

Sales and Leases
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Sales Contract Formation

I. Common Law Contract Formation: A Review

A. Foundations

1. **Mutual Assent:** Each party to a contract manifests its assent to the contract by making a promise or beginning or tendering performance, and each party's promise or performance must relate to the other party's. *Restatement (Second) of Contracts* §§ 18 & 23 [hereinafter "R2"].
2. **"Bilateral" vs. "Unilateral" Contracts**
 - a. **Bilateral Contract:** each party makes a promise in exchange for the promise made by the other.
 - b. **Unilateral Contract:** one party makes a promise in exchange for specified performance by the other.
3. **"Objective" vs. "Subjective" Assent:** As a general rule, we judge contract formation by the parties' objective manifestations of intent – what they said and what they did – not by their hidden, subjective intent.

B. Offer: "the manifestation of [the offeror's] willingness to enter into a bargain, so made as to justify [the offeree] in understanding that his assent to that bargain is invited and will conclude [the bargain]." R2 § 24.

1. **"Offer" vs. "Preliminary Negotiations":** a manifestation is not an offer "if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until [the "offeror"] has made a further manifestation of assent. R2 § 26.
2. **Requirement of "Certainty":** a purported offer cannot be accepted to form a contract unless the terms of the offer "provide a basis for determining the existence of a breach and for giving an appropriate remedy." R2 § 33(1)-(2).
3. **"Open" Term(s):** the existence of one or more open or uncertain terms may evidence that the purported offer is only preliminary. R2 § 33(3).

C. **Acceptance:** the offeree's assent to the terms of the offer, demonstrated "in a manner invited or required by the offer." R2 § 50(1).

1. **Means of Acceptance**

a. **Performance**, see R2 § 50(2)

b. **Promise**, see R2 § 50(3)

c. **Silence:** As a rule, the law does not consider an offeree's mere silence or inaction as constituting an acceptance *that is binding against the offeree*; however, mere silence or inaction may constitute acceptance if:

i. "[T]he offeror has stated or given the offeree **reason to understand that assent may be manifested by silence or inaction**, and the offeree in remaining silent and inactive *intends to accept* the offer," R2 § 69(1)(b);

ii. "[B]ecause of **previous dealings** or otherwise, it is **reasonable that the offeree should notify the offeror** if he *does not* intend to accept," R2 § 69(1)(c); or

iii. "[A]n offeree **takes the benefit of offered services with reasonable opportunity to reject them** and reason to know they were offered with the expectation of compensation," R2 § 69(1)(a).

2. **"Time, Place, and Manner":** If an offer prescribes the time, place, or manner of acceptance, the offeree must strictly comply with those requirements to create a contract; otherwise, acceptance may be made by any reasonable means. R2 § 60.

3. **"Acceptance" vs. "Counteroffer" (the "Mirror Image" Rule):** A reply to an offer that purports to accept it, but on terms additional to or different from those offered, is a counteroffer, not an acceptance. R2 § 59.

4. **When Does an Acceptance Take Effect?:** Unless the offer states otherwise, an acceptance that satisfies the offer's "procedural" requirements is effective as soon as the offeree communicates it to the offeror – even if the offer has not yet received the offeree's communication; except in the case of an "option contract," where the acceptance does not take effect until the offeror receives it. R2 § 63.

5. **Terminating the Power to Accept:** Unless the offer specifically provides otherwise, an offeree's power to accept an outstanding offer may be terminated by, *inter alia*,

- a. **Rejection:** An offeree's rejection of the offer terminates her power to accept. R2 §§ 36(1)(a) & 38(1).
- b. **Counteroffer:** A counteroffer proposes a substitute bargain differing from that in the original offer; an offeree who makes a counteroffer *forfeits the power to accept* the original offer unless the offeror or offeree clearly manifests a contrary intent. R2 §§ 36(1)(a) & 39.
 - ◆ A rejection or counteroffer terminates the offeree's power of acceptance at the time the rejection or counteroffer is communicated to the offeror; provided that, if the rejection or counteroffer is communicated by mail or telegram (or, presumably, fax or e-mail):
 - (1) the offeree's power to accept terminates when the offeror receives the rejection or counteroffer; unless
 - (2) the offeree communicates and the offeror receives an acceptance prior to the time the offeror receives the (earlier-sent) rejection or counteroffer. R2 § 40.
- c. **Lapse of Time:** If the offer contains a time of acceptance provision, the offeree's failure to accept before or by that time terminates her power of acceptance; otherwise, an offer terminates if not accepted within a "reasonable" period of time. R2 §§ 36(1)(b) & 41.
- d. **Revocation by the Offeror:** Unless the terms of the offer state otherwise, the offeror may revoke an offer at any time before the offeree accepts the offer. R2 § 36(1)(c).
 - ◆ A revocation is only effective when "actually communicated" to the offeree or when the offeree "acquires reliable information" that the offeror has taken actions evidencing an intent to revoke the offer. R2 § 42-43.
- e. **Death or Incapacity:** An offer is personal; and, therefore, terminates on the death or incapacity of either the offeror or offeree. R2 §§ 36(1)(d) & 48.
- f. **Failure of a Condition:** An offeree's power to accept may terminate due to the non-occurrence of any condition of acceptance required by the terms of the offer. R2 § 36(2).

D. **Special Case: Unilateral Contracts**

1. **Commencement or Tender of Performance**

- a. If an offer invites an offeree to accept by rendering a performance **and does not invite a promissory acceptance**,
 - i. an option contract arises when the offeree begins the invited performance or tenders a beginning of it; and
 - ii. the offeror's duty ... under any option contract so created is conditional on completion **or tender** of the invited performance **in accordance with the terms of the offer**. R2 § 45.
- b. **Manifestations of Contrary Intent:** R2 § 45 cmt. b provides that § 45 will not come to the aid of an offeree if the terms of the offer manifest the offeror's intent to reserve the right to revoke after the offeree begins to perform.
- c. The offeror is not bound to perform her part of the bargain unless the offeree **completes** the requested performance, unless the offeree's failure to complete is due to the offeror preventing, waiving, or repudiating the offeree's full performance.
- d. And, in any event, the offeree must **actually begin** to perform. Merely preparing to perform will not be enough to prevent the offeror from revoking.

2. **Notice of Acceptance:** While an offer for a unilateral contract can generally be accepted by merely performing the act requested, *see* R2 § 54(1), an offeree who

- a. **may choose** between accepting by promise and accepting by performance,
- b. **elects** to accept by performance, and
- c. has reason to know that the offeror has **no adequate means** of learning of her performance with reasonable promptness and certainty,

must exercise **reasonable diligence** to notify the offeror of her performance, unless the offeror the offeror **otherwise learns** of the performance within a reasonable time or the offer itself indicates that **no notification** of the offeree's performance is required. R2 § 54(2).

G. Consideration

1. **The Nature of Consideration:** Consideration transforms a promise into a contract. In the absence of consideration, a promise will not be enforced absent *detrimental reliance* or *unjust enrichment*.
2. To constitute consideration, the promisee's return promise or performance must be "**bargained for**." R2 § 71(1).
 - ◆ The *Restatement (Second)* explicitly abandons the requirement of benefit to the promisor or detriment to the promisee. R2 § 79(a).
3. The promisee's return promise or performance is "bargained for" if
 - a. the **promisor sought it** in exchange for his promise and
 - b. the **promisee gave it** in exchange for that promise. R2 § 71(2).
4. Consideration may be given to or by a **third party**. R2 § 71(4).
5. **Forms of Consideration:** Valid consideration may take the form of
 - a. an **act**, including giving **value** (*i.e.*, money), R2 §§ 71(3)(a) & 72;
 - b. **forbearing** from acting, R2 § 71(3)(b);
 - c. **creating, modifying, or destroying** a legal **relationship, right, or duty**, R2 § 71(3)(c); or
 - d. a **return promise**, as long as the promised performance would be consideration, R2 § 75.

II. Forming Contracts to Sell Goods

- A. Five major differences between the UCC or CISG and common law:
 1. **Open Terms:** At common law, an open or uncertain term may evidence that a purported offer is only preliminary. R2 § 33. By comparison,
 - a. **UCC § 2-204(3):** Even if one or more terms are left open a contract for sale or lease does not fail for indefiniteness if the parties have **intended to make a contract** and there is a **reasonably certain basis** for giving an appropriate remedy.
 - b. **CISG Art. 14(1):** An offer "is sufficiently definite if it indicates the goods and expressly or impliedly fixes or makes provision for determining the quantity and price."

2. **Irrevocability:** At common law, an offeror may revoke her offer at any time before the offeree accepts it, unless it is supported by separate consideration. R2 §§ 36(1)(c) & 87(1)(a). By comparison,
 - a. **UCC § 2-205:** A written offer, signed by a merchant, that purports to give the offeree an irrevocable option to accept the offer for some state period of time, will bind the merchant to keep the offer open for the stated time, or for a reasonable time if no time is stated, but in no event for more than three months.
 - b. **CISG Art. 16(2):** As a general rule, an offer is revocable unless it indicates it is irrevocable by “stating a fixed time for acceptance or otherwise,” or it was reasonable for the offeree to rely on the offer being irrevocable and the offeree has acted in reliance on the offer.

3. **Manner of Acceptance:** If an offer governed by common law prescribes the time, place, or manner of acceptance, the offeree must strictly comply with those requirements to create a contract; otherwise, acceptance may be made by any reasonable means. R2 § 60. By comparison,
 - a. **UCC § 2-206(1)(a):** Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract invites acceptance *in any manner and by any medium* reasonable in the circumstances.
 - b. **CISG art. 18(1) & (2):** A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance, provided the statement reaches the offeror or the offeror becomes aware of the conduct within the time the offeror has fixed, or within a reasonable time if the offeror has not fixed a time.

4. **The “Mirror Image” Rule:** At common law, if the offeree’s acceptance varies the terms of the offer in any way, the purported acceptance is a counteroffer. R2 § 59. By comparison,
 - a. **UCC § 2-207(1):** “A definite and seasonable expression of acceptance ... which is sent within a reasonable time operates as an acceptance *even though it states terms additional to or different from those offered* ..., unless acceptance is made expressly conditional on assent to the additional or different terms.”
 - b. **CISG Art. 19(2):** “[A] reply to an offer which purports to be an acceptance but contains *additional or different terms which do not materially alter* the terms of the offer *constitutes an acceptance*, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect.”

5. **The “Last Shot” Rule:** At common law, because a purported acceptance that included additional or different terms is treated as a counteroffer, parties can continue to exchange non-agreeing forms indefinitely. Once the parties perform the contract, the terms of the last form sent are deemed accepted by the party who first performed without sending a contrary form. By comparison,
 - a. **UCC § 2-207** dispenses with the “last shot” rule completely.
 - ◆ The 2003 amendments to Article 2 appear to give an offeree the ability to force the offeror into Article 2’s default terms by permitting the offeree to accept with different or additional terms and then declaring that, the offeree having done so, the terms of the contract will be those on which the parties agree, plus UCC “gap fillers.”
 - b. **CISG Art. 19** dispenses with the “last shot” rule only when the purported acceptance does not materially alter the offer’s terms.

B. **Firm Offers: A Closer Look**

1. **UCC § 2-205:** A merchant who makes an offer
 - a. in a **signed writing**,
 - b. giving **assurances it will be held open** for a fixed period or for an indefinite period,
 - c. **cannot revoke** the offer, despite the lack of separate consideration
 - i. for the period stated in the firm offer, if less than 3 months;
 - ii. for 3 months, if the period stated in the offer is more than 3 months; or
 - iii. for a “reasonable time” not to exceed 3 months, if the offer is silent.
2. The 3-month limit does not apply to otherwise-binding option contracts for which separate consideration is given.
3. **(Not-So-“Firm”) Offers Under the CISG**
 - a. An offeror can revoke his offer as long as the revocation reaches the offeree before she accepts, Art. 16(1), unless

- b. the offer indicates it is irrevocable by “stating a fixed time for acceptance or otherwise,” Art. 16(2)(a), or
- c. it was reasonable for the offeree to rely on the offer being irrevocable and the offeree has acted in reliance on the offer, Art. 16(2)(b); but
- d. an offeror can withdraw **any** offer as long as the offeree receives the withdrawal before or at the same time as the offer, Art. 15(2); and
- e. in any event, an offer (irrevocable or not) terminates when the offeree’s rejection reaches the offeror, Art. 17.

C. **The Article 2 “Battle of the Forms”**

- 1. **“Additional” Term:** A term in a purported acceptance that does not contradict a term in the offer and does not “materially alter” the contract as a whole.
- 2. **“Different” Term:** A term in a purported acceptance that contradicts a term in the offer or that, while not contradicting a term in the offer, “materially alters” the contract as a whole. *See* UCC § 2-207 cmts. 4 & 5.
- 3. **Knockout Rule:** Discard different terms and replace with UCC gap fillers.
 - ◆ The 2003 amendments codify the knockout rule and apply it to any additional or different term to which both parties do not agree.

D. ***Battaglia de la Forma* Under the CISG**

- 1. A reply that purports to be an acceptance, but includes additional or different terms, is a **counteroffer**, like at common law. Art. 19(1).
- 2. However, if the additional or different terms **do not materially alter** the terms of the offer, then the reply is an **acceptance**, unless the offeror, without undue delay, objects to the discrepancy. Art. 19(2).
- 3. In the absence of a timely objection, the terms of the contract are those in the offer plus any non-materially-altering terms in the reply. Art. 19(2).
- 4. Art. 19(3) identifies certain terms which are, by definition, material.