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Firm Offers Under the UCC and the CISG

Henry Mather

In the sale of goods context, offerors have usually not chosen to make their offers irrevocable. In some situations, however, an irrevocable or firm offer makes good sense. If the offeree would have to spend substantial time and money investigating the proposed deal, he will be unlikely to incur the expense of such an investigation if the offer can be revoked at any moment; an irrevocable offer makes him more willing to undertake the investigation and thus enhances the likelihood of acceptance. If the offeror has identified a particular person as her preferred trading partner or the person most likely to accept her terms, a firm offer to that person will flatter him with what appears to be a first option; he will thus be more likely to consider the offer seriously and accept it.

We can expect that in the future, firm offers to buy or sell goods will become ever more frequent. There are at least two good reasons for such an expectation. First, the increasing technological complexity and product differentiation of the goods being sold will more often require offerees to undertake costly investigations and thus lead to a greater number of firm offers. Second, trade in goods becomes increasingly global, merchants will more often be searching for trading partners in distant and unfamiliar markets. If an Ohio merchant, for example, has little information about potential trading partners in such a market, but has been able to identify one company with a good reputation for competence and dependability, the Ohio merchant will likely have a strong preference for that company and send it a firm offer, rather than incur the expenses of investigating other companies.

This article will examine the firm offer rules in the present Uniform Commercial Code (“UCC”), the proposed revision of UCC Article 2, and the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). With respect to each of these rules, we will seek answers to four questions: (1) Must the

offer be in writing in order to be irrevocable? (2) What limits are imposed on the period of irrevocability? (3) What kind of assurance of irrevocability is required? (4) If the offer does not meet the rule's formal requirements, might the offer nonetheless become irrevocable due to the offeree's reliance? We will also evaluate the firm offer rule in the proposed revision of UCC Article 2 and consider the propriety of nonuniform enactments. Finally, we will try to develop some standard terms that could be used in drafting offers. Throughout this article, we will assume that both parties are merchants.

I. The Present UCC Section 2-205

In the present UCC, the firm offer rule is found in section 2-205. Before looking at this section, however, we should recall its historical background.

A. *Historical Background*

In American contract law, the general rule has been that an offer is revocable until it is accepted.¹ Even if the offeror promises not to revoke, this promise was traditionally regarded as legally ineffective in the absence of consideration.²

American courts have long recognized that if the offeror promises not to revoke the offer before a specified time and receives consideration for this promise, an option contract is formed and the offer is irrevocable until the specified time.³ Although such option contracts have often been used as preludes to contracts for the sale of real estate, buyers and sellers of goods have usually not been willing to take the extra step of forming an option contract before forming a contract for the sale of goods.

Under the *Restatement (First) of Contracts*, an offer for a unilateral contract becomes irrevocable when the offeree began the requested performance.⁴ This rule applied only if the offer clearly

1. See, e.g., RESTATEMENT (FIRST) OF CONTRACTS § 35(1) (1932) (stating that an offer may be terminated by the offeror's revocation, except as stated in §§ 45-47); E. ALLAN FARNSWORTH, CONTRACTS § 3.17, at 158 (3d ed. 1999).

2. See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2.25(b), at 113 (4th ed. 1998); FARNSWORTH, *supra* note 1, § 3.23, at 180.

3. See, e.g., RESTATEMENT (FIRST) OF CONTRACTS § 46 (1932); FARNSWORTH, *supra* note 1, § 3.23, at 180-82. In this article, the term "option contract" refers to the contract formed when consideration is exchanged for a promise not to revoke an offer.

4. See, e.g., RESTATEMENT (FIRST) OF CONTRACTS § 45, § 45 cmts. a, b (1932).

invited acceptance by performance and not by return promise.⁵ In the sale of goods context, offers seldom indicate unequivocally that acceptance can be made only by performance; thus, the *Restatement (First)* part performance rule was seldom available. Even when it was applicable it made the offer irrevocable only when the offeree actually began performance or tendered a beginning of performance, as opposed to merely preparing to perform.⁶

The *Restatement (First) of Contracts* also contained a promissory estoppel doctrine stating that the promisee's reliance on a promise could make the promise enforceable despite the lack of consideration.⁷ Could an offeror's promise not to revoke his offer be enforced under this doctrine? Section 35 provided that an offer could be terminated by the offeror's revocation, except as stated in sections 45 through 47;⁸ the promissory estoppel doctrine was contained in section 90, however.⁹ Further doubts about the usefulness of promissory estoppel as a device to make offers irrevocable were raised when *James Baird Co. v. Gimbel Bros., Inc.*¹⁰ was decided in 1933, one year after the publication of the *Restatement (First)*. In *Baird*, the court held that the section 90 promissory estoppel doctrine could not be applied to an offer for a commercial exchange if the offer lacked a promise not to revoke.¹¹ The court left open the question of whether a promise not to revoke could be enforced by way of promissory estoppel, but hinted that its answer would be in the negative.¹²

In the 1940s and 1950s, however, a number of American courts suggested that the offeree's reliance on an offer could make the offer irrevocable under the promissory estoppel doctrine, but did not make it clear whether there had to be an express promise not to revoke.¹³ This issue was given a rather innovative resolution in the

5. See *id* § 45, § 45 cmt. c, § 31.

6. See *id* § 45 cmt. a.

7. See *id* § 90.

8. See *id* § 35(1).

9. See RESTATEMENT (FIRST) OF CONTRACTS § 90.

10. 64 F.2d 344 (2d Cir. 1933) (involving subcontractor's offer to sell linoleum to a potential general contractor).

11. See *id.* at 346.

12. See *id* (noting that although promissory estoppel might apply, the decisions are otherwise).

13. See *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654, 661 (7th Cir. 1941) (dictum) (rejecting *Baird* and indicating that the fact that a transaction would be a commercial sale of goods would not preclude the use of promissory estoppel); *Kucera v. Kavan*, 84 N.W.2d 207, 210 (Neb. 1957) (dictum) (indicating that an option contract offer to sell an interest in land would also be irrevocable under section 90 of the *Restatement (First)*; *Northwestern Eng'g Co. v. Ellerman*,

landmark case, *Drennan v. Star Paving Co.*,¹⁴ decided by the California Supreme Court in 1958. In *Drennan* the court held that even if there was no explicit promise not to revoke, the foreseeability of the offeree's reliance on an offer created an implied promise by the offeror not to revoke: If this implied promise lacked consideration, it could be enforced under the promissory estoppel doctrine, and the offer could thus be rendered irrevocable.¹⁵

The *Drennan* court indicated, however, that the offeree's reliance on an offer make the offer irrevocable only if that reliance was detrimental to the offeree, foreseeable to the offeror, and reasonable on the part of the offeree.¹⁶ These requirements are easily met when, as in *Drennan*, the offeror is a subcontractor who anticipates that his offer might be relied upon by the offeree general contractor when she makes her own bid to the owner of the construction site. In many sale of goods cases, however, it would be very difficult for the offeree to prove that these requirements were satisfied. Promissory estoppel has therefore had somewhat limited usefulness in the sale of goods context.

As this brief historical survey indicates, any legal rule making offers irrevocable when they lack both consideration and detrimental reliance would be a radical departure from traditional American contract law. The UCC provided just such a rule for sales of goods.

B. *The Firm Offer Rule*

The 1962 Official Text of the UCC, enacted as statutory law in most states, includes a firm offer rule in section 2-205.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term

10 N.W.2d 879, 884 (S.D. 1943) (rejecting *Baird* reasoning and holding that a subcontractor's offer to construct a sewer system was irrevocable under section 90 the offeror did not explicitly promise not to revoke).

14. 333 P.2d 757 (Cal. 1958) (involving subcontractor's bid offer to do paving work for a general contractor).

15. *See id.* at 760.

16. *See id.* at 760.

of assurance on a form supplied by the offeree must be separately signed by the offeror.¹⁷

C. *Must the Offer Be in Writing?*

Section 2-205 explicitly requires that the offer be in writing.¹⁸ Furthermore, the written offer must be signed.¹⁹ The official comments indicate that although section 2-205 was intended to modify the traditional rule requiring consideration, the purpose was to give effect to only *deliberate* intentions to make an irrevocable offer, hence the requirement of a signed writing.²⁰

D. *What Limits Are Imposed on the Period of Irrevocability?*

Section 2-205 imposes an outside limit of three months on the period of irrevocability. Thus, if an offer stated that it would be irrevocable for six months, section 2-205 would make it irrevocable for only three months.²¹ To make such an offer irrevocable for six months the offeree would have to furnish consideration for the offer.²² Of course, if an offer states that it will be irrevocable for two weeks the period of irrevocability will last only two weeks.

E. *What Kind of Assurance of Irrevocability Is Required?*

Section 2-205 requires that the written offer give an “assurance that it will be held open.” This probably means that the offer must contain a written assurance (a promise) not to revoke. But what of language is sufficient? I am unable to find any judicial decision that provides helpful guidance here.

17. U.C.C. § 2-205 (2000). The term “merchant” is defined in *id.* § 2-104(1). In applying section 2.205, we should regard as a merchant any person acting within the scope of her business. *See id.* § 2-104 cmt. 2.

18. The term “writing” is defined in *id.* § 1-201(46).

19. The term “signed” is defined in *id.* § 1-201(39) and further explained in § 1-201 cmt. 39.

20. *See id.* § 2-205 cmts. 1-2.

21. When does the three-month period of irrevocability begin to run? When the offer is sent or when it is received? Presumably, when it is received. American case law generally regards an offer as not becoming effective until it is received by the offeree. *See, e.g.,* E. ALLAN FARNSWORTH, *CONTRACTS* § 3.10, at 134 (3d ed. 1999). Until an offer has become effective, it can be “withdrawn” but cannot be “revoked.” For the distinction between withdrawal and revocation, *see id.* § 3.17, at 157.

22. If the promise not to revoke is supported by consideration, the period of irrevocability may continue for as long as the parties specify; the section 2-205 rule deals only with offers that are not supported by consideration. *See* U.C.C. § 2.205 cmt. 3 (2000).

Language stating that “this offer will expire on June 1” would usually not suffice. It would normally be interpreted as merely establishing an expiration date for the offer, rather than a promise not to revoke. What about language stating that “this offer will be open until June 1”? This might be interpreted as an assurance that the offer will remain available for acceptance until June 1 (will not be revoked before June 1), but it might also be interpreted as merely stating that the offer will not expire until June 1. Language stating that “this offer will be good until June 1” is equally ambiguous. What if the offer states that it “will be held open until June 1”? Most offerees could reasonably interpret this as an assurance by the offeror that he will not revoke before June 1. The phrase “will be held open” suggests that during the stated period, the offeror will not take positive action to kill the offer, which is not the same thing as merely watching the offer expire. Finally, language stating that “we assure you that we will not revoke this offer before June 1” should certainly suffice.

White and Summers suggest that the following language would satisfy the section 2-205 “assurance” requirement: “This offer is firm and will remain open for three months.”²³ What indicates a promise not to revoke is not the phrase “will remain open for three months” (which is ambiguous), but the word “firm,” which is usually interpreted to mean irrevocable. We should exercise caution, however, before concluding that any given word or phrase will always (or never) satisfy the section 2-205 requirement. A word or phrase may mean one thing in one trade and something else in another trade.

All we can say is that our courts can be expected to interpret the language of the offer as an “assurance” under section 2-205 if the offeree could have reasonably interpreted the language as a promise not to revoke. In dealing with problems of contract formation and mutual assent, most American courts take an objective approach, interpreting one party’s words as they would reasonably be interpreted by the other party.²⁴ We can thus expect

23. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-4, at 49 (5th ed. 2000) (student hornbook edition); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-4, at 33 (4th ed 1995) (practitioners’ edition).

24. See, e.g., FARNSWORTH, *supra* note 21, § 3.6, at 116-18 (discussing subjective and objective theories of assent), § 3.10, at 132-34 (discussing which communications are offers), § 3.17, at 159 (discussing what counts as a revocation). Unless it is somehow inconsistent with the UCC rules, case law espousing the objective approach to interpretation can be applied by the court. See U.C.C. § 1-103 (2000).

a court to consider all of the offeree's circumstances (including usages of trade and any prior course of dealing with the offeror) that shed light on how the offeree could have reasonably interpreted the language in the offer.

F. If the Offer Does Not Meet the Requirements of Section 2-205, Might It Become Irrevocable Because of the Offeree's Reliance?

An offer might contain some indication that it is irrevocable and yet not meet the requirements of section 2-205. It might not be in writing. It might be written but not signed. It might not contain an adequate "assurance" of irrevocability. Does section 2-205 permit a finding that such an offer is nonetheless irrevocable because of the offeree's reliance? Or does section 2-205 displace any case law applying promissory estoppel, so that such case law cannot be used via section 1-103?²⁵

The last sentence of comment 2 to section 2-205 states that when oral offers are relied upon they "remain revocable under this Article since authentication by a writing is the essence of this section."²⁶ Does this merely mean that oral offers cannot be made irrevocable by section 2-205, or does it mean that compliance with

25. A case law doctrine does not supplement the UCC provisions if it has been "displaced" by a particular UCC provision. *See* U.C.C. § 1-103 (2000). The official comments to section 1-103 use the phrase "explicitly displaced." *See id.* § 1-103 cmt. 1.

If the offer is not written and signed, the offeree who tries to use promissory estoppel to enforce a promise not to revoke is also likely to have a problem under the statute of frauds in section 2-201. Subsection (1) states that "[e]xcept as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable . . . unless there is some writing . . . signed by the party against whom enforcement is sought." U.C.C. § 2-201(1) (1999). This rather clearly indicates that the exceptions in subsections (2) and (3) are the only exceptions. The exceptions in subsection (3) cover some acts of reliance, but only when those acts involve part performance or preparations for performance. *See id.* § 2-201(3)(a), (c).

Nevertheless, a court might hold that the statute of frauds is not a defense to a promissory estoppel claim. One court, for example, reasoned that the section 2-201 statute of frauds applies only to contractual claims, and a promissory estoppel claim is a noncontractual claim. *See* Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687, 697 (W.D. Wis. 1974) (applying Wisconsin law), *aff'd*, 527 F.2d 772 (7th Cir. 1976).

Other courts, however, hold that promissory estoppel cannot be used to avoid the statute of frauds, *see, e.g.*, Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc., 463 F. Supp. 543, 552-54 (N.D. Miss. 1978) (applying Mississippi law), or that promissory estoppel can overcome the statute of frauds only when the promisor had promised to produce a writing, *see, e.g.*, Tiffany Inc. v. W.M.K. Transit Mix, Inc., 493 P.2d 1220, 1225-26 (Ariz. App. 1972).

26. U.C.C. § 2-205 cmt. 2 (2000).

section 2-205 is the only way to render irrevocable an offer lacking consideration in a transaction governed by Article 2? The quoted words "under this Article" seem to suggest the latter interpretation. But in most states, the official comments are not enacted as statutory law and remain merely persuasive authority. A court could thus reject the last sentence in comment 2, if it could not interpret that sentence to be consistent with case law approving promissory estoppel as a device to make offers irrevocable.

Certain cases are often cited as authority for the proposition that section 2-205 does not preclude the application of promissory estoppel. Some of these decisions involved (or may have involved) sale of goods transactions and approved the use of promissory estoppel. But none of them expressly held that an offer not complying with section 2-205 can be made irrevocable under promissory estoppel theory.

*E.A. Coronis Associates v. M. Gordon Construction Co.*²⁷ involved a subcontractor's bid to supply and erect structural steel.²⁸ Although the appellate court remanded the case for a determination of whether the elements of a promissory estoppel were present,²⁹ it did not decide whether the bid was an offer³⁰ and did not decide whether the transaction was governed by UCC Article 2.³¹ The court noted that the bid did not contain anything resembling the assurance required by section 2-205³² but expressly declined to decide whether section 2-205 precludes promissory estoppel.³³

*Janke Construction Co. v. Vulcan Materials Co.*³⁴ involved an oral price quotation for the sale of concrete pipes to a general contractor.³⁵ The federal district court noted that the price quotation did not comply with UCC section 2-205,³⁶ but enforced the supplier's price quotation under the Wisconsin promissory estoppel doctrine.³⁷ We might see here an implicit holding that section 2-205 does not preclude promissory estoppel. But the court did not indicate the promissory estoppel was being used to make an

27. 216 A.2d 246 (N.J. Super. Ct. App. Div. 1966).

28. *See id.* at 248, 249.

29. *See id.* at 252.

30. *See id.* at 249.

31. *See id.*

32. *See E. A. Coronis Associates*, 216 A.2d at 248, 249.

33. *See id.* at 253 n.2.

34. 386 F. Supp. 687 (W.D. Wis. 1974) (applying Wisconsin law, *aff'd*, 527 F.2d 772 (7th Cir. 1976).

35. *See id.* at 689.

36. *See id.* at 691-92.

37. *See id.* at 692-95.

offer irrevocable. The court never characterized the price quotation as an offer, and there does not appear to have been an attempted revocation. So revocability was not an issue. This was merely a case in which the court applied the Wisconsin promissory estoppel doctrine, which enforced promises that did not even rise to the level of a contractual offer.³⁸

*Jenkins & Boller Co. v. Schmidt Iron Works, Inc.*³⁹ involved a subcontractor's written bid for the sale and installation of various metals.⁴⁰ The appellate court cited a number of UCC Article 2 sections (including 2-205)⁴¹ and apparently assumes that the transaction was governed by Article 2. The appellate court upheld the trial court's application of promissory estoppel in awarding judgment to the general contractor who relied on the bid.⁴² But it is not clear that revocability was an issue (acceptance may have preceded attempted revocation⁴³). The opinion never stated that an offer that does not comply with section 2-205 may nevertheless become irrevocable under promissory estoppel doctrine.

Two decisions involved offers to sell goods and declined to apply promissory estoppel theory. But neither opinion expressly states that promissory estoppel cannot be used to make irrevocable an offer that does not comply with section 2-205.

In *Tatsch v Hamilton-Erickson Mfg. Co.*,⁴⁴ a supplier made a telegraphic offer in 1963 to sell folding tables and benches to a general contractor.⁴⁵ The New Mexico court held that the offeree's reliance on the offer could not constitute a promissory estoppel and cited the *Baird* decision.⁴⁶ Although the UCC had been in effect in New Mexico since 1962, the court did not cite section 2-205 or any other UCC section and seems to have been unaware of section 2-205.⁴⁷

*Ivey's Plumbing & Elec. Co. v. Petrochem Maint., Inc.*⁴⁸ involved a manufacturer's price quotation, partly oral and partly

38. *See id.* at 692-93 (citing *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965)).

39. 344 N.E.2d 275 (Ill. App. Ct. 1976).

40. *See id.* at 276.

41. *See id.* at 277, 278-79.

42. *See id.* at 277, 278.

43. *See id.* at 277.

44. 418 P.2d 187 (N.M. 1966).

45. *See id.* at 188.

46. *See id.* at 189.

47. *See id.* at 190 (stating that an offer not under seal or given for a consideration may be withdrawn at any time prior to acceptance).

48. 463 F. Supp. 543 (N.D. Miss. 1978) (applying Mississippi law).

written for the sale of air compressors.⁴⁹ The court held that the price quotation was at best a revocable offer, because it contained no assurance that it would be held open, as required by UCC section 2-205.⁵⁰ The court did not expressly hold that section 2-205 precludes the application of promissory estoppel. But the court held that under Mississippi law, promissory estoppel could not overcome the UCC section 2-201 statute of frauds defense,⁵¹ so the court was obviously aware of promissory estoppel theory when it discussed section 2-205. Furthermore, the court stated in a footnote that it rejected the contention that a seller's firm offer "may arise by implication from the mere fact of the buyer's" detrimental reliance.⁵² It is not clear, however, whether the court merely meant to state the truism that an *express* promise to hold an offer open cannot be *implied* from offeree reliance (or the foreseeability of such reliance), or meant, in addition, that promissory estoppel cannot be used to enforce an express promise to hold an offer open when the offer fails to satisfy one of the other section 2-205 requirements.

Although the scholarly commentators are not in agreement on this promissory estoppel issue, they are at least clear in staking out their positions. White and Summers suggest that when "section 2-205 is not met, this should not be taken to prevent offerees from invoking promissory estoppel or Restatement doctrine."⁵³ Robert Nordstrom states that section 2-205 should not be read to preclude the application of promissory estoppel; he makes the interesting argument that section 2-205 was not intended to deal with the revocability "of offers from which consideration has been given or for which a *substitute for consideration* is present."⁵⁴ Michael Gibson argues that, on the contrary, Karl Llewellyn, the primary drafter of UCC Article 2, was opposed to promissory estoppel doctrine because of his desire for formal authentication of firm offers, and that the courts have improperly used promissory estoppel to bypass UCC sections such as 2-205.⁵⁵

49. *See id.* at 545.

50. *See id.* at 551-52.

51. *See id.* at 552-54.

52. *Id.* at 551 n.4.

53. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-4, at 49 (5th ed. 200) (student hornbook edition); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-4, at 33 (4th ed. 1995) (practitioners' edition).

54. ROBERT J. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 33, at 86 (1970) (emphasis added).

55. *See* Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the*

II. CISG Article 16

The CISG is an international treaty ratified by the United States and most of the other leading trading nations in the world, with Japan and the United Kingdom being the most notable exceptions. The CISG governs a sale of goods transaction between a party located in the United States and a party having its place of business in another country that has ratified the treaty.⁵⁶ The CISG does not normally apply, however, to goods bought by a consumer; nor does it apply to sales of vessels or aircraft.⁵⁷

The treaty was drafted by the United Nations Commission on International Trade Law (“UNCITRAL”).⁵⁸ In drafting the article dealing with the revocability of offers, UNCITRAL faces a serious challenge: the various domestic legal systems of the world took widely disparate approaches to revocability. A survey of English, German, and French contract law illustrates this disparity.

A. Comparative Law Background

In English contract law, offers are generally revocable until there is an effective acceptance.⁵⁹ Even if the offeror expressly promises not to revoke during a specified time, this promise is not enforceable unless it is supported by consideration or is under seal.⁶⁰ English courts have been reluctant to use the promissory estoppel doctrine often employed by American courts to make

Restatement (Third) of Contracts, 73 IOWA L. REV. 659, 661, 662, 701-03 (1988).

56. See United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, art. 1, S. TREATY DOC. NO. 98-9 (1980), 19 I.L.M. 668 [hereinafter “CISG”]. If a party has places of business in more than one country, the one that counts is the one that has the closest relationship to the contract and its performance. See *id.* art. 10(a).

Article 1(1)(b) provides that the CISG also applies when the parties are located in different countries and conflict of laws rules lead to the application of the law of any country that has ratified the treaty. This provision is not United States law, however, because the United States has declared, pursuant to article 95, that it will not be bound by article 1(1)(b). See message from the President of the United States Senate, Appendix IB, S. TREATY DOC. NO. 98-9 (1980).

57. See CISG art. 2(a), (e).

58. For a brief history of the drafting of the CISG and the 1980 Vienna diplomatic conference at which it was approved, see JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* §§ 4-10 (3d ed. 1999).

59. See J. BEATSON, *ANSON’S LAW OF CONTRACT* 52 (27th ed. 1998); HEIN KÖTZ, *1 EUROPEAN CONTRACT LAW* 22 (Tony Weir trans., 1997).

60. See BEATSON *supra* note 59, at 54-55; KÖTZ, *supra* note 59, at 22; P.D.V. MARSH, *COMPARATIVE CONTRACT LAW ENGLAND, FRANCE, GERMANY* 58 (1994); Iswar C. Saxena *Report on English Law, in 1 FORMATION OF CONTRACTS* 766, 766 (Rudolf B. Schlessinger ed., 1968).

subcontractors' offers irrevocable and thus allow accepting offerees to recover the breach of contract.⁶¹ In England, the tendency has been to use promissory estoppel only as a shield for defendants and not as a sword enabling plaintiffs to establish causes of action.⁶²

With respect to the revocability of offers, German contract law is at the opposite end of the spectrum. Offers are generally irrevocable. If the offeror promises not to revoke during a specified period, the offer cannot be effectively revoked during that period.⁶³ If the offer states that it must be accepted within a specified period and thus fixes an expiration date, it is irrevocable throughout that period.⁶⁴ If the offer is silent as to both revocability and expiration, it is irrevocable for a reasonable time (a reasonable time for a response for the offeree).⁶⁵ About the only way the "offeror" can make the "offer" revocable is to expressly state that it is revocable, using words such as *freibleibend* or *ohne Obligo*. In such a case, it is likely to be treated as an invitation for an offer and not as a true offer.⁶⁶

The French approach to revocability lies somewhere between the English approach and the German approach. Although offers have generally been revocable under French law, there are a number of situations in which the offeror has an obligation not to revoke.⁶⁷ These situations arise when

- (1) the offeror expressly promises not to revoke during a specified time,⁶⁸
- (2) the offer states that it must be accepted within a specified time,⁶⁹ or

61. See BEATSON, *supra* note 59, at 55, 117; MARSH, *supra* note 60, at 58.

62. See BEATSON, *supra* note 59, at 117-18 (citing *Combe v. Combe*, 2 K.B. 215 (1951), and other cases).

63. See MARSH, *supra* note 60, at 63.

64. See Karl H Neumayer, *Report on German and Swiss Law*, in 1 FORMATION OF CONTRACTS 780, 782 (Rudolf B. Schlesinger, ed., 1968) (citing § 148 BGB [the German Civil Code]).

65. See KÖTZ, *supra* note 59, at 23 (citing § 145 BGB); MARSH, *supra* note 60, at 63; KONRAD SWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 361 (3d rev. ed. Tony Weir trans., 1998).

66. See KÖTZ, *supra* note 59, at 23; MARSH, *supra* note 60, at 63; ZWEIGERT & KÖTZ, *supra* note 65, at 362; Neumayer, *supra* note 64, at 781 (citing § 145 BGB).

67. See MARSH, *supra* note 60, at 59; ZWEIGERT & KÖTZ, *supra* note 65, at 359.

68. See Cass. Civ., Dec. 17, 1958, D. Jur. 1959, 33 (declaring that if the offeror has expressly or implicitly undertaken not to revoke before a certain time, he cannot revoke before that time without incurring liability); MARSH, *supra* note 60, at 59; BARRY NICHOLAS, FRENCH LAW OF CONTRACT 64 (1982); Pierre Bonassies, *Report of French Law*, in 1 FORMATION OF CONTRACTS 769, 769-70 (Rudolf B. Schlesinger ed., 1968).

69. See KÖTZ, *supra* note 59, at 22-23; ZWEIGERT & KÖTZ, *supra* note 65, at 359; Bonassies, *supra* note 68, at 772 n.17.

- (3) circumstances or usage of trade require that the offeror hold the offer open for a reasonable time (a *délai raisonnable*) before revoking.⁷⁰

The court decisions and commentators are not in agreement, however, about the legal consequences of a premature revocation that violates the obligation not to revoke.⁷¹ It has been suggested that the premature revocation is ineffective and that the offeree's acceptance will thus form a contract for breach of which the offeror would be liable for expectation damages.⁷² The other and more often expressed view is that he premature revocation effectively precludes the formation of a contract but subjects the offeror to delictual (tort) liability for the offeree's reliance loss.⁷³

The French approach obviously differs from the English approach by imposing on offerors a legal obligation not to revoke in many situations where there is no promise of irrevocability supported by consideration. Unlike the German approach, however, the French approach does not clearly make a premature revocation ineffective; it is likely to merely subject the offeror to liability for the offeree's reliance loss, and in many cases, the offeree will not have suffered any reliance loss.

B. *The CISG Rule*

CIGS article 16 was designed as a compromise of the disparate approaches taken by domestic legal systems.⁷⁴ It provides as follows:

- (1) Until a contract is concluded an offer may be revoked in the revocation reaches the offeree before he has dispatched an acceptance.
- (2) However, an offer cannot be revoked:

70. See KÖTZ, *supra* note 59, at 22-23; MARSH, *supra* note 60, at 59-60; NICHOLAS, *supra* note 68 at 64; ZWEIGERT & KÖTZ, *supra* note 65, at 359; Bonassies, *supra* note 68, at 772 n.17.

71. See NICHOLAS, *supra* note 68, at 63-67.

72. See Bonassies, *supra* note 68, at 775-76.

73. See KÖTZ, *supra* note 59, at 22-23; NICHOLAS, *supra* note 68, at 64-66 (discussing two court decisions that favored a delictual remedy and observing that there seems to be no case in which a clearly contractual remedy has been given); ZWEIGERT & KÖTZ, *supra* note 65, at 359-60.

74. See KÖTZ, *supra* note 59, at 24; G. Eörsi, *Article 16—Revocability of Offer in COMMENTARY ON THE INTERNATIONAL SALES LAW 150, 150-54* (C.M. Bianca & M.J. Bonell eds., 1987). For a contrary view that the CISG rule is not a compromise between civil legal systems and common law legal systems, but instead is based on fundamental ideas shared by both types of legal system, see Kazuaki Sono, *Restoration of the Rule of Reason in Contract Formation: Has There Been Civil and Common Law Disparity?*, 21 CORNELL INT'L L.J. 477, 478-84 (1988).

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.⁷⁵

C. *Must the Offer Be in Writing?*

Unlike UCC section 2-205, CISG article 16(2) does not require that an offer be in writing in order to be firm and irrevocable. Although it may be difficult for an offeree to prove that an unwritten offer indicated that it was irrevocable, it is often possible.

D. *What Limits Are Imposed on the Period of Irrevocability?*

CISG article 16(2) also differs from the UCC firm offer rule by not imposing any statutory limit on the period of irrevocability. Thus an offer will be irrevocable for one year if the offer so stipulates.

E. *What Kind of Assurance of Irrevocability Is Required?*

Under article 16(2), an offer will be irrevocable if its express terms indicate irrevocability. The offeror need not use the words, "I promise not to revoke." An assurance that "I will hold this offer open until June 15" will make the offer irrevocable until June 15.⁷⁶ It has also been suggested that words like "this is a firm offer" unambiguously indicate irrevocability.⁷⁷

75. CISG art 16. Under the CISG, "revocation" of an offer is distinguished from "withdrawal" of an offer. Under article 15(2), an offer (even one that is irrevocable) may be withdrawn if the withdrawal reaches the offeree before, or at the same as, the offer. Since an offer cannot become effective until it reaches the offeree (article 15(1)), a withdrawal complying with article 15(2) prevents the offer from ever becoming effective. Revocation, on the other hand, is a way of terminating an offer that has become effective.

In assuming that article 16 governs a revocability issue in our American client's transaction, we assume that the other party's state has not made an article 92(1) declaration excluding the CISG Part II contract formation rules (the United States has not made such a declaration). We also assume that the parties have not somehow opted out of article 16 by way of article 6, which allows the parties to exclude the application of the CISG altogether or exclude any of its provisions except article 12. We also assume that the non-American party's state has not made an article 96 declaration that, pursuant to article 12, eliminates the article 16 provision indicating that a firm offer need not be in writing in order to be effective. (The United States has not made an article 96 declaration).

76. JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 142, at 160 (3d ed. 1999).

77. See Peter Schlechtriem, *Formation of the Contract*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 97, 120-21

Problems arise from the article 16(2)(a) reference to “a fixed time for acceptance.” This is undoubtedly a reference to offer language stating that the offer must be accepted within a specified time or that the offer will expire at a specified time.⁷⁸ Does such language necessarily indicate irrevocability and thus automatically make the offer irrevocable? An American lawyer would be surprised by this question. She would assume that fixing a time when the offer expires cannot, by itself, indicate that the offer is irrevocable. But, as we have noted, civil law systems are apt to regard the fixing of an expiration date as a sign of irrevocability.⁷⁹

The CISG has no official comments. But UNIDROIT *Principles of International Commercial Contracts* article 2.4 is identical to CISG article 16. And comment 2(a) to UNIDROIT article 2.4 states that the “indication of a fixed time for acceptance may, but need not necessarily, amount by itself to an implicit indication of an irrevocable offer. The answer must be found in each case through a proper interpretation of the terms of the offer”⁸⁰ The UNIDROIT *Principle* and comments were drafted by an international team of legal experts and were intended to be an unofficial restatement of legal principles for international commercial contracts. We can expect that many courts and arbitrators will use the comments to UNIDROIT article 2.4 for guidance in interpreting CISG article 16.⁸¹

The prevailing view of commentators on the CISG is similar to the UNIDROIT comment insofar as both deny that an offer that

(Peter Schlechtriem ed., 2d ed. 1998).

78. In a sentence that obviously deals with expiration, article 18(2) provides that an “acceptance is not effective if the indication of assent does not reach the offeror within *the time he has fixed* or, if no time is fixed, within a reasonable time.” CISG art. 18(2) (emphasis added).

Note, by the way, that under article 18(2) (first sentence), an acceptance does not become effective and form a contract until the acceptance reaches the offeror. Although the offeree’s dispatch of his acceptance cuts off the offeror’s power to revoke under article 16(1), it does not yet form a contract.

79. See *supra* note 64, 69 and accompanying text.

80. UNIDROIT PRINCIPLE OF INTERNATIONAL COMMERCIAL CONTRACTS art. 2.4 cmt. 2(a) (1994) [hereinafter “UNIDROIT Principles”].

81. CISG article 7(1) provides that in interpreting the CISG, a tribunal must have regard for the international character of the CISG and the need to promote uniformity in its application, COSG art. 7(1). Using the UNIDROIT articles and comments in interpreting the CISG would seem to be a good way to apply international rules, rather than domestic rules, and thus enhance uniformity and predictability in the legal treatment of international sales. See Alejandro M. Garro, *The Gap-filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1154, 1189, 1190 (1995).

fixes a deadline for acceptance (an expiration date) is automatically irrevocable. In the commentators' view, however, offer language limiting the time for acceptance should be regarded as creating a presumption that the offer is irrevocable during this time. The presumption could be rebutted by a showing that the offer would be understood as merely setting an expiration date.⁸²

I see no justification for a presumption that tilts the evidentiary playing field in favor of either party. Article 16(2)(a) should be interpreted so that stating a fixed time for acceptance *may* indicate irrevocability, but whether it *does* indicate irrevocability should depend upon an application of CISG article 8, which determines how the offer should be interpreted and does not support the use of presumptions. Article 8 provides:

- (1) For the purpose of this Convention statements made by the other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the proceeding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usage and any subsequent conduct of the parties.⁸³

Consider a hypothetical case in which the offer stipulated that it could not be accepted after March 15. Assume that the offeree did not ask the offeror whether her offer was irrevocable, and that given what the offeree knew, he would not have been "aware" of the offeror's subjective intent to make a revocable offer.⁸⁴

82. See, e.g., HONNOLD, *supra* note 76, § 143.1 at 163; Schlechtriem, *supra* note 77, at 121; Sono, *supra* note 74, at 479.

Honnold suggests that this rebuttable presumption is the best way to give effect to both (1) the fact that the 1978 UNCITRAL draft (which was ultimately adopted) rejected a Working Group draft providing that an offer cannot be revoked if it states a fixed time of acceptance, and (2) the fact that the final version retained a reference to "a fixed time for acceptance." See HONNOLD, *supra* note 76, § 143.1 at 163.

83. CISG art. 8.

84. Disputes are likely to arise when the offeror believes that her offer is revocable and the offeree assumes that it is irrevocable. Disputes are unlikely if

Paragraph (1) is thus inapplicable. The offer must be interpreted under paragraph (2) and is irrevocable through March 15 if a reasonable person in the offeree's position would understand the language fixing a March 15 deadline for acceptance as also indicating irrevocability. We will assume that there are no relevant circumstances of the types listed after the word "including" in paragraph (3). We will assume, for example, that the parties are transacting business in an international trade that has no regularly observed usage concerning the irrevocability implications of offer language that fixes an expiration date.⁸⁵

In applying article 8(2), the basic question is whether a reasonable person in the offeree's circumstances would have assumed that the offer was irrevocable and would not have bothered to contact the offeror and ask her whether the offer was irrevocable. In some variants of our hypothetical case, the answer to this basic question should be affirmative, and the offer should be declared irrevocable through March 15. If advice of counsel or the offeree's own experience in trading with persons in the offeror's country led the offeree to believe that the practice in the *offeror's* country was to regard as irrevocable any offer that fixed a deadline for acceptance, then the offeree could reasonably assume that the offer he received was intended to be irrevocable.

In other variants, however, the answer to the basic question should be negative, and the offer should be declared revocable. If the offeree's only reason for assuming that the offeror had made an irrevocable offer was the fact that in the *offeree's* country, offers fixing a deadline for acceptance are normally regarded as irrevocable, such an assumption would be unreasonable. A reasonable person engaged in international trade would not assume that legal and business practices in his country were reflected in the practices of every other country. A reasonable offeree would therefore make an inquiry as to the offeror's intention, and the cheapest and most reliable inquiry would be one directed to the offeror herself. The offeror's response to the reasonable offeree's inquiry would be that the offer was revocable, and the reasonable offeree would thus not assume that it was irrevocable.

both parties regard the offer as revocable, or both parties regard the offer as irrevocable, or the offeror believes her offer is irrevocable and the offeree assumes that it is revocable.

85. CISG article 9 determines when the parties are bound by a usage of trade. Unless a usage was agreed to by the parties, it is not binding if it was not a *regularly observed* usage in an *international* trade. See CISG art. 9.

*F. If the Offer Does Not Meet the Requirements of Article 16(2)(a),
Might It Become Irrevocable Because of the Offeree's Reliance?*

Recall that under CISG article 16(2)(b), an offer is irrevocable "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."⁸⁶ Even if the words of the offer do not indicate irrevocability under paragraph (2)(a), the offeree may be able to establish irrevocability under paragraph (2)(b) if he has reasonably relied on an implied promise not to revoke.

Paragraph (2)(b) looks very much like American promissory estoppel doctrines, although it does not expressly require that the offeree's reliance must have been foreseeable to the offeror and does not expressly require that the offeree's reliance be detrimental.⁸⁷ Despite these omissions, we can expect that many tribunals will apply paragraph (2)(b) in much the same fashion as American courts have used promissory estoppel. If the offeree's reliance was not reasonably foreseeable to the offeror, a court applying paragraph (2)(b) could usually find that the offeree's reliance on the offer's being irrevocable was unreasonable.⁸⁸ And courts could easily assume that "reliance" means detrimental reliance. To rely on a belief (for example, a belief that the offeror will not revoke) is to act in a way that will impair one's future well-being if the belief turns out to be false. Cases arise under paragraph (2)(b) because an offeree's belief that the offeror would not attempt to revoke has turned out to be false.

The critical issue under paragraph (2)(b) is whether the offeree reasonably relies on the offer's being irrevocable. Presumably, the offeree (1) must have had a good reason for believing that the offer was irrevocable and (2) must also have acted reasonably in relying on that belief (did not engage in a foolhardy form of reliance). Both requirements will probably be met when the parties understand that the offeree might use the offer in preparing his own offer to a third person, as in cases where a supplier of goods makes an offer to a general contractor who is bidding for a construction contract.⁸⁹ It has also been suggested that the reliance requirements

86. CISG art. 16(2)(b).

87. See *supra* text accompanying note 16.

88. The comments to UNIDROIT *Principles* article 2.4 suggest that the offeree's acts of reliance do not make the offer irrevocable unless they should have been foreseen by the offeror. See UNIDROIT PRINCIPLES art. 2.4 cmt. 2(b).

89. See HONNOLD, *supra* note 76, § 144, at 164, see also UNIDROIT PRINCIPLES art. 2.4 cmt. 2(b), illus. 4.

will be met when the parties understood that the offeree would have to undertake a costly investigation in order to decide whether to accept the offer.⁹⁰

It is not clear whether an offeree can satisfy the requirements of paragraph (2)(b) when his reliance takes the form of inaction (an omission or forbearance). The English version of paragraph (2)(b) uses the word “acted.” A court might decide that an offeree has not acted in reliance if his only reliance was a failure to act.⁹¹ At least one commentator, however, suggests that the word “acted” means not only a positive act, but also a failure to act, for example, a demonstrable failure to solicit other offers.⁹²

III. The Proposed Revision of the UCC Firm Offer Rule

Since 1991, a drafting committee appointed by the Permanent Editorial Board for the UCC has been working on a revised Article 2. When a final draft has been approved by both the American Law Institute (“ALI”) and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), the new Article 2 will be promulgated as a uniform act and presented to the various state legislature for statutory enactment. The following discussion is based on the April 14, 2000 Decision Draft of the revised Article 2.⁹³

A. *The Proposed Firm Offer Rule*

In the proposed revision of Article 2, the firm offer rule has been moved from section 2-205 to section 2-204, which provides:

An offer by a merchant to buy or sell goods is an authenticated record which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months;

90. See ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 167-68 (1989) (quoting various authorities); see also UNIDROIT PRINCIPLES art. 2.4 cmt. 2(b).

91. The UNIDROIT comments refer to acts which the offeree must have “performed” in reliance and provide a series of examples, all of which involve positive actions. See UNIDROIT PRINCIPLES art. 2.4 cmt. 2(b).

92. See Schlechtriem, *supra* note 77, at 122.

93. UNIFORM COMMERCIAL CODE, [NEW] REVISED ARTICLE 2, SALES: DISCUSSION DRAFT (April 14, 2000) (American Law Institute 2000) [hereinafter “P. REV. U.C.C.”].

but any such term of assurance in a form record supplied by the offeree must be separately authenticated by the offeror.⁹⁴

B. *Must the Offer Be in Writing?*

The proposed firm offer rule does not require that the offer be in "writing." The present requirement of a "signed writing" would be replaced by the requirement of an "authenticated record." The word "record" means "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."⁹⁵ To "authenticate" a record, one must sign or otherwise use a symbol or sound with intent to adopt or accept the terms of that record.⁹⁶

Thus, the words of an offer are preserved in a "record" if they can be seen on a computer screen or heard from a tape recording, even if they are never reduced to tangible form.⁹⁷ And this record can be "authenticated" by the offeror through use of any visible symbol or sound intended to indicate her adoption of the offer terms. Nevertheless, a telephonic or other oral offer is not in an authenticated record if it has not been recorded in some way. Thus, a primary purpose of the original UCC firm offer rule—to exclude oral offers—is preserved.⁹⁸ The proposed revision merely accommodates technological advances in recording communications.

It may be argued that the revised firm offer rule should not even require an authenticated record, that it should apply to purely oral offers, as CISG article 16(2) does.⁹⁹ I see no compelling objective, however, to the authenticated record requirement, so long as the new section 2-205 makes it clear that an authenticated

94. *Id.* § 2-205.

95. *Id.* § 2-103(a)(34).

96. *Id.* § 2-103(a)(1). Even if the proposed firm offer rule is not enacted, a new federal statute (effective October 1, 2000) provides that the respect to any transaction in or affecting interstate or foreign commerce, a record or signature cannot be denied legal effect solely because it is in electronic form. See Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, §§ 101(a), 103(a)(3), 106, 114 Stat. 464, 464, 468, 472 (2000). See also Uniform Electronic Transactions Act § 2, § 3(b)(2) and cmts. 4, 7, § 7 (2000) (containing provisions similar to those of the federal statute).

97. The present UCC defines "writing" to include any intentional reduction to tangible form. See U.C.C. § 1-201(46) (2000).

98. The purpose to exclude oral offers is expressed in *id.* § 2-205 cmt. 2.

99. See HONNOLD *supra* note 76 at 161 n.6 § 142, at 161 n.6 (3d ed. 1999) (merely noting, without taking a position on the issue, that law revision bodies in other common law countries have proposed the elimination of formal writing requirements for firm offers).

record containing the offeror's assurance of irrevocability is not the exclusive way to make an offer irrevocable, and allows some means of making a purely oral offer irrevocable.

C. What Limits Are Imposed on the Period of Irrevocability?

Note that the proposed section 2-205 preserves the present three-month limit on the period of irrevocability. A three-month limit on "reasonable time" (the period of irrevocability when no period is specified in the offer) is probably justified. It enhances the predictability of legal outcomes and is arguably consistent with the CISG.

A three-month limit on irrevocability when the offerer specifies a longer period is a different matter, however. It is difficult to see why an offer that states a six-month period of irrevocability should be treated differently than an offer stating a two-month period. The outside limit of three-month should be eliminated in order to respect party autonomy and makes the UCC consistent with the CISG.

D. What Kind of Assurance of Irrevocability Is Required?

The new proposed UCC firm offer rule applies only if the offer record "by its terms gives assurance that it will be held open."¹⁰⁰ This is essentially the language of the present rule.

We noted above that our courts have not made it clear what counts as an adequate "assurance."¹⁰¹ One might therefore argue that the revised firm offer rule should clear up some of the confusion. The new rule could at least provide that merely fixing an expiration date is not an adequate assurance that the offer will be held open.

It seems preferable, however, to accept the statutory language in the proposed revision. An offer should be interpreted as a reasonable person in the offeree's circumstances would interpret it. Language that would not be interpreted as an assurance of irrevocability in one trade might be interpreted as such an assurance in another trade. This might even be true of language fixing an expiration date. It would therefore be unwise to revise the firm offer rule by identifying particular language as always inadequate or always adequate.

100. P. REV. U.C.C. § 2-205.

101. See *supra* Part I.E.

E. If the Offer Does Not Meet the Requirements of Proposed Section 2-204, Might It Become Irrevocable Because of the Offeree's Reliance?

We noted above that it is not clear whether the present UCC section 2-205 firm offer rule precludes courts from using promissory estoppel to make an offer irrevocable.¹⁰² This is an important issue that needs to be resolved. A small step in this direction was taken in the comments to a previous draft of the revised Article 2: “[Section 2-205] supplements rather than displaces other methods by which [offers are made irrevocable], such as with consideration or by reliance.”¹⁰³ This is a clear statement that the firm offer rule in proposed section 2-205 does not preclude the application of promissory estoppel to offers that fail to meet that section’s formal requirements.

Even if the comment is restored in the final version of the new Article 2, however, it would be only a persuasive comment and not statutory law. The comment would still leave it up to the courts of each state to decide whether promissory estoppel can be applied. We cannot expect the case law to be uniform from state to state. We can expect that the case law of many states will be difficult to research and comprehend.

It would be preferable that the statutory text of the new section 2-205 explicitly provide that an offeror’s express or implied assurance of irrevocability makes the offer irrevocable if it is supported by consideration or the offeree reasonably relies on it. This is the position that a probable majority of courts would take.

If the proposed section 2-205 is promulgated by the ALI and NCCUSL as part of a uniform act, it would not be improper for state legislatures to enact nonuniform versions setting forth their positions on promissory estoppel. I would hope that many legislatures would enact provisions similar to that proposed in the preceding paragraph. Even if some legislatures provide that offeree reliance cannot make an offer irrevocable, that would at least be a welcome clarification of the law in those states.

One of the purposes of the UCC is to make uniform the law among the various jurisdictions.¹⁰⁴ Another important purpose is to

102. See *supra* Part I.F.

103. UNIFORM COMMERCIAL CODE, REVISED ARTICLE 2, SALES: PROPOSED FINAL DRAFT (MAY 1, 1999) § 2-204 cmt. 2 (American Law Institute 1999). In this May 1, 1999 draft, the firm offer rule was in section 2-204, rather than 2-205. The draft of April 14, 2000 omits the comments to its firm offer section (section 2-205).

104. See U.C.C. § 1-102(2)(c) (200).

simplify, clarify and modernize the law governing commercial transactions.¹⁰⁵ If state legislatures enact disparate nonuniform versions of the new section 2-205, adding provisions dealing with promissory estoppel, this obviously will not enhance uniformity, but neither will it make the law less uniform than it would be if all states were to enact section 2-205 in its proposed uniform version and then go their separate ways by means of case law. The statutory enactment of such nonuniform versions would at least make it easier for lawyers to ascertain each state's position on promissory estoppel in the revocation context and would thus promote simplicity and clarity.

It may be objected that state legislatures should not attempt to codify a promissory estoppel doctrine because this would deprive courts of the flexibility needed in developing and applying a doctrine that is equitable in nature. But the statutory reference to offeree reliance need not present a detailed and inflexible promissory estoppel doctrine with an exhaustive enumeration of all the required elements. A nonuniform version of the new section 2-205 could paint its position on reliance with broad strokes.

CISG article 16(2)(b) provides a good model. It expresses the crucial requirement that the offeree's reliance be reasonable. As I have already suggested, the CISG's failure to expressly require that the reliance be reasonably foreseeable to the offeror and detrimental to the offeree is not a serious defect.¹⁰⁶ If necessary, such details can be filled in by case law. If a strong majority of states were to incorporate the language of CISG article 16(2)(b) into nonuniform versions of the new UCC section 2-205, this would actually enhance legal uniformity, not only throughout the United States, but throughout the global marketplace.¹⁰⁷

105. *See id.* § 1-102(2)(a).

106. *See supra* text accompanying.

107. In the absence of structural reasons or strong policy reasons for deviating from the CISG, the UCC should be in harmony with the CISG. All other things being equal, it is advantageous (for both merchants and lawyers) to have the same rules govern domestic and international sales. *See* Linda J. Rusch, *The Relevance of Evolving Domestic and International Law on Contracts in the Classroom: Assumptions About Assent*, 72 TUL. L. REV. 2043, 2062 (1998) (suggesting that any revision of UCC Article 2 that does not take into account legal developments in the international sphere risks adopting idiosyncratic rules that will not be serviceable under the demands of the global economy); Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43, 47, 92 (1991) (arguing the eliminating differences between UCC Article 2 and CISG reduces legal transaction costs).

IV. Drafting Offers

During the next few years, the various states of the United States will enact the revised UCC Article 2 at different times, and the CISG will be ratified by additional countries at different times. Many offerors negotiating contracts for sales of goods will thus face an especially complex legal environment. Some of their offers will be governed by the present UCC Article 2, some will be governed by the revised Article 2, some will be governed by the CISG, and some will be governed by the domestic law of a state or country that has not adhered to any UCC Article 2 or to the CISG. As we have seen, these different bodies of law contain different rules concerning revocability.

Despite these differences, it will be possible for offerors and their lawyers to develop standard revocability terms that can be routinely used (with a high probability of success) in most transactions likely to be governed by either the UCC or the CISG. In other words, a New York offeror should be able to use the same revocability term for Texas offerees and French offerees. The offeror will, of course, need two different standard terms: one for situations in which he wants his offer to be revocable, and another for situations in which he wants his offer to be irrevocable.

A. Making the Offer Revocable

If a New York offeror wants his offer to be revocable, he should use a standard term similar to the following:

This offer will expire at 5:00 p.m. New York time on _____, 20__ and cannot be accepted after that time. This is not a firm offer, and we reserve the right to revoke it at any time. Therefore, you should not rely on this offer until we have formed a contract.

This first sentence established a very specific expiration time. There are good reasons for specifying a time of expiration. First, it avoids the uncertainty that arises when the offer states no expiration time and is thus deemed to have a “reasonable” duration. Second, if the market price of the goods is apt to fluctuate rapidly, the offeror will want an early expiration date that curtails the offeree’s opportunity to speculate at the offeror’s expense (and does so automatically, without any need for offeror revocation).¹⁰⁸ Fixing an expiration date would not make the offer

108. Assume that the offeree is a buyer. If she is allowed a long time in which

irrevocable under the present or revised UCC rule, and should not make the offer irrevocable under CISG article 16(2)(a), because the offer clearly indicates that it is revocable.

This is accomplished in the second sentence, which, in order to minimize the risk of misunderstanding, says the same thing in two different ways: "This is not a firm offer," and "we reserve the right to revoke it at any time." Such language should make the offer revocable even under the domestic law of a country that follows the German approach to revocability.

The third sentence is a warning to the offeree that she should not rely on the offer. Such a warning will tend to make any offeree reliance unreasonable and thus help the offeror overcome an argument based on American promissory estoppel doctrine or on CISG article 16(2)(b).

B. Making the offer Irrevocable

If a New York offeror wants his offer to be irrevocable, he should use a standard term similar to the following (and offerees should be advised by their counsel to request such language):

This offer will expire at 5:00 p.m. New York time on _____, 20__ and cannot be accepted after that time. This is a firm offer, and we assure you that we will not revoke it prior to the above-stated time of expiration.

The first sentence is identical to the first sentence in the standard term for revocable offers. The reasons for fixing an expiration time in revocable offer apply to irrevocable offers as well.

So long as the offer appears in a "signed writing," the second sentence would make the offer irrevocable under the present UCC section 2-205.¹⁰⁹ But for no more than three months! If an American offeree requests an offer that is firm for a longer period, the offeror could suggest an option contract with consideration.

to make up her mind, she can wait until the market price reaches a point well above the price stipulated in the seller's offer, and then accept the offer, buy the goods from the offeror at the offer price, and resell the goods at the new and higher market price. If the market price does not rise but instead declines after the offeree receives the offer, she can reject or simply ignore the offer and purchase similar goods at the new and lower market price. Unless it is curtailed by an early expiration date, opportunistic speculation may also be possible when the offeree is a seller.

109. We are assuming that the offeror is a merchant who is offering to buy or sell goods.

So long as the offer appears in an “authenticated record,” the second sentence would make the offer irrevocable (for up to three months) under the proposed revised UCC section 2-205. (An American Offeree who wants more than three months of irrevocability could purchase an option contract.) So long as the terms of the offer are provable in any way, the second sentence would also make the offer irrevocable (throughout its duration) under CISG article 16(2)(a).

The second sentence would make the offer irrevocable under the domestic law of many countries, but not countries (such as the United Kingdom) that follow the English approach to revocability and have not yet ratified the CISG. An offeree located in such a country should be advised to consult her own lawyer.¹¹⁰

In summary, the proposed standard terms could be routinely used when an American offeror wants to make a revocable offer, and could be routinely used for most situations in which an American offeror wants to make an irrevocable offer to an offeree located in the United States or some other country that has ratified the CISG. If an American offeree requests an offer that is firm for more than three months, however, the offeror should suggest an option contract. And if the offeree is located in a country that has not yet ratified the CISG, the offeror should advise her to ask her own lawyer how the offer could be made irrevocable under the law of her own country.

110. How would a New York offeror know whether the offeree is located in such a country? If it is not practical for the offeror to consult his attorney on each international transaction, the attorney could give him a (continually updated) list of the countries that have ratified the CISG, along with effective dates. If his offeree is located in a country in which the CISG is not yet effective, the offeror should simply assume that the transaction might be governed by the domestic law of the offeree's country and advise the offeree to ask her own lawyer how irrevocability could be achieved under the law.