

Sales of Goods - Battle of the Forms Under UCC and CISG A Practical Perspective

ACC of Western Pennsylvania

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Agenda

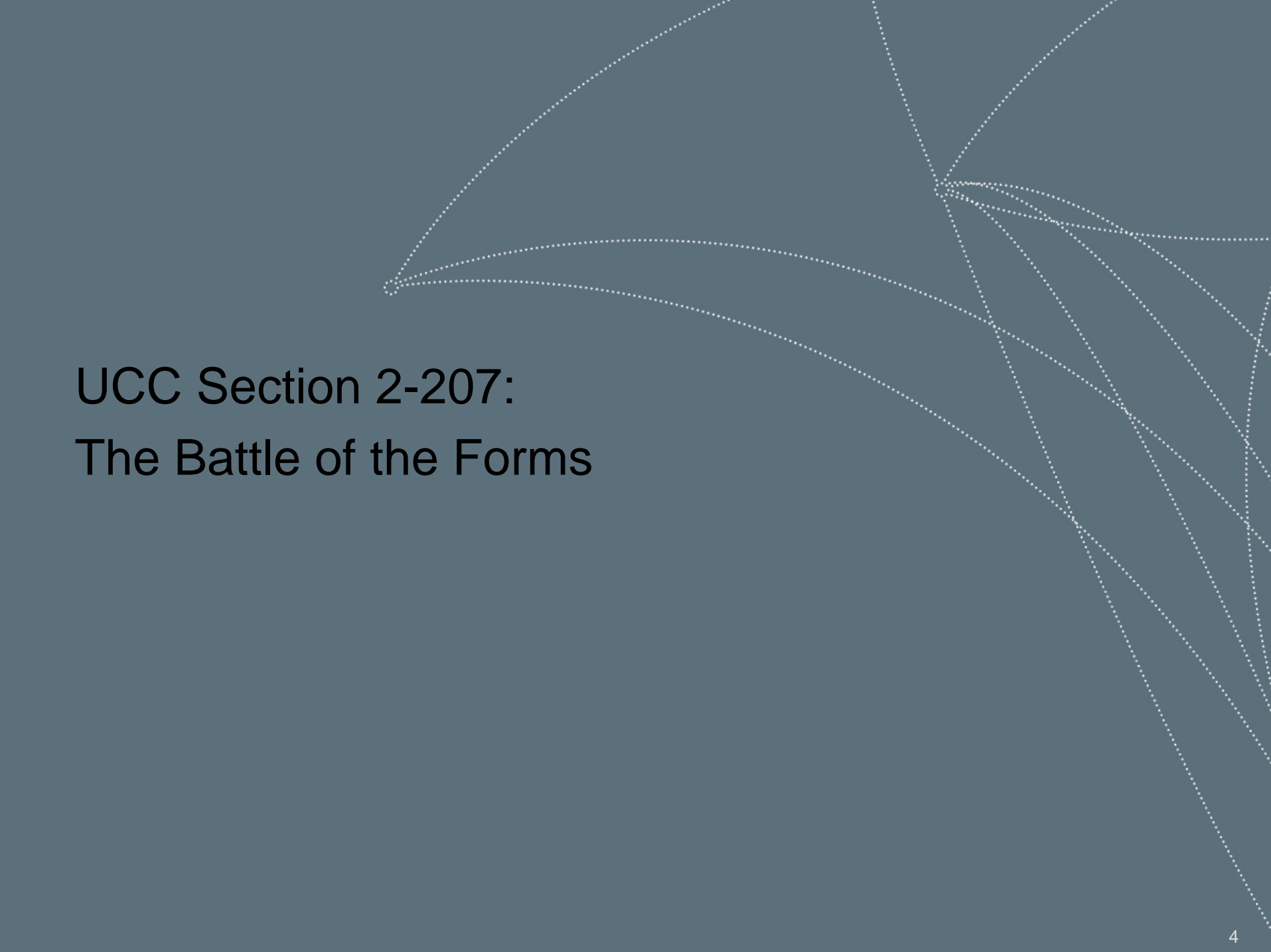
1. Introductions
 - UCC Basics
 - UCC Battle of the Forms
 - CISG Basics
 - CISG Battle of the Forms
 - INCOTERMS 2000
 - Conclusion



The Uniform Commercial Code

UCC Basics

- Been around for 50 years
- Uniform body of commercial law
- Applies to domestic (USA) sales of goods
 - Does not apply to services contracts
 - Does it apply to mixed service and goods contracts?
- Code is pro-Buyer by design



UCC Section 2-207: The Battle of the Forms

UCC Battle of the Forms

- Fairly consistent scenario:
 - Buyer issues the RFQ with its standard T&C's
 - Seller issues its quotation with its standard T&C's
 - Buyer and Seller negotiate and agree on main points like price, quantity, quality & time for delivery
 - Buyer issues a PO with its standard T&C's (typically Buyer asks Seller to sign the PO)

UCC Battle of the Forms

- Seller sends its Order Acknowledgment with its own standard T&C's (typically Seller asks Buyer to sign the Acknowledgment)
- Seller ships the goods and Buyer accepts shipment
- Something goes wrong (defective product, failure to pay, etc.)
- Dispute can not be resolved
- Need to know:
 1. Do I have a contract?
 2. If so, what are its terms?

UCC Battle of the Forms

- UCC Section 2-207 is the place to look no matter what jurisdiction you are in
- First question: Do we have a contract?
- 2-207(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.

UCC Battle of the Forms

- 2-207(2)
 - The ***additional*** terms are construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - The offer expressly limits acceptance to the terms of the offer,
 - They materially alter it, or
 - Notification of objection to them has already been given or is given within a reasonable time after notice of them is received

UCC Battle of the Forms

- Material Alterations:
 - Any change to price, quantity, quality, delivery
 - Warranty disclaimers
 - Limitations on liability
 - Dispute resolution
 - Arbitration
 - Choice of law
 - Forum selection
 - Attorneys' fees provisions

- Bottom line: most protections added by Seller's acknowledgment form will be deemed to be a "material alteration" and will not be part of the Contract by operation of 2-207(2)

UCC Battle of the Forms

- 2-207(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

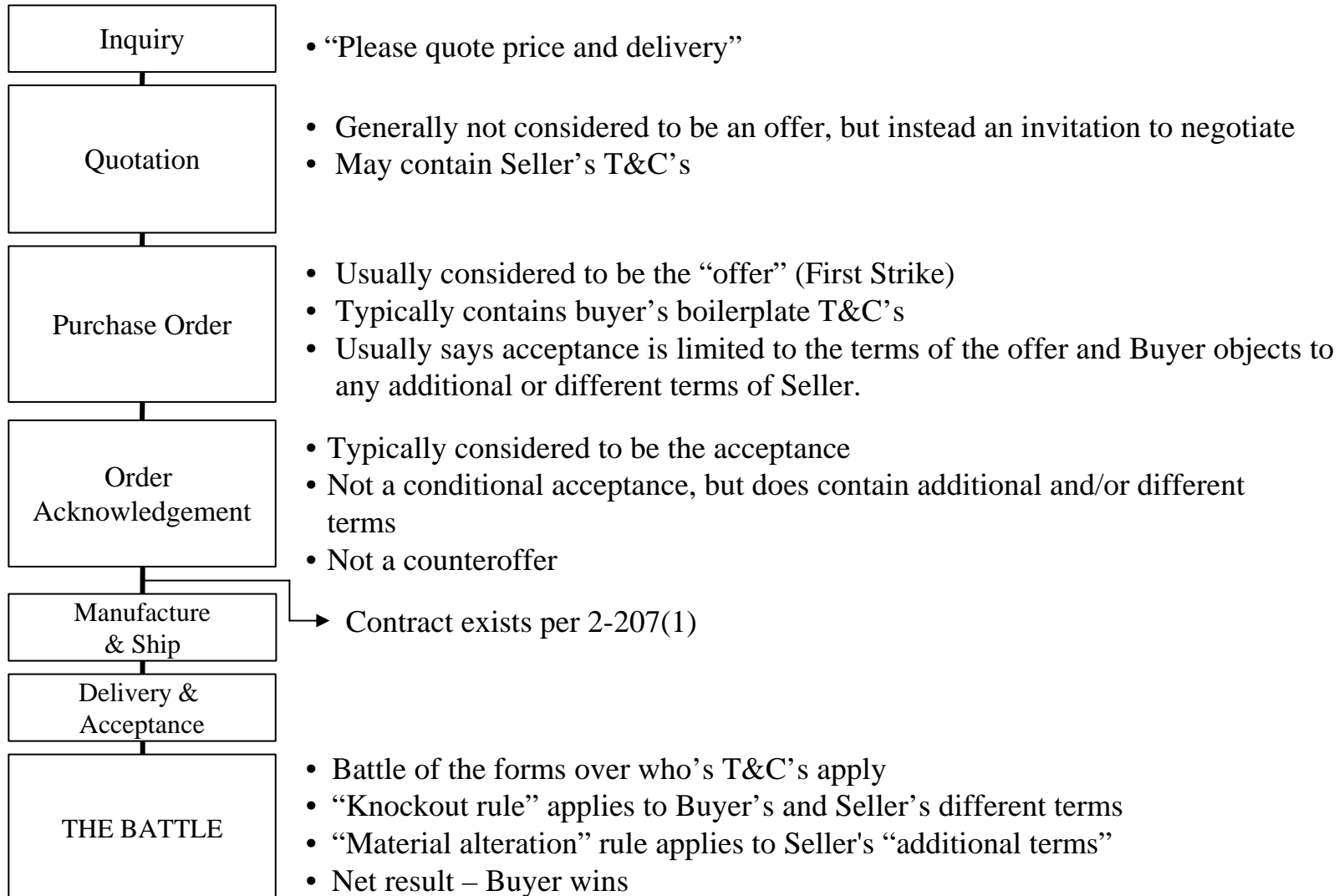
UCC Battle of the Forms

- Three possible outcomes in the exchange of forms:
 - Seller's form is treated as an "acceptance" and a contract exists on the writings; or
 - No contract on the writings because the Seller expressly conditions its acceptance on Buyer's acceptance of Seller's T&C's; or
 - Is there a contract on the writings when Buyer expressly conditions its offer on Seller's acceptance and Seller accepts with different terms and conditions?

If there is a contract on the writings:

- Terms are those that agree between the exchanged forms
 - “Additional” terms that are not material come in if not contradicted
 - “Material alterations” are not accepted
- Contradictory terms are “Knocked-out”
- Seller’s protective terms typically do not become part of the contract
- Buyer wins the battle of the forms

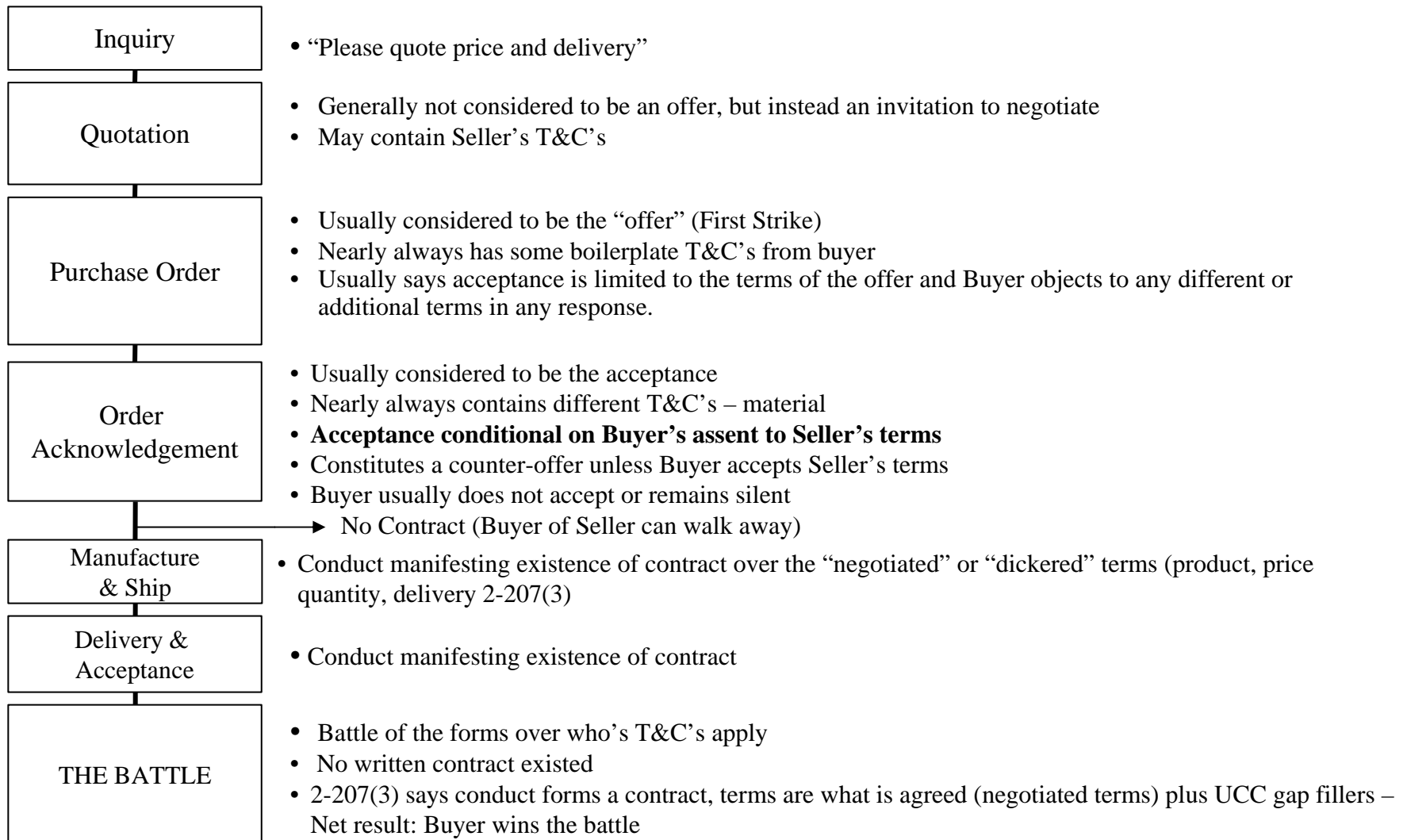
Typical Transaction – Seller’s acknowledgement is not a counteroffer



If there is no contract on the writings:

- Buyer and Seller can walk away from the deal if they want
- Seller ships and Buyer accepts shipment
 - A contract now exists by conduct per 2-207(3)
- Terms are the “dickered” ones and those in both forms that do not clash
- Remaining terms are supplied by pro-Buyer UCC “gap fillers”
 - Implied warranties of merchantability and fitness
 - No limit of liability for Seller
 - Consequential damages apply
 - 4 year statute of limitations
 - Full palette of Buyers remedies still in play
- Buyer wins the battle of the forms

Typical Transaction – Seller’s acknowledgement is a counteroffer



Buyer's Nuclear Weapon

ACCEPTANCE, TERMS AND CONDITIONS OF CONTRACT

Whether construed as an offer, acceptance or confirmation, these terms and conditions of purchase include all documents and exhibits attached hereto and all other terms incorporated by reference herein. This purchase order shall constitute the final, complete and exclusive statement of this contract and may not be modified or rescinded except by a written change order issued by the Buyer. If this purchase order constitutes an offer by the Buyer to purchase the goods and/or services specified upon the terms and conditions and at the price(s) and with the delivery date(s) specified herein, Seller shall indicate its acceptance of this order by verbal acceptance communicated to the Buyer, by written acceptance on the face of this purchase order received by the Buyer, by other written confirmation received by the Buyer, by commencing work on this purchase order in any manner, expressly conditioned on notice of such commencement of work received by the Buyer, or by the delivery of the goods or services within the time for such delivery as stated in this purchase order. Regardless of the manner or medium of acceptance time is of the essence. ***As an offer, this purchase order expressly limits acceptance to its terms and conditions, and notification of objection to any different or additional terms in any response to this offer from the Seller is hereby given.*** If this purchase order is construed as an acceptance of the Seller's offer, this acceptance is expressly conditioned on the offeror's assent to any additional or different terms contained in this purchase order. If this purchase order is construed as a confirmation of an existing contract, the parties agree that this purchase order constitutes the final, complete and exclusive terms and conditions of the contract between the parties. If the parties have otherwise completed a signed, written contract, the parties agree that the use of this purchase order to place orders for goods or services pursuant to such a contract shall be construed to supplement the terms of such written contract only to the extent that the terms and conditions of this purchase order are not inconsistent with such written contract. ***Regardless of its construction as an offer, acceptance, confirmation or use to place orders for goods or services pursuant to an earlier contract, this purchase order incorporates by reference all terms of the Uniform Commercial Code providing any protection for the Buyer, including, without limitation, all express and implied warranty protection and all Buyer's remedies under the Uniform Commercial Code.***

Seller's Options

- Knowing that Seller will likely lose the Battle of the Forms, what can the savvy Seller do to protect itself?
 - If leverage in the market is favorable, force Buyer to accept and sign Seller's standard T&C's
 - If Buyer has some power too, try and negotiate a "frame agreement" that incorporates both parties' key T&C's
 - For Seller, the key protections are:
 - Payment provisions
 - Disclaimer of implied warranties
 - Limitation on remedy to repair/replace at Seller's option
 - Limit on total liability to a % of the contract price
 - Disclaimer of all consequential damages
 - Dispute resolution (venue, choice of law)

Seller's Options

- Other Options:
 - Accept Buyers T&C's as a whole and negotiate with Buyer to add Seller's key protective T&C's
 - Seller should not sign Buyer's form
 - Absent the above, proceed on a "bet the company" basis on risky or high value sales
 - Walk away from the deal

UCC Battle of the Forms - Summary

- Intent of 2-207 was to get away from the harsh “mirror image” rule
- End product is a rule that transfers bargaining power from the Seller to the Buyer
- More like the “first shot” rule; the party who sends the first form, typically the PO, is the “master of the offer” and binds the subsequent transaction
- If the deal breaks down, a contract may be formed by conduct with UCC gap fillers to fill holes
- Gap fillers are pro-Buyer and allocate risk to Seller
- With proper wording and sound practices, the Buyer should always win the UCC Battle of the Forms
- Seller can only win by having market power to force Buyer to sign Seller’s T&C’s or by getting Buyer to modify Buyer’s standard T&C’s to include Seller’s key protections
- Purchasing and sales staff must be trained to recognize the battle and take steps to protect the company

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UN Convention on the International Sale of goods

CISG Basics

- The UN Convention on the International Sale of Goods – also known as the “CISG”
- It is a uniform body of sales law for export sales
- Developed by UNCITRAL
 - UN Commission on International Trade Law
 - Initially agreed in Vienna in 1980
 - Came into force on 1 January 1988 after the first 10 nations ratified it
- Most lawyers are unaware of its existence
- It is not taught in law school
- It is the effective sales law of NAFTA

CISG Basics

- CISG applies between parties in different countries where those countries have ratified the CISG
 - As of August 2010 – 76 countries have ratified the CISG constituting
 - It covers about 80 % of world trade
 - Major absentees are Brazil, India, England and South Africa
- United States adopted it in 1989

CISG Basics

- CISG is the law of the land in the USA for most export contracts
 - It is a treaty of the United States
 - It trumps any state law of sales (UCC) via Supremacy Clause of the US Constitution
- Likely will not apply if the other party is in a non-signatory country (Article 95 Declaration)
- Parties can opt out of the CISG by agreement
- If parties opt out or the counter-party is in a non-signatory country, then the contract will be governed by the domestic law applicable according to international conflict of laws principles

The background features several white dotted lines that form a complex, abstract pattern. These lines are composed of small white dots and create a sense of movement and depth, with some lines curving and others intersecting. The overall effect is a modern, minimalist aesthetic.

CISG Battle of the Forms

CISG – Article 19

- Article 19 addresses the Battle of the Forms in the CISG
 - Unlike the UCC, CISG is considered pro-Seller
- Article 19 (1):
 - A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is considered to be a rejection of the offer and constitutes a counter-offer
 - Traditional “Mirror Image” Rule

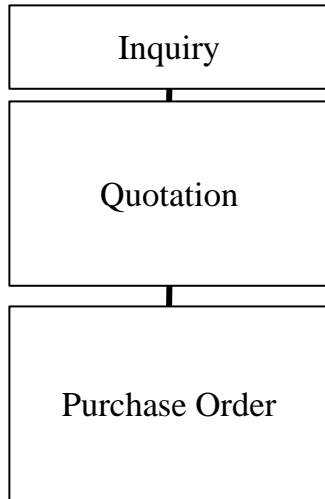
CISG – Article 19

- Article 19 (2):
 - However, a reply to an offer which purports to be an acceptance, but contains **additional or different** terms which do not materially alter the terms of the offer, constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy
 - An attempt to “soften” the “Mirror Image” Rule
 - Note use of words “additional or different” – picked up on the problems of UCC 2-207 (2)

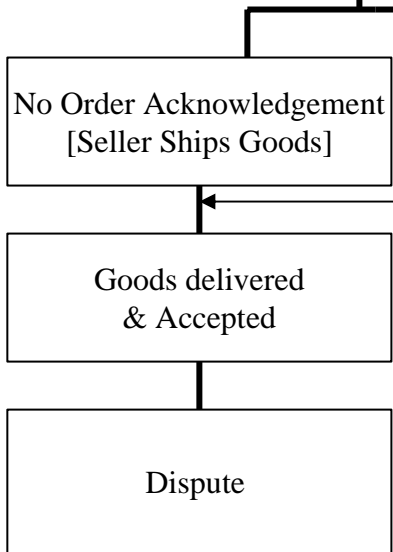
CISG – Article 19

- Article 19 (3):
 - Additional or different terms relating to, among other things, the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially
 - Pretty broad definition of “materiality”
 - Most terms a Seller wants will be considered material alterations
 - So, the “softening” effect of Article 19 (2) is restricted to the point of being meaningless

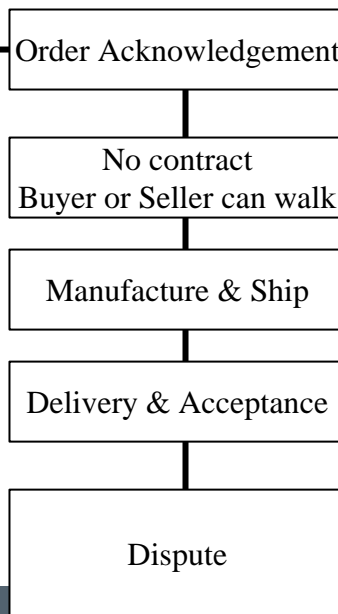
International Sales of Goods



- “Please quote price and delivery”
- Generally not considered to be an offer, but instead an invitation to negotiate
- May contain Seller’s T&C’s
- Usually considered to be the offer
- Typically contains Buyer’s T&C’s
- Usually says acceptance is limited to the terms of the offer and Buyer objects to any additional or different terms of Seller.



- Contract formed on Buyer’s terms
- Seller accepts Buyer’s offer by shipping on Buyer’s terms
- Buyer wins battle of the forms



- Contains new and different T&C’s
- Article 19 of CISG makes this a counteroffer
- Buyer accepts Seller’s counteroffer and T&C’s when Buyer accepts the goods
- Contract formed on Seller’s Terms
- Seller wins battle of forms - Last shot rule

CISG – Battle of the Forms

- Typical form exchange scenario plays out between international Buyers and Sellers
- Because most of Seller's additional terms are "material", the Seller's acceptance will most often be deemed to be a counter-offer
- Since most Buyers do not accept the Seller's terms, there is most often no contract based on the writings
- CISG permits oral contracts to be enforced
- Subsequent exchange of standard forms are treated as attempts to modify an existing contract

CISG – Battle of the Forms

- If the contract has been completed, the last form exchanged usually controls – Seller is more likely to win under the CISG as its form is typically the last one sent
- In practice, both parties who are savvy try to get in the “last shot”. They send a last set of T&C’s, sometimes with the invoice or the shipping papers (for Seller) or with payment (for Buyer)
- If the contract was not completed, there is no contract by conduct savings clause. Courts are to apply the “general principles of CISG (which do not exist) to see if a contract existed and what were its terms
- Net result is that most courts will apply the law of the nation in which they sit to determine who wins
- Trend is to use “knock-out” rule (Germany and France)
- For sales of big ticket items or where there is a substantial risk if something goes wrong, Buyers and Sellers need to be careful

CISG – Battle of the Forms

- If the contract will take a long time to perform (product takes months or years to manufacture and ship) or the cost is substantial, then the Seller needs to be mindful that there may be no contract in place and Buyer can back out until it accepts the shipment

Pro-Buyer “Opt Out” and Dispute Resolution Clause

The parties hereby agree to exclude application of the UN Convention on the International Sale of Goods (CISG) to any contract made pursuant to this purchase order. Any dispute arising under this contract will be governed by the law of the Commonwealth of Pennsylvania, United States of America, including the Pennsylvania statutes of limitations, but excluding conflict of laws provisions. Any dispute arising under this contract shall be adjudicated exclusively in a Commonwealth of Pennsylvania or United States Federal Court located in Pittsburgh, Pennsylvania. The Seller waives any and all objections that it might otherwise have as to personal jurisdiction and venue in these exclusive tribunals.

CISG - Summary Observations on Article 19

- Article 19 is not a pure common-law “Mirror Image” counter-offer rule nor does it produce the broad “expression of acceptance” result of UCC 2-207(1)
- It tolerates in the counter-offer a quantum of difference in the “additional or different” terms that is somewhere between the rigidity of the pure “mirror image” counter-offer rule and the flexibility of the “expression of acceptance” rule
- In practice, it is a “last shot” rule and is generally thought of as being pro-Seller
- Drafting tip:
 - For Buyers – opt out of CISG
 - For Sellers – silence, CISG will apply and most Buyers don’t know it

INCOTERMS 2000

INCOTERMS 2000

- Official ICC rules for interpretation of trade terms in international trade
- Reference to Incoterms 2000 in a sales contract defines clearly the parties' respective obligations for:
 - Method of delivery, loading and unloading responsibilities
 - EXW, FOB, CIF, etc.
 - Insurance and risk of loss
 - Customs clearance and paperwork

UCC v. CISG – Conclusion

UCC v. CISG – Conclusion

■ UCC

- State law adopted by legislatures
- First Shot Rule
- Pro Buyer
- Willingness to find that a contract is formed
- Conduct may form a contract
- No oral contracts
- Generally accepts form provisions not objected to
- Industry custom not permitted to alter the terms of the contract

■ CISG

- Treaty trumps State laws
- Last Shot Rule
- Pro Seller
- Focus is on the mutual intent of the parties
- Contract by conduct not officially recognized
- Embraces oral contracts
- Generally ignores form provisions not agreed to
- Usage in trade is the gap filler and can be used to alter the terms of the contract
- Parole evidence permitted to alter the contract terms

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