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## Castles in the Air: Blanket Assent and the Revision of Article 2

Alexander M. Meiklejohn

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# Castles in the Air: Blanket Assent and the Revision of Article 2

Alexander M. Meiklejohn\*

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\* A.B. Amherst College; J.D. University of Chicago; Professor of Law, Quinnipiac College School of Law. The author thanks Peter Alces, Ian Ayres, Robert Bonn, Amelia Boss, Kate Curran, Neal Feigenson, Charles Heckman, John Honnold, Charles Knapp, Linda Meyer, Robert Power, Margaret Sachs, Elyn Saks, and John Thomas for their encouragement and comments on earlier drafts; Michael Brandt, Vicki Kahaner, Bruce Lockwood, John Ricciardi, Brian Spears, and Tracy Wheeler for their research assistance.

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### *Introduction*

In Professor Grant Gilmore's view, the purpose of "general commercial legislation" is to clarify business law rather than to improve business practices.<sup>1</sup> The legislation is designed to "state as matter of law the conclusion which the business community apart from statute and as matter of fact gives to the transaction in any case."<sup>2</sup> Thus, the transaction's legal consequences will match the parties' expectations.

The Uniform Commercial Code meets Gilmore's description; its "underlying purposes and policies" are facilitative rather than regulatory.<sup>3</sup>

1. Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341 (1948).

2. *Id.*

3. Uniform Commercial Code § 1-102(2) (1990) [hereinafter U.C.C.]. There are, of course, limits to this approach. See *id.* §§ 1-203, 2-302, -719(2), (3).

The obvious question for its drafters, therefore, is how to identify the conclusion that the business community gives to a particular transaction "apart from statute and as matter of fact."<sup>4</sup>

Professor Lawrence Friedman points out that the original drafters of the Code did not base their work on studies of business practices:

Devotion to business practice was deeply felt; nonetheless, it was window dressing at bottom. The Code did not start out with empirical studies of what business wanted, or with a theory of what the economy needed. Some Wall Street lawyers and businessmen were asked their opinions; but there were no real explorations of what was wrong (if anything) with the way law intersected the business world.<sup>5</sup>

Friedman found the resulting Code "curiously old-fashioned," focused on problems of "disorder in doctrine, clashing case law, and what seemed to be unlovely and unsympathetic arrangements of statutes."<sup>6</sup> In the major revision of the Code that is now under way,<sup>7</sup> Reporters and Drafting Committees are again proceeding without empirical studies.<sup>8</sup> As a result, the product of their efforts may well be as academic<sup>9</sup> as the original version.

4. Gilmore, *supra* note 1, at 1341.

5. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW 581-82* (1973); *see also* John E. Murray, Jr., *The Realism of Behaviorism Under the Uniform Commercial Code*, 51 OR. L. REV. 269, 297 (1972) [hereinafter Murray, *Realism*].

6. FRIEDMAN, *supra* note 5, at 581.

7. The National Conference of Commissioners on Uniform State Laws has revised Articles 3 and 6, amended Article 4, and promulgated Articles 2A and 4A. U.C.C. arts. 3, 6, 4, 2A (1990), 4A (1989). Drafting Committees are preparing revised versions of Articles 2 and 8. Uniform Commercial Code Revised Article 2, Sales (Tentative Draft July 29-August 5 1994) [hereinafter July 1994 Draft Revision]. Charles W. Mooney, Jr., *Good Faith Transferees of U.S. Treasury Securities and Other Weird Ideas: Making Federal Commercial Law*, 26 LOY. L.A. L. REV. 715, 717 (1993). Revision of Article 9 is under way as well. Bryan D. Hull, *Foreword: "Is the UCC Dead, or Alive and Well?"*, 26 LOY. L.A. L. REV. 535, 535-36 (1993). *See generally* Symposium, *Is the UCC Dead, or Alive and Well?*, 26 LOY. L.A. L. REV. 535 (1993).

8. *See, e.g.*, Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 770-72 (1993). There are, of course, some published studies of contracting behavior available to those involved in the revision process. *See infra* notes 192-260 and accompanying text.

9. *See* FRIEDMAN, *supra* note 5, at 581-82.

Professor Karl Llewellyn, the "principal drafter"<sup>10</sup> of Article 2 of the Code, employed a drafting style that is, in theory, responsive to Friedman's criticism.<sup>11</sup> Llewellyn believed that the solution to any problem of commercial law is "immanent" in the commercial setting that gave rise to the problem.<sup>12</sup> Article 2 directs courts to discover and implement immanent solutions, deciding each case on the basis of a focused empirical inquiry.<sup>13</sup> The inquiry will produce information not only about the events that led directly to the transaction in dispute, but also about any relevant aspects of the parties' past dealings with each other and the practices of their industry. Thus, the lack of empirical studies at the Code drafting stage becomes irrelevant when the parties give the court a comprehensive education in the business realities that bear on their dispute.<sup>14</sup> Indeed, the resulting Code is far more flexible than, and therefore preferable to, any attempted codification of practices revealed in empirical studies.<sup>15</sup>

10. James J. White, *Promise Fulfilled and Principle Betrayed*, 1988 ANN. SURV. AM. L. 7, 16.

11. See, e.g., Permanent Editorial Board Study Group Uniform Commercial Code Article 2, Richard E. Speidel, Chair, Preliminary Report, Introduction at 9 (March 1, 1990) [hereinafter Prelim. Rpt.].

12. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 122 (1960); see also Prelim. Rpt., *supra* note 11, Introduction at 11; Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 624-27 (1975).

13. Professor White rightly points out that Article 2 does establish some rules, thus prescribing solutions to at least some problems of commercial law. White, *supra* note 10, at 18-21. The rules he describes, however, §§ 2-319, -320, -509, -706, and -712, are default rules, subject to change by agreement. See U.C.C. §§ 2-319, -320, -509(4), -718(1), -719 (1990). And the agreement is part of the immanent solution. See *infra* notes 44-63 and accompanying text. For a rule that is subject to change by agreement only in part, however, see U.C.C. § 2-725(1) (1990). See generally JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 3-10 (3d ed. 1988) (discussing "limits on freedom of contract" in Article 2).

14. Prelim. Rpt., *supra* note 11, Introduction at 9; see also Richard E. Speidel, *Contract Law: Some Reflections Upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822, 829-32. See generally Murray, *Realism*, *supra* note 5.

References throughout this paper to judicial inquiries into commercial context do not mean, of course, that trials in commercial cases are to be conducted in the inquisitorial rather than the adversarial mode. Rather, the parties are to present evidence of context in response to the dictates of the Code. See, e.g., U.C.C. § 2-302(2) (1990).

15. Gilmore, *supra* note 1; Prelim. Rpt., *supra* note 11, Introduction at 9.

The centerpiece of Llewellyn's methodology is the notion of agreement; the court's initial inquiry is into the bargain, if any, that the parties have made.<sup>16</sup> The Code definition of the term "agreement" makes clear that the parties' actual agreement, rather than any deemed agreement, is the focus of the inquiry.<sup>17</sup> And by incorporating implied terms and meanings, the definition also makes clear that the parties are to provide any relevant information about their past dealings and industry practices.<sup>18</sup>

An Article 2 Study Group, whose recommendation led to the revision of the Article, echoes<sup>19</sup> the widely held view that Llewellyn's drafting style has stood the test of time,<sup>20</sup> and the draft revisions to date indicate that the Drafting Committee concurs.<sup>21</sup> Thus, all indications are that revised Article 2 will maintain Llewellyn's response to Friedman: a commercial code need not be based on *ex ante* empirical studies if it directs courts to discover commercial reality in the cases before them.

At least one tenet of Llewellyn's thought is at odds with this approach, however. In thinking about contract formation by means of standard form documents, he conceived of the notion of "blanket assent."<sup>22</sup> A party

16. See *infra* notes 44-47 and accompanying text.

17. U.C.C. § 1-201(3) (1990).

18. *Id.*

19. Prelim. Rpt. *supra* note 11, Introduction at 16-17.

20. E.g., Peter A. Alces, *Roll Over, Llewellyn?*, 26 LOY. L.A. L. REV. 543, 549 (1993); Anita F. Hill, *Is The UCC Dead or Merely Languishing?*, 26 LOY. L.A. L. REV. 651, 657 (1993). For a dissenting view, see Danzig, *supra* note 12, at 635. Danzig agrees, however, that "normative insight is enriched by empirical observations." Richard Danzig, *Legal Realism: Commentary*, 1988 ANN. SURV. AM. L. 49, 65.

21. See generally July 1994 Draft Revision, *supra* note 7. The draft makes few substantive changes in the basic formation and interpretation sections of Article 2. See, e.g., *id.* at 11 (the proposed revision of § 2-204); *id.* at 18-23 (the proposed revisions of §§ 2-301 to -310); see also Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1311-12 (1994).

22. The notion represents Llewellyn's solution to the problem of which, if any, of the boilerplate provisions in a standard form document of sale the law should enforce:

Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable

that<sup>23</sup> agrees to engage in a transaction described in the other party's form document of sale gives a blanket, as opposed to specific, assent to any "not unreasonable or indecent" terms the document may contain.<sup>24</sup> If the party later seeks to avoid enforcement of a form term, the only question is whether the term is unreasonable or indecent and therefore outside the scope of the assent; the assent itself is assumed, and need not be proven by the sender of the document.<sup>25</sup>

Had blanket assent remained in the realm of theory, the formation and interpretation sections of Articles 1 and 2 of the Code would have been relatively uniform in their call for a focused empirical study in each case. Article 2 contains one section, however, that codifies the notion. Section 2-207,<sup>26</sup> on "Additional Terms in Acceptance or Confirmation," makes sense only if the parties to a particular sales transaction give blanket assents to the form terms of each other's documents.<sup>27</sup>

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meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

LLEWELLYN, *supra* note 12, at 370.

23. This paper refers to parties "that" engage in transactions rather than those "who" engage in transactions because, at least in the reported cases dealing with "additional" terms, *see infra* notes 102, 146 and accompanying text, the parties are usually business firms rather than individuals. Cf. Karl N. Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 733 n.63 (1931).

24. LLEWELLYN, *supra* note 12, at 370.

25. Although Llewellyn does not quite make this explicit, his description of the notion of blanket assent makes clear both that in his view there is no actual assent to particular form clauses, and that the issue for the court is reasonableness. *Id.*; *see also* Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893 (1991); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1198-1206 (1983). Professor Rakoff suggests that for Llewellyn the notion of blanket assent may have "represented a strategic compromise in its day; by conceding the enforcement of reasonable clauses, [blanket assent] helped to establish the legitimacy of refusing to enforce outrageous form terms." *Id.* at 1201.

26. U.C.C. § 2-207 (1990).

27. Danzig characterizes part of the Llewellyn passage describing blanket assent as "Llewellyn's retrospective comment on . . . § 2-207," Danzig, *supra* note 12, at 629 n.30, but this is mistaken; Llewellyn mentions several Code sections in the discussion in which the passage appears, but they do not include § 2-207. LLEWELLYN, *supra* note 12, at 369-70; *see*

In this transaction, the "battle of the forms," a buyer and a seller of goods send each other form<sup>28</sup> documents of sale, printed on paper, that do not match completely. The documents match with respect to "performance"<sup>29</sup> terms, such as the quantity, description, and price of the goods, and the time and manner of delivery and payment, but not with respect to "breakdown" terms, such as warranties, dispute resolution, or remedies. The parties perform despite the differences between their documents, and blanket assent establishes the breakdown terms of the resulting agreement.<sup>30</sup> By enforcing those terms, section 2-207 legislates a preconceived, stereotypical model of the transaction.<sup>31</sup>

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Rakoff, *supra* note 25, at 1199 n.96. For purposes of this paper's analysis, however, the point is not that Llewellyn himself applied the notion of blanket assent to § 2-207, but rather that the notion helps explain the section's rules. *See infra* text accompanying notes 99-145.

28. Nothing in § 2-207's text limits its coverage to transactions involving form documents. Indeed, subsection (1) applies both to "[a] definite and seasonable expression of acceptance" and to "a written confirmation which is sent within a reasonable time." U.C.C. § 2-207(1) (1990). Thus an acceptance need not even be in writing, much less in a printed form, and a confirmation need not be printed. *See also id.* cmt. 1. In their discussion of § 2-207, Professors White and Summers describe eight transaction types to which the section may apply, only one of which involves non-form communications. WHITE & SUMMERS, *supra* note 13, § 1-3. In the authors' assessment, the section does serve a useful purpose as applied to some non-form communications. *Id.* at 47.

Commentators on the section have focused principally on its application to transactions that involve form documents of sale. *See, e.g.,* Brown, *supra* note 25, at 899 (Section 2-207 is "generally understood" to apply only where "at least one party's preprinted form plays a role"—a limitation that "makes good sense."); Gregory M. Travalio, *Clearing the Air After the Battle: Reconciling Fairness and Efficiency in a Formal Approach to U.C.C. Section 2-207*, 33 CASE W. RES. L. REV. 327, 367-68 (1983). Professor Wladis reports that the Code drafters first began to consider the application of § 2-207 to the battle of the forms in the early 1950s. John D. Wladis, *U.C.C. Section 2-207: The Drafting History*, 49 BUS. LAW. 1029, 1040-41 (1994).

29. Professors Barron and Dunfee employ this terminology. Paul Barron & Thomas W. Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171, 174 (1975).

30. *See infra* notes 99-145 and accompanying text.

31. White uses this terminology, referring to the "model transactions contemplated in section 2-207." White, *supra* note 10, at 34. He also attributes the failure of the section to the fact that the Code drafters "were incapable of understanding the underlying transaction." *Id.* at 37. He does not, however, connect blanket assent with the model that underlies the section.



This striking departure from Llewellyn's general methodology produced a section that Gilmore deemed "arguably the greatest statutory mess of all time."<sup>32</sup> Judges and scholars alike have agreed with Gilmore's assessment, and most scholars have concluded that revision of the section is in order.<sup>33</sup> In laying foundations for revision, these writers have not set out to describe alternative transactional models for the battle of the forms.<sup>34</sup> Yet they have done so in effect by making assumptions about the agreements that issue from the battle. Thus, the rich and voluminous literature on the section<sup>35</sup> in large measure replicates the choice of the original Code drafters to treat the battle of the forms as a special case of contract formation and interpretation.

This paper argues that the drafters of revised Article 2 must reject this approach. In the absence of strong empirical support, no Code section should be based on the notion of blanket assent, or any other preconception about the agreements that issue from the battle of the forms. Because the simple fact of § 2-207's existence suggests that ordinary formation and interpretation principles do not apply, the drafters should not include it in the revised Code.<sup>36</sup>

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32. Letter from Grant Gilmore to Robert S. Summers (September 10, 1980), reprinted in RICHARD E. SPEIDEL ET AL., SALES & SECURED TRANSACTIONS 513, 514 (5th ed. 1993).

33. See e.g., Prelim. Rpt. *supra* note 11, pt. 2, at 20-23 (recommending "major revision"). The Drafting Committee has considered several possible revisions. See July 1994 Draft Revision, *supra* note 7, at 13-14; Uniform Commercial Code Revised Article 2, Sales, Parts 1, 2, 3, and 7 (Tentative Draft December 21, 1993), pts. 1-3, at 15-18; Uniform Commercial Code Revised Article 2, Sales Parts 1-6 (Tentative Draft September 10, 1993), at 15-21 [hereinafter September 1993 Draft Revision]; Uniform Commercial Code Revised Article 2, Sales Parts 1 and 2, pt. 2, at 21-38 (Tentative Draft April 2, 1992) [hereinafter 1992 Draft Revision].

34. Indeed, two of the writers use the term "model" in describing conceptions with which they disagree. See *infra* notes 101, 149.

35. For bibliographies, see Brown, *supra* note 25, at 893 n.2; Charles M. Thatcher, *Sales Contract Formation and Content—An Annotated Apology for a Proposed Revision of Uniform Commercial Code § 2-207*, 32 S.D. L. REV. 181, 182 n.3 (1987). Professors Knapp and Crystal describe Professor Thatcher's bibliography as "presumably exhaustive and certainly exhausting." CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 306 (3d ed. 1993). Most recently, see *Ending the "Battle of the Forms": A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code*, 49 BUS. LAW. 1019 (1994).

36. The Article 2 Study Group "reserved judgment" on a suggestion by Professor Honnold that the section be eliminated. Permanent Editorial Board Study Group Uniform

Instead, the drafters should revise section 2-204, the basic Article 2 formation section, to emphasize the applicability of those principles to the problem of nonmatching communications in sales transactions.<sup>37</sup> The revised section should provide simply that if one party proposes a term, whether in a form document or otherwise, the other party may agree to the term either expressly or by implication. In the absence of express or implied agreement, the proposed term is not enforceable unless it corresponds to a term the law supplies in any event. If the parties do business with nonmatching documents, the section will prompt the judicial inquiry into agreement and commercial context that Llewellyn envisioned.

Use of Llewellyn's general methodology and avoidance of transactional models are necessary in the current revision process for two reasons. First, commentators on section 2-207 have cited some empirical data concerning the contracts buyers and sellers of goods make when they send each other form documents that are printed on paper. These data indicate that any transactional model will probably be inaccurate in many cases. Moreover, the advent of computer technology has brought changes both to sales documents and to the manner of their transmission, further complicating the patterns of behavior on which any model must be based. Given these changes, indeed, the very notion of a standard form document of sale may become unworkable.

Second, and perhaps more important, the overall design of the Code is in flux, responding to major changes in technology and in the economies of the United States and other countries. In response to the growth of sales of services and the relative decline of sales of goods in the American economy,<sup>38</sup> for example, the drafters of the revised Code are tentatively planning

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Commercial Code Article 2, Richard E. Speidel, Chair, Executive Summary, at 14 n.19 (March 5, 1991). The Drafting Committee has rejected the suggestion. See July 1994 Draft Revision, *supra* note 7, at 13-14; Speidel, *supra* note 21, at 1325-26. For advocacy of an approach similar to this paper's in the context of international sales, see Christine Moccia, Note, *The United Nations Convention on Contracts for the International Sale of Goods and the "Battle of the Forms,"* 13 FORDHAM INT'L L.J. 649 (1990).

37. This proposal is consistent with the Study Group recommendation that the revision of § 2-207 "draw on and be consistent with the underlying policies of Article 2, Part 2, particularly § 2-204." Prelim. Rpt., *supra* note 11, pt. 2, at 21.

38. See Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 MOD. L. REV. 1, 3 (1992); Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725, 725 (1993).

to bring some service transactions within its scope.<sup>39</sup> Assumptions that arguably make sense when applied to sales of goods may make no sense when applied to sales of services. To the extent that the drafters recognize differences among transactions, therefore, any transactional models they adopt will inevitably be both complex and varied. Provisions based on those models will be equally complex and varied, and the revised Code will exhibit, in new forms, the technicalities and inconsistencies that riddled pre-Code commercial law.<sup>40</sup>

Although this paper's specific focus is the need to eliminate section 2-207, then, its more general argument is that in the current revision the drafters must maintain an emphasis on the notion of actual agreement throughout Article 2. Indeed, they must draft provisions that will bring that emphasis home to generalist judges and lawyers, as well as to specialists in commercial law.<sup>41</sup> If they fail to do so, Llewellyn will have no answer to Friedman's criticism of revised Article 2.

Part I briefly summarizes the basic sections in Article 2, as well as the definitional sections in Article 1, that direct courts to analyze sales in their commercial context and to focus first on the parties' agreement. It then highlights the contrast between these sections and existing section 2-207 and concludes by proposing a revised version of section 2-204 (proposed section 2-204). The proposed section applies the approach of the basic sections to the problem of "additional" terms,<sup>42</sup> sharpening the focus on agreement and simplifying and clarifying existing section 2-204.

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39. Uniform Commercial Code Revised Article 2, Sales Chapter 3 (Tentative Draft February 10, 1994) [hereinafter February 1994 Draft Revision].

40. The first Tentative Draft of Chapter 3 of Article 2 illustrates the danger. The draft includes § 2-2203, on "Mass Market Licenses," which will govern "shrink wrap licenses" of computer software, *id.* at 79, despite the fact that at least one court has held that these licenses are subject to § 2-207. *Step-Saver Data Sys. v. Wyse Technology*, 939 F.2d 91, 98-99 (3d Cir. 1991). Section 2-2203 in effect treats cases involving shrink wrap licenses as even more special than cases involving the battle of the forms. It is longer and more complex than § 2-207 and is evidently based on blanket assent. *See id.* § 2-2203(a), (b). On the dangers of detailed and complex code provisions, see Alces, *supra* note 20; Gilmore, *supra* note 1, at 1355-59.

41. The Article's semantics will play an important role. *See infra* text accompanying notes 91-92, 368-69. For an argument that revised Articles 3 and 4 are "inaccessible to most of their users," see Lary Lawrence, *What Would be Wrong With a User-Friendly Code?: The Drafting of Revised Articles 3 and 4 of the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 659, 659 (1993).

42. Section 2-207 governs both cases of "additional" terms and cases of "different" terms. U.C.C. § 2-207(1) (1990): References in this paper to the law of "additional terms" are to the law that governs both kinds of terms.

Part II describes the "blanket assent" model on which section 2-207 is based, as well as the three alternative models that appear in the scholarly commentary on the section. It then reviews the empirical evidence cited in the commentary, which indicates that none of these models enjoys sufficient empirical support to merit incorporation in Article 2.

Part III highlights the differences between proposed section 2-204 and revisions based on the transactional models<sup>43</sup> by applying each to a hypothetical sales transaction. Although the models vary in their sensitivity to commercial context, any model-based revision is likely to obscure evidence of actual agreement in some cases. Part III therefore concludes that the drafters of the revised Code should eliminate section 2-207 and adopt the proposed section.

### *I. Code Fundamentals and the Law of Additional Terms*

#### *A. Articles 1 and 2*

Articles 1 and 2 direct courts to begin their search for immanent solutions by discovering<sup>44</sup> the parties' agreement, if any.<sup>45</sup> The agreement is the "bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance."<sup>46</sup> Terms implied from course of dealing, usage of trade, or course of performance ("implied" terms) are thus part of the bargain the parties have made;<sup>47</sup> the court's inquiry is not to end with an examination of express terms.

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43. The comparison involves only three of the four models; the fourth is not susceptible to this kind of comparison. See *infra* note 272 and accompanying text.

44. For use of this terminology, see John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 20 (1982) [hereinafter Murray, *The Article 2 Prism*].

45. See, e.g., SPEIDEL ET AL., *supra* note 32, at 478, 572; Murray, *The Article 2 Prism*, *supra* note 44, at 21.

46. U.C.C. § 1-201(3) (1990).

47. *Id.* "One of the most significant changes effected by the Code is the treatment of trade usage as an actual part of agreements." Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777, 778 (1986). For discussion of implication of terms from course of dealing, see *infra* note 312 and accompanying text.

In sections 1-205(4)<sup>48</sup> and 2-208(2),<sup>49</sup> the Code drafters adopted an important general rule of construction to aid courts in resolving conflicts among apparent components of an agreement: express terms control over implied terms;<sup>50</sup> and among implied terms course of performance controls over course of dealing and usage of trade,<sup>51</sup> and course of dealing controls over usage of trade.<sup>52</sup> Thus, in general, the parties' performance under the agreement is the best implied indicator of their intent, their series of earlier transactions is the next best, and practice in their industry ranks last.

In determining whether an agreement exists, courts must disregard artificial pre-Code principles such as the requirement of a high degree of definiteness. Section 2-204 prescribes a flexible approach:

**§ 2-204. Formation in General.**

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale 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.<sup>53</sup>

Various "gap-filler" sections in Article 2 require courts to supply terms ("supplied" terms) that parties have omitted from their agreements.<sup>54</sup> Like the definition of agreement, these sections are responsive to business settings; the supplied terms are those that are commercially reasonable under the circumstances of the individual case, and the facts that bear on the reasonableness of a supplied term may also bear on the meaning of an agreed

48. U.C.C. § 1-205(4) (1990).

49. U.C.C. § 2-208(2) (1990).

50. U.C.C. § 1-205(4) (1990).

51. U.C.C. § 2-208(2) (1990).

52. U.C.C. § 1-205(4) (1990).

53. U.C.C. § 2-204 (1990).

54. These include §§ 2-305, -308, and -309. U.C.C. §§ 2-305, -308, -309 (1990). *See generally* WHITE & SUMMERS, *supra* note 13, §§ 3-4 to -9.

term.<sup>55</sup> Thus, a court may extract and apply "values and norms which are 'immanent' in the relevant context . . . whether they emerge in determining the agreement in fact of the parties or in filling 'gaps' in that agreement."<sup>56</sup>

Discovery of the terms of the factual bargain is not the end of the process because the parties' obligations are not necessarily the same as the bargain's terms. A "contract" is the "total legal obligation which results from the parties' agreement as affected by [the Code] and any other applicable rules of law."<sup>57</sup> The parties' contract might well contain a warranty of merchantability or fitness for a particular purpose, for example, even if their agreement did not.<sup>58</sup>

The distinction between agreement and contract is of vital importance. If the Code drafters had not intended to require an inquiry into factual bargains, they could simply have used the term contract to refer to the set of legal obligations that results from the parties' transaction.<sup>59</sup> This would have held no suggestion that courts should distinguish between terms that the parties select and those that the law supplies. The separate definition of agreement indicates clearly that courts are to examine the factual bargain independently of any resulting legal obligations.<sup>60</sup>

The overriding message of the basic formation and interpretation sections, then, is that courts must examine all express and implied indicia of the parties' agreement, as well as its business setting. Courts that are tempted to simplify this process by focusing only on writings<sup>61</sup> receive scant encouragement; even the hierarchy among express and implied terms is stated in general language, and Professors James White and Robert Summers report that the hegemony of express terms is more apparent than

55. Cf. U.C.C. § 2-314 cmt. 7 (1990). *Accord*, SPEIDEL ET AL., *supra* note 32, at 884.

56. Prelim. Rpt., *supra* note 11, Introduction at 11. Cf. Speidel, *supra* note 14, at 827.

57. U.C.C. § 1-201(11) (1990).

58. U.C.C. §§ 2-314(1), -315 (1990). In either case, the warranty is supplied by the Code, rather than implied from course of dealing or usage of trade. Section 2-314(3), on the other hand, provides for warranties arising from course of dealing or usage of trade. *Id.* § 2-314(3).

59. See generally ARTHUR L. CORBIN, 1 CORBIN ON CONTRACTS § 3 (1963).

60. See SPEIDEL ET AL., *supra* note 32, at 478 ("The Code itself recognizes the primacy of agreement.").

61. *E.g.*, Murray, *Realism*, *supra* note 5, at 290-93.

real, in at least some jurisdictions.<sup>62</sup> Although the agreement is not necessarily controlling in all respects, it is the "foundation stone"<sup>63</sup> of Article 2.

### B. Section 2-207

The Code drafters adopted section 2-207 in part to address the common law "mirror image" rule, according to which parties had not made an agreement if the terms of their communications did not match.<sup>64</sup> This rule was likely to produce unjust results when applied to transactions in which one or both parties used a form document of sale. If an offer and a purported acceptance contained the same performance terms, the parties would probably believe they had a contract for sale. Yet if the form breakdown terms of their documents did not match, the purported acceptance was a counteroffer—both a refusal to make a bargain on the offeror's terms and an offer to make a bargain on the offeree's terms. Thus, quite possibly contrary to the parties' expectations, there was no contract despite the exchange of documents.<sup>65</sup> If they performed despite the differences between their documents, the "last shot" rule<sup>66</sup> held that they had made a contract on the terms of the last document sent—the last shot in the battle of the forms.<sup>67</sup>

62. WHITE & SUMMERS, *supra* note 13, § 3-3, at 125; *see also* U.C.C. § 2-202 cmt. 2 (1990).

63. SPEIDEL ET AL., *supra* note 32, at 478.

64. *See, e.g.*, WHITE & SUMMERS, *supra* note 13, § 1-3, at 29-30; Brown, *supra* note 25, at 901; Murray, *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1331 n.93 (1986) [hereinafter Murray, *Solutions*] (citing 1 RICHARD M. ALDERMAN, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 15 n.42 (2d ed. 1983) (formerly Hawkland)).

65. *See, e.g.*, LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 602-04 (5th ed. 1990); WHITE & SUMMERS, *supra* note 13, § 1-3, at 29-30; Daniel A. Levin & Ellen Blumberg Rubert, *Beyond U.C.C. Section 2-207: Should Professor Murray's Proposed Revision Be Adopted?*, 11 J.L. & COM. 175, 175-77 (1992).

66. Frederick Lipman, Esq., attributes this term to Professor Hawkland. Frederick D. Lipman, *On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code*, 24 BUS. LAW. 789, 792-93 (1969).

67. *See* Barron & Dunfee, *supra* note 29, at 176-77; Levin & Rubert, *supra* note 65, at 177-78.

Section 2-207 was designed to alter substantially both the mirror image rule and the last shot rule,<sup>68</sup> and courts<sup>69</sup> and commentators<sup>70</sup> alike recognize that the section has done so:

**§ 2-207. Additional Terms in Acceptance or Confirmation.**

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [the Code].<sup>71</sup>

If the drafters had been content simply to change these two rules, the section might have been much more successful. In subsection (2) and the second sentence of subsection (3), however, they went much farther, prescribing new rules that determine the terms of contracts formed under the section. Subsection (2) creates two general rules: the initial terms of a

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68. See, e.g., Brown, *supra* note 25, at 901-04.

69. See, e.g., Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1165-66 (6th Cir. 1972).

70. See, e.g., WHITE & SUMMERS, *supra* note 13, § 1-3. The authors' summary of the § 2-207 case law reveals that the section has substantially changed both rules, although it has generated considerable confusion in the process. See also Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms*, 68 VA. L. REV. 1217, 1222 (1982); Barron & Dunfee, *supra* note 29, at 177-79.

71. U.C.C. § 2-207 (1990).



contract formed by offer and acceptance are those of the offer, but some terms from the acceptance may be included as well.<sup>72</sup> The rule that terms from the acceptance may be included is then subject to four qualifications: (i) "Different" terms of the acceptance are excluded.<sup>73</sup> An "additional" term is included only if (ii) the offer does not "expressly limit[] acceptance to the terms of the offer,"<sup>74</sup> (iii) the term does not "materially alter" the contract,<sup>75</sup> and (iv) the offeror fails to manifest an objection to the term.<sup>76</sup> The distinction in subsection (1) between acceptances and confirmations, which apparently produces no difference in treatment under that subsection,<sup>77</sup> may play a role under subsection (2).<sup>78</sup> Subsection (3), finally, creates a single rule that contrasts sharply with those of subsection (2): the

72. U.C.C. § 2-207(2) (1990). See generally Brown, *supra* note 25. But see Wladis, *supra* note 28, at 1042-44.

73. This point is the subject of controversy. The exclusion of different terms is the clear implication of the text of subsection (2), which, unlike subsection (1), omits any reference to different terms. U.C.C. § 2-207(2) (1990). For Brown's explanation of the reason for the omission, see *infra* text accompanying note 120. Summers supports the view that the subsection refers only to additional terms. WHITE & SUMMERS, *supra* note 13, § 1-3, at 34-35. Wladis argues that the drafting history supports this view. Wladis, *supra* note 28, at 1050.

Comment 3 to § 2-207 indicates, however, that different terms may be incorporated in the agreement: "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2)." U.C.C. § 2-207 cmt. 3 (1990). Murray summarizes the arguments pro and con, siding with Comment 3. Murray, *Solutions*, *supra* note 64, at 1354-65. "[T]he failure to include 'different' terms in subsection (2) would emasculate the subsection's purpose. . . ." *Id.* at 1365. If Murray is correct, however, the result is simply a change in one aspect of Professor Brown's model. See *infra* text accompanying note 120. For an argument that the omission of the word "different" from the statutory text is the result of a printer's error, see John L. Utz, *More on the Battle of the Forms: The Treatment of "Different" Terms Under the Uniform Commercial Code*, 16 UCC L.J. 103, 110-12 (1983).

74. U.C.C. § 2-207(2)(a) (1990).

75. U.C.C. § 2-207(2)(b) (1990).

76. U.C.C. § 2-207(2)(c) (1990).

77. According to Brown, "[t]he purpose of the inclusion of confirmations in subsection (1) was to clarify that a confirmation inconsistent with the terms of the agreed contract does not negate contractual intent." Brown, *supra* note 25, at 940-41. For further clarification, see Wladis, *supra* note 28, at 1038-39.

78. See *infra* text accompanying notes 104-40.

terms of a contract established by conduct are those on which the documents agree and those "incorporated" under other Code provisions.<sup>79</sup>

The rules of section 2-207, particularly those of subsection (2), require explanation. If neither party has signed or otherwise expressly manifested agreement to the terms of the other's document, it is unclear by what means the offeree has agreed to the terms of the offer, and by what means the offeror has agreed to some terms of the acceptance.<sup>80</sup> The mystery is all the greater because the terms of the documents, which may be boilerplate, apparently trump terms implied from course of performance, course of dealing, or usage of trade; the section actively encourages courts to draw terms from form documents with little or no investigation of commercial context.<sup>81</sup>

The section's semantics are also problematical. The drafters used the undefined term "assent" in subsection (1), and spoke throughout the section of the terms of the "contract" rather than those of the "agreement." The reference to assent suggests that something other than agreement is intended, thus directing courts away from, rather than toward the bargain in fact. And the references to the contract disguise most effectively the role, if any, of that bargain in establishing the parties' total legal obligation.<sup>82</sup>

79. U.C.C. § 2-207(3) (1990).

80. See Myron Kove, *"The Battle of the Forms": A Proposal to Revise Section 2-207*, 3 UCC L.J. 7, 9 (1970).

81. The "proviso" of subsection (1), which provides that an acceptance is ineffective if it is "expressly made conditional on assent to the additional or different terms," U.C.C. § 2-207(1) (1990), compounds the problem. It invites courts to treat apparent acceptances as ineffective to create agreements if they contain form provisions that track its language. For a case in which the court concluded that form language was ineffective because it did not track the proviso closely enough, see *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1167-68 (6th Cir. 1972).

82. Professor Speidel, the Reporter for revised Article 2, has rightly criticized the reference to intention to contract in existing section 2-204(3):

The phrase "intended to make a contract" in . . . § 2-204(3) is an unfortunate selection of words since it suggests that the parties must intend their agreement to have legal consequences. Whether the parties ever intend this is extremely doubtful. The real question is whether the agreement has proceeded to such a point that no further negotiations are contemplated before performance can commence.

Speidel, *supra* note 14, at 830 n.28 (citations omitted). The most recent draft version of revised § 2-204 nevertheless refers to the parties' intention that their agreement be "sufficient to make a contract for sale." July 1994 Draft Revision, *supra* note 7, at 11. And the most

The comments to the section, whose role is presumably to resolve confusion introduced in its text,<sup>83</sup> only make matters worse. Comments 4 and 5 indicate that the test for inclusion in the contract of terms proposed in the acceptance is unfair surprise: a term is included if it will not produce unfair surprise but excluded if it will.<sup>84</sup> This test is inappropriate for two reasons. First, it fails to resolve the mystery of the section. It suggests, but by no means makes clear, that the absence of unfair surprise is equivalent to agreement. And second, it generates confusion about the section's role within Article 2. Cases decided under the section often focus on breakdown terms in sellers' documents, such as disclaimers of warranty or of liability for buyers' consequential damages.<sup>85</sup> Each of these terms is subject to review for unfair surprise under a specific Code section—the former under section 2-316<sup>86</sup> and the latter under section 2-719(3).<sup>87</sup> Moreover, each may be subject to additional review for unconscionability—a concept that incorporates the notion of unfair surprise—under section 2-302.<sup>88</sup> This dual structure invites courts to distinguish among two or more levels or kinds of unfair surprise to avoid redundant analysis.<sup>89</sup> Section 2-207 evidently requires yet another distinction, but nothing in Article 2 tells courts what

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recent draft version of § 2-207 nevertheless speaks of "assent" and of "contract" terms. *Id.* at 13.

83. See generally WHITE & SUMMERS, *supra* note 13, at 12-14. For highly skeptical discussion of the comments to § 2-207, see Letter from Grant Gilmore to Robert S. Summers, *supra* note 32, reprinted in, SPEIDEL ET AL., *supra* note 32, at 514.

84. U.C.C. § 2-207 cmts. 4, 5 (1990).

85. *E.g.*, Step-Saver Data Sys., Inc. v. Wyse Technology, 939 F.2d 91, 96 (3d Cir. 1991) (disclaimer of warranties); Hydraform Prod. Corp. v. American Steel & Aluminum Corp., 498 A.2d 339, 343-45 (N.H. 1985) (disclaimer of liability for consequential damages).

86. U.C.C. § 2-316(2), (3) (1990); *id.* cmt. 1.

87. U.C.C. § 2-719(3) (1990); WHITE & SUMMERS, *supra* note 13, § 12-11, at 529-31.

88. U.C.C. § 2-302 (1990).

89. With respect to disclaimers of warranty, see generally WHITE & SUMMERS, *supra* note 13, § 12-11, at 532-38; Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI. KENT L. REV. 199 (1985). With respect to disclaimers of liability for consequential damages, see generally WHITE & SUMMERS, *supra* note 13, § 12-11, at 530-32. With respect to both, see generally Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1292-1301 (1987). For criticism of the structure of the Code, see Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 516-28 (1967).

level or kind of unfair surprise the drafters reserved for the section.<sup>90</sup> If its subject is unfair surprise, then, the section's very presence in the Code is at odds with the simplicity and clarity that Llewellyn sought.

*C. Proposed Section 2-204*

Proposed section 2-204 provides as follows:

**§ 2-204. Formation and Terms in General.**

(a) Parties may make an agreement for sale in any manner sufficient to show that they have intended to enter into a bargain, including conduct by both that recognizes the existence of a bargain.

(b) Parties may make an agreement for sale even though:

- (1) the moment of its making is undetermined; or
- (2) one or more terms are not agreed upon, if there is a reasonably certain basis for giving an appropriate remedy.

(c) If one party proposes a term, the other party may agree to the term either expressly or by implication. Implied agreement exists if the term corresponds to an applicable course of performance, course of dealing, or usage of trade.

The proposed section improves upon the existing combination of sections 2-207 and 2-204 in at least four ways. First, the elimination of section 2-207 indicates that cases of additional or different terms are not subject to a special set of rules. The proposed section emphasizes this point by treating these cases as a subset of the larger set of cases in which the parties have apparently failed to reach agreement on all terms.<sup>91</sup> Article 2's basic formation section now governs the entire set of cases. The applicability of the section, moreover, does not depend on the use of a standard form document of sale.

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90. For one court's solution to the problem in the context of a disclaimer of liability for consequential damages, see *Hydraform Prod. Corp. v. American Steel & Aluminum Corp.*, 498 A.2d 339, 343 (N.H. 1985). Inquiry into unfair surprise under § 2-207(2)(b) led to §§ 2-719(2), -719(3), which in turn led to § 2-302. *Id.* Resolution of the unfair surprise issue under § 2-302 left open the issue of failure of essential purpose under § 2-719(2). *Id.*

91. Professors Baird and Weisberg believe that the original Code drafters sought, at least in part, to accomplish this in drafting § 2-207. Baird & Weisberg, *supra* note 70, at 1221.

Second, the proposed section sharpens the initial focus on actual agreement by describing the parties as intending to enter into a bargain, rather than as intending to create a contract. It maintains this focus throughout by avoiding any reference to contract terms. Thus, any inquiry into terms supplied by the Code will take place under other sections.

Third, any inquiry into terms deleted by the Code will also take place under other sections; the proposed section simplifies and clarifies the Code by focusing only on agreement and making no reference to unfair surprise. The structure of the Code will emphasize that courts are not to merge the two notions by treating the absence of unfair surprise as equivalent to agreement. Indeed, the issue of unfair surprise will be irrelevant in any case in which the court finds that there is no agreement to a proposed term.

Fourth, the proposed section should maximize contextual analysis. The test for inclusion of a term that one party proposes is simply the other party's agreement, either express or implied. Assume, for example, that trade usage permits a seller of goods on credit to charge interest on amounts due for more than thirty days, but not on amounts paid within thirty days. The usage is part of the bargain between a buyer and a seller in the trade<sup>92</sup> if neither proposes a term relating to interest. It is also part of the bargain if, for example, the seller uses a document of sale that states that the buyer will owe interest on only those amounts due for more than thirty days. The buyer has agreed implicitly to the seller's proposed interest term.

Suppose, however, the seller uses a document of sale that purports to change the usage—to let it charge interest on amounts due for more than ten days rather than thirty. The provision relating to interest is a proposed term to which the buyer may agree either expressly or by implication. If there is no express agreement, the term will be part of the bargain if the parties' course of performance or course of dealing overrides the trade usage. But if there is no such course of performance or course of dealing, the seller will not have succeeded in changing the term implied from the usage. This approach takes seriously the "pre-agreed" status of terms and meanings implied from transactional settings.<sup>93</sup>

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92. See generally Elizabeth Warren, *Trade Usage and Parties in the Trade: An Economic Rationale for an Inflexible Rule*, 42 U. PITT. L. REV. 515 (1981).

93. See Task Force, A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, *An Appraisal of the March 1, 1990, Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1019 (1991) [hereinafter *Appraisal*]. This does not

## II. Model Sales

Professor John Honnold observed recently that "legal science has not yet found a satisfactory way to decide what the parties have 'agreed' when they have consummated a transaction on the basis of the routine exchange of inconsistent forms."<sup>94</sup> This state of affairs by no means reflects a lack of effort on the part of the legal scientists who have written about the battle of the forms.<sup>95</sup> Yet the effort has been almost completely non-empirical. The model that underlies section 2-207 and the competing models described in the scholarly commentary are, in the main, ingeniously constructed castles in the air, unsupported by substantial empirical evidence. They hover over the Code, in profound conflict with Llewellyn's general methodology.

### A. The Models Described

Four models emerge from the commentary. All four predate the widespread use of computer technology in sales contracting, and all four thus assume that the parties use paper documents of sale, with standard breakdown terms printed in form language and performance terms filled in for each transaction. All four also assume that the parties reach express agreement on performance terms.

Three of the models are qualified in the sense that they describe both typical and atypical transactions. In the first model, which underlies the section, the typical buyer and seller give blanket assents to all or some of each other's form breakdown terms. In the second, described by Dean John Murray, Jr.,<sup>96</sup> the typical parties give blanket assents to the breakdown

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mean that people in business must "adhere passively to the compulsory uniformity of behavior imposed by tradition and custom," FRIEDRICH KESSLER ET AL., *CONTRACTS* 4 (1986), but only that one party must obtain the other's agreement to innovate. *Contra* JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 169 n.8 (2d ed. 1991). For more detailed discussion of the operation of proposed § 2-204, see *infra* text accompanying notes 309-26.

94. HONNOLD, *supra* note 93, § 165, at 228.

95. *See supra* note 35.

96. Murray's articles are: *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337 (1986) [hereinafter Murray, *Proposed Revision*]; *Solutions*, *supra* note 64; *The Article 2 Prism*, *supra* note 44; *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597 (1978); *Realism*, *supra* note 5; and *Intention Over Terms: An Exploration of U.C.C. 2-207 and New Section 60, Restatement of Contracts*, 37 FORDHAM L. REV. 317 (1969).

terms of Article 2. And in the third, described by Professor Hunter Taylor, Jr.,<sup>97</sup> there are no blanket assents; any breakdown terms in the typical agreement are implied from course of performance, course of dealing, or usage of trade. In the fourth model, described by Professors Douglas Baird and Robert Weisberg,<sup>98</sup> the parties are responsive to the applicable law, which might, if appropriately drafted, encourage them to reach agreement on the terms of the last document sent.

### 1. *The Section 2-207 Model: Professor Brown*

In a subtle and thoughtful explication of section 2-207,<sup>99</sup> Professor Caroline Brown describes its underlying<sup>100</sup> model.<sup>101</sup> In the model, which is remarkably intricate and detailed, the buyer and the seller of goods are business firms,<sup>102</sup> and an interest in efficient operation leads one or both to use a form document of sale.<sup>103</sup> The effect of the form terms depends on whether the document helps to form an agreement, serving as

Most recently, see John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1464-81 (1994).

97. E. Hunter Taylor, Jr., *U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality*, 46 U. CIN. L. REV. 419 (1977).

98. Baird & Weisberg, *supra* note 70.

99. Brown, *supra* note 25.

100. For a report that no single model animated the various drafters of § 2-207, see Letter from Grant Gilmore to Robert S. Summers, *supra* note 32, *reprinted in*, SPEIDEL ET AL., *supra* note 32, at 514. The argument that a model underlies the section does not mean, however, that all participants in its drafting held the model in mind as they made their contributions. It means only that the model explains the section's provisions.

101. Brown's only use of the term "model" is in observing that Article 2 eschews at least some preconceptions of traditional contract doctrine. Brown, *supra* note 25, at 899. Moreover, she "makes no effort to address the function of § 2-207 in *all* cases." *Id.* at 894 n.6. She argues, however, that "[t]he significance of a simple exchange of forms (or an exchange of forms coupled with performance) must be determined in large part by rather mechanical rules derived from the drafters' presumptions of what the parties expected." *Id.* at 904. The rules make sense even though the section is badly drafted. *Id.* at 943. These presumptions about expectations may not track the models of the common law, but they constitute a model nevertheless.

102. Brown never makes this point explicit, but it is implicit in much of her discussion, which emphasizes efficiency of business operation. *E.g.*, *id.* at 922, 926.

103. *Id.* at 900, 903.

either an offer or an acceptance, or confirms an agreement that the parties have reached informally.

*a. Offer and Acceptance*

Brown focuses mainly on offer and acceptance, and assumes that in most cases the buyer is the offeror.<sup>104</sup> She describes both typical and atypical agreements.

*i. Typical Agreements*

A seller that receives an offer on a form document examines "carefully" its "filled-in" terms, which generally relate to performance.<sup>105</sup> Moreover, Brown argues, the seller has "a natural opportunity and practical incentive to examine" other parts of the offer,<sup>106</sup> including its form breakdown terms. Yet for reasons of efficiency, the seller simply sends a form acceptance without reading the offer's breakdown terms.<sup>107</sup> The buyer, on receiving the acceptance, does not read its breakdown terms,<sup>108</sup> merely giving a "cursory glance at the few filled-in terms to verify the impression that the [acceptance] signifies an agreement already concluded."<sup>109</sup>

Although the breakdown terms remain unread, the buyer's impression is correct; the exchange of documents produces an agreement, and the parties usually proceed with the transaction.<sup>110</sup> The terms of the agreement are the performance terms on which the documents agree, the breakdown terms of the offer, and the not unreasonable additional breakdown terms of the acceptance.

The mechanism for the inclusion of unread breakdown terms is blanket assent.<sup>111</sup> By sending a form offer, Brown contends, the offeror (1) proposes that the offeree give a blanket assent to the offer's breakdown

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104. *Id.* at 902.

105. *Id.* at 915.

106. *Id.*

107. *Id.*

108. *Id.* at 916.

109. *Id.*

110. *Id.* at 896-97, 903.

111. *Id.* at 916 n.108, 895.



terms, and (2) gives the offeree latitude—indeed implicitly invites the offeree—to add terms that "do not significantly alter the bargain proposed in the offer."<sup>112</sup> The invitation amounts to the offeror's advance blanket assent to "any reasonable term [in the acceptance that is] not inconsistent with the offer, no matter how important that term might be."<sup>113</sup> The notion of unfair surprise furnishes the outer limit of reasonableness, and thus of blanket assent:<sup>114</sup> the offeror's invitation does not include terms that the offeror would be surprised to discover in the acceptance.<sup>115</sup>

The notion of unfair surprise will exclude few of the offeree's proposed terms, however. The offeror has the opportunity, in carefully preparing its own form document, to address any subject it deems important. This means that the offeror's silence on any subject strongly implies a willingness to accept any term the offeree proposes on that subject; only an occasional term in an acceptance will be unfairly surprising and therefore excluded from the agreement.<sup>116</sup>

Suppose, for example, an offer contains a form provision entitling the buyer to consequential damages if the seller breaches, but omits any provision relating to warranties. In Brown's view, the offeror (1) invites the offeree to agree via blanket assent to the consequential damages provision, and (2) agrees in advance to any not unfairly surprising provision relating to warranties. Only a warranty term that "no reasonable person in the offeror's position would anticipate the offeree providing"<sup>117</sup> is excluded from the offeror's invitation. By sending an acceptance, the offeree complies with both of the offeror's requests, giving a blanket assent to the terms of the offer,<sup>118</sup> including the consequential damages provision, and furnishing the invited warranty provision. The harmonious result is agreement on both consequential damages and warranties. Blanket assent thus puts an end to the battle of the forms.

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112. *Id.* at 928; *see also id.* at 905.

113. *Id.* at 929, 931.

114. *Id.* at 944.

115. *Id.* at 936.

116. *Id.* at 931.

117. *Id.* at 935.

118. *Id.* at 915-17. This assent does not include terms that are proposed in bad faith or that are unconscionable. *Id.* at 937-40.

Brown's description of the typical agreement explains the rules of section 2-207(2)—the main source of the section's mystery. The offeree's blanket assent explains the basic rule that the offer supplies the initial set of breakdown terms. And the offeror's implicit invitation explains both the general rule that breakdown terms from the acceptance may enter the agreement,<sup>119</sup> and the four qualifications of that rule. Because the offeror does not invite the offeree to supply terms that conflict with those of the offer, (i) "different"—as opposed to "additional"—terms in the acceptance do not become part of the agreement.<sup>120</sup> Because any offeror may decline to extend an implicit invitation, (ii) even additional terms in the acceptance are excluded if the offer expressly limits acceptance to the terms of the offer.<sup>121</sup> Because the offeror's implicit invitation extends only to reasonable terms in the acceptance, (iii) material alterations are not part of the agreement.<sup>122</sup> And because an offeror may limit the invitation it extends, (iv) an objection to a particular term in the acceptance will exclude that term.<sup>123</sup> An offeree's disclaimer of warranties, for example, will become part of the agreement under the general rule of subsection (2) if it does not run afoul of one of these four qualifications.

### *ii. Atypical Agreements*

Brown recognizes that a seller may respond to an offer with a counteroffer rather than an acceptance.<sup>124</sup> The seller may, for example, tell the buyer's purchasing agent that a form acceptance is intended to serve

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119. *Id.* at 929.

120. *Id.* at 930-32. If Murray is correct that different terms may become part of the agreement under § 2-207(2), *see supra* note 73, Brown's model requires a minor adjustment: the offeror's implicit invitation includes terms that conflict with those of the offer, but only if the requirements of subsection (2) are met. Thus the offer must not expressly limit acceptance to the terms of the offer, U.C.C. § 2-207(2)(a) (1990), the terms must not materially alter the agreement, *id.* § 2-207(2)(b), and the offeror must not give notice of objection to the terms. *Id.* § 2-207(2)(c).

121. Brown, *supra* note 25, at 929.

122. *Id.* at 929-30. Brown emphatically rejects the view that the baseline for assessing the materiality of an alteration is the set of terms that Article 2 provides. *Id.* at 936-37.

123. *Id.* at 929.

124. *Id.* at 907.

this function,<sup>125</sup> or the performance terms of the acceptance may differ in an important way from those of the offer.<sup>126</sup> If the offeror then performs, it has agreed to the terms of the counteroffer. Section 2-207 does not supply a rule that tracks this set of expectations, Brown contends, and the case should therefore be disposed of under the common law of contracts.<sup>127</sup>

Where the parties do business with form documents, however, the offeree's dispatch of a response usually signifies acceptance of the offer.<sup>128</sup> Brown argues that courts should "rarely if ever" find a counteroffer solely on the basis of "the offeree's inclusion of a preprinted proviso in an ordinary form where the filled-in portions match the offeror's proposal."<sup>129</sup> As a result, section 2-207 will govern in most cases.

It is also possible for a seller to send a document that is ambiguous—neither an acceptance nor a counteroffer. The document might, for example, contain a form proviso "highlighted by color, typeface, or location"—arguably ambiguous if form language commonly goes unread.<sup>130</sup> If this occurs, Brown writes, the document has "no . . . ascertainable positive legal effect."<sup>131</sup> If the parties then perform, their conduct furnishes "the *only* evidence that they have made an agreement."<sup>132</sup> And the terms on which they have agreed are evidently limited to those on which the documents coincide—in many cases probably only the performance terms.<sup>133</sup> Section 2-207(3) governs, and the parties' expectations are consistent with the rule of that subsection: the terms of the contract are those

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125. *Id.* at 916 n.106; *see also id.* at 922.

126. *Id.* at 912.

127. *Id.* at 919. *See generally id.* at 917-19. Because § 2-207 does not apply in the case of a counteroffer, the common law remains applicable under § 1-103. U.C.C. § 1-103 (1990).

128. Brown, *supra* note 25, at 921.

129. *Id.* at 923. A "proviso" is a provision that tracks the last clause of § 2-207(1). U.C.C. § 2-207(1) (1990); *see* Brown, *supra* note 25, at 897 n.13; *supra* note 81; *see also* Brown, *supra* note 25, at 897, 907, 921.

130. Brown, *supra* note 25, at 926.

131. *Id.* at 926.

132. *Id.*

133. *Id.* at 927.

on which the writings agree and "supplementary terms incorporated under any other provisions of [the Code]."<sup>134</sup>

*b. Confirmations*

If the parties make an informal agreement that one or both of them later confirms with a form document, Brown observes that neither party is the offeror, and therefore neither's document furnishes an initial set of terms.<sup>135</sup> The terms of the agreement undoubtedly include those agreed on informally.<sup>136</sup> They also include those on which the confirmations agree. If a confirmation includes a not unreasonable term and the recipient of the confirmation remains silent on the subject, that term will become part of the agreement.<sup>137</sup> If, on the other hand, the term contradicts a term in a confirmation sent by the recipient, the contradictory terms "knock" each other out, and neither becomes part of the agreement.<sup>138</sup>

Brown's discussion of confirmations does not explain any feature of the text of section 2-207(2). The "knock-out" component of her model, however, explains the "knock-out" rule of Comment 6:

Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on the confirmation sent by himself. As a result the requirement that there be notice of objection which is found in subsection (2) is satisfied and the conflicting terms do not become a part of the contract.<sup>139</sup>

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134. U.C.C. § 2-207(3) (1990); Brown, *supra* note 25, at 927-28.

135. Brown, *supra* note 25, at 941.

136. This conclusion is implicit in Brown's argument that a term in a confirmation that conflicts with one in the informal agreement is a "different" term. *Id.*

137. *Id.* at 941; U.C.C. § 2-207 cmt. 6 (1990). Brown does not argue explicitly that blanket assent operates in the area of confirmations as it does in the area of offers and acceptances. If the recipient has sent its own form confirmation, it has probably invited the other party to respond with reasonable, noncontradictory terms. This argument applies with less force, if any, where the recipient has not sent its own confirmation. Perhaps the opportunity to send a confirmation means that the recipient's silence supplies the requisite invitation.

138. Brown, *supra* note 25, at 942.

139. U.C.C. § 2-207 cmt. 6 (1990).

In cases of offer and acceptance, of course, blanket assent makes this rule inapplicable.<sup>140</sup>

*c. Implied Terms and Blanket Assent*

Regardless of whether the parties' documents function as offer and acceptance or as confirmations, terms implied from course of performance, course of dealing, and usage of trade play a rather limited role in the model Brown depicts. An express term of the offer that becomes part of the agreement via the offeree's blanket assent presumably trumps any contrary implied term under the qualified hierarchy the Code drafters provided.<sup>141</sup> And an express term in the acceptance to which the offeror has given advance blanket assent presumably has the same effect.<sup>142</sup>

The existence of an implied term can make a form term in the acceptance unreasonable, and thus lead to its exclusion as a material alteration.<sup>143</sup> This may occur, for example, if the form term directly contradicts the implied term. Yet the breadth of the offeror's implicit invitation means that the form term will usually be included.<sup>144</sup>

Although Brown makes the case for blanket assent to the terms of the offer and some terms of the acceptance, she does not say explicitly that the employees who arrange sales give that assent, or even realize that it takes place. She suggests, indeed, that the Code drafters adopted the notion of blanket assent because it produced an appropriate compromise: "The Code

140. See *supra* notes 104-23 and accompanying text. Summers agrees with Brown on this point, but White disagrees. WHITE & SUMMERS, *supra* note 13, § 1-3, at 33-34.

141. U.C.C. § 1-205(4) (1990); see *supra* notes 48-52 and accompanying text.

142. Brown does indicate that if a course of dealing or a usage of trade exists and the offer is silent on the subject, the offeror has not necessarily agreed to any term the offeree may propose. The offer's silence may, for example, reflect the fact that a usage is recognized so clearly in the trade that its mention appeared unnecessary. Brown's argument implies that the offeree's term becomes part of the agreement if (1) it "is common enough in the industry or in transactions between the two parties to negate the possibility of the offeror's surprise," and (2) it "is not inconsistent with expectations created by the parties' prior dealings." Brown, *supra* note 25, at 936. This notion translates into a "light" burden for the offeree, and thus the express term in the acceptance should prevail in most cases. *Id.*

143. *Id.* at 935.

144. See *supra* note 142. This applies literally only to offer and acceptance; Brown's article includes no discussion of the relation between implied terms and form terms in confirmations. Yet presumably the material alteration analysis remains the same.

balances, on the one hand, the need to give effect to commercial expectations created by the common exchange of unread forms with the need, on the other hand, to give some effect to the forms' preprinted terms, perhaps to justify the expense and effort of their drafting."<sup>145</sup>

The basis of Brown's model, then, is blanket assent—a notion that did not necessarily reflect commercial reality even in the minds of the Code drafters. Brown does envision some atypical transactions, and she acknowledges that the notion of unfair surprise and the Code concepts of good faith and unconscionability will render some form terms unenforceable. Yet in the typical case, blanket assent means that the court will be able to draw most, if not all, of the breakdown terms from the form provisions in the documents of sale.

## 2. *Alternative Models*

Other commentators on section 2-207 have generally agreed with the description of the parties<sup>146</sup> and their business routines that Brown presents. Most assume, for example, that the buying and selling firms use one-sided documents and that sales personnel almost never read form terms.<sup>147</sup> Disagreement focuses instead on blanket assent and the role of the law of additional terms.

### a. *Dean Murray*

#### i. *Typical Agreements*

In a comprehensive and detailed series of articles,<sup>148</sup> Murray bases his view of the battle of the forms<sup>149</sup> on his conception of the "underlying

145. Brown, *supra* note 25, at 927; *see also id.* at 904.

146. The commentators assume not only that the parties are usually business firms, but also that a firm has the resources to obtain legal advice. *See, e.g.*, Barron & Dunfee, *supra* note 29, at 174; Travalio, *supra* note 28, at 365, 371-73, 378.

147. *See, e.g.*, Barron & Dunfee, *supra* note 29, at 173-75; Murray, *Proposed Revision*, *supra* note 96, at 345-46; Corneill A. Stephens, *On Ending the Battle of the Forms: Problems With Solutions*, 80 KY. L.J. 815, 815-16, 818-19 (1991-92); Travalio, *supra* note 28, at 329-33.

148. *See supra* note 96.

149. Murray uses the term "model" not to describe his conception of the agreements parties make using form documents of sale, but rather to describe the unduly narrow approach of the common law. Murray, *Realism*, *supra* note 5, at 289. Yet his view of the proper

philosophy of Article 2."<sup>150</sup> The crux of his argument is that the typical party that receives a document of sale gives a blanket assent<sup>151</sup> to only those of its form terms that match the "specific normative assumptions of Article 2"—assumptions that are embodied in the Article's standard terms. These standard terms include "express and implied warranties and all judicial remedies to protect the fundamental expectation interests of the parties."<sup>152</sup> Thus, the typical buyer does not give a blanket assent to a seller's disclaimer of Code warranties, and the disclaimer remains outside the agreement.<sup>153</sup>

The normative component in Murray's argument verges on dominance. He regards the standard terms of Article 2 as balanced and fair; although warranties protect the buyer, for example, the right of cure protects the seller.<sup>154</sup> And the Article "not only enables but directs courts to impose their understanding of commercial morality on the market place."<sup>155</sup>

Yet Murray's emphasis on norms coexists with an emphasis on judicial discovery of the agreement. The underlying philosophy of Article 2 "may be stated as a more precise and fair identification of the factual bargain of the parties,"<sup>156</sup> and the courts' "task is to approximate, as closely as the objective evidence permits, the 'true understanding' of the parties."<sup>157</sup>

interpretation of § 2-207 clearly rests on a set of assumptions about the parties' agreement, and these assumptions constitute a model. See *infra* text accompanying notes 151-75.

150. See Murray, *Proposed Revision*, *supra* note 96, at 339-40; Murray, *Solutions*, *supra* note 64, at 1311, 1372-85.

151. Most of Murray's discussion of § 2-207 concerns the proper interpretation of the section, and he generally focuses on the notion of unfair surprise rather than the notion of blanket assent per se. See, e.g., Murray, *Solutions*, *supra* note 64, at 1354-65. Yet he clearly endorses the notion of blanket assent. *Id.* at 1376.

152. *Id.* at 1374; see also *id.* at 1377 (adding "statute of limitations, reasonable time, place, and manner of performance, and other normative assumptions"); Murray, *Realism*, *supra* note 5, at 279.

153. Murray, *Solutions*, *supra* note 64, at 1377.

154. See Murray, *Proposed Revision*, *supra* note 96, at 353; Murray, *Solutions*, *supra* note 64, at 1377.

155. Murray, *The Article 2 Prism*, *supra* note 44, at 20; see also *id.* at 19.

156. Murray, *Proposed Revision*, *supra* note 96, at 340. In an earlier formulation, this philosophy was "a more precise and fair identification of the actual or presumed assent of the parties." Murray, *Realism*, *supra* note 5, at 276.

157. Murray, *Solutions*, *supra* note 64, at 1313.

There is no tension between precision and fairness because the commercial morality of normal buyers and sellers tracks the commercial morality of the Article, and the terms of the normal agreement match the standard terms of the Article.<sup>158</sup> Thus, the normal parties give blanket assents to those standard terms.

### *ii. Atypical Agreements*

In a given transaction, one or both of the parties may wish to deviate from a standard term of Article 2. Clear communication of this intention will make the agreement atypical. The test for clear communication is commercial reasonableness; the question is whether a reasonable party would understand the other's intention to deviate from the Article 2 terms.<sup>159</sup> A printed form document may pass the test in a particular case.<sup>160</sup> Enforcement of a form term in the absence of clear communication, however, will produce an unfairly surprising departure from the standard Article 2 terms.<sup>161</sup>

If an offer is the vehicle for clear communication of an intention to deviate from the standard terms, the understanding of the offeree is that the relevant term of the response must match that of the offer for the response to function as an acceptance.<sup>162</sup> An offeror may, for example, demand that the parties resolve any of their disputes by arbitration. If the response to the offer also calls for arbitration, there is an agreement that requires use of the procedure, even though it deviates from the standard terms of Article 2.

If the relevant term of the response is not the same, however, the response is an ineffective acceptance—simply a refusal to make a bargain on the offeror's terms—and there is no agreement. If the parties nevertheless perform, their agreement consists only of the performance terms that match,

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158. Murray, *Proposed Revision*, *supra* note 96, at 352-53; Murray, *Solutions*, *supra* note 64, at 1351-52.

159. See Murray, *Solutions*, *supra* note 64, 1322-54; Murray, *Realism*, *supra* note 5, at 281. On the issue of the recipient's understanding, "[t]he clarity of the language, its conspicuousness and evidence of other means of communicating its meaning would be relevant." Murray, *Proposed Revision*, *supra* note 96, at 359.

160. Murray, *Solutions*, *supra* note 64, at 1384; Murray, *Realism*, *supra* note 5, at 281.

161. See Murray, *Solutions*, *supra* note 64, at 1374-76.

162. See *id.* at 1325-27.



and the law must complete the contract by supplying the remaining terms.<sup>163</sup> The absence of an arbitration provision in Article 2 means that any disputes not settled informally will be resolved by litigation.

If the intention to deal only on the party's terms is communicated clearly in a response to an offer,<sup>164</sup> on the other hand, the reasonable understanding of the offeror is that the response is a counteroffer rather than either an effective or an ineffective acceptance.<sup>165</sup> An offeror that receives a counteroffer and then performs thereby agrees to the terms of the counteroffer, whether or not those terms match the standard terms of Article 2.<sup>166</sup> Thus, if the seller is the party that wishes to arbitrate, it can require the buyer to use the procedure by means of a counteroffer that the buyer accepts by performing.

### iii. Implied Terms

Murray stresses the importance of commercial context.<sup>167</sup> He advocates an interpretation of section 2-207 in which offers include implied terms for purposes of determining whether express terms in the acceptance are "additional" or "different."<sup>168</sup> Offers also include implied terms for the purpose of assessing the materiality of the alteration wrought by a term in the acceptance.<sup>169</sup> Where an implied term matches an Article 2 standard term, it is part of the typical agreement.<sup>170</sup> An implied term, moreover, can control over a standard Article 2 term in at least some situations,<sup>171</sup> thus making the transaction atypical even though there is no express communication of intention to deviate from the standard terms of the Article.<sup>172</sup>

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163. *Id.*

164. *See id.* at 1343-52.

165. *Id.* at 1325, 1328, 1335.

166. *Id.*

167. *Id.* at 1313-14, 1361 n.209, 1383-84; Murray, *Realism*, *supra* note 5, at 289.

168. Murray, *Solutions*, *supra* note 64, at 1362.

169. *Id.* at 1363.

170. Murray, *Realism*, *supra* note 5, at 281.

171. Murray, *Solutions*, *supra* note 64, at 1361, 1377; Murray, *Realism*, *supra* note 5, at 283.

172. Murray, *Realism*, *supra* note 5, at 283.

Murray firmly believes, however, that Article 2 prohibits enforcement of unfair commercial practices.<sup>173</sup> In general, deviations "from the parties' normal assumptions are frowned upon."<sup>174</sup> And given his view that Article 2 reaches a fair balance between buyer- and seller-oriented terms, this disapproval extends logically to implied as well as express deviations.<sup>175</sup> Thus, a practice that runs counter to a standard term is suspect at the very least.

### *b. Professor Taylor*

Taylor's rejection of blanket assent makes his model far less detailed than either Brown's or Murray's. Indeed, were it not for his assumption that typical sales agreements exist, his conception would not constitute a model, but simply a call for an open-ended empirical inquiry.

### *i. Typical Agreements*

Taylor envisions a typical agreement whose express terms relate only to performance.<sup>176</sup> There are clearly some situations in which a term

173. Murray, *The Article 2 Prism*, *supra* note 44, at 19-20.

174. Murray, *Solutions*, *supra* note 64, at 1374.

175. Murray recognizes, of course, that an agreement can be fair even if it contains a deviant express term. A low price, for example, may compensate for a disclaimer of warranties. *Id.* at 1327 n.83. Yet the express term remains deviant and thus frowned upon, and Murray's articles furnish no reason for treating deviant implied terms differently.

176. Taylor, *supra* note 97, at 421, 425. Many other commentators agree. *See, e.g.*, Barron & Dunfee, *supra* note 29, at 173-75, 206-07; Mark E. Roszkowski, *Ending the Battle of the Forms: A Proposed Revision of UCC Section 2-207*, 26 UCC L.J. 144 (1993); Stephens, *supra* note 147, at 837 (departing from Taylor's model, however, by treating as part of the agreement conspicuous terms that appear "on the first page of the [acceptance]"); Appraisal, *supra* note 93, at 1062; Travalio, *supra* note 28, at 329-31, 336-37 n.37, 355, 361-62. One passage in Travalio's article suggests that he subscribes to Brown's version of blanket assent. *Id.* at 353. The suggestion is merely that, however. The likelihood is, rather, that each party's use of a form document reflects an intent to object to the other's breakdown terms. *Id.* at 354; *see also* Thatcher, *supra* note 35; Charles M. Thatcher, *Battle of the Forms: Solution by Revision of Section 2-207*, 16 UCC L.J. 237 (1984). Thatcher writes that "Murray's thoughtful critique of Section 2-207 and the case law furnished most of the insight and incentive for [his proposed revision of the section]." *Id.* at 246. His proposed revision, however, appears consistent with Taylor's model; unlike Murray's, it makes no reference to the standard terms of Article 2. *Id.* at 246-47; Thatcher, *supra* note 35, at 189-90. Professor Herbert's view of the agreement is generally consistent with

implied from usage of trade or course of dealing is part of the agreement.<sup>177</sup> Where form provisions in the parties' documents "are identical and . . . consistent with trade, custom or past dealings between the parties" the provisions may "properly be thought of as agreed to."<sup>178</sup> If the parties have not expressly agreed—in a document or otherwise—on a particular subject, any applicable course of dealing or trade usage will supply a term on the subject.<sup>179</sup> And where the buyer's order is silent on the subject and the seller's acknowledgment agrees with the implied term, Taylor's argument implies that the agreement incorporates the seller's term.<sup>180</sup> Thus, for example, if a trade usage limits the buyer's remedies for breach of warranty to repair or replacement, the seller's form provision to that effect is part of the agreement.

Where the form terms conflict and one coincides with an implied term, Taylor favors giving effect to the one that coincides with the implied term.<sup>181</sup> Given the remedy-limiting trade usage, for example, the seller's provision will be effective even if the buyer's document includes a form provision subjecting the seller to liability for consequential damages. Taylor does not argue explicitly, however, that the term is part of the agreement; it may instead be outside the agreement but included in the contract.<sup>182</sup>

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Taylor's. See Michael J. Herbert, *Contracts of Accretion: A Modest Proposal for U.C.C. Section 2-207*, 14 MEM. ST. U. L. REV. 441 (1984).

177. Taylor, *supra* note 97, at 437.

178. *Id.* at 425 n.17.

179. *Id.* at 431-32.

180. *Id.* at 434-35.

181. This approach is generally consistent with that of proposed § 2-204. See *supra* notes 92-93 and accompanying text; *infra* text accompanying notes 309-26.

182. Enforcement of the express term that coincides with the implied term is appropriate because it "fulfills the more reasonable of the two expectations." Taylor, *supra* note 97, at 437. If the parties' expectations are different, the term must be part of the contract but not part of the agreement. The notion that the parties' expectations are different seems at odds with Taylor's generalization about the lack of expectations on breakdown matters. He suggests, however, one possible exception to that generalization: "To the extent that either party has a precise expectation beyond obtaining performance from the other (*e.g.*, payment of money or delivery of goods), it is likely that each party believes that the contract has been formed in accordance with the terms of its own form." *Id.* at 421.

*ii. Atypical Agreements*

Form language in one party's document may occasionally displace a term otherwise implied in the agreement. A provision in the buyer's document may have that effect, for example, if "its presence in the buyer's form is effectively and conspicuously communicated to the seller."<sup>183</sup> If the provision is not conspicuous, however, its inclusion "would generally produce a result not reasonably foreseeable by the seller."<sup>184</sup>

By the same token, a seller may type or handwrite a notation on a form document that would be sufficiently conspicuous to place the buyer on notice that the seller insisted on a particular term. If the buyer receives the document and performs, the term should arguably be effective, presumably as part of the agreement.<sup>185</sup> Yet Taylor has his doubts: "ordinarily more should be required," he writes, since it is so easy for the seller to pick up the telephone or send a telegram to initiate negotiation over the term.<sup>186</sup>

*c. Professors Baird and Weisberg*

Most commentators on section 2-207 assume that counsel who prepare form documents are familiar with the law, and in some instances incorporate particular clauses that track parts of the section, such as the subsection (1) proviso.<sup>187</sup> Yet commentators, including Brown, do not argue that the advent of the section produced any fundamental change in either document preparation or contracting behavior. The assumption is that firms used one-sided documents before section 2-207 became law and they continue to do so today; sales personnel ignored one-sided provisions before the section became law and they continue to do so today. Form documents may be more prevalent today than they were under the common law, but commentators relate the development to firm size and the need for efficiency rather than to the enactment of the Code.

Baird and Weisberg, however, believe that contracting practices are potentially responsive to the law. They agree that form language goes

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183. *Id.* at 436-37.

184. *Id.* at 437.

185. *Id.* at 440-41.

186. *Id.* at 441, 447.

187. *E.g.*, Brown, *supra* note 25, at 920 n.127; Murray, *Solutions*, *supra* note 64, at 1337-41.

unread under section 2-207, but argue that an appropriate change in the law might stimulate some parties to read form provisions. If courts reestablished and strictly enforced the "last shot" rule, buyers, which usually submit offers, would realize that performance would bind them to the terms of sellers' acceptances.<sup>188</sup> At least some buyers would therefore read the form terms on the acceptances and "take their business elsewhere" if the terms were unacceptable.<sup>189</sup> This would encourage sellers generally "to design the terms in [their form documents] in the *mutual interest* of the parties."<sup>190</sup>

Baird and Weisberg thus describe a model in which the few buyers and sellers that are willing to devote time to reading form language in effect represent those that are not. Negotiation by these few, rather than blanket assent by all, produces fair terms and an end to the battle of the forms.<sup>191</sup>

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188. Baird & Weisberg, *supra* note 70, at 1257.

189. *Id.*

190. *Id.*

191. The authors describe two conditions that must be met if this is to occur. First, a sufficient number of buyers must read form terms. Based upon the work of Beale and Dugdale, *see infra* note 194 and accompanying text, and upon studies that "[suggest] that fixed printed terms in sellers' warranties conform to buyers' preferences even in consumer transactions," Baird and Weisberg regard it as "quite plausible" that this condition "will be met." Baird & Weisberg, *supra* note 70, at 1258. Second, however, courts must be willing to enforce the last shot rule strictly, and on this score the authors have their doubts. Courts are generally unwilling "to enforce formal rules of contract formation," *id.* at 1259, and they did not enforce the mirror image rule strictly before § 2-207 became law. *Id.* at 1233-37.

Doubts about strict enforcement of the last shot rule lead Baird and Weisberg to raise the possibility of a "slightly narrower version" of the rule, to be couched in statutory terms:

**LEGENDED ACCEPTANCE**

A merchant seller may respond to a merchant buyer's offer with a writing that bears the legend: "WARNING: Seller will only contract on the basis of the terms set forth in this document and no other. Acceptance of the goods constitutes acceptance of the terms set forth on this document."

This document must be sent 10 days before the goods are shipped. The legend must be conspicuous, it must be in at least 16-point type, and it must be in a color different from the rest of the document. If the seller employs such a document and the goods are delivered and accepted, a contract shall exist and the terms in the seller's legended acceptance shall constitute the terms of the contract.

*Id.* at 1260.

Courts might be more likely to enforce the last shot rule if it applied only to acceptances that bore this legend. Yet even in this limited form, the last shot rule is

### 3. Summary

Although the four models vary in their depth of detail, each has a central, distinguishing feature. Brown's model rests on the notion of blanket assent to the terms of the offer and the not unfairly surprising additional terms of the acceptance, and Murray's rests on the notion of blanket assent to the standard terms of Article 2. In Taylor's model, the typical transaction does not involve blanket assent, and in the Baird and Weisberg model the transaction is responsive to the applicable law.

#### B. The Empirical Evidence

##### 1. The Record

Commentators on section 2-207 have cited a limited record of empirical data regarding the agreements that issue from the battle of the forms. The record consists essentially of a few accounts of first-hand investigations,<sup>192</sup> notably Murray's; Professor Stewart Macaulay's classic 1963 article titled *Non-Contractual Relations in Business*;<sup>193</sup> a 1975 article by Professors Hugh Beale and Tony Dugdale on their interviews with "representatives of nineteen firms of [English] engineering manufacturers";<sup>194</sup> and the 1990 report of an ABA Task Force on electronic data

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conducive to artificial analysis, both because it employs the concepts of offer and acceptance, see HONNOLD, *supra* note 93, § 132.1; Herbert, *supra* note 176; Murray, *Solutions*, *supra* note 64, at 1366-72; Roszkowski, *supra* note 176, at 152-55, and because it apparently applies only where the buyer is the offeror. Courts are likely to manipulate the concepts of offer and acceptance in order to bring transactions within the rule if they wish to enforce the seller's form provisions, or to make the rule inapplicable if they do not wish to enforce those provisions.

192. There is, of course, a considerable body of reported case law on § 2-207. The value of the case reports as a source of data is limited greatly, however, by the fact that the courts' inquiries into agreement are often superficial at best. See *infra* notes 329-59 and accompanying text. For analysis of some of the cases, see White, *supra* note 10, at 32-38. White notes that the transactions that gave rise to the cases "are much more varied and complex" than those described in the comments to § 2-207. *Id.* at 34.

193. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

194. Hugh Beale & Tony Dugdale, *Contracts Between Businessmen: Planning and the Use of Contractual Remedies*, 2 BRIT. J.L. & SOC'Y 45, 46 (1975).

interchange between business firms.<sup>195</sup> Baird and Weisberg cite the Beale and Dugdale study as "suggestive" of the notion that at least some parties read form language and "are aware of the legal consequences of documents that differ."<sup>196</sup>

The record depicts commercial behavior that is strikingly varied. Brown, for example, found that "actual commercial practice involving the use of forms is quite disparate and difficult to generalize about, except for a few fundamental observations."<sup>197</sup> Variety characterizes both the agreement formation procedures sales employees follow and the employees' conceptions of the terms of the resulting agreements. And these formation procedures, and perhaps conceptions of terms, are changing substantially in some industries in response to the explosive growth in the use of computer technology.

#### *a. Paper Documents*

##### *i. Formation Procedures*

Macaulay found that form provisions tended to be located on the back of a document of sale, and that they were often "lengthy and printed in small type."<sup>198</sup> A seller's acknowledgement of an order "[t]ypically . . . [would] have ten to 50 paragraphs favoring the seller, and these provisions [were] likely to be different from or inconsistent with the buyer's provisions."<sup>199</sup> Beale and Dugdale report a similar finding: "the majority of contracts were made by each party using his 'back of order' conditions."<sup>200</sup>

Not all of the firms in Macaulay's sample, however, used one-sided form documents. Smaller firms were less likely to engage in this form of

195. Electronic Messaging Services Task Force, *The Commercial Use of Electronic Data Interchange—A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645 (1990) [hereinafter EDI Report].

196. Baird & Weisberg, *supra* note 70, at 1219 n.5. The Beale and Dugdale study is "merely suggestive" because it involved only 19 firms. *Id.* at 1254 n.87.

197. Brown, *supra* note 25, at 894 n.6.

198. Macaulay, *supra* note 193, at 58.

199. *Id.* at 59; *see also* Travalio, *supra* note 28, at 376.

200. Beale & Dugdale, *supra* note 194, at 49; *see id.* at 53-54 (conflict over late delivery); *id.* at 56 (conflict over warranties and remedies).

"standardized planning."<sup>201</sup> Brown found that "[s]ome forms lack[ed] any fine print at all; some [had] copious amounts."<sup>202</sup> And Beale and Dugdale report that some firms made agreements without using any form documents.<sup>203</sup>

Most data indicate that sales personnel focus almost exclusively on performance terms in arranging routine transactions. Murray spoke "with more than 5,000 purchasing agents, over a period of more than a decade," without finding "one purchasing manager who read printed terms," and discovered that "when the purchasing agents were asked to explain a printed term from their own purchase order forms, they could not do so."<sup>204</sup> Macaulay's study also showed that purchasing agents generally ignored form language on the documents they received.<sup>205</sup> Beale and Dugdale were often "told that the other party's [form provisions] would be scrutinized,"<sup>206</sup> but also found that in the battle of the forms the parties generally seemed unconcerned over the conflict between form provisions.<sup>207</sup>

Macaulay's interviews revealed that sales employees usually assumed that differences between form provisions did not prevent parties from reaching enforceable agreements.<sup>208</sup> Beale and Dugdale found, however, that "[t]here was considerable awareness of the fact that in many cases an exchange of [conflicting form provisions] would not necessarily lead to an enforceable contract."<sup>209</sup> In general, the authors observed a "gradual change in attitude towards tightening up procedures and creating legally enforceable agreements."<sup>210</sup> Several of their interviewees said that this change was "the result of a new professionalism among young managers, many of whom [had] studied contract law."<sup>211</sup> In some instances, the

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201. Macaulay, *supra* note 193, at 58.

202. Brown, *supra* note 25, at 894 n.6.

203. Beale & Dugdale, *supra* note 194, at 48-49.

204. Murray, *Solutions*, *supra* note 64, at 1317 n.47; *see also* Barron & Dunfee, *supra* note 29, at 175 n.14.

205. Macaulay, *supra* note 193, at 59.

206. Beale & Dugdale, *supra* note 194, at 50.

207. *Id.* at 54, 56.

208. Macaulay, *supra* note 193, at 59.

209. Beale & Dugdale, *supra* note 194, at 50.

210. *Id.* at 51.

211. *Id.*



change eliminated the battle of the forms; firms began to negotiate "standing supply contracts to govern future orders."<sup>212</sup>

Murray found that "the typical purchasing agent [had] no understanding of the agreement process (e.g., whether a 'quote' is an offer), and [did] not identify his or her company as offeror or offeree."<sup>213</sup> Brown's investigation revealed that "[a]lmost any form from a purchase order to an acknowledgement to an invoice [could] be used as the original or sole communication," and that, in general, a form document was more likely to serve as a confirmation than as either an offer or an acceptance.<sup>214</sup> A purchasing agent employed by "a division of one of the largest manufacturing corporations in the United States" told Macaulay that the corporation had sufficient bargaining power to force its suppliers to sign and return its form purchase orders, but that in doing so the suppliers often enclosed their own form acknowledgements, which contained "conflicting provisions." The agent would keep the signed purchase order and throw away the acknowledgment.<sup>215</sup>

### *ii. Terms of the Agreement*

Of sixteen sales managers Macaulay interviewed, "[n]ine said that frequently no agreement was reached on which set of fine print was to govern."<sup>216</sup> Some of Beale and Dugdale's interviewees thought the terms of the last document sent "might prevail,"<sup>217</sup> but the authors' account suggests that this was an impression of what the courts would do rather than of the parties' understanding.<sup>218</sup>

Beale and Dugdale found considerable evidence of implied terms. Most of these related to performance,<sup>219</sup> but some related to breakdowns. An "unwritten law," for example, required a seller to notify the buyer "in

212. *Id.*

213. Murray, *Solutions*, *supra* note 64, at 1317-18 n.47; *see also id.* at 1350 n.162; Murray, *Proposed Revision*, *supra* note 96, at 351.

214. Brown, *supra* note 25, at 894 n.6.

215. Macaulay, *supra* note 193, at 59.

216. *Id.*

217. Beale & Dugdale, *supra* note 194, at 50.

218. *See id.*

219. *See id.* at 51 (payment term is "net monthly account").

advance of any likely delay" in delivery.<sup>220</sup> Another limited the seller's liability to the cost of repair or replacement of defective goods.<sup>221</sup> "[A]ll sellers said that in some circumstances they would repair or replace a defective product outside the warranty period."<sup>222</sup>

Beale and Dugdale did not find, however, that buyers and sellers had modified their one-sided documents to incorporate these implied terms. Indeed, there was a "positive resistance to the idea."<sup>223</sup> Preservation of flexibility provided a possible explanation: "It seem[ed] probable that these customs were felt to operate more satisfactorily and flexibly in a purely commercial context than they would in the formal context of legal rights and duties."<sup>224</sup> Professors Lon Fuller and Melvin Eisenberg suggest a different reason for the lack of balanced form documents in the United States: "An inquiry addressed to about forty trade associations reveal[ed] that the factor which most inhibit[ed] the development of recommended standard forms [lay] in a fear that the anti-trust laws [might] be interpreted to prohibit this kind of cooperative rationalization of business practice."<sup>225</sup>

The purchasing agents Murray interviewed had "at least a visceral reaction to 'indecent' terms," as well as a "clear sense of their 'commercial understanding.'"<sup>226</sup> Moreover, "[w]hen informed of the 'normative assumptions of Article 2,' . . . [they] suggest[ed] an identity between those assumptions and their 'commercial understanding.'"<sup>227</sup> This understanding was inchoate, however:

[The agents did] not understand the concept of warranty (e.g., that the implied warranty of merchantability [might] be highly preferable to the typical warranty of repair or replacement preferred by the [seller]). They not only [had] no understanding of disclaimers of warranties; they [had] no concept of buyer or seller remedies or, a fortiori, consequential damages. They

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220. *Id.* at 54.

221. *Id.* at 56.

222. *Id.* at 57.

223. *Id.* at 59.

224. *Id.*

225. FULLER & EISENBERG, *supra* note 65, at 603.

226. Murray, *Solutions*, *supra* note 64, at 1318 n.47.

227. *Id.*

typically [did] not know what arbitration is unless they [had] been involved in that process.<sup>228</sup>

Even when there was apparent express agreement on breakdown terms, Macaulay found that parties generally treated the express "terms" as irrelevant if something went wrong.<sup>229</sup> Thus, disregard for writings was apparently common, and compromise and informal dispute resolution were the norm.<sup>230</sup> One-sided provisions might, however, prove useful in the process of negotiating a settlement.<sup>231</sup>

Beale and Dugdale found that sellers at times went to court to collect liquidated damages when buyers failed to pay, but also that sellers used legal procedures only for a "serious bad debt problem," and that "the problem of bad debts was very small."<sup>232</sup> The authors' findings are generally consistent with Macaulay's report that buyers that cancelled orders expected to reimburse sellers only for their expenses.<sup>233</sup> Although English law entitled buyers to consequential damages for late delivery, "it appeared that such consequential losses were seldom claimed and almost never paid."<sup>234</sup> Buyers seldom sought to enforce liquidated damages clauses in fully negotiated agreements.<sup>235</sup> In the area that apparently most often produced disputes—the quality of the goods—"resort to formal dispute settlement procedures was rare."<sup>236</sup>

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228. *Id.* The comparison between the implied warranty of merchantability and the "warranty of repair or replacement" is misleading; the former is a warranty and the latter is a remedy. Compare U.C.C. § 2-314(1) (1990) with *id.* § 2-719(1)(a).

229. Macaulay, *supra* note 193, at 61.

230. *Id.* For a generally consistent account, see Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the "Battle of the Forms,"* 49 BUS. LAW. 1019, 1026-27 (1994).

231. See 2 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 173 (1993).

232. Beale & Dugdale, *supra* note 194, at 51.

233. Some reimbursements included a component of lost profits, but in at least some cases that component appeared to be "induced more by commercial convenience in calculating costs than by awareness of contractual rights." *Id.* at 53.

234. *Id.* at 54.

235. See *id.* at 55.

236. *Id.* at 58.

*b. Computer Technology*

*i. Formation Procedures*

The widespread and growing use of computer technology in buying and selling goods is changing formation procedures in at least two ways. First, it is changing the documents. Baird and Weisberg wondered as early as 1982 whether "in an era of word processing the unquestioning distinction between typewritten terms and nondickered terms in fine print [could] persist."<sup>237</sup> Both software and printers now permit firms to generate their own documents of sale. Each purchase order or acknowledgment may be custom-printed,<sup>238</sup> with no difference in typeface or color between performance and breakdown terms.

This method of document production challenges the traditional distinction between form and nonform terms. If the face of a document is an unreliable guide, courts that must identify standard form terms will be forced to examine a firm's contracting practices. A term in an acknowledgment may be standard if it appears in all of the firm's acknowledgments. Yet if the firm charges the same price to all of its customers, the price will also be a standard term by that criterion, and if the firm then alters the price or any other term for a particular customer or class of customers, the term will lose its standard status.

The second, and perhaps more important change in formation procedures is the electronic transmission of documents of sale.<sup>239</sup> This process often involves a third-party "provider," which transmits documents in electronic form between the buyer and the seller.<sup>240</sup> The ABA Task Force predicted that electronic data interchange (EDI) "will likely become the predominant method of sales contracting,"<sup>241</sup> and the practice has

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237. Baird & Weisberg, *supra* note 70, at 1226 n.17.

238. See generally David Claiborne, *Windows Adds WYSIWYG to Form Design*, PC WEEK, Mar. 18, 1991, at 89; Jennifer Edstrom, *Printer Suite Debuts—AS/400 Customers to Get Turnkey Solutions*, COMPUTER RESELLER NEWS, Aug. 23, 1993, at 110; Douglas S. Price, *Electronic Forms are Timesavers, Speaker Says; Speech by Lee Waxman of Xerox Corp.*, GOV'T COMPUTER NEWS, June 12, 1989, at 148.

239. See generally BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE (1991); EDI Report, *supra* note 195.

240. EDI Report, *supra* note 195, at 1655-56.

241. *Id.* at 1649.

already become common in some industries.<sup>242</sup> Indeed, there are "fully automated EDI environment[s]," in which there is no "human decision making with respect to particular transactions."<sup>243</sup>

EDI often occurs in the context of longstanding business relationships, particularly requirements and output contracts.<sup>244</sup> The Task Force's study revealed that non-management employees, who had little contact with lawyers, would initiate the practice<sup>245</sup> with the firm's "most loyal or trusted trading partners."<sup>246</sup> Within an industry, large firms are likely to lead in EDI implementation, driven by the desire to reduce the costs of their many transactions. These firms then either mandate or offer incentives for use of the practice by their suppliers.<sup>247</sup>

242. See Bob Adams, *High Tech Brings New Tax Questions*, PETROLEUM INDEPENDENT, Nov. 1991, at 40; Leila Davis, *Retailers Go Shopping for EDI*, DATAMATION, Mar. 1, 1989, at 53; *Distributors Moving Toward EDI and Bar Coding*, INDUS. DISTRIBUTION, Oct. 1989, at 13; Kate Evans-Correia, *Purchasing Now Biggest EDI User*, PURCHASING, Oct. 21, 1993, at 47; Tim Minahan, *Postal Service Makes Major Commitment to EDI for Routine Business Transactions*, GOV'T COMPUTER NEWS, Sept. 20, 1993, at 3; Robert Mullins, *Despite Its Price Tag, Retail Suppliers Log Onto Electronic Data Interchange*, BUS. J.-MILWAUKEE, Oct. 10, 1992, at A18; Bruce Newburger, *Agents and EDI: Threat or Opportunity?*, AGENCY SALES MAG., Mar. 1993, at 23; Anne E. Skagen, *Nurturing Relationships, Enhancing Quality With Electronic Data Interchange*, MGMT. REV., Feb. 1989, at 28; Stephen D. Sprinkle et al., *Industry on the Move*, BOBBIN, July 1991, at 43; Benjamin Wright, *Record-keeping for Electronic Transactions*, TAX EXECUTIVE, Sept. 1989, at 40.

243. EDI Report, *supra* note 195, at 1657; see also Mullins, *supra* note 242; Julie Ritzer Ross, *Developments Cut Costs, Speed Shipments*, GLOBAL TRADE, Nov. 1991, at 14.

244. EDI Report, *supra* note 195, at 1657 n.35.

245. *Id.* at 1658.

246. *Id.* n.37. For a report that EDI in turn enhanced trust between a firm and its customers, see Ross, *supra* note 243, at 14. Anne Skagen observes that "EDI fosters customer-supplier partnerships—long-term procurement relationships founded on mutual commitment." Skagen, *supra* note 242, at 28. Trust between the parties and the lack of lawyer involvement may explain the Task Force's finding that those who implemented EDI usually did so with no concern over whether the resulting formalities satisfied the statute of frauds. EDI Report, *supra* note 195, at 1681.

247. EDI Report, *supra* note 195, at 1657 n.36; see Paul F. Daisy, *Resisting EDI Could Be Hazardous to Your Firm*, TRANSP. & DISTRIBUTION, June 1988, at 61; Jeanne Iida, *Wesco Plans to Drop Suppliers Not Using EDI*, METALWORKING NEWS, May 1, 1989, at 38; Pat Natschke Lenius, *Super Valu May Charge Non-UCS-EDI Users*, SUPERMARKET NEWS, Nov. 13, 1989, at 28; John Mutter & Maria Heidkamp, *Walden Pushes Vendors to Order Electronically*, PUB. WEEKLY, Mar. 30, 1992, at 7; Newburger, *supra* note 242, at 23; Skagen, *supra* note 242, at 28.

Yet some writers report resistance to EDI.<sup>248</sup> One observes that "[f]or a specialty manufacturer—with a delivery cycle of several months, a broad customer mix, and few open orders—EDI simply does not make sense."<sup>249</sup> If one of the parties to a sales transaction is unable to "participate in electronic links," the provider may furnish it with paper copies of documents the other party has sent electronically.<sup>250</sup> The paper copies arrive either in the mail or via facsimile machines.<sup>251</sup> Moreover, some companies that do participate nevertheless send paper confirmations of EDI transmissions.<sup>252</sup>

The Task Force found that information transmitted electronically is normally limited to performance terms, and "does not generally include 'back-side' terms and conditions."<sup>253</sup> One reason for this is that the "standard transaction sets" necessary for electronic transmission cannot incorporate both the necessary performance terms and a full set of breakdown terms.<sup>254</sup>

Both provider firms and EDI consultants encouraged buyers and sellers to adopt "trading partner agreements," which could set forth agreed-upon breakdown terms. The Task Force discovered, however, that most firms failed to execute these agreements.<sup>255</sup> Although the agreements that

248. See Alice Messing, *What it Takes to be a Virtual Enterprise*, U.S. DISTRIBUTION J., Oct. 15, 1993, at 38; Skagen, *supra* note 242, at 28. Skagen noted that, as of 1989, 5000 firms in the United States used EDI, and that Coopers & Lybrand projected a steady increase of 1500 to 2000 firms per year. *Id.* Yet she also noted that "[g]iven the fact that there are upwards of 3 million businesses presently operating in the U.S., current figures hardly suggest an incipient revolution." *Id.*

249. Skagen, *supra* note 242, at 28.

250. Amy Bermar, *SoCal Edison Adopts EDI to Keep Its Suppliers Satisfied*, PC WEEK, May 10, 1988, at C4.

251. *Id.*

252. The Task Force found that "mid-to-small size" firms often confirmed EDI transmissions with paper documents. EDI Report, *supra* note 195, at 1658. This practice had become less common at the conclusion of the study, however, and the Task Force expected it to become even less so in the future. *Id.* n.39.

253. *Id.* at 1656 n.30. For a description of the various steps involved in the transmission process, see *id.* at 1681 n.152.

254. See *id.* at 1698. A "transaction set" is "an electronic document format." *Id.* at 1660 n.49; see also *id.* at 1703 n.233; WRIGHT, *supra* note 239, § 17.4, at 320-21; McCarthy, *supra* note 230, at 1024-25. But see WRIGHT, *supra* note 239, § 17.43, at 323-24.

255. EDI Report, *supra* note 195, at 1657-58.

did exist were diverse, many contained "unilateral" provisions favorable to the large firms that prepared them.<sup>256</sup> In some cases, the master agreements defined the terms and conditions of sale as those of the parties' paper documents, even when the paper documents were in conflict.<sup>257</sup> In other cases, the master agreements simply did not address the issue of breakdown terms.<sup>258</sup>

### *ii. Terms of the Agreement*

EDI users informed the Task Force that "they did not intend to conduct business on terms and conditions different than those reflected by the 'backside' of their standard written documents."<sup>259</sup> There is evident tension between this information and the finding that EDI use is most common between trusted trading partners that do business either without master agreements or with master agreements that do not resolve breakdown issues. The Task Force suggested that some firms might solve the problem by declining to adopt the technology.<sup>260</sup> Another possibility, which the Task Force did not discuss, is that selling firms that are forced to contract electronically with powerful buyers may give implied blanket assents to the buyers' breakdown terms even in the absence of express trading partner agreement on those terms.

## *2. Implications*

Three features of this record of empirical data render inappropriate the use of any of the four transactional models as a basis for the law of additional terms. First, the record is nearly nonexistent in comparison to the volume of sales activity in the United States. A study conducted more than thirty years ago in one state, coupled with an English survey of nineteen firms in one line of business, the Task Force's report, and a few first-hand accounts, cannot tell the drafters of the revised Code what breakdown terms the typical buyer or seller envisions, or even whether there is such a thing as a typical buyer or seller.

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256. *Id.* at 1661.

257. *Id.* at 1698.

258. *Id.*

259. *Id.*

260. *See id.* at 1698-99.

Second, the record offers little or no support for the main feature of any of the four models. Both the Brown version and the Murray version of blanket assent suffer from the lack of evidence that sales employees have authority to agree to terms other than those stated on their firms' documents.<sup>261</sup> No report furnishes any direct evidence of the specific version of blanket assent that Brown's model incorporates, or indicates that the terms of an agreement depend on whether documents function as offer and acceptance or as confirmations. No findings support the notion that firms give blanket assents of which their sales employees are unaware. And there is little evidence that buying and selling firms would respond to a change in the law of the battle of the forms.

No evidence indicates that conspicuous language on a form paper document, whether printed or handwritten, produces any change in expectations about terms. Thus, there is no support for the distinction in the Brown, Murray, and Taylor models between typical and atypical transactions, at least insofar as that distinction is based on the appearance of the documents. Moreover, any assumptions made on that basis may have little or no validity in an environment of computer-generated documents or electronic contracting.

Murray's finding that purchasing agents see an "identity" between their commercial understanding and the standard terms of Article 2 does offer some support for his contention that parties give blanket assents to those terms. Yet an inchoate understanding hardly evidences assent to the Article's specific breakdown terms. Moreover, Murray "dealt with a much smaller number of [sellers'] representatives,"<sup>262</sup> whose commercial understanding he does not report. The understanding of these representatives may differ in important respects from that of their purchasing agent counterparts. Macaulay has observed, for example, that "industrial sellers almost never give voluntarily" a full set of "warranties subject to a liability for consequential damages."<sup>263</sup> And Murray provides some corroboration

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261. Brown acknowledges that sales employees may lack the necessary authority. Brown, *supra* note 25, at 926.

262. Murray, *Solutions*, *supra* note 64, at 1350 n.162.

263. Lawrence M. Friedman & Stewart Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805, 818. This observation appears in the context of the authors' criticism of § 2-207. *See id.* at 818-19. Murray disagrees with their "astonishing interpretation" of the section, but does not contest their observation about warranties. Murray, *Realism*, *supra* note 5, at 270 n.4; *see also* Letter from Benjamin



for Macaulay's observation by contrasting the implied warranty of merchantability—an Article 2 standard term and thus part of the "normal factual bargain"—with "the typical warranty of repair or replacement preferred by [the seller]."<sup>264</sup> Although the contrast is technically between a warranty and a remedy,<sup>265</sup> it nevertheless suggests that the warranty of merchantability is not part of the typical agreement.

Third, the variety and mutability of the practices revealed in the record suggest that any model will be inaccurate in many cases. Moreover, particular findings actively undercut some features of the four extant models. Macaulay's findings regarding dispute resolution, for example, are inconsistent with any notion of blanket assent, either to the standard terms of Article 2 or to provisions in form documents that purport to make the other party liable for full expectation damages. If buyers and sellers expect to settle most disputes informally, they do not expect to go to court in most cases and probably expect compromise rather than relief, much less full expectation relief, for only one party. The existence of these expectations even when agreements are fully negotiated suggests that they may be pervasive when the parties exchange conflicting documents.

Macaulay's findings also suggest that one-sided drafting might persist even under a rigidly enforced last shot doctrine; enforcement of sellers' terms in the small number of transactions actually litigated might offer counsel for a buyer insufficient incentive to negotiate breakdown terms *ex ante*, thus foregoing the perceived benefits of a one-sided document in settlement negotiations. As Professor Todd Rakoff<sup>266</sup> and Llewellyn<sup>267</sup> both suggest, one-sided terms may reflect counsel's "professional ethos," and standardized documents of sale may help management-level personnel maintain a firm's internal organization.<sup>268</sup> To the extent that the existence

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Wright to Article 2 Drafting Committee (Feb. 7, 1993), reprinted in Mark E. Roszkowski & John D. Wladis, *Revised U.C.C. Section 2-207: Analysis and Recommendations*, 49 BUS. LAW. 1065, 1069 (1994).

264. See *supra* note 228 and accompanying text.

265. See *supra* note 228.

266. See Rakoff, *supra* note 25, at 1221; see also Beale & Dugdale, *supra* note 194, at 57.

267. See *Hearings on the Uniform Commercial Code*, 1 LAW REVISION COMMISSION, REPORT TO THE N.Y. LEGISLATURE OF 1954, at 113 (1954) (quoted in Murray, *Solutions*, *supra* note 64, at 1350).

268. Rakoff, *supra* note 25, at 1223.

and nature of the form terms are interwoven with the internal structure of the firm, they are unlikely to change in response to changes in legal doctrine.<sup>269</sup>

Indeed, Beale and Dugdale's discovery of resistance to "balanced" breakdown terms suggests that the battle of the forms may serve the needs of both a firm's counsel and its sales force. Counsel has the opportunity to exercise skill in drafting one-sided provisions and to brandish those provisions in settlement negotiations. Sales personnel enjoy freedom to follow flexible implied terms because conflict between form provisions reduces the area of express agreement.

Reports that sales personnel seldom pay attention to form language, and that parties often fail to reach agreement on breakdown terms, do lend support to Taylor's view that many agreements consist only of performance terms. Moreover, the Beale and Dugdale study generally corroborates his views regarding implied terms.

The overall message of the record, however, is that even Taylor's model is inappropriate. The indiscriminate use of form documents and the lack of substantial evidence of typical as opposed to atypical agreements suggests that his most basic distinction is unduly detailed. And given the record's limitations, it is entirely possible that there are many situations in which the parties' expectations match one of the other models. Inequalities in bargaining power of the sort the Task Force observed, for example, may induce sellers to give blanket assents to buyers' breakdown terms.<sup>270</sup> There is simply not enough proof of order in the world of the battle of the forms—or even of what that world is—to justify a Code section based on preconceptions about the formation or terms of an agreement for sale.

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269. Moreover, if firms use form documents in part for internal reasons, they are unlikely to give blanket assents to terms that depart from their own, whether the terms are those of another firm's document or those of Article 2.

270. This does not necessarily mean that all or even any of those terms should be enforceable. If the blanket assents exist in fact, the terms are part of the parties' agreement, but they are nevertheless subject to review for unconscionability under § 2-302 and for other failings under other sections in Article 2.

### III. Application

A hypothetical transaction described in the April 1992 Draft Revision of Parts 1 and 2 of Article 2<sup>271</sup> provides a useful vehicle for comparing proposed section 2-204 to statutory alternatives based on the models of Brown, Murray, and Taylor. The comparison focuses on the models, rather than on specific proposed revisions, because the issues relate to underlying concepts rather than specific statutory language.

The comparison does not include an alternative based on Baird and Weisberg's model. The hypothetical transaction involves documents that do not agree on the subject of dispute resolution—documents that would not exist in a jurisdiction in which a rigid last shot rule had produced a negotiated dispute-resolution term acceptable to both parties. The Baird and Weisberg thesis is not testable by means of the hypothetical, and the drafters of the revised Code should reject it simply because of its lack of empirical support.<sup>272</sup>

Application to the hypothetical transaction demonstrates that none of the three remaining models is as responsive to business settings as proposed section 2-204. A revision based on Brown's model will be the most formalistic, leading courts to focus almost exclusively on the parties' documents. A revision based on Murray's model, although less formalistic, will direct judicial attention primarily to the standard terms of Article 2. A revision based on Taylor's model will be the most responsive of the three, as well as the most consistent with proposed section 2-204. Yet the very fact that

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271. See 1992 Draft Revision, *supra* note 33, pt. 2, at 27.

272. Baird and Weisberg might raise a twofold objection: (1) the fault lies in the hypothetical, rather than in their model, and (2) the other models also lack empirical support. With respect to the first objection, the only hypothetical that would test their model is not a transaction but rather a jurisdiction that maintains a rigidly enforced last shot doctrine. Although a hypothetical transaction can be brought to ground in some respects, *see infra* text accompanying notes 273-308, a hypothetical jurisdiction cannot. And with respect to the second objection, although the authors would be correct, a revision based at least in part on each of the other models has been considered by either the Study Group or the Drafting Committee or both. See Prelim. Rpt., *supra* note 11, at 21-23 (recommending consideration of Murray's proposed revision); September 1993 Draft Revision, *supra* note 33, at 15-21 (setting forth two possible revisions: Alternative A, based largely on Brown's model, and Alternative B, based at least in part on Taylor's model); 1992 Draft Revision, *supra* note 33, pt. 2, at 31-32 (setting forth "Kunz-McCarthy proposal," evidently based on Taylor's model). It is therefore useful to examine the operation of the other models despite their lack of empirical support. Professor Herbert has noted the absence of support for the Baird and Weisberg view. Herbert, *supra* note 176, at 478-79.

Taylor's model describes typical transactions will lead courts to approach cases like the hypothetical with those transactions in mind. Only proposed section 2-204 requires an open-ended inquiry that begins with the parties' agreement.

Like many reported cases under section 2-207, the hypothetical involves an arbitration clause in the seller's document:

S and B do business in a trade where arbitration is a common method of dispute resolution. S and B have done business before, and S's standard forms have always contained an arbitration clause. Assume that B orders goods, S accepts the offer, ships the goods and mails an acknowledgment form containing an arbitration clause. B accepts and uses the goods and, later, resists arbitration when a dispute over quality develops.<sup>273</sup>

B's order evidently did not mention arbitration, and there is no indication that the parties have ever settled a dispute by that means.<sup>274</sup>

The hypothetical includes limited information about the transaction's context; arbitration is common in the industry but the industry is not identified. More complete information about context will make the comparison among proposed section 2-204 and the alternatives both more realistic and more revealing.

The textile industry furnishes an appropriate context, for three reasons. First, many of the reported arbitration cases under section 2-207 have involved sales of textiles.<sup>275</sup> Second, commentators<sup>276</sup> and courts<sup>277</sup> alike cite the industry as one in which arbitration is the customary means of settling sales disputes.<sup>278</sup> And third, there is some published information about the prevalence of textile arbitrations. The information is approximately twenty-five years old, which does not undermine its illustrative value for

273. 1992 Draft Revision, *supra* note 33, pt. 2, at 27.

274. *Id.*

275. *See, e.g.*, cases cited *infra* notes 330-59 and accompanying text.

276. *See, e.g.*, ROBERT M. RODMAN, *COMMERCIAL ARBITRATION WITH FORMS*, § 29.1, at 630 (1984).

277. *See* *N&D Fashions, Inc. v. DHJ Indus.*, 548 F.2d 722, 726 (8th Cir. 1976); *infra* text accompanying notes 337-48.

278. For historical information relating to textile arbitrations, see BARBARA M. TUCKER, *SAMUEL SLATER AND THE ORIGINS OF THE AMERICAN TEXTILE INDUSTRY 1790-1860*, 212 (1984); Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 *MINN. L. REV.* 240 (1928); William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 *WASH. U. L.Q.* 193.

purposes of analysis of the hypothetical transaction, and indeed permits an assessment of the courts' responsiveness to business reality during the years following its publication.

Many writers have described various features of the textile industry, and in the late 1960s, Professor Robert Bonn conducted an empirical study of textile arbitrations.<sup>279</sup> Bonn reports that "[t]he American textile industry consist[ed] of literally thousands of independent firms, each of which [was] specialized by function, by type of material handled, and by end-product usage."<sup>280</sup> Among these firms, capitalization and general economic strength were concentrated at the beginning of the manufacturing chain; mills, for example, tended to be much stronger than garment manufacturers.<sup>281</sup> Mills and converters usually sold on credit, with a "sixty- or ninety-day 'grace' or allowance period."<sup>282</sup>

Each of the several sales in the manufacturing chain held the potential for a dispute, and three features of the industry made disputes especially likely. First, late delivery could have serious consequences "because of the instability of the market for textile end products."<sup>283</sup> Second, problems with the quality of cloth were common "because no textile material is ever perfect and the standards used to judge the extent of the imperfections [might] vary markedly depending on the particular individual who happen[ed] to be judging."<sup>284</sup> And third, the economic weakness of firms at the buying end of the manufacturing chain often led to late payment.<sup>285</sup> Disputes occurred when "buyers . . . delay[ed] or refuse[d] to pay for goods ordered and received charging that sellers were either late in delivery or delivered material of inferior quality."<sup>286</sup>

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279. Robert L. Bonn, *The Predictability of Nonlegalistic Adjudication*, 6 L. & SOC'Y REV. 563, 567 (1972).

280. *Id.* at 565.

281. *See id.* at 566.

282. *Id.* at 573.

283. *Id.* at 566.

284. *Id.*

285. *Id.*

286. *Id.*; see also Frederic P. Houston, *Textile Transactions*, in *ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS* 145, 150-52 (Alan I. Widis ed., 1979).

Bonn cites an estimate that "95 to 100 percent of textile contracts [contained arbitration] clauses,"<sup>287</sup> and also offers the general observation that "[t]he industry handle[d] . . . disputes arising between buyers and sellers of textile products through the mechanism of commercial arbitration."<sup>288</sup>

Bonn's description of his principal source of data indicates, however, that the number of arbitrations was actually much smaller than the number of disputes:

With the intention of exploring the issue of predictability of case outcomes, a study was made of commercial textile cases arbitrated through the American Arbitration Association for the years 1967 and 1968. There were a total of 91 cases in 1967 and 100 in 1968 in which an arbitral award was rendered.<sup>289</sup>

Given the number of transactions that must have occurred among the thousands of firms and the high potential for disputes in each transaction, there must have been more than ninety-one disputes in 1967 and 100 in 1968.<sup>290</sup> Bonn's report of his interviews with five lawyers who specialized in textile arbitration confirms this inference: all said that "more than 95% of the disputes brought to them were resolved informally."<sup>291</sup> Thus, arbitration was far more the exception than the rule.

Representatives of textile firms told Bonn they generally preferred informality because "one does not arbitrate against a good present customer or a customer who represents a good prospect for future business since pressing claims against opponents in arbitration is not regarded as an amicable way of conducting business."<sup>292</sup> Although there were some

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287. Robert L. Bonn, *Arbitration: An Alternative System for Handling Contract Related Disputes*, 17 ADMIN. SCI. Q. 254, 260 (1972).

288. Bonn, *supra* note 279, at 566.

289. *Id.* at 567. Of course, there could have been arbitration in other forums, such as the General Arbitration Council of the Textile Industry. See 25 YEARS: THE ASSOCIATION OF COTTON TEXTILE MERCHANTS OF NEW YORK 1918-1943, at 22-23 (1944) [hereinafter 25 YEARS]. Even so, Bonn's interviews suggest that very few disputes were arbitrated.

290. Cf. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

291. Bonn, *supra* note 279, at 572.

292. *Id.* at 573.

exceptions, in general a selling firm would arbitrate against a customer only if it were willing to lose the customer.<sup>293</sup>

This principle of case selection meant that arbitration tended to occur between sellers and "marginal buyers, i.e., buyers who were very small firms or buyers with whom the seller[s] enjoyed or expected to enjoy only a very marginal business relationship."<sup>294</sup> The procedure might be seen as "a device by which sellers [could] recover monies owed by marginal buyers . . . [—] as much a 'collection tool' as it [was] a type of legal or quasi-legal system."<sup>295</sup> As such, "it [became] a measure of last resort by which sellers [could] recover accounts rather than a court in which two parties 'battle[d] out' an important factual or even legal issue."<sup>296</sup> One of the most important of its advantages over litigation was simply that it was much faster.<sup>297</sup>

Sellers also tended not to pursue arbitration if the buyer had a legitimate reason for refusing to pay.<sup>298</sup> When they did arbitrate, they were well prepared and represented by counsel.<sup>299</sup> Outcomes were therefore highly predictable: sellers prevailed in the great majority of cases.<sup>300</sup>

Bonn's findings suggest an explanation for both the presence of the arbitration clause in the acknowledgment sent by the hypothetical seller, S, and the absence of the clause in the purchase order sent by B. S generally sold cloth on credit, and management and/or counsel wanted to be able to collect efficiently by means of arbitration if necessary, or at least to use the threat of arbitration in negotiating a settlement. B generally bought cloth on credit, and—if anyone in the firm gave thought to the issue—its management and/or counsel realized that it would have more leverage in a dispute if the ultimate resolution took place in the courts.

More important than the content of the documents, however, are S and B's *ex ante* expectations about what would actually happen if a dispute

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293. *Id.*; see Bonn, *supra* note 287, at 262.

294. Bonn, *supra* note 279, at 574.

295. *Id.* at 575.

296. *Id.*

297. Bonn, *supra* note 287, at 260.

298. Bonn, *supra* note 279, at 574.

299. *Id.* at 574-75.

300. *Id.* at 575.

occurred. Bonn did not address this issue *per se*. He focused on the prevalence of arbitration and the predictability of its outcomes rather than the states of mind in which parties entered into agreements of sale. Yet his findings suggest some possible conclusions.

The high potential for disputes in the textile industry suggests that S and B probably had some knowledge, if only in general terms, about what textile buyers and sellers did when transactions broke down. And the common use of arbitration provisions in sales agreements suggests that sales personnel in the industry were more aware of the procedure than were the purchasing agents with whom Murray spoke.<sup>301</sup> Thus, S and B might well have known that textile disputes were more likely to be resolved in arbitration than in litigation.

Yet general knowledge of dispute resolution procedures is not the same as an expectation about the possible breakdown of a particular transaction. The hypothetical does not indicate whether S and B have ever had disputes before, but the fact that they have continued to do business suggests that they have either had none or settled informally any that did arise. Nothing in the hypothetical indicates, in Bonn's terms, that B had become a marginal buyer in S's eyes, and therefore both parties probably expected the process of informal settlement to continue in the future. Each party might even have expected that, if compromise failed in a particular instance, one party would abandon its claim for the sake of preserving the relationship. This would not necessarily mean that the dispute would have no future consequences; both parties might well be aware that the relationship, although preserved, would be less favorable to the party that refused to compromise.

Only if B had been a marginal buyer in S's eyes would S have anticipated the possibility of eventually filing a demand for arbitration. Yet if B were marginal and aware of that status, it might have anticipated resisting the eventual demand. Thus, in the only circumstances that held any prospect of arbitration, the parties would probably have disagreed about the use of the procedure.

The parties' expectations might depend to some extent on the price of the textile goods—a fact not specified in the hypothetical. Although it was cheaper than litigation,<sup>302</sup> Bonn found that arbitration did entail costs, including attorney's fees: "sellers using the aid of their counsel prepare[d]

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301. See *supra* text accompanying note 228.

302. Bonn, *supra* note 287, at 261.



quite thoroughly the cases which [were] to go into arbitration even to the extent of engaging in mock sessions during which their counsel test[ed] them at length on their factual knowledge of the case and the arguments to be presented."<sup>303</sup> Both parties might be aware that S would view the expenditure of time and money as justifiable only to recover a large amount.

If the parties' contingent expectations about arbitration were not in agreement, of course, the ultimate resolution of the dispute might be in the courts—a result that seems at odds with Bonn's generalization about the prevalence of textile arbitrations, as well as with the notion that litigation is the least amicable means of settling disputes.

The conflict is more apparent than real, however, for two reasons. First, nothing in Bonn's study indicates that S and B's battle-of-the-forms method of contracting was common in the textile industry. The prevalence of arbitrations may have reflected either widespread use of standard sales agreements that contained arbitration clauses, executed by both parties or by agents acting for both parties, or buyer and seller membership in trade associations whose bylaws required use of the procedure.<sup>304</sup>

Second, the issue is not whether arbitration is preferable as a matter of social policy, but rather what the parties expected *ex ante*,<sup>305</sup> and the "amicable" nature of arbitration in comparison to litigation may not have been apparent to B.<sup>306</sup> Given its efficacy as a collection tool, some buyers may have viewed the procedure as biased in favor of sellers.<sup>307</sup> And if it

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303. Bonn, *supra* note 279, at 575.

304. See 25 YEARS, *supra* note 289, at 22-23; *Nellemann v. Spartan Sportswear, Inc.*, 201 N.Y.S.2d 52, 54 (Sup. Ct. 1960).

305. The question under the Code and the law of arbitration is whether B agreed to follow the procedure. See Dale B. Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CAL. L. REV. 317, 320-21 (1979). For analysis of the relation between state law and federal arbitration law, see Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985).

306. For a general summary of criticisms of commercial arbitration, see Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 441-53 (1988). Perceived problems include unqualified arbitrators. *Id.* at 447-50.

307. Bonn reports that a "practice" of lawyers who specialized in textile arbitration "was to reject out of hand all arbitrators who did not represent the same branch of industry as the client in the particular case under the theory that an arbitrator representing a different branch of the industry would not perceive the case in the proper manner." Bonn, *supra* note 279, at 572 (footnote omitted). This suggests that textile merchants were not always confident of the fairness of the procedure.

did not expect to continue buying from S, B would not expect to engage in arbitration rather than litigation for the sake of preserving the relationship.<sup>308</sup>

Bonn's findings by no means demonstrate that S and B failed to agree on arbitration. His report does suggest, however, that their business relationship held implications for the manner in which they would resolve their disputes. The important question about any successor to section 2-207 is not what result it will produce in the case, but rather whether the court will examine these implications, as well as all other evidence of the parties' expectations.

#### A. Proposed Section 2-204

The parties clearly intended to enter into a bargain, so there was an agreement under proposed section 2-204.<sup>309</sup> The question is whether the arbitration provision in S's acknowledgment was part of the agreement. Under subsection (c), B did not agree to the provision expressly. S will argue, however, that implied agreement existed because the provision corresponded to an applicable course of dealing or usage of trade.<sup>310</sup> Under section 1-205(1), "[a] course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."<sup>311</sup> S will argue that both parties understood that they would go to arbitration if settlement negotiations failed because the documents it sent B in the past always included the arbitration clause. B will counter that the relationship furnished no basis for an understanding that the parties would actually use the procedure. They evidently have not arbitrated disputes in the past, and B may even be able to

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308. Contrast, perhaps, the attitude of a party engaging in a continuing relationship with a trading partner of greater bargaining power, and agreeing to the partner's terms for the sake of preserving the relationship. See *supra* text accompanying notes 247, 260.

309. The exchange of documents coupled with performance (conduct) clearly reveals the intention to enter into a bargain. And under subsection (b)(2), even if the parties disagreed about arbitration, the price, quantity, and delivery terms will permit the court to give an appropriate remedy.

310. S will not be able to claim that there was a course of performance, because the agreement did not "involve[] repeated occasions for performance by either party." U.C.C. § 2-208(1) (1990).

311. *Id.* § 1-205(1).

persuade the trier of fact that its sales personnel never noticed the provision in the acknowledgment. Indeed, the relationship was probably inconsistent with an expectation of arbitration, as any past disputes were settled by negotiation.

The basic issue under section 1-205(1) is whether an implied arbitration term arose from the mere presence of the provision in the documents or whether it can arise only from a series of instances in which parties actually employ the procedure.<sup>312</sup> However the court resolves this issue, the result should be an increased understanding of section 1-205(1).

Under section 1-205(2), "[a] usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."<sup>313</sup> S will cite Bonn's generalization about the prevalence of arbitration in the textile industry.<sup>314</sup> The very fact that S is pursuing arbitration probably indicates that it now views B as a marginal buyer, and S may argue that it always held that view. B will counter that very few cases are arbitrated,<sup>315</sup> and that it had no reason *ex ante* to think of itself as a marginal buyer in S's eyes, particularly given the parties' history of dealings, so any usage of seller arbitration against marginal buyers is inapplicable. Indeed, if B persuaded the court that it was not marginal, it might be able to show the existence and applicability of a usage according to which S would abandon its claim instead of attempting to compel arbitration.<sup>316</sup> If B was marginal and aware of that status, moreover, it will claim that it therefore expected to insist on litigation.

Just as proposed section 2-204 cannot resolve the argument over course of dealing, so too it must leave unresolved the argument over trade

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312. *See Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 103-04 (3d Cir. 1991) ("While one court has concluded that terms repeated in a number of written confirmations eventually become part of the contract even though neither party ever takes any action with respect to the issue addressed by those terms, most courts have rejected such reasoning." (footnotes omitted)); *see also* Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789, 794 (1993) (asking whether terms, as opposed to meanings, can be implied from course of dealing under definition in § 1-205(1)).

313. U.C.C. § 1-205(2) (1990).

314. *See supra* text accompanying notes 287-88.

315. *See supra* text accompanying notes 289-300.

316. The enforceability of this usage would be irrelevant to the issue of the parties' expectations.

usage. Bonn's findings suggest that many textile buyers and sellers would not have anticipated arbitration, but section 1-205(2) requires an inquiry into S and B's justifiable expectations about a particular transaction—an inquiry that must be both unbiased and open-ended—and S may be able to make the requisite showing. Whatever the outcome, proposed section 2-204 can again claim credit for exposing the issue of the legal status of unexpressed contingent expectations.

The open-ended nature of proposed section 2-204 may, however, raise fears of judicial abuse. Those who have followed the battle of the forms over the years may be especially concerned that courts might adopt a rigid version of the mirror image rule or the last shot rule. The proposed section provides only that parties "may" make an agreement despite differences between their documents, and it permits a court to find that the recipient of the last document sent has agreed to its terms. "Welshers"<sup>317</sup> might therefore be able to escape from their agreements on the basis of differences in form provisions, and the hypothetical buyer, B, might find itself bound to S's arbitration provision even though it had not actually agreed to arbitrate.<sup>318</sup>

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317. White and Summers use this term. WHITE & SUMMERS, *supra* note 13, § 1-3, at 29-30.

318. S can argue either that (1) B's performance with knowledge or reason to know of the arbitration provision manifested agreement to arbitrate, or (2) B is, for some reason, estopped from resisting enforcement of the arbitration provision. Proposed § 2-204 leaves room for the first argument by not prescribing the exclusive means of reaching agreement on a particular term. S should and will prevail if it can show that both parties actually expected arbitration. Additional facts that would strengthen the argument are, for example, that both parties knew the transaction was of unusual economic importance to S, so that the expense of arbitration would be justifiable, or that S's representatives made clear in the course of negotiation that arbitration was essential. *See, e.g., Advance Concrete Forms, Inc. v. McCann Constr. Specialties Co.*, 916 F.2d 412, 413-14 (7th Cir. 1990); Roszkowski & Wladis, *supra* note 263, at 1075. The hypothetical does not include those facts, however, and the likelihood without more is that B, and probably even S, did not anticipate arbitration.

S's second argument is that, even though B did not agree to arbitrate, B is estopped from resisting S's demand for the procedure. S will make this argument, which concerns the terms of the contract as opposed to those of the agreement, not under proposed § 2-204 but rather under § 1-103. *See U.C.C. § 1-103* (1990). On the facts as presented in the hypothetical, the argument should not succeed. Suppose, however, that B was knowingly a marginal buyer, that S had made clear in negotiations that it would eventually file a demand for arbitration if necessary, and perhaps that the transaction was important enough to justify the expense of the procedure. Particularly if B was aware of the importance of the transaction to S, a court could justifiably find that S had reasonably relied on not having to

Yet courts are unlikely for three reasons to enforce mirror image and last shot as rigid, or even general rules. First, commentators have reported that the rules often were not rigidly enforced in pre-Code cases.<sup>319</sup> Second, the rules are based on transactional models, and the text of proposed section 2-204 is clearly antithetical to models in general. The drafters of the revised Code will be able to stress this point effectively in the Official Comments to the new section, emphasizing that there is no intention to permit courts to resurrect the rules.

Third, in both the basic course on Contracts and advanced courses on Sales, teachers and casebook authors have routinely denounced *Poel v. Brunswick-Balke-Collender Co.*<sup>320</sup> and *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*<sup>321</sup> for the past thirty years.<sup>322</sup> Indeed, many first-year students have realized that the *Roto-Lith* court not only distorted the text of section 2-207, but also subverted the purposes of the Code by applying the mirror image and last shot rules to an exchange of form documents. An entire generation of lawyers and judges has thus learned that neither mirror image nor last shot belongs in Article 2.<sup>323</sup>

Professor Jesse Dukeminier has observed that "lawyers are creatures of habit,"<sup>324</sup> and Dean Roscoe Pound believed that "[t]enacity of a taught legal tradition is much more significant in our legal history than the

litigate to collect, even if it also found that B had not agreed to the arbitration provision. Nothing in proposed § 2-204 is inconsistent with the conclusion that estoppel should require B to arbitrate; indeed, the contextual analysis the section prescribes is conducive to the discovery of any available evidence that would support a finding of estoppel. For arguments in favor of the use of estoppel principles in the context of the battle of the forms, see Roszkowski, *supra* note 176, at 160-62; Roszkowski & Wladis, *supra* note 263, at 1074-75.

319. See Baird & Weisberg, *supra* note 70, at 1233-35; John L. Gedid, *A Background to Variance Problems Under the Uniform Commercial Code: Toward A Contextual Approach*, 22 DUQ. L. REV. 595, 632 (1984); Wladis, *supra* note 28, at 1036-37.

320. 110 N.E. 619 (N.Y. 1915).

321. 297 F.2d 497 (1st Cir. 1962).

322. See, e.g., FULLER & EISENBERG, *supra* note 65, at 601-02, 607; KNAPP & CRYSTAL, *supra* note 35, at 277-79, 289.

323. Cf. HONNOLD, *supra* note 93, § 170.3, at 238 ("'Last shot' theories have been rightly criticized as casuistic and unfair. They do not reflect international consensus that justifies importing them into the [United Nations Convention on Contracts for the International Sale of Goods]." (footnote omitted)).

324. Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1027 (1987).

economic conditions of time and place."<sup>325</sup> One need not agree completely with Pound to believe that thirty years of instruction, coupled with appropriate Official Comments, offers sufficient protection.<sup>326</sup>

### *B. The Alternatives*

Under each of the alternatives to proposed section 2-204, the court will begin with the assumption that the transaction was typical. The party that wishes to take advantage of a departure from the usual set of expectations will have the burden of proving that departure.

#### *1. Brown*

If the transaction was typical in Brown's model, B implicitly invited S to supply a dispute-resolution term, and gave an advance blanket assent to S's arbitration provision if it was not unfairly surprising. The unfair surprise test imposes a "light" burden<sup>327</sup> on S: the fact that B had the opportunity to be thorough in preparing its form purchase order suggests strongly that B does not care what forum the parties use to resolve disputes that resist negotiation.<sup>328</sup> Moreover, S will point out that textile contracts often require arbitration, and that the documents it has sent B have always included an arbitration provision. These arguments will almost certainly persuade the court that there is no unfair surprise, and B will have to arbitrate the dispute.

The court will reach this conclusion easily, on the basis of the parties' documents and perhaps some testimony regarding the common use of arbitration provisions in textile sales agreements. There will be no need to ask how the parties have settled past disputes, or when, if ever, S began to think of B as a marginal buyer. Having determined that there is no unfair surprise, the court will be able to avoid the more difficult question of what the parties expected.

A substantial body of evidence indicates that the court's analysis will be superficial. Much of the sales activity in the textile industry over the

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325. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 82 (1938).

326. Cf. Robert C. Power, *The Fast Food of Modern Legal Realism*, 68 B.U. L. REV. 507, 510 n.21 (1988) (book review) (relating judicial activism to judges' legal education).

327. See *supra* note 142.

328. See *supra* text accompanying notes 111-16.

years has taken place in New York,<sup>329</sup> and the New York courts have decided many of the reported cases that concern the enforceability of textile arbitration provisions.<sup>330</sup> The response of these courts, traditionally regarded as skilled in analysis of business problems, reveals that in practice the notion of unfair surprise, incorporated in section 2-207(2)(b) under the rubric of material alteration,<sup>331</sup> is not conducive to contextual analysis.

In pre-Code cases, the New York courts' assessments of expectations regarding arbitration were superficial at best. In a 1942 case,<sup>332</sup> for example, the parties had engaged in twenty-odd transactions in which the buyer ordered textiles orally and the seller shipped the goods and then sent an invoice.<sup>333</sup> On the invoice, "there had been stamped in red ink the words: 'All controversies arising from the sale of these goods are to be settled by arbitration.'"<sup>334</sup> The seller's president testified, however, that he did not mention arbitration in negotiating sales: "I never speak to a customer about arbitration. It would be bad policy."<sup>335</sup> The court rejected any connection among the parties' transactions; each sale stood on its own, and by remaining silent in the face of the red stamp, the buyer had avoided making the written agreement necessary to bind it under the New York arbitration statute.<sup>336</sup>

329. At times, sales activity has been heavily concentrated in New York City. 25 YEARS, *supra* note 289, at 4; Editor's note to Frederic P. Houston, *A Barrier to Arbitration in the Textile Industry*, ARB. J., June, 1979, at 9.

330. See, e.g., *Marlene Indus. v. Carnac Textiles, Inc.*, 380 N.E.2d 239 (N.Y. 1978); *Helen Whiting, Inc., v. Trojan Textile Corp.*, 307 N.Y. 360 (1954); *Tanenbaum Textile Co. v. Schlanger*, 287 N.Y. 400 (1942); *Loudon Mfg. v. American & Efird Mills*, 360 N.Y.S.2d 250 (App. Div. 1974); *Tunis Mfg. v. Mystic Mills*, 40 A.D.2d 664 (1972); *Trafalgar Square, Ltd. v. Reeves Bros.*, 315 N.Y.S.2d 239 (App. Div. 1970); *Wachusett Spinning Mills v. Blue Bird Silk Mfg.*, 7 A.D.2d 382, *aff'd per curiam*, 190 N.Y.S.2d 1011 (N.Y. 1959); *Pavia & Co. v. Fulton County Silk Mills*, 284 A.D. 391 (1954); *In re Les Belles Enters.*, 17 U.C.C. Rep. 909 (N.Y. Sup. Ct. 1975); *C.M.I. Clothesmakers, Inc. v. A.S.K. Knits, Inc.*, 380 N.Y.S.2d 447 (Sup. Ct. 1975).

331. U.C.C. § 2-207(2)(b) (1990); *id.* cmts. 4, 5.

332. *Tanenbaum Textile Co. v. Schlanger*, 287 N.Y. 400 (1942).

333. *Id.* at 401-03.

334. *Id.* at 403.

335. *Id.*

336. *Id.* at 404.

In *Helen Whiting, Inc. v. Trojan Textile Corp.*,<sup>337</sup> decided in 1954, the tide turned in favor of arbitration when the Court of Appeals offered a slightly hedged remark: "From our own experience, we can almost take judicial notice that arbitration [provisions] are commonly used in the textile industry . . . ."<sup>338</sup> The court reasoned that the buyer's familiarity with these common provisions and its retention of the seller's documents meant that it had agreed to arbitrate the parties' dispute.<sup>339</sup>

New York's enactment of the Code in 1962<sup>340</sup> produced no change in this analysis. The remark in *Helen Whiting* made its way into many opinions, none of which applied either the definition of course of dealing in section 1-205(1) or the definition of usage of trade in section 1-205(2).<sup>341</sup> The courts held that a buyer that retained an acknowledgment or invoice thereby agreed to the arbitration provision it contained.<sup>342</sup> In some opinions, this conclusion was based upon a misreading of section 2-201(2),<sup>343</sup> but in others, the courts simply reasoned on the basis of the remark in *Helen Whiting* that an arbitration provision was not a material alteration under section 2-207(2)(b) and was therefore enforceable against

337. 307 N.Y. 360 (1954).

338. *Helen Whiting, Inc. v. Trojan Textile Corp.*, 307 N.Y. 360, 367 (1954).

339. *Id.* The case involved three sales, two of which were disputed. *Id.* at 362-63. In the undisputed sale, the buyer signed the seller's writing, but in the disputed sales it did not. *Id.* The buyer's president "testified that he was familiar with [arbitration provisions]," *id.* at 367, but no testimony addressed the prevalence of the procedure as opposed to the provisions.

340. New York enacted the Code in 1962, effective September 27, 1964. N.Y. U.C.C. LAW § 1-101 (Consol. 1981).

341. *See, e.g.,* *Lehigh Valley Indus. v. Armtex, Inc.*, 384 N.Y.S.2d 837, 838 (App. Div. 1976); *Gaynor-Stafford Indus. v. Mafco Textured Fibers*, 384 N.Y.S.2d 788, 790 (App. Div. 1976); *Trafalgar Square, Ltd. v. Reeves Bros.*, 315 N.Y.S.2d 239, 242 (App. Div. 1970); *C.M.I. Clothsmakers, Inc. v. A.S.K. Knits, Inc.*, 380 N.Y.S.2d 447, 449 (Sup. Ct. 1975). Indeed, in 1974, the Appellate Division commented that "[t]he experience to date has added strength to [the *Helen Whiting*] observation." *Loudon Mfg. v. American & Efirid Mills*, 360 N.Y.S.2d 250, 251 (App. Div. 1974).

342. *See* cases cited *supra* note 341.

343. The courts reasoned that under § 2-201(2) a buyer that retained a document for more than 10 days with reason to know of the arbitration provision it contained thereby agreed to the provision. *See, e.g.,* *Loudon Mfg. v. American & Efirid Mills*, 360 N.Y.S.2d 250, 251 (App. Div. 1974); *Trafalgar Square, Ltd., v. Reeves Bros.*, 315 N.Y.S.2d 239, 242 (App. Div. 1970).



the textile buyer.<sup>344</sup> In a 1976 case,<sup>345</sup> for example, the trial court found that the buyer was unaware of the seller's arbitration provision.<sup>346</sup> The appellate division nevertheless enforced the provision, observing that both parties "were merchants [with] long experience in the textile industry" who had "dealt with each other for seven months."<sup>347</sup> For the appellate division, the buyer's "claim that the arbitration clause in [the seller's] form was a 'material alteration' of the terms of the contract between the parties [was] negated by the rule in [*Helen Whiting*] that arbitration [was] common in the textile industry."<sup>348</sup>

In 1978, in *Marlene Industries v. Carnac Textiles, Inc.*,<sup>349</sup> the court of appeals put an end to the rulings in favor of arbitration. Holding that the textile buyer in the case need not arbitrate,<sup>350</sup> the court drew on a 1962 decision, not involving textiles, in which it had taken a position on arbitration.<sup>351</sup> Because an agreement to arbitrate "must be clear and direct, and must not depend upon implication, in veiglement or subtlety . . . [its] existence . . . should not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet."<sup>352</sup>

The court argued in *Marlene* that clear proof of agreement was necessary because "by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of

344. See *Lehigh Valley Indus. v. Armtex, Inc.*, 384 N.Y.S.2d 837, 838 (App. Div. 1976); *Gaynor-Stafford Indus. v. Mafco Textured Fibers*, 384 N.Y.S.2d 788, 791 (App. Div. 1976). One court construed § 2-201(2) correctly, but nevertheless used its "reason to know" notion to support the conclusion that the arbitration provision was not a material alteration under § 2-207(2)(b). *C.M.I. Clothsmakers, Inc. v. A.S.K. Knits, Inc.*, 380 N.Y.S.2d 447, 448-49 (Sup. Ct. 1975).

345. *Gaynor-Stafford Indus. v. Mafco Textured Fibers*, 384 N.Y.S.2d 788 (App. Div. 1976).

346. *Id.* at 790.

347. *Id.*

348. *Id.* at 791.

349. 380 N.E.2d 238 (N.Y. 1978).

350. *Marlene Indus. v. Carnac Textiles, Inc.*, 380 N.E.2d 239, 242 (N.Y. 1978).

351. See *Doughboy Indus. v. Pantasote Co.*, 233 N.Y.S.2d 488, 493 (App. Div. 1962).

352. *Marlene*, 380 N.E.2d at 242 (quoting *Doughboy*, 233 N.Y.S.2d at 493).

anything less than a clear indication of intent."<sup>353</sup> The textile seller's arbitration clause was therefore excluded as a material alteration.<sup>354</sup>

*Marlene* may have been a decision about how textile merchants should settle their disputes, but it was not a decision about how they did settle their disputes. The court did not mention the prevalence of arbitration in the industry. The *Helen Whiting* remark about textile arbitration clauses, emphasized in the seller's brief on appeal,<sup>355</sup> evidently vanished before the court filed its opinion. Indeed, the court's statement of its holding indicated that the result had nothing to do with textiles: "We hold that the inclusion of an arbitration agreement materially alters a contract for the sale of goods, and thus, pursuant to section [2-207(2)(b)], it will not become a part of such a contract unless both parties explicitly agree to it."<sup>356</sup>

The New York Court of Appeals has essentially maintained this view since 1978.<sup>357</sup> Although other jurisdictions may be more favorably

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353. *Id.*

354. *Id.*

355. Brief for Respondent at 8, *Marlene*.

356. *Marlene*, 380 N.E.2d at 242. For criticism of the decision from a pro-arbitration perspective, see *Furnish*, *supra* note 305, at 331. For an argument that the court should have focused on unfair surprise rather than arbitration policy, see IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 17.5.3, at 17:37 (1994).

357. See *Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154 (N.Y. 1979). In *Schubtex*, the court did focus on the practice of arbitration itself rather than simply on arbitration provisions: "There is no evidence that in their prior dealings the parties ever arbitrated any dispute pursuant to the arbitration clause or that the clause was material in their negotiations." *Id.* at 1156. The court also observed that course of dealing and usage of trade could be relevant to the issue of the existence of an agreement to arbitrate. *Id.* Yet the court reaffirmed the rule that there would be no arbitration if that agreement was not express. *Id.* The suggestion of the concurring judges that the court had abandoned that rule, *id.* at 1156-59, disregarded the majority's insistence on a written agreement to arbitrate. *Id.* at 1156.

The court of appeals enforced a seller's arbitration provision in a 1980 case, but there the buyer signed the first of several confirmation forms it received, all of which contained the provision. See *Ernest J. Michel & Co. v. Anabasis Trade, Inc.*, 409 N.E.2d 933, 933 (N.Y. 1980). The court made no inquiry into implied terms. Professors Macneil, Speidel, and Stipanowich suggest that the *Michel* case effectively limited *Marlene* to battle-of-the-forms situations in which "there [is] no evidence that the buyer was aware of the arbitration clause or agreed to arbitrate." MACNEIL ET AL., *supra* note 356, § 17.5.3, at 17:37 n.40.

The remark from *Helen Whiting* resurfaced in 1986 in a case in which the United States District Court for the Southern District of New York enforced an arbitration provision

disposed toward arbitration,<sup>358</sup> decisions in other states do not reflect a more detailed inquiry into expectations regarding textile arbitration.<sup>359</sup> Regardless of whether the court enforces the arbitration provision of the hypothetical seller, S, then, the textile cases suggest that a revision of section 2-207 based on Brown's model is unlikely to generate a search for implied terms if the transaction was typical.

S might argue, however, that the transaction was atypical—that its acknowledgment was a counteroffer and, therefore, B agreed to the arbitration provision even if it was a material alteration. This argument will probably not succeed. The provision was not conspicuous, and no communication indicated that S would do business only on the terms of the acknowledgment.<sup>360</sup>

## 2. *Murray*

Under a Code provision based on Murray's model, B will probably not have to arbitrate the dispute. The normal sales agreement incorporates, via blanket assent, "all judicial remedies," as those are standard under Article 2.<sup>361</sup> If the transaction was typical, therefore, the court will be under no obligation to examine its setting.

Nothing in Murray's model will prevent S from arguing that the transaction was atypical, either because arbitration was a usage of the textile industry or because the provision was always present in S's documents, and this amounted to a course of dealing.<sup>362</sup> Yet arbitration is a deviation from

in a confirmation sent by a broker to both the buyer and the seller. *Imptex Int'l Corp. v. Lorprint, Inc.*, 625 F. Supp. 1572, 1572 (S.D.N.Y. 1986).

358. *See, e.g.*, *N&D Fashions, Inc. v. DHJ Indus.*, 548 F.2d 722, 727 (8th Cir. 1976). For a non-textile case in which the court enforced an arbitration provision in a battle-of-forms context, see *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709 (7th Cir. 1987).

359. *See, e.g.*, *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972); *Frances Hosiery Mills v. Burlington Indus.*, 204 S.E.2d 834, 835-38 (N.C. 1974); *see also* Herbert, *supra* note 176, at 459.

360. *See supra* notes 124-29 and accompanying text.

361. *See supra* notes 151-52 and accompanying text. Murray has proposed a revised version of § 2-207. Murray, *Proposed Revision*, *supra* note 96, at 355. There is a contract under subsection (1) of his proposed revision, and its terms are those "the parties have consciously considered"—presumably the performance terms—and "the standard terms of [the Code]." *Id.*

362. On the basis of either the trade usage or the course of dealing, S could argue under subsection (3) of Murray's proposed revision that B "reasonably should have understood"

the standard judicial remedies of Article 2,<sup>363</sup> and the generally suspect character of deviations will reinforce the existing judicial reluctance to search for implied terms. As a result, the court will probably treat the transaction as typical and refuse to enforce the arbitration provision.

### 3. *Taylor*

If the transaction was typical, a court that applied Taylor's model might ask the same questions that proposed section 2-204 will prompt: whether the arbitration provision corresponded to a term implied from course of dealing or usage of trade. The provision will be enforceable if it corresponded to an implied term and unenforceable if it did not.

If the typical agreement did not contain an implied arbitration provision, S will claim that the transaction was atypical because the acknowledgment functioned as a counteroffer. There is no evidence, however, of any telephone call or other communication of the sort that Taylor regards as sufficient to make the transaction atypical.<sup>364</sup>

### C. *Summary*

Proposed section 2-204 is designed to encourage lawyers and courts to educate themselves about practices like the ones Bonn found, as well as about the implications of particular parties' dealings with each other. As applied to the hypothetical transaction set in the industry Bonn describes, the proposed section is unlikely to require B to arbitrate its dispute with S. Yet twenty-five years have passed since Bonn conducted his study, and current textile practices may be very different from those that he found. In some parts of the industry, for example, buyers may give blanket assents to arbitration provisions in sellers' form documents. Nothing in the proposed section would exclude evidence of, or even create a presumption against, either the Brown version or the Murray version of blanket assent in a particular transaction.

Under a Code provision based on either Brown's model or Murray's, courts will have little incentive to engage in this kind of analysis. The notion

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both the arbitration provision and "that [it] would become part of any [contract resulting from the exchange of documents] to which [B] expressed assent through . . . conduct." Murray, *Proposed Revision, supra* note 96, at 355-56.

363. Murray, *Solutions, supra* note 64, at 1364.

364. See *supra* text accompanying notes 183-86.

of blanket assent effectively confines contextual inquiry to the issue of unfair surprise, and inquiry into unfair surprise will produce, at best, an indirect assessment of the parties' expectations. At worst, it will produce judicial opinions, like those of the New York courts, that rest on policy relating to the provisions at issue rather than the status of the provisions in the eyes of the parties.

Among the models, only Taylor's calls logically for essentially the same analysis, as applied to the transaction between S and B, as proposed section 2-204. A Code section based on his model that makes express reference to implied terms will produce many of the same benefits as the proposed section. Yet simply because his model describes typical transactions, it will reduce courts' receptivity to evidence of terms or agreements—including those reached via blanket assent—that do not fit the mold. As a consequence, it will inhibit the inquiry into context that the rest of Article 2 requires.

### *Conclusion*

When the parties to a sales transaction are bureaucracies rather than individuals, and when those bureaucracies standardize many of their transactions,<sup>365</sup> blanket assent offers an intuitively appealing account of the contracting process and the expectations it produces. Indeed, indications are that the drafters of revised Article 2 will continue to employ the notion in the law of additional terms.<sup>366</sup> Yet the notion is a preconception that lacks

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365. See Elizabeth Warren, *Legal Realism: Commentary*, 1988 ANN. SURV. AM. L. 49, 51.

366. The most recent version of § 2-207 is as follows:

**SECTION 2-207. WHEN VARYING TERMS ARE PART OF CONTRACT.**

(a) In [Article 2], "varying terms" means terms prepared by one party and contained in a standard form writing or record.

(b) If an agreement of the parties contains varying terms, a contract results if sections 2-204 and 2-206 are satisfied.

(c) Varying terms contained in the writings and other records of the parties do not become part of a contract unless the party claiming inclusion proves that the party against whom they operate expressly agreed to the terms or assented to and had notice of the terms from trade usage, previous course of dealing or course of performance. Between merchants, the burden of proof is by a preponderance of the evidence. Otherwise, it is by clear and convincing evidence.

empirical support and interferes with the kind of judging Llewellyn envisioned.<sup>367</sup>

In an incisive analysis of the language of the 1962 Official Text of the Code, Professor David Mellinkoff points out that the original drafters, having introduced the distinction between agreement and contract, went on to draft sections in which the two notions appeared in a "rapid pirouette," so that the reader saw "for fleeting moments the face of bargain and the backside of obligation in one blurred image with the backside of bargain and the face of obligation."<sup>368</sup> Just as the drafters of the revised Code must be less precise than their predecessors in their conceptions of agreements,<sup>369</sup> they must be more precise in their use of language. The notion of agreement

(d) If a contract with varying terms is formed under subsection (a), the terms are:

- (1) terms upon which the writings or records agree;
- (2) varying terms included under subsection (c);
- (3) terms to which the parties have otherwise agreed;
- and
- (4) any supplementary terms incorporated under any other provision of [the Code].

July 1994 Draft Revision, *supra* note 7, at 13. The proposed revision is problematical in several respects. First, subsection (a) fails to make clear exactly what a "varying" term varies. Moreover, the subsection relies on the distinction between form and non-form terms—a distinction that may become obsolete in an age of computer-generated documents. See *supra* text accompanying notes 237-38. Second, subsection (b) provides that there may be a contract even though the parties' agreement "contains" varying terms. It is difficult to imagine how the agreement can "contain" a varying term, because the term's varying status seems to indicate that, at least initially, it is proposed by one party and not necessarily agreed to by the other. And third, although the reference in subsection (c) to trade usage, course of dealing, and course of performance is most welcome, that subsection refers to "assent" rather than agreement. As in the current version of the Code, *see, e.g.*, U.C.C. § 2-207(1) (1990), "assent" is undefined, but subsection (c) makes sense only if there can be assent to a term in the absence of notice of the term; it seems very likely indeed that this is an unexpressed reference to blanket assent. See also *supra* note 40. For a general endorsement of the goals of an earlier version of revised § 2-207, as well as criticism of its language, see Roszkowski & Wladis, *supra* note 263. Speidel explains, and illustrates the operation of, an earlier version of the section in Speidel, *supra* note 21, at 1326-32.

367. See Danzig, *supra* note 12; Warner Lawson, *Legal Realism: Commentary*, 1988 ANN. SURV. AM. L. 49, 66.

368. David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 189 (1967).

369. See generally Gilmore, *supra* note 1.

is what permits Llewellyn to answer Friedman, at least in theory, even when buyers and sellers of goods use documents that include "additional" terms. The drafters should emphasize that notion by eliminating section 2-207, by adopting proposed section 2-204, and by employing the terms "agreement" and "contract" in a consistent fashion throughout Articles 1 and 2.