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NOTES

UNIFORM COMMERCIAL CODE—SALES—INADVERTENT ACCEPTANCE OF BUYER'S TERMS

BY REED T. PHALAN*

Because of two innovations in the "Formation of Contract" portion of the Uniform Commercial Code Article on Sales, it is possible for a businessman to become obligated on a contract which he does not intend to make. These innovations concern (1) making a non-conforming shipment in response to an order, and (2) accepting an order with changed terms or conditions.

Non-Conforming Shipment in Response to an Order

The Uniform Commercial Code states:

"Unless the seller states the contrary a shipment sent in response to an order to which it does not conform is an acceptance and at the same time a breach. But a shipment of non-conforming goods offered as an accommodation to the buyer in substitution for the goods described in the order is not an acceptance."¹

If an order for goods for prompt or current shipment does not expressly require written reply, it can be accepted either by a promise to ship or by such a shipment, without any written acceptance acknowledging or confirming the order.² It is not unusual that a seller does not have on hand the ordered goods but has available similar goods, which may serve the buyer's purpose just as well. To increase customer good will, or merely to make a sale, seller sometimes may assume that similar goods will be acceptable to buyer and ship them without first ascertaining if the buyer is willing to take them. Under the Code provision quoted above, unless seller explains that his act means something else, his act of shipping goods in response to an order is an acceptance of the order and an agreement to be bound by its terms. Buyer can reject the goods (since they do not conform exactly to his order³) and hold seller to a contract to deliver as ordered.

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¹ PA. STAT. ANN. tit. 12A § 2-206(2) (1953), UNIFORM COMMERCIAL CODE § 2-206(2). Further reference to the Code will be to appropriate sections only.

² UNIFORM COMMERCIAL CODE § 2-206(1) (b).

³ UNIFORM COMMERCIAL CODE § 2-601.

If a seller does not wish his act of shipping substitute goods to obligate him to deliver as ordered in case the substitute goods are not acceptable to the buyer, seller should, with the shipment or in advance of it, explain to buyer that it is a substitute shipment, sent as an accommodation to buyer. If seller so explains, his act of shipping does not form a contract between the parties; there is merely the buyer's offer and seller's counteroffer. Buyer can reject the counteroffer and the only loss to seller is freight or shipping charges.

Acceptance with Changed Terms or Conditions

The Uniform Commercial Code states:

"(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.

(2) The additional terms are to be construed as proposals for addition to the contract and between merchants become part of the contract unless they materially alter it or notification of objection to them has already been given or is given within a reasonable time." ⁴

What is meant by "definite" acceptance or "written confirmation" is not entirely clear.

Example: Seller writes to buyer: "I hereby offer to sell you the following goods (describing them) for \$600 cash on delivery." Buyer replies: "I hereby accept your offer. I will pay \$100 on delivery and the balance in sixty days."

It would seem that under the Code provision quoted above, buyer has accepted seller's offer at seller's terms, and is obliged to take the goods and pay \$600 on delivery.

Suppose in the above example, buyer's reply reads, "I hereby accept subject to the following terms and conditions: "\$100 on delivery, balance in sixty days." Is the acceptance "definite" if expressly made "subject to" the different terms? Until the meaning of this provision in the Code has been clarified, the offeree should follow a cautious interpretation.

If an offer pertains to something other than sale of goods, a reply from offeree seeming to acquiesce but also stating certain terms and conditions, is an acceptance if the terms and conditions stated are not different from those expressed or implied in the offer. But it is not an acceptance if the terms are

⁴ UNIFORM COMMERCIAL CODE § 2-207.

different.⁵ It otherwise expresses acquiescence but is prevented from being an acceptance because terms stated are different from those in the offer.

As to goods, a cautious interpretation of the quoted Code provision is: If the only thing that might prevent the reply from being an acceptance is the fact that the terms and conditions stated are different (that is, except for this dissimilarity of terms, it expresses acquiescence to the offer), then it is an acceptance of the original offer. Such an acceptance which adds other terms is an acceptance plus an offer to amend the contract formed by the acceptance. If recipient in turn accepts the different terms, the contract is amended. Recipient's failure to object is an acceptance of the different terms only if (1) both parties are merchants, *and* (2) the change that the different terms would make is an immaterial change.

Changes which are considered immaterial and which therefore become part of the contract between merchants unless recipient objects, include: (1) a provision fixing reasonable time for complaint within customary limits, and providing that no claims for defect will be allowed after such time; (2) a provision for interest to accrue on overdue money obligations under a contract.⁶

Under this "cautious" interpretation and until the point is further clarified by courts or legislature,⁷ offeree should refrain from expressing acquiescence at all, unless he intends to be bound by the terms of the original offer. If offeree wants to contract only on his different terms, his reply should not use the word "accept" or "confirm" or any other expression indicating acquiescence to offeror's proposal.

Large-scale businesses commonly use printed forms in accepting or acknowledging orders. The wording of such a form, when used by an offeree, may result in binding offeree to terms which he does not think he is accepting.

Example: B Co. sent to S Co. a purchase order form reading in part: "Please enter our order for the following described goods," followed by a typewritten description of the goods ordered and prices. The form contained no reference to strikes. In reply S Co. sent to B Co. a printed form titled "Purchase Memo," reading, as part of the printed form: "This acknowledges

⁵ RESTATEMENT, CONTRACTS § 59 (1932).

⁶ See Official Comment to UNIFORM COMMERCIAL CODE § 2-207.

⁷ It is interesting to note that proposed changes in the Code (as incorporated in House Bill No. 1507, Session of 1955, which was defeated in the Senate) include a change in Section 2-207 so that it would read, in part: "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.*" (Emphasis added.)

receipt of your order for the following described goods, which we accept, subject to the terms and conditions on the reverse side hereof." The description of goods and prices was typewritten on the form from B Co.'s purchase order. On the reverse side of S Co.'s purchase memo form, among other things, was printed: "S Co. will not be liable for any delay in delivery or failure to deliver, resulting from labor trouble or strike." B Co. did not reply. Before S Co. could ship the ordered goods, its plant was closed by a strike. B Co. sues S Co. for damages for nondelivery.

Assume here, as is usually the case, that the seller's labor trouble would not excuse him from his contract obligation to deliver, unless his contract expressly contained a strike excuse or escape provision.⁸ Under the "cautious" interpretation of the Code provision concerning acceptance with changed terms, S Co., in using the term "accept" in its form, accepted B Co.'s order on B Co.'s terms; the addition of different terms constituted a suggestion to amend the contract to include the strike escape provision. This would be a material change; therefore B Co.'s silence was not an acceptance of the change. S Co. would be bound by its acceptance of B Co.'s terms, the strike escape provision would *not* be a part of the contract, and B Co. could recover damages from S Co. for failure to deliver.

⁸ 12 AM. JUR., *Contracts*, § 371 (1939).