

# Contracts

Number  
of MBE  
Questions:  
25

- Formation of contracts: approx. 6–7 questions
- Performance, breach, and discharge: approx. 6–7 questions
- Defenses to contract enforceability: 3–4 questions
- Parol evidence and interpretation: 3–4 questions
- Contract remedies: 3–4 questions
- Third-party rights: 3–4 questions
- UCC Article 2 and revised Article 1: approx. 6–7 questions



## II. Contract Formation

### 1) OFFER

[OMITTED FROM SAMPLE]

### 2) ACCEPTANCE

a) Definition: manifestation of assent to the offer.

i) Note: **Objective** (rather than subjective) assent is necessary. Courts look at the acceptance from the viewpoint of a reasonable person.

(1) *Ex.: Mary makes an offer to wash Betsy's car for \$20. Betsy agrees to pay her the \$20 (but was secretly only joking). Is an offer and acceptance present?*

b) Effectiveness of acceptance

i) Acceptance is effective as soon as it is out of the offeree's possession (the "mailbox rule"). Thus, an acceptance sent through the mail is effective when it is **sent**. This is regardless of whether it ever arrives, as long as it was properly addressed and mailed.

(1) Exceptions:

(a) **Option contract:** acceptance is effective upon receipt.

(b) Special rules when both an **acceptance and rejection** are sent:

(i) *Rejection mailed first, then acceptance is mailed:* whichever one is received first by the offeror is the effective communication.

(ii) *Acceptance mailed first, then rejection sent:* the mailbox rule applies (acceptance is effective) unless the offeror relied on the letter of rejection

before the acceptance was received—then the offeree will be estopped from enforcing the contract.

- c) Methods of accepting an offer
  - i) Who can accept an offer?
    - (1) General rule: only the person to whom the offer is made may accept the offer.
    - (2) Exception: the power to accept an option contract can be assigned unless otherwise stated.
  - ii) How is an offer accepted?
    - (1) The offeror can mandate the method of acceptance: “Offeror is master of his offer.”
      - (a) However, if it is unclear whether the offer “suggests” a way to accept or proscribes the manner to accept, it will be treated as a suggestion and the offeree can accept in any manner that is reasonable under the circumstances.
        - (i) *Ex.: The offeror can say: “The only way to accept this offer is by telephone” (in which case a written acceptance would not be sufficient). However, if the offeror said, “Call me if you want to accept my offer,” a written acceptance likely would be sufficient as calling would be viewed as a suggestion rather than a mandate.*
    - (2) Unilateral contracts (rewards, prizes, or the offer expressly states the only method to accept is full performance)—full performance is the only method of acceptance.
    - (3) Bilateral contracts can be accepted by a promise or beginning performance (“implied promise”).
      - (a) If an offeree begins performance, he has accepted the offer and must finish performing or he is breaching. (Note how this is different from unilateral contracts.)

**Ex.: A makes B an offer to landscape A’s front yard for \$500.**

What is the effect of...	UNILATERAL	BILATERAL
<b>B buys supplies</b>	2	3
<b>B begins to landscape</b>	4	5
<b>B stops landscaping when he is 50% done</b>	6	7
<b>Can A tell B to stop when he is 50% done?</b>	8	9
<b>Substantial performance (B is 95% of the way done)</b>	10	11
<b>Full performance (B finishes the job)</b>	12	13

- i) A note on silence as acceptance: Silence is not generally acceptance. However, watch for prior dealings or circumstances that make it reasonable to believe that the offeree’s silence constitutes acceptance (e.g., if the offeree takes the benefit of offered services with reasonable opportunity to reject them and knows they were offered with the expectation of compensation).
- ii) Special rules for the UCC seller of goods



- (1) The seller of goods can accept an offer by:
  - (a) **promising to ship** the goods (“promising to perform”), or
  - (b) **shipping the goods** (“beginning performance”).
    - (i) Note: if the seller does not make any promises but ships nonconforming goods, this constitutes an **acceptance and a breach**.
    - (ii) Note: If the seller seasonably notifies the buyer that he is sending the nonconforming goods as an “accommodation” before accepting the offer, that is a **counteroffer**. The buyer does not have to accept the accommodation but cannot sue for breach.

1. *Ex.: Sandra, a barista that owns her own coffee shop, frequently buys coffee from Ted’s Coffee Estate. On January 1, Sandra sends Ted an offer saying, “Ted, I would like to order 1,000 bags of the Costa Rican coffee for 5 dollars a bag.” Ted writes back on January 2<sup>nd</sup> saying, “Sure thing. Will have them out next week. /s/ Ted.” The next week, Ted realizes that an incompetent employee sold 200 of the bags to a different customer. So, on January 10<sup>th</sup>, Ted ships 800 bags of Costa Rican coffee and 200 bags of Panamanian coffee to Sandra with a note saying, “Dear Sandra, I ran out of the Costa Rican coffee, thus I sent you 800 bags of Costa Rican coffee and 200 bags of Panamanian coffee—worth 6 dollars a bag—as an accommodation. /s/ Ted.” On January 12<sup>th</sup>, the coffee beans arrive. Sandra rejects all of the coffee beans and sues Ted for breach. Who wins and why? Please provide a detailed explanation.*

---



---



---

.14

d) **Acceptance with different or additional terms**

i) **Common law: mirror-image rule** (also mentioned above)

- (1) The acceptance must be the mirror-image of the offer or it operates as a rejection. If there are additional or different terms, the “acceptance” is actually a counteroffer and no contract is formed by the papers alone.
- (2) Last shot rule: if the parties proceed to act like a contract was formed, look to see which party sent the last piece of paper before performance to determine what the terms are.

ii) **UCC: battle of the forms 2-207**

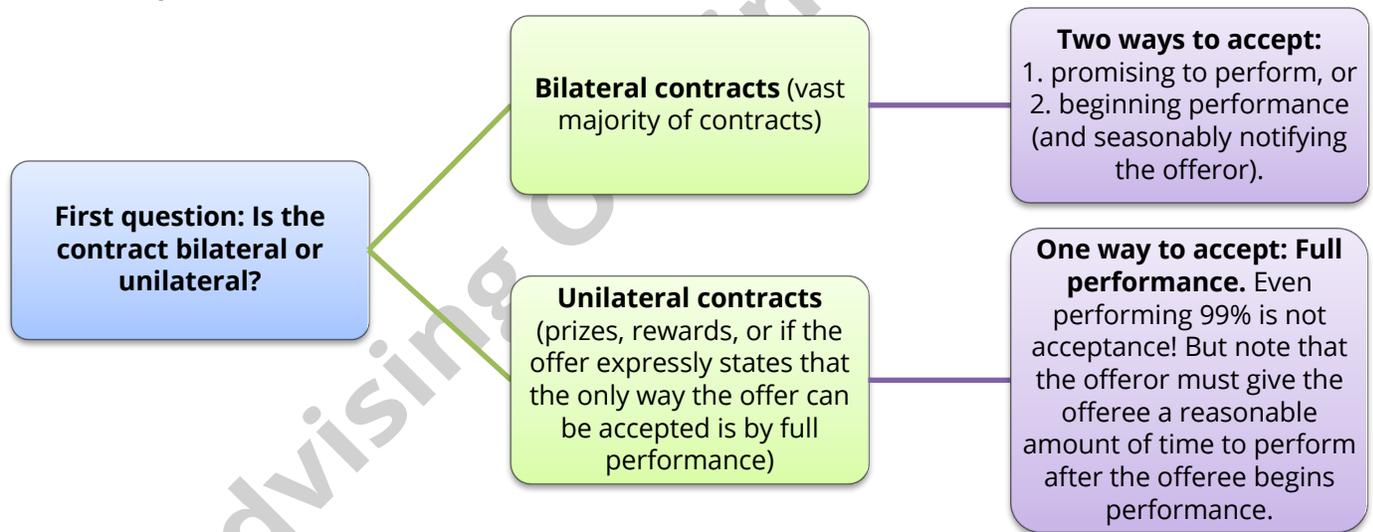
(1) **Acceptance with additional terms**

- (a) Unlike common law, there is no mirror-image rule, and a definite and seasonable acceptance that contains different or additional terms will **still constitute an acceptance unless the “acceptance” says that acceptance is expressly made conditional on assent to the additional or different terms**.
  - (i) However, if the parties still act like a contract occurs (even though the writings do not establish a contract—e.g., the seller sends the goods and the buyer pays for them), the terms that govern are the terms that **both the writings agree upon** and **gap fillers** by the UCC (discussed further below).



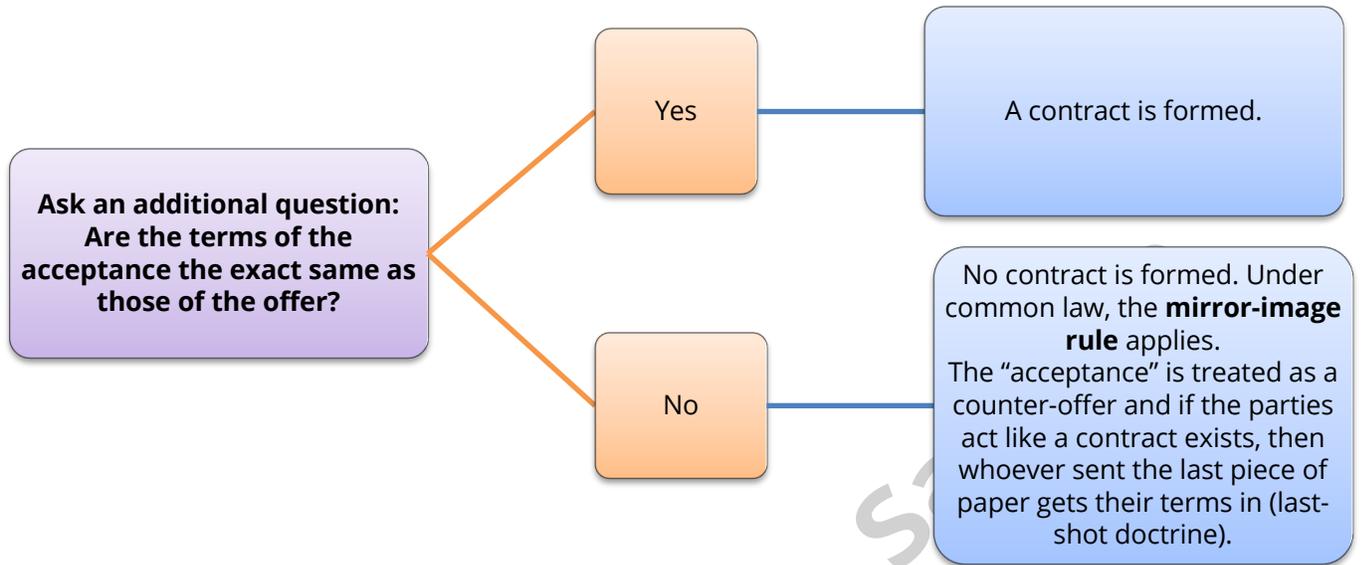
- (b) Assuming there is no “expressly conditional” language in the acceptance, the additional terms become part of the contract if both parties are **merchants**, unless:
    - (i) the offer **expressly limits acceptance** to the terms of the offer,
    - (ii) the additional terms “**materially alter**” the contract, or
    - (iii) the **offeror has already objected** or objects within a reasonable time after receiving the terms.
  - (c) Otherwise, the additional terms are mere “proposals” for addition, which must be separately accepted by the other party.
- (2) **Acceptance with different terms**
- (a) A few approaches:
    - (i) Majority rule: knockout rule—courts will “knock out” any different terms and then use the default terms (the “gap fillers” of the UCC) to fill in the gaps.
    - (ii) Minority rule: treat different terms the same as additional terms (see above).

Charts that illustrate acceptance  
How to accept under common law

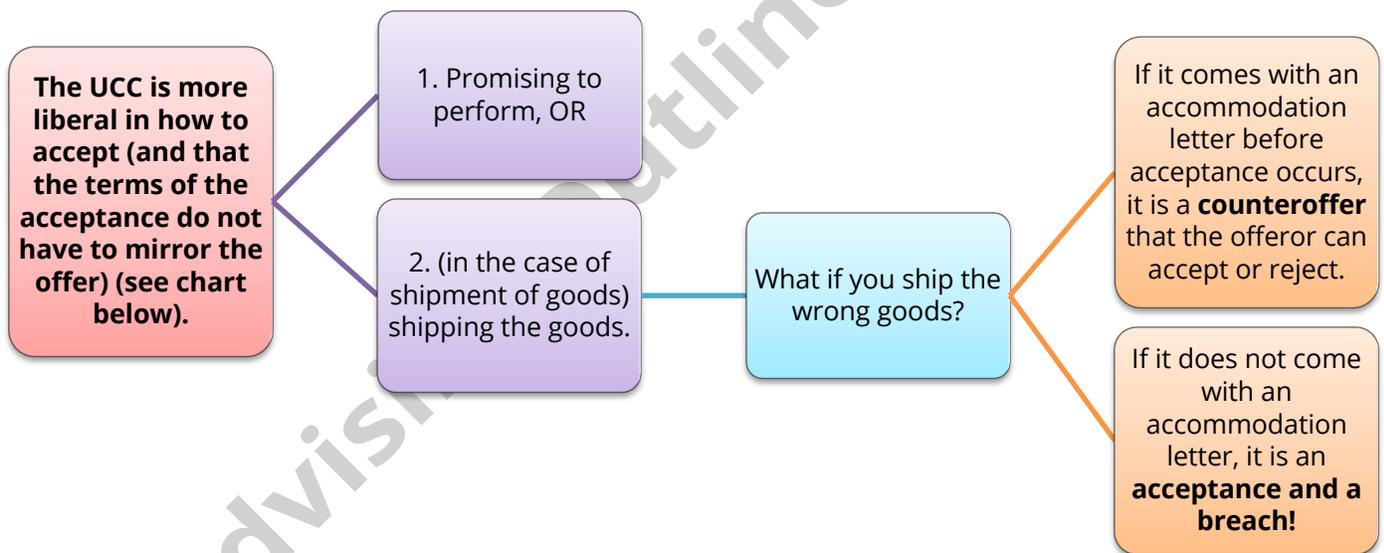




**Acceptance by writing under common law (also summarized in chart below)**

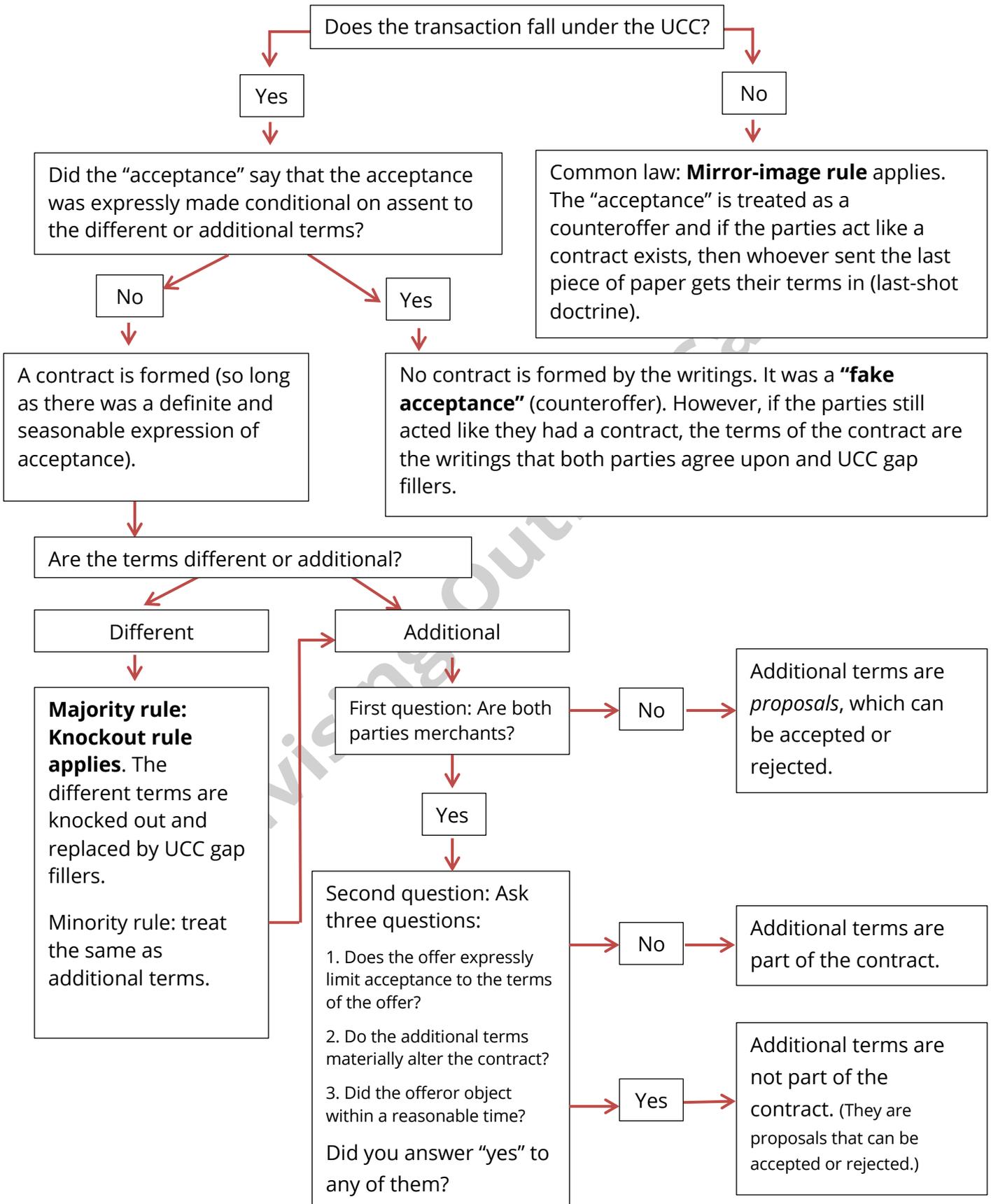


**How to accept under the UCC**





### Different or Additional Terms in the Acceptance or Confirmation





[REST OF OUTLINE OMITTED FROM SAMPLE]



## Answers

---

<sup>1</sup> Yes, the situation is looked at objectively.

<sup>2</sup> Nothing.

<sup>3</sup> Nothing.

<sup>4</sup> Option contract.

<sup>5</sup> Acceptance.

<sup>6</sup> Nothing (and no breach).

<sup>7</sup> Breach.

<sup>8</sup> No, he cannot revoke.

<sup>9</sup> Breach.

<sup>10</sup> No acceptance.

<sup>11</sup> Substantial performance so a duty arises in other to perform

<sup>12</sup> Acceptance.

<sup>13</sup> Duty is discharged.

<sup>14</sup> Under the UCC, one can accept an offer to buy goods with either a promise or a shipment of goods. A shipment of nonconforming goods is an acceptance and a breach unless the seller seasonably notifies the buyer that the shipment of nonconforming goods is offered only as an accommodation. In the shipment-of-non-conforming-goods-with-letter-as-accommodation-scenario, the buyer may reject the accommodation but if he does, the seller is not in breach. Indeed, the shipment of nonconforming goods is viewed as a counteroffer rather than an acceptance. However, in this case the seller did not accept by shipment. Instead, the seller accepted by letter. Thus, this is not a typical "acceptance by shipment" case. Since the seller already accepted by letter, it was obliged to send conforming goods to the buyer. By not doing so, the seller was in breach and the buyer can sue.