market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiff's should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of the telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to *Hyde* v. *Wrench*, where one party offered his estate for 1000l., and the other answered by offering 950l. Lord Langdale, in that case, held that after the 950l. had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer . . .

BGB **2.G.51.**

§ 150: . . .

(2) An acceptance with amplifications, limitations or other alterations is deemed to be a refusal coupled with a new offer.[159]

Note

(1) A statement that purports to be an acceptance but changes the terms of the offer is in reality a counter-offer: for example, an offer to supply goods that is "accepted" by an order for their supply and installation.[160] The rule according to which the terms of the acceptance must correspond to those of the offer is referred to in the common law as the "mirror-image rule". *Hyde* v. *Wrench* shows that a counter-offer is regarded in English law as a rejection of the original offer.[161] *Stevenson, Jaques & Co.* v. *McLean* shows that whether a communication is a counter-offer or a mere request for information depends on the intention with which it was made, objectively assessed.

(2) The "mirror-image rule" is also to be found in Article 1326 of the Italian CC and section 59 of the American Restatement 2nd. A variation on the mirror image rule can be found in the *Principles of European Contract Law*. Under Article 2:208, an acceptance need not mirror the offer precisely, but it must not "materially alter the terms of the offer" of the offer. Paragraph C of the Comment on the Article explains that "a term is material if the offeree knew or as a reasonable person in the same position as the offeree should have known that the offeror would be influenced in its decision as to whether to contract or as to the terms on which to contract". See also Unidroit Principles Article 2.11 and CISG Article 19,[162] and Article 6:225 paragraph 2 of the Dutch Civil Code:

[159] Translated by Von Mehren & Gordley, op. cit. at 193, n. 55. See also Malaurie and Aynès, para. 389.
[160] Treitel, *Contract*, at 18 and 41; see also McKendrick, *Contract*, at 27.
[161] With the result that the original offer lapses, as has been seen in **2.1.2.D**, *supra*, at 210–11.
[162] Cit. at the beginning of this section, *supra* at 226.

BW **2.NL.52.**

Article 6.225: 2. Unless the offeror objects to the differences without delay, where a reply intended to accept an offer only deviates from the offer on points of minor importance, the reply is considered to be an acceptance and the contract is formed according to the latter".

(2) The "battle of the forms"

Principles of European Contract Law **2.PECL.53.**

Article 2:209: *Conflicting General Conditions*

(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.

(2) However, no contract is formed if one party:

(a) has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or

(b) without delay, informs the other party that it does not intend to be bound by such contract.

(3) General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.

Unidroit Principles **2.INT.54.**

Article 2.22: Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

Court of Appeal **2.E.55.**
Butler Machine Tool Co. Ltd. v. *Ex-cell-O Corpn. Ltd*[163]

DIFFERENT APPROACHES TO THE BATTLE OF THE FORMS

The tear-off acknowledgement slip

On one approach to the battle of the forms, it is not necessary to look only at an offer and an acceptance when considering whether a contract has been agreed. As an alternative, all of the relevant documentation should be construed together to discern whether a harmonious interpretation can be achieved.

[163] [1979] 1 All ER 965.

Facts: On 23 May 1969, in response to an enquiry by the buyers, the sellers made a quotation offering to sell a machine tool to the buyers for £75,535, delivery to be in ten months' time. The offer was stated to be subject to certain terms and conditions which "shall prevail over any terms and conditions in the Buyer's order". The conditions included a price variation clause providing for the goods to be charged at the price ruling on the date of delivery. On 27 May the buyers replied by placing an order for the machine. The order was stated to be subject to certain terms and conditions, which were materially different from those put forward by the sellers and which, in particular, made no provision for a variation in price. At the foot of the buyer's order there was a tear-off acknowledgement of receipt of the order stating that "We accept your order on the Terms and Conditions stated thereon". On 5 June the sellers completed and signed the acknowledgement and returned it to the buyers with a letter stating that the buyer's order was being entered "in accordance" with the seller's quotation of 23 May. When the sellers came to deliver the machine they claimed that the price had increased by £2,892. The buyers refused to pay the increase in price and the sellers brought an action claiming that they were entitled to increase the price under the price variation clause contained in their offer. The buyers contended that the contract had been concluded on the buyer's rather than the seller's terms and was therefore a fixed-price contract. The judge upheld the seller's claim on the ground that the contract had been concluded on the basis that the seller's terms were to prevail since they had stipulated that in the opening offer and all subsequent negotiations had been subject to that. The buyers appealed.

Held: A contract had been concluded by the parties.

Judgment: [LAWTON LJ and BRIDGE LJ applied the ordinary rules for counter-offers. This meant that the order of 27 May constituted a counter-offer because it referred to the general conditions of the buyers which were materially different from those used by the sellers. This counter-offer of the buyers was accepted by the sellers by the acknowledgement and letter of 5 June; the reference to the original offer served only to identify the transaction and not to reintroduce the terms of the sellers. Therefore a contract was concluded on the terms and conditions of the buyers. Lord Denning adopted a different approach]:

LORD DENNING MR: . . . If those documents are analysed in our traditional method, the result would seem to me to be this: the quotation of 23 May 1969 was an offer by the sellers to the buyers containing the terms and conditions on the back. The order of 27 May 1969 purported to be an acceptance of that offer in that it was for the same machine at the same price, but it contained such additions as to cost of installation, date of delivery and so forth, that it was in law a rejection of the offer and constituted a counter-offer. That is clear from *Hyde* v. *Wrench*. As Megaw J said in *Trollope & Colls Ltd* v. *Atomic Power Constructions Ltd*: ". . . the counter-offer kills the original offer". The letter of the sellers of 5 June 1969 was an acceptance of that counter-offer, as is shown by the acknowledgement which the sellers signed and returned to the buyers. The reference to the quotation of 23 May 1969 referred only to the price and identity of the machine . . .

In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date. . . . The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them. As Lord Cairns LC said in *Brogden* v. *Metropolitan Railway Co*:

> ". . . there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description."

Applying this guide, it will be found that in most cases when there is a "battle of forms" there is a contract as soon as the last of the forms is sent and received without objection being taken to it. That is well observed in *Benjamin on Sale*. The difficulty is to decide which form, or which part of which form, is a term or condition of the contract. In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them. Such was *British Road Services Ltd* v. *Arthur V Crutchley & Co Ltd* per Lord Pearson; and the illustration given by

Professor Guest in Anson's Law of Contract where he says that "the terms of the contract consist of the terms of the offer subject to the modifications contained in the acceptance". That may however go too far. In some cases, however, the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back and the buyers orders the goods purporting to accept the offer on an order form with his own different terms and conditions on the back, then, if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller. There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication.

In the present case the judge thought that the sellers in their original quotation got their blow in first; especially by the provision that "These terms and conditions shall prevail over any terms and conditions in the Buyer's order". It was so emphatic that the price variation clause continued through all the subsequent dealings and that the buyer must be taken to have agreed to it. I can understand that point of view. But I think that the documents have to be considered as a whole. And, as a matter of construction, I think the acknowledgement of 5th June 1969 is the decisive document. It makes it clear that the contract was on the buyer's terms and not on the seller's terms: and the buyer's terms did not include a price variation clause . . .

BGH, 26 September 1973[164]

TERMS NOT AGREED BUT CONTRACT NEVERTHELESS C

The heat-retaining silo

Whilst particular terms and conditions may not be incorporated into a contract following a battle of the forms, the parties may be estopped from denying that a contract has in fact been concluded.

Facts: On 1 December 1969 the defendant, using its own order form which referred in the standard way to its "terms and conditions of purchase" printed overleaf, ordered a heat-retaining silo to be delivered by 15 April 1970. Clause 1 of the terms and conditions of purchase provided as follows:

> "Orders given by us . . . are placed on the basis of our terms and conditions of purchase. Where the contractor's standard-form terms and conditions provide otherwise, they shall be valid only if they are confirmed by us in writing."

The essence of clause 3 of the terms and conditions of purchase was that the statutory rules were to apply decisively to any claim for compensation for failure to comply with the deadline for delivery. Thereafter, on 5 January 1970, the plaintiff sent the defendant a detailed "confirmation of order", in which—likewise referring in the standard way to its attached "terms and conditions of sale and delivery"—it accepted the order on the basis that delivery was to be effected by no later than "middle to end April 1970". However, according to the plaintiff's terms and conditions of sale and delivery, the particulars concerning the delivery deadline were only approximate and non-binding; liability to pay compensation for late delivery was excluded.

By letter of 22 April 1970, the defendant, referring expressly to its order form, gave the plaintiff formal notice of default by the latter and announced that, in the event of failure by the plaintiff to effect delivery by 30 April 1970, it would claim compensation. The equipment was delivered at the end of June 1970 and put into operation by the defendant. The defendant withheld from the agreed purchase price of approximately DM 90,000 the sum of DM 27,450 by way of recompense for the damage caused by the delay.

Held: The defendant had not accepted the plaintiff's terms and conditions in passively receiving the conditions set out in the plaintiff's confirmation of order or in acceptance of delivery, but a contract had nevertheless been concluded between the parties.

[164] BGHZ 61.282.

Judgment: (a) As is apparent *inter alia* from § 362 HGB, silence does not in principle constitute consent, even in legal dealings between commercial traders (BGHZ 1, 353, 355). In particular, in a settled line of case-law—relating, it is true, to disputes which did not concern letters of confirmation passing between commercial traders, the Bundesgerichtshof has declined to construe the mere passive receipt, without objection, of a modified confirmation of order as constituting tacit acceptance thereof (BGHZ 18, 212, 216; judgment of 12 February 1952—I ZR 98/51 = LM BGB § 150, para. 2; judgment of 14 March 1963—VII ZR 257/61 = WM 1963, 528 = LM BGB § 150, para. 6) . . .

2. It follows that the plaintiff's terms and conditions of sale and delivery were not incorporated into the contract merely by virtue of the passive receipt by the defendant, without objection, of the confirmation of order dated 5 January 1970. Nor, however, is the plaintiff entitled to rely in that connection on the fact that the defendant subsequently accepted the equipment and put it into operation. It is true that, in certain circumstances, where a modified confirmation of order is sent and the purchaser takes delivery of the goods without raising any objection, that may be regarded as constituting tacit acceptance by the purchaser of the modified contract (§ 150(2) BGB), with the result that he is deemed to have consented to the seller's general terms of business, as referred to—particularly where the seller has clearly stated at a previous juncture that he is prepared to effect delivery only on his own terms (see the judgment of the BGH of 17 September 1954—I ZR 18/53 = LM BGB § 150, para. 3 = BB 1954, 882, and the judgment of 14 March 1963—VII ZR 257/61 = WM 1963, 528 = LM BGB § 150, para. 6 = NJW 1963, 1248). The present case does not, however, involve any passive receipt, taking place without any objection being raised, which could be construed as amounting to tacit acceptance. On the contrary, the defendant gave notice by letter of 22 April 1970, in which it referred to its written order of 1 December 1969, that it proposed to claim compensation for failure to comply with the delivery deadline . . .

3. The fact that, because the plaintiff accepted the defendant's order of 1 December 1969 only in a modified form and the defendant did not accept the new terms proposed by the plaintiff at all, neither the defendant's terms and conditions of purchase nor the plaintiff's terms and conditions of sale and delivery were therefore incorporated into the contract does not mean, however, that no contract came into existence. The application of § 150(2) BGB is subject to the principle of good faith (judgment of the BGH of 12 February 1952—I ZR 98/51, cited above). In the present case, neither of the parties has at any time called in question, either before or during the dispute, the fact that a legally effective purchase contract was concluded. They performed the contract—the plaintiff by delivering the equipment and the defendant by accepting delivery of it and by paying at least part of the purchase price, although it was already quite clear at that point that there was a dispute as to whose terms of business had been incorporated into the contract. In so doing, they made it clear that, as far as they were concerned, the determination of the matter in issue did not affect the existence of the contract itself. Consequently, in accordance with the principle of good faith, both parties must be deemed to be estopped from pleading that the contract never came into existence (judgment of the Chamber of 25 June 1957—VIII ZR 257/56 = WM 1957, 1064, not reproduced in that respect in LM BGB § 150, para. 5; Krause BB 1952, 996, 998).

BGH, 20 March 1985[165]

CONFLICTING CLAUSES AND ADDITIONAL CLAUSES

Oven-timing clocks

Where a contract has been concluded but the parties each seek to rely on their standard terms, and the court is seeking to identify the terms of the contract, a party is not necessarily bound by a term which does not conflict with his own terms.

Facts: On 27 October 1980 the bankrupt debtor ordered from the plaintiff, on the terms and conditions of purchase printed on the reverse side of the order form, certain time-switch clocks to be installed in electric ovens. Clause 16 of those terms and conditions of purchase was in the following terms: "Diverging terms of business. By accepting our order, the supplier declares that he consents to these terms and conditions of purchase. In the event that our order is confirmed by the supplier on terms which diverge from our terms and conditions of purchase, the latter shall nevertheless apply, even where we do not raise any objection. Consequently, divergent terms shall apply only where they have been expressly acknowledged by us in writing. If the supplier does not consent to the foregoing way of proceeding, he shall be obliged forthwith to indicate his disagreement in a specific letter to that effect. In such cases, we reserve the right to cancel the order, without thereby entitling the supplier to make any claim whatever against us. Our terms and conditions shall also apply to future transactions, even where no express reference is made to them, provided solely that they have already been received by the customer." On 11 February 1982 the bankrupt debtor placed a supplementary order with the plaintiff for the supply of further energy-regulating devices. The plaintiff confirmed the order, referring to its General Terms and Conditions of Delivery and Payment, which provided that the transaction was to be governed exclusively by its written confirmation of order in conjunction with the said General Terms and Conditions of Delivery and Payment. Clause 7 of those Terms and Conditions contained an extended and wide-ranging retention of title provision in respect of delivered goods.

Held: Whilst a contract had been concluded, it was not possible to conclude that the bankrupt debtor intended, by means of its preventive clause, to exclude only those of the plaintiff's terms and conditions of sale which conflicted with its own terms and conditions of purchase, and not also to exclude the plaintiff's additional clauses.

Judgment: . . . The appellate court further concluded, correctly, that the bankrupt debtor did not declare, even tacitly, that it consented to the global incorporation into the contract of the plaintiff's General Terms and Conditions. A finding that the bankrupt debtor tacitly submitted to be bound by the plaintiff's terms and conditions of sale would conflict with the unequivocal statement contained in its own terms and conditions of purchase, to the effect that it contracted solely on its own terms and that it was to be deemed to have agreed to the application of divergent conditions appearing in the confirmation of order only if it had acknowledged in writing that those divergent conditions were to apply. . . . In view of the anticipatory objection by the bankrupt debtor, clearly expressed in the preventive clause contained in its terms and conditions, to the application of the plaintiff's General Terms and Conditions, such a change of mind on the bankrupt debtor's part cannot, in the absence of any new supervening circumstances, be held to have taken place and cannot, in particular, be inferred from the fact that the bankrupt debtor raised no fresh objection to the plaintiff's terms and conditions of sale and accepted delivery of the goods without reservation—as the appellate court rightly accepted, that point not having been challenged in the appeal on a point of law (see the judgment of the Chamber, WM 1977, 451 [452]) . . .

(aa) Where—as in the present case—a contract has come into existence without any agreement being reached as to the application of the general terms and conditions of either of the parties, that does not mean that, in such circumstances, the corresponding optional law is to apply in its entirety, and without exception, in place of the rules and stipulations laid down in the general terms and

[165] NJW 1985.1838.

conditions in question (see Bunte, ZIP 1982, 449 [450], setting out the relevant opinions on the issue; Wolf, in Wolf-Horn-Lindacher, *AGB-Gesetz*, § 2, note 77; Ulmer, in Ulmer-Brandner-Hensen, *AGB-Komm.*, 4th edition, § 2, note 101; Erman-Hefermehl, *BGB*, 7th edition, § 2 AGB-Gesetz, note 48). On the contrary, the parties may be deemed to have intended to apply those stipulations diverging from or supplementing the optional law which were contained in the general terms and conditions of both the parties, which were framed in similar or identical forms of wording and which both parties accordingly wished to see incorporated into the contract.

(bb) However, such a manifest consensus is lacking where the general terms and conditions of one of the parties contain "additional" stipulations which are not matched by corresponding, equivalent provisions contained in the terms and conditions of the other party, e.g.—as in the present case—a retention of title clause. The question whether, in such a case, it is possible to infer—even where no consensus is manifestly apparent from the general terms and conditions of both of the parties—that one of the parties tacitly agreed to the inclusion in the contract of the additional stipulations unilaterally laid down by the other party will depend on the wishes of the party opposing those stipulations, which are to be ascertained in the light of the other circumstances of the case (see Ulmer, § 2, note 104; Löwe-Graf von Westphalen-Trinkner, *AGB-Gesetz*, § 2, note 47). In the present case, however, it is not possible to conclude that the bankrupt debtor intended, by means of its preventive clause, to exclude only those of the plaintiff's terms and conditions of sale which conflicted with its own terms and conditions of purchase, and not also to exclude the plaintiff's additional clauses. . . .

Notes

(1) Lord Denning in the *Butler Machine Tool* indicates briefly three approaches to resolve the problem of the so-called "battle of forms". The traditional approach, which was adopted in that case by Lawton and Bridge L JJ, is to consider the communications between the parties as offers and counter-offers, in accordance with the "mirror-image rule".[166] Each communication in which a party refers to its own standard terms and conditions operates as a rejection of the other party's standard terms and conditions, and as a counter offer. In this approach the party who has made the last reference to its own terms and conditions often wins the battle—"last shot-doctrine"—, because its counter-offer is accepted by the conduct of the other party when that party carries out the contract for example by shipping the ordered goods or by taking delivery.[167]

(2) According to the Bundesgerichtshof in the *Heat Retaining Silo* case, the mere fact that A clearly believes a contract has been concluded for example by sending a reminder does not establish that the terms and conditions of the party that "fired the last shot" have been accepted by the other party. Rather, the Bundesgerichtshof requires that the other party actually performs its part of the contract or takes delivery of the goods ordered. However, since in that case the dispute about the terms of the contract had already arisen at the moment of delivery, the buyer's taking delivery could not operate as an acceptance of the sellers terms and conditions. Furthermore, as is shown by the *Oven Timing Clocks* case, if A's standard terms and conditions include a condition fending off B's terms and conditions, A's performance cannot be construed as an acceptance of B's terms and conditions. Thus, in German law an acceptance by conduct of the terms and conditions of the party who "fired the last shot" is not easily assumed—compare also 10 June 1974.[168]

[166] *Supra*, at 230.
[167] See for acceptance by conduct **2.1.3.A.**, *supra*, at 213 ff.
[168] BB 1974.1136.

(3) An objection raised to the "last shot-doctrine" is that it is arbitrary to give precedence to the terms and conditions of the party that happens to have "the last word" in the process of concluding the contract.

(4) Another way to resolve the problem could be to let the terms and conditions of the offeror prevail, unless they are expressly rejected by the acceptor: the "first blow" rule. The underlying idea is then that the party making the last communication has the last chance to clear up the matter; if he does not do this and enters into the contract without making his acceptance expressly conditional on acceptance of his own terms and conditions, he knowingly takes the risk of being bound to the other party's terms and conditions.[169] The German Bundesgerichtshof has followed this approach more than once. In this approach, in which an exception is made to the "mirror image" rule, the question remains on what terms and conditions the contract is concluded.

(5) An objection that is raised to both of the two approaches mentioned above is that one party should not be given control where, in reality, the parties are in disagreement on relevant terms.[170]

(6) This objection is met by a third approach, according to which the terms and conditions of both parties in so far as they can be reconciled are included in the contract, whereas the conflicting terms and conditions are left out—the "knock-out rule", adopted in Article 2.22 of the Unidroit Principles,[171] and by § 2–207(3) of the American UCC.[172] Any gaps in the contract will have to be filled by suppletive rules of law, usage, trade practices etc. This approach was followed by the Bundesgerichtshof in the second of the two German cases here cited, where, as has been noted, the "last shot-doctrine" could not be applied in the absence of an acceptance by conduct. While applying the "knock-out rule", the BGH had to decide, however, not about a *conflicting* term, but about the inclusion in the contract of an *additional* term of the seller about reservation of property after delivery, and which was not dealt with at all in the terms and conditions of the buyer. The BGH held that the inclusion in the contract of additional terms of one party depended on the will of the other party, which had to be determined having regard to the circumstances. One of those circumstances was that the buyer's conditions fended off any deviating terms and conditions of the other party, and from this condition, the BGH deduced that the buyer did not assent to the incorporation of *any* other term, whether or not it conflicted with the buyer's own terms. It would seem more logical, however, to say that a condition that is different from the suppletive rules that would apply in its absence conflicts with the terms of the offer if the offer does not address the subject in question.

(7) The case-law of the BGH shows a tendency towards an innovative and more realistic approach to the battle-of-forms problem. Instead of giving precedence to the terms and conditions of one party, the BGH is prepared to place the terms and conditions of both parties on an equal footing and substitute the conflicting terms by suppletive rules of law. French case law adopts the German solution. A similar attempt has been made in the United States with § 2–207 of the UCC (Uniform Commercial Code). The provision is applicable only to sale contracts and constitutes a departure from the traditional rule

[169] See Von Mehren, op. cit. at 96.
[170] *Ibid.*, at 100.
[171] *Supra*, at 229.
[172] *Infra*, at 236.

sponded with a letter to Smith in which it offered to withdraw the discharge if he would comply with certain terms and conditions. Smith signed under the typewritten words, "Understood, Agreed to and Accepted," added some handwritten notations, and again signed his name. The notations contained a request by Smith to see his personnel file and to contest any mistakes he found there. Panhandle contended that Smith, by adding the request to see his personnel file and to contest mistakes, made a counter-offer. The Wyoming Supreme Court disagreed. There was testimony that all Panhandle employees had a right to see their personnel files, and while the court acknowledged that the acceptance was what Corbin once referred to as a "grumbling" acceptance, it was an acceptance nonetheless.

(5) *The Battle of Forms, Mirror Image and UCC 2–207.* In *Minneapolis & St. Louis Railway Co*, supra, the parties, who were at a distance, exchanged letters and telegrams. The terms of these writings were read and responded to. But the contract failed because of a disagreement over a material, negotiated term, the quantity of steel to be sold.

In many transactions, the writings of the parties may be a bit more complex. The buyer's purchase order and the seller's acknowledgment may be standard forms that contain terms that are not read or negotiated over by the other party. Put differently, these terms are in the pre-printed "boiler plate" and are drafted by one party in their own interest. Sometimes these terms add to terms in the offer of the other party or to an agreement previously reached. Sometimes these terms contradict other terms. In all cases, however, the party drafting the terms will claim that they are part of the agreement.

In resolving disputes of this sort, keep your eye on three questions: (1) Was any contract formed between the parties; (2) If so, what are its terms; and (3) What commercial policies explain (or should explain) UCC 2–207? Consider the words of one court:

> The problem underlying any "battle of the forms" is that parties engaged in commerce have failed to incorporate into one formal, signed contract the terms of their contractual relationship. Instead, each has been content to rely upon standard terms which each has included in its purchase orders or acknowledgments, terms which often conflict with those in the other party's documents. Usually, these standard terms mean little, for a contract looks to its fulfillment and rarely anticipates its breach. Hope springs eternal in the commercial world and expectations are usually, but not always, realized. It is only when the good faith expectations of the parties are frustrated that the legal obligations and rights of the parties must be precisely determined. This case presents a situation typical in any battle of the forms: it is not that the parties' forms have said too little, but rather that they have said too much yet have expressly agreed upon too little.

McJunkin Corporation v. Mechanicals, Inc., 888 F.2d 481, 482 (6th Cir.1989).

DTE Energy Technologies, Inc v. Briggs Electric, Inc.

Eastern District of Michigan, 2007.
2007 WL 674321.

■ PATRICK J. DUGGAN, UNITED STATES DISTRICT JUDGE.

DTE Energy Technologies, Inc. ("Plaintiff") initiated this diversity lawsuit after Briggs Electric, Inc. ("Defendant") allegedly breached a contract for the sale of electric generator systems. Plaintiff, in its amended complaint, seeks: (1) damages based on Defendant's alleged failure to pay invoices and (2) declaratory relief prohibiting Defendant from both obtaining incidental or consequential damages and forcing Plaintiff to mediate this dispute in California. Presently before the Court is Defendant's motion to dismiss for lack of personal jurisdiction and improper venue, filed pursuant to Rule 12 of the Federal Rules of Civil Procedure, and alternatively, to transfer. * * *

I. *Background*

In May 2002, Plaintiff, a Michigan corporation with its principal place of business in Farmington Hills, Michigan, began negotiations with Hoag Memorial Hospital Presbyterian ("Hoag") for the sale of electric generator systems to be installed as part of a construction project ("Project") at Hoag's site in Newport Beach, California. On May 6, 2003, Hoag and DPR Construction, Inc. ("DPR") entered into a contract where DPR would act as general contractor for the Project. Subsequently, on August 1, 2003, Hoag informed Plaintiff that it would not be entering into a contract with Plaintiff and "instead directed [Plaintiff] to attempt to negotiate a subcontract for the sale of the electric generator systems with an unspecified subcontractor of DPR." . . .

Defendant later won the bid as the subcontractor. Part of Defendant's obligation as subcontractor was to perform the electrical work on the Project, which included "procuring and installing the electric generator systems." . . . On October 21, 2003, Defendant sent a Purchase Order to Plaintiff. Defendant contends that the Purchase Order constituted an offer. Furthermore, Defendant argues that Plaintiff accepted its Purchase Order on November 10, 2003 when Rick Cole sent an email to Ron Calkins, a representative of Defendant, stating:

> Ron,
>
> Per our discussion.
>
> Rick

The e-mail also contained a forwarded message, bearing the subject line "Waukesha extended warranty," from Rick Cole to James Easley, a representative of Hoag. This forwarded message states in relevant part:

> Jim,
>
> We have received our order from Briggs Electric for the three Waukesha engine generator sets. I wanted to take this opportunity to thank you again for allowing DTE to participate on this project. We have assigned a project manager and two engineers to the project and we are completing the submittals now.
>
> The bid documents required that we offer a price for extended warranty which was quoted at $21,000 per year. Waukesha's warranty policy

requires that we include the extended warranty coverage at the time we enter our order. I need to know if Hoag is planning to accept the extended warranty and, if so, how to bill the cost. Thus, according to Defendant, this forwarded message acknowledging the receipt of the Purchase Order is evidence that Plaintiff accepted the Purchase Order, through its conduct.

Plaintiff submitted an Order Acknowledgment to Defendant on December 4, 2003. . . . Plaintiff contends that the Order Acknowledgment and the Standard Terms and Conditions of Sale attached to the Order Acknowledgment should be construed as an offer. Plaintiff argues that Defendant did not object to the terms of this alleged offer, and Defendant accepted the alleged offer when it sent payment to Plaintiff. The Standard Terms and Conditions of Sale attached to the Order Acknowledgment contain the following forum-selection and choice-of-law clause:

> The provisions of this Agreement shall be construed in accordance with and governed by the laws of the State of Michigan as applicable to contracts made and performed entirely within that State, and any action thereon may be brought only in a court of competent jurisdiction located in Michigan.

Plaintiff contends that it delivered the electric generator systems and provided other related services at Defendant's request. Furthermore, Plaintiff argues that Defendant has breached its obligation to pay Plaintiff under the agreement and "owes [Plaintiff] in excess of $880,000 for the generator systems, for related service, and for additional work which [Plaintiff] performed at [Defendant's] request." Rather than paying the amount owed, Plaintiff alleges that Defendant has made a demand to Plaintiff for damages that "purportedly arise out of delays in completion of the Project." Specifically, Plaintiff alleges that "[o]n or about October 6, 2006, [Defendant] allegedly submitted a demand for mediation against [Plaintiff], Hoag, and [the general contractor] with JAMS in California seeking a declaration of the contractual rights and duties of the parties arising out of the same transaction and occurrence of events pled in this Complaint."

Defendant acknowledges that the Order Acknowledgment contains a forum-selection and choice of law clause. However, Defendant contends that it did not agree to the forum-selection clause.

II. *Defendant's Motion to Dismiss for Lack of Personal Jurisdiction*

A. Standard of Review

* * *

B. Applicable Law and Analysis

* * *

1. Consent as a Basis for Personal Jurisdiction

Plaintiff argues that Defendant has consented to personal jurisdiction based on a forum-selection clause in the parties' sales agreement. Under Michigan law, consent is a basis for a court to exercise personal jurisdiction over a non-resident corporation as long as the limitations in Section 600.745 are satisfied. Mich. Comp. Laws § 600.711. Section 600.745 states in relevant part:

> If the parties agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state shall entertain the action if all the following occur:
>
> (a) The court has power under the law of this state to entertain the action.
>
> (b) This state is a reasonably convenient place for the trial of the action.
>
> (c) The agreement as to the place of the action is not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (d) The defendant is served with process as provided by court rules. *Id.* § 600.745(2).

According to Plaintiff, Defendant consented to personal jurisdiction when it accepted the forum-selection clause in the December 4, 2003 Order Acknowledgment, which Plaintiff contends was the offer. Defendant argues that the Order Acknowledgment was not the offer and contends that the Purchase Order it sent Plaintiff on October 21, 2003 was the offer. Once the Court determines which document operated as the offer, it can decide whether the forum-selection clause is binding.

In their briefs and at the hearing held on this motion, the parties refer to Michigan's version of the Uniform Commercial Code ("UCC"). The UCC provides that "[a] contract for the 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." Mich. Comp. Laws § 440.2204(1). More specifically, "[a]n offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." *Id.* § 440.2206(1)(a). "As a general rule orders are considered as offers to purchase."

* * *

Plaintiff asserts two other reasons why the Purchase Order should not be construed as an offer. First, Plaintiff argues that Defendant did not formally become the subcontractor on the Project until November 5, 2003; thus, the Purchase Order could not have operated as an offer. Second, Plaintiff argues that the Purchase Order is "indefinite, incomplete, and contradictory." . . . This Court disagrees with these arguments. First, the fact that Defendant submitted the Purchase Order before it was formally the subcontractor has no bearing on whether the Purchase Order constituted an offer. Second, the Court does not believe the Purchase Order was "indefinite, incomplete, and contradictory." The Purchase Order contained a quantity, price, and delivery terms.

This Court believes the October 21, 2003 Purchase Order constituted an offer. The Purchase Order was the initial communication between Plaintiff and Defendant, and it was sent to Plaintiff after Hoag informed Plaintiff that it would need to negotiate a deal with the subcontractor. Furthermore, the Order Acknowledgment references, by number, the Purchase Order and lists the exact price as that listed in the Purchase Order. Because the Court believes the Purchase Order was an offer, the Court must now determine the effect of the Order Acknowledgment, and more specifically, whether the forum-selection clause is enforceable against Defendant.

"Michigan courts recognize that '[a] contractual forum selection clause, though otherwise valid, may not be enforced against one not bound by the contract.' . . ." "It is for Michigan courts to determine in the first instance whether a forum selection clause is contractually binding." In deciding whether Defendant is bound by the forum selection clause, the Court is guided by Michigan Compiled Laws Section 440.2207, which is identical to Section 2–207 of the UCC. *Compare* Mich. Comp. Laws § 440.2207 *with* UCC § 2–207. "[T]he purpose of Section 2–207 is to interpret a contract that has been made, not to determine that one exists." James J. White, *Contracting Under Amended 2–207,* 2004 Wis. L.Rev. 723, 733 (2004). As stated above, the parties do not dispute whether a contract for the sale of the electric generators exists; rather, the parties disagree as to whether the forum-selection clause is part of their contract.

[Section 440.2207] alters the common law "mirror image rule" by establishing a general rule that a written confirmation operates as an acceptance even though its terms are not identical to those contained in the offer. James J. White & Robert S. Summers, Uniform Commercial Code 55–56 (6th ed.2006). This general rule contains an exception. In order to avoid accepting an offer by sending a written confirmation containing additional or different terms, a party can state that "acceptance is expressly made conditional on assent to the additional or different terms." Mich. Comp. Laws § 440.2207(1). The Sixth Circuit has stated: "[i]n order to fall within the [exception], it is not enough that acceptance is expressly conditional on additional or different terms; rather, an acceptance must be *expressly* conditional on offeror's *assent* to those terms." *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 (6th Cir.1972) (emphasis in original).

Plaintiff argues that even if the Purchase Order constituted an offer, it expressly rejected the offer in its Order Acknowledgment. Plaintiff contends that the following clause contained in the Standard Terms and Conditions of Sale attached to the Order Acknowledgment is an express rejection:

> 1. Entire Agreement. These Standard Terms and Conditions of Sale, together with the Sale Agreement into which they are incorporated and Schedule 1 thereof (collectively the "Agreement"), set forth and forms the entire understanding between DTE Energy Technologies, Inc. ("Seller") and Buyer with respect to the products described in the Sale Agreement. All prior other and collateral agreements, representations, warranties, promises and conditions relating to the subject matter of this Agreement are superseded by this Agreement. No additions to or variations from these Terms and Conditions shall be binding unless in a writing executed by Seller's President or one of Seller's Vice Presidents and Buyer. If Buyer's purchase order is referenced, it is solely for inclusion of a purchase order number and none of the terms and conditions of any purchase order or other Buyer document shall apply.

This Court does not believe this provision amounts to an express rejection under Section 440.2207(1).

As stated above, in order for a written confirmation of an offer to amount to a rejection and/or a counteroffer, the written confirmation must be "*expressly* made conditional on *assent* to the additional or different terms." *Dorton,* 453 F.2d at 1168. Furthermore, Section 440.2207 is "intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms therein." *Id.* The provision Plaintiff contends is an express rejection does not contemplate the buyer's assent to the additional or different terms. Rather, it makes any additional or different terms binding with or without the buyer's assent.*

Because the Order Acknowledgment was not expressly conditional on Defendant's assent to the additional terms, "[t]he additional terms are to be construed as proposals for addition to the contract." Mich. Comp. Laws § 440.2207(2). Furthermore, absent the application of a specified exception, the additional terms become part of the contract when the contracting parties are both "merchants."

Defendant, invoking one of the specified exceptions pertaining to merchants, argues that the forum-selection clause is an additional term and that it "materially alters" the terms of the parties' contract. *Id.* § 440.2207(2)(b). Recently, another court in the Eastern District of Michigan addressed this exact issue. In *Metro. Alloys Corp. v. State Metals Indus., Inc.,* 416 F.Supp.2d 561 (E.D.Mich.2006), the defendant, a New Jersey corporation, argued that personal jurisdiction did not exist based on the plaintiff's consent to a New Jersey forum-selection clause set forth on the reverse side of the defendant's "Sales Contract." *Id.* at 564. The court recognized that the determinative issue was whether the plaintiff was bound by the forum-selection clause. *Id.* at 566. After finding that the Michigan state courts had not directly addressed the issue, the Court, taking into consideration the objectives of the UCC and the Michigan courts' policy of looking to interpretations of other jurisdictions to resolve undecided contractual issues, held:

* Even if the Order Acknowledgment was an express rejection, Defendant did not accept the forum-selection clause by merely accepting and paying for the electric generators. *PCS Nitrogen Fertilizer, L.P. v. The Christy Refractories, L.L.C.,* 225 F.3d 974, 980 (8th Cir.2000) (stating "mere acceptance of and payment for goods does not constitute acceptance of all the terms in the seller's counter-offer") (citing *Ralph Shrader, Inc. v. Diamond Int'l Corp.,* 833 F.2d 1210, 1215 (6th Cir.1987)).

if faced with the issue, the Michigan Supreme Court would rule that a unilateral addition of a forum selection clause to a contract governed by the UCC is a material alteration of the contract that does not become part of the contract by operation of M.C.L. 440.2207(2)(b).

After reviewing the reasoning of the court in *Metro. Alloys Corp.*, this Court concludes that Defendant is not bound by the forum-selection clause. The forum-selection clause was contained in the fine print attached to an Order Acknowledgment sent by Plaintiff after Defendant had submitted an offer. Assuming the Order Acknowledgment operated as an acceptance, which on these facts the Court believes is an interpretation most favorable to Plaintiff and an interpretation that does not take into consideration Defendant's controverted factual assertions, this Court finds that the forum-selection clause at issue in the present case materially altered the parties' contract and is not enforceable against Defendant.

* * *

NOTES

(1) Which party made the offer in this case, the seller (plaintiff) or the buyer (defendant)? Were you persuaded by the court's decision? The court does not provide a working definition of offer and does not explain how the plaintiff, who was competing for the subcontract, knew or had reason to know that the defendant was inviting it to accept.

(2) If the defendant made the offer, how did the plaintiff accept it under UCC 2–207(1)? If there was no express condition (the court so holds), how can plaintiff accept the offer and still propose an additional materially altering term, the forum selection clause?

(3) How does UCC 2–207(2) deal with the plaintiff's materially altering term? Is it part of the contract? What is the effect of the parties's conduct, i.e., the seller ships the goods and the buyer accepts and pays for them. Does the buyer's conduct (without objection) accept the forum selection clause?

(4) Suppose that the purchase order contained a term agreeing to mediate disputes in California under specified procedures. If the seller accepts the offer in the acknowledgment and proposes a Michigan forum selection clause, the seller has proposed a different rather than an additional term. How is this issue resolved under UCC 2–207(2)?

(5) Although disputes like that in *DT Energy* are frequently called a "battle of the forms," UCC 2–207 neither defines "standard forms" nor limits its application to standard form contracts. Does this mean that UCC 2–207 applies to disputes like that in *Minneapolis & St. Louis Ry. Co.*, supra? If so, how would the dispute in that case be resolved under UCC 2–207? Can there ever be a "definite acceptance" when the purported acceptance materially varies the quantity or price terms?

NOTE: PROBLEMS IN THE INTERPRETATION OF UCC 2–207.

(7) *Routes to Contract Formation.* There are at least three routes to contract formation in and around UCC 2–207, the first before the comma in subsection (1) and the second in subsection (3). The first varies the common law "mirror image" rule but the second is consistent with prior law. See UCC 2–204(1). Be sure you understand why.

The third route opens after the comma in subsection (1). Suppose that the offeree sends a response with additional or different terms and states clearly "this acceptance is conditioned upon the offeror agreeing to the additional or different terms." This is a counteroffer, right? See UCC 2–207(1), after the comma. How can it be accepted? If the goods are not shipped to and accepted by the buyer, acceptance of the counteroffer would have to be by words of assent. Silence would not do it. See *Textile Unlimited v. A. BMH & Co.*, infra at 342.

Suppose, however, the offeree, a seller, ships the goods and the buyer accepts them. Does the buyer's conduct accept the counteroffer? Or is this a case for the application of UCC 2–207(3)? Although early decisions interpreting UCC 2–207 held that the counteroffer was accepted by conduct, the preferred view is that UCC 2–207(3) controls in all cases where no contract is formed under subsection (1) and the seller ships and the buyer accepts the goods. See JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 52–59 (1st Cir.1999).

Confirmation of Oral Agreement. It has been said that UCC 2–207(1) is "unusually poorly drafted as it applies to written confirmations." Utz, *More on the Battle of the Forms: The Treatment of "Different" Terms Under the Uniform Commercial Code*, 16 U.C.C.L.J. 103, 105, n. 5 (1983). The written confirmation is said to operate as an acceptance even though it states terms at variance with those agreed upon. But if the parties reached a prior agreement, was there not a prior acceptance? Note that a written confirmation may salvage an oral agreement otherwise within the statute of frauds. UCC 2–201(2).

What are the terms of the contract? In most cases under UCC 2–207 a contract has been formed by one route or another and the dispute is over what terms are part of the contract. What are the terms of the following contracts:

(a) B makes an offer to buy goods on a purchase order which, on the back in smaller type, provides that seller shall pay "liquidated damages" in the amount of $500 for each day of delayed delivery. Assume that clause, if agreed to, would be enforceable. See UCC 2–718(1). S responds by telegram and "accepts" the offer. There are no additional or different terms. S breaches the contract by a 20 day delay in delivery.

(b) B makes an offer to buy goods on a purchase order. S sends an acknowledgment which accepts the offer and contains a form clause on the back that purports to exclude all liability for consequential damages resulting from the delay. Assume that the clause, if agreed to, would be enforceable. See UCC 2–719(3). S ships the goods and B accepts and uses them. Due to nonconformities, B suffers consequential losses of $50,000. Is the "excluder" term part of the contract? Should the question be answered under UCC 2–207(2) or 2–207(3)? What is the difference?

(c) Suppose B makes an offer to buy goods. On the back of the purchase order is a form clause that S shall pay $500 per day for consequential damages caused by delay in delivery. S responds by an acknowledgment that accepts the offer, but the acknowledgment provides (on the back in a form term) that the seller shall not be liable for consequential damages caused by any delay in delivery. S is 20 days late in delivery and B, invoking its liquidated damage

clause, sues for $10,000. Should the question be answered under UCC 2–207(2) or (3)? What is the difference?

Different terms. It is to be noted that UCC 2–207(1) uses the phrase "terms additional to or different from" but that subsection (2) refers to "additional" terms. It is generally assumed that both types of variant terms should be disposed of in accordance with the rules of subsection (2). However, the omission of "different" from subsection (2) has influenced some courts to apply a so-called "knock out" doctrine, whereby even if a contract is formed under subsection (1), the terms of the contract are not those contained in the "offer" plus whatever terms are added by reason of subsection (2), but those upon which the "forms" agree. That is, the differing terms cancel each other. See, e.g., Northrop Corp. v. Litronic Industries, 29 F.3d 1173 (7th Cir.1994); Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir.1984). Where is the statutory basis for this? If the "different" terms in the "acceptance" are not handled under subsection (2), they should drop out altogether.

International Contracts and Sales. Despite the fact that form contracts and terms are used by both seller and buyer in international sales, CISG rejected the approach of UCC 2–207. Thus, Article 19(1) provides:

> A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

Article 19(2) states that a contract may be created if a purported acceptance "contains additional or different terms which do not materially alter the terms of the offer," and Article 19(3) attempts to state the terms that are considered to alter the terms of an offer materially. A notable inclusion is terms relating to the settlement of disputes, such as arbitration provisions.

Article 2.11 of the UNIDROIT Principles of International Commercial Contracts follows CISG Art. 19 up to a point. Special rules, however, are applicable to contracting under standard terms. See Art. 2.19 through 2.22. Article 2.22 deals specifically with the "battle of the forms:"

> Where both parties use standard terms [defined in Art. 2.19(2)] and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract. To the extent that there is no agreement, the disputed standard terms are "knocked out."

Textile Unlimited, Inc. v. A .. BMH and Company, Inc.

United States Court of Appeals, Ninth Circuit, 2001.
240 F.3d 781.

■ THOMAS, CIRCUIT JUDGE:

In this appeal, we consider, *inter alia,* the proper venue for a suit to enjoin an arbitration. Under the circumstances presented by this case, we conclude that the Federal Arbitration Act does not require venue in the contractually-designated arbitration locale.

I

Textile Unlimited, Inc. ("Textile") claims that A .. BMH and Company, Inc. ("A .. BMH") is, in the parlance of the industry, spinning a yarn by contending that the two companies had agreed to settle contract disputes by binding arbitration in Georgia. A .. BMH counters that Textile is warping the facts.

Over the course of ten months of this tangled affair, Textile bought goods from A .. BMH in approximately thirty-eight transactions. Each followed a similar pattern. Textile would send a purchase order to a broker in California containing the date, item number, item description, quantity ordered, and price. A .. BMH would respond with an invoice, followed by shipment of the yarn and an order acknowledgment. Both the invoice and the order acknowledgment contained a twist: additional terms tucked into the back of the invoice and the face of the acknowledgment, terms that had not adorned Textile's purchase order. Specifically, the A .. BMH documents provided:

> *Terms.* All sales of yarn by A .. BMH & Co., Inc. ("Seller") are governed by the terms and conditions below. Seller's willingness to sell yarn to you is conditioned on your acceptance of these Terms of Sale. If you do not accept these terms, you must notify Seller in writing within 24 hours of receiving Seller's Order Confirmation. If you accept delivery of Seller's yarn, you will be deemed to have accepted these Terms of Sale in full. You expressly agree that these Terms of Sale supersede any different terms and conditions contained in your purchase order or in any other agreement.
>
> . . .
>
> *Arbitration.* All disputes arising in connection with this agreement shall be settled in Atlanta, Georgia by binding arbitration conducted under the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator will not be permitted to award punitive damages with respect to any dispute. Judgment upon the award rendered may be entered, and enforcement sought, in any court having jurisdiction. The total costs of arbitration, including attorneys' fees, will be paid by the losing party.
>
> *Governing Law and Venue.* This transaction shall be governed by and construed in accordance with the laws of the State of Georgia. If any court action is brought to enforce the provisions of this agreement, venue shall lie exclusively in the Superior Court of Fulton County, Georgia. You expressly consent to personal jurisdiction in the Superior Court of Fulton County, Georgia, and waive the right to bring action in any other state or federal court.

Textile did not request any alterations. However, after receiving a shipment in September 1998, Textile refused to pay, alleging that the yarn was defective. A .. BMH submitted the matter to arbitration in Atlanta, Georgia. The American Arbitration Association ("AAA") notified both parties on January 10, 2000, that it had received the arbitration request.

Textile did not object to the arbitration within the time provided by AAA rules. Textile eventually protested, contending that the arbitration clause had not been woven into the contract. Textile also argued that the objection period should have been lengthened because the initial notice had been sent to an attorney no longer with its law firm. Textile reserved the right to challenge the jurisdiction of the AAA, and indicated that nothing in the letter should be deemed a waiver.

With arbitration looming, Textile filed an action on April 10, 2000 in the United States District Court for the Central District of California to enjoin the arbitration. Unruffled, the AAA Arbitrator found on May 5, 2000 that the case was arbitrable. On June 26, 2000, Textile moved for a stay of the arbitration pending in Georgia. On July 17, 2000, the district court preliminarily enjoined both the pending arbitration and A .. BMH from any further action regarding arbitration of the dispute in question. A .. BMH timely appealed the district court's order.

II

The district court correctly concluded that venue was proper in the Central District of California under 28 U.S.C. § 1391. Contrary to A .. BMH's arguments, nothing in the Federal Arbitration Act ("FAA" or "the Act"), 9 U.S.C. § 1 *et seq.*, requires that Textile's action to enjoin arbitration be brought in the district where the contract designated the arbitration to occur. [The court reviewed the judicial decisions interpreting the venue provisions of the Federal Arbitration Act.] * * *

In sum, the district court correctly determined that venue was proper in the Central District of California. * * * This result is consistent with the underpinnings of arbitration theory. One of the threads running through federal arbitration jurisprudence is the notion that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Communications Workers,* 475 U.S. 643, 648 (1986) (quoting *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574, 582 (1960)). Requiring a party to contest the very existence of an arbitration agreement in a forum dictated by the disputed arbitration clause would run counter to that fundamental principle.

III

The district court did not abuse its discretion in granting the preliminary injunction....

The district court found that Textile would suffer irreparable harm if the arbitration were not stayed, that the balance of hardships tipped in Textile's favor and that it was in the public interest to stay arbitration. These findings were not clearly erroneous, and A .. BMH does not contest them on appeal.

Thus, to obtain a preliminary injunction, Textile needed only to show that serious questions were raised. The district court determined that not only were serious questions raised, but that Textile had shown a probability of success on the merits. The district court did not err in that assessment.

A

Section 2207 of the California Commercial Code controls contract interpretation when the parties have exchanged conflicting forms.... It provides:

[The court quoted UCC 2–207 in full.]

Under § 2207(1), an acceptance will operate to create a contract even if additional or different terms are stated *unless* the acceptance is expressly conditioned on assent to the new terms. If a contract is created under § 2207(1), then § 2207(2) defines the terms of the contract.... However, if the acceptance is expressly conditioned on the offeror's assent to the new terms, the acceptance operates as a counteroffer. If the counteroffer is accepted, a contract exists and the additional terms become part of the contract.... To qualify as an acceptance under § 2207(1), an offeror must "give specific and unequivocal assent" to the supplemental terms. [The court relied upon Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440 (9th Cir. 1986), interpreting the Oregon enactment of UCC 2–207.] If the new provisos are not accepted, then no contract is formed. However, even when the parties' written expressions do not establish a binding agreement under § 2207(1), a contract may arise based upon their subsequent conduct pursuant to § 2207(3). *Id.*

A .. BMH argues that a contract including the arbitration clause was formed pursuant to § 2207(1) because the fine print provided that Textile was "deemed to have accepted these terms in full" if Textile did not respond in 24 hours. This contention is foreclosed ... because Textile did not "give specific and unequivocal assent" to the supplemental conditions. Thus, a contract containing the new terms that A .. BMH attempted to pin on Textile was not formed under § 2207(1).

Part of ... the rationale [in *Diamond Fruit Growers*, supra] was to avoid a rule which would allow one party to obtain "all of its terms simply because it fired the last shot in the exchange of forms." *Id.* at 1444. In short, modern commercial transactions conducted under the U.C.C. are not a game of tag or musical chairs. Rather, if the parties exchange incompatible forms, "all of the terms on which the parties' forms do not agree drop out, and the U.C.C. supplies the missing terms."

A .. BMH also claims that a contract formed under § 2207(1) because its acceptance was not expressly made conditional on Textile's assent to the additional or different terms. Thus, A .. BMH reasons, a contract was formed under § 2207(1) and we must turn to § 2207(2) to ascertain the contract terms. However, A .. BMH's assertion is belied by the plain words of its documents which provide that "Seller's willingness to sell yarn to you is conditioned on your acceptance of these Terms of Sale." Thus, A .. BMH's claim is unavailing.

B

Because no contract was formed under § 2207(1), our interpretation of the agreement must be guided by § 2207(3) which examines the conduct of the parties to determine whether a contract for sale has been established and the terms thereof. The parties do not dispute that through their actions, they formed a contract under § 2207(3).

The terms of an agreement formed pursuant to § 2207(3) are those terms upon which the parties expressly agreed, coupled with the standard "gap-filler" provisions of Article Two. The U.C.C. does not contain a "gap-filler" provision providing for arbitration. . . .

Under § 2207(3), the disputed additional items on which the parties do not agree simply "drop out" and are trimmed from the contract. . . . Thus, the supplemental terms proposed by A . . BMH, including the arbitration clause, do not festoon the contract between the parties.

C

[The court held that Textile did not waive its right to object to arbitration.]

* * *

IV

In sum, this action was properly venued in the Central District of California. The district court did not abuse its discretion in granting the preliminary injunction. To the contrary, the district court's reasoning was correct in all respects.

AFFIRMED.

NOTES

(1) The court concludes that no contract to arbitrate was made under UCC 2–207(1) and that the seller made a counteroffer. If the buyer accepted the goods without objection, isn't that an acceptance of the counteroffer with the arbitration clause? How did the court interpret UCC 2–207 to avoid this result? Do you see any support for that interpretation in the text or the comments?

(2) The parties had an extensive prior course of dealing, some 38 transactions. Is that relevant to deciding cases under UCC 2–207? In Deer Stags, Inc. v. Garrison Indus., 2000 WL 1800491 (S.D.N.Y.2000), the seller's definite acceptance under UCC 2–207(1) contained an additional term, an arbitration clause. The buyer accepted the goods without objection. The court held that under UCC 2–207(2), the arbitration clause was not material and became part of the contract. The court reasoned that since the parties had engaged in more than 50 transactions in the past with the same terms, there was no unfair surprise or hardship to the buyer to include the term. Is this a proper reading of the statute?

(3) Commentary upon UCC 2–207 is voluminous, much of it critical. See e.g. Daniel Keating, *Exploring the Battle of Forms in Action,* 98 Mich. L. Rev. 2678 (2000), and other articles in this Symposium. What do you think?

Comment: Arbitration Terms and the Battle of the Forms

In arbitration, the parties agree in writing to submit defined disputes, either existing or future, to independent third persons (arbitrators) for a final decision on the merits. The parties control what disputes are submitted, the selection of the arbitrators, and the procedures to be followed and are entitled to a fair hearing on the merits. Once the award is made, however, judicial review is limited: an award cannot be vacated because the arbitrators made errors of fact or law.

In the United States, there are three layers of arbitration law. The first is international arbitration, which is governed by the United Nations Convention on the Recognition and Enforcement of Foreign Awards (The New York Convention), as implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. sec. 201–208. The second is interstate arbitration, which is governed by Chapter 1 of the FAA, 9 U.S.C. sec. 1–16. The third is intrastate arbitration law, which is governed by the applicable state arbitration act (frequently the Uniform Arbitration Act, which has recently been revised). See generally Edward Brunet, Richard E. Speidel, Jean R. Sternlight, & Stephen J. Ware, Arbitration Law in America: A Critical Assessment 29–62 (Cambridge, 2006).

All three layers of arbitration law require, at a minimum, that the arbitration agreement be in a writing assented to (but not necessarily signed) by both parties. In the *Textile Unlimited* case, just considered, Chapter 1 of the FAA applied. Section 2 provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or controversy, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Because the FAA provides little guidance on when a "written provision" is contained in a contract or agreed to by the parties, resort to state law is necessary. In contracts for the sale of goods, that state law is UCC Article 2 and, in transactions like that in *Textile Unlimited*, the specific provision is UCC 2–207. Since the court held that the seller's written arbitration term was not included in the contract for sale, the conditions of FAA Section 2 were not satisfied and the buyer was entitled to an injunction against arbitration. If the written term were included in the contract, i.e., the buyer had expressly agreed to the arbitration term in the seller's form, the buyer would be bound to arbitrate and the seller could get both an order compelling arbitration under FAA sec. 4 and an order staying any litigation commenced by the buyer pending arbitration, FAA sec. 3.

Suppose the same facts except that the seller's place of business was Toronto, Canada and the buyer's place of business was in California. Two things change here: First, the international contract for sale is governed by

§ 2:207 – Additional Terms in Acceptance of 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 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 this Act.