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Doing Business in the United States

CHAPTER 5 Preparation of a Sales Contract *

1-5 Doing Business in the United States § 5.02

§ 5.02 Contract Formation

[1] Offer and Acceptance

The Uniform Commercial Code makes it very easy to form a contract under Article 2. In any contract, there are always two issues: whether a contract has been formed, and what are the terms of that contract. The predisposition of the Code is to find an enforceable contract where the parties have evidenced agreement. n1 This is an accommodation to the perceived realities of the commercial world in which businessmen do not always channel communications through counsel. Commercial bargains thus frequently fall short of the standards sought to be imposed by the common law of contracts. The purpose of the Code is to accommodate reasonable business practices. Thus Section 2-204(1) of the Code states:

> "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."

Such an approach also has its dangers, however. Thus one who prepares a statement of an "agreement in principle" or of a negotiation position should in many circumstances indicate that he does not intend to be legally bound by it, if that is the case.

The fact that one or more terms, that are usually necessary for the formation of a contract, are left open, n2 will not prevent the formation of a contract if it appears the parties intended to make a contract and there is a reasonably certain basis for giving a remedy; i.e., the court or the Code can supply reasonable terms for those that are missing, such as price, time of delivery, and the like. However, the more terms that are left open, the less likely it is that the parties intended to enter into a binding agreement. In addition, if certain terms, such as quantity, are not included there can be no contract. n3

While in most cases Article 2 of the Uniform Commercial Code follows the common law rule that offers generally are revocable, prior to acceptance, unless the offeror receives consideration to keep the offer open, (i.e., an option contract), this rule is not followed for certain offers made by merchants. n4 If a merchant signs a written offer giving assurances that it will be held open for a certain period of time, the offer is irrevocable for the period stated in the offer, or for a reasonable time period, if no period is stated. n5 Although, in no event may the time period exceed three months, the offer should state when it expires if the offeror does not want to be bound past a certain date. n6 Note that such an offer is irrevocable even if the offeree gives no consideration.

An offeror who wishes the offeree to indicate his acceptance of the offer in a specific manner must so state in the offer. Otherwise, the Code permits the offeree to accept in any reasonable manner and by any reasonable medium under the circumstances. n7 In addition, *U.C.C. § 2-206(1)(b)* provides that if an offer to buy goods for prompt or current shipment is made, the seller may accept such an offer by promptly promising to ship or by promptly shipping the goods. Under § 2-206(2), a seller can accept a contract by beginning performance if the offer could be construed as inviting the start of performance, as long as the offeror is notified of the offeree's acceptance within a reasonable time.

The common law "mirror image" rule, which provided that a contract was formed only if the acceptance "mirrored" the offer, i.e., that it contained no new or different terms, has been abandoned. Instead, under the Code, an acceptance containing additional or different terms from the offer is valid "unless acceptance is expressly made conditional on assent to the additional or different terms." n8 Whether the additional or different terms will be included in the contract depends on whether both parties are merchants. If only one of the parties is a merchant, the contract will include only the terms of the offer. Between merchants, however, the additional terms will become part of the contract unless:

> "(a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received." n9

A change in either party's risk would be considered a material alteration. Examples of a change in risk would be warranty disclaimers, a clause giving a party the right to cancel the contract, or a clause contradicting usage of trade. But note that an existing trade usage and/or prior course of dealing between the parties may make even this type of alteration immaterial. n10

If any of the three situations outlined above occurs, then the offeror's terms will control. For a merchant to prevent the possibility that he will become subject to additional terms that he does not want included, is to state in his offer that any acceptance must be limited to the terms of his offer. Alternatively, he may specify additional terms that he will find objectionable. Finally, he should be ready to object to any others that are contained in the acceptance.

If the buyer is purchasing on credit, it is permissible for the seller to make any orders taken by salesmen conditional upon a higher executive's approval. n11 This will give the seller a chance to investigate the credit worthiness of the buyer before allowing the sale to become final.

[2] Usefulness and Necessity of a Written Contract

Section 2-201 of the Code (Article 2's Statute of Frauds) provides that in general, a contract for the sale of goods at a price of $500 or more is not enforceable unless there is some writing sufficient to indicate that a contract has been made and such writing has been signed by the party against whom the contract is sought to be enforced, or that party's agent. A formal writing is not required, and a writing which omits or incorrectly states a term will still be considered sufficient, but the contract will not be enforceable beyond the quantity stated in the writing.

Partial performance of an oral contract can be a substitute for a writing but such a contract is enforceable only to the extent of the performance rendered. Therefore the buyer must pay for those goods which have been accepted and the seller must supply goods for which payment has been made and accepted. n12 There are two other situations in which a contract will be enforced even without a writing. One is where the goods are to be specially made for the buyer, are not suitable for sale to others in the ordinary course of the seller's business and the seller has begun performance before the buyer notifies the seller that he no longer wants the goods. n13 The other situation occurs if a party admits in court that a contract was made, but the contract will not be enforceable beyond the quantity of the goods admitted. n14

Although generally, in order to be enforceable, the writing must be signed by the party against whom it is being enforced, n15 if one "merchant" signs a confirmation of agreement and sends it to another merchant, it is binding upon the latter, even though never signed by him, if he has reason to know of its contents and fails to object to it within ten days after it is received. n16 The effect of this provision is to take away the defense of the Statute of Frauds from the party who fails to answer.

Several writings, as well as a single writing, may perform the evidentiary function that a contract has been formed, if at least one of the writings has been signed by the party against whom enforcement is sought. Recognizing that electronic commerce has changed the business world, courts have indicated that computer files, electronic data files and recording devices may be sufficient to satisfy the writing requirement. The issue is whether an "electronic signature" constitutes a signature to a writing, and if electronic media is considered a writing at all.

Besides the obvious necessity of putting a sales contract for $500 or more in writing, there are good reasons why a sales contract should be in writing. Putting the contract in writing reduces the chance that either party will breach its provisions. There can be no dispute over whether the written terms are part of the contract, whereas the terms of an oral contract can always be questioned. Having a writing will avoid any problems regarding the applicability of the Statute of Frauds.

A written contract may not be contradicted by "evidence of any prior agreement or of a contemporaneous oral agreement" if the contract was "intended by the parties as a final expression of their agreement." n17 Thus it is advisable for the contract to state that it represents the final agreement of the parties, or contain some other phrase that has the same meaning. n18

Terms in a contract may be explained or supplemented by course of dealing, usage of trade or course of performance n19 or by evidence of additional terms that are not inconsistent with the contract unless the contract was intended as a complete and exclusive statement of the terms of the agreement. n20 If the parties do not want any contract terms added to those contained in the writing, such a clause should be included.

Of course, the contract can always be modified by a subsequent written agreement. n21 Under § 2-209, no consideration is necessary to make an agreement modifying a contract binding, as long as the modification is sought in good faith. While a contract can be modified orally, the parties can prevent subsequent modification by an oral agreement by stating in the contract that any modification must be in writing. Such a clause is not effective if it is contained in a form supplied by a merchant, unless it is separately signed (e.g. by initials) by the other party. n22 However, the latter requirement does not apply if the other party is also a merchant. n23 The requirements of the statute of Frauds (section 2-201) must be satisfied if the contract as modified is within its provisions. n24

FOOTNOTES:

(n1)Footnote 1. *See U.C.C. § 2-204(1).*

(n2)Footnote 2. *U.C.C. § 2-204(2).*

(n3)Footnote 3. *See* discussion in *§ 5.03 infra*.

(n4)Footnote 4. *See § 14.03 [3] infra* for an explanation of "merchant" status under Article 2 of the Code.

(n5)Footnote 5. *U.C.C. § 2-205*.

(n6)Footnote 6. *Id.*

(n7)Footnote 7. *U.C.C. § 2-206(1)(a)*; For example, the shipping of goods has been held to constitute acceptance.

See, e.g., Joseph Muller Corp., Zurich v. Commonwealth Petrochemicals, Inc., 334 F. Supp. 1013, 10 U.C.C. Rep. Serv. 1029 (S.D.N.Y. 1971) .

(n8)Footnote 8. *U.C.C. § 2-207(1)*. This section of the Code is often strictly construed. In *Air Master Sales Co. v. Northbridge Park Coop, Inc., 748 F. Supp. 1110, 13 U.C.C. Rep. Serv. 2d 726 (D.N.J. 1990)* , the court held that an offer is converted into a counteroffer "only where the offeree clearly reveals its unwillingness to proceed with the transaction unless it is assured of the offeror's assent to the additional terms."

(n9)Footnote 9. *U.C.C. § 2-207(2)*.

(n10)Footnote 10. *See Weisz Graphics Division of Fred B. Johnson Co., Inc. v. Peck Industries, Inc., 304 S.C. 101, 403 S.E.2d 146, 15 U.C.C. Rep. Serv. 2d 80 (App. 1991)* .

(n11)Footnote 11. *Venters v. Stewart, 261 S.W.2d 444 (Ky. 1953)* .

(n12)Footnote 12. *U.C.C. § 2-201(3)(c)*; *See, Monetti, S.P.A. v. Anchor Hocking Corp., 931 F.2d 1178, 14 U.C.C. Rep. Serv. 2d 706 (7th Cir. 1991)* .

(n13)Footnote 13. *U.C.C. § 2-201(3)(a)*

(n14)Footnote 14. *U.C.C. § 2-201(3)(b)*

(n15)Footnote 15. *U.C.C. § 2-201(1)*.

(n16)Footnote 16. *U.C.C. § 2-201(2)*; Note that "signed" has been held to mean executed or adopted. *See, Monetti, S.P.A. v. Anchor Hocking Corp., 931 F.2d 1178, 14 U.C.C. Rep. Serv. 2d 706 (7th Cir. 1991)* . As such, a writing "signed" by typed initials or made upon company letterhead may satisfy the "signing requirement." *Id. First Valley Leasing, Inc. v. Goushy, 795 F. Supp. 693, 19 U.C.C. Rep. Serv. 2d 1002 (D.N.J. 1992)* .

(n17)Footnote 17. *U.C.C. § 2-202*.

(n18)Footnote 18. However, such statements (known as "merger clauses") are sometimes disregarded by the courts. *See* the discussion of the parol evidence rule in § 5.06[5].

(n19)Footnote 19. *U.C.C. § 2-202(a)*; *See, e.g., Petroleo Brasileiro, S.A. Petrobas v. Nalco Chemical Co., 784 F. Supp. 160, 18 U.C.C. Rep. Serv. 2d 61* (D.N.J.) , *aff'd, 977 F.2d 569 (3d Cir. 1992)* .

(n20)Footnote 20. *U.C.C. § 2-202(b)*.

(n21)Footnote 21. *See § 4.04[9][a] supra.*

(n22)Footnote 22. *U.C.C. § 2-209(2)*

(n23)Footnote 23. *U.C.C. § 2-209(2)*.

(n24)Footnote 24. *U.C.C. § 2-209(3)*.

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