THE EVOLUTION OF THE AMERICAN LAW OF CONTRACT FORMATION FROM COLONIAL TIMES TO THE UNCITRAL CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

Joseph W Dellapenna*

I INTRODUCTION

In the United States, contract law is largely a matter of state law rather than federal or national law. For the purposes of this chapter, I define a contract as: (1) a promise or agreement;[1] (2) supported by a "validation device";[2] (3) capable of being interpreted by a court;[3] and (4) for which there is a reasonable basis for a remedy.[4] One could write an essay on each of these four elements. The one that requires some explanation is the concept of a "validation device," for that is a term that not all lawyers, even in the United States, will readily recognise. What I mean by a validation device is that the

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* Professor of Law, Villanova University, Charles Widger School of Law.

1 See eg *Feld v Henry S Levy & Sons Inc* 335 NE2d 320 (NY 1975); *Wood v Lucy Lady Duff Gordon* 118 NE 214 (NY 1917); *Omni Group Inc v Seattle-First Nat'l Bank* 645 P2d 727 (Was 1982).

2 What constitutes a "validation device" in the American common law is considered *infra* in the text at notes 5 to 19.

3 UCC, at 2-204(3); see also *Raffles v Wichlehaus* 2 H&C 906 (Exch 1864) (although this is an English case and not an American one, it is often cited in US courts).

4 UCC, at 2-204(3). What constitutes an appropriate remedy can be a complex issue; developing the answer to the issue is beyond the scope of this chapter.

promise or agreement is supported by one or more of the reasons that US courts require as a basis for enforcing ("validating") a contract. There are primarily three such reasons: consideration,[5] reliance,[6] and receipt of a material benefit,[7] although there are a few minor validation devices that, in the United States at least, do not often figure in the case but cannot readily be explained in terms of the three major validation devices.[8]

The oldest and most traditional reason for enforcing a contract in the United States is called "consideration." By consideration, American lawyers mean that the promise or agreement was bargained for and given in exchange for something of legal value (regardless of whether it has any economic value).[9] This is sometimes described as involving a "legal benefit" to the promisor or a "legal detriment" to the promisee.[10] "Reliance" is about a century old as a generally recognised validation device.[11] Reliance requires a material detriment to the promisee incurred by the promisee because of a promise already given.[12] Thus, reliance has two differences from consideration: (1) the detriment must be material as opposed to merely legal;[13] and (2) the detriment must be incurred after the promise is given, whereas because consideration must be intended as the exchange for a promise, it must be either before or contemporaneously with the promise.[14]

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5 Restatement of the Law of Contracts (Second), at 71 (1981) ("Restatement (Second)").

6 Idem, at 90.

7 Idem, at 86.

8 For example, contracts under seal. The seal today has little effect in most states of the United State, but on rare occasions can still play a role. See for example *Marine Contractors Co v Hurley* 310 NE2d 915 (Mass 1974).

9 Restatement (Second), above n 5, at 71; see also *Earle v Angell* 32 NE 164 (Mass 1892).

10 See eg *Hamer v Sidway* 27 NE 256 (NY 1891).

11 The concept of reliance as a general validation device was first recognised in the early decades of the twentieth century; its inclusion in the first *Restatement of Contracts* at 90 (1933), caused it quickly to become accepted by courts throughout the United States.

12 Restatement (Second), above n 5, at 90; see for example *Drennan v Star Paving Co* 333 P2d 757 (Cal 1958).

13 See eg *Wheeler v White* 398 SW2d 93 (Tex 1965).

14 See eg *First Nat'l Bank of Logansport v Logan Mfg Co* 577 NE2d 949 (Ind 1991); *Ricketts v Scothorn* 77 NW 365 (Neb 1898).

"Material benefit" is not universally recognised as a validation device,[15] although it has been embraced by the Restatement (Second) of Contracts.[16] When a material benefit is recognised as a validation device, it requires that the promisor receive a material benefit because of which the promisor promises something of value to the promisee.[17] It thus is complementary to the reliance doctrine, with two differences from consideration: (1) the benefit must be material rather than merely legal,[18] and (2) the benefit must be received before the promise is made.[19]

With the foregoing concept of what is a contract under American law, this chapter will consider the following questions: How a contract is created; by what process of words or actions do two persons (natural or legal) create a legally binding promise or agreement. Just as there have been significant changes in how promises or agreements are validated under American law in the four centuries since English colonists first brought the Common Law to North America, there have been significant changes in how contracts are created during that period of time as well. It is on those changes that this chapter will focus.

II THE TRADITIONAL OFFER-ACCEPTANCE MODEL OF CONTRACT FORMATION

For centuries Common Law lawyers and jurists considered that a contract – a proper promise or agreement – would emerge from a process of bargaining in which one side would propose the contract (the offer), and the other side would (eventually) agree to its terms (the acceptance).[20] Common Law courts define an offer as an indication of a present intention to enter into a contract that needs only the other side's assent to complete the formation of the contract.[21] This is the model of haggling in the bazaar, for such one-on-one haggling was in fact the usual, perhaps only, way that contracts were formed

15 See eg *Harrington v Taylor* 36 SE2d 227 (NC 1945).

16 Restatement (Second), above n 5, at 86.

17 See eg *Webb v McGowin* 168 So 199 (Ala 1936).

18 Above n 17.

19 See eg *Edson v Poppe* 124 NW 441 (SD 1910).

20 See eg *Carlill v Carbolic Smoke Ball Co* (1892) 1 QB 256.

21 See eg *Cobaugh v Klick-Lewis Inc* 561 A2d 1248 (Pa Super Ct 1989); *Southworth v Oliver* 587 P2d 994 (Or 1978).

in the Middle Ages, whether the parties were acting in person or at a distance. In this model, one or more offers would be made by the two sides engaged in the negotiations until they reached an agreement on the terms of the contract or they abandoned the effort. One side would make an offer. If the offeree said "yes" (or took actions expressing agreement) and nothing (or very little) more, there was a contract.[22] Yet very often, the other side would seek changes in the offer. This response, in whatever form it took ("I accept, but …"; or "Here is my offer …"), was not an acceptance but rather a "counteroffer".[23] Traditionally any material difference between the offer and the purported acceptance meant the purported acceptance was a counteroffer and a rejection of the original offer.[24] Each counteroffer, in turn, could be met with another counteroffer. Often the process of negotiation would involve a long series of offers and counteroffers before finally the two sides decide to stop the negotiations or one side accepts the other side's most recent offer.[25]

At a time when the only validation device accepted by the courts was consideration, the contemplation of this process gave rise to the notion that the validating exchange must be "bargained for," which simply meant (and means) that it was the thing sought in the offer-and-acceptance process.[26] This process was meant to ensure that contract law was all about enforcing obligations created by the mutual assent of the parties with the intent to create a legal obligation (signalled by the exchange).[27] The offer that was accepted to create the contract expressed the offeror's (or promisor's) assent. The acceptance expressed the offeree's (or the promisee's) assent as well as completing the formation of the contract.

Unfortunately, in the nineteenth century, the excessively individualistic attitude of American (and other) courts caused the jurists of the time to use the expression "the meeting of the minds" to express the idea that contracts

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22 See eg *Davis v Jacoby* 34 P2d 1026 (Cal 1934); *Evertite Roofing Corp v Green* 83 So 2d 449 (La Ct App 1956).

23 See eg *Fairmount Glass Works v Crunden-Martin Wooden Ware Co* 51 SW 196 (1899).

24 See eg *Petterson v Pattberg* 161 NE 468 (NY 1928).

25 See eg *Lonergan v Scolnick* 276 P2d (Cal Cr App 1954).

26 See eg *Earle v Angell* 32 NE 164 (Mass 1892); *Fisher v Union Trust Co* 101 NW 852 (Mich 1904); *Military College Co v Brooks* 147 A 488 (NJ 1929).

27 See eg *Lucy v Zehmer* 84 SE2d 516 (Va 1954).

were all about enforcing obligations assented to by both sides to the agreement.[28] Whether the jurists intended the phrase "meeting of the minds" in a subjective sense (the minds of the two persons involved must share the same thought at the same point in time) is not entirely clear and perhaps seems unlikely given the difficulty of proving such a conjoined thought. Yet the phrase remains in use creating a potential confusion about just when and how a contract is formed.[29] One must begin by understanding that intent is not a fact; it is a conclusion that a court imposes on the raw data of what was said and done.[30] Instead, courts look for the outward expressions of the parties to judge their "manifest intent".[31] These manifestations are to be interpreted according to how they would be understood by a reasonable person in the position of the actual recipient of the manifestation.[32]

An exception to this approach is when it can be shown that both sides shared an unreasonable meaning (if they were joking, although their words might lend themselves to a more serious meaning[33]), the actual, if aberrant, meaning will prevail.[34] Sometimes parties to the exchange will have two different reasonable views. Courts will search for a reason to choose between the competing reasonable meanings, but if there is no good reason, courts find that there is no basis for interpreting the purported contract, and there simply is no contract.[35]

This traditional model of contract formation has largely broken down in the United States.[36] The changes in how contracts are made in the United

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28 *Embry v Haggardine-McKittrick Dry Goods* 105 SW 777 (Mo Ct App 1907).

29 See eg *Flower City Painting Contractors v Gumina Const Co* 591 F2d 162 (2d Cir 1979).

30 See *Robbins v Lynch* 836 F2d 330 (7th Cir 1988).

31 See eg *Industrial Am Inc v Fulton Indus Inc* 285 A2d 412 (Del 1971); *New York Trust Co v Island Oil & Transp Co* 56 F2d 580 (2d Cir 1932).

32 See eg *Leonard v Pepsico* 210 F3d 88 (2d Cir 1999); *Embry v Haggardine-McKittrick Dry Goods* 105 SW 777 (Mo Ct App 1907); *Leitner v Braen* 143 A2d 256 (NJ 1958); *Southworth v Oliver* 587 P2d 994 (Or 1978).

33 See *Lucy v Zehmer* 84 SE2d 516 (Va 1954).

34 See eg *Kabil Dev Corp v Mignot* 566 P2d 505 (Or 1977).

35 See eg *Raffles v Wichlehaus* 2 H&C 906 (Exch 1864) (although this is an English case and not an American one, it is often cited in US courts).

36 W David Slawson "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84 Harv L Rev 529, 529; see generally Shelly Smith "Reforming the Law

States might be called the industrialisation of contract formation. That is, persons involved in the contract formation process have specialised functions in which someone (often a lawyer) drafts the proposed language, someone else communicates that language, and yet another person decides to accept or reject any proposed changes. What is more, the contracts are mass-produced, not individually negotiated, or crafted to fit the particular needs of the parties or transactions involved. In this setting, it is often unclear whether an agreement has actually been concluded, or has been broken off.[37]

A number of contracts in the United States are still formed in a more or less straightforward offer-and-acceptance model. Most real estate contracts, contracts for the purchase of automobiles and many high-level employment contracts are prime examples. Any contract that is individually crafted often follows the offer-and-acceptance model. However, the great majority of contracts in the United States simply do not follow that model. The contracts instead are mass-produced through an assembly-line process. The result is a product that costs much less to produce but is not fitted to the needs of each individual transaction. This is true for many types of contracts, including ordinary employment contracts (how often does an assembly-line worker or a salesperson in a shopping mall get to negotiate specialised terms of employment?) and a great number of consumer contracts.[38] In short, any form of contract, generally speaking, simply does not fit the actual offer-and-acceptance model.[39]

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of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis" (2010) 14 Lewis & Clark L Rev 1035.

37 See eg *Bretz v Portland General Elec Co* 882 F2d 411 (9th Cir 1999).

38 See eg Wayne R Barnes "Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection" (2007) 211(3) 82 Wash L Rev 227; Scott R. Peppet "Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts" (2012) 59 UCLA L Rev 676.

39 See generally Barnes, above n 38; Peppet, above n 38; Slawson, above n 36; Smith, above n 36.

III HOW KARL LLEWELLYN RECAST THE CONTRACT FORMATION PROCESS

Karl Llewellyn, in his long and storied career including being one of the leading founders of "American Legal Realism",[40] spent many years teaching contracts as a law professor at Columbia University and later at the University of Chicago. He and other legal realists set about to study the process of contract formation empirically.[41] They found that quite often what the record of the negotiations disclosed was a series of counteroffers with no acceptance on either side. This came about because each side would send a form of response that did not match the one sent by the other side. Such exchanges came to be called "the battle of the forms".[42] Remarkably this absence of a legally binding contract did not seem to impede businesses in their affairs – unless, or until, a transaction broke down and the parties ended up in court. Whether the court would find that somehow a contract existed became a very much, take your chances and roll the dice to see what a court would decide.

In other cases, there would be a great imbalance of bargaining power between the sides, allowing the stronger side to impose its terms on the weaker side.[43] Such "agreements" came to be called "contracts of adhesion" because the weaker side's only choice was either to adhere to (accept) the proffered terms or to abandon the transaction altogether.[44] What is more, nobody on either side actually reads the terms supposedly agreed upon.[45] An early example is the practice of boilermakers for steam engines attaching a small metal plate to the side of the boiler disclaiming liability. This practice became so consistent that even today, lawyers and others use the term

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40 See Karl N Llewellyn "Some Realism about Realism—Responding to Dean Pound" (1931) 44 Harv L Rev 1222; see generally William Twining, Karl Llewellyn and the Realist Movement (1973).

41 See eg Daniel Keating "Symposium on Empirical Research in Commercial Transactions: IV. Doctrine in Action Exploring the Battle of the Forms in Action" (2000) 98 Mich L Rev 2678.

42 See eg *Marlene Indus Corp v Carnac Textiles Inc* 380 N.E.2d 239, 240 (1978); see generally John E Murray Jr. "The Definitive "Battle of the Forms": Chaos Revisited" (2000) 20 JL & Com 1.

43 See eg Daniel D Barnhizer "Inequality of Bargaining Power" (2005) 76 U Colo L Rev 139.

44 See text infra at notes 68 to 74.

45 Shmuel L Becher *"Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*" (2008) 45 Am Bus LJ 723.

"boilerplate" to describe contract terms (often in small print) that are neither read nor understood yet, routinely included in purported contracts.

Llewellyn served as director of the American Law Institute's Uniform Commercial Code (UCC) project from 1942 until 1966.[46] He was director of the overall project as well as a principal draftsman of art 1 (the "General Part") and art 2 ("Sales"). Particularly in art 2, Llewellyn sought to recast the contract formation process to reflect the way in which most sales contracts (and many other contracts as well) are actually made. While the entire UCC project was permeated with the realist perspective, and art 2, in particular, made numerous changes in the then generally understood law of contracts relating to sales,[47] two sections of the article recast the entire theory of contract formation virtually, at least for sales contracts and perhaps for contracts generally to the extent to which art 2 would influence general contract law, as it often did. These two sections are s 2-204 and s 2-207. The first s (2-204) is deceptively simple in contrast with the devilish complexities of the second s (2-207), and yet it is the first section that describes the more profound changes in the design of the contract formation process.

A Section 2-204 and the Radical Redesign of the Contract Formation Process

Section 2-204 was drafted to deal with the reality that often it was impossible to identify, in any real fashion, an offer and an acceptance even though the parties clearly had concluded some sort of contract.[48] For example, thanks to the industrialisation of the contracting process, a clerk in Company A might issue a solicitation of bids (a "solicitation") to supply goods (say raw materials or finished product to add to inventory) to a number of companies. The solicitation might ask that bids be submitted by a certain date by returning the form with the requested information provided on the form. A clerk for Company B would most likely instead send company B's own form (an "offer") listing quantity, price, terms of delivery, warranties, and so on, asking

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46 See eg Karl N Llewelly "Why a Commercial Code?" (1951) 22 Tenn L Rev 779; "Statement of Karl Llewellyn to the Law Revision Commission in New York" (1954) *New York L Revision Comm'n, Record on the Hearings on the Uniform Commercial Code* 27.

47 Richard Danzig "A Comment on the Jurisprudence of the Uniform Commercial Code" (1975) 27 Stan L Rev 621.

48 See generally Carolyn M Edwards "Contract Formation under Article 2 of the Uniform Commercial Code" (1977) 61 Marquette L Rev 215.

that Company A accept by signing and returning the form. The clerk at Company A, if they decide to accept Company B's offer, instead of signing Company B's offer form, will send another form (a "purchase order"), which reflects the same quantity and price and perhaps terms of delivery, but which will vary as to warranties and perhaps other important terms (time and manner of payment, for example) and ask that Company B indicate assent by signing and returning the form. Company B's clerk will not sign or complete the form but instead will send yet another form (an "acknowledgement") reiterating Company B's original term,[49] and so on. In extreme cases, as many as seven or eight different forms might be sent by each side, each seeking to have its terms form the basis of the contract. Hence the name "battle of the forms".[50] At some point, one side or the other might begin to perform on the basis of the supposed contract, yet all we have in the paper trail is a series of counteroffers (each of which counts as a rejection of the other side's previous offer) and no acceptance at all. If for some reason either party wants out of the "contract", it will claim that, in fact, there never was any promise or agreement and hence no contract.[51]

A court confronting such an all too common set of facts must decide whether the words and actions were a contract or whether the parties had, in fact, failed to reach an agreement.[52] A court might construe the action on one side's part as an acceptance, and the offer would be the last form to arrive before the action began,[53] this despite the fact that the relevant form had indicated that the only way to accept the offer was to sign and return the form.[54] Alternatively, the court might conclude that because the last form on each side was so restrictive in defining what would count as an acceptance, there had been no acceptance (merely an "accommodation"), and hence no

49 The classic instance is found in *Poel Brunswick-Balke-Collender Co* 110 NE 619 (NY 1915).

50 See eg *Marlene Indus Corp v Carnac Textiles Inc* 380 NE2d 239, at 240 (1978); see generally John E Murray Jr "The Definitive "Battle of the Forms": Chaos Revisited" (2000) 20 JL & COM 1.

51 See eg *Learning Works Inc v Learning Annex Inc* 830 F2d 541 (4th Cir 1987); see generally Murray, above n 42, at 1316.

52 See eg *Poel Brunswick-Balke-Collender Co* 110 NE 619 (NY 1915).

53 See eg *Brewster of Lynchburg Inc v Dial Corp* 33 F3d 355 (4th Cir 1994); *Step-Save Data Sys Inc v Wyse Tech* 939 F2d 91 (3d Cir 1991).

54 See eg *Olson v Johnston* 301 P3d 791 (Mont 2013).

contract was formed.[55] There was no rational way for a lawyer (or anyone else) to predict what a court would do in the face of a battle of the forms. Yet businesses went on exchanging such forms and conducting their affairs without regard to whether they had created a contract through the exchanged forms. In many lines of business, goods or services were exchanged for a price and to all appearances without any real contract.

Llewellyn concluded that, in fact, the Common Law offer and acceptance model could not be applied to such business arrangements.[56] He drafted s 2-204 to deal with the problem of whether there is a contract if one cannot identify an acceptance.[57] Section 2-204 reads in full:

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

Section 2-204 says in the clearest terms possible that a contract for the sale of goods exists if there is evidence (whether by words or conduct) of agreement between the parties recognising the existence of a contract and even though no acceptance can be found.[58] The latter point is not explicit. After all, Llewellyn had to phrase the provision in terms that would be approved by members of his advisory committee and ultimately by the entire membership of the American Law Institute. So instead, he wrote that the contract is formed even though "the moment of its making is undetermined".[59]

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55 *Bretz v Portland General Electric Co* 882 F2d 411 (9th Cir 1999); *Poel Brunswick-Balke-Collender Co* 110 NE 619 (NY 1915).

56 See Cornell A Stephens "On Ending the Battle of the Forms: Problems with Solutions" (1992) 80 Ky L Rev 815 at 820.

57 See *Kleinschmidt Div v Futuronics Corp* 395 NYS2d 151, at 152 (1977); see generally Kristin Johnson Hazelwood "Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers" (1998) 55 Wash & Lee L Rev 1287.

58 See William D Hawkland *Uniform Commercial Code* s 2-204, at 217-18 (1998).

59 UCC, at 2-204.

What determines the moment of the making of a contract is when an acceptance occurs.[60] Thus, s 2-204(2) says in no uncertain terms that courts should not be concerned to find an acceptance.

While there is nothing to dispense with the requirement of an offer if no "acceptance" is necessary, it is difficult to see how an "offer" is still required, at least in the full technical sense of that term (because, for example, some terms are indefinite or left open[61]). But if an acceptance is not necessary (and perhaps an offer as well), how then is a court to determine whether there is a contract? The answer is found in s 2-204(3): "if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy".

This answer is not without its difficulties. "Intent" here is no less problematic a term than elsewhere in the law of contracts. Presumably s 2-204(3) adopts the objective test for intent – did the words or actions of the parties manifest an intent to form a contract without regard to their actual subjective intention?[62] In addition, a "reasonably certain basis" for an "appropriate remedy" is not defined. It will take generations of cases to provide content to these terms. Courts have barely begun this process more than 50 years after the finalisation of the UCC in 1962, partly because the innovations in s 2-204 are just too radical. In fact, we still find jurists and lawyers struggling to identify an acceptance, much like under the pre-UCC law.[63] So imbued are law-trained people with the offer-and-acceptance model that they apparently cannot conceive of another way to form a contract despite s 2-204's rather clear indication that there is another model of contract formation. Perhaps anticipating such resistance to the radical reformulation of the contract formation process found in s 2-204, Llewellyn gave us another provision specifically addressed to resolving the battle of the forms: s 2-207.

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60 See eg *Dickinson v Dodds* (1875) 2 Ch Div 463 (another English case often cited in the United States).

61 See eg *Hartung v Billmeier* 66 NW2d 784 (Minn 1954).

62 See eg *Embry v Haggardine, McKittrick Dry Goods Co* 105 SW 777 (Mo Ct App 1907); *Lucy v Zehmer* 84 SE2d 516 (Va 1954).

63 See generally Edwards, above n 48.

B Section 2-207 and the Resolution of the Battle of the Forms

Section 2-207 was intended to address the battle of the forms specifically.[64] The resolution of this problem proved difficult and controversial, so it went through numerous drafts before settling on the present language in 1962:[65]

(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 that recognises the existence of a contract is sufficient to establish a contract for sale, although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Applying s 2-207 has much troubled the courts.[66] Section 2-207 begins by again dispensing with the need for a court to find an "acceptance" in the traditional sense of that term – an agreement to the contract that matches the offer in all material respects.[67] As s 2-207 suggests, just because s 2-204 dispenses with the need to find an acceptance, s 2-204 does not rule out recourse to the offer-and-acceptance model where it actually describes what

64 See generally John E Murray Jr "Intention over Terms: An Exploration of UCC 2-207 and New Section 60, Restatement of Contracts" (1969) 37 Fordham L Rev 317.

65 Idem. An attempt to rewrite s 2-207 in 2002 has failed to gain legislative acceptance, so the 1962 language remains in force in nearly all states.

66 See Thomas R Haggard "UCC 2-207: A Suggested Analysis" (1990) 10 JL & Com 257.

67 See eg *Fairmount Glass Works v Crunden-Martin Wooden Ware Co* (1899) 51 SW 196.

is happening between the parties. Section 2-207 deals with the problem of how to resolve an attempted but incomplete process of offer and acceptance. It does so in a complex, one might say almost convoluted, form, with three subsections (one of which itself has three additional subsections). In so doing, it provides the answer left hanging in s 2-209: Without a contract arrived at through the acceptance of an offer, what are the terms of the contract that did arise?

Subsection (1) indicates that "expressions of acceptance" are an "acceptance" despite containing "additional or different" terms from the "offer".[68] Under the classic American Common Law, such expressions (for example, additional forms) would have been a counteroffer and not an acceptance.[69] Yet subs (1) contained a provision that rapidly made it irrelevant, if a lawyer was involved in the process. The party sending the "offer" could preclude the operation of subs (1) by including a term in the purported acceptance that made it "expressly conditional on assent to the additional or different terms". Lawyers promptly included such a clause in every form that might be construed as an acceptance, effectively rendering subs (1) a nullity.[70]

What then to do regarding whether a contract has been formed? The answer is found in s 2-204: if the parties think there is a contract and there is a reasonably certain basis for an appropriate remedy, there is a contract despite the failure to find an acceptance. However, what are the terms of the resulting contract? That question is answered in the remaining two sections of s 2-207, providing two different answers depending on whether the contract is between merchants (persons – natural or legal – who are engaged in a business dealing with goods of the kind covered by the contract[71]) or whether at least one of the parties is not a merchant.

Subsection (2) begins positively enough: such proposed additional or different terms become part of the contract unless one of three exceptions in subs (2) applies. The problem is that one or another of the exceptions,

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68 See eg *Diamond Fruit Growers Inc v Krack Corp* 794 F2d 1440 (9th Cir 1986); *Marlene Indus Corp v Carnac Textiles Inc* (1978) 380 NE2d 239, at 240.

69 See eg *Fairmount Glass Works v Crunden-Martin Wooden Ware Co* (1899) 51 SW 196.

70 See eg *Richardson v Union Carbide Indus Gases Inc* 790 A2d 962 (NJ Super 2002).

71 UCC, s 2-104(1).

however, will almost always apply.[72] It has become routine to include in every form, on both sides, an expression of prohibition of changes in the acceptance (the first exception), which is enough to make subs (2) a nullity. If that were not enough, the very fact that the parties are in court arguing about whether a term was included in the contract is a pretty strong indication that the change was material (the second exception).[73] Finally, the section perversely creates an incentive on each side to generate one more form to be sent without question or thought – a form that reiterates that no changes are allowed, or, in the language of s 2-207(2)(c), that objects to any changes (the third exception). Ironically, this provision, part of a design intended to make the duelling forms unnecessary, creates an incentive to generate more forms, not fewer forms.

What is left of s 2-207 is subs (3). In practical effect, both subss (1) and (2) have been rendered inoperative. Subsection (3) provides the answer. When the conduct of the parties indicates that the parties had a contract even though their "writings" (or, by extension, other expressions that passed between them) do not establish the existence of the contract, the terms of the contracts are those terms, where the expressions of parties match, filling in the blanks with supplemental terms found in the UCC itself (or in the law generally). This solution reflects Karl Llewellyn's realist theory of how contracts are created.[74] During a process of contract formation (often, but not always, contract negotiations), there is meaningful assent to the "dickered terms" (terms actually discussed or considered by the parties or their representatives), but no real assent to the "boilerplate" (the unread and unconsidered fine print that proliferates in written contracts today).

The "dickered terms" almost certainly will include price and quantity and will also include any other terms of prime importance to the parties. As Llewellyn argued, the parties can be said to have assented only to those dickered terms, to the broad type of the transaction and any "not unreasonable" or "not indecent" terms included in the forms passing between

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72 See eg *Dorton v Colins & Aikman & Corp* 453 F2d 1161 (6th Cir 1972); *Roto-Lith Ltd v FP Bartlett & Co* 297 F2d 497 (1st Cir 1962); see generally Timothy Davis "UCC Section 2-207: When Does an Additional Term Materially Alter a Contract?" (2016) 65 Cath UL Rev 489.

73 See eg *Orkal Indus v Array Connector Corp* 948 NYS2d 318 (App Div 2012).

74 See Karl N Llewellyn *The Common Law Tradition: Deciding Appeals* (1960) 370-371.

the parties.[75] In Llewellyn's words, the fine print has no business in undercutting the meaning of the dickered terms, the terms that, in fact, are the only ones that parties can meaningfully said to have agreed to. The result of this line of thinking is, in effect, that there are two contracts created by the same formation process: a contract with the dickered terms and a supplemental contract including the "not unreasonable" and "not indecent" terms found in the fine print.[76]

IV THE PROBLEM OF THE ADHESION CONTRACT

A separate, but related, problem arises when there is a great imbalance of bargaining power during the contract formation process.[77] Although this problem might arise in negotiations between merchants exchanging forms, it primarily arises where one party is a merchant (a person doing business in goods, the kind under the contract[78]) and the other side is not. This is typical of consumer contracts. A consumer goes into a place of business to buy something and, one way or another ends up with a contract memorialised in a form provided by the business. There is no negotiation over the terms of the form, and it is totally one-sided in favour of the business or (between merchants) the stronger side. The weaker side (whether a consumer or otherwise) has no choice but to agree or to walk away entirely, to adhere to the form or to reject the transaction entirely – hence the term "adhesion contract".[79] This is more akin to legislation (powerful institutions impose rules on the rest of society similar to Congress's ability to impose its will on the rest of society) than it is to contracts as we normally think of them.

This is an all too common situation in which the fine print contradicts or undercuts the meaning of the dickered terms (if the parties cannot reach an agreement on the dickered terms, there will be no contract).[80] Courts have

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75 Idem.

76 Idem.

77 See eg *The Bremen v Zapata Off-Shore Co* 407 (1972) US 1, at 12-13.

78 UCC, s 2-104(1).

79 See generally David A Hoffman "Relational Contracts of Adhesion" (2018) 85 U Chi L Rev 1395; Nicholas S Wilson "Freedom of Contract and Adhesion Contract" (1965) 14 Int'l & Comp LQ 172.

80 See Andrew Burgess "Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion″ (1986) 15 Anglo-Am L Rev 255.

been trying to prevent such "contracts of adhesion" from taking undue advantage of the weaker side, first through a sometimes strained or tendentious interpretation of the language of the form and second by a head-on assault on the form. In the interpretive turn, courts would conclude that particular objectionable terms were not actually part of the contract, either because the weaker party could not reasonably be understood to have understood and assented to the terms, or because the clause in question does not actually mean what it says.[81] This approach solves the problem in the case at hand, but it does nothing to prevent the next case. It signals to the offending party to go back and rewrite the clause to make it easier to understand and harder to distort, but is just as disempowering to the weaker side. In any event, the interpretive turn is of no help to the weaker party who, when shown the fine print during any dispute, simply goes along and does not take the issue to court.

The frontal assault on such terms was to find that the offending clause was unenforceable because it violated "public policy"[82] or was "unconscionable" (something that a court, in good conscience, cannot enforce).[83] This eliminates the clause, at least in terms of the particular clause, but does not prevent businesses from continuing to employ such clauses against unwitting parties who do not go to a lawyer over their disputes. What is more, for parties who do end up in court, it introduces considerable uncertainty as to what the terms of the contract really are, particularly because the results of what constitutes a violation of public policy or is unconscionable will vary from judge to judge.[84] While it marks some progress over the interpretative turn, it is simply not a solution to the general problem. Llewellyn's two-contract theory (which, while not limited to adhesion contracts, would apply to them) provides a general theory that could go far to solve the problem for a court. It does not prevent oppression of the party who does not consult an attorney (perhaps nothing would solve that problem), nor does it altogether preclude

81 See eg *Howard v FCIC* 540 F2d 695 (4th Cir 1976); *Aetna Casualty & Surety Co v Murphy* 538 A2d 219 (Conn 1988); *Weisz v Parke-Bernet Galleries Inc* 325 NYS2d 576 (NY Sup 1971*); Jones v Great Northern Ry Co* 217 P 673 (Mont 1923).

82 See eg *Henningsen v Bloomfield Motors* 161 A2d 69 (NJ 1960); *Richards v Richards* 513 NW2d 118 (Wis 1994).

83 UCC, s 2-302; *Williams v Walker-Thomas Furniture Co* 350 F2d 445 (DC App 1965); *Waters v Min Ltd* 587 NE2d 231 (Mass 1992).

84 See eg *Brower v Gateway 2000 Inc* 676 NYS2d 569 (NY Sup 1998).

uncertainty about what the terms of the contract are. Fine print that contradicts or undercuts the reasonable understanding of the dickered terms simply are not part of the contract.[85]

V APPLYING CONTRACT FORMATION THEORY TO "SHRINK-WRAP" OR "POINT-AND-CLICK" CONTRACTS

Today, innumerable contracts are formed online or involving computer software (and sometimes hardware) without negotiations over the terms of the contract. At one time of such transactions, the goods would be delivered in "shrink-wrap" plastic that would include, either on the plastic itself or on a form included within the delivery, one-sided fine print that the customer had never seen before and could only reject by returning the goods (sometimes at the customer's expense).[86] Today, the "assent" to the fine print takes the form of a small window on a computer screen whereby the customer cannot complete the transaction without scrolling down on the window and clicking on a box at the bottom of the small window. The terms included in the small window are not only one-sided, but they are also often difficult to read and understand – classic examples of "legalese." Most people simply scroll down, find the box and point and click on the box because the customer is online to buy something and not to ponder the legal significance of fine print in a small window.

The result of this process, whether of the shrink-wrap variety or the "point-and-click" variety, is a classic contract of adhesion writ large. It has the same problems and the same solutions as any contract of adhesion.[87] The problems identified by Karl Llewellyn and addressed in art 2 of the UCC do not disappear just because one is dealing with E-commerce. The result is that courts have struggled with the meaning and effect of shrink-wrap or point-and-click contracts, just as they have struggled with adhesion contracts

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85 Perhaps the clearest expression of Llewellyn's theory in a case is found in *Broemmer v Abortion Services of Phoenix* 840 P2d 1013 (Ariz 1992); see also Restatement (Second), above n 5, at 211(3).

86 See eg *ProcCD Inc v Zeidenberg* 86 F3d 1447 (7th Cir 1996); *Hill v Gateway 2000 Inc* 105 F3d 1147 (7th Cir 1997).

87 See eg *Klocik Gateway Inc* 104 F Supp 2d 1332 (D Kan 2000); *Brower v Gateway 2000 Inc* 676 NYS2d 569 (NY Sup 1998).

generally.[88] The central problem, as with adhesion contracts generally, is how to keep the cost efficiency of mass-produced contracts without allowing the imposition of unfair terms.[89] The solution, such as it is, is to apply contemporary contract formation theory, particularly Llewellyn's two-contract theory, to E-commerce contracts.

VI WHERE DOES UNCITRAL FIT IN?

UNCITRAL has drafted a convention focused on E-commerce: The United Nations Convention on the Use of Electronic Communications in International Contracts.[90] This Convention addresses the effectiveness of electronic communications,[91] but with offers and acceptances, it only provides that certain communications count as "invitations to make an offer"[92] and when an electronic communication can be counted as dispatched or received (classic offer-and-acceptance questions).[93] The Convention does not address the questions of offer and acceptance that are far more troubling for contract formation than questions of whether electronic communication is as effective as written or spoken communication. The problems with these adhesion contracts are not resolved by Convention provisions requiring that a copy of the contract be made available on request of a party to the contract[94] or creating a right to correct errors in electronic communication or to withdraw the offending communication.[95] In short, the Convention simply does not speak to the most important issues in E-commerce contract formation.

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88 See eg *Klocik. Gateway Inc* 104 F Supp 2d 1332 (D Kan 2000).

89 See eg above n 88; see generally Restatement (Second), above n 5, at 211; see also Kevin Sobel-Read & Jaako Salminen "Recalibrating Contract Law: Choses in Action, Global Supply Chains, and the Enforcement of Obligations outside of Privity" (2018) 93 Tul L Rev 218.

90 The United Nations Convention on the Use of Electronic Communications in International Contracts ("UN Convention") No E07V2 (2007) <https://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf> accessed May 2019.

91 Idem, arts 8, 9, 10.

92 Above n 90, art 11.

93 Above n 90, art 10.

94 Above n 90, art 12.

95 Above n 90, art 13

To some extent, the problems of contract formation are addressed by the Convention on the International Sale of Goods, although that Convention is rather conservative and does not reflect the sort of advanced thinking on contract formation expressed in the UCC or the writings of Karl Llewellyn. There is a clear need for a convention to address these problems. This is a need that UNCITRAL could fill if it were to undertake more broadly to address problems of contract formation in the field of e-commerce. The current Draft Provisions on the Cross-Border Recognition of IDM and Trust Services[96] does not even begin to address these questions.

96 UNGA, UN doc A/CN.9/WG. IV/WP.157 (28 January 2019).