

PART 2**FORMATION, TERMS, AND READJUSTMENT OF CONTRACT****SECTION 2-201. NO FORMAL REQUIREMENTS.**

(a) A contract or modification thereof is enforceable, whether or not there is a record signed by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year after its making.

(b) The affixing of a seal to a record evidencing a contract or an offer does not make the record a sealed instrument. The law with respect to sealed instruments does not apply to the contract or offer.

SOURCE: Sales, Section 2-201; 2-203 (December, 1994)

Notes

1. Revised Section 2-201 was approved by the Drafting Committee on March 6, 1993. A motion to restore the statute of frauds was rejected by a voice vote of the Commissioners at the 1995 Annual Meeting of NCCUSL. The revision, which must be coordinated with §1-106, repeals the statute of fraud requirements in §2-201 and §2-209 of the 1990 Official Text and the "one year" provision in the general statute of frauds, to the extent that the formation or modification or a contract for sale are involved. Commercial parties, however, may still agree that a contract modification must be in a signed record. See §2-210(2).

2. Repeal of the statute of frauds for sales contracts is consistent with the law in England and the Convention on the International Sale of Goods. There is, however, a statute of frauds for leases of goods, Section 2A-201.

3. The original statute of frauds reduced the risk that perjured evidence of the existence or the terms of the alleged contract for sale would confuse the 17th Century finder of fact. The Drafting Committee concluded that this risk is neutralized by the modern fact finding process and that current §2-201 was

frequently used to avoid liability in cases where there was credible evidence of an agreement and no evidence of perjury. Moreover, there is no persuasive evidence that the valuable habit of reducing agreements to a signed record will be adversely affected by the repeal.

4. The law relating to sealed instruments, formerly stated in Section 2-203, now appears in Section 2-201(b).

SECTION 2-202. FINAL WRITTEN EXPRESSION; PAROL OR EXTRINSIC EVIDENCE.

(a) Terms on which confirmatory memoranda of the parties agree, or which are otherwise set forth in a record intended by the parties as a final expression of their agreement with respect to the included terms, may not be contradicted by evidence of a previous agreement or a contemporaneous oral agreement. However, the terms may be explained or supplemented by evidence of:

(1) course of dealing or usage of trade or course of performance; and

(2) of noncontradictory additional terms unless the court finds that the writing was intended as a complete and exclusive statement of the terms of the agreement.

(b) In determining whether the parties intended a writing or record to be final or complete and exclusive with respect to some or all of the terms, the court shall consider all evidence relevant to intention to integrate the document, including evidence of a previous agreement or representation or of a contemporaneous oral agreement or representation.

SOURCE: Sales, Section 2-202 (March, 1995).

Notes

1. If, after a preliminary hearing authorized by §2-202(b), the court concludes that the parties intended a partially integrated writing, §2-202(a) states when evidence of prior agreements or contemporaneous oral agreements is excluded. Evidence is excluded if it directly contradicts terms in the record but evidence is admitted if it proves a non-contradictory additional term. This latter ground for admissibility changes original §2-202, which excluded evidence of "inconsistent additional terms," and arguably narrows the effect of a partial integration. The change follows comment 3 of the original §2-202, which stated that if the "additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact."

2. The effect of a totally integrated record is that both contradictory and non-contradictory additional terms are excluded. The best evidence of a total integration is a so-called "merger" clause. The last sentence of §2-202(b) in the May, 1994 Draft stated that a merger clause does not create a conclusive presumption of a total integration. Although this sentence was consistent with the case law, see e.g., ARB, Inc. v. E-Systems, Inc., 663 F.2d 189, 198-199 (D.C. Cir. 1980), it was removed at the March, 1995 meeting of the Drafting Committee.

3. In the case of either a partial or a total integration, terms in the record may be "explained or supplemented...by course of dealing or usage of trade or by course of performance" §2-202(a)(1). Evidence intended to explain a term in a record is relevant to contract interpretation. The parol evidence rule does not apply. Evidence intended to supplement a term in a record poses in different language the problem of whether additional terms are contradictory or not. But unless the record clearly excludes or contracts out of the trade usage or course of dealing or performance, both §1-205(3) and §2-202(a)(1) support admissibility to supplement even though it may also appear to vary or contradict that term. The reason is the special status of this evidence (it is not directly related to pre-contract negotiations) and the assumption that the parties intended to include it unless otherwise clearly agreed.

4. Subsection (c) of the May, 1994 Draft, which stated that before extrinsic evidence was admissible to interpret a contract the court must find that the contract was ambiguous, was deleted at the March, 1995 meeting of the Drafting Committee. Subsection (c), which sparked controversy, was inconsistent with the policy of the 1990 Official Text, §2-202, comment 1(c), the Restatement, Second of Contracts, see §§200-203, and the approach of most courts. See, e.g., Pacific Gas & Electric Co. v. G. W. Thomas

Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968) (Traynor, Chief Justice). Thus, the courts, as before, are left to decide whether a merger clause is conclusive on the question of intention and when extrinsic evidence should be admitted to interpret language in the record.

At the October, 1995 meeting of the Drafting Committee, the scope of the court's power to interpret a term in an integrated writing was discussed. Concern was expressed lest the phrase "terms may be explained" in §2-202(a) would be limited to the sources listed in (1) and (2) and that the dreaded "plain meaning rule" might reemerge. A motion to save the phrase passed, however, [9-8, 7-0] with the expectation that the comments would state that the sources of evidence for contract interpretation are broader than those indicated in subsection (a). See CISG Art. 8(3). **[New, January, 1996]**

5. In October, 1993, the Drafting Committee rejected motions that (1) a standard form merger clause in a consumer contract is inoperative against a consumer (2) a standard form merger clause in a consumer contract is not enforceable unless the party asserting it proves by clear and convincing evidence that the consumer "understood and expressly agreed to" the clause. A motion to approve the draft as presented was approved by the Commissioners present but rejected by a vote of all persons present. The conclusion of those adhering to the present draft was that revised §2-202(b) gives the court sufficient flexibility to sort out cases where there is unfair surprise or no real assent, whether the issue involved using a merger clause as (1) a substitute for an inoperative disclaimer of express warranties, see §2-316(a), or (2) a device to exclude other terms agreed in the negotiating process. See §2-302.

Lingering dissatisfaction with this outcome will be moderated by new §2-206, dealing which standard form contracts and terms.

SECTION 2-203. FORMATION IN GENERAL.

(a) A contract may be made in any manner sufficient to manifest agreement, including by offer and acceptance and conduct of both parties recognizing the existence of the contract.

(b) If the parties so intend, an agreement is sufficient to make a contract, even if the time when the agreement was made cannot be determined, one or more terms are left open or to be

agreed upon, or standard terms in the records of the parties do not otherwise establish a contract.

(c) If a contract is made and one or more terms in the agreement are left open, the contract does not fail for indefiniteness if there is a reasonably certain basis for an appropriate remedy.

(d) Language in a standard form or a standard term that conditions the intention of that party to be bound upon further agreement by the other party must be clear and conspicuous.

SOURCE: Sales, Section 2-204 (December, 1994).

Notes

1. In transactions where standard terms in the records of one or both parties do not agree, the issue of contract formation has been detached from the original §2-207 and is treated in §2-203(b) and §2-205(a)(1). One looks there to determine whether any contract has been formed. If some contract is formed, the question of what standard terms, if any, are included is treated in new §2-206 and revised §2-207.

The last clause in §2-203(b) deals with contract formation where the parties intend to make a contract but "standard terms" in their records do not otherwise establish (or might prevent the formation of) a contract. The test is taken from the first sentence of the original §2-207(3). Thus, if there is conduct by both parties which recognizes the existence of a contract but standard terms in their records do not agree, a contract is still made under §2-203(b).

2. The Drafting Committee concluded that proof of the quantity term after repeal of the statute of frauds, §2-201 is subject to §2-203(c). The contract is not enforceable beyond the quantity proved. Potential proof sources for the quantity term include trade usage, prior course of dealing and course of performance. If an agreement on quantity cannot be proved, the agreement fails for indefiniteness under §2-203(c).

SECTION 2-204. FIRM OFFERS. An offer by a merchant to enter into a contract made in a signed record that by its terms gives

assurance that the offer will be held open is not revocable for lack of consideration during the time stated. If no time is stated, the offer is irrevocable for a reasonable time not to exceed three months. A term of assurance in a record supplied by the offeree is ineffective unless it is conspicuous.

SOURCE: Sales, Section 2-205 (December, 1994)

Notes

1. The September 10, 1993 draft of §2-205 provided that if no time is stated in a written firm offer, "the offer is irrevocable for a commercially reasonable time." A motion to restore the original language of §2-205, imposing a three month limit, was approved by all of the persons present but was rejected by the Commissioners. Despite the change, the issue is presumably still open.

2. There was no objection to the revision in the last sentence, which substitutes a requirement of conspicuously for that of "separately signed."

SECTION 2-205. OFFER AND ACCEPTANCE IN FORMATION OF CONTRACT.

(a) Unless otherwise unambiguously indicated by the language of a contract or the circumstances the following rules apply:

(1) An offer to make a contract must be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances, including a definite expression of acceptance containing standard terms which vary the terms of an offer.

(2) An order or other offer to buy or acquire goods for prompt or current shipment must be construed as inviting acceptance either by a prompt promise to ship or by prompt or current shipment of conforming or nonconforming goods. However, a shipment of nonconforming goods is not an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation.

(b) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

SOURCE: Sales, Section 2-206 (December, 1994)

Notes

- As noted under Section 2-203, Section 2-203 [formerly

Section 2-204] and Section 2-205 [formerly Section 2-206] were revised to state that in the "battle of the forms" issues of contract formation are to be separated from questions of what terms become part of the contract. Thus, revised Section 2-203(b) provides that the parties can intend to contract even though the "standard terms in the records of the parties do not otherwise establish a contract" and revised Section 2-205(a) provides that a "definite expression of acceptance" accepts an offer even though it contains "standard terms varying the terms of an offer." These principles were previously found in Section 2-207(1) and (3) of the 1990 Official Text.

2. The formation test in §2-205(a)(1) follows that in the original §2-207(1). Unless the offer clearly provides otherwise, a definite acceptance creates a contract even though the acceptance contains standard terms that vary the offer. Unlike the Restatement, Second and CISG, a definite acceptance containing a standard term which materially varies the terms of the offer can create a contract. The offeree can avoid a contract by stating to the offeror that no contract exists unless the offeror agrees to the offeree's standard terms. Presumably, if both parties state that they will not be bound unless the other agrees to their terms, there is no contract unless there is subsequent conduct by both recognizing the existence of a contract.

Language in an offer or purported acceptance which attempts to condition contract formation upon agreement by the other to the terms proposed should be clear and, when contained in a standard form record, be conspicuous.

Here are some examples.

Example #1. After negotiations where no agreement was reached, B sent S an offer in a record [not a standard form] to purchase 1,000 units of described goods at \$500 per unit. The front of the purchase order contained blanks which Buyer filled in and the back contained several standard terms, including an arbitration clause. S sent an acknowledgment the front of which stated "we are pleased to accept your order for 1,000 units at \$500 per unit." The back of the acknowledgment contained a standard term excluding all liability for consequential damages. After the acknowledgment was mailed, S changed its mind (the market price went up) and faxed a rejection to B. There is a contract under 2-205(a)(1), which reinforces §2-203(a). B clearly accepted the offer and the seller's record did not unambiguously indicate by language or otherwise that there would be no contract unless S agreed to all of the terms proposed, both negotiated and standard. See §2-203(d).

The case for a definite expression of acceptance is even clearer if S also shipped the goods before attempting to revoke. There would be no contract, however, if S had said "we are pleased to accept your order at \$600 per unit" or had clearly and conspicuously indicated that it did not intend to conclude a contract unless B agreed to all of S's terms, both negotiated and standard. See §2-203(d). Whether B's arbitration clause or S's exclusion clause are part of the contract depends upon §2-207.

Example #2. Suppose, in Example #1, that Seller "accepted" Buyer's order for \$600 per unit and the back of the acknowledgment contained a standard term that "seller reserves the right to litigate any dispute." Nevertheless, Seller shipped the goods with the acknowledgment and Buyer accepted them without objection. There is a contract under §2-203(b). Since the price term was negotiated, Seller's price of \$600 constituted a counteroffer which Buyer accepted by using the goods. [The usual principles of contract formation apply here.] There was no risk of unfair surprise and B assented without objection by accepting the goods. Which if any of the conflicting standard terms prepared by the parties become part of the contract is determined by §2-207.

Example #3. Suppose, in Example #2, that Seller accepted Buyer's order for \$500 and shipped the goods which Buyer accepted. Later, there was a dispute, Buyer demanded arbitration and Seller insisted that it had reserved the right to litigate. There is a contract under either §2-205(a) (1) or §2-203 despite the different standard terms on dispute resolution. Unless the Buyer's arbitration clause becomes part of the agreement under §2-207, the "default" rule is that the seller may litigate.

Example #4. Suppose that standard terms in the records of both parties clearly and conspicuously state that there will be no contract unless their terms are agreed to by the other party. See §2-203(d). The seller ships and the buyer accepts the goods. There is a contract under §2-203(a) & (b). The agreement of the parties includes non-standard terms in the records of the parties, applicable "default" rules from Part 3 and standard terms incorporated under §2-207.

SECTION 2-206. STANDARD FORM RECORDS.

(a) If the terms of a contract are contained in a standard form record and the party who did not prepare the standard form record manifests assent to it, Section 2-102(a)(29), the party manifesting assent adopts all terms contained in the standard

form as part of the contract except those terms which are unconscionable.

(b) A term in a standard form to which a consumer has manifested assent by conduct or by signing the standard form is not part of the contract if the consumer could not reasonably have expected it, unless it has been expressly agreed to by the consumer. In determining whether a term is part of the contract, the court shall consider the content, language and presentation of the standard form.

(c) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form and whether or not the party read the form.

SOURCE: Licenses (September, 1994).

Notes

1. This section, which is new, deals with cases where terms of the contract are contained in a standard form as defined in §2-102(a)(38). Typically, all the terms of the contract, including a merger clause, will be in the standard form. Section 2-207 deals with cases where standard terms, as defined in §2-102(a)(39), are contained in records that are not standard forms.

In most cases, the parties will not have agreed to the terms before the standard form is presented. Thus, the standard form is proposed as an offer which can be accepted by conduct or signature. See §§2-203 and 2-205. Under §2-206(a), however, unless the party who did not prepare the form "manifests assent" to the standard form (by conduct, including a signature), the terms of the standard form are not part of the contract. To "manifest assent" the party, at a minimum, must have an opportunity to review the terms of the standard form and an opportunity to decline to engage in conduct of assent. §2-102(a)(29). "Opportunity to review" is defined in §2-102(a)(31). If assent is manifested after an opportunity to

review, concerns over unfair surprise are resolved and that party adopts the terms of the standard form unless they are otherwise unconscionable under §2-105.

2. At the October, 1995 meeting of the Drafting Committee, Alternative A of the October, 1995 Draft was adopted. Thus, if assent is manifested to a standard form after an opportunity to review it, all of the terms of the standard form are adopted except those that are unconscionable. Alternatives B and C in the October, 1995 draft, which excluded certain terms under circumstances where the party submitting the form should have called them to the attention of the assenting party but failed to do so, were rejected.

3. Subsection (b) provides a different rule for consumers. The question is not what the provider should have disclosed but what the consumer should have reasonably expected. If the term is within the consumer's reasonable expectations it is included. If the term is beyond those reasonable expectations it is not adopted unless the consumer "expressly agreed to it." This subsection is under review by the Consumer Subcommittee.

4. For background, Section 2-206 modifies the December, 1994 Draft based on the discussions of the Drafting Committee. Alternative A received substantial support at the January, 1995 meeting. Alternative B stems from Section 2-2203 (Licenses). Alternative C follows Section 211(c) of the Restatement, Second except that the party is not required to expect the regular use of such forms. Subsection (b), which provides a special rule for consumers, is based upon UNIDROIT Art. 2.20.

6. Some Illustrations: Seller drafts a clause excluding all liability for consequential damages and includes it in a record prepared by Seller. The record contains other terms. Buyer receives and signs the record. The goods do not conform to the contract and Buyer suffers consequential damages.

(1) If the exclusion clause is neither contained in a standard form nor is a standard term, §2-206 and §2-207 do not apply. Buyer is bound by its assent to the record. Put differently, Buyer is solely responsible for reading and understanding the clause before assent.

(2) If the exclusion clause is a standard term contained in a standard form, Buyer is not bound unless it "manifests assent" as that term is defined in §2-102(a)(29). §2-206(a). This offers some minimal protection against unfair surprise. On the other hand, if Seller and Buyer negotiated the exclusion clause, the record is no longer a standard form and §2-206(a) does not apply.

(3) If the exclusion clause is a standard term contained in a record that is not a standard form, §2-207 rather than §2-206(a) determines whether it becomes part of the contract. On the other hand, if the seller and buyer negotiate the exclusion clause, it is not a standard term and §2-207 does not apply.

SECTION 2-207. EFFECT OF VARYING STANDARD TERMS.

(a) If one party to a contract assents to standard terms in a record prepared by the other party that is not a standard form and the standard terms vary materially the agreement of the parties, the standard terms are not part of the contract unless the party claiming inclusion establishes that the other party:

- (1) expressly agreed to them, or
- (2) had reason to know of them from trade usage, prior course of dealing, or course of performance and that they were intended for inclusion in the contract.

(b) In cases governed by subsection (a), the terms of the contract are:

- (1) standard terms included under subsection (a);
- (2) other terms, whether or not contained in a record, to which the parties have agreed; and
- (3) supplementary terms incorporated under any other provision of this article.

SOURCE: Sales, Section 2-207 (December, 1994, March, 1995)

Notes.

1. The original Section 2-207 was both an exception to the common law "duty to read" principle and a particularized application in commercial cases of the unconscionability doctrine in §2-302. In practice it applied to determine if there was some contract for sale when the writings of the parties were in conflict and, if so, what terms in the writings of the parties

became part of the contract. The objective was to neutralize any strategic advantage gained where standard terms were used (although §2-207 was not limited to standard terms) and to reduce the risk of unfair surprise where one party apparently agreed (assented by conduct) to standard terms which had not been read or understood. The assumption was that even in commercial transactions the risk of unfair surprise requires special rules where standard terms are involved. More particularly, it assumes that commercial parties in unstructured transactions [i.e., no standard form record] do not have a realistic opportunity to review the standard terms of the other before manifesting assent.

2. Initially, two versions of Section 2-207 were drafted. The first followed Section 2-207 in the 1990 Official Text and attempted to amplify and clarify it in light of apparent objectives, academic commentary, and judicial decisions. The second developed a simplified structure that focused on the unfair surprise issue. Assuming that some contract was formed under §§2-203 and 2-205, the sole question was whether "varying terms" became part of the contract. At the October 1-3, 1993 meeting, the Drafting Committee approved the approach of the second version of §2-207. A first effort to implement that objective was made in the May, 1994 draft, where the key concept, "varying terms," was defined in §2-207(a). Drawing on the September, 1994 Draft of the Licenses article, the December 20, 1994 Draft of Article 2 added a new section on "standard form agreements" and defined such terms as "standard form" and "standard terms" in Part 1. These sections provided a direct response to recurring questions raised in standard form contracting. Relying on new §2-206, covering "Standard Form Agreements," and the new definitions to do deal with most unfair surprise and advantage taking, the May, 1995 Draft of §2-207 was limited to "conflicting" standard terms. i.e., terms which vary other terms by adding to or contradicting them.

3. In October, 1995 the Drafting Committee decided to limit §2-206 to cases where all of the agreement was contained in a standard form. Section 2-207, therefore, has been reworked to deal with the unstructured, partially negotiated transaction where standard terms are contained in the records of one or both parties. Revised §2-207 (January, 1996) operates as follows:

First, it assumes a contract for sale has been formed under §§2-203 and 2-205. Section 2-207 does not deal with contract formation. It also assumes that there will be an agreement between the parties on terms other than standard terms.

Second, Section 2-206, where all of the terms are contained in a standard form record, does not apply. If it applies, §2-207 does not.

Third, Section 2-207 applies where one or both parties use standard terms which add to or differ materially from [vary] the terms [standard terms, negotiated terms or terms supplied by Article] in the agreement between them. To have a contract there must be some agreement. Section 2-207 deals with the narrow question whether the standard terms of one or both parties are part of that agreement.

Fourth, the purpose of §2-207 is still to minimize unfair surprise and "first" and "last" shot advantage taking where one party seeks to include a standard term which varies terms in the agreement. Key definitions are "term," §1-201(42), and "standard terms," §2-102(a)(39). The phrase "varying terms," although not defined, includes standard terms which materially add to or are different from the agreement of the parties.

Fifth, the need for §2-207 arises because the party against whom the standard terms operate has assented [not "manifested assent", §2-102(a)(29)] to them under circumstances where there is no realistic opportunity to review. Unlike the §2-206 case where all terms are in a standard form, there is no assurance that a seller or a buyer will (or even "should") take time to read and understand the "boilerplate." Thus, a special test to validate apparent assent is required. Moreover, more than a simple awareness of the standard terms may be required. In the absence of express agreement, the other party should also understand that the party seeking inclusion intended the standard terms to be part of the contract. This follows Judge Wisdom's well reasoned opinion in *Step-Saver Data Sys. v. Wyse Technology*, 939 F.2d 91, 102-103 (3d Cir. 1991) ("shrink wrap" license).

Illustrations

A. All terms expressed in one record. In many cases, all of the terms of the contract are contained in one record to which both parties have assented, usually by signature. If that record is not a standard form, §2-206 does not apply. If some of the terms are standard terms, §2-207 does not apply because the risk of unfair surprise and advantage taking is low. If all of the terms, both negotiated and standard, are in one record, a party who manifests assent to that record is bound.

B. All terms expressed in one standard form record. Section §2-206 applies here. Since substantially all of the terms are standard terms and none are negotiated, the assenting party must have an opportunity to review before manifesting assent.

C. Standard terms in the record of only one party.
Consider two cases:

First, after negotiations, Seller sends an offer in a record which contains a standard term arbitration clause. Buyer accepts in a record which contains no standard terms. Later, Seller initiates arbitration under a standard term in its offer. There is a contract under §2-203(a). Whether the arbitration clause is part of the agreement (the "first shot") is determined under §2-207(a).

Second, after negotiations, Buyer sends an offer in a record which contains no standard terms. Seller makes a definite acceptance in a record which contains standard terms, one of which excludes any liability for consequential damages and another of which states a method of payment. The goods, which Seller shipped and Buyer accepted, are unmerchantable and Buyer suffers consequential damages. There is a contract under §2-205(a)(1). Whether the exclusion clause is part of the contract (the "last shot") is again determined under §2-206(a). Here the buyer's conduct in accepting the goods without objection manifests assent to the standard term but does not include it in the contract unless §2-206(a) is satisfied.

Note in both cases the party against whom the standard term was asserted had assented to the term. But unless that assent is of the quality required in §2-207(a), the standard term is not part of the contract.

C. Standard terms in records of both parties. In transactions at a distance where the records of both parties contain standard terms, the risk of unfair surprise and strategic advantage is probably the highest. The agents who handle these transactions rarely take the opportunity to review the forms and this reality is well understood by all. Thus, both parties can include advantageous standard terms and know that the other party won't read it and will probably manifest a blanket assent to all terms without objection.

Consider these cases.

(1) After negotiations, Buyer orders 1,000 units of goods at \$50 per unit in a record which contains standard terms. Seller sends an acknowledgment "accepting" the offer and promising to send 900 units in a record which contains standard terms. Before the acknowledgment arrives, Seller sells the goods to a third person for \$65 a unit. Unless §2-205(a)(2) applies, the purported acceptance was a counteroffer when it is received by Buyer and, thus, a rejection of the offer. The "mirror image" rule still applies where the offer is varied by negotiated rather than standard terms. See §2-205(a)(1). No question whether standard terms are part of the contract is raised.

(2) After negotiations, Buyer sends an offer to buy 1000 units at \$50 per unit in a record which contains a standard term arbitration clause. Seller sends an acknowledgment accepting the offer in a record which contains a standard term warranty disclaimer. Seller then ships and Buyer accepts the goods. Neither object to the other's standard terms. Later, Buyer discovers that the goods are unmerchantable and initiates arbitration. Seller denies that it agreed to arbitrate and claims that all implied warranties were disclaimed. There is a contract. Whether either the arbitration clause or the disclaimer are part of the contract depends upon what either party is able to establish under §2-207(a).

(4) Suppose the records of both parties contained standard term arbitration clauses which differed in material ways. For example, Buyer's clause might agree to arbitrate "all disputes arising out of or relating to" the contract and Seller clause might agree to arbitrate all disputes "except breach of warranty claims." Here the standard terms conflict. Under §2-207 neither clause becomes part of the contract unless subsection (a) is satisfied. But there is no automatic "knockout." It is possible, for example, that one or both of the standard term arbitration terms will be expressly agreed to by one of the parties. If so, it becomes part of the agreement and subject to the process of contract interpretation.

The same analysis applies if the records contained standard term arbitration clauses which agreed in substance. Suppose they differed only in the time within which a demand for arbitration must be made. Nevertheless, both materially vary the terms of the agreement [the "default" rule is no arbitration] and neither is part of the contract unless §2-207(a) is satisfied.

D. Standard terms in records confirming prior oral agreements. Suppose Seller and Buyer reach an oral contract or a contract for sale through "informal" correspondence. Later, Seller sends a signed record confirming and containing standard terms that vary the prior oral agreement. What is the effect of the standard terms?

Original §2-207(1) provided that a "written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those...agreed upon." Thus, the confirmation was treated as an acceptance rather than a proposal to modify the contract and the additional or different terms became part of the contract only if §2-207(2) was satisfied. The problem was complicated where an earlier oral agreement was unenforceable under the statute of frauds and the writing both satisfied the statute between merchants, see §2-202(2), and proposed additional or different

terms. Furthermore, a confirmation proposing additional or different terms and expressly conditioning the contract upon agreement to them was probably a repudiation rather than an acceptance or a proposal for modification.

Revised Article 2 solves the problem without specifically identifying it.

First, the statute of frauds is repealed.

Second, whether the oral or informal agreement is a contract is decided under §§2-203 and 2-205.

Third, if there is a contract whether the standard terms in a confirmation become part of the agreement depends upon §2-207.

Fourth, if the record proposes a modification and the terms are included under §2-207(a), whether the modification is enforceable is determined by §2-210.

Finally, whether the record is a repudiation rather than a proposed modification is determined by §2-613.

In sum, revised §§2-203, 2-205 and 2-207 and new §2-206 focus on two questions that were implicit in the original §2-207. First, when does the presence of standard terms in the records of one or both parties prevent contract formation achieved under other principles? Second, if some contract is formed, when do the standard terms become part of the agreement?

SECTION 2-208. ELECTRONIC TRANSACTIONS: FORMATION.

(a) In an electronic transaction, if an electronic message initiated by one party evokes an electronic message or other electronic response by the other, a contract is created when the initiating party receives a message [signifying] **manifesting** acceptance.

(b) A contract is created under subsection (a) even if an individual representing either party was not aware of or did not review the initial message or response or the action **manifesting** acceptance of the contract. Electronic records exchanged in an

electronic transaction are effective when received in a form and at a location capable of processing the record even if an individual is not aware of their receipt.

(c) In determining when an electronic message sent to another party is received by that party, the following rules apply:

(1) If the recipient of the message, whether or not recorded, has designated an information system for the purpose of receiving such messages, receipt occurs when the message enters the designated information system.

(2) If the intended recipient has not designated an information system for receipt of electronic records, receipt occurs when the record enters any information system of the intended recipient.

Source: Licenses, Section 2-2202 (September, 1994); UNCITRAL, Model Law on EDI

Notes

This section is new and has not been discussed by the Drafting Committee. It is part of a cluster of new definitions and sections designed to deal with EDI transactions.

SECTION 2-209. COURSE OF PERFORMANCE OR PRACTICAL CONSTRUCTION.

(a) If a contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other party, a course of performance accepted or acquiesced in without

objection is relevant to determine the meaning of the agreement. performance, and any course of dealing and usage of trade must be construed, if reasonable, as consistent with each other. However, if that construction is unreasonable, express terms prevail over course of performance and course of performance prevail over both course of dealing and usage of trade.

(c) Subject to Section 2-210, course of performance is relevant to show a waiver or modification of a term inconsistent with the course of performance.

SOURCE: Sales, Section 2-209 (December, 1994)

Notes

The ABA UCC Article 1 Review Task Force has redrafted Section 1-205 to incorporate the provisions of Section 2-209. If this revision is approved, there will be no need for Section 2-208 in Article 2. There appears to be general support for this proposed move.

SECTION 2-210. MODIFICATION, RESCISSION, AND WAIVER.

(a) A good-faith agreement modifying a contract under this article is binding without consideration.

(b) Except in a consumer contract or as otherwise provided in subsection (c), a contract that contains a term that prohibits modification or rescission except by a signed record may not be otherwise modified or rescinded.

(c) A party whose language or conduct in effecting a modification or rescission is inconsistent with a term requiring a signed record to modify or rescind a contract may not assert the term if the other party is induced to change its position

reasonably and in good faith.

(d) Subject to subsection (c), a contract term may be modified or rescinded by waiver. Language or a course of performance between the parties is relevant to show a waiver of any term inconsistent with that language or course of performance. The waiver of an executory portion of the contract may be retracted by reasonable notification received by the other party that strict performance is required of any term waived unless the waiver induced the other party to change its position reasonably and in good faith.

SOURCE: Sales, Section 2-209 (December, 1994)

Notes

1. There are several changes in revised Section 2-210 [formerly Section 2-209 of the 1990 Official Text].

First, the requirement of a good faith agreement to modify is explicitly stated in subsection (a).

Second, the section is revised to reflect the repeal of the statute of frauds. Except in a consumer contract, however, the parties may agree that a signed record is required to modify or rescind the contract. See Subsection (b).

Third, it is clearer when a "no oral modification" clause can be waived by the party for whose benefit it was intended, subsection (c). Similarly, subsection (d) clarifies the nature and effect of waiver when other terms of the contract are involved. Thus, the party for whose benefit a term is required can waive it by electing not to insist on it at an appropriate time or by inducing reliance in the other party by representing that a term will not be insisted on at a future time.

2. Except in Consumer Contracts, subsection (b) validates "no oral modification" terms in contracts for sale. In other cases, the normal rules of modification and rescission apply, including agreed modifications under subsection (1). In the original Section 2-209(2), the NOM clause was valid in all transactions, with the requirement that a form containing the NOM

clause supplied by a merchant had to be separately signed by a non-merchant. The Drafting Committee excluded Consumer Contracts from NOM clauses and deleted the "separately signed" clause, leaving commercial parties who are not merchants to fend for themselves.

3. Subsection (c) provides that a NOM clause, a contract condition, may be waived in certain circumstances by the party for whose benefit it was included, provided that the words or conduct of waiver are inconsistent with the NOM clause and induce reasonable, good faith reliance. Reliance is required whether the language of waiver is part of or independent from an agreement with the other party. Compare Restatement, Second, Contracts §139.

To illustrate, suppose the contract contains a NOM clause and a schedule for installment deliveries by the seller. The seller encounters production problems, misses a due date and requests an extension of delivery time from the buyer. First, suppose the buyer states that it will not insist on the NOM condition and orally agrees to a time extension. The seller does not request a written modification and proceeds to deliver under the modified schedule. Later, the seller invokes the NOM clause and sues for damages caused by late delivery. Here, the NOM clause is waived under subsection (c) by express, inconsistent language which induced reasonable, good faith reliance and the agreed modification is enforceable under subsection (a). Second, suppose the buyer states that the late delivery is excused and orally agrees to a time extension. The seller, without obtaining a written modification, proceeds under the modified schedule. Later, the buyer invokes the NOM clause and sues the seller for damages arising from late delivery. Once again, the NOM clause was waived under Subsection (c), this time by the buyer's "language and conduct in effecting a modification...is inconsistent with the term and induces the other party to change its position reasonably and in good faith."

Although a party may waive one late installment, an agreement to modify the time of future deliveries is not necessarily enforceable. It must be either a "good faith" agreement under subsection (a) or induce reasonable, good faith reliance under subsection (d). The doctrine of waiver is not available to create or modify agreed duties under the contract.

4. Subsection (d) recognizes the general principle of waiver where NOM clauses are not involved. There are three types. In the first, called election waiver, the party for whose benefit a condition is included elects not to insist upon the condition after the time for its occurrence has passed. The condition is excused without a need to prove reliance by the

other party. Election waiver is included in the first sentence of subsection (d). In the second, called reliance waiver, the party for whose benefit a condition is included states that he will not insist upon the occurrence of a condition in the future. Here, however, the waiver may be retracted unless the other party has changed its position "reasonably and good faith." Subsection (d), last sentence. In the third, the court simply excuses the condition when its nonoccurrence would cause "disproportionate forfeiture" and the occurrence of the condition was not a "material part of the agreed exchange." Restatement, Second, Contracts §229. See *Aetna Casualty and Surety Co. v. Murphy*, 538 A.2d 219 (Conn. 1988) (burden on party seeking excuse to prove that condition was not a material part of exchange).

SECTION 2-211. DELEGATION OF PERFORMANCE; A party may delegate to another its performance under a contract for sale unless the other party to the contract has a substantial interest in having the original promisor perform or directly control the performance required by the contract or the contract prohibits delegation. A delegation of performance does not relieve the delegating party of any duty to perform or liability for breach.

SOURCE: Sales, Section 2-210(a) (December, 1994); Licenses, Section 2-2304 (September, 1994).

Notes

1. This section has not been conformed to §9-318(4) or §2A-303.

2. The original language of §2-210(4) has been restored. The May, 1994 draft stated that acceptance of a "delegation of duties" rather than acceptance of the "assignment" constituted a promise to perform duties under the contract. Arguably, this unduly narrows and complicates the legal effect of accepting the transfer of a contract where rights are assigned and duties are delegated.

SECTION 2-212. ELECTRONIC MESSAGES; ATTRIBUTION. If an electronic message is sent to another party, as between the party indicated in the message as the initiating party and the party

receiving the message, the party described as the initiating party is bound by the terms of the message if:

- (1) the message was sent by that party or a person who had authority to act on behalf of that party in reference to such messages;
- (2) by properly applying a procedure previously agreed to by the parties for purposes of authentication, the recipient concluded that the message was originated by, or otherwise attributable to, the initiating party; or
- (3) the message as received resulted from actions of a person whose relationship with the party described as the initiating party enabled that person to gain access to and use the method employed by the alleged initiating party to identify data messages as its own.

SOURCE: UNCITRAL Draft Model Law on EDI

SECTION 2-213. INTERMEDIARIES IN ELECTRONIC MESSAGES.

(a) If a party engages an intermediary to perform services such as the transmission, logging, or processing of data, the party who engages the intermediary is liable for any damage arising directly from that intermediary's acts, errors, or omissions in the performance of such services.

(b) If a party sends an electronic message through or with the assistance of an intermediary providing transmission or similar services, the party who sends that message is bound by the terms of the message as received notwithstanding errors in

the transmission unless the party receiving the message should have discovered the error by the exercise of care reasonable under the circumstances or the receiving party failed to employ a verification or authentication system agreed to by the parties before such transmission.

SOURCE: UNCITRAL Draft Model Law on EDI