

13.3: Sales Contract Formation

The common law expects parties to form a contract by making an offer, with an acceptance that mirrors the offer and includes all material terms. Modern business transactions, however, frequently do not follow that pattern. As a result, UCC §2-204 provides that a contract may be formed in any manner that shows the parties reached an agreement.

The terms of sales contracts are supplied by three sources:

1. The express agreement of the parties;
2. Course of dealing, usage of trade, and course of performance; and
3. The UCC.

Express Agreement

The general rule is that parties are free to make their own sales contract. When parties agree on terms—especially for quality, quantity, price, delivery and payment—those terms control over UCC provisions. The parties’ freedom to contract, however, is not limitless. Parties cannot disclaim their obligation of good faith, diligence, and due care. Similarly, liquidated damages provisions must be based on the value of the contract and cannot be a penalty for breach of contract. Further, limitations on consequential damages cannot be unconscionable.

Course of Dealing, Usage of Trade & Course of Performance

The parties’ agreement may be based on their actions. **Course of dealing** is an established pattern of prior conduct between the parties to a particular transaction. If a dispute arises, the parties’ course of dealing can be used as evidence of how they intended to carry out the transaction. In other words, the current contract is interpreted based on past contracts.

Course of performance relates to the conduct of the parties under the contract in question after its formation. It occurs when a contract involves repeated performance and looks at how the parties have acted when performing this particular contract, not contracts in the past.

Usage of trade is a practice or custom in a particular trade used so frequently that it justifies the expectation that it will be followed in the current transaction. It is industry standards and customs related to a particular industry.

UCC Provisions

When sales contracts do not have all the necessary terms, the UCC “fills in the gaps” of the contract. The most important UCC gap-filler provisions relate to price, quantity, delivery, and time of performance.

Figure 11.2 UCC Gap-Filler Provisions

Provision	Subject	Description
§2-305	Price	Price can be left open to be fixed at later time
		Reasonable price determined upon delivery “Output” and “Requirement” amounts can be determined at later time
§2-306	Quantity	No quantity that is unreasonably disproportionate to the estimate will be enforced
		Reasonable amount in keeping with normal or prior comparable output or requirements is implied
§2-507	Delivery	Delivery occurs at seller’s place of business unless contract provides otherwise
§2-308/ §2-309	Time	Reasonable time for performance

Provision	Subject	Description
§2-305	Price	Price can be left open to be fixed at later time; Reasonable price determined upon delivery
§2-306	Quantity	“Output” and “Requirement” amounts can be determined at a later time; No quantity that is unreasonably disproportionate to the estimate will be enforced; Reasonable amount in keeping with normal or prior comparable output or requirements is implied
§2-507 & §2-308	Delivery	Delivery occurs at seller’s place of business unless contract provides otherwise
§2-309	Time	Reasonable time for performance

When these sources of contract terms are in conflict, the UCC applies the following hierarchy:

1. Express terms;
2. Course of performance;
3. Course of dealing;
4. Usage of trade; and
5. UCC gap-filler provisions.

The logic is that the parties are free to contract the terms they would like. In absence of an express agreement, the parties’ conduct shows their intent. In practical terms, usage of trade and UCC provisions often go hand-in-hand. For example, what constitutes

“reasonable time” for performance is often based on relevant industry standards. Although the UCC identifies a hierarchy, in practice it is not rigidly applied by the courts when determining usage of trade and UCC provisions.

Additional and Different Terms

Under UCC §2-207, an acceptance that adds or alters terms will often create a contract. Unlike the common law that treats modifications as a counter-offer, the UCC has a more flexible concept of acceptance. This is to address the “battle of the forms” that happens when merchants buy and sell goods with pre-printed forms. Frequently buyers use pre-printed forms to place an order that are then acknowledged by the seller on its own pre-printed forms. These forms typically contain language favorable to the party sending it and rarely agree.

Section 2-207 still requires the parties to intend to create a contract. If the differing forms show that the parties never reached an agreement, then no contract exists.

However, if the acceptance contains an additional term, then a contract is usually formed. An **additional term** is a proposed contract term that addresses issues not included in the offer. Additional terms expand the offer to cover more essential terms to ensure a meeting of the minds.

If both parties are merchants, the additional terms usually become part of the contract unless:

1. The offer states that it cannot be accepted with additional or different terms;
2. The additional terms materially alter the offer; or
3. The party making the offer promptly rejects the additional terms.

A **different term** is a proposed contract term that contradicts the term(s) in the offer. Under the UCC, different terms cancel each other out. In most states, different terms are replaced by UCC gap-filler provisions.

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