupid*, 11 LEWIS & CLARK L. REV. 233 (2007); Colin P. Marks, *The Limits of Limiting Liability in the Battle of the Forms: U.C.C. Section 2-207 and the “Material Alteration” Inquiry*, 33 PEPPERDINE L. REV. 501 (2006); Omri Ben-Shahar, *An Ex-Ante View of the Battle of the Forms: Inducing Parties to Draft Reasonable Terms*, 25 INT’L REV. L. & ECON. 350 (2005).

¹⁸ See Robert Lee Dickens, *Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases*, 11 MARQ. INTELL. PROP. L. REV. 379 (2007); Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797 (2007); Christina L. Kunz, et al., *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401 (2001). See, e.g., *Hotels.com, L.P. v. Canales*, 195

electronic environment is the use of so-called “browse-wrap” agreements. In this type of transaction, the user of the electronic interface may click on a button that says “place order,” “confirm order,” or “I agree,” but the only terms of the agreement that are displayed are the description of the goods, the price, the quantity, and perhaps the shipping terms. The other terms are not displayed, but the website may provide a link to them or may simply display a notice that the transaction is governed by a set of terms and that using the website or engaging in some defined conduct will bind the user to the terms.¹⁹

At this point we are examining electronic contracting as it impacts the issue of assent to a bargain. We will consider some of the other issues in electronic contracting later in this Chapter.

Problem 2-7

Abel visits Retailer’s website and decides to order a new toaster advertised for sale on the website. Abel clicks on the picture of the toaster and adds the toaster to his electronic shopping cart.

- A. A screen pops up with the various terms including the following: “Any disputes concerning any product provided through this website must be resolved in binding arbitration.” Two buttons are under the pop up screen one of which states “I agree” and the other of which states “I disagree.” To actually complete the purchase, Abel must click on the “I agree” button. Clicking on the “I disagree” button removes the item from the electronic shopping cart. Abel clicks on “I agree” and completes ordering of the toaster. When the toaster arrives, it is a miserable failure at toasting anything. Is Abel bound by the arbitration clause?

S.W.3d 147 (Tex. Ct. App. 2006).

¹⁹ See Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up to Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173 (2007); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006); Christina L. Kunz, *et al.*, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003). See, e.g., *Southwest Airlines Co. v. BoardFirst, L.L.C.*, 2007 WL 4823761 (N.D. Tex. 2007).

For a discussion of other perspectives on electronic contracting, see Sylvia Mercado Kierkegaard, *E-contract Formation: U.S. and EU Perspectives*, 3 SHIDLER J. L. COM. & TECH. 12 (2007); Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175 (2006).

- B. Assume instead of the pop up screen as described above, when Abel clicks on the picture of the toaster to place the toaster in his electronic shopping cart, the screen changes to provide a hyperlink which states, “click here for terms of sale.” Abel does not click on the hyperlink but rather completes his purchase of the toaster. If Abel had clicked on the hyperlink, Abel would have seen the same arbitration clause as stated above. When the toaster arrives, it is a miserable failure at toasting anything. Is Abel bound by the arbitration clause?
- C. You have been asked to advise a retailer who is in the process of establishing a website on which customers may place their orders. What reasons, if any, are there for recommending a browse-wrap agreement rather than click-wrap agreement?

B. CONTRACT FORMATION IN INTERNATIONAL TRANSACTIONS

1. CISG

The provisions for forming a contract governed by the CISG are found in Articles 14 through 24. These rules resemble the offer and acceptance rules of the common law more closely than they do the contract formation rules of Article 2. Article 14 defines an offer and requires that it be definite about the description of the goods, the quantity, and the price. Articles 15, 16, and 17 govern the effectiveness and revocation of offers. Articles 18, 20, 21, and 22 govern the manner and timing of acceptances.

Most notable is Article 19, which presents another approach to the battle of the forms.²⁰ To understand it, it is advisable to read its three sub-articles in order. Sub-article (1) adopts something very much like the common-law mirror image rule. A reply which purports to be an acceptance but which contains different or additional terms is really a rejection and counter-offer. Sub-article (2) cuts back on

²⁰ See Henry D. Gabriel, *The Battle of the Forms: A Comparison of the United Nations Convention for the International Sale of Goods and the Uniform Commercial Code*, 49 BUS. LAW. 1053 (1994). For a survey of different countries' approaches to the battle of the forms issues concerning standard terms, see Kevin C. Stemp, *A Comparative Analysis of the "Battle of the Forms,"* 15 TRANSNATIONAL L. & CONTEMP. PROB. 243 (2005); James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109 (2003).

sub-article (1) by indicating that if the additional or different terms do not materially alter the terms of the offer, then the reply is an acceptance. The additional or different terms will become part of the contract unless the offeror promptly objects to them. Sub-article (3) significantly minimizes the scope of sub-article (2), however, by providing that virtually every conceivable term is in fact material.

To illustrate, assume that a buyer in California sends an offer in a record to a seller in Mexico City.²¹ The seller responds with a record that purports to accept the offer but also contains a clause changing the delivery date. The seller ships later than the buyer expected but in accord with the seller's delivery date. The buyer accepts the goods and then uses them, even though it is very unhappy about the timing of the delivery. Under CISG Article 19, the seller's reply is a counter-offer because it contains an additional term (the delivery clause) that materially alters the offer. Buyer's conduct in accepting the goods indicates assent to the counter-offer, including the delivery clause. CISG Art. 18(3). In essence, the CISG adopts something like the last-shot rule that UCC section 2-207(1) sought to avoid. Under this construct, commercial parties under the CISG must read and object to terms in the forms or risk agreeing to them.

Problem 2-8

Revisit Problem 2-5. What would be the result in Parts B, C, and D if the transaction were governed by the CISG? What would be the result in each of those Parts if the transaction were governed by the CISG and the parties went ahead and performed (shipped and accepted the goods).²²

²¹ Both the United States and Mexico have ratified the CISG.

²² See *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528 (9th Cir. 2003) (party who did not object to forum selection clause in other side's invoice sent after agreement formed did not agree to clause as the CISG requires agreement to terms and does not enforce unilateral attempts to modify terms).

Even if an arbitration clause is part of the parties' agreement under the CISG analysis, it still might not be enforceable. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) requires an "agreement in writing" to arbitrate and then defines "agreement in writing" to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties, or contained in an exchange of letters or telegrams." Art. II(2).

2. UNIDROIT Principles

The UNIDROIT Principles of International Commercial Contracts are for international contracts what the Restatement (Second) of Contracts is for domestic transactions. They are not law, but they may provide persuasive guidance to courts and to parties. The UNIDROIT Principles on contract formation are closely analogous to the UCC Article 2 rules on contract formation. Offer and acceptance as well as the conduct of the parties may be sufficient to show agreement. UNIDROIT Art. 2.1.1. In addition, if the parties intend to agree, they may leave terms open yet still have a valid agreement. UNIDROIT Art. 2.1.14. The Principles contain a number of familiar offer and acceptance rules. UNIDROIT Arts. 2.1.2 through 2.1.13.

In a battle of the forms, a response that purports to be an acceptance but which contains non-material additional or different terms is treated as an acceptance. UNIDROIT Art. 2.1.11. The non-material terms become part of the agreement unless the offerer objects to the terms. *Id.* If the term is a standard term (whether material or non-material), the term is not effective if it is “not reasonably expected” by the other party or the other party has not “expressly accepted” it. UNIDROIT Art. 2.1.20. If the parties agree to terms and they also have standard terms that are “common in substance” the parties have a contract on those terms unless the other party indicates in advance or without undue delay that it does not intend to be bound to the contract. UNIDROIT Art. 2.1.22. Standard terms are “provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.” UNIDROIT Art. 2.1.19.

SECTION 2. BARRIERS TO ENFORCEABILITY

A. STATUTE OF FRAUDS

1. *In General*

Some oral agreements are not enforceable because a statute of frauds requires that the agreement be evidenced by a signed writing to become a valid contract. Historically, the types of agreements covered by a statute of frauds include agreements to buy and sell real estate and agreements that cannot be performed

within one year.²³ The Uniform Commercial Code has several provisions that could fairly be regarded as a statute of frauds,²⁴ including one applicable to the sale of goods. Read section 2-201.

The statute of frauds functions as a barrier to enforcement of an alleged agreement. If the plaintiff cannot prove compliance with the statute of frauds, the plaintiff's claim will fail. The typical lawsuit follows either of two patterns. After the plaintiff sues the defendant for breach of contract, the defendant either:

- (i) submits a motion to dismiss, alleging that the plaintiff has not pled satisfaction of the statute of frauds; or
- (ii) pleads the statute of frauds as an affirmative defense in its answer, and later moves for summary judgment on the basis that the plaintiff has not been able to produce a writing or other sufficient evidence to satisfy the statute of frauds.

Bear in mind that even if the plaintiff submits evidence that satisfies the statute of frauds, that does not mean that the plaintiff has proven that a contract exists. Satisfying the statute of frauds merely unlocks the door to the courthouse and allows the plaintiff the opportunity to prove the rest of its case. The plaintiff still has the burden of proving that the contract existed, what its terms were, and that the defendant breached it.

Two principal justifications have been asserted for the statute of frauds. First, the statute of frauds avoids fraudulent or perjured claims that an agreement was made. Second, the statute encourages the useful business habit of making a writing.²⁵ You should question these assertions. With respect to the first, it is worth noting that the CISG does not have a statute of frauds, *see* CISG Art. 11, and the UNIDROIT Principles do not require a writing of any sort, *see* UNIDROIT Art. 1.2. Indeed, England, which is where the statute of frauds originated, abandoned it more than a half-century ago. Moreover, while the statute of frauds may prevent

²³ *See* RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(d), (e).

²⁴ *See* UCC §§ 5-104, 9-203(b)(3). Article 8 used to have a statute of frauds, *see* former § 8-319, but it was repealed as part of the 1994 revisions. *See* Art. 8 Prefatory Note IV.B.7. The pre-revision version of Article 1 also had a general statute of frauds for transactions in excess of \$5,000, *see* former § 1-206, but that too was repealed in the revision process.

²⁵ *See* Lawrence Vold, *The Application of the Statute of Frauds Under the Uniform Sales Act*, 15 MINN. L. REV. 391, 393–94 (1931); Jason S. Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859 (1996).

one type of fraud – seeking judicial enforcement of an agreement that never existed – it would seem to increase the likelihood of another: denial of the existence of an agreement that was reached. The second justification presumes that encouraging individuals and businesses to memorialize their agreements is worth the added cost and that individuals and businesses will in fact modify their behavior because of the law. Both of these require some empirical research to confirm.

Problem 2-9

What does a plaintiff have to plead and prove to demonstrate compliance with section 2-201(1)? Based upon these requirements, what would you advise a client who is entering into transactions to do to ensure there is sufficient evidence to satisfy the statute of frauds?

2. The Exceptions

The general rule in section 2-201(1) is subject to four exceptions: one in subsection (2) and three in subsection (3). Subsection (2) is known as the “merchants must read their mail rule.”²⁶ It provides that a merchant’s receipt of a confirmation may be sufficient to satisfy the statute of frauds if the merchant fails to object in writing within ten days. Is it a good idea to limit this exception to communications “between merchants?”²⁷ Who qualifies as a merchant for the purposes of this rule? See UCC § 2-104 & cmt. 2.

Problem 2-10

- A. The exception in section 2-201(2) applies only if the confirmation is “sufficient against the sender.” What does that phrase mean and how does it limit the scope of subsection (2)? Construct a scenario in which the confirmation is sufficient against the sender and another in which the confirmation is not.

²⁶ A point that is also borne out by UCC § 2-207(2).

²⁷ See Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295 (2005).

- B. Silas runs a hardware store as a sole proprietor. Brittany is starting a landscaping business and needs to buy a large riding mower. On April 1, Brittany visited Silas's store and discussed purchasing a Jack Stallion 3000 riding mower for \$3,700. The following day, Brittany sent an e-mail message to Silas, stating the following:

Thanks for talking with me yesterday. This message is to confirm our agreement that I will be buying a Jack Stallion 3000 for \$3,700, payment to be 90 days after delivery. I will come by on April 15 to pick up the mower. Thanks. – Brittany

Silas responded with the following message:

I never agreed to payment in 90 days. I cannot possibly do business on such terms. I am happy to try to work something out with you or to arrange for alternative financing, but you'll have to come in to discuss it. – Silas.

If Brittany and Silas have no further discussions, and Brittany sues Silas for breach of contract, can Silas successfully raise the statute of frauds defense? If not, do they have a contract? What should Silas have done to preserve the statute of frauds defense?

CASAZZA v. KISER
313 F.3d 414 (8th Cir. 2002)

Bowman, Circuit Judge

This appeal arises from James Casazza's ill-fated effort to purchase a fifty-two-foot sailboat named the "*Andante*" from Joseph C. Kiser. Casazza sued Kiser seeking damages under the legal theories of breach of contract and promissory estoppel for Kiser's failure to sell him this boat. The District Court granted Kiser's motion to dismiss. We affirm.

I. Background

In late May 2001, Casazza read Kiser's listing of the *Andante* on an internet sales site. Shortly thereafter, Casazza contacted Kiser and expressed an interest in purchasing the boat. They agreed to meet during the weekend of June 2, 2001, in Ft. Lauderdale, Florida, where the *Andante* was located. Casazza first viewed the boat on June 2 and looked at it again with Kiser the following day. Casazza and Kiser met again on June 4, 2001, and, according to Casazza, negotiated an agreement for Casazza's purchase of the *Andante*. The details of this agreement

were handwritten by each party on separate sheets of paper and at some point converted, presumably by Casazza, into a typewritten agreement (collectively, the “purchase terms”). That agreement provided for a sales price of \$200,000 for the boat. The agreement further stated the sale was contingent on a marine survey, including a sea trial, satisfactory to Casazza. Among other provisions, the agreement also required payment by wire transfer and replacement of the mast step, and it detailed the logistics of transferring the boat from Florida to Virginia. Kiser never signed the agreement and the marine survey and sea trial did not take place.

During their meeting on June 4, Kiser gave Casazza a blank Coast Guard bill of sale to complete. The next day, Kiser and Casazza executed a software license transfer agreement for the boat’s navigational software. This license agreement is the only document in the dispute signed by both parties and it does not refer to the *Andante*. Following these events, Casazza arranged for a marine survey, obtained an estimate for repair of the mast step, visited marinas, and tentatively reserved slip space for the *Andante* at a marina in Virginia. Things apparently went awry a week later, however, when Kiser informed Casazza that he would not sell him the boat. In response, Casazza initiated this suit and sought a temporary restraining order (TRO) to prevent Kiser from selling the *Andante* to someone else. While the application for the TRO was pending, but before Kiser had notice of it, Kiser sold the boat. Casazza amended his complaint and Kiser moved to dismiss the case on the basis of the statute of frauds. Casazza responded to Kiser’s motion to dismiss and filed a Federal Rule of Civil Procedure 56(f) motion and affidavit requesting that the District Court’s consideration of the motion to dismiss be delayed pending additional discovery.

On January 15, 2002, the District Court dismissed the action, concluding that additional discovery would not assist the court in the resolution of whether the statute of frauds applies to the dispute and that the defense barred Casazza’s breach of contract and promissory estoppel claims. The District Court denied Casazza’s motion for reconsideration. On appeal, Casazza argues the District Court erred in dismissing his claims.

II. Discussion

. . . We review de novo a district court’s order granting a motion to dismiss, viewing the allegations in the complaint in the light most favorable to the plaintiff. . . . Like the District Court, we must accept the allegations of the complaint as true and dismiss the case only when “it appears beyond doubt that the plaintiff can prove

no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

A. The Statute of Frauds Defense

Casazza contends the District Court erred when it dismissed his breach of contract claim, holding it was barred by the statute of frauds. Subject to certain limited exceptions, the statute of frauds renders unenforceable any unwritten contract for the sale of goods with a value over \$500. . . . [Court applied Minnesota law – Eds.] Because Kiser raised the statute of frauds defense in his motion to dismiss, Casazza was required to affirmatively show the existence of an appropriate writing or an exception to this defense in order to avoid dismissal by the District Court. In this appeal, Casazza argues that the alleged contract was taken out of the statute of frauds by (1) the doctrine of part performance, (2) the existence of a sufficient writing, and (3) the possibility that Kiser may have a sufficient writing or that Kiser might admit a contract was formed between the parties had the District Court granted Casazza’s request for additional time for discovery. All these arguments are without merit.

(1) Part Performance

Under the part-performance exception to the statute of frauds, a writing is not required “with respect to goods for which payment has been made and accepted or which have been received and accepted.” [§ 2-201(3)(c)]. Here, Casazza contends that his acceptance of the navigational software constitutes part performance of the parties’ alleged agreement concerning the sale of the *Andante*. In support of this claim, Casazza relies on section [2-606(2)], which provides that “[a]cceptance of a part of any commercial unit is acceptance of that entire unit.” According to Casazza, the navigational software is part of the *Andante*. Thus, Casazza argues, when he accepted this software, he accepted the *Andante*.

First, we question the applicability of section [2-606(2)] to the present dispute. The drafters of the commercial code designed this provision to limit a buyer’s right of revocation of acceptance to whole units. As the Ninth Circuit observed of the uniform provision at issue here, “The commercial unit provision is included to protect a *seller* from having a buyer return *less* than a commercial unit. Return of less than a commercial unit would leave the seller with only components of a commercial unit, which would have severely reduced market value.” *S & R Metals, Inc. v. C. Itoh & Co. (America)*, 859 F.2d 814, 817 (9th Cir.1988) (first emphasis added) (citing *Abbett v. Thompson*, 263 N.E.2d 733, 735–36 (Inc. Ct. App. 1970)

(holding buyer could not keep some parts of a car wash machine and revoke acceptance of the rest because the entire machine was a commercial unit and would have little value to the seller if incomplete)).

Second, even assuming section [2-606(2)] applies to the instant dispute, we conclude that under no circumstances could the software and the *Andante* be considered a single “commercial unit.” Minnesota’s Uniform Commercial Code states that:

“Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

Minn.Stat. § 336.2-105(6) (2000). Viewing Casazza’s allegations in the light most favorable to him, we are hard-pressed to see how the navigational software and the *Andante* are a “single whole.” Notably, Casazza concedes that the navigational software was purchased years after the *Andante* was built and that Kiser sold the boat to another party without it. Though Casazza distinguishes some cases cited in Kiser’s brief, Casazza fails to cite a single case in support of his position that this Court should treat the *Andante* and the navigational software as a commercial unit, and our own research has not revealed any authority supporting this position. In short, we agree with the District Court that the doctrine of part performance cannot transmute Kiser’s gift of the navigational software into a contract for the sale of the *Andante*.

(2) *Sufficient Writing*

Casazza also argues that the statute of frauds is inapplicable to this dispute because there is a sufficient writing showing the existence of a contract between the parties. The primary purpose of the writing requirement in the statute of frauds is to demonstrate that a contract for sale has indeed been made. *See* 1, JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 2-4, at 63 (4th ed.1995). But the statute does not require one writing containing all the terms. *See Simplex Supplies, Inc. v. Abhe & Svoboda, Inc.*, 586 N.W.2d 797, 801 (Minn. Ct. App. 1998). Rather, “[s]everal papers may be taken together to make up the memorandum, providing they refer to one another, or are so connected together, by reference or by internal evidence, that parol testimony is not necessary to establish their connection with the contract.” *Id.* (quoting *Olson v. Sharpless*, 55 N.W. 125,

126 (Minn. 1893)). In addition, “[t]he signature can be found on any document and may consist of ‘any symbol executed or adopted by a party with present intention to authenticate a writing.’” *Id.* (quoting [§ 1-201(39)]). Casazza argues that the purchase terms, in particular the notes allegedly made by Kiser, and the executed software license transfer agreement constitute a sufficient writing. We disagree.

Casazza admits that he does not have a copy of a document that satisfies the statute of frauds. Casazza attempts to overcome this obstacle by arguing his pleadings reference the existence of a handwritten document allegedly prepared by Kiser, which – along with the executed software transfer agreement – constitute a sufficient writing. The typewritten agreement attached to Casazza’s amended complaint is not signed by Kiser and there is no allegation that Kiser participated in its preparation. While Kiser did sign the software license transfer agreement, that document does not refer to any contemplated, proposed, or agreed contract for the sale of the *Andante*. We refuse to allow Casazza to proceed with his breach of contract claim on this basis because to do so would eviscerate the statute of frauds. Casazza has failed to produce any document, or combination of documents, that satisfy the statute of frauds’ writing requirement. Casazza’s statements that a writing sufficient to satisfy the statute of frauds *may* exist is not enough to defeat Kiser’s motion to dismiss.

(3) Admissions Exception

In a related argument, Casazza argues that the admissions exception to the statute of frauds applies to this dispute. *See* [§ 2-201(3)(b)]. That subsection provides that even when there is no signed writing sufficient to satisfy the writing requirement, the proponent of the exception can escape the requirements of the statute of frauds “if the party against whom enforcement is sought admits in pleading, testimony or otherwise in court that a contract for sale was made.” *Id.* Here, Kiser has made no such admission. Nonetheless, Casazza argues that had the District Court granted his request for additional time for discovery pursuant to Fed. R. Civ. P. 56(f), Kiser might have made such an admission. Specifically, Casazza claims that Kiser may have a sufficient writing or that Kiser might admit a contract was formed between the parties if he were deposed. The District Court denied the request and found that resolution of whether the statute of frauds applies to the dispute did not require further factual development.

In light of our decision affirming the District Court’s decision to dismiss Casazza’s breach of contract claim, we need not reach the discovery issues raised in Casazza’s Rule 56(f) petition. . . . The District Court held a hearing on the motion

to dismiss on January 14, 2002. By that time – six months after the suit was filed – Casazza still had not produced any writing sufficient to satisfy the statute of frauds nor had he obtained an admission from Kiser that a contract existed. Given the period of time that elapsed and the conclusory nature of Casazza’s request for a continuance, we find the District Court did not abuse its discretion by denying further discovery and ruling on the motion to dismiss. . . .

B. *Promissory Estoppel*

Casazza alternatively argues that even if the alleged contract fails to satisfy the statute of frauds, his case should be permitted to proceed because a statute of frauds defense is inapplicable to his promissory estoppel claim. The District Court rejected this argument, holding that Casazza’s promissory estoppel claim rests on the same purported promise that forms the basis of his breach of contract claim and that to allow Casazza to pursue the promissory estoppel claim, despite the lack of a sufficient writing, “would negate the purpose of the statute of frauds.” Memorandum and Order, January 15, 2002, at 5 n.1.

Promissory estoppel implies “a contract in law where none exists in fact.” *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981). “Under promissory estoppel, a promise which is expected to induce definite action by the promisee, and does induce the action, is binding if injustice can be avoided only by enforcing the promise.” *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992).

In *Del Hayes & Sons, Inc. v. Mitchell*, 230 N.W.2d 588, 593-94 (Minn. 1975), the Minnesota Supreme Court identified three approaches courts have taken concerning the applicability of the statute of frauds defense to promissory estoppel claims. Under the first (or “RESTATEMENT”) approach, “promissory estoppel will defeat the statute of frauds only when the promise relied upon is a promise to reduce the contract to writing.” *Id.* The second approach described by the court, and adopted in numerous jurisdictions, rejects “the view that promissory estoppel can remove an oral contract from the statute of frauds.” *Id.* at 594; *see also Lige Dickson Co. v. Union Oil Co.*, 635 P.2d 103, 107 (Wash. 1981) (holding “promissory estoppel cannot be used to overcome the statute of frauds in a case which involves the sale of goods”). According to the court, jurisdictions that have adopted this approach “do so because a promissory estoppel exception would likely render the statute of frauds nugatory.” *Del Hayes*, 230 N.W.2d at 594; *see also McDabco, Inc. v. Chet Adams Co.*, 548 F. Supp. 456, 461 (D.S.C.1982) (“The [South Carolina] legislature has provided that the only exceptions to the

requirements of a written contract of sale are provided in [section 2-201(2) and (3)]. Promissory estoppel is not included within these subsections.”). The third and least restrictive approach described by the court states that an oral promise can satisfy the statute of frauds only “where the detrimental reliance is of such a character and magnitude that refusal to enforce the contract would permit one party to perpetrate a fraud.” *Del Hayes*, 230 N.W.2d at 594. The court went on to note that “[a] mere refusal to perform an oral agreement, unaccompanied by unconscionable conduct, however, is not such a fraud as will justify disregarding the statute.” *Id.*; see also *Resolution Trust Corp. v. Flanagan*, 821 F. Supp. 572, 574 (D. Minn.1993) (“under the doctrine of promissory estoppel, a party seeking to take an agreement out of the ‘statute of frauds must demonstrate that application of the statute of frauds would protect, rather than prevent, the perpetration of a fraud’ ”). The *Del Hayes* court did not endorse any particular view and held that, under any approach, promissory estoppel was not available so as to remove the oral contract at issue in that case from the statute of frauds. *Del Hayes*, 230 N.W.2d at 594.

In this case, the District Court apparently adopted the second or “restrictive” approach, which prohibits Casazza from doing an end-run around the statute of frauds because his promissory estoppel claim is based on the very promise that the statute otherwise bars. We might be inclined to agree with Casazza that Minnesota does not endorse such a hard-nosed view. . . . Nonetheless, we affirm the District Court’s dismissal of Casazza’s promissory estoppel claim. Even if we assume Casazza is correct that Minnesota does not endorse the view that promissory estoppel can never overcome the statute of frauds defense in a case such as this, he fails to convince us that his claim could proceed under either of the remaining approaches discussed by the Minnesota Supreme Court in *Del Hayes*.

Casazza’s promissory estoppel claim fails under the RESTATEMENT approach because he did not sufficiently allege that Kiser promised to reduce their oral agreement to writing. Casazza argues he made a sufficient allegation in his amended complaint, where he alleged that Kiser asked him to complete a blank Coast Guard bill of sale. In ruling on Casazza’s motion for reconsideration, the District Court rejected this argument and held that “[e]ven a liberal reading of the Complaint . . . does not support the inclusion of such a claim.” Order, February 7, 2002, at 2. Based on our own review of the amended complaint, we agree. The bill of sale is mentioned in only one line of Casazza’s five-page amended complaint. Nowhere in this complaint does Casazza specifically allege that Kiser promised to reduce their oral agreement to writing. . . .

Casazza's promissory estoppel claim also fails under the so-called least restrictive approach. Under this approach, Casazza's promissory estoppel claim can only proceed "where the detrimental reliance is of such a character and magnitude that refusal to enforce the contract would permit one party to perpetrate a fraud." *Del Hayes*, 230 N.W.2d at 594. . . . Here, Casazza alleges that he and Kiser reached an agreement on the sale of the *Andante* and that he subsequently arranged for a survey, obtained an estimate for some repairs, visited marinas, and tentatively arranged slip space for the boat. Casazza also alleges that a week later, Kiser told him he was not going to sell him the boat. Nowhere in Casazza's amended complaint does he allege that Kiser did anything that would constitute a fraud. At most, Casazza alleges that Kiser broke their oral agreement after Casazza had expended some money and time in anticipation of buying the boat.

Casazza's allegations simply do not amount to detrimental reliance of the sort required to take this agreement out of the statute of frauds. *See Del Hayes*, 230 N.W.2d at 594 n.11 ("The fraud most commonly treated as taking an agreement out of the Statute of Frauds" occurs where "the other party has been induced to make expenditures or a change of situation . . . , so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscionable injury and loss." (quoting 3 WILLISTON, CONTRACTS (3d ed.) § 533A, p. 798) (emphasis added by *Del Hayes*)). Whatever we might think of Kiser's behavior, we find nothing in the pleadings to suggest that judicial refusal to enforce the oral agreement "would permit one party to perpetrate a fraud." *Id.* "[A] mere refusal to perform an oral agreement unaccompanied by unconscionable conduct . . . is not such a fraud as will justify disregarding the statute." *Id.* Casazza's promissory estoppel claim therefore must fail.

III. Conclusion

For the reasons stated, we affirm the order of the District Court dismissing Casazza's suit.

Notes

1. For a slightly different view on the amount of discovery a plaintiff may conduct before dismissing the complaint, see *DF Activities Corp. v. Brown*, 851 F.2d 920 (7th Cir 1988) (once defendant denies under oath the existence of the agreement, case should be dismissed).

2. For a different take on the use of promissory estoppel to circumvent the statute of frauds, see *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809 (Wy. 1992) (promissory estoppel may justify enforcement of oral promise otherwise within the scope of UCC § 2-201).

Problem 2-11

What should Casazza have done in the interaction with Kiser to make sure that he would have been able to satisfy the statute of frauds? Would a confirming memorandum under section 2-201(2) have worked in this situation? Are Casazza and Kiser merchants? See UCC § 2-104.

Assume both parties are merchants and you are advising Casazza during the course of this interaction. What should Casazza have done? Now change sides and consider how Kiser should respond to the advice you gave Casazza.

Modifications to an existing agreement also may have to be in writing, either because the initial agreement requires modifications to be in writing or because the statute of frauds applies to the agreement as modified. See UCC § 2-209(2), (3). We will consider modifications further in Chapter Three.

Problem 2-12

BIM and Silicon Solutions allegedly entered an oral agreement for Silicon Solutions to produce and sell to BIM 50,000 integrated circuits for use in computers. The circuits were to conform to particular specifications furnished by BIM. BIM then issued purchase orders for 7,000 circuits. After manufacture and delivery, BIM accepted and paid for 4,000 circuits but rejected the remaining 3,000 on the basis of alleged quality problems. Silicon Solutions sued for damages caused by BIM's "wrongful" rejection of 3,000 circuits and for breach of contract for BIM's failure to order the remaining 43,000 circuits. BIM moved for a summary judgment on the basis of section 2-201. Silicon Solutions argued that the summary judgment should be denied because the statute of frauds was satisfied under section 2-201(3)(a) and (c). See UCC § 2-606 as to goods accepted.

Silicon Solutions cited *Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1036–37 (5th Cir. 1982), in which the court stated that the "statute exempts contracts

involving ‘specially manufactured’ goods from the writing requirement because in these cases the very nature of the goods serves as a reliable indication that a contract was indeed formed.” Further:

Where the seller has commenced or completed the manufacture of goods that conform to the special needs of a particular buyer and thereby are not suitable for sale to others, not only is the likelihood of a perjured claim of a contract diminished, but denying enforcement to such a contract would impose substantial hardship on the aggrieved party. . . . The unfairness is especially acute where . . . the seller has incurred substantial, unrecoverable expense in reliance on the oral promise of the buyer. . . . The crucial inquiry is whether the manufacturer could sell the goods in the ordinary course of his business to someone other than the original buyer. If with slight alterations the goods could be so sold, then they are not specially manufactured; if, however, essential changes are necessary to render the goods marketable by the seller to others, then the exception does apply.

How should the court rule?

3. *More on Electronic Contracting*

Both the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”)²⁸ and the Uniform Electronic Transactions Act (“UETA”)²⁹ potentially apply to transactions under Article 2. E-Sign’s operative section, codified at 15 U.S.C. § 7001, does not apply if a state has enacted UETA.³⁰ Both E-Sign and UETA provide that signatures, contracts, or other records shall not be denied validity “solely” because they are in electronic form or that an electronic record was

²⁸ E-Sign is codified at 15 U.S.C. § 7001 *et seq.* Section 7003(a) does not exempt Article 2 transactions from its scope.

²⁹ UETA is in effect in 46 states and the District of Columbia. UETA section 3 does not exempt Article 2 transactions from its scope. In order for UETA to govern an Article 2 transaction, however, the parties have to agree to conduct the transaction electronically. UETA §§ 3 and 5(b).

³⁰ 15 U.S.C. § 7002.

used in contract formation. Similarly, electronic records can satisfy the requirement of a writing that may be imposed under other law, such as by a statute of frauds. E-Sign § 7001(a); UETA § 7. No party is required to use electronic communications, and E-Sign incorporates some disclosure rules to use regarding electronic communications in transactions with consumers. E-Sign § 7001(b); UETA § 5. The United Nations Convention on the Use of Electronic Communications in International Contracts has provisions of similar import. Arts. 8 through 14. The United States has not yet ratified this Convention.³¹

The theory of these various promulgations is that electronic communication is a medium that may require some additional rules but does not require any change in the basic underlying legal principles of contract law. Hence their provisions are minimal and encourage electronic commerce, rather than impose an elaborate scheme of rules or directive.³²

B. UNCONSCIONABILITY

Courts have always had the discretion to refuse to enforce an agreement. Sometimes they would declare an agreement void as against public policy.³³ Other times they would invalidate an agreement because it was unconscionable. That is, the agreement shocked the conscience of the court.³⁴ Article 2 codifies this rule in section 2-302. It authorizes a court to refuse to enforce an unconscionable

³¹ For a comparison, see Charles H. Martin, *The Electronic Contracts Convention, the CISG, and New Sources of E-commerce Law*, 16 TUL. J. INT'L & COMP. L. 467 (2008); Jennifer A. Puplava, *Use and Enforceability of Electronic Contracting: The State of Uniform Legislation Attempting to Regulate E-commerce Transactions*, 16 MICH. ST. J. INT'L L. 153 (2007); Henry D. Gabriel, *United Nations Convention on the Use of Electronic Communications in International Contracts and Compatibility with the American Domestic Law of Electronic Commerce*, 7 LOY L. & TECH. ANN. 1 (2006-07); Charles H. Martin, *The UNCITRAL Electronic Contracts Convention: Will it Be Used or Avoided?*, 17 PACE INT'L L. REV. 261 (2005).

³² See Ronald J. Mann & Travis Siebeneicher, *Just One Click, The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984 (2008); John M. Norwood, *A Summary of Statutory and Case Law Associated with Contracting in the Electronic Universe*, 4 DEPAUL BUS. & COM. L.J. 415 (2006).

³³ See RESTATEMENT (SECOND) OF CONTRACTS §§ 178-96.

³⁴ Compare RESTATEMENT (SECOND) OF CONTRACTS § 208.

agreement entirely or to excise the unconscionable provisions and enforce the remainder.

Unfortunately, nothing in the UCC purports to define the meaning and scope of the term “unconscionable.” Still, there is some guidance. The UCC tells us that unconscionability is to be determined at the time of contracting, not at some later point when circumstances have changed. UCC § 2-302(1). In addition, it is a legal issue for the court, and thus not a factual one for the jury. *Id.* The comments then supply more help by identifying the underlying principle as “the prevention of oppression and unfair surprise.” UCC § 2-302 cmt. 1.

This comment has prompted courts and commentators³⁵ to suggest that there are two aspects to unconscionability: substantive unconscionability and procedural unconscionability. Substantive unconscionability (*i.e.*, “oppression”) deals with the substantive terms of the contract, such as price, warranties, and limitations on remedy. Procedural unconscionability (*i.e.*, “unfair surprise”) deals with the bargaining process and covers such things as lack of meaningful choice, deception, small print, and language barriers. Many courts require some aspect of both substantive and procedural unconscionability before they will give relief. Others are more lenient, and will permit an abundance of one to make up for a lack or minimal amount of the other.

Most of the successful claims of unconscionability arise in the consumer context. The early cases under Article 2 tended to involve sales of furniture or appliances at inflated prices to poorly educated or non-English speaking customers.³⁶ More recently, the cases tend to involve the enforceability of an arbitration clause in a consumer contract. The consumer’s first attack on such a clause is usually to argue that the clause is not part of the agreement at all, relying

³⁵ Unconscionability is another area that is a favorite for law professors to write about. *See, e.g.*, Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE UNIV. L. REV. 469 (2008); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227 (2007).

³⁶ *See, e.g.*, *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. 1971); *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970); *Toker v. Perl*, 247 A.2d 701 (N.J. Sup. Ct. 1968), *aff’d*, 260 A.2d 244 (N.J. Super. Ct. App. Div. 1970); *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757 (N.Y. Dist. Ct. 1966), *rev’d only as to remedy*, 281 N.Y.S.2d 964 (N.Y. Sup. Ct. 1967); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

on the contract formation rules of section 2-207. With some minor exceptions,³⁷ those arguments have not fared well.³⁸

The consumer's second attack is to argue that the arbitration clause is unconscionable. All claims of unconscionability face an uphill battle. Courts generally are loathe to interfere with freedom of contract. Unconscionability claims against an arbitration clause face an even steeper incline, because the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, codifies a strong national policy in favor of arbitrating private disputes. Nevertheless, there is a growing body of law that recognizes that – at least in consumer transactions – arbitration agreements can be unconscionable, particularly if they require arbitration in a remote location or require payment of a fee in excess of the amount of the underlying transaction.³⁹ While few of these cases have arisen under Article 2, some have.⁴⁰ Consider this recent example.

³⁷ *E.g., Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan.), *dismissed for lack of subject matter jurisdiction*, 2000 WL 1372886 (D. Kan. 2000), *refusing to vacate first order*, 2001 WL 1568346 (D. Kan. 2001). *See also Rogers v. Dell Computer Corp.*, 138 P.3d 826 (Okla. 2005) (laying out the analysis but concluding that the record was not sufficiently complete to reach a determination).

³⁸ *E.g., Fiser v. Dell Computer Corp.*, 165 P.3d 328 (N.M. Ct. App. 2007), *rev'd on other grounds*, 188 P.3d 1215 (N.M. 2008); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997).

³⁹ *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004) (arbitration clause in employment agreement unconscionable because of its one-way application, one-year limitations period, bar on class actions, and cost splitting provisions). *See also Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003) (arbitration clause was unconscionable because it barred class actions, split costs inappropriately, and mandated that results be kept confidential); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002), *cert. denied*, 537 U.S. 1226 (2003) (striking a ban on class actions from an arbitration clause). *But see Anders v. Hometown Mortgage Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003) (limitations on remedies do not affect the enforceability of an arbitration agreement); *Rosen v. SCIL, LLC*, 799 N.E.2d 488 (Ill. Ct. App. 2003) (credit card arbitration agreement not unconscionable because it prohibited class actions).

⁴⁰ *See Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. Sup. Ct. App. Div. 1998) (arbitration clause unconscionable because it made arbitration prohibitively expensive).

FISER V. DELL COMPUTER CORP.
188 P.3d 1215 (N.M. 2008)

Serna, Justice

We granted certiorari to review whether Defendant Dell Computer Corporation's Motion to Stay and Compel Arbitration pursuant to the Federal Arbitration Act was properly granted. We hold that, in the context of small consumer claims that would be prohibitively costly to bring on an individual basis, contractual prohibitions on class relief are contrary to New Mexico's fundamental public policy of encouraging the resolution of small consumer claims and are therefore unenforceable in this state. We reverse.

I. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

Plaintiff Robert Fiser purchased a computer from Defendant via the company's website. He subsequently filed a putative class action lawsuit contending that Defendant systematically misrepresents the memory size of its computers. He alleges violations of the New Mexico Unfair Practices Act (UPA), the New Mexico False Advertising Act, the New Mexico Uniform Commercial Code (UCC), and common law concepts of breach of contract, breach of warranty, misrepresentation, violations of the covenants of good faith and fair dealing, bad faith, and unjust enrichment.

Central to the issue presented is the scant amount of damages alleged: Plaintiff estimates that Defendant's alleged misrepresentation results in a monetary loss to its customers of just ten to twenty dollars per computer.

Defendant filed a Motion to Stay and Compel Arbitration pursuant to the Federal Arbitration Act (FAA). *See* 9 U.S.C. §§ 3, 4 (2000). Defendant argued that, pursuant to the "terms and conditions" on its website at the time of the purchase, Plaintiff is required to individually arbitrate his claims and is precluded from proceeding on a classwide basis either in litigation or arbitration. The "terms and conditions" included an arbitration clause mandating that "any claim, dispute, or controversy . . . against Dell . . . [was subject to] binding arbitration administered by the National Arbitration Forum (NAF)." The terms also included a clause (hereinafter referred to as the class action ban) which directed that the arbitration was "limited solely to the dispute or controversy between [Plaintiff] and Dell."⁴¹

⁴¹ Although, in the past, the procedural rules of the NAF also did not allow for classwide arbitration, the rules have apparently been amended to provide for such a procedure since

Finally, the “terms and conditions” contained a choice-of-law provision declaring Texas law to be controlling. Although the parties disagree over whether Plaintiff assented to Defendant’s “terms and conditions,” we do not reach that issue. We assume without deciding, for the purpose of our analysis, that he assented to the terms.

The district court agreed with Defendant that Plaintiff was bound by the arbitration provision and thus granted Defendant’s motion. The Court of Appeals affirmed. Plaintiff petitioned for a writ of certiorari; both the New Mexico Attorney General and Public Justice filed amicus briefs in support of Plaintiff. Because we conclude that the class action ban is contrary to fundamental New Mexico public policy, we reverse.

II. DISCUSSION

A. Application of Texas Law Would Violate New Mexico Public Policy

1. New Mexico Respects Choice-of-Law Provisions Unless Application of the Chosen Law Would Contravene New Mexico Public Policy

The threshold question in determining the validity of the class action ban is which state’s law must be applied to this potentially multi-state class action that was filed in New Mexico by a New Mexico resident against a defendant that maintains its principal place of business in Texas for damages relating to a contract that contains a choice-of-law clause directing that Texas law be applied.

___New Mexico respects party autonomy; the law to be applied to a particular dispute may be chosen by the parties through a contractual choice-of-law provision. However, when application of the law chosen by the parties offends New Mexico public policy, our courts may decline to enforce the choice-of-law provision and apply New Mexico law instead. New Mexico courts will not give effect to another state’s laws where those laws would “violate some fundamental principle of justice.” *Reagan v. McGee Drilling Corp.*, 933 P.2d 867 (N.M. 1997).

Application of Texas law to the instant matter would likely require enforcing the class action ban. Unless enforcement of the class action ban would run afoul of fundamental New Mexico public policy, our conflict of law rules counsel respecting the choice-of-law provision and applying Texas law.

briefing was completed. *See* <http://www.arb-forum.com/default.aspx> and proceed through the links as follows: “programs and rules,” “arbitration,” “the code of procedure,” “arbitration class procedures.”

2. It is Fundamental New Mexico Policy that Consumers Have a Viable Mechanism for Dispute Resolution, No Matter the Size of the Claim

New Mexico policy strongly supports the resolution of consumer claims, regardless of the amount of damages alleged. That policy is demonstrated by several of our statutes. For example, the New Mexico legislature enacted the UPA, which is unequivocal: “[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful.” Section 57-12-3. The UPA was clearly drafted to include a remedy for small claims: a party need not show any monetary damage to be entitled to an injunction, § 57-12-10(A), and “[a]ny person who suffers *any* loss of money . . . [may] recover actual damages or the sum of one hundred dollars (\$100), whichever is greater.” § 57-12-10(B) (emphasis added).

The fundamental New Mexico policy of providing consumers a mechanism for resolution is also seen in the False Advertising Act, which specifically empowers private individuals to bring rights of action in the name of the state and for “all others similarly situated.” § 57-15-5.

Yet another example of New Mexico’s fundamental public policy in ensuring that consumers have an opportunity to redress their harm is the Consumer Protection Division of the Attorney General’s Office, which is charged with protecting New Mexico citizens from unfair and deceptive trade practices. In this effort, the Consumer Protection Division is authorized and funded to investigate suspicious business activities, informally resolve the complaints of dissatisfied consumers, educate citizens about their consumer rights, and file lawsuits on behalf of the public.

3. The Class Action Device is Critical to Enforcement of Consumer Rights in New Mexico

The opportunity to seek class relief is of particular importance to the enforcement of consumer rights because it provides a mechanism for the spreading of costs. The class action device allows claimants with individually small claims the opportunity for relief that would otherwise be economically infeasible because they may collectively share the otherwise prohibitive costs of bringing and maintaining the claim.

The opportunity for class relief and its importance to consumer rights is enshrined in the fundamental policy of New Mexico and evidenced by our statutory scheme. *See, e.g.*, Rule 1-023 NMRA (setting forth the rules of civil procedure governing class actions). Notably, the UPA specifically references class actions as a private remedy available under the act. § 57-12-10(E). Further, the New Mexico

Uniform Arbitration Act declares that arbitration clauses that require consumers to decline participation in class actions are unenforceable and voidable. *See* NMSA 1978, §§ 44-7A-1(b)(4)(f), 44-7A-5 (2001). While this provision may be preempted by the FAA, *see Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the FAA].”), it is clear evidence of the fundamental New Mexico policy of allowing consumers a means to redress their injuries via the class action device.

In New Mexico, we recognize that the class action was devised for “vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” *Romero v. Philip Morris, Inc.*, 109 P.3d 768 (N.M. 2005). A purpose of the class action is to conserve party resources. As the United States Supreme Court recognized,

[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997). “Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.” *Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980). The Federal Rules Advisory Committee recognized the critical nature of the class action to individuals with small claims when it directed that one of the grounds on which class certification may be appropriate is where “the amounts at stake for individuals [are] so small that separate suits would be impracticable.” Fed. R. Civ. P. 23(b)(3), advisory committee note (1966 amendment).

Thus, beyond merely a procedural tool, the class action functions as a gatekeeper to relief when the cost of bringing a single claim is greater than the damages alleged. When viewed in this light, a contractual provision that purports to ban class actions for small claims implicates not just the opportunity for a class action but the more fundamental right to a meaningful remedy for one’s claims. This Court has recognized that the right of access to the courts is part of the right to petition for redress of grievances guaranteed by both the United States and New Mexico constitutions. While the class action ban may or may not rise to the level of a constitutional violation, a prohibition on class relief where there is no

meaningful alternative for redress of injury certainly does not provide for effective vindication of rights.

In view of the fact that Plaintiff's alleged damages are just ten to twenty dollars, by attempting to prevent him from seeking class relief, Defendant has essentially foreclosed the possibility that Plaintiff may obtain *any* relief. Thus, we conclude that Defendant's prohibition on class action relief, when applied to small claims plaintiffs, is contrary to New Mexico's fundamental public policy to provide a forum for relief for small consumer claims. The words of the California Supreme Court are apropos:

By imposing this clause on its customers, [Defendant] has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be . . . without an effective method of redress cannot be ignored.

Discover Bank v. Super. Ct., 113 P.3d 1100, 1108 (Cal. 2005).

Defendant contends that Plaintiff has not met the evidentiary burden of proving that his damages are outweighed by the cost of bringing an individual claim. While we recognize that, in some cases, more extensive factfinding will be required, we emphasize that Plaintiff only alleges his damages to be between *ten and twenty dollars*. We do not find it necessary to engage in an exhaustive analysis regarding whether the economic and opportunity costs of bringing a ten to twenty dollar claim are prohibitive. In light of attorney's fees, the costs of gathering evidence and preparing the case, and the time spent educating himself on the issues and organizing and presenting the claim, the likelihood that Plaintiff's actual costs will exceed ten to twenty dollars is certain. The economic realities of the present case are clearly more tangible than the mere "risk" that Plaintiff will be faced with prohibitive costs. *Cf. Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–91 (2000) (holding that arbitration agreement's failure to address how parties would allocate arbitration costs does not render it per se unenforceable on the grounds that the claimant may be subjected to steep costs where claimant did not present evidence that she would be subjected to such high costs). Suffice it to say that "only a lunatic or a fanatic sues for [ten to twenty dollars.]" *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

For all of the foregoing reasons, New Mexico's fundamental public policy requires that consumers with small claims have a mechanism for dispute resolution via the class action. Therefore, application of Texas law, that would allow the class

action ban, is contrary to New Mexico public policy. Accordingly, we invoke the public policy exception and apply New Mexico law rather than Texas law to analyze the validity of the class action ban.

B. Under New Mexico Law, the Class Action Ban is Invalid Because It is Contrary to Public Policy and Therefore Unconscionable

Plaintiff contends that the class action ban is unconscionable. This determination is a matter of law and is reviewed de novo. We agree.

The classic articulation of unconscionability is that it is comprised of two prongs: substantive unconscionability and procedural unconscionability. Substantive unconscionability relates to the content of the contract terms and whether they are illegal, contrary to public policy, or grossly unfair. *Padilla v. State Farm Mut. Auto. Ins. Co.*, 68 P.3d 901 (N.M. 2003); *Guthmann v. La Vida Llena*, 709 P.2d 675, 679 (N.M. 1985). Procedural unconscionability is determined by analyzing the circumstances surrounding the contract's formation, such as whether it was an adhesive contract and the relative bargaining power of the parties. *Guthmann*, 709 P.2d at 679. "The weight given to procedural and substantive considerations varies with the circumstances of each case." *Id.*

As set forth above, we concluded in the course of our conflict analysis that the class action ban violates New Mexico public policy. By preventing customers with small claims from attempting class relief and thereby circumscribing their only economically efficient means for redress, Defendant's class action ban exculpates the company from wrongdoing. "Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to retain the benefits of its wrongful conduct." *Discover Bank*, 113 P.3d at 1106. On these facts, enforcing the class action ban would be tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws. It is not hyperbole or exaggeration to say that it is a fundamental principle of justice in New Mexico that corporations may not tailor the laws that our legislature has enacted in order to shield themselves from the potential claims of consumers. Because it violates public policy by depriving small claims consumers of a meaningful remedy and exculpating Defendant from potential wrongdoing, the class action ban meets the test for substantive unconscionability.

In the instant case, the nature of the "terms and conditions" may or may not rise to the level of an adhesive or procedurally unconscionable contract. When a court makes an analysis into whether a particular contract is adhesive, it typically inquires into three factors: (1) whether it was prepared entirely by one party for the

acceptance of the other; (2) whether the party proffering the contract enjoyed superior bargaining power because the weaker party could not avoid doing business under the particular terms; and [(3)] whether the contract was offered to the weaker party without an opportunity for bargaining on a take-it-or-leave-it basis. *Guthmann*, 709 P.2d at 678. The Court of Appeals held that the terms did not constitute a contract of adhesion because there was no evidence that Plaintiff could not avoid doing business under the particular terms mandated by Defendant. While we agree that Defendant’s “terms and conditions” may not rise to the level of an adhesive contract, we nevertheless conclude that the terms are unenforceable because there has been such an overwhelming showing of substantive unconscionability. For these reasons, the agreement is unconscionable under New Mexico law and will not be enforced in this state.⁴²

C. Invalidation of the Arbitration Agreement and Embedded Exculpatory Class Action Ban is Not Preempted by the FAA

Having held that the class action ban is unenforceable in New Mexico, we turn to an examination of whether the FAA preempts our ruling. Congress enacted the FAA to counteract judicial hostility to arbitration. The Act provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract.” Section 2. While the FAA prevents “[s]tates from singling out arbitration provisions for suspect status,” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), it does not give arbitration provisions special protection either. It only requires that they be placed “upon the same footing as other contracts.” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). “Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.” *Doctor’s Assocs.*, 517 U.S. at 687. Because our invalidation of the ban on class relief rests on the doctrine of unconscionability, a doctrine that exists for the revocation of any contract, the FAA does not preempt our holding. Class action bans that effectively deny consumer plaintiffs relief are invalid in New Mexico, regardless of the contracts in which they are found.

⁴² We note that numerous other jurisdictions have also concluded that class action bans are unconscionable. See, e.g., *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir. 2007); *Skirchak v. Dynamics Research Corp.*, 432 F. Supp. 2d 175, 180–81 (D. Mass. 2006); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002); *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 274–75 (Ill. 2006).

D. The Class Action Ban is Not Severable

When a provision of a contract is determined to be unconscionable, we “may refuse to enforce the contract, or [we] may enforce the remainder of the contract without the unconscionable clause, or [we] may so limit the application of any unconscionable clause as to avoid any unconscionable result.” [§ 2-302]. Here, the class action ban is part of the arbitration provision and is central to the mechanism for resolving the dispute between the parties; therefore, it cannot be severed. We decline to enforce the arbitration provision.

III. CONCLUSION

Contractual prohibition of class relief, as applied to claims that would be economically inefficient to bring on an individual basis, is contrary to the fundamental public policy of New Mexico to provide a forum for the resolution of all consumer claims and is therefore unenforceable in this state. The arbitration provision is invalid and the Court of Appeals reversed. We remand for proceedings consistent with this opinion.

The CISG does not have any provisions that address the concept of unconscionability, perhaps because it does not apply to consumer transactions. *Cf.* CISG Art. 4 (disclaiming any concern with the “validity” of the contract or any of its provisions). The UNIDROIT Principles do not deal with invalidity arising from “immorality or illegality,” UNIDROIT Art. 3.1, but do deal with issues of “gross disparity.” UNIDROIT Art. 3.10.

Problem 2-13

In a contract for sale of a car from a car dealer, the document signed by the buyer provided that all disputes arising under the contract must be resolved in arbitration, with the arbitrator chosen by the seller. The clause also provided that the buyer would be responsible for half of the arbitrator’s fee unless the seller won the dispute in which case, the buyer would be responsible for all fees. The buyer is college educated and read the document prior to signing it. The buyer did not like the clause and objected to it but the seller refused to sell the car to the buyer unless the buyer signed the document. The buyer really wanted the car and grudgingly signed the document. Predictably the car was a lemon and the buyer is

consulting you regarding what to do now. In your research, you find that all car dealers in the area have the same clause in their sales contracts. Is the buyer stuck with the arbitration clause?

Problem 2-14

You represent an office supply store that purchased a high end printer for use in the store. The office supply store placed the order for the printer by telephone and the seller responded by promptly sending the office supply store an acknowledgment form. That form included a choice-of-forum clause that requires all litigation against the seller to be commenced in Illinois, where the seller's chief executive office is located. The office supply store is located in Florida and has never done business in Illinois. The printer broke down a few months after it was delivered and the seller refused to replace it. The office supply store, which had paid no attention to the acknowledgment form, then sued the seller in the state court in Florida. The seller moved to dismiss the case based upon the choice-of-forum clause. Is the choice-of-forum clause enforceable? What are the best arguments that it is not?

Problem 2-15

Sly Electronics's sales force consists largely of college students who sell stereo components out of their vans. The sales force is trained to make people believe – but without actually saying – that the goods are stolen. The gimmick is that customers (*i.e.*, “marks”) will think they are getting a really good deal (a steal, so to speak), because they are buying stolen goods. In fact, the goods are not stolen and the sales force is properly licensed to sell goods on the street. Moreover, the deal is not very good at all. The typical markup is quite high. A component that Sly Electronics sells for \$600 will typically cost it only \$200 and retail for about \$300. If a customer learns the truth after a purchase and sues to rescind the transaction, will the customer have a good claim of unconscionability? Why or why not? In analyzing this question, which comparison is the more appropriate consideration and why: (i) price to cost; or (ii) price to value?

