Chapter 16

CONTRACT FORMATION IN A FORM-CONTRACT SETTING

NOTE ON THE BATTLE OF THE FORMS

When goods are supplied by a seller to a manufacturer or retailer there is in most cases no document covering the transaction called on its face a "contract." Often the buyer will send to the seller a form he calls a "purchase order." At the bottom of this form, or on the reverse side, there will appear certain preprinted terms, often loosely designated in the form as "conditions." These terms or "conditions" may be fairly extensive, and include shipping instructions, provisions making the order cancellable for delays in delivery, stipulations covering crating charges, provisions for the arbitration of disputes, etc. Usually the purchase order form will state that the order is given "subject to" the conditions stated. Generally the purchase order will request an "acknowledgment," although occasionally the word "acceptance" is used. The buyer sometimes hopefully provides a tear sheet or a separate form, requesting the seller to sign and return this as an "acknowledgment" of the order.

Often the seller, instead of accepting the buyer's purchase order, or returning the buyer's "acknowledgment" form, sends the buyer his own form, frequently called a "sales order." Or the first document may be a "sales order" sent by the seller to the buyer. This will be like the buyer's "purchase order," and will itself be "subject to" certain preprinted terms or "conditions" printed at the bottom or on the back.

The chances that the preprinted terms in the sales order will coincide with those in the purchase order are negligible. Sometimes, to strengthen its position, the seller will repeat these terms (or perhaps a different set of terms) on the invoice that is sent when the goods are shipped, stating in this form that the goods are shipped "subject to the following conditions." The buyer, anticipating that the seller will decorate the back of its invoice with fine print, may stipulate in his purchase order that if the terms stated in the invoice do not agree with the buyer's purchase order, the terms of the purchase order will control.

The result is that instead of an orderly negotiation of the terms of the sale, we have the parties engaged in a battle of forms, each jockeying for position and each attempting to get the other to indicate assent to its form. Sometimes a seller's sales order is signed by the buyer, and a buyer's

purchase order is signed by the seller. Thus, the same transaction is covered by two different forms stipulating inconsistent terms. More commonly, neither party is willing to sign the other's form, so that each party states in writing its terms of the sale, but neither expressly indicates assent to the terms proposed by the other.

The battle of the forms had a special bite under the *mirror-image* (or *ribbon-matching*) rule of classical contract law, that any difference between an offer and a purported acceptance, no matter how minor, prevented the formation of a contract. Since the seller's form and the buyer's form seldom if ever matched, the exchange of a purchase order and a order and a sales order (or counterpart forms) would seldom if ever constitute a contract under the mirror-image rule.

But the matter did not end there. Under the rule that an offer can be accepted by conduct, if the seller shipped the goods and the buyer accepted them, under traditional common law principles a contract was deemed to have been made on the terms of the last form, on the theory that the last form was a counter-offer, and the goods were shipped and accepted pursuant to that counter-offer. For example, suppose the buyer began the transaction by sending a purchase order, and the seller responded by sending back a nonconforming sales order. Under the mirror-image rule there would be no contract at that point. However, the sales order would not be without legal effect; instead, under traditional principles it would be a counter-offer. Now suppose the seller shipped the goods. If the buyer accepted the goods, she was deemed to have accepted pursuant to the sales order/counter-offer, so that the terms of the resulting contract were those set by the seller. Similarly, suppose the seller began with a sales order, the buyer responded with a purchase order, the seller shipped the goods, and the buyer accepted the shipment. In that case, the terms of the contract would be those set in the purchase order, because the buyer's nonconforming purchase order would be a counter-offer, and the seller's shipment would be deemed an acceptance of that counter-offer. This analysis was often called the "last-shot" approach, because if performance occurred, the terms of the contract were those set by whichever party fired the last shot in the battle of the forms.

UCC §§ 2–201, 2–204, 2–207

[See Selected Source Materials Supplement]

ABA TASK FORCE REPORT ON ARTICLE 2, 16 Del.J.Corp.Law. 981, 1063–64 (1991). "The premise that underlies section 2–207 is that pre–printed boilerplate terms in each party's form are not read. Indeed, they cannot reasonably be expected to be read by the other party."

NOTE ON WHAT CONSTITUTES AN ACCEPTANCE UNDER UCC § 2–207

UCC § 2–207 applies if there has been a "definite and seasonable expression of acceptance," but leaves open what constitutes a definite and