

I. Understanding the Roles of Offer and Acceptance in the Formation of a Contract*

What is an Acceptance?

An *acceptance* is “a manifestation of assent to the terms [of the offer] made by the offeree in the manner invited or required by the offer.” In determining if an offeree accepted an offer and created a contract, a court will look for evidence of three factors: (1) the offeree intended to enter the contract, (2) the offeree accepted on the terms proposed by the offeror, and (3) the offeree communicated his acceptance to the offeror.

Intention to Accept

In determining whether an offeree accepted an offer, the court is looking for the same *present intent to contract* on the part of the offeree that it found on the part of the offeror. And, as is true to intent to make an offer, intent to accept is judged by an objective standard. The difference is that the offeree must objectively indicate a present intent to contract on the terms of the offer for a contract to result. As the master of the offer, the offeror may specify in detail what behavior is required of the offeree to bind him to a contract. If the offeror does so, the offeree must ordinarily comply with all the terms of the offer before a contract results.

Intent and Acceptance on the Offeror’s Terms

Common Law: Traditional “Mirror Image” Rule

The traditional contract law rule is that an acceptance must be the *mirror image* of the offer. Attempts by offerees to change the terms of the offer or to add new terms to it are treated as counteroffers because they impliedly indicated an intent by the offeree to reject the offer instead of being bound by its terms. However, recent years have witnessed a judicial tendency to apply the mirror image rule in more liberal fashion by holding that only *material* (important) variances between an offer and a purported acceptance result in an implied rejection of the offer.

Even under the mirror image rule, no rejection is implied if an offeree merely asks about the terms of the offer without indicating its rejection (*an inquiry regarding terms*), or accepts the offer’s terms while complaining about them (*a grumbling acceptance*).

Distinguishing among a counteroffer, an inquiry regarding terms, and a grumbling acceptance is often a difficult task. The fundamental issue, however, remains the same: Did the offeree objectively indicate a present intent to be bound by the terms of the offer?

UCC Standard for Acceptance on the Offeror’s Terms: The “Battle of the Forms”

Strictly applying the mirror image rule to modern commercial transactions, most of which are carried out by using preprinted form contracts, would often result in frustrating the parties’ true intent. Offerors use standard order forms prepared by their lawyers, and offerees use standard acceptance or acknowledgement forms drafted by their counsel. The odds that these forms will agree in every detail are slight, as are the odds that the

* Excerpts from Jane Mallor, *Business Law and the Regulatory Environment* (11th Ed. 2001).

parties will read each other's forms in their entirety. Instead, the parties to such transactions are likely to read only crucial provisions concerning the goods ordered, the price, and the delivery date called for, and if these terms are agreeable, believe that they have a contract.

If a dispute arose before the parties started to perform, a court strictly applying the mirror image rule would hold that no contract resulted because the offer and acceptance forms did not match exactly. If a dispute arose after performance had commenced, the court would probably hold that the offeror had impliedly accepted the offeree's counteroffer and was bound by its terms.

Because neither of these results is very satisfactory, the Code, in a very controversial provision often called the "Battle of the Forms" section [2-207] has changed the mirror image rule for contracts involving the sale of goods. UCC section 2-207 allows the formation of a contract even when there is some variance between the terms of the offer and the terms of the acceptance. It also makes it possible, under *some* circumstances, for a term contained in the acceptance form to become part of the contract. The Code provides that *a definite and timely expression of acceptance* creates a contract, even if it includes terms that are *different from those stated in the offer* or even if it states additional terms that the offer did not address [2-207(1)]. An attempted acceptance that *was expressly conditioned* on the offeror's agreement to the offeree's terms would *not* be a valid acceptance, however [2-201(1)].

What are the terms of a contract created by the exchange of standardized forms? The additional terms contained in the offeree's form are treated as "proposals for addition to the contract." If the parties are both *merchants*, the additional terms become part of the contract unless:

1. The offer *expressly limited* acceptance to its own terms.
2. The new terms would *materially alter* the offer, or
3. The offeror gives notice of objection to the new terms within a reasonable time after receiving the acceptance [2-207(2)].

When the offeree has made his acceptance expressly conditional on the offeror's agreement to the new terms or when the offeree's response to the offer is clearly not "an expression of acceptance" (e.g., an express rejection), no contract is created under section 2-207(1). A contract will only result in such cases if the parties engage in conduct the "recognizes the existence of a contract," such as an exchange of performance. Unlike her counterpart under traditional contract principles, however, the offeror who accepts performance in the face of an express rejection or expressly conditional acceptance is not thereby bound to all of the terms contained in the offeree's response. Instead, the Code provides that the terms of a contract created by such performance are those on which parties' writings *agree*, supplemented by appropriate gap-filling provisions from the Code [2-207(3)].

Communication of Acceptance

To accept an offer for a bilateral contract, the offeree must make the promise requested by the offer. An offeror must communicate the terms of his proposal to the offeree before an offer results. This is so because communication is a necessary component of the present intent to contract required for the creation of an offer. For similar reasons, it is

generally held that an offeree must communicate his intent to be bound by the offer before a contract can be created. To accept an offer for a unilateral contract, however, the offeree must perform the requested act. The traditional contract law rule on this point assumes that the offeror will learn of the offeree's performance and holds that no further notice from the offeree is necessary to create a contract unless the offeror specifically requests notice.

Manner of Communication

The offeror, as the master of the offer, has the power to specify the precise time, place, and manner in which acceptance must be communicated. This is called stipulation. If the offeror stipulates a particular manner of acceptance, the offeree must respond in this way to form a valid acceptance. Suppose Prompt Printing makes an offer to Jackson and the offer states that Jackson must respond by certified mail. If Jackson deviates from the offer's instructions in any significant way, no contract results unless Prompt Printing indicates a willingness to be bound by the deviating acceptance. If, however, the offer merely suggests a method or place of communication or is *silent* on so such matters, the offeree may accept within a *reasonable time by any reasonable means* of communication. So, if Prompt Printing's offer did not require any particular manner of accepting the offer, Jackson could accept the offer by any reasonable manner of communication within a reasonable time.

When Is Acceptance Communicated?

Acceptances by Instantaneous Forms of Communication

When the parties are dealing face-to-face, by telephone, or by other means of communication that are virtually instantaneous, there are few problems determining when the acceptance was communicated. As soon as the offeree says, "I accept," or words to that effect, a contract is created, assuming that the offer is still in existence.

Acceptances by Noninstantaneous Forms of Communication

Suppose the circumstances under which the offer was made reasonably led the offeree to believe that acceptance by some noninstantaneous form of communication is acceptable, and the offeree responds by using mail, telegraph, or some other means of communication that creates a time lag between the dispatching of the acceptance and its actual receipt by the offeror. The practical problems involving the timing of acceptance multiply in such transactions. The offeror may be attempting to accept it. An acceptance may get lost and never be received by the offeror. The time limit for accepting the offer may be rapidly approaching. Was the offer accepted before a revocation was received or before the offer expired? Does a lost acceptance create a contract when it is dispatched, or is it totally ineffective?

Under the so-called "mailbox rule," properly addressed and dispatched acceptances can become effective when they are dispatched, even if they are lost and never received by the offeror. The mailbox rule protects the offeree's reasonable belief that a binding contract was created when the acceptance was dispatched. By the same token, it exposes the offeror to the risk of being bound by an acceptance that she has never received. The offeror, however, has the ability to minimize this risk by stipulating in her offer that she must actually receive the acceptance for it to be effective. Offerors who do this

maximize the time they have to revoke their offers and ensure that they will never be bound by an acceptance that they have not received.

Operation of the Mailbox Rule: Common Law of Contracts

As traditionally applied by the common law of contracts, the mailbox rule would make acceptances effective upon dispatch when the offeree used a manner of communication that was expressly or impliedly authorized (invite) by the offeror. Any manner of communication suggested by the offeror (e.g., “You may respond by mail”) would be expressly authorized, resulting in an acceptance sent by the suggested means being effective on dispatch. Unless circumstances indicated to the contrary, a manner of communication *used by the offeror in making the offer* would be impliedly authorize (e.g., an offer sent by mail would impliedly authorize an acceptance by), as would a manner of communication common in parties’ trade or business (e.g., a trade usage in the parties’ business that offers are made by mail and accepted by telegram would authorize an acceptance by telegraph). Conversely, an improperly dispatched acceptance or one that was *nonauthorized* would be effective when *received*, assuming that the offer was still open at that time. This placed on the offeree the risk of the offer being revoked or the acceptance being lost.

The mailbox rule is often applied more liberally by courts today. A modern version applied of the mailbox rule that is sanctioned by the *Restatement (Second)* holds that an offer that does not indicate otherwise is considered to invite acceptance by any *reasonable means* of communication, and a properly dispatched acceptance sent by a reasonable means of communication within a reasonable time is effective on dispatch. The *Cantu* case illustrates the more liberal version of the mailbox rule.

Operation of the Mailbox Rule: UCC

The UCC, like the *Restatement (Second)*, provides that an offer that does not specify a particular means of acceptance is considered to invite acceptance by *any reasonable means* of communication. It also provides that a properly dispatched acceptance sent by a reasonable means of communication within a reasonable time is effective on dispatch. What is reasonable depends on the circumstances in which the offer was made. These include the speed and reliability of the means used by the offeree, the nature of the transaction (e.g., does the agreement involve goods subject to rapid price fluctuations?), the existence of any trade usage governing the transaction, and the existence of prior dealings between the parties (e.g., has the offeree previously used the mail to accept telegraphed offers from the offeror?). So, under proper circumstances, a mailed response to a telegraphed offer or telegraphed response to a mailed offer might be considered reasonable and therefore effective on dispatch.

What if an offeree attempts to accept the offer by some means that is *unreasonable* under the circumstances or if the acceptance is not properly addressed or dispatched (e.g., misaddressed or accompanied by insufficient postage?) The UCC rejects the traditional rule that such acceptances cannot be effective until received, It provides that an acceptance sent by an unreasonable means would be effective on dispatch *if* it is received within the time than an acceptance by a reasonable means would normally have arrived.

Stipulated Means of Communication

As we discussed earlier, an offer may stipulate the means of communication that the offeree must use to accept by saying, in effect: "You must accept by mail." An acceptance by the stipulated means of communication is effective on dispatch, just like an acceptance by any other reasonable or authorized means of communication. The difference is that an acceptance by other than the stipulated means does not create a contract because it is an acceptance at variance with the terms of the offer.

Special Acceptance Problem Areas

Acceptance in Unilateral Contracts

A unilateral contract involves the exchange of a promise for an act. To accept an offer to enter such a contract, the offeree must perform the requested act. As you learned in the last chapter, however, courts applying modern contract rules may prevent an offeror from revoking such an offer once the offeree has begun performance. This is achieved by holding either that a bilateral contract is created by the beginning of performance or that the offeror's power to revoke is suspended for the period of time reasonably necessary for the offeree to complete performance.

Acceptance in Bilateral Contracts

A bilateral contract involves the exchange of a promise for a promise. As a general rule, to accept an offer to enter such a contract, an offeree must *make the promise requested by the offer*. This may be done in a variety of ways. For example, Wallace sends Stevens a detailed offer for the purchase of Steven's business. Within the time period prescribed by the offer, Steven sends Wallace a letter that says, "I accept your offer." Stevens has *expressly* accepted Wallace's offer, creating a contract on the terms of the offer. Acceptance, however, can be *implied* as well as expressed. Offerees who take action that objectively indicates agreement risk the formation of a contract. For example, offerees who act in a manner that is inconsistent with an offeror's ownership of offered property are commonly held to have accepted the offeror's terms. So, if Arnold, a farmer, leaves 10 bushels of corn with Porter, the owner of a grocery store, saying, "Look this corn over. If you want it, it's \$5 a bushel," and Porter sells the corn, he has impliedly accepted Arnold's offer. But what if Porter just let the corn sit and, when Arnold returned a week later, Porter told Arnold that he did not want it? Could Porter's failure to act ever amount to an acceptance?

Silence as Acceptance

Since contract law generally requires some objective indication that an offeree intends to contract, the general rule is that an offeree's silence, without more, is *not* an acceptance. In addition, it is generally held that an offeror cannot impose on the offeree a duty to respond to the offer. So, even if Arnold made an offer to sell corn to Porter and said, "If I don't hear from you in three days, I'll assume you're buying the corn," Porter's silence would still not amount to acceptance.

On the other hand, the circumstance of a case sometimes impose a duty on the offeree to reject the offer affirmatively or be bound by its terms. These are cases in which the offeree's silence objectively indicates an intent to accept. Customary trade practice or prior dealings between the parties may indicate that silence signals acceptance. So, if

Arnold and Porter had dealt with each other on numerous occasions and Porter has always promptly returned items that he did not want, Porter's silent retention of the goods for a week would probably constitute an acceptance. Likewise, an offeree's silence can also operate as an acceptance if the offeree has indicated that it will. For example, Porter (*the offeree*) tells Arnold, "If you don't hear from me in three days, I accept."

Finally, it is generally held that offerees who accept an offeror's performance knowing what the offeror expects in return for his performance have impliedly accepted the offeror's terms. So, if Apex Paving Corporation offers to do the paving work on new subdivision being developed by Majestic Homes Corporation, and Majestic fails to respond to Apex's offer but allows Apex to do the work, most courts would hold that Majestic is bound by the terms of Apex's offer.

Acceptance When a Writing Is Anticipated

Frequently, the parties to a contract intend to prepare a written draft of their agreement for both parties to sign. This is a good idea not only because the law requires written evidence of some contracts, but also because it provides written evidence of the terms of the agreement if a dispute arises at a later date. If a dispute arises before such a writing has been prepared or signed, however, a question may arise concerning whether the signing of the agreement was a necessary condition to the creation of a contract. A party to the agreement who now wants out of the deal may argue that the parties did not intend to be bound until both parties signed in writing. A clear expression of such intent by the parties during the negotiation process prevents the formation of a contract until both parties have signed. However, in the absence of such a clear expression of intent, the courts ask whether a reasonable person familiar with all the circumstances of the parties' negotiations would conclude that the parties intended to be bound only when a formal agreement was signed. If it appears that the parties had concluded their negotiations and reached agreement on all the essential aspects of the transaction, most courts would probably find a contract at the time agreement was reached, even though no formal agreement had been signed.

Acceptance of Ambiguous Offers

Although offerors have the power to specify the manner in which their offers can be accepted by requiring that the offeree make a return promise (a bilateral contract) or perform a specific act (a unilateral contract), often an offer is unclear about which form of acceptance is necessary to create a contract. In such a case, the offer may be accepted in any manner that is *reasonable* in light of the circumstances surrounding the offer. Thus, either a promise to perform or performance, if reasonable, creates a contract.

Acceptance by Shipment

The Code specifically elaborates on the rule stated in the preceding section by stating that an order requesting prompt or current shipment of goods may be accepted either by a *prompt promise to ship or by a prompt or current shipment of the goods* [2-206(1)(b)]. So, if Apex Corporation orders 500 IBM personal computers from Marks Office Supply, to be shipped immediately, Marks could accept either promptly promising to ship the goods or by promptly shipping them. If Marks accepts by shipping, any subsequent attempt by Apex to revoke the order will be ineffective.

What if Marks did not have 500 IBMs in stock and Marks knew that Ampex desperately needed the goods? Marks might be tempted to ship another brand of computers (that is, *nonconforming goods* – goods different from what the buyer ordered), hoping that Ampex would be forced by its circumstances to accept them because by the time they arrived it would be too late to get the correct goods elsewhere. Marks would argue that by shipping the wrong goods it had made a counteroffer because it had not performed the act requested by Ampex's order. If Ampex accepts the goods, Marks could argue that Ampex has impliedly accepted the counteroffer. If Ampex rejects the goods, Marks would arguably have no liability since it did not accept the order.

The Code prevents such a result by providing that prompt shipment of either conforming goods (what the order asked for) or nonconforming goods (something else) operates as an acceptance of the order [2-206(1)(b)]. This protects buyers such as Ampex because, sellers who ship the wrong goods have simultaneously accepted their offers and breached the contract by sending the wrong merchandise.

But what if Marks is an honest seller merely trying to help out a customer that has placed a rush order? Must Marks expose itself to liability for breach of contract in the process? The Code prevents such a result by providing that no contract is created if the seller notifies the buyer within a reasonable time that the shipment of nonconforming goods is intended as an accommodation (an attempt to help the buyer) [2-206(1)(b)]. In this case, the shipment is merely a counteroffer that the buyer is free to accept or reject and the seller's notification gives the buyer the opportunity to seek the goods he needs elsewhere.

Who Can Accept an Offer?

As the masters of their offers, offerees have the right to determine who can bind them in a contract. So, the only person with the legal power to accept an offer and create a contract is the *original offeree*. An attempt to accept by anyone other than the offeree is treated as an offer, because the party attempting to accept is indicating a present intent to contract on the original offer's terms. For example, Price offers to sell his car to Waterhouse for \$5,000. Anderson learns of the offer, calls Price, and attempts to accept. Anderson has made an offer that Price is free to accept or reject.