Formation of Contracts for the Sale of Goods

Calvin W. Corman
FORMATION OF CONTRACTS FOR THE SALE OF GOODS

CALVIN W. CORMAN

I. INTRODUCTION

All advanced legal systems, and all bodies concerned with governing international trade transactions, are today struggling with the problems connected with the need to develop acceptable legal rules for contract formation, particularly involving the sale of goods. This article will set forth some of the problems that are inherent in contract formation, and will describe and compare some of the solutions offered (1) by the civil law systems, especially as seen in Japan, Germany, and France; (2) by the common law systems, especially as expressed both in the developing Second Restatement of Contracts and in the Uniform Commercial Code Article on Sales; and (3) by international bodies, especially as seen in the Uniform Law on the Formation of Contracts for the International Sale of Goods.

In the United States, modification of the rules of offer and acceptance acquired early impetus from the writings of Llewellyn in the 1930's, and from his work in the 1940's while he was Reporter for the proposed Uniform Revised Sales Act. The decision to develop a more expansive Uniform Commercial Code (hereinafter UCC) changed only the format, and except for revisions in terminology, the fundamental concepts of the earlier proposals continued to be advanced, so that many basic positions on contract formation asserted...
two decades earlier are reflected in the current version of the UCC. Further study is being carried forward by the Second Restatement of Contracts, and the revised portions significant to this article have been approved by the American Law Institute.\(^4\)

There has been parallel, independent study on contract formation in international transactions during this same quarter century. The International Institute for the Unification of Private Law has been active during this period, working toward adoption of uniform rules for the formation of international sales contracts. The Institute’s first draft of a Uniform Law on the Formation of Contracts for the International Sale of Goods and the early drafts of the proposed Uniform Revised Sales Act in the United States were both developed prior to World War II. This parallel development continued, and the second “Rome” draft for an International Act was completed at the same time that intensive study of the proposed UCC progressed in the United States. The present text of the UCC was formulated in 1962; the final draft of the Uniform International Act was completed at the Hague in 1964, with the United States delegation actively participating for the first time as representatives of a member nation.\(^5\)

\(^4\) Tentative Draft No. 1 of Restatement (Second), Contracts, was approved by the American Law Institute at its 1964 annual meeting. Braucher, *Offer and Acceptance in the Second Restatement*, 74 Yale L.J. 302 (1964).

\(^5\) The current (1964) formulation of a Uniform Law on the Formation of Contracts for the International Sale of Goods, and covering Convention, together with the 1964 Uniform Law on the International Sale of Goods, and covering Convention, were approved by the Diplomatic Conference on the Unification of Law governing the International Sale of Goods held at the Hague in April 1964. An alternate article 1 to the 1964 Uniform Law on the Formation of Contracts for the International Sale of Goods provides: “The present law shall apply to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Uniform Law on the International Sale of Goods.” Article 1 of the Uniform Law on the International Sale of Goods specifies the circumstances when that law is to apply. The scope of the application may, however, be limited by adoption and application of article II, paragraph 2, of the Convention Relating to a Uniform Law on the International Sale of Goods.


the approval of the proposed draft at The Hague in 1964, it has now been submitted to the member nations for consideration and possible ratification.

II. THE OFFER

The Japanese Civil Code does not expressly differentiate an invitation to submit an offer from an offer itself. The two are nevertheless regarded as distinct, both in theory and in practice, for general standards are used to ascertain when the invitation gives the recipient the power to create, by his acceptance, a legally enforceable contract. Although there have been few reported Japanese decisions which have directly faced the problem of this distinction, the scholars unanimously seem to differentiate an invitation to make an offer from the offer itself, applying the same standards as those in Anglo-American law.

Anglo-American law, emphasizing the bargain aspect of the transaction, defines an offer as a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." If the addressee of the manifestation either knows or has reason to know that the person making it does not intend to conclude the bargain at that time, then the manifestation is merely a stage in the preliminary


But note the following observation on the Japanese law of sales, Braucher, Commercial Law in Japan and America, 47 A.B.A.J. 150, 153 (1961): Claims for commercial damages have given rise to numerous decisions, but the code provisions remain the subject of a substantial number of unsettled disputes going to basic questions of theory and scope.... Scholars' opinions are not greatly affected by judicial opinions; in the absence of a doctrine of precedent, judicial decisions do not finally resolve the many unsettled questions. Nor does there seem to be any feeling that legislative clarification is urgent, or any established machinery which is likely to produce legislative revision.

7ISHIDA, SAIREN KAKURON (Detailed discussion on obligations) 6 (1955); 5(1) Wagatsuma, Sairen kakuron 57 (1954); Minamitani, Bōeki keiyaku no seiritsu (Formation of trade contracts), Bōeki to hōrutsu 191-96, in 8 Bōeki jitsumu kōza (Ishikawa ed. 1962).

8See Restatement (Second), Contracts § 24 (Tent. Draft No. 1, 1964) [hereinafter cited as Restatement (Second), Contracts].
negotiations. This applies to advertisements of goods, either by display, by newspaper, radio and television, or by catalogues, price lists, and circulars. These advertisements are not ordinarily intended, nor usually understood, as offers to sell. Nor are submittals of price quotations as statements of price per unit of quantity, nor requests for bids on a construction project, usually construed as offers. The submittal of unsigned documents or letters is only an advance indication in preliminary negotiations.

Courts in both the civil law system and the common law system must frequently differentiate preliminary negotiations by seller and purchaser from offers leading to the sale of goods. In France, 

---

9 Id. at § 25.
10 See Annot., Seller's advertisements as affecting rights of parties to sale of personal property, 158 A.L.R. 1413 (1945); Annot., Advertisement or circular letter addressed to public or special class of persons, and relating to purchase or sale, as an offer acceptance of which will consummate a contract, 157 A.L.R. 744 (1945).
12 See, e.g., Frederick v. Curtright, 137 Cal. App. 610, 290 P.2d 875 (Dist. Ct. App. 1955); Klemm Reflecto Co. v. Munro, 321 Pa. 25, 183 Atl. 803 (1936) (estimate that 200 reflectors could be sold in three months under requirements contract); Excelsior Knitting Mills, Inc. v. Bush, 38 Wn. 2d 876, 233 P.2d 847 (1951) (tentative order for merchandise to be manufactured by seller taken subject to manufacturer's acceptance).
although there is some commentary to the contrary, both the courts and scholars of law recognize that trade circulars and catalogues advertising goods for sale serve only as invitations to receive offers. Article 4 of the Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter referred to as the Uniform International Act) states in negative fashion that a communication to specific persons shall not constitute an offer unless prescribed requirements as to objectives and definiteness are satisfied; it must indicate the offeror's intention to be bound, and be sufficiently definite to permit the conclusion of the contract by acceptance. These broad standards, however, offer little guidance for specific application.

See, e.g., 1 BAUDRY-LACANTINERIE ET BARDE, TRAITE DES OBLIGATIONS § 30 (3d ed. 1968); circulars are considered as a form of offer that remains open to the extent of available stock, similar to where the goods are displayed in a shop window or on a shop counter with price designated.

See, e.g., 1 BAUDRY-LACANTINERIE ET BARDE, TRAITE DES OBLIGATIONS § 30 (3d ed. 1968); circulars are considered as a form of offer that remains open to the extent of available stock, similar to where the goods are displayed in a shop window or on a shop counter with price designated.

The same standards are recognized in Japanese law. See WAGATSUMA, op. cit. supra note 7, at 57.

The problem of objective conformity of offer and acceptance in regard to the formation of a contract, and application of these standards to resolve them, are well-illustrated in Shimolde v. Wada, HONTSU SHIBUN (No. 702) 25 (Anotsu Dist. Ct., March 15, 1911). In that case B wired S: "Quote me the price for soy bean waste produced in Port Arthur for shipment in January." On the same day S replied by telegram: "We will sell soy bean waste at the price of ¥ 2.50 per 10 sheets, shipment in January, arrival at Yokkaichi, insurance and freight paid." On the following day, B wired: "Received your telegram. Will buy 10,000 sheets." To which S replied: "Received your last telegram. Will negotiate with the producer. Please keep your order open till tomorrow." In response B replied: "We received your telegram saying you will sell. Cannot wait." By this telegram B implied that the contract was already formed, and before this telegram reach S, S wired: "We have negotiated with the producer. Can accept your order at ¥ 3.00 per 10 sheets." B did not respond to this telegram, believing S was bound by the contract to furnish 10,000 sheets at ¥ 2.50 per 10 sheets.

There were no further communications between the parties until two months later when the market price for soy bean waste had risen considerably. After sending two or three notices to S demanding performance, B sent a final notice asking S to perform within seven days. When S failed to perform, B sought damages for breach. B claimed that S's telegram ("We will sell...at ¥ 2.50...") was an offer which was accepted by B's telegram ("Received your telegram. Will buy 10,000 sheets.").

The court noted, however, that the first mention of the quantity of 10,000 sheets first appeared in B's purported acceptance telegram, whereas nothing about quantity was mentioned in S's purported offer. Therefore, it was impossible for the court to find that 10,000 sheets was the quantity fixed by both parties as an essential term of the purported contract. The court interpreted S's initial telegram as a simple price quotation—an invitation for an offer. B's telegram in response was the offer. Since it was never accepted by S, there was no contract.

Farnsworth, Formation of International Sales Contracts: Three Attempts at Unification, 110 U. PA. L. REV. 305, 312 (1962): Not only is this language [UNIFORM INTERNATIONAL ACT art. 3 (1958 draft)] too vague to be of much help in the kinds of situations which cause trouble but the test for determining whether a communication is sufficiently definite to constitute an offer is circular. It can hardly be regarded as an adequate sub-
Interpretation of the communication may be clarified by reference to preliminary negotiations, to established practices between the parties, to usage, and to any applicable legal rules for contracts of sale.\textsuperscript{18}

Both the Japanese Civil Code and the Uniform International Act declare that the offeror cannot be bound until his offer has been communicated to the offeree;\textsuperscript{19} the offer will lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.\textsuperscript{20}

III. TERMINATION OF THE OFFERENCE’S POWER OF ACCEPTANCE BY REVOCATION OF THE OFFER

A. Civil Law Approach

Although the legislative provisions under consideration differ regarding the manner of expression of offers, these differences are not substantial. But this is not true of the termination by revocation of the offeree’s power of acceptance. In Japan, if an offer specifies a period for acceptance, it is irrevocable during that period;\textsuperscript{21} and if a time limit is not stated in an offer made \textit{inter absentes}, revocation is not permitted before the expiration of the time reasonably necessary for the offeror to receive notice of acceptance.\textsuperscript{22} This allows for the possibility that, following receipt of the offer, the offeree may wish to make a special investigation, prompted perhaps by the nature of the offer and/or by the receipt of other offers. He can, of course, communicate his acceptance effectively within the stated period; or if no period is stated, then he is given a reasonable period for acceptance, so that he is protected against the possible imposition by the legal system of an unexpected substitute for the more detailed rules found in most legal systems and would merely invite any tribunal to fill in the lacunae by application of its own domestic law, contrary to the stated purpose of the draft.

Article 4 of the Uniform Law on the Formation of Contracts for the International Sale of Goods [hereinafter cited as \textit{Uniform International Act} (1964 draft)] is similar to article 3 of the “Rome” draft of 1958. However, article 4(2), suggesting available sources for interpretation of the communication, is new to the present formulation.

\textsuperscript{18} \textit{Uniform International Act} art. 4(2) (1964 draft).

\textsuperscript{19} \textit{Japanese Civil Code} art. 97(1): “A declaration of intention made \textit{inter absentes} shall be effective as from the time when notice thereof has reached the other party.” [This translation, and those of the Japanese Civil Code provisions which follow, are taken from 2 Eibun horeisha Law Bulletin Series (hereinafter EHS) No. 2100 (1966).] \textit{Uniform International Act} art. 5(1) (1964 draft).

\textsuperscript{20} \textit{Uniform International Act} art. 5(1) (1964 draft): “The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.”

\textsuperscript{21} \textit{Japanese Civil Code} art. 521(1): “An offer specifying a period for acceptance cannot be revoked.”

\textsuperscript{22} \textit{Japanese Civil Code} art. 524.
loss.\textsuperscript{23} It is presumed here that there is an intent to keep these offers open either for a fixed period or for a reasonable period.

The offeror in Japan, however, can regulate the matter of revocation by stating in the offer that he may revoke it at any time, despite a pre-established fixed time for acceptance.

Other methods of termination of the offeree's power of acceptance are recognized both in Japan and in the United States.\textsuperscript{24} When the offer is made \textit{inter absentes}, the power of acceptance may terminate at the end of the time stated in the offer,\textsuperscript{25} or if no time is specified, at the end of a reasonable time.\textsuperscript{26} But an offer to enter into a contract made \textit{inter praesentes} must be accepted immediately or a lapse results.\textsuperscript{27}

\textsuperscript{23}See 5(1) \textsc{Wagatsuma, op. cit. supra} note 7, at 60. See also de Becker's comment to Civil Code article 521, \textsc{De Becker's Annotated Civil Code of Japan 123} (1909) : The offeror cannot freely withdraw his offer within the specified period of time, because the other party may require to make some preparations for accepting it, and if after he had made these preparations and was about to accept the offer, the offeror suddenly withdrew the offer, it might cause a great deal of prejudice and annoyance to the other party.

See also \textsc{Corbin, Offer and Acceptance, And Some of the Resulting Legal Relations, 26 Yale L.J. 169, 197 & n.56 (1917)}, in \textsc{Selected Readings in the Law of Contracts 170, 191 n.56 (1931)}.

\textsuperscript{24} \textsc{Restatement (Second), Contracts § 35. Methods of Termination of the Power of Acceptance:}

(1) An offeree's power of acceptance may be terminated by

(a) rejection or counter-offer by the offeree, or
(b) lapse of time, or
(c) revocation by the offeror, or
(d) death or incapacity of the offeror or offeree.

(2) In addition, an offeree's power of acceptance is terminated by the failure of any condition of acceptance arising under the terms of the offer.

\textsuperscript{25} \textsc{Japanese Civil Code} art. 521(2): "If the offeror does not receive notice of acceptance within the period specified, the offer shall lapse." \textsc{Cf. Restatement (Second), Contracts §§ 35(1)(b), 40.}

\textsuperscript{26} \textsc{Japanese Commercial Code} art. 508(1) [as translated in 2 EHS No. 2200 (1963)]: "An offer to enter into a contract in respect of which no period of acceptance has been fixed, when made \textit{inter absentes}, shall lapse if notice of its acceptance is not dispatched by the offeree within a reasonable period." Note, however, that this provision applies only when the transaction to be entered into is a "commercial transaction."

\textsc{Cf. Restatement (Second), Contracts § 40. Lapse of Time: "(1) An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time."}

\textsc{German Civil Code (BGB) art. 146:}

(1) The offer lapses when declined as to the offeror or when not accepted in the time prescribed by secs. 147-49.

(2) What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.

(3) Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in sec. 51, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received.

\textsuperscript{27} \textsc{Japanese Commercial Code} art. 507. Again, this is a Commercial Code provision; hence, it does not apply to "non-commercial transactions" (see also note 26 supra). However, scholars are of the opinion that in most cases the same rule should be applied even to "civil transactions" unless special circumstances exist; \textit{e.g.}, where
This is unduly harsh upon the offeree, who may need time to consider the offer before making his decision. Because of this, the Uniform International Act includes the qualification that acceptance of an oral offer must be immediate only if the circumstances show that the offeree does not need time for reflection.\textsuperscript{28}

For the Japanese offeree's power of acceptance to be terminated by revocation of the offer made \textit{inter absentes}, notice of the revocation must normally arrive before the dispatch of the acceptance.\textsuperscript{29} Although this is not specifically expressed in either the Japanese Civil or Commercial Codes, it can be inferred from article 526(1) of the Civil Code, which provides that a contract \textit{inter absentes} comes into existence when notice of acceptance is dispatched.\textsuperscript{30}

A delay in the arrival of the notice of revocation alters the conditions. If the acceptor knows that the revocation was dispatched so that it normally would have arrived before the dispatch of the notice of acceptance, he must immediately dispatch to the offeror notice of the delayed arrival.\textsuperscript{31} If he fails to do so, the acceptance is not effective, and the contract does not come into existence.\textsuperscript{32}

The Japanese position regarding the effective revocation of offers, as expressed in Japan's Civil Code, has been directly influenced by the developed law of Europe, especially by the law of Germany. In Germany, the offeror is precluded from withdrawing an offer until the expiration of any fixed period; if no time limit is imposed, the offeror does not have the power to withdraw his offer during the period in which he could have reasonably expected to receive a reply, unless he expressly states otherwise.\textsuperscript{33} That is, under the German Civil Code the binding offer remains open until either a specified or a reasonable

\textsuperscript{28} \textit{Uniform International Act} art. 8(1) (1964 draft).

\textsuperscript{29} See \textit{Ishida}, \textit{op. cit. supra} note 7, at 10; \textit{5(1) Wagatsuma, op. cit. supra} note 7, at 60.

\textsuperscript{30} \textit{Japanese Civil Code} art. 526(1).

\textsuperscript{31} \textit{Japanese Civil Code} art. 527(2).

\textsuperscript{32} \textit{German Civil Code} (BGB) art. 145: "An offer to contract is binding upon the offeror unless he has provided for the contrary."

\textsuperscript{33} \textit{German Civil Code} (BGB) art. 151(2).
time has elapsed. These two legal systems have similar approaches to delayed arrival of acceptance and to revocation of the offer.

The present position began to evolve in European jurisprudence near the beginning of the nineteenth century, due in part to the increased use of the mails for communication. The concept that the offer was irrevocable for a legally fixed time originated in legislative form with the Prussian Code of 1794 and the Austrian Code of 1811. In Germany, it was first brought into the Commercial Code, and then into the Civil Code. This legislation directly influenced the adoption of a similar position in the Japanese Code of 1898.

The offeror in Germany may avoid making a binding offer by inserting a *freibleibend* (without obligation) clause in his communication, thereby reversing the positions of the parties. A communication that would normally be considered a firm offer becomes only an invitation, and its "acceptance" by the recipient becomes the offer. To afford some protection to the recipient of a communication containing a *freibleibend* clause, the legislation requires that the original offeror, upon receipt of an affirmative response, must immediately reply to the contrary, or be subject to the presumption that he has accepted the offer.

---

54 **German Civil Code** (BGB), art. 147: "The offer made to a person present must be immediately accepted. This applies also to offers made by one person to another over the telephone. An offer made to an absent person must be accepted during the time the offeror may expect the arrival of the answer under regular circumstances."

55 **German Civil Code** (BGB) art. 148: "In case a time was fixed by the offeror for the acceptance, the acceptance must be made within this time."

56 **German Civil Code** (BGB) art. 149: "In case the acceptance was forwarded in due time by the offeree, but delivered belatedly to the offeror, the latter, if he should have known of the due acceptance must, on receiving the acceptance, notify the offeree of the delay unless he has done so before. If he delays the notifications, the acceptance will not be considered as belated." See Nussbaum, *Comparative Aspects of the Anglo-American Offer-And-Acceptance Doctrine*, 36 COLUM. L. REV. 920, 923 (1936).

57 Cf. **Japanese Civil Code** art. 527, with regard to delayed arrival of notice of the revocation of an offer:

1. Even in cases where notice of the revocation of an offer has arrived after notice of acceptance has been despatched, if the acceptor could have known that it was despatched at such a time that it would have under normal circumstances arrived before the despatch of the notice of acceptance, the acceptor shall despatch without delay notice of the delayed arrival to the offeror.

2. If the acceptor has neglected to give the notice mentioned in the preceding paragraph, the contract shall be deemed not to have come into existence.

See also notes 31 and 32 *supra* and accompanying text.

58 The binding force of unilateral promises had been recognized as early as medieval German law. 3 Von Gericke, **Deutsches Privatrecht** 284 (1917).


60 Allgemeines Buengerliches Gesetzbuch fuer das Kaisertum Oesterreich § 862.

61 **German Civil Code** (BGB) arts. 145-49. See notes 33-35 *supra*. Irrevocability of the offer was expressed in the German Commercial Code of 1861 and subsequently in the German Civil Code of 1896 that became effective in 1900.

62 See **Japanese Civil Code** arts. 521, 524. See notes 21-23 *supra*. 
After the First World War, when the German economic system moved through a period of inflation followed by a period of deflation, the use of freibleibend clauses increased, especially in commercial transactions, and their use has continued to increase, until today these clauses are incorporated into many forms of offer. There is now general recognition of this practice in most civil law systems of Europe. The standard order form used by automobile sales agencies in Germany calls for the buyer's signature to a provision binding him for thirty days, subject to rejection by the offeree during that period.

There has been a parallel development in the law of France; French law permits the withdrawal of an offer at any time before it is accepted, but there are circumstances which modify this rule. A promise to keep an offer open for a fixed time precludes revocation during that period. Where the period of the firm offer is indefinite, the offer is not retractable until reasonable notice has been given of the intent to withdraw. The theory of the firm offer is usually based on the view that the promise to keep the offer open is tacitly accepted by the offeree, rather than that the promisor is bound simply by reason of the unilateral declaration of his will. This latter proposition has
received more extensive recognition in German jurisprudence.\(^9\)

The proposed French-Italian Code of Obligations, promulgated during the second quarter of the present century\(^5\) and subsequently abandoned in favor of independent revisions of the French and Italian Civil Codes, stated that the revocation of the offer should not serve as an obstacle to the formation of the contract.\(^6\) It is recognized that a promise could be the source of a legal obligation, provided that it was placed in written form and specified a definite duration. French legal writers have suggested several theoretical bases for the irrevocability of the firm offer during an allotted time: (1) that its withdrawal constitutes a fault; (2) that it is binding on principles of contract formation; and (3) that it is binding by application of the theory of unilateral will.\(^7\) Each of these theories has on occasion been supported by the courts.\(^8\)

---


\(^5\) The Code Napoleon does not have an article corresponding to Article 1809 of the Louisiana Civil Code. Nevertheless, the majority of the French commentators reach the same result by the interpretation of Article 1101 of the Code Napoleon and agree that there can be no revocation for the stated time or a reasonable time.

\(^6\) Siegel, Das Versprechen als Verflich-tungsbrun, (1874); Stobbe, 13 Zetnrschrit ftur Rechtsgeschichte. See also German Civil Code provisions, notes 33-35 supra.

\(^7\) The first draft was published in 1927 to be followed by subsequent studies. Franco-Italian Code of Obligations art. 2.

\(^8\) Franco-Italian Code of Obligations art. 60. Article 2 involved the offer to contract, and article 4 the public promise of a reward. Planiol, a critic of the theory that a unilateral declaration of will is binding on the maker independently of any acceptance by another person, observed that the Franco-Italian Code of Obligations "(pays) homage to the new idea that the will obligates him who gives it without an acceptance being necessary. But in truth such a concept remains purely theoretical." 2 Planiol, Trait\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\''\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\'\"
The 1950 proposed draft for a new French Civil Code precludes the revocation of an offer that sets a period for acceptance; or if such a period results from the particular circumstances, it precludes revocation until the expiration of that period. A comparable provision in the Italian Civil Code binds the offeror to keep his offer open for the stated period. This is also true where one party agrees to be bound by his offer but the other party has the option to accept or refuse it.

The Italian Commercial Code is more restrictive in that the offeror retains the power of revocation but subjects himself to liability for damages if the offeree had prepared to perform the contract in reliance on the offer. This position rests upon the culpa-in-contrahendo theory elaborated in Germany during the last century by Rudolf von Jhering. But even this deviation from the position accepted today by most European legal systems is mitigated by the established rule of Italian commercial law, where it is presumed that the offeror waives his right to require acceptance when the offer is stated for a definite period.

This approach of the European civil law systems, especially as expressed in Germany and in the closely related Japanese system, can be contrasted with that of the common law system, particularly with that

\begin{itemize}
  \item Jahn v. Charry, Bordeaux, 17.1.1870, D. 1871.2.96 (withdrawal of offer recognized but constituted a fault).
  \item The courts have not generally accepted these theories. See, e.g., de Portes v. Vullier, Civ. 3.2.1919, D. 1923.1.126; von Mehren, The French Civil Code and Contract: A Comparative Analysis of Formation and Form, 15 La. L. Rev. 687, n.2 (1955).
  \item Travaux de la Commission de Réforme du Code Civil Année 1948-1949 art. 11, at 705 (1950):
    \begin{itemize}
      \item The offeror may revoke his offer if it has not yet been accepted. However, when the offer sets a period for acceptance or such a period results from the circumstances of the case, the offer cannot be revoked before this period has expired, except in the case where the offer has not yet come to the attention of the offeree.
    \end{itemize}
  \item Italian Civil Code art. 1329 (1): "If the offeror binds himself to keep open the offer for a certain period of time, revocation is not effective."
  \item Italian Civil Code art. 1331: "When the parties agree that the declared offer of one of the parties shall be binding on himself but that the other party has the option to accept it or refuse it, such declaration of the first party is considered as an irrevocable offer with regard to the effects of Article 1329. If no time limit has been set for acceptance, it may be set by the judge."
  \item Italian Civil Code of 1882 art. 36, para. 3.
  \item 4 JAHRENBURCH FÜR DIE DogMAtik DES HEUTIGEN Romischen UND DeUTsCHEN PRIVATRECHTS (1861); Nussbaum, supra note 35, at 924; Longo, The Cornell Project on the Common Core of Legal Systems: A View of a Civilian, 4 Colum. J. Trans-Nat. L. 1, 11 n.20 (1965): "For example, in Italian law an offer is normally revocable, but the offeree is compensated for loss and expenses sustained in 'bona-fide' reliance on the offer."
  \item Cour de Cas, 28.2.1870, D.P. 1871.1.61 (dictum); Nussbaum, supra note 35, at 924.
\end{itemize}
of the Uniform Commercial Code, with respect to commercial offers for sale or purchase of goods.

B. Common Law Approach

At approximately the same date that the drafters of the Prussian Code were elaborating the concept of an offer that is irrevocable for a stated time, the English court was expressing the position, in the case of Cooke v. Oxley, that the seller is not bound by the acceptance of his offer even though he had agreed to keep it open for a certain time at the recipient's request. Application of the subjective theory of contract formation, and the necessity for a consideration or a seal to convert the promise into a binding option, restricted the development of the irrevocable offer in England.

The influence of the subjective theory of contracts waned during the last century, but the necessity of adequate formality of the promise continued to restrict British judicial development corresponding to that on the continent. Reliable information of revocation of

---

**Footnotes:**


It was suggested that the ten days during which the offer was to remain open had not expired when it was withdrawn. But this can make no difference. The offer was not a contract, and the term that it should remain open for ten days was therefore not binding. It has often been held that such an offer may, notwithstanding, be withdrawn within the time limited: [cases cited].

For commonwealth decisions see, e.g., Canada: Fraser v. Morrison, [1958] 12 D.L.R. 2d 612, 615:

Unless there was an acceptance by the owner (the defendants), and that acceptance had been communicated to the plaintiffs, there could be no contract. The 10-day clause did not make the offer to purchase binding on the plaintiffs for that period because the offer in terms did not so provide and in any case there was no consideration given on which such a contract could be founded. The plaintiffs therefore, had the right to cancel their offer to purchase any time before acceptance by the defendants had been communicated to them.

the offer did not have to be received directly from the offeror to be legally effective.\textsuperscript{62}

The Second Restatement of Contracts (of which the sections on contract formation were recently approved) recognizes the accepted common law concept that an offeree's power of acceptance is terminated when he receives from the offeror a manifestation of an intention not to enter into the proposed contract,\textsuperscript{63} or when he acquires reliable information that the offeror has taken, or will take, definite action inconsistent with an intention to enter into the proposed contract.\textsuperscript{64} This applies to commercial offers to sell and purchase goods as well as to other forms of transactions.\textsuperscript{65} There is often failure to take into account the expectation of performance created by the assurance expressed in the offer. A businessman may be inclined to place less

\textsuperscript{62} See Dickinson v. Dodds, [1876] 2 Ch. D. 463, 45 L.J.Ch. 777 (C.A. 1876) (property sold to third party after offeror had promised the offeree that "This offer to be held open until Friday at 9 a.m."). In King v. Homer, [1914] 33 N.Z.L.R. 222 (1913), there was an offer by appellants to permit respondent to hunt opposums on appellant's land for a stated sum of money. Before the money was tendered respondent learned that appellant had granted the right to a third party.

\textsuperscript{63} See RESTATEMENT (SECOND), CONTRACTS § 41.

\textsuperscript{64} Id. at § 42.

\textsuperscript{65} For cases dealing with withdrawal of offer to sell before acceptance, see, e.g., Dura Chem. Co. v. Dalton-Cooper Inc., 107 N.Y.S.2d 280 (Sup. Ct. 1951); Deibel v. Kaufman, 44 Ohio L. Abs. 321, 62 N.E.2d 770 (1945) (corporate stock).


The purchase order may provide that the offer will be effective unless it is revoked by a stated date. See Nelson Equip. Co. v. Harner, 191 Ore. 359, 230 P.2d 188, 192 (1951): "The provision for cancellation was to enable the defendant to withdraw on or prior to, but 'not later than 1 Jan. 49.'"

For cases dealing with indirect communication of revocation, see, e.g., Threlkeld v. Inglett, 289 Ill. 90, 124 N.E. 368 (1919); Giovanola v. Fort Lee Bldg. & Loan Ass'n, 123 N.J. Eq. 103, 195 Atl. 357 (Ch. 1938) (dictum); Watters v. Lincoln, 29 S.D. 98, 135 N.W. 712 (1912); Hoover Motor Express Co. v. Clements Paper Co., 193 Tenn. 6, 241 S.W.2d 851 (1951); Antwine v. Reed, 145 Tex. 521, 199 S.W.2d 482 (1947). See L CORBIN, CONTRACTS § 40 (1963); Annot., Attempted revocation of offer by letter mailed or telegram filed before, but not received until after, letter or telegram of acceptance was mailed or filed, 125 A.L.R. 989 (1949).
importance upon the binding force of the legal concept of consideration than upon commercial practice and usage within the trade.

To alleviate this difficulty, legislation has been enacted in a few states, exemplified by New York, and, with respect to offers to buy or sell goods, the principle of irrevocability has today been adopted throughout most of the United States through the wide state enactment of the UCC.

Section 2-205 of the UCC applies to the offer made by a merchant to buy or to sell goods. Despite the lack of consideration, if the merchant gives assurance in a signed writing, his offer will be held open for any stated period, but not exceeding three months. If the signed writing fails to specify the time for which the offer will be held open, it will remain irrevocable for a reasonable time, again not exceeding three months.

While the offeree receiving a firm offer will usually be a merchant, under the UCC it is the fact that the offeror is a merchant, usually a dealer in goods of the kind involved, that is controlling. Although oral communication, frequently by telephone, is recognized in commercial practice as an established method of consummating contracts, the

---

66 NEW YORK PERS. PROP. LAW § 33(5) (McKinney 1962):
When hereafter an offer to enter into a contract is made in writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance or irrevocability. When such a writing states that the offer is irrevocable but does not state any period of time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time.

The section was repealed upon adoption of the Uniform Commercial Code, N.Y. Sess. Laws 1962, ch. 553, effective Sept. 27, 1964.


67 The fact that the signed writing gives assurance that it is irrevocable, that it is not subject to cancellation, or that the offeror will not revoke the offer for a stated period that exceeds three months, does not mean that such provision is to be given no legal effect by the courts, but only that without consideration it is irrevocable for a reasonable time under the circumstances which can not exceed three months. This interpretation was suggested when the concept of an irrevocable offer to buy or sell goods was first proposed in the early drafts of the Uniform Revised Sales Act § 18: "Commercial reason cannot recognize the total failure of a deliberate transaction merely because it has contemplated an engagement extending beyond the period allowed by this section." Comment to UNIFORM REVISED SALES ACT §18 (proposed Final Draft No. 1, 1944).

68 But the definition of the term "merchant" is not so limited. UCC § 2-104:
(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

[Citations to the UCC are to UNIFORM COMMERCIAL CODE 1962 OFFICIAL TEXT WITH COMMENTS.]
UCC limits the application of this section on the firm offer to the signed writing. The UCC also requires that the term of assurance must be separately signed by the offeror where such term is on a form supplied by the offeree. This is generally done by the offeror’s placing his initials in the margin adjacent to the pertinent language. Thus, a manufacturer’s field representative may obtain the retail merchant’s signature on a printed purchase order form that precludes cancellation by the buyer while leaving the manufacturer’s acceptance subject to home office approval, or the supplier may submit his irrevocable bid on the form prescribed by the contractor.


The marked difference in approach to the termination of the power of acceptance by revocation of the offer in the civil law system, as expressed in both Europe and Japan, and that of the common law system, has been observed. This difference is evidenced again in the proposed solution in the Uniform Law on the Formation of Contracts for the International Sale of Goods (Uniform International Act). The 1958 proposal ("Rome" draft) chose the civil law principle that an offer that has arrived cannot be revoked unless it contains a reservation of such right. In effect, this proposal expressed the commercial practice of using the German freibleibend clause, or its counterpart.

---

60. See UCC § 2-205, comment 2. For pre-UCC decisions in which the purchaser apparently placed his order with the seller’s representative by means of execution of the seller’s form see, e.g., Ludowici-Celadon Co. v. McKinley, 307 Mich. 149, 11 N.W.2d 839 (1943) (roofing tile, 30-day offer subject to approval of seller’s executive department); United Aluminum Corp. v. Argentiero, 48 Pa. D. & C. 559, 561 (Munic. Ct. Phila. 1943) (aluminum ware—specification of exclusive territory satisfied consideration requirement); Renne v. Volk, 188 Wis. 508, 205 N.W. 385 (1925) (farm lighting plant—non-cancellable order subject to company’s approval).

In Wilmington Trust Co. v. Coulter, 200 A.2d 441 (Del. 1964), the court refused to apply UCC § 2-205, by analogy, to the sale of shares of stock held in trust by a corporate trustee. But there were additional reasons for the court’s refusal. See Hogen, Sales, Bulk Transfers and Documents of Title, 20 Bus. Law. 697, 698 (1965).


An offer which has arrived may not be revoked unless the offeror has reserved to himself the right of revocation in the offer. Tacit intention in this matter shall only be taken into account by reason of the nature of the transaction or the usages to which the offeror has made reference or which persons finding themselves in the situation of the offeror and the offeree consider to be generally applicable.
in other civil law systems. Under this proposal, the reservation could be expressed or implied, either by the nature of the transaction or by usage. The offer must refer to such usage or it must be commonly considered applicable by persons in the same condition.

The drafters expressed concern that the effectiveness of the implied reservation should not be measured by a subjective standard. If the offeror resided in a country whose laws gave him the right of withdrawing his offer without explicit reservation, as in common law countries, it might be urged that, applying a subjective standard, there is evidence of an implied will of the offeror to reserve a right of withdrawal.⁷² With the abandonment of the civil law approach in the current Uniform International Act there is no longer concern for an objective standard to determine implied reservations.

The present proposal, drafted in 1964 and now submitted to member governments for consideration and possible ratification, demonstrates greater reliance on the common law approach. The offeror was formerly obligated to reserve a right of revocation, either explicitly or implicitly; the present proposal allows revocation of the offer by communication to the offeree, subject to stated exceptions.

The power of revocation must be exercised in good faith or in conformity with fair dealing. It is precluded either until the expiration of any stated fixed time for acceptance, or if the communicated offer indicates that the offer is firm or irrevocable.⁷³ These restrictions may be either expressed, or implicit in the circumstances, or derived from the preliminary negotiations or from practices established between the parties, or based upon usage.⁷⁴ Although these “exceptions” naturally restrict the basic position of freedom of revocability of the offer,⁷⁵

---

⁷³ Uniform International Act art. 5(2) (1964 draft): “After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.”
⁷⁴ Uniform International Act art. 5(3) (1964 draft): “An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage.”
⁷⁵ Uniform International Act art. 2(1) (1964 draft): “The provisions of the following Articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply.”
Cf. Uniform International Act art. 1(9) (1964 draft): “Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law.”
they indicate commercial practice and provide legal recognition for the businessman's reliance on the firm offer.\textsuperscript{76}

While the basic approach to the firm offer is similar in the UCC and the Uniform International Act, in that both now provide that the offeror has freedom of revocation without the necessity of reservation, as well as that the right of revocation must be exercised in good faith, there are secondary differences that should be noted.

The UCC requires that a firm offer be written and signed by the offeror; the term itself must be signed separately by the offeror where the form is supplied by the offeree. These formal requirements illustrate the more rigid attitude in the common law. This is also exemplified by the retention in the UCC of the Statute of Frauds requirement; neither formality is included within the Uniform International Act.\textsuperscript{77}

The international legislation refers to the offer that states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable, whereas the UCC is directed to the terms of the offer that give assurance that it will be held open. The statement of a fixed time for acceptance, or of the irrevocability of the offer, will indeed usually give assurance that it will be held open, but this is irrelevant to the question of whether the offeror should be precluded from effectively revoking his offer. Subject to equitable defense, the offeror should be held to his statement. The drafters of the UCC limited its provision expressly to the merchant's offer that is not supported by consideration. Neither limitation is included in the Uniform International Act.

Finally, the UCC, in contrast with the Uniform International Act, restricts the irrevocability of the firm offer to three months, thereby excluding the long term option given without supporting consideration. There is less need for this restriction in international trade, particularly when the offer specifies an extended time for acceptance.

The civil law system is more protective of the offeree in this area than is the common law system, but this protection is accomplished at the expense of greater uncertainty, since there is a likelihood of dispute over withdrawal of the offer before the expiration of a reasonable time for acceptance.

A similar attitude is expressed in the general conditions prepared by the Economic Commission for Europe (ECE), under the auspices of the United Nations, for use in international contracts; these con-


\textsuperscript{77} See UCC § 2-201; \textit{Uniform International Act} art. 3 (1964 draft). See also \textit{Uniform Law on the International Sale of Goods} art. 15.
FORMATION OF CONTRACTS

form to commercial practice as described by experts representing the interests of both buyer and seller. ECE standard conditions that may be incorporated into contracts for the sale of sawn softwood, citrus fruit, solid fuels, and for the export and import of hardwood logs and sawn hardwood from the temperate zone, permit revocation of any except a firm offer.\(^7\) A similar recognition of commercial practice may have influenced the modification of position from the 1958 to the 1964 drafts of the Uniform International Act.\(^7\) An intermediate position is expressed in the Italian Commercial Code, where only the offeree’s reliance interest is protected.\(^8\)

IV. EFFECT OF THE OFFEROR’S DEATH OR INCAPACITY ON THE OFFEREES POWER OF ACCEPTANCE

In Japan the legal validity of a declaration of intention is not affected by the declarant’s death or his loss of mental capacity after the notice has been dispatched.\(^8\) But in the case of an offer, which is a declaration of intention, it is provided that the offer is effective upon communication unless a contrary position had been expressed, or unless the offeree learns of the death or loss of capacity before arrival of the notice.\(^8\) Once an offer is received by the offeree before

---

\(^7\) Each of the following General Conditions include the phrase: “Any offer not described as a firm offer shall not be deemed to be a binding offer.” ECE, General Conditions for Export and Import of Sawn Softwood, para. 2.3, U.N. Doc. No. ME/410/56 (1956); ECE, General Conditions for the Export and Import of Solid Fuels, para. B. 3 (slip note), U.N. Pub. Sales No. 59 II. E/Min. 1 (1958); ECE, General Conditions for the International Sale of Citrus Fruits, para. 2.2, U.N. Pub. Sales No. 58 II.E/Min. 12 (No. 312) (1958); ECE, General Conditions for the Export and Import of Hardwood Logs and Sawn Hardwood From the Temperate Zone, para. 2.3 (No. 420) (1961). The ECE conditions for plant and machinery do not include a provision with regard to the offeror’s right to revoke his offer. Farnsworth, Formation of International Sales Contracts: Three Attempts at Unification, 110 U. PA. L. REV. 305, 316 (1962).

\(^8\) Undoubtedly the change in emphasis was directly influenced by the fact that the United States delegation actively participated in the 1964 drafting sessions, whereas formerly their role had been that of an invited observer. For the background history on The Hague Convention of 1964, see Honmold, The Uniform Law for the International Sale of Goods: The Hague Convention of 1964, 30 LAW & CONTEMP. PROB. 326, 329-32 (1965).

\(^9\) ITALIAN CIVIL CODE of 1882, art. 36, para. 3. In sale of goods transactions these expenses incurred in reliance upon the offer remaining open may include the cost of packing, storage, freight, brokerage fees, or purchase of related raw materials by the buyer-offeree, the clearing of stock by the seller-offeree, the rejection of other offers, and his making additional offers. See Nussbaum, Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine, 36 COLUM. L. REV. 920, 925 (1936).

\(^1\) JAPANESE CIVIL CODE art. 97(2) :

The validity of a declaration of intention shall not be affected, even if the declarant dies or loses his capacity after he has despatched the notice.

\(^2\) JAPANESE CIVIL CODE art. 525:

The provision of Article 97 paragraph 2 shall not apply in cases where the offeror has declared an intention to the contrary or where the other party was aware of his death or of his loss of capacity.

See Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 YALE L.J. 169, 186 n.29 (1916).
the offeror's death or incapacity, neither event itself precludes the offeree's power of acceptance, unless the offer is of a personal character. This position is to be compared first with that of the European civil law and then with that developed by the common law.

In Germany, unless the agreement is personal, the conclusion of an effective contract is not prevented by death or incapacity, either in the sense of bankruptcy or of loss of mental capacity, before acceptance. Article 130, paragraph 2 of the German Civil Code (BGB) provides that the death of the offeror or his loss of capacity before acceptance does not preclude effective acceptance before the expiration of the time allotted by the terms of the offer. A similar viewpoint is contained in the Italian Civil Code.

French jurisprudence, on the other hand, holds that the offer terminates by operation of law if it is not accepted before the death of the offeror. This position stems from the view that offers of donations are considered personal to the offeror. This interpretation is also pertinent, in the view of most French authors, when the offeror becomes so incapacitated before acceptance that he no longer retains a juridically effective will.

The French Council of State, however, recognizes the exception of competitive bids made by individuals to the State for the construction of public works. The State is not explicitly required to accept such offers; consequently, they are not automatically terminated upon the offeror's death or incapacity.

---

84 Cohn, Civil Law, in 1 Great Britain Foreign Office Manual of German Law 50, § 159 (1950).
85 Italian Civil Code art. 1329: "If the offeror binds himself to keep open the offer for a certain period of time, revocation is not effective. In such case, the death or supervening legal incapacity of the offeror does not affect the validity of the offer, unless such validity is barred by the nature of the transaction or other circumstances."
86 Cass. 21.4.1891, S. 95.1.398; D. 1892.1.181; 2 Planiol, Traité Élémentaire de Droit Civil, n° 980 (11th ed. 1939). Cf. L. A. Civ. Code Ann. art. 1810 (West 1952): "If the party making the offer, died before it is accepted, or he to whom it is made, die before he has given his assent, the representatives of neither party are bound, nor can they bind the survivor;" Union Sawmills Co. v. Mitchell, 122 La. 900, 48 So. 317, 318 (1909) (proposal to purchase standing timber).
87 See Aubry & Rau, Droit Civil Francais § 343, at 482-83 (5th ed. 1902); 12 Baudry-Lacantinerie n° 31 (3d ed. 1906); 24 Demoiselle, Court du Code Civil, n° 63, 69, 70 (2d ed. 1870); 15 Laurent, Droit Civil Francais, n° 478 (1875); 6 Planiol et Ripert, Droit Civil Francais, n° 140 (1930); 3 Potier, Oeuvres, n° 32 (new ed. 1821); 6 Toullier, Droit Civil Francais n° 31 (4th ed. 1824); Papale, The Effect of Death in Pre-Contract Negotiations, 4 Loyola L. Rev. 109 (1948).
The common law system terminates the offeree's power of acceptance when either he or the offeror dies or is deprived of legal capacity to enter into the proposed contract. The disposition of the outstanding offer following death has been the subject of considerable legal writing that is critical of the view that contract formation requires a subjective meeting of the minds. During the past century this has given way, in many areas of the common law, to an objective test of reasonable expectation. Indeed, during the drafting state of the original Restatement of Contracts in the mid-1920's it was initially proposed in articles 35 and 48 that death did not automatically revoke the offer. Although most of the advisers favored this proposition, it was disapproved by the majority of the Council of the American Law Institute. At the instance of the Council, the Restatement section was altered to read that with stated exceptions the offeror's death, or insanity that deprived him of contractual capacity, terminated the offer.


Restatement, Contracts §§ 35(1)(f) (1932). Restatement, Contracts §§ 45-47 (1932) are exceptions to § 35(1)(f).

The Second Restatement of Contracts perpetuates this doctrine, although the Comment describes the rule, viz., that the offeror's death terminates the power of acceptance of the offeree despite his lack of knowledge, as "a relic of the obsolete view that a contract requires a 'meeting of minds,' and it is out of harmony with the modern doctrine that a manifestation of assent is effective without regard to actual mental assent."^94

The common law view is founded on the proposition that it is implicit in the nature of an offer that it is made subject to the contingency that the parties will live, and that death terminates the negotiations. This argument is only realistic when the offer is subject, by its nature, to the condition that one or both of the parties remain alive. Commercial contracts are rarely so contingent, and the business community cannot assume the existence of this contingency as a valid guideline.

If requested acts are performed in ignorance of the offeror's death, the common law position that death terminates the offeree's power of acceptance is patently untenable. Obviously a sale, a loan, or an extension of service may be made in reliance upon a promise of guarantee, in ignorance of the promisor's death. An effort to accept the offer of guarantee in this manner is distinct from mere expression of assent by correspondence. The distinction should rest upon whether the effort at acceptance is actually made without knowledge of the offeror's death, rather than on the manner of acceptance. Nevertheless there is less objection to a refusal to give effect to the acceptance made without knowledge of the death when the offeree has not materially changed his position in reliance on an effective contract.^96

There are a few instances where the death of the guarantor (no notification of which was given to the guarantee) did not revoke the guaranty, although this is certainly not the generally accepted position.^97 Courts have not been solicitous of the position of the businessman who extends value in ignorance of the guarantor's death. The

^93 Restatement (Second), Contracts §§ 35 (1) (d), 48.
^94 Restatement (Second), Contracts § 48, comment a.
^96 1 Corbin, Contracts § 54, at 229 (1963).
^98 See Annot., Guarantor's death as terminating guaranty, 42 A.L.R. 926, 933-35 (1926).
FORMATION OF CONTRACTS

judiciary has observed that "it is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living." The courts have in fact at times become overindulgent in their desire to protect the estate of the deceased.

At the international level, it is clear that drafting an acceptable provision for the Uniform International Act regarding the effects produced by the death or incapacity of the offeror or offeree is difficult, due to the divergent positions of the various legal systems. Countries following the common law approach terminate the offeree's power of acceptance of the bare offer upon the occurrence of any of these events; whereas some of the civil law countries, exemplified by Germany, provide that neither death nor incapacity of one of the parties precludes the right, where it is otherwise available, to establish a contractual relationship. The latter concept has found acceptance due to a desire to assure the certainty of business transactions and to avoid for commercial concerns the difficulties that might result from death or incapacity. There is also an intermediate position that examines the possibly necessary detrimental reliance of the offeree in attempting to accept the offer without knowledge of the offeror's death or incapacity.

The 1936 draft of the Uniform International Act proposed as a solution that the question of the possible lapse of an offer upon the offeror's death or incapacity depend upon whether the offer prescribed a time for acceptance. The "Rome" draft of 1958 abandoned this distinction, stipulating instead that should the death of the offeror or his incapacity to contract result in the cessation of the activity to which the offer was attached, the offer could be revoked without undue

---

60 Aitken v. Lang's Adm'r, 106 Ky. 652, 51 S.W. 154, 155 (1899), quoted with approval in L. Teplitz Thrown Silk Co. v. Rich, supra note 99, 179 Atl. at 306:
"This notice might not be received for a long time, as the real and personal representatives of the deceased might be ignorant of the guaranty, and in the meantime the estate might be bankrupted."
104 This is apparently the view that has been adopted in Japan. See notes 81 & 83 supra and accompanying text.
105 For discussion of the three categories see Meijers, Underlying Principles of the Draft Concerning the Conclusion of Contracts by Correspondence in Unification of Law, in INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW 71, 75 (1948).
delay. This has been further modified in the present formulation so that article 11 now establishes that the formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance. This basic position, however, is subject to the contrary intention of the parties, to usage, and to the nature of the transaction. Thus the position proposed in the Uniform International Act has shifted from an initial attitude basically favoring the common law view, to an ultimate attitude that affords greater protection to the offeree as in many civil law jurisdictions.

V. MANNER OF ACCEPTANCE

Advanced legal systems uniformly adopt the position that the offeror has the power to control the manner in which his offer is to be accepted. He may prescribe the exact manner of acceptance, he may allow the offeree alternate methods of acceptance, or he may omit any reference to a prescribed method of acceptance thereby enabling the offeree to accept in any manner reasonable under the circumstances.

In commercial transactions, offers to purchase that are solicited by a manufacturer's or distributor's sales representative are frequently subject to approval by the home office, permitting supervisory control over the field representative as well as over the flow of orders to be filled and the limit of credit to be extended. Failure to obtain such approval may preclude the consummation of a contract.

104 Uniform International Act art. 4 (1958 draft).
105 Uniform International Act. art. 11 (1964 draft): "The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction."
106 Meijers, supra note 102, at 77: "In view of these different systems, the Committee felt that agreement could only be reached on the English principle that death counts revocation."
107 The Restatement of Contracts, following the distinction between bilateral and unilateral contracts, adopted the position as expressed in § 31 that in case of doubt it was presumed that the offer invited the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform rather than a unilateral contract necessitating actual performance. An analysis based upon a bilateral/unilateral classification has been subject to justifiable criticism. See Stoljar, The False Distinction Between Bilateral and Unilateral Contracts, 64 Yale L.J. 515 (1955). It is now proposed that the distinction be abolished. See Restatement (Second), Contracts, Reporter's Note § 12 (Tent. Draft No. 1, 1964); Braucher, Offer and Acceptance in the Second Restatement, 74 Yale L.J. 302, 304 (1964).
108 Armor Insulating Co. v. National Gypsum Co., 11 Ga. App. 672, 31 S.E.2d 880, 884-85 (1944), is an example of the use of home office approval of the sales representatives purchase orders to control the extent to which goods will be supplied to the purchaser on credit: The order was never released from the credit department; we advised Armor
A principal, receiving notice of an order solicited by his agent, may become legally bound by failing to repudiate the order within a reasonable time. A preferable position limits this effect of the principal’s silence to situations where there have been prior similar business transactions between the parties or other justifiable bases for imposing an obligation upon the principal to communicate his decision. The principal’s silence in this situation is distinct from his act of shipping the ordered goods. The requirement in the order that it shall not be binding unless accepted in writing by the principal is waived by shipment of the requested goods, especially where the buyer has accepted delivery.

And the approval of the home office sufficient to bind the Insulating Company that when payment for the past due account was received, the order in question would be released as far as credit was concerned; until an order is approved by the credit department nothing can be done on it by way of sending it to the mill for fabrication; the first step taken with an order is submission to the credit department for approval; at the time Armor asked for immediate delivery the order was still unacceptable because the past due account had not been paid.

For cases where the buyer was precluded from effectively relying upon seller’s failure to approve purchase order when specified goods were delivered and accepted see, e.g., Pratt-Gilbert Co. v. Renaud, 25 Ariz. 79, 213 Pac. 400, 403 (1923): "It is a strange contention that the promise to do should be considered as of more importance and acceptable than the fulfillment of the promise." Columbia Weighing Mach. Co. v. Vaughn, 123 Kan. 474, 255 Pac. 973 (1927); Electric Neon Clock Co. v. Cooper, 83 So. 2d 678 (La. Ct. App. 1955); Simms v. Ervin, 46 Wn. 2d 417, 282 P.2d 291 (1955).
seller has on occasion consisted merely of the seller’s communicated assurance that the order will receive “our very best attention.” The effect of such an expression must be measured in terms of the reliance that it may induce under the particular circumstances. The contracting parties may have established a course of dealing in which the acknowledgement takes on more significance than a mere formality.

The merchant seller may on occasion be charged with the duty to communicate his decision regarding offers solicited by his sales representative. If he fails to do so, his silence may result in a forced acceptance, especially where a deposit has been solicited and submitted,

313 Hill’s, Inc. v. William B. Kessler, Inc., 41 Wn. 2d 42, 43-44, 246 P.2d 1099, 1100 (1952), citing with approval the following quotation from Bauman v. McManus, 75 Kan. 106, 89 Pac. 15, 18 (1907) (Emphasis added.):

The promise that the order shall receive prompt and careful attention seems to imply something more than that the manufacturers will quickly and cautiously investigate the advisability of accepting it .... The engagement to use care seems more naturally to relate to the manner of filling the order than to the settling of a doubt whether to fill it at all. The expression of thanks for the favor has some tendency in the same direction. We incline strongly to the opinion that the letter, standing by itself, was as effectual to close a contract as though in set phrase it had said that the goods would be shipped; that to permit any other construction to be placed upon it would be to countenance the studied use of equivocal expressions, with a set purpose, if an advantage may thereby be derived, to keep the word of promise to the ear and break it to the hope.

In the Hill’s decision acceptance of the offer was also shown by subsequent correspondence with the plaintiff purchaser.

314 In Krohn-Fechheimer Co. v. Palmer, 282 Mo. 82, 221 S.W. 353 (1920), the offeror upon receipt of such letter of assurance promptly sent a letter revoking his offer. But the seller’s attempt to cancel the order two months after having given its “assurance” and at a date that was too late for the offeror-purchaser to procure substitute goods may constitute a breach of contract. See Hill’s, Inc. v. William B Kessler, Inc., supra note 113; Bauman v. McManus, supra note 113; RESTATEMENT (SECOND), CONTRACTS § 58, illustrations 1,2.

315 Calcasieu Paper Co. v. Memphis Paper Co., 32 Tenn. App. 293, 222 S.W.2d 617, 621 (1949):

In the instant case we are not dealing, however, with one isolated transaction where we are confined to the document itself on which the parties have never acted.

On the contrary, we have a long course of dealing and many like transactions over the years where merchandise has invariably been delivered on this form of document without further communication between the parties.

For annotation of cases see Annot., Acknowledging receipt of order for goods as an acceptance completing the contract, 10 A.L.R. 683 (1921).

316 E.g., Enterprise Mfg. Co. v. Campbell, 121 S.W. 1040, 1041 (Ky. 1909) : “After appellant accepted the cash payment of $100 from appellees, we think it was incumbent upon it within a reasonable time either to accept or reject the order. Appellant could not keep appellees’ money for an unreasonable length of time, and then claim that it never accepted the order.” In Blue Grass Cordage Co. v. Luthy, 98 Ky. 583, 33 S.W. 835 (1896), an order for twine submitted by salesman to cordage company on May 9, 1892, was rejected by the company and the offeror notified on May 21, 1892; Sacks v. McNamara Buick-Pontiac, Inc., 226 N.Y.S. 3d 34, 36 (Suffolk City Ct. 1962); Peterson v. Graham-Brown Shoe Co., 210 S.W. 737 (Tex. Civ. App. 1919); Hendrickson v. International Harvester Co. of America, 100 Vt. 161, 135 Atl. 702, 705 (1927):

And true it is that it is frequently said that one is ordinarily under no obligation to do or say anything concerning a proposition which he does not choose to accept; yet we think that, when one sends out an agent to solicit orders for his
or where there exists between the parties a course of dealing established by a series of similar transactions. A like position is expressed in the Japanese Commercial Code. There, the trader who receives an offer from a person with whom he maintains regular business relations to enter into a contract that is within the scope of his business, must dispatch his notice of rejection without delay or he will be deemed to have accepted the offer.

Some of the trade associations representing the interests of both sellers and buyers have agreed upon the incorporation of a standard provision into order forms that unless the seller gives notice within a specified period, the submitted order will be considered accepted. Exemplary of such a standardized provision is that agreed upon between the National Retail Dry Goods Association and the Trade Council of the Garment Association.

In civil law systems, acceptance of commercial offers by reason of the recipient's silence is recognized in other circumstances. An offer may be made with the reservation that the offeror will not be bound by goods, authorizing such agent to take such orders subject to his (the principal's) approval, fair dealing and the exigencies of modern business require us to hold that he shall signify to the customer within a reasonable time from the receipt of the order his rejection of it, or suffer the consequences of having his silence operate as an approval.

117 UCC § 1-205(1): "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expression and other conduct."

RESTATEMENT (SECOND), CONTRACTS § 72. Acceptance by Silence or Exercise of Dominion.

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases and in no others: . . .

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Illustration 5;

A, through salesmen, has frequently solicited orders for goods from B, the orders to be subject to A's personal approval. In every case A has shipped the goods ordered within a week and without other notification to B than billing the goods to him on shipment. A's salesman solicits and receives another order from B. A receives the order and remains silent. B relies on the order and forbears to buy elsewhere for a week. A is bound to fill the order.

118 JAPANESE COMMERCIAL CODE art. 509:

In cases [where] a trader has received an offer to enter into a contract which falls within any of the branches of the business carried on by him from a person with whom he is in regular business relations, he shall without delay despatch notice of acceptance or rejection. If he has neglected to despatch such notice, he shall be deemed to have accepted the offer.

119 Basic trade provisions of 1949: "1. It is mutually agreed and understood that all the terms and conditions set forth on this order are satisfactory unless the Seller notifies Purchaser to the Contrary, before shipment is made, within 15 days from the date of this order."

it (freibleibend); should the offeree communicate his acceptance of such a restricted offer, the offeror’s silence will normally be construed as indicating his intention to consummate a contract.120

These are exceptional circumstances, however, for in many commercial transactions it would be unreasonable to force a duty of negative communication upon the seller. This attitude is reflected in much of the reported commercial litigation involving rejected offers for the sale of goods.121

Thus, there is considerable flexibility in the manner of effectively accepting a commercial offer, and unless otherwise indicated by either the language of the offer or the circumstances, acceptance is invited in any manner and by any reasonable medium.122 The terms of the offer to purchase goods or the nature of the transaction may indicate that the goods are to be shipped promptly or that they are ordered for current shipment. In these circumstances the buyer is normally not concerned with the advance receipt of commitment from the seller. Unless the buyer’s order expressly limits the manner of acceptance of goods ordered for prompt or current shipment, the seller adopts a reasonable method of acceptance when he either makes prompt or current shipment, or promptly promises to make such shipment.123

---

120 Daniels, The German Law of Sales, 6 AMER. J. COMP. LAW 471, 480 (1957); "[German Civil Code (BGB)] para. 151 provides that the acceptance does not have to be communicated to the offeror when under the circumstances or in accordance with the practice of the trade an answer is not expected."

121 For case annotation see Annot., Silence when offer is made or failure to reject it as acceptance which will consummate a bilateral contract, 77 A.L.R. 141 (1932); Annot., Effect of delay of principal in disapproving or rejecting orders for goods taken by agent subject to approval, 7 A.L.R. 1686 (1920). See Royal Ins. Co. v. Beatty, 119 Pa. 6, 9, 12 Atl. 607 (1888), quoted with approval in Cohen v. Johnson, 91 F. Supp. 231, 236 (M.D. Pa. 1950):

While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence... it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected, to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence.

122 UCC § 2-206(1)(a); RESTATEMENT (SECOND), CONTRACTS § 29(2).

123 This position is adopted in UCC § 2-206(1)(b). Although the language of this subsection refers to “inviting acceptance... by a prompt promise to ship” this is to be interpreted as a prompt promise to ship promptly for the buyer’s request, for prompt shipment is not satisfied by a prompt promise to ship at some later date. Williston, The Law of Sales in the Proposed Uniform Commercial Code, 63 HARV. L. REV. 561, 577 (1950):

Obviously, a prompt promise to ship the goods eventually should not serve as an acceptance of an order to “ship at once,” stated as illustrative in Comment 3. I assume the draftsman means a “prompt promise to ship promptly” or at any rate within a brief reasonable time, though neither the section or the Comment indicates this. Perhaps it is intended that a general promise, interpreted as performable within a reasonable time is sufficient.

See also RESTATEMENT (SECOND), CONTRACTS § 31: “Invitation of Promise or
FORMATION OF CONTRACTS

Sometimes, offers for the purchase of goods can not be filled by current shipment; it may be necessary for the seller to either acquire or manufacture the goods requested. Or an offer may request some other form of performance. Whenever the commencement of requested performance is a reasonable mode of acceptance, the UCC requires that the offeror must be notified of the acceptance within a reasonable time.\(^\text{124}\) The UCC does not indicate the circumstances in which beginning the requested performance is a reasonable mode of acceptance, other than to suggest that the contract may be established by the conduct by both parties which recognizes its existence.\(^\text{125}\) This contrasts with the more specific declaration in the civil codes of Europe\(^\text{126}\)

Performance. In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.\(^\text{127}\) See id. at Illustrations 5 and 6 involving orders for goods requesting prompt shipment.


Defendant argues that there is a radical distinction, in regard to communications, between offers which ask that the offeree do something and offers which ask that the offeree promise something, and that in offers of the former kind communication of the acceptance is ordinarily not required, while in the offers of the latter kind communication of the acceptance is always essential, citing 13 C.J. 284. The cases cited in support of the text are not offers of the kind we have before us. There may very well be an offer of a promise to do, the acceptance of which does not require, or contemplate, immediate action, but only a promise of future action. Such an offer could be accepted only by the offeror making the promise, since no immediate action is required of him. But this is not the case before us. Here defendant offered to buy a machine, not at some time in the future, but to make a present purchase, with the understanding, which means upon the conditions, stated in the order, and to pay therefor the sum named in payments and at the time stated in the order. Plaintiff, by shipping the machine, accepted the offer, and thereby the offer became a contract, the terms and conditions of which became binding on both parties.

See also Moore v. Scott Stamp & Coin Co., 178 F.2d 3 (2d Cir. 1949) (postage stamps purchased by the plaintiff in China at the defendant's request and shipped by registered mail addressed to the defendant); Port Huron Mach. Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928) (order for farm machinery for current shipment shipped to purchaser two days before receipt of telegram attempting to revoke the order). In Calcasieu Paper Co. v. Memphis Paper Co., 32 Tenn. App. 293, 222 S.W.2d 617 (1949), the “Acknowledgment of Order” was printed across the order form for purchase of paper; the parties over a long course of dealing had delivered and received merchandise on such form of document without any further communication.

For discussion of shipment of non-conforming goods, see text accompanying notes 139 through 145 infra.

\(^\text{124}\) UCC § 2-206(2).

\(^\text{125}\) UCC § 2-204(1). For annotation of pre-UCC cases see Annot., Acting on order for goods as an acceptance thereof, 29 A.L.R. 1332 (1924), supplementing Annot., 19 A.L.R. 476 (1922).

\(^\text{126}\) E.g., ITALIAN CIVIL CODE art. 1327. Acceptance by performance:

When the performance is to be made without a previous reply to the offer because this is requested by the offeror or because it is implied from the nature of the transaction, or because of custom, the contract is completed at the time and place of the commencement of such execution.

The party accepting shall promptly notify the other party of the commencement of the performance, and is otherwise liable in damages.
The offeree may accept an offer to buy goods for prompt or current shipment by prompt delivery of the ordered goods to a carrier, and this may be considered the beginning of requested performance. This manner of acceptance will come to the offeror’s attention in normal course, and the obligation of notifying the offeror of acceptance by beginning performance should not be interpreted as including current shipments.\textsuperscript{129} Although the civil law and the UCC require that the offeror be notified of acceptance within a reasonable time following the commencement of the requested performance, they differ as to the legal consequence of failure to comply. The UCC and the Second Restatement of Contracts, although differing in the manner of expression, completely discharge any existing or potential contractual duty of the offeror.\textsuperscript{130} In contrast, in the civil law of Italy the offeree who fails to

\textsuperscript{127} JAPANESE CIVIL CODE art. 526(2): In cases where no notice of acceptance is necessary either by reason of a declaration of intention to that effect by the offeror or by reason of business usage, the contract comes into existence at the time when any event takes place which can be taken as a declaration of intention to accept. See also 5(1) WAGATSUMA, op. cit. supra note 83, at 71.

\textsuperscript{128} UNIFORM INTERNATIONAL ACT art. 6 (1964 draft): (1) Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror. (2) Acceptance may also consist of the despatch of the goods or of the price or of any other act which may be considered to be equivalent to the declaration referred to in paragraph 1 of this Article either by virtue of the offer or as a result of practices which the parties have established between themselves or usage.

\textsuperscript{129} UCC § 2-206(2) should be interpreted as applying to the beginning of requested performance other than prompt or current shipment under UCC § 2-206(1)(b). In most commercial transactions shipment will be under reservation and thus the buyer will learn of the seller’s acceptance by means of shipment by the time of arrival of the goods at the requested destination. Should the court interpret UCC § 2-206(2) as applying to current shipments, the court may exercise necessary control by factual determination of whether the offeror was notified of this form of acceptance within a “reasonable” time.

\textsuperscript{130} UCC § 2-206(2) is applicable “When the beginning of a requested performance is a reasonable mode of acceptance ....” RESTATEMENT (SECOND), CONTRACTS § 56(2). UCC §2-206(2) is applicable “When the beginning of a requested performance is a reasonable mode of acceptance ....” RESTATEMENT (SECOND), CONTRACTS § 56(2).
notify the offeree promptly of the commencement of requested performance is subject to liability for any damages resulting from his failure.\textsuperscript{131} This position has the advantage of limiting the possibility of speculation by the offeror.\textsuperscript{132}

The same position was also proposed in the 1958 "Rome" draft of the Uniform International Act,\textsuperscript{133} but in the present formulation the necessity of communicating notice of acceptance by act is not expressed with the necessary clarity, and the sanction of damage liability for failure to comply has been omitted.\textsuperscript{134} These omissions followed objections by various governments in their observations on the "Rome" draft.\textsuperscript{135} The purpose of requiring the offeree to exercise reasonable promptness and certainty. Neither rule requires that the offeree receive notice, but only that "such steps as may be reasonably required to inform the other in ordinary course [be taken]." UCC § 1-201(26) ("notifies" defined), i.e., that the offeree "exercises reasonable diligence"; Restatement (Second), Contracts § 56(2)(a).

However, UCC §§ 2-206(2) provides that if the offeror is not notified of acceptance within a reasonable time he may treat the offer as having lapsed before acceptance, whereas Restatement (Second), Contracts § 56(2) provides that the contractual duty of the offer is discharged unless § 56(2)(a), (b), or (c) is satisfied.\textsuperscript{136} See, e.g., Italian Civil Code art. 1327, supra note 126.

There has been a similar observation favoring the position proposed in the "Rome" draft of the Uniform Law on the Formation of Contracts for the International Sale of Goods. Farnsworth, Formation of International Sales Contracts: Three Attempts at Unification, 110 U. Pa. L. Rev. 305, 324-25 (1962): "The less severe sanction of the Rome Draft seems adequate and, although it raises the problem of proof of damages, it does not give the offeror the opportunity to speculate on a change in the market or other conditions, as he may under the Code."

\textsuperscript{137} Uniform International Act art. 5, para. 2 (1958 draft):

Acceptance may also consist of the delivery of a note or the payment of a price according to the conditions of the offer, or of any act which may be considered to be equivalent to an acceptance either by virtue of the offer or as a result of earlier dealings between the parties. In such cases the acceptor without undue delay should send to the offeror a notice informing him of the performance of the act which amounts to acceptance; he must make good any damage caused by his omission (to do this).

\textsuperscript{138} Uniform International Act art. 6 (1964 draft). See note 128 supra for text of article 6.

Since article 6(1) requires that the declaration must be communicated, and in article 6(2) the "other act must be considered to be equivalent to the declaration referred to in paragraph 1 of this Article," there is the possibility of effectively contending that the act of acceptance other than dispatch of the goods must be communicated to the offeror. If this is intended it should be expressed specifically.

\textsuperscript{139} Austrian Federal Government: "The obligation provided for at end of para. 2 (Article 5 of the 'Rome' draft) according to which the acceptor should in the case of a real acceptance (acceptance by act) in addition send information to the offeror is not provided for in Austrian law. As this duty creates a burden on commercial life and does not answer to any true legal economic need, its abrogation is to be desired." Observations of the Governments and of the ICC on the Draft Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movable), The Hague, 1963, Doc./F/Frep./2, at 3 [hereinafter cited as 1963 Observations] in II Diplomatic Conference on the Unification of Law Governing the International Sale of Goods 436 (The Hague 1964) [hereinafter cited as II Diplomatic Conference].

Great Britain: "The last sentence of paragraph 2 of Article 5 however, seems to introduce an unfamiliar principle. If the offeror has waived the need for notification (and the preceding provision of the Article seem to contemplate that he may), it is
effort to notify the offeror that he has commenced the requested performance is to afford protection to both parties. The notification must unambiguously express the offeree’s intention to engage himself.103

VI. VARIANCE OF OFFER AND ACCEPTANCE

A. Introduction

Japanese law does not expressly provide that the acceptance correspond with the content of the offer, but the provision is implied. If the offeree should indicate in responding to the offer that his acceptance is subject to a condition, or if it includes any modification, he is deemed to have rejected the original offer and to have made a counter-offer.137

This position is well established in most advanced legal systems, although it does not correspond with commercial practice.138 The UCC, in sections 2-206 and 2-207, attempts a closer correspondence.

This article will consider the effect of variances between requested and tendered performance, as well as the legal consequences of variances in the communicated notice of acceptance. Attention will then

difficult to see why the acceptor should be liable in damages for failing to notify.” 1963 Observations, at 17; II Diplomatic Conference 462.

For similar observations by the government of Denmark see 1963 Observations, at 13; Finland: 1963 Observations, at 39; Denmark, II Diplomatic Conference 444; Finland, II Diplomatic Conference 446.

137 UCC § 2-206, comment 3, suggests that “Such a beginning of performance must unambiguously express the offeree’s intention to engage himself.” (Emphasis added.) It is not the beginning of performance that serves as the unambiguous expression of the offeree’s intention as the performance must have been requested. UCC § 2-206(2). Rather it is the notification of acceptance by stating that the offeree has commenced the requested performance that must be unambiguous.

In Excelsior Knitting Mills v. Bush, 38 Wn. 2d 876, 233 P.2d 847 (1951), a shirt manufacturer delivered sample shirts to the respondent for his approval on September 13, 1949. Following correspondence the manufacturer wrote to respondent on December 10, 1949, informing him that the order for shirts had been placed in work and requested a confirmation of the order. But the order was never confirmed and after certain shirt styles had been manufactured and made ready for shipment the respondent requested cancellation. The court held that a contract was never established.

“We think this is a case where both parties made tentative offers and both parties acted without confirmation of the other party .... We think the trial court was correct in finding that there was no contract as to the goods refused.” Id. at 880, 233 P.2d at 849.

137 JAPANESE CIVIL CODE art. 528.

138 In Tucker Duck & Rubber Co. v. Byram, 206 Ark. 828, 177 S.W.2d 759 (1944), there was a purchase order for 3/8” and 3/4” cuttings of lumber; the seller’s acknowledgment stated that he would “try to fill the order for 3/4” lumber” but he shipped only the 3/4”. The acceptance was considered to be conditional and thus his failure to deliver 3/4” cuttings did not constitute a breach of contract. See also Smith v. Oscar H. Will & Co., 51 N.D. 357, 199 N.W. 861 (1924) (Turkestean alfalfa seed ordered, seller shipped sweet clover seed); Hind v. Willich, 127 Misc. 355, 216 N.Y. Supp. 155 (Sup. Ct.), aff’d, 221 App. Div. 837, 224 N.Y. Supp. 819 (1926) (weight deficiency in bags of rice shipped by seller.)
be given to the comparative approach with regard to these additional or different terms in the exchanged communications.

B. Variance of Acceptance of Offer Requesting Prompt or Current Shipment of Goods

Under the UCC, unless either the language of the offer or the circumstances unambiguously indicate otherwise, an order to buy goods for prompt or current shipment is construed as inviting prompt or current shipment as an alternate means of acceptance. And the acceptance does not depend on whether the shipped goods correspond to those specified in the offer.

Upon tender and delivery, the buyer may reject all of the goods if they do not conform, or accept some commercial units while rejecting the balance. Because of the unlikelihood of his discovering certain non-conformity before acceptance, the buyer is given the right in limited situations to revoke the acceptance upon discovery. With revocation he obtains the same rights and duties with regard to the goods as if he had rejected them. The buyer who has accepted the tender of nonconforming goods preserves his damage remedy by notifying the seller within a reasonable time after he discovers or should have discovered the breach.

The drafters of the UCC sought to preclude the seller from effectively claiming that his non-conforming shipment constituted a counter-offer, and that the buyer's receipt of tender without objection constituted acceptance. Therefore, the UCC imposes an obligation of due notification upon the seller; if he does not want his shipment of non-conforming goods to constitute an acceptance of the original

---

120 See note 123 supra and accompanying text.
121 UCC § 2-601.
122 UCC §§ 2-608(1) (b), 2-608(3).
123 UCC § 2-607: "(3) Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; ..."
Suppose the shipment we have been discussing is not in accordance with the order, though it has clear reference thereto. Orthodox analysis, lumping all aspects of the shipment into one, has been led or driven to treating it as a counter-offer. The approach here suggested can lead to treating it as an over expression of active and effective agreement plus a defective attempted performance: an acceptance plus a breach.
See also Hawland, U.C.C. Sales and Bulk Sales 7 (1958); Project, A Comparison of California Sales Law and Article Two of the Uniform Commercial Code, 10 U.C.L.A. L. Rev. 1087, 1118 (1963).
offer, the seller must seasonably notify the buyer that the shipment is offered only as an accommodation. This requirement is not satisfied by the buyer's knowledge at the time of accepting delivery that the goods do not correspond with the order.

C. Variance of Communicated Notice of Acceptance

Where an acceptance is by communication, rather than by action, and includes additional or different terms from those in the offer, UCC section 2-207 is applicable. In one of the first appellate level decisions to consider the section, the court, in an opinion that has already resulted in extensive critical commentary, disparaged the statute, calling it "not too happily drafted." The drafting is traceable to a simple, commercially expedient proposal expressed in the mid-1940's in the proposed Uniform Revised Sales Act.

Professor Llewellyn, the Reporter for the proposed legislation, was concerned with two possible situations involving additional terms in an acceptance or confirmation: (1) the wire or letter, intended as a closing or a confirmation of an informal agreement, that includes

---

144 The order or other offer to buy goods for prompt or current shipment may unambiguously indicate that the shipped goods must conform to the contract. UCC § 2-206(1), introductory phrase. Under these circumstances the seller will be precluded from claiming in good faith that the non-conforming shipment and accompanying notice continued shipment solely for the buyer's accommodation.

145 UCC § 2-206(1) (b). UCC § 1-204(3): "An action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time."


minor additions; and (2) the exchange between merchants of printed form contracts evidencing the intended consummation of an agreement, but including different terms.\textsuperscript{140} To establish a legal rule corresponding to the commercial practice in sales transactions, section 20 of the Proposed Final Draft No. 1 for a Uniform Revised Sales Act stated that additional terms in a definite expression of acceptance or in a written confirmation shall be construed as proposals for modification, and where both parties are merchants, the additions shall become part of the contract, but only if essential terms are not altered and if objection is not made within a reasonable time.\textsuperscript{160}

An amended form of this proposal was brought into early drafts of the UCC, and with each new draft it was further amended, each time increasing in complexity. The 1950 UCC draft converted the conditional statement of the Uniform Revised Sales Act into a positive statement that definite and seasonable expression is an acceptance.\textsuperscript{151} The 1952 draft made such acceptance effective even if it includes different terms from those offered or agreed upon (the earlier draft had been limited to additional terms).\textsuperscript{152} Then, owing to concern that too great a burden was placed on the offeree, the 1956 draft permitted the offeree to qualify his acceptance and expressly make it conditional upon offer-

\textsuperscript{140}\textit{Uniform Revised Sales Act} § 20, comment at 128-29 (Proposed Final Draft No. 1, 1944).

\textsuperscript{151}\textit{Uniform Revised Sales Act} (Proposed Final Draft No. 1, 1944):
Section 20. Additional Terms in Acceptance or Confirmation.
Where either a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time states terms additional to those offered or agreed upon (a) the additional terms are to be construed as proposals for modification or addition; and (b) between merchants the additional terms become part of the contract if they do not alter the essential terms and are not objected to within a reasonable time.

\textsuperscript{152}UCC § 2-207 (Proposed Final Draft, 1950):
Additional Terms in Acceptance or Confirmation.
(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 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 is given within a reasonable time after they are received.

\textsuperscript{152}UCC § 2-207 (1952 draft).
Additional Terms in Acceptance or Confirmation.
(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.
or's assent to any additional or different terms. At the same time, the offeror's power to control the terms of acceptance was given more explicit recognition. In addition, cognizance was given to the fact that the parties may recognize, by their conduct, the existence of a contract in fact although a contract in law cannot be established solely from their writings. Undoubtedly section 2-207 will continue to appear somewhat confusing and requires further elaboration here.

The most frequent pattern of litigation stemming from commercial practice is that in which a purchase order for goods is submitted by a buyer, frequently upon solicitation by the seller's agent, followed by a written response from the seller containing terms additional to or different from those in the offer. The litigating parties have been reversed only rarely (with the legal action initiated by the seller as offeror or by the buyer as offeree). In the past, whether the seller was plaintiff or defendant in litigation of this kind, he had a high degree of success in the appellate courts.


154 See 1956 Recommendations § 2-207(2) (a). UCC § 2-207(2) (1952 draft) added the words "has already been given." See note 152 supra.

155 1956 Recommendations § 2-207 (3).

156 E.g., Dura Chem. Co. v. Dalton-Cooper, Inc., 107 N.Y.S.2d 280 (Sup. Ct. 1951) (plaintiff-buyer's efforts to accept offer were unsuccessful due to fact that his communication contained material changes or modifications and was made after communication to him of the revocation of seller's offer); Frick & Lindsay v. Johnston & S. Ry. Co., 271 Pa. 546, 115 Atl. 837 (1922), (plaintiff-seller's offer was not accepted due to material variance in terms of buyer's response as to time for shipment and place for delivery); Annot., Difference Between Offer and Acceptance as Regards Place of Payment or of Delivery as Variance Presenting Consummation of Contract, 3 A.L.R.2d 256 (1949).

157 See, e.g., American Lumber & Mfg. Co. v. Atlantic Mill & Lumber Co., 290 Fed. 632 (3rd Cir. 1923); Boston Lumber Co. v. Pendleton Bros., 102 Conn. 626, 129
FORMATION OF CONTRACTS

What effect does the enactment of UCC section 2-207 have upon this established position? It should be emphasized that this section is applicable in two situations: (1) where there has been a definite and seasonable expression of acceptance or a written confirmation sent within a reasonable time, and (2) where the conduct of both parties recognizes the existence of a contract, although the contract cannot otherwise be established by means of the parties' writings. In the former situation, this section is only applicable where there is a definite expression of acceptance, and presumably the written confirmation must be equally definite. Thus, situations still exist in which the court must analyze the problem in terms of whether the

---

108 See, e.g., Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962) (buyer precluded from effectively claiming breach of sales warranty due to disclaimer of warranty term included in seller's acceptance form (UCC § 2-207 applied)); Sadler Mach. Co. v. Ohio Nat'l, Inc., 202 F.2d 887, 891 (6th Cir. 1953) (buyer unsuccessful in efforts to regain down payment on destroyed machinery; court found that seller's change in terms of payment was "merely a correction of the buyer's error."); Cohen v. Cerame, 275 App. Div. 904, 89 N.Y.S.2d 635, 636 (1949) (buyer successfully claimed that seller's failure to deliver "free cutting brass rods" constituted breach of contract; court found that both parties understood that seller's acceptance was conditioned upon ability to obtain goods from the government); Gunderson v. Kenyon, 253 App. Div. 306, 2 N.Y.S.2d 635, 636 (1938) (buyer's claim that seller breached contract for shipment of twine held unsuccessful as time was understood to be of the essence and the seller's response "to be shipped at the mills' convenience" constituted a counter offer that was never accepted); Schorsch v. Hartford City Paper Co., 165 N.Y. Supp. 261 (Sup. Ct. 1917) (buyer unsuccessfully claimed that seller's failure to make shipments constituted breach; seller's acknowledgment specified shipment f.o.b. mills Indiana, whereas buyer's order called for delivery f.o.b. New York).

But cf. Estes Lumber Co. v. Palmyra Yellow Pine Co., 29 Ga. App. 15, 113 S.E. 821 (1922) (syllabus only) (although seller's "acceptance" added new terms, the plaintiff-buyer continued to demand shipment after receipt of this communication).

109 In Tilt v. La Salle Silk Mfg. Co., 5 Daly (N.Y.) 19 (1873), the plaintiff-seller responded in writing to the buyer's order: "We approve of the foregoing contract, with the understanding that we are not to be held responsible for any delay beyond our control...." The buyer accepted the first late delivery and was precluded from rejecting subsequent late shipments. Cf. Banks v. Crescent Lumber & Shingle Co., 61 Wn. 2d 528, 379 P.2d 203 (1963), where the seller marked a copy of the purchaser's order form "accepted," changed the terms of payment to "Full payment 21 days" and returned it to the buyer. Buyer was permitted to effectively cancel the undelivered orders following a drop in market price of the lumber.
offeror has accepted a counter-offer. This is especially true of transactions that never proceed beyond the executory level.

If there has been a definite and seasonable expression of acceptance or a written confirmation sent within a reasonable time, the UCC provides that it operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless the acceptance is expressly made conditional upon offeror's assent to the additional or different terms. Such a definite expression of acceptance that is expressly conditional on offeror's assent to additional or different terms is in fact a conditional acceptance, with the offeree proposing a counter-offer. Whether the offeree states that he definitely accepts, subject to the condition that additional or different terms are assented to by the offeror, or that he definitely will not accept the offer except upon the offeror's assenting to the additional or different terms, his expression carries the same meaning.

The printed acceptance form often used by the offeree (seller) frequently contains terms that do not correspond with those on the purchaser's printed order forms; it may even contain terms that are in direct conflict with the order form. If the offeree (seller) does not want his expression to operate as an acceptance, he must be sure that either the form cannot be legally construed as a definite expression of

---


For cases in which buyer's communication did not constitute a definite expression of acceptance see, e.g., In re Marcus Mfg. Co., 120 F. Supp. 784, 786 (D.N.J. 1954) ("The new purchase order contained material conditions, including a modification of the terms of payment, which were not embodied in the debtor's counter-offer."); Dura Chem. Co. v. Dalton-Cooper, Inc., 107 N.Y.S.2d 280 (Sup. Ct. 1951) (buyer's attempted acceptance contained "certain material changes or modifications" which were never adopted).


202 UCC § 2-207(1).
acceptance, or that it is clearly stated in the form that the acceptance
is conditional upon offeror's assent to the additional or different terms.

These qualifications to legal acceptance, as well as the notification
required by UCC section 2-206 that shipment is offered only as an
accommodation to the buyer, are included for the seller's protection.
However, reported litigation indicates that the offeree (seller) is rarely
in need of such protection.\textsuperscript{163} The legal effect of such an acceptance
upon the offeror (buyer) is more important. Indeed, the buyer receiv-
ing a responsive communication stating that his order has been ac-
cepted, but with different terms for payment, cannot safely disregard
the communication and purchase the goods elsewhere.\textsuperscript{164}

Since the offeree (seller) may condition the legal operation of his
acceptance on assent by the offeror (buyer) to the additional or differ-
ent terms, the manner of effective assent to immaterial additions in
the mercantile transaction must be resolved. The offeror's silence
following communication of the qualified acceptance may, on occasion,
constitute such assent.\textsuperscript{165} Although the UCC does not so state,\textsuperscript{166}
the same position should be adopted as to minor differences in the ac-
ceptance, especially where the litigable dispute arises out of an on-going
transaction.

\textsuperscript{163} Estes Lumber Co. v. Palmyra Yellow Pine Co., 29 Ga. App. 15, 113 S.E. 821
(1922) (syllabus only), is one of the few reported decisions in which the seller added
additional terms to his acceptance and then was held in breach of contract due to his
failure to make delivery.

For the legal effect of such an acceptance upon the offeror (buyer), see Washing-
appellant first contends that no contract ever came into existence because there was
no unequivocal acceptance of the buyer's offer to purchase. This is apparently an
after-thought."); Tilt v. La Salle Silk Mfg. Co., 5 Daly (N.Y.) 19 (1873) (buyer-
offeror, having accepted partial delivery could not reject the balance where shipment
was made under express qualification against liability for possible delay); Sadler
Mach. Co. v. Ohio Nat'l, Inc., 202 F.2d 887, 891 (6th Cir. 1953) (buyer unsuccessful
in effort to regain his down payment on machinery destroyed in fire at seller's
plant; court found that the variances in the seller's acceptance were merely corrections
of the buyer's errors).

\textsuperscript{164} 1955 N.Y.L. REv. COMM'N REPORT 635 (Illustration suggested by Professor
Patterson). UCC § 2-207 was subsequently amended but the problem remains in the
present (1962) formulation. The terms of payment, in the proposed hypothetical
constitute a different rather than an additional term, thus UCC §2-207(2) is inappli-
cable, and since both parties have not recognized the existence of a contract, UCC
§ 2-207(3) does not apply.

\textsuperscript{165} UCC §2-207(2). Between merchants the additional terms become part of the
contract unless they materially alter it, or express objection is made or the offer
limits acceptance to the terms of the offer.

\textsuperscript{166} UCC §2-207(2) refers to the construction of only additional terms. Comment
3 to UCC §2-207 suggests: "Whether or not additional or different terms will
become part of the agreement depends upon the provisions of subsection (2). If
they are such as materially to alter the original bargain, they will not be included
unless expressly agreed to by the other party." (Emphasis added.) For criticism
of the second sentence in this UCC Comment see notes 171, 173 infra and accompanying
text.
It is, however, the manner of assent to material additions or differences that is likely to provoke controversy, and there is no effort toward resolution made in the UCC. The court is permitted considerable freedom in shaping its own solution. There has been a tendency of the judiciary to find that the buyer implicitly assents to the variance of terms in the seller’s written acceptance when he fails to make objection following receipt of the tendered goods.\(^\text{107}\) A limited sampling of business opinion indicates that offerors are often willing to be bound by statements in their suppliers’ acknowledgment forms.\(^\text{108}\)

To resolve this question under the UCC provision, it must be determined if the offeree’s expression of acceptance or written confirmation is definite and seasonable, and if the writings of the parties establish a contract between them.\(^\text{109}\) Even if there is failure to prove either requirement, an enforceable contract may still be established where both parties by their conduct (which may include shipment of the ordered goods and acceptance without objection) recognize its existence. But under these circumstances the conflicting terms in the offeree’s (seller’s) acceptance are legally ineffective,\(^\text{110}\) a position that may be disadvantageous to him.

Additional terms that are included in an effective acceptance are

---


\(^{108}\) Buyer breached contract in refusing to accept tendered delivery: Riverside Coal Co. v. Borman Coal Co., 114 Conn. 492, 159 Atl. 280 (1932); Boston Lumber Co. v. Pendleton Bros., 102 Conn. 626, 129 Atl. 782 (1925).

\(^{109}\) See also Annot., Circumstances supporting inference of original offeror’s acceptance of counter offer or assent to conditions attached by offeree to his acceptance, 135 A.L.R. 821 (1941).

\(^{110}\) In response to a questionnaire, answering businesses indicated almost uniformly their willingness to be bound by statements in their suppliers’ acknowledgment forms. This practice itself affords basis for denying offerees the right to demand specific assent as a condition of a binding contract. Businessmen should not be enabled to escape in court, commitments which they would have observed as a matter of course but for the litigation. UCC §§ 2-207(1), 2-207(3). UCC § 2-204(3): “Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”

\(^{110}\) UCC § 2-207(3).
construed as proposals for additions to the contract, but the language of the UCC, in contrast with the suggested interpretation in the Official Comment, does not direct a similar construction for different terms included in the legally effective expression of acceptance. The courts are forced to distinguish factually between the two categories of variance from the offer, a task that is not only difficult, but rarely of value. Since the variance cannot materially alter the contract, and since both parties must be merchants, terms that are either additional or different should be treated alike. Thus, where the date of delivery is not of primary significance to either party, an acceptance that specifies delivery a few days earlier than requested in the order should be construed as a modification of the offer, unless the offeror voices express objection within a reasonable time.

Indeed North Carolina and Wisconsin, in adopting the UCC, have included the words "or different" in section 2-207(2).

The offeror can control the legally operative terms of acceptance by stating in the offer that the acceptance is limited to the terms of the offer. The obvious advantage that this affords him will undoubtedly result in the inclusion of a similar phrase as standard practice in printed commercial forms offering the purchase or sale of goods.

---

171 UCC § 2-207(2): "The additional terms are to be construed as proposals for addition to the contract." Comment 3 to UCC § 2-207, see supra note 166.

172 Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915), an order for rubber was telephoned on April 2 for import to New York. This was followed by a brief "acceptance" on April 4 enclosing a more formal writing containing minor additional terms. The buyer responded on April 6 on an "order" form in which the seller was to "guaranty" the deliveries as agreed upon and "which in any event you must promptly acknowledge." The court found the response of April 6 to be a conditional acceptance which in turn was never accepted. However, the contract was established by the response on April 4 to the telephoned order, and the question should have been one of the correct disposition of the additional terms. See Llewellyn's Comment to UNIFORM REVISED SALES ACT § 20 at 129 (Proposed Final Draft No. 1, 1944). See also RESTATEMENT (SECOND), CONTRACTS § 60, illustration 1 (formerly illustration 1 to § 60 of the original Restatement) and the suggestion in the Reporter's Note that the illustration was modified in the light of UCC § 2-207.

174 See Nelson Equip. Co. v. Harner, 191 Ore. 359, 230 P.2d 188, 193 (1951): We do not consider an expression of willingness to deliver goods a few days before the date specified to be indicative of a counter offer. In fact, the defendant testified that he had "requested a little earlier delivery." If he had not wanted the earlier delivery he could have refused to accept the machine until 1 April. The defendant's contention in this respect is without merit. See also Washington Elec. Co-Op v. Norry Elec. Corp., 193 F.2d 412, 414 (2d Cir. 1951) (neither the expression in the acceptance as to time of payment nor the type of carrier to be used constituted a material variance from the terms of the buyer's offer).

Today, many sales organizations, as members of trade associations, include in their printed forms the requirement that the buyer must express an objection to the terms of the submitted order within a limited number of days from its date.\textsuperscript{175}

Commercial transactions for the purchase of goods are often formulated by the exchange of printed forms, each containing provisions that are advantageous to the sender and therefore different from each other.\textsuperscript{176} The offeree's (seller's) printed acceptance may include a definite expression of acceptance conditioned on the buyer's assent to any terms that add to or differ from the offer. Thus, the exchanged forms may both limit the terms of the acceptance to those of the offer, and limit the effectiveness of the acceptance to assent to terms that are not in the offer. On the basis of the exchanged writings alone, the parties have failed to establish a legally enforceable contract. But the drafters of the UCC recognized that commercial sales transactions frequently go forward with little concern for legal formalism. The conduct of the parties may evidence an existing contract, regardless of discrepancies in their exchanged printed forms.\textsuperscript{177} The contract

\textsuperscript{175} For litigation involving such clauses see Albrecht Chem. Co. Inc. v. Anderson Trading Corp., 298 N.Y. 437, 84 N.E.2d 625 (1949) (arbitration provision); Application of Doughboy Indus., Inc., \textit{supra} note 174 (arbitration provision).

The following trade associations representing sellers include a similar provision in their recommended forms: Affiliated Dress Manufacturers, Inc.; Associated Corset and Brassiere Manufacturers, Inc.; Associated Fur Manufacturers, Inc.; Trouser Institute of America; Boys' Apparel and Accessories Manufacturers Association; Chicago Fashion Apparel Industries; Fashion Originators Guild of America, Inc.; Industrial Council of Cloak, Suit & Shirt Manufacturers, Inc.; Infants' and Children's Coat Association, Inc.; International Association of Garment Manufacturers; Merchants' Ladies Garment Association, Inc.; Millinery Stabilization Commission; National Association of Blouse Manufacturers, Inc.; National Authority for the Ladies' Handbag Industry; National Coat and Suit Industry Recovery Board; National Dress Manufacturers' Association; National Heavy Outwear Association; National Knitted Outwear Association; National Skirt and Sportswear Manufacturers Association, Inc.; New England Shoe and Leather Association; Popular Priced Dress Manufacturers' Group, Inc.; United Infants' and Children's Wear Association, Inc.

A similar protective clause for purchasers is included in the Basic Trade Provisions of the National Retail Dry Goods Ass'n. See 1954 N.Y.L. Rev. Com'm Report 121.


You have to understand that these things come out in regular routine. A company will be issuing scores or hundreds of purchase orders each day. When the acceptances come back, they are matched up by some clerk. Somebody may look at them; most of the time nobody does and generally there is no trouble. Things go through. Well trouble comes, either in periods of stress in our economy,
thus established by the conduct of the parties, is given legal recognition
limited to those terms on which the differing writings agree, supple-
mented by terms that may be incorporated from other provisions of the
UCC Sales article.178

The contract created in this manner cannot be effectively challenged
on the ground of indefiniteness, for terms may be left open when the
parties intend to make a contract and when there is a reasonably
certain basis for giving an appropriate remedy.179 A similar effort to
give legal effect to the recognized intent of the parties is found in
article 155 of the German Civil Code. If both parties consider that they
have concluded a contract, although in fact they have not come to an
agreement on some individual points, their contract may still be legally
valid where it can be established that they would have been willing to
conclude an agreement without reference to the matters left open.180
French jurisprudence, recognizes a tacit acceptance inferred from the
act of sending ordered goods.181

The offeree (seller) who ships goods at about the same time as
delivery is made of his non-conforming written acceptance may be
more concerned with salvaging an enforceable contract than he is with
insisting on particular terms in his acceptance.182 However, the dispute
may not center on the validity of the executed contract, but on the
application of a particular disputed term, such as the disclaimer of
sales warranty,183 or on the submission of disputes to arbitration.184
In fact, the disputed term may be important to both parties, and either

---

See Application of Doughboy Indus., Inc., 17 App. Div. 2d 216, 233 N.Y.S.2d 488,
492 (1962) : "Recognizing, as one should, that the businessmen in this case acted
with complete disdain for the 'lawyer's consent' of the very commercial forms they
were sending and receiving, the question is what obligation ought the law to attach
to the arbitration clause."

178 UCC § 2-207(3). Thus the goods that have been tendered and accepted may not
be subject to express warranty because the written offer and acceptance are in
conflict as to its application, but the implied sales warranties, UCC §§ 2-313, 2-314,
2-315, are applicable.
179 UCC § 2-204(3).
180 GERMAN CIVIL CODE art. 155 (1950). Cohn, Civil Law, in 1 GREAT BRITAIN
FOREIGN OFFICE MANUAL OF GERMAN LAW 50 (1950).
181 AMOS & WALTON, INTRODUCTION TO FRENCH LAW 156 (2d ed. 1963).
183 See Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962)
(applying UCC § 2-207); Vaughan's Seed Store v. Morris April & Bros., 123 N.J.L.
26, 7 A.2d 868 (Sup. Ct. 1939).
184 See Albrecht Chem. Co. Inc. v. Anderson Trading Corp., 298 N.Y. 437, 84
N.E.2d 625 (1949); Application of Doughboy Indus., Inc., 17 App. Div. 2d 216, 233
of them may prefer the other’s choice of term to the complete elimination of the term from the enforceable contract.¹⁸⁵

VII. COMPARATIVE INTERPRETATION OF ADDITIONAL OR DIFFERENT TERMS IN COMMUNICATED ACCEPTANCE

In *Roto-Lith, Ltd.*,¹⁸⁶ the Court of Appeals for the First Circuit, interpreting UCC section 2-207, observed: “It would be unrealistic to suppose that when an offeree replies, setting out conditions that would be burdensome only to the offeror, *he intended* to make an unconditional acceptance of the original offer, leaving it simply to the offeror’s good nature whether he would assume the additional restrictions.”¹⁸⁷ But the language of the UCC forces the offeree to express just such an intent in his acceptance. If his communication contains a definite and seasonable expression of acceptance, he must qualify it by expressly requiring the offeror’s (buyer’s) assent to additional or different terms contained therein. Otherwise, the offeree’s expression operates as a legally binding acceptance into which only the additional terms that do not materially alter the contract are incorporated as part of the contract.¹⁸⁸ And even these minor additions may be precluded by the

---

¹⁸⁵ The buyer’s purchase order may call for extension of credit for a stated period, or for the quality of the ordered goods to meet certain specifications. The seller’s acknowledgment may reduce the term of credit to be extended, or propose a lower standard of quality. But neither seller nor buyer contemplate a cash transaction, nor that the quality of the goods to be delivered remain unspecified beyond the implied requirement of merchantability. For the legal system to strike the credit or quality term under UCC § 2-207(3) forces a contract upon the parties that neither may desire.


¹⁸⁷ *Id.* at 500.

¹⁸⁸ UCC § 2-206(2)(b). Examples of variances in the seller’s acceptance that were found not to be material: Franklin Research & Dev. Corp. v. Swift Elec. Supply Co., 340 F.2d 439, 444 (2d Cir. 1964): “The offer and acceptance are not required to meet with geometric precision in order to form a valid contract. In the present case, the parties consistently acted as if they had made a binding agreement, and Franklin should not be penalized for the failure of the parties to draft their communications with the niceties of contract law foremost in their minds.” Washington Elec. Co-Op v. Norry Elec. Corp., 193 F.2d 412 (2d Cir. 1951) (manner and time of shipment); Riverside Coal Co. v. Elman Coal Co., 114 Conn. 492, 159 Atl. 280 (1932); Boston Lumber Co. v. Pendleton Bros., 102 Conn. 626, 129 Atl. 783 (1925) (term excusing seller in the event of delayed or prevented delivery); Tilt v. La Salle Silk Mfg. Co., 5 Daly (N.Y.) 19 (1873) (term excusing delayed delivery); Calcasieu Paper Co. v. Memphis Paper Co., 32 Tenn. App. 293, 222 S.W.2d 617 (1949) (shipment subject to completion of prior orders). See also suggested illustrations in UCC § 2-207, comment 5.

Examples of clauses that materially alter the contract: *Roto-Lith, Ltd.* v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962) (disclaimer of warranties—similar suggestion UCC § 2-207, comment 4); Vaughan’s Seed Store v. Morris April & Bros., 123 N.J.L. 26, 7 A.2d 868 (Sup. Ct. 1939) (disclaimer of warranties and limitation of time to express dissatisfaction with goods [Today under applicable
expressed terms of the offer or by the offeror's giving notification of objection within a reasonable time. A similar position is expressed in article 154 of the German Civil Code, and is also well established in French jurisprudence. Although failing to establish a binding contract based solely upon exchanged writings, the parties may still salvage the contract, to the extent that the terms agree, based upon the conduct of the parties that recognizes its existence.

The UCC does give legal recognition to the fact that the sales manager and the purchasing agent are rarely concerned with the minor deviations that occur with the exchange of different printed forms. In many large scale operations, even if there were greater concern, it

---

1. UCC provision the latter term might be found to be unconscionable, UCC § 2-302; or that the merchant-seller was not in good faith, UCC § 2-103(1) (b), in that seller refused to honor an objection received on the sixth day after delivery of goods under an acceptance requiring objection within five days.); Albrecht Chem. Co. Inc. v. Anderson Trading Corp., 298 N.Y. 437, 84 N.E.2d 625 (1949) (term requiring arbitration of disputes); Application of Doughboy Indus., Inc., 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962) (term requiring arbitration of disputes); Banks v. Crescent Lumber & Shingle Co., 61 Wn. 2d 528, 379 P.2d 203 (1963) (term requiring "full payment 21 days").

For additional examples of suggested typical clauses which would normally materially alter the contract see UCC § 2-207, comment 4.

2. UCC §§ 2-207(2) (a), 2-207(2) (c).

Cf. Restatement (Second), Contracts § 60. Purported Acceptance Which Adds Qualifications.

"A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."

3. GERMAN CIVIL CODE (BGB) art. 154 (1950). Cohn, Civil Law, in 1 GREAT BRITAIN FOREIGN OFFICE MANUAL OF GERMAN LAW 50 (1950) : "An agreement is concluded only, if both parties have agreed on every point on which according to the declaration of even one of them agreement is required, section 154 BGB."

4. AMOS & WALTON, INTRODUCTION TO FRENCH LAW, 156 (2d ed. 1963) : "The acceptance must meet the offer: if it is qualified by reservation or new conditions it is tantamount to a new offer which, in turn, must be accepted if a contract is to emerge."

5. This fact is illustrated in Macaulay, Non-Contractual Relations In Business: A Preliminary Study, 28 AM. SOC. REV. 55, 59 (1963).

Ten of the 12 purchasing agents interviewed said that frequently the provisions on the back of their purchase order and those on the back of a supplier's acknowledgment would differ or be inconsistent. Yet they would assume that the purchase was complete without further action unless one of the supplier's provisions was really objectionable. Moreover, only occasionally would they bother to read the fine print on the back of suppliers' forms.

Sixteen sales managers were asked about the battle of forms. Nine said that frequently no agreement was reached on which set of fine print was to govern, while seven said that there was no problem. Four of the seven worked for companies whose major customers are the large automobile companies or the large manufacturers of paper products. These customers demand that their terms and conditions govern any purchase, are careful generally to see that suppliers acquiesce, and have the bargaining power to have their way. The other three of the sales managers who have no battle of the forms problem, work for manufacturers of special industrial machines. Their firms are careful to reach complete agreements with their customers.
would be too difficult and uneconomical to compare all of the fine print for variations.\(^9\)

In Japanese legal theory, the offeree who attaches conditions to his acceptance is deemed to have rejected the offer and extended his own proposal for possible acceptance. From the viewpoint of interpretation, however, the Japanese position is similar to that in UCC section 2-207, and the judicial attitude toward an offeree's reply that materially alters the offer is important.

Article 7 of the Uniform International Act clearly reflects the influence of the United States' delegation to the diplomatic conference on the Unification of Law Governing the International Sale of Goods held at The Hague in April 1964.\(^10\) Although the basic positions adopted by both the Uniform International Act and the UCC are similar, there are differences in expression and approach that warrant comparison. The Uniform International Act explicitly states its basic position: that an acceptance containing additions, limitations or other modifications is normally both a rejection of the offer and a counter-offer. On the other hand, the UCC leaves this basic proposition for implication.\(^10^5\)

The language of the Uniform International Act in the area under present consideration is markedly superior to that of the UCC, with the latter reflecting its piece-meal drafting revisions.\(^10^6\)

These segments of legislation are concerned with the same problems:

1. The determination of when a reply containing variances consti-

\(^9\) See Macaulay, supra note 192, at 59: The seller's acknowledgment form may be received by the buyer and checked by a clerk. She will read the face of the acknowledgment but not the fine print on the back of it because she has neither the time nor ability to analyze the small print on the 100 to 500 forms she must review each day. The face of the acknowledgment—where the goods and the price are specified—is likely to correspond with the face of the purchase order. If it does, the two forms are filed away. At this point, both buyer and seller are likely to assume they have planned an exchange and made a contract.

\(^10^4\) The earlier drafts of the proposed Uniform International Act did not include a provision concerning the legal effect of the acceptance containing additional or different terms from those in the offer. See Uniform International Act (1958 draft). For English translation of the proposed 1936 draft, see Preliminary Draft of a Uniform Law on International Contracts Made by Correspondence, 1 Unification of Law 161 (1948). It was not until the 1964 Conference that the United States, in its newly acquired position as member delegate to the international organizations, actively participated in the drawing conferences. See Honnold, The Uniform Law for the International Sale of Goods; The Hague Conference of 1964, 30 Law & Contemp. Prob. 326, 329 (1965) (discussion of the working conferences on the revised draft for a Uniform Law on the International Sale of Goods).

\(^10^5\) Uniform International Act art. 7, para. 2, is stated as a special exception to the basic rule, but UCC § 2-207 is expressed without qualification.

\(^10^6\) Compare UCC § 2-207(1): "(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, unless acceptance is expressly made conditional on assent to
tutes a legally operative acceptance; and (2) the extent to which any terms of variance are to be included as part of such acceptance. On the former question, the Uniform International Act is the more limited, since it applies only to additional or different terms that do not materially alter the offer. Section 2-207(1) of the UCC does not include this restriction, but of course the more material the variance in the offeree's reply, the less likely that it constitutes the required "definite" expression of acceptance or written confirmation.

As for the terms to be included in the operative acceptance, there are again important differences between the two legislative expressions. Although the Official Comment to UCC section 2-207 suggests that the contract may include different as well as additional terms that do not materially alter it, the language of the section, perhaps through inadvertance, is limited to the immaterial additional term. This is an unnecessary discrimination that is not found in the Uniform International Act. In addition, the latter correctly refers to altering the terms of the offer; the former refers to altering the terms of the contract.197 Although in theory the Uniform International Act is more limited regarding the scope of the enforceable variances in the reply, the UCC adopts a more restrictive attitude regarding additional terms incorporated into the acceptance. Under the UCC the transaction must be "between merchants," and is subject to exclusion where the offer expressly limits acceptance to the terms of the offer; neither restriction is expressed specifically in the Uniform International Act.198 Although both sets of legislation recognize the offeror's legal right, by timely objection, to preclude the automatic incorporation of even immaterial additional terms, the Uniform International Act expresses the matter with greater clarity.199

---

197 UCC § 2-207(2) : "The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: ... (b) they materially alter it." (Emphasis added.) "It" refers to "the contract," whereas UNIFORM INTERNATIONAL ACT art. 7(2) (1964 draft) refers to "the terms of the offer." See note 196 supra.
198 Compare UCC § 2-207(2)(a), with UNIFORM INTERNATIONAL ACT art. 7, para. 2 (1964 draft). See note 196 supra.
199 Cf. UCC § 2-207(2)(c), and UNIFORM INTERNATIONAL ACT art. 7, para. 2 (1964 draft). See note 196 supra.

UCC § 2-207(3) gives legal recognition to the contract in fact created by the conduct of both parties, despite the lack of legally enforceable written contract. Although the factual distinction necessary for application of UCC § 2-207(3) rather
VIII. **TIME OF EFFECTIVE ACCEPTANCE OF OFFER**

### A. The Common Law

The time allotted by the judicial system for revocation of the offer made *inter absentes*, and the time when the acceptance of the offer is effective to establish a binding contract, are interrelated. Obviously, the longer the period in which the offer may be revoked, the greater the risk that the offeree's reliance interest may be disappointed. Thus, the judicial attitude toward the effective date of an acceptance by correspondence is influenced by the position which the particular legal system adopts towards the binding nature of the offer. This is seen in a comparison of the common law and the civil law systems.

It had been basic to the common law system that the bare offer, not supported by the formality of seal or of consideration, was subject to revocation by communication until the time of its effective acceptance. To afford the offeror this extent of freedom of revocation, and to require that the offeree's communication of acceptance when made at a distance must be received to be effective, placed the parties in imbalance.

By the beginning of the last century, the Anglo-American legal system diminished this imbalance by reducing the application of the subjective standard of a required meeting of the minds, and by establishing the time of the acceptance of the offer as the time of the dispatch of the communication (dispatch rule). Thus, by the time of the

---

than UCC § 2-207(1) (definite and seasonable expression of acceptance) may be difficult, it is of advantage to include an expression similar to UCC § 2-207(3). Unfortunately the Uniform International Act (1964 draft) does not do so.


Some legal systems protect these interests of the offeree before he dispatches the acceptance. For example, German law generally makes offers irrevocable. Other civil law systems protect at least the reliance interest by the doctrine of *culpa in contrahendo*. Except for limited and recent American developments in the doctrine of promissory estoppel and a handful of statutory provisions of limited application, the inexorable logic of the consideration dogma has prevented similar protection in Anglo-American law. The expectation and reliance interests of the offeree thus being naked to the whims of the offeror prior to acceptance, it is not surprising that the Anglo-American courts have kept that period of nakedness as short as possible by adoption of the dispatch rule.


An unmistakable criticism as to the Adams v. Lindsell rule has been sufficiently urged upon the courts. But they stick to it in England as well as in this country. Something must be behind this attitude of the courts. An attempt should be ventured to apply some "psychoanalysis" to their actions and to look for the "complex" behind them.

The revocability doctrine may be the root of the trouble. Its connection with the Adams v. Lindsell rule will become apparent from a comparative investigation.
famous case of *Adams v. Lindsell*\(^{201}\) in 1818, the English court adopted a position freeing the offeree-buyer from his concern that the offeror-seller might sell the goods to a third party before arrival of his communication of acceptance, thereby precluding an effective acceptance.

Faced with the offeror’s freedom to revoke his bare offer, the court gave legal effect to the expression of acceptance as soon as it was properly manifested by a reasonable effort to communicate. This “dispatch” rule of *Adams v. Lindsell* flowed as a natural consequence from the revocability of the bare offer. And the development of this relationship is not peculiar to the Anglo-American legal system; the revocability rule was applied in Germany at an earlier date. At one time the revocability rule, placing the time of consummation of the contract at the time of mailing the notice of acceptance, had also been applied by German courts.\(^{202}\) In France, a divergence of views developed regarding both the revocability of the offer and the time of effective acceptance.\(^{203}\) Japanese law also recognizes the dispatch rule.\(^{204}\)

Judicial application of the “dispatch” rule is especially important to the offeree, for by shortening the period between his receipt of the communicated offer and the time when a binding contract is consummated by his acceptance, the extent of his risk is proportionately reduced. Destruction of the property specified in the offer,\(^{205}\) or the death of the offeree\(^{206}\) between the posting of the acceptance and its

---

\(^{201}\) 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818). The offeror’s letter in which he proposed to sell certain goods and requested an answer by return post, was misdirected with the result that the acceptance arrived two days later than expected. On the day following that when the acceptance would have arrived if the original letter had been properly directed, the offeror sold the goods to a third party. The posting of the acceptance constituted a contract binding both parties and entitling the offeree to recover in an action for the offeror’s failure to complete performance of the contract.


\(^{203}\) See notes 216-26, 251-52, 255-56 infra and accompanying text.

\(^{204}\) See text accompanying note 211 infra.

\(^{205}\) Brisban v. Boyd, 4 Paige 17 (N.Y. 1832) (cotton burned while defendant’s letter accepting offer to take the cotton on joint account was in transit to the plaintiff-offeror).

\(^{206}\) Mactier’s Adm’rs v. Frith, 6 Wend. 103 (N.Y. 1830). Mactier’s reply by mail to Frith’s offer to take brandy on his own account was in transit when Mactier died. The court relied upon Adams v. Lindsell, 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

In Potter v. Sanders, 6 Hare 1, 10, 67 Eng. Rep. 1057 (Ch. 1846), the English Court of Chancery observed as dictum: “If the vendor had died on the 23rd after posting the letter of that date, I can scarcely entertain a doubt that the plaintiff would, in this court, have been the owner of the estate as against the heir of the vendor.” Cf. Kennedy v. Thomassen, [1929] 1 Ch. 426, where the trustees of a will,
receipt, have been the subject of litigation. In addition, there is the risk of a delayed or lost communication of acceptance,\textsuperscript{207} as well as of disadvantageous price fluctuation during the interim. Of course, judicial application of the dispatch rule does not always result in an advantage to the offeree.\textsuperscript{208}

By specifying that the acceptance must be received within a stated time, the offeror can control the period during which the acceptance may become effective.\textsuperscript{209} But if he merely specifies that delivery of the acceptance be made within the allotted time, his specification may be satisfied by "delivery" of the acceptance to the postal authorities.\textsuperscript{210}

having offered to redeem certain annuities held by the deceased, sent the deceased's solicitor a draft release which the deceased executed on January 12, 1928, five days before her death. The solicitors did not inform the trustees that the release had been executed until January 24, seven days after her death. The money was paid to the solicitors for the deceased on January 30, notice of the death not being received until January 31. It was held that the money must be returned, as the dispatch of the communication of acceptance by the solicitors was not made until after the offeree's death. In a contract for the sale of goods, UCC § 2-206(2) might produce a similar result.

\textsuperscript{207} Late delivery: Adams v. Lindsell, 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818) (acceptance was not received by the offeror in the expected time due to fact that the offer had been misdirected); Dunlop v. Higgins, 1 H.L. Cas. 381, 12 Jur. 295, 9 Eng. Rep. 805 (H.L. 1848) (seller attempted to sell offered lot of pig-iron to third party after offeree-buyer had posted acceptance).

Lost communication of acceptance: Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497, 498 (1st Cir. 1962):

Defendant testified that in accordance with its regular practice the acknowledgment was prepared and mailed the same day. The plaintiff's principal liability witness testified that he did not know whether this acknowledgment "was received, or what happened to it." On this state of the evidence there is an unrebutted presumption of receipt. Johnston v. Cassidy, 1932, 279 Mass. 593, 181 N.E. 748; cf. Tobin v. Taintor, 1918, 229 Mass. 174, 118 N.E. 247.

In Bassar v. Camp, 1 Kerman 441 (N.Y. 1854), acceptance was duly posted but was never received by the offeror, who did not learn of such acceptance until more than one month later. Relying on Adams v. Lindsell and concurring cases, the court found a completed contract at the time that the letter of acceptance was duly posted, regardless of what happened to it afterwards.

\textsuperscript{208} See, e.g., Tayloe v. The Merchants' Fire Ins. Co., 50 U.S. (9 How.) 390 (1850): Communication accepting offer to insure building was in transit when the building was destroyed by fire. The insurance company was obligated under a binding contract created upon posting the acceptance.

\textsuperscript{209} Postal Telegraph Cable Co. v. Louisville Cotton Seed Oil Co., 140 Ky. 506, 131 S.W. 277 (1910); Western Union Tel. Co. v. Gardner, 278 S.W. 278 (Tex. Civ. App. 1925): "Receipt" limitation based upon general understanding of the contracting parties, thereby enabling the seller-acceptor to bring an effective action against the telegraph company for failure to deliver the telegram of acceptance; Fire Ass'n v. Allis Chalmers Mfg. Co., 129 F. Supp. 335, 344 (N.D. Iowa 1955) (acceptance was not received within the allotted time, but renewed offer was subsequently accepted).

\textsuperscript{210} Morello v. Growers Grape Prods. Ass'n, 82 Cal. App. 2d 365, 186 P.2d 463, 467 (Dist. Ct. App. 1947): "The word 'delivered' in the offer creates only an apparent, not a real difficulty, because under the law dealing with the formation of contracts delivery of an acceptance to the post office operates as delivery to the person addressed, except in unusual cases." See also Annot., Time when offer or proposition is mailed or when it is received through mail as commencement of period allowed for acceptance, 72 A.L.R. 1214 (1931); Caldwell v. Cline, 109 W. Va. 553, 156 S.E. 55 (1930).
B. The Civil Law

Although Japanese Civil Code article 97(1) states the general rule that a declaration of intention takes effect upon its arrival, article 526(1) provides an exception: a contract \textit{inter absentes} comes into existence at the time the notice of acceptance is dispatched. However, when the period for acceptance is specified in the offer, article 521(2) provides that notice of acceptance must be \textit{received} within the period specified in the offer. If the offeror does not receive notice of acceptance within the specified period, the offer shall lapse. How to reconcile these seemingly contradictory provisions, \textit{viz.}, the dispatch rule of article 526(1) as opposed to article 521(2)'s requirement of receipt within the specified period, has long been the topic of heated argument among Japanese scholars.\textsuperscript{211} While there are no reported cases on the point, the prevailing and more persuasive view is as follows: The dispatch rule of article 526(1) is the general rule as to time of contract formation, while article 521(2) is a special rule applicable only to contracts in which a period for acceptance has been specified. Analytically, the contract is formed at the time acceptance is dispatched, even when the offeror specifies the period of acceptance; then, if the offeror fails to receive the acceptance within the specified period, the legal effect of the contract formation is lost retroactively. Of course, when no period of acceptance is specified in the offer, the dispatch rule of article 526(1) applies.

European and South American countries are divided on the question of the effective time of acceptance of an offer where notice of acceptance is communicated between parties at a distance from each other. Germany adopts the time of the offeror's receipt of the notice, based on article 130 of the German Civil Code.\textsuperscript{212} Communication to the offeror's residence, or to an employee who can reasonably be expected to take messages at his place of business, satisfies this requirement.\textsuperscript{213}

\textsuperscript{211} For the various scholarly opinions see Takashima, \textit{Keiyaku no seiritsu} (Formation of a contract) \textit{Jurisuto} (Bessatsu No. 4) 76, 77 (1965).

\textsuperscript{212} \textit{GERMAN CIVIL CODE} art. 130, para. 1 (1900): "A declaration addressed to another person, if made in the absence of the latter, becomes effective when he receives it." This position is restricted by reason of article 151 of the German Civil Code (BGB) permitting the conclusion of a contract without communication of acceptance if tacit acceptance is usual as regards the particular class of agreement, or if the offeror has waived the communication of acceptance. Nussbaum, \textit{Comparative Aspects of the Anglo-American Offer-And-Acceptance Doctrine}, 36 \textit{COLUM. L. REV.} 920, 922 (1936). See also Comment, 7 \textit{TULANE L. REV.} 590, 597 (1935).

\textsuperscript{213} T. v. S., 97 RGZ 336 (Reichsgericht, Jan. 3, 1920) (telephone message left with the telephone operator in the offeror's firm was not a satisfactory communication to the offeror, but the court indicated that receipt of the message by proper personnel would constitute receipt by the offeror). \textit{Cf. UCC} § 1-201(26): "A person ‘receives'
A number of European nations besides Germany,214 as well as some of the South American countries,215 apply the requirement that the notice of acceptance is not effective until it is received by the offeror, or (in some countries) until it is brought to the offeror’s knowledge.

French commentary during the eighteenth and nineteenth centuries, including that of Masse, Troplong, and Troullier,216 followed the

a notice or notification when . . . (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.”

Austria (AUSTRIAN CIVIL CODE art. 862; 1 Hasenohrl, DAS OSTERREICHISCHE OBLIGATIONENRECHT (1898) 654.

Belgian: The following opinions recognize the acceptance as effective at the time of receipt: Brussels, 8 Nov. 1911, Pasicrisie, 1912.1.239; Liege, 19 Nov. 1913, Pasicrisie, 1914.2.18; Trib. Civ. Liege, 9 Aug. 1917, Pasicrisie, 1918.3.127; Trib. Com. Liege, 19 Nov. 1926, Pasicrisie, 1927.2.369. 2 Planiol, Traité Élémentaire de Droit Civil sec. 986.

Italy: ITALIAN CIVIL CODE art. 1326: “A contract is complete when he who makes an offer has knowledge of the other party’s acceptance.” Court of Cassation, Rome, April 5, 1916, Giurisprudenza Italiana 1916 T. 732. Art. 1328, para. 2: “Acceptance may be revoked, provided the offeror is made aware of it before such acceptance.”

ITALIAN COMMERCIAL CODE art. 36, para. 1. “When persons are not in each other’s presence, a bilateral contract is not consummated before the offeror has received notice of the acceptance within the time fixed by him or necessary under ordinary conditions.” The interchange of offer-and-acceptance dependent upon the kind of contract involved and upon the general commercial usage.” See 2 Bolaffio, 11 CODICE DI COMMERCIO 145 (5th ed. 1923). Exceptions to the above rule in the Italian Commercial Code have limited its application. 12 Baudry-Lacantinerie et Barde, Traité théorique et pratique de droit civil (3d ed. 1906), Des obligations 1, note 26, n. 39, p. 66 fn. 3. The proposed Franco-Italian Project, Project de Code des obligations et des contracts Art. 2 permitted either party to revoke prior to the offeror’s receipt of knowledge of the acceptance. 2 PLANIOl, TRAITé ÉLÉMENTAIRE DE DROIT CIVIL § 986. However, it was presumed that the contents of the communications were known upon arrival.

Spain: SPANISh CIVIL CODE art. 1262 (1889): “An acceptance made by letter shall not bind the person making the offer except from the time it comes to his knowledge.” But cf. SPANISh COMMERCIAL CODE art. 54 and note 236 infra.

Switzerland: article 10, para. 1 of the Code of Obligations appears to adopt the “dispatch-acceptance” rule, but this merely refers to the retroactive effect of the acceptance. 5 Oser and Schoenenberger, KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH (DAS OBLIGATIONENRECHT) (2d ed. 1929) 82. Nussbaum, supra note 212, at 922.

de Visscher includes Belgium, Romania, Bulgaria and Portugal among the European countries requiring that the notice of acceptance must come to the “knowledge” of the offeror to be effective. Jacques de Visscher, Du moment et du lieu de doration des contracts par correspondance en droit international prive, 19 REVUE DE DROIT INTERNATIONAL 90-91 (1938).

Ehrenzweig includes Czechoslovakia, as well as Austria, as adopting the time of receipt, according to doctrine, as expressed in German jurisprudence. 2 Ehrenzweig, SYSTEM DES OSTERREICHISCHEN ALLGEMEINEN PRIVATRECHTS 154. Winfield also includes Sweden, Norway, Denmark, Poland (CODE OF OBLIGATIONS art. 70) and Russia (U.S.S.R. CIVIL CODE art. 134) as applying the time of receipt.

M. Masse, ANSALDI, DE COMMERCIO ET MERCATURE, Disc. 61, n. 9; Troplong, DROIT CIVIL EXPLIQUE, DE LA VENTE, ch. 1, nn* 22-25; Troullier, 6 DE DROIT CIVIL FRANCAIS 3, sec. 29, n. 1.
position developed by the civilians, that an acceptance was not legally effective until it was communicated. Merlin, although perhaps incorrectly, interprets Pothier's writings as being in agreement. There is, however, no doubt that judicial writers were not in complete agreement.

Nor has this division of opinion in France been limited to scholarly writings; there has been an equal lack of uniformity among the French courts. During the nineteenth century this division of judicial opinion was extreme, with some courts holding the acceptance effective from the time of the offeree's expression of decision (emission theory) and with others holding it not effective until notice of the offeree's decision actually came to the knowledge of the offeror (information theory).

Most twentieth century decisions in France have applied either the reception theory (holding that the contract is established when the notice of acceptance reaches the offeror, regardless of his personal knowledge), or the expedition theory, (holding that the contract is established when the notice of acceptance is dispatched). Advocates of the former find some support in article 932 of the French Civil Code, whereas proponents

---

**Duvergier, 1 De La Vente, Nos. 59-61, reasons that the acceptance is effective from the date of posting of the notice as the offeree thereby loses his ability to exercise control over the communication. Troplong rejects this argument. Troplong, 1 LE DROIT CIVIL EXPLIQUE, L'EXCHANGE ET DU LOUGAGE, ch. 5, no. 105 n. 4. "It is of no consequence whether a letter can be withdrawn from the post office by the writer after it is posted, for that is a matter of regulation merely for the safety of communication; and if it is true that the writer cannot withdraw the letter, it is no less true that the person to whom it is addressed has no power over it until it is delivered to him." Note, Contract by Letter, 7 Am. L. Rev. 433, 455 (1873).

**Merlin, Repertoire de Jurisprudence, Vente sec. 1, art. 3 n. 11 bis., interpreting Pothier, Contrat de Vente, para. 1, sec. 1, art. 3, n. 32.

**See Note, Contract by Letter, 7 Am. L. Rev. 434, 449 (1873).


**De Marans v. Deschamps, Orléans, 26.6.1886 D. 1885.135; Aubrey, supra note 219, at 1014.


**French Civil Code art. 932:

A donation during life shall not bind the donor, or produce any effect, except from the day on which it shall have been accepted in express terms. The acceptance may be made, the donor living, by a subsequent and authentic act, of which a minute shall remain; but then the donation shall not have effect with regard to the donor, except from the day on which the act which shall verify such acceptance shall have been notified to him. [English translation in Code Napoleon (1841)].
of the latter refer to article 1985, which concerns the time of acceptance of procuration.\textsuperscript{224}

The French Court of Cassation has in the past been of the opinion that the question is one of fact that must depend upon the particular circumstances and the probable intent of the parties,\textsuperscript{225} but it has shown a recent tendency to favor the \textit{expedition} theory.\textsuperscript{226} Many nations,\textsuperscript{227} in addition to the United States and Japan, today apply this theory of the time of contract formation, although, as has been seen,\textsuperscript{228} there are many other countries that apply different theories.

The committee\textsuperscript{229} of the International Institute for the Unification of Private Law, in its initial draft proposal of 1936, proposed that the contract be concluded at the place and moment of \textit{dispatch} of the communication of acceptance, with exceptions for contrary stipulation or for the employment of an unusual means of acceptance.\textsuperscript{230} The committee chose this rule in the belief that it was the one most often used, especially in international commerce.\textsuperscript{231}

\textsuperscript{224}FRENCH CIVIL CODE art. 1985, para. 2: "The acceptance of procuration may be merely tacit, and result from the performance which has been given to it by the agent." Procuration is an act by which one person gives another the power to act in his name and for his benefit. FRENCH CIVIL CODE art. 1984, para. 1.


\textsuperscript{227}Winfield suggests that the greater number of nations adopt the theory of expedition. In addition to France and Japan he includes among the civil law countries Egypt, Morocco, and Spain (COMMERCIAL CODE art. 54). The Spanish Civil Code adopts the time of receipt. See note 214 \textit{supra}. Winfield, \textit{Some Aspects of Offer and Acceptance}, 55 L.Q. REV. 499, 507 (1939).

The following countries of South America applying the Spanish system to commercial transactions adopt the expedition theory: Bolivia, Brazil, Chile, Colombia, Costa Rica, Equador, Guatemala, Honduras and Peru. OBREGON, LATIN-AMERICAN COMMERCIAL LAW 290 (1921). Obregon also includes Mexico in this category, but article 1807 of the Mexican Civil Code (1928) provides that the contract arises when the acceptance is received.

\textsuperscript{230}See notes 212-15 \textit{supra} and accompanying text.

The following committee was appointed by the President of the Institute: M. M. d'Amelio, President; A. Asquini (Italy); A. Bagge (Sweden); L. Biamonti (Representative of the International Chamber of Commerce); H. Capitant (France); Sir Civil J. P. Hurst and Sir W. Graham-Harrison (Great Britain); J. M. Manzanilla (Peru); J. Hamel (France); E. M. Meijers (Netherlands); Guido von Stroebele (Austria). Reporters: M. C. Righetti, (Secretary General of the Institute), C. Baldoni and S. Cerulli Irelli (of the Institute). See \textit{INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW} 160, 161 (1948).

\textsuperscript{231}UNIFORM INTERNATIONAL LAW art 8(1) (c) (1936 draft): "Where the acceptance takes place by an express declaration, the place and the moment of the conclusion of the contract are (C) The place and the moment the acceptance is dispatched in all other cases."

\textsuperscript{232}Meijers, \textit{Underlying Principles of the Draft Concerning the Conclusion of Contracts by Correspondence}, in \textit{INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW} 71, 81 (1948): "The Committee finally decided that when the two
World War II forced the postponement of consideration of this legislation, and the Governing Council of the Institute established a new committee in 1956.\textsuperscript{232} This committee's revised draft, submitted to the Governing Council in 1958, abandoned the previously submitted "dispatch-acceptance" rule, and replaced it with the requirement that the notice of acceptance must be communicated to the offeror by delivery at his address. The present formulation contains the 1964 drafting committee's recommendation that when the parties are at a distance, the contract is formed at the time of the offeror's receipt of the communication of acceptance, changing the earlier recommendation\textsuperscript{233} favoring adoption at the time of expedition.\textsuperscript{234} Although this proposal represents the established law of Germany and of other nations with a similar viewpoint, it is not consonant with either the common law or with the prevailing position in many civil law countries, including Japan, France, and most nations of South America.

\section*{C. Delayed Receipt or Late Communication of Acceptance}

Although in Japan it is required that the notice of acceptance must be \textit{received} within the period specified in the offer to be legally effective, there is an exception expressed in article 522 of the Japanese laws differ on this point, the place and moment in which acceptance is dispatched are the place and moment of the conclusion of the contract, because this is the system followed by the laws more often applied in international commerce.”

\textsuperscript{233} Members of the Committee appointed in April 1956: A. Bagge, president, Ascarelli de Castro y Bravo, Gutzwiller, Hamel, Riese and Wortley, members. Messrs. Bagge and Hamel had served as members of the original committee. \textit{International Institute for the Unification of Private Law, 1958 Yearbook} 53.

\textsuperscript{234} \textit{Uniform International Act} arts. 5, 7, 9, 10, 12 (1958 draft).

\textit{Uniform International Act} (1964 draft):

\begin{itemize}
\item Art. 5, para 4: A revocation of an offer shall only have effect if it has been communicated to the offeree before he has \textit{dispatched} his acceptance or has done any act treated as acceptance under para. 2 of article 6. (Emphasis added.)
\item Art. 6, para. 1: Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.
\item Art. 8, para. 1: A declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror, and usage.
\item Art. 10: An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance.
\item Art. 12, para 1: For the purposes of the present law, the expression "to be communicated" means to be delivered at the address of the person to whom the communication is directed.
\end{itemize}

Thus the offeror may not be able to revoke his offer communicated to the offeree after notice of acceptance has been dispatched, but the offeree may revoke such acceptance by communication to the offeror before or at the same time as the acceptance, see \textit{id.} art. 10. This is justifiable as neither party desires the formation of a binding contract, and the offeror has not relied to his detriment on the dispatched notice of acceptance.
Civil Code. If the offeror has reason to know that the late notice of acceptance was dispatched so that in normal circumstances it would have arrived within the specified period, and if he has not already sent notice, he must promptly dispatch notice of the delayed arrival to the offeree. If the offeror fails to give such notice, the delay in the receipt of notice of acceptance is disregarded. Additionally, article 523 of the Japanese Civil Code, following the German Civil Code,\textsuperscript{235} permits the offeror to regard the delayed acceptance as a new offer.

The offer to enter into a contract made \textit{inter absentes} that does not state a period for acceptance lapses if notice of its acceptance is not dispatched by the offeree within a reasonable period.\textsuperscript{236} This view is adopted by most legal systems today, although some Ibero-American laws fix the delay at a specified number of days according to the distance involved.\textsuperscript{237} The Uniform International Act combines both views. Where no time is fixed, the declaration of acceptance of an offer must be communicated within a reasonable time, with due account taken of the circumstances, including the rapidity of the means of communication used by the offeror as well as usage.\textsuperscript{238}

The necessity of notifying the offeree of the delayed arrival of his acceptance, to preclude its effectiveness, is indigenous to the civil law; this requirement in Japanese law was derived from article 149 of the German Civil Code. Section 73 of the \textit{Second Restatement of Contracts} expresses the accepted common law position that the late acceptance merely constitutes an offer to the original offeror. The recipient (the original offeror) of the late acceptance may be under a duty to notify the other party (the original offeree) that he does not intend to be bound by the later acceptance. This duty results from previous dealings, however, or from usage in the particular trade, that should lead the original offeree to understand that receipt of the delayed acceptance without objection constitutes acceptance.\textsuperscript{239} This

\textsuperscript{235} \textit{German Civil Code} (BGB) art. 150. Cohn, \textit{Civil Law}, in 1 GREAT BRITAIN FOREIGN OFFICE MANUAL OF GERMAN LAW 50 (1950).
\textsuperscript{236} \textit{Japanese Commercial Code} art. 508(1), the text of which is set forth in note 26 supra.
\textsuperscript{237} Meijers, \textit{Underlying Principles of the Draft Concerning the Conclusion of Contracts by Correspondence}, in \textit{INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW} 71, 79 (1948).
\textsuperscript{238} \textit{Uniform International Act} art. 8, para. 1 (1964 draft).
\textsuperscript{239} \textit{Restatement (Second), Contracts} § 73: "Effect of Receipt by Offeror of a Late or Otherwise Defective Acceptance. A late or otherwise defective acceptance may be effective as an offer to the original offeror, but his silence operates as an acceptance in such a case only as stated in section 72."
§ 72. Acceptance by Silence or Exercise of Dominion: "(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the
FORMATION OF CONTRACTS

is very different from the civil law, where the duty to give notice rests upon the necessity of investigating the document containing the acceptance, to determine whether the circumstances under which it was sent were such that it would have been communicated in due time if the transmission had been normal.

The Uniform International Act adopts the civil law position.\textsuperscript{240} The drafting committees who prepared the pre-World War II drafts of the proposed Uniform International Act\textsuperscript{241} intentionally rejected the civil law position on notice of intent by the offeror, following his receipt of delayed acceptance. It was their belief that the results of the application of this rule were usually the same as those obtained by use of the general rule that the delayed acceptance constituted a new offer.\textsuperscript{242} Besides, most legislative drafts at that time were discarding this position, even in jurisdictions where it had been recognized. Yet, surprisingly, following the termination of World War II, upon resumption of work toward a final draft, the drafters introduced the matter of notice to the offeree upon delayed arrival of acceptance into the 1958 "Rome" draft;\textsuperscript{243} this has been carried forward into the current proposal.

This position is subject to criticism because it will be difficult for the offeror to always determine whether the notice of acceptance would have been communicated in due time in normal circumstances. An offeror who has received delayed notice of acceptance may misjudge the necessity of dispatching prompt notice that he considers his offer to have lapsed. Although this notice must be furnished promptly, there

\footnotesize{\textsuperscript{240}Uniform International Act art. 9, para. 2 (1964 draft): If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offer has promptly informed the acceptor orally or by dispatch of a notice that he considers his offer as having lapsed.

\textsuperscript{241}A Working Committee of the International Institute for the Unification of Private Law (President: Sir Cecil Hurst; Members: Messrs. Bagge, Capitant, Gutteridge, Hamel and Rabel) undertook in 1930 to draft a uniform law on the international sale of goods. Their preliminary draft was submitted to the Governing Council in 1934. In this year it was decided to begin separate work on the formation of contracts for the international sale of goods, and in 1936 a draft Uniform Law on International Contracts by Correspondence had been prepared. For English translation of this draft, see International Institute for the Unification of Private Law 161 (1948).

\textsuperscript{242}Meijers, Underlying Principles of the Draft Concerning the Conclusion of Contracts by Correspondence, in International Institute for the Unification of Private Law 71, 83 (1948).

\textsuperscript{243}Uniform International Act art. 8 (1958 draft).}
is a possibility of the offeror’s using this provision for speculation where it is apparent that the notice would normally have been communicated in due time.\textsuperscript{244}

IX. COUNTERMANDING UNCOMMUNICATED ACCEPTANCE OF OFFER

Application of the “dispatch” rule by common law jurisdictions precludes the offeror from effectively withdrawing his offer after the offeree’s notice of acceptance has been dispatched. It is irrelevant that the notice of withdrawal was dispatched prior to the dispatch of the acceptance, since the revocation is not effective until it is received.\textsuperscript{245}

There are a few decisions in the United States that reflect a different position regarding the effective time of acceptance or revocation of the offer,\textsuperscript{246} but most of them involve unilateral mistake; a similar result

\textsuperscript{244} Uniform International Act art. 9, para. 2 (1964 draft) provides that this is to be ascertained by inquiry as to whether “the letter or document which contains the acceptance shows that it has been sent in such circumstances ....” Although this communication may show the date of dispatch, it will not assist the recipient in determining the customary time necessary for transmittal. This information must be acquired from other sources. Whether if such transmission had been normal it would have been communicated in due time becomes a rather close question of fact. See Aubrey, The Formation of International Contracts, With Reference to the Uniform Law on Formation, 14 INT. & Comp. L.Q. 1011, 1020, 1021 (1965).

Farnsworth, Formation of International Sales Contracts: Three Attempts at Unification, 110 U. Pa. L. Rev. 305, 323 (1962): “The objection of this rule is that it enables the offeror to speculate on fluctuations in the market and on changes in other conditions between the time when the offeree sent the acceptance and the time when the offeror must decide whether to consider it as an acceptance.”

\textsuperscript{245} Barnebey v. Barron G. Collier, Inc., 65 F.2d 864, 868 (8th Cir. 1933); Stephen M. Weld & Co. v. Victory Mfg. Co., 205 Fed. 770 (E.D.N.C. 1913): Plaintiff, a cotton dealer, accepted an offer to purchase cotton by depositing a telegram in the office of Western Union in Philadelphia at 10:15 a.m. At 10:40 a.m. plaintiff received a telegram from the defendant cotton mill company attempting to revoke its offer to sell. Plaintiff’s telegram of acceptance was not received by defendant until 12:35 p.m.; L. & E. Wertheimer, Inc. v. Wehle-Hartford Co., 126 Conn. 30, 9 A.2d 279 (1939), 125 A.L.R. 985 (plaintiff effectively accepted offer to sell whiskey); Paramount Pictures Distrib. Corp. v. Gehring, 283 Ill. App. 581 (1936) (plaintiff effectively accepted offer for rental of motion pictures); Ziehme v. McInerney, 67 Ill. App. 577 (1912) (letter of acceptance posted by plaintiff, and jewelry shipped, before receipt of notice of revocation of the offer to purchase); Farmers’ Produce Co. v. McAlester Storage & Comm’n Co., 48 Okla. 488, 150 Pac. 483 (1915) (court relied in part on OKLA. STAT. ANN. §§ 913, 914 (1910)); Ellard v. Waterloo Mfg. Co., 20 Sask. 601, [1926] 3 D.L.R. 207 (defendant-buyer effectively posted letter accepting offer to sell before he received plaintiff’s notice that the offer had been withdrawn). See also Annot., Time and Place of Consumption of Contract on Acceptance by Telegraph of Offer, 47 A.L.R. 159 (1927).

Rhode Island Tool Co. v. United States, 130 Ct. Cl. 698, 128 F. Supp. 417 (1955), is usually considered as expressing a “minority” position based upon ability to control the communication. The court, however, observed, 128 F. Supp. at 418: “The record does not show whether the notice of award was mailed before or after the telephone conversation in which plaintiff advised the defendant of its mistake and asked to withdraw its bid.” The decision may also be rationalized on the theory of unilateral mistake. See note 247 infra and accompanying text.

\textsuperscript{246} Rhode Island Tool Co. v. United States, supra note 245, 128 F. Supp. at 420 (plaintiff sought to withdraw bid due to mistake): “The reason for the old rule had disappeared. This does not change any principle, it simply changes the practice
could have been obtained by placing greater emphasis upon this factor.  

Although the application of the "dispatch-acceptance" rule protects the offeree against a subsequent communication of revocation, its strict application also serves to preclude him from countermanding his own acceptance made at a distance, once it has been dispatched. The dispatched acceptance binds the offeree, even if it comes to the offeror's attention after he has received a subsequently dispatched notice countermanding the acceptance.

There is little reason, other than a desire for uniformity of position, to apply the "dispatch-acceptance" rule in these circumstances. Under the rule, the offeror in such a case is permitted to force a binding to suit the changed conditions, but leaves unchanged the principle of finality, which is just as definite as ever, though transferred to a different point by the new postal regulation."; Dick v. United States, 113 Ct. Cl. 94, 82 F. Supp. 326 (1949), 59 Yale L.J. 374 (1950); Pacific Alaska Contractors v. United States, 157 F. Supp. 844 (Ct. Cl. 1958); Plaintiff-bidder wrote, and apparently posted, a letter accepting the government's partial award, on the day prior to the United States' (defendant) telegram of revocation. Although the notice of acceptance is not a model of clarity, it was posted prior to, and received after, notice of revocation. The court found that no contract was created because notice of the acceptance was not received until after the revocation had been communicated; Stahl v. Loeb, Cooney & Loeb, 209 Ill. App. 246 (1917) (abstract decision): No contract established as defendant withdrew offer before receiving plaintiff's notice of acceptance. There is no indication as to whether the notice of revocation was received before dispatch of the notice of acceptance; Watters v. Lincoln, 29 S.D. 98, 135 N.W. 712 (1912): Under South Dakota statute, revocation of offer effective when placed in the course of transmission to the offeree. Notice of acceptance posted thereafter is ineffective to create a binding contract.

MacNeil, Time of Acceptance: Too Many Problems For A Single Rule, 112 U. Pa. L. Rev. 947, 955 (1964): "Instead of facing up to the functional problem of mistake, each time the court repudiated the dispatch rule generally...Such a repudiation was not, however, necessary. The state of the law of mistake would have permitted relief in those cases without overthrowing the dispatch rule." In Rhode Island Tool Co. v. United States, 130 Ct. Cl. 698, 128 F. Supp. 417, 421 (1955), the court observed: "Manifestly a mistake was made. The defendant is not injured by permitting its correction. It only forbids defendant's unjust enrichment by preventing its taking technical advantage of an evident mistake."

For decisions applying the "receipt" of communication rule in other contexts see Fitzgerald v. W. F. Sebel Co., 295 F.2d 654 (10th Cir. 1961); Guardian Nat'l Bank v. Huntington County State Bank, 206 Ind. 185, 187 N.E. 388 (1933); Traders' Nat'l Bank v. First Nat'l Bank, 142 Tenn. 229, 217 S.W. 977 (1920). Morrison v. Thoelke, 155 So. 2d 889 (Fla. App. 1963), 15 Mercer L. Rev. 516 (1964), 38 Tulsa L. Rev. 566 (1964), 1 Tulsa L.J. 188 (1964), is a recent application of the "dispatch-acceptance" rule in these circumstances. A contract for the purchase of realty had been mailed by appellants to appellees for their acceptance. Appellees executed the instrument and deposited it in the mail addressed to the appellant's attorney. Prior to the receipt of the contract, appellee telephoned the appellant's attorney and revoked the acceptance. Presumably with knowledge of this telephone conversation, appellant recorded the contract. Appellees sued to quiet title and appellants counterclaimed for specific performance. Applying the "dispatch-acceptance" rule, the court found that both parties became bound when the acceptance was received. A similar position was adopted in an earlier New Zealand decision. Wenkheim v. Arnott, 1 J.R. 73. See Winfield, Some Aspects of Offer and Acceptance, 55 L.Q. Rev. 499, 506 (1939).
contractual obligation upon the offeree. But when an offeree desires not to enter into a binding contract, his desire should be recognized, so long as it does not prejudice the offeror's interests. The desire of an offeree whose notice of acceptance is received before the arrival in normal course of his previously dispatched rejection should be similarly regarded.

French jurisprudence, expressed by both Pothier and Pardessus, favors permitting the offeree to withdraw his dispatched acceptance before it is received by the offeror, provided that the offeror is indemnified for any loss sustained because of the withdrawal.

Within the common law system there have been deviations from this strict application of the rule, by legislation in India, and by judicial decision in Scotland. In France, Merlin, as the offeree's counsel, persuaded the Court of Cassation in 1813 that the important factor in these circumstances is the comparative receipt times of the conflict-

---

240 Note, Contract by Letter, 7 Am. L. Rev. 434, 451 (1873): "Moreover, it is not a question of whether, for the sake of safety in communication, a letter cannot be withdrawn from the post, but whether one can revoke the contents of a letter by another communication that arrives more promptly than the first letter. Can any one hesitate on this point?"

250 This is the position recommended in Winfield, Some Aspects of Offer and Acceptance, 55 L.Q. Rev. 499, 511 (1939): "Moreover, the acceptance is what the offeree finally intended and the law is in favor of giving effect to a man's intention unless, indeed, the other party is prejudiced by his change of mind; and it is hard to see what harm the offeror has suffered here."

Winfield had adopted a similar position where the notice of rejection, dispatched subsequent to his acceptance, is the first communication received by the offeror. However, his opinion changed. Id. at 511: "But why should he be allowed to do so when once he has taken a decision?" Id. at 513: "First, any fair-minded man would say that there was an agreement directly the letter of acceptance was posted. Secondly, there is no reason why the law should encourage vacillation about acceptance on the part of the offeree. Thirdly, an offeror normally expects benefit from the acceptance of his offer; why should he be deprived of that benefit simply because the offeree has changed his mind after he has accepted?" But cf. A. E. Staley Mfg. Co. v. Northern Co-ops., Inc., 168 F.2d 892 (8th Cir. 1948) (seller responded to offer by proposing varying terms, and then attempted unsuccessfully to accept offer as originally submitted).

251 Pothier, Contrat de Vente, art. 3, § 1, para. 1. Note, Contract by Letter, 7 Am. L. Rev. 434, 449 (1873).

252 Pardessus, Cours de Droit Commercial, ch. 5, tit. 2, para. 2, n.250.

253 Indian Contract Act § 5: "An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards." Winfield, supra note 250, at 505. See also Sabbath v. Katha Venkatasawmy, [1903] 27 Madras 355.

254 Countess of Dunmore v. Alexander, 9 S. & D. 190 (1830): Betty Alexander had expressed a desire to enter the service of the Countess of Dunmore. The Countess wrote to Lady Agnew requesting that she engage Betty Alexander. Lady Agnew forwarded the letter which was received by Betty Alexander at the same time as she received a subsequently posted letter revoking the Countess' acceptance. The Court of Sessions, in reversing the decree of the Sheriff Substitute, found that Lady Agnew was the Countess' agent and therefore the acceptance was not effective until received. The revocation having been received at the same time as the offer it served to neutralize the acceptance.
FORMATION OF CONTRACTS

Masse affirms the soundness of this position.\(^{256}\)

In Japan, neither the Civil Code nor the Commercial Code expressly answers these questions about the possibility of revocation of notice of acceptance made *inter absentes*. Since there are no reported cases, and scholars are divided in their attitudes, the solution rests in the interpretation to be given related provisions of the Japanese Civil Code. As already seen, article 526 provides that a contract *inter absentes* comes into existence at the time the notice of acceptance is dispatched. The drafters desired to preclude the revocation of the acceptance after the dispatch of notice. It was reasoned that since the offeror is precluded from effectively revoking an offer where the notice of revocation has not been received by the time the notice of acceptance is dispatched it would be unjust to permit the offeree to revoke a dispatched acceptance and thereby utilize market fluctuations to gain enrichment. This is the prevailing opinion today in Japan,\(^{257}\) although there also exists a strong opposing position.\(^{258}\)

The Japanese Great Court of Cassation, in *Kawasaki v. Japan*,\(^{259}\) held that where sealed bids in connection with government construction contracts are to be opened at a meeting of all bidders, as required by government regulations, the highest bid is considered an acceptance of the government’s offer, and it may not be withdrawn once the opening of the bids starts.

X. OPTION CONTRACTS AND FIRM OFFERS

The principal exception to the application of the “dispatch-acceptance” rule in Anglo-American law involves the time of effective acceptance of an offer expressed in a binding option contract. Here the communication of acceptance is not effective until it is received, and the *Second Restatement of Contracts* now expresses this position.\(^{260}\) The offeree may revoke his acceptance up until its receipt, but

---


\(^{256}\) Masse, *Le Droit Commercial*, tit. 3, ch. 1, § 2, n.8, art. 1.


\(^{258}\) As to the details of scholarly views, see Takashima, *op. cit. supra* note 211, at 76, 77.

\(^{259}\) Minroku 157 (Gr. Ct. Cass., May 31, 1901). The intermediate appellate court held that the bidder was deemed to have made an offer *inter praesentes*, rather than an acceptance, and that its bid could be revoked before the government’s acceptance was effective. This opinion was quashed and the case remanded.

\(^{260}\) *Restatement (Second), Contracts* § 64: “Time When Acceptance Takes Effect. Unless otherwise provided, ... (b) an acceptance under an option contract is not operative until received by the offeror.”
he takes the risk of delay or of loss in transmission. In options for a
specified time particularly, the communication of acceptance must be
received by the expiration date to be effective. Much of the reported
litigation that served to develop this common law exception has been
explained on other bases, and the courts have rarely evaluated the
possible justifications for the exception. Frequently, the question
involves the time of effective notice for lease renewals or for purchase
options on realty.

Where an option contract is involved, the offeree’s affirmative re-
sponse is both a notice of acceptance and a condition of the promisor’s
existing contractual duty. Corbin emphasizes the latter as the basis
for making the notice of acceptance effective upon receipt, rather than
upon dispatch.

If the purpose of the notice is the termination of an

---

251 (1) The offer may expressly require receipt of the acceptance: Lewis v.
(18 Mass.) 277 (1822), the Massachusetts court adopted the “receipt-acceptance” rule
as to bare offers.

(2) Time was of the essence of the bargain: Scott-Burr Stores Corp. v. Wilcox,
194 F.2d 989, 991 (5th Cir. 1952) (renewed lease); Hoban v. Hudson, 129 Minn.
335, 152 N.W. 723 (1915) (shares of stock).

(3) Effectiveness of notice of cancellation rather than creation of contract in-
volved: Wheeler v. McStay, 160 Iowa 745, 141 N.W. 404 (1913); Brown Method
Co. v. Ginsberg, 153 Md. 414, 138 Atl. 402, 403 (1927): “But it seems to us that
termination at least involves setting the parties free of its obligation, and that this
cannot be regarded as accomplished unless and until that other party is notified of it.
Conceivably the other party might be legally free without knowing it, but its free-

408 WASHINGTON LAW REVIEW [ Vol. 42: 347

(4) Place rather than time of acceptance for purposes of conflicts of law involved:
Compania de Astral, S.X. v. The Boston Metals Co., 205 Md. 237, 107 A.2d 357,

Williston suggests that the acceptance of the “option-offer”, as distinguished
from other forms of option, may be subject to the general rules as to communication
of an acceptance. 3 WILLISTON, CONTRACTS §853 (rev. ed. 1936). See Shubert
Theatrical Co. v. Rath, 271 Fed. 827 (2d Cir. 1921); Martinell v. Fiduciary
Counsel, 133 N.J. Eq. 408, 30 A.2d 281, 284 (Ct. Err. & App. 1943) (dictum).

252 See, e.g., Scott-Burr Stores Corp. v. Wilcox, 194 F.2d 989, 991 (5th Cir. 1952)
(lease renewal-time of the essence); Cities Serv. Oil Co. v. National Shawmut
28 N.W.2d 289 (1947); Hoban v. Hudson, 129 Minn. 335, 152 N.W. 723 (1915);
McCorry Stores Corp. v. Goldberg, 45 N.J. Eq. 152, 122 Atl. 113 (Ch. 1923): “As
a matter of policy, in a formal transaction such as the renewal of a lease so valuable
as this one is said to be, there should be no unnecessary extention of the privilege of
 corresponding by mail. It requires little imagination to conceive of the innumerable
schemes that might be devised in fraud of other parties, if the rule is extended.”
Cf. Kibler v. Caplis, 140 Mich. 28, 103 N.W. 531 (1905) (option to purchase hides,
the seller to be notified by a stated date).

253 1A CORBIN, CONTRACTS § 264 (1963):

It is believed that, in the absence of an expression of contrary intention, it
should be held that the notice must be received. As above explained, the notice
existing contractual relationship—frequently the case—this basis for distinction is certainly justified. With a more fundamental reason, however, for recognizing the “receipt” rule in option contracts. Since the offer is irrevocable only for the period of the option, the offeree who decides to communicate his acceptance of the option proposal runs the risk of a communicated revocation while his acceptance is in transmission. But the offeree’s reliance interest is not in jeopardy, as it is with the typical revocable offer. There is a direct correlation, although it is seldom expressed by the courts, between the offeror’s power of revocation and the legal rule that is applied as to the effective time of acceptance in transactions inter absentes.

The UCC recognizes as binding a merchant’s firm offer to buy or sell goods, made in a signed writing that gives assurance that it will be held open. The UCC does not express any position on the effective time of acceptance of such a firm offer, but the time of receipt of the notice of acceptance should be used. When applied to this question

---

is in one aspect a notice of acceptance of an offer; but in another aspect it is a condition of the promisor’s already existing contractual duty. It is more likely to be regarded in this latter aspect by the parties themselves.

Corbin expresses his personal objection to extending the “dispatch” rule to notice of acceptance in already binding option contracts.

With the exception of contracts to ship ordered goods, Corbin’s examples involve the power to terminate existing legal relations. 1A Corbin, op. cit. supra note 263, at 21:

A landlord’s “notice to quit” must be received by the tenant. The power of termination of a contract of employment or of any other continuing contract, can be effectively exercised only by bringing home notice to the other party, not by merely mailing it to him. In a contract to ship goods as ordered, there is no duty of immediate performance until an order is received.

In a practical sense there is no “duty” until receipt of notice because of lack of prior communication, but it is circular reasoning to state that there is no “legal duty” for this is dependent upon the legal rule adopted as to option contracts.

Restatement (Second), Contracts § 64, comment (f): “Option contracts. An option contract provides a dependable basis for decisions whether to exercise the option; and removes the primary reason for the rule of subsection (1). Moreover, there is no objection to speculation at the expense of a party who has irrevocably assumed that risk.”

MacNeil, Time of Acceptance: Too Many Problems for a Single Rule, 112 U. Pa. L. Rev. 947, 975 (1964): “Also where the offer is irrevocable, one of the prime reasons for the dispatch rule is lacking, namely the protection of the offeree against the consequences of revocation.” Id. at 969: “There is hardly a single case applying the dispatch rule to loss or delay in transmission where it is clear both that the offeree had not relied on the contract and that the offeror had relied on its non-existence. Moreover in a large number of the cases applying the dispatch rule there was heavy reliance by the offeree.”

UCC § 2-205. Firm Offers.

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 of assurance on a form supplied by the offeree must be separately signed by the offeror.
of the effective time of acceptance, reasoning that is valid with respect to an option contract is equally valid with respect to an irrevocable firm offer.\textsuperscript{267}

The UCC does adopt the logical position that the "dispatch-acceptance" rule should be applied where the beginning of the requested performance is a reasonable mode of acceptance. The offeree, having begun the requested performance, must take reasonable steps to inform the offeror of his acceptance. If he dispatches this notice of acceptance within a reasonable time, the offeree is protected in his reliance on an established contract, without being subjected to the risks incident to application of the rule that the acceptance is not effective until it is received.\textsuperscript{268} There is, however, a clear distinction (with respect to the effective time of notice of a communicated acceptance) between the notice of acceptance of an irrevocable firm offer, and the notice of acceptance of a bare offer, where the offeree has begun the requested performance.

\section*{XI. The Living Law}

A comparative study of American and foreign statutes and court opinions concerned with the formation of commercial contracts provides insight into the development and direction of the formal legal system and broadens the scope of our understanding.\textsuperscript{269} But the

\textsuperscript{267} In Haldane v. United States, 69 Fed. 819 (8th Cir. 1895), the offeror guaranteed to sell specified hay to the United States for sixty days at a stated price. The government posted its notice of acceptance of this firm offer before the expiration of the sixty days but it was not received within this allotted time. Thus the proposed acceptance was not effective. The court reasoned, 69 Fed. at 822: "The doctrine is well established that, when a statute requires notice to be given to a person for the purpose of creating a liability, personal notice is intended, unless some other form of notice is expressly authorized by the statute."

\textsuperscript{268} UCC §2-206(2). "Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance." (Emphasis added.)

\textsuperscript{269} UCC § 1-201(26): "A person 'notifies' or 'gives' a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." UCC § 1-201, comment 26: "'Notifies'. New. This is the word used when the essential fact is the proper dispatch of the notice, not its receipt. Compare 'Send'. When the essential fact is the other party's receipt of the notice, that is stated."

activities of commercial enterprises leading to the consummation of contracts for the sale and purchase of goods are influenced by other factors than the formal rules developed by the legal system. Inquiry must also be directed into the nature and content of the documents used, the manner of their formulation, and the extent to which they influence commercial practice.270

Routine transactions involving the manufacturer's sale and distribution of goods are frequently handled today through standardized planning, that is, through the exchange of printed business documents setting forth the terms and conditions of the transaction. These documents are concerned with the performance itself, rather than with future conditions or events such as defective execution of the agreement. And little attention is given in routine transactions to the possibility of using these printed documents to obtain legal enforcement of the contract.271

Trade associations have been successful in standardizing contract forms in some industries; their efforts have reduced the exchange of

270 See UCC §1-102. Purposes; Rules of Construction; Variation by Agreement:
(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
(2) Underlying purposes and policies of this Act are ... (b) to permit the continued expansion of commercial practice through custom, usage and agreement of the parties...
(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.
(4) The presence in certain provisions of this Act of the words 'unless otherwise agreed' or other words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3)....

UNIFORM INTERNATIONAL ACT art. 2 (1964 draft) : "(1) The provisions of the following Articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply."

Freedom of contract is recognized in all civil law systems. For example in Germany the parties are free to contract their own contract under the principle of Vertragsfreiheit, subject to limited restrictions. Cohn, Civil Law, in 1 GREAT BRITAIN FOREIGN OFFICE MANUAL OF GERMAN LAW 70, nn.212-14.

271 Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55, 58 (1963) :
This type of standardized planning is very common. Requests for copies of the business document used in buying and selling were sent to approximately 6,000 manufacturing firms which do business in Wisconsin. Approximately 1,200 replies were received and 850 companies used some type of standardized planning. With only a few exceptions, the firms that did not reply and the 350 that indicated they did not use standardized planning were very small manufacturers such as local bakeries, soft drink bottlers and sausage makers.

conflicting printed forms and have produced terms more representative of accepted trade practices. The use of these forms, which typically serve the advantage of the association members, tends to establish fixed practices in the industry, where often none existed.272 These efforts by trade organizations, as well as the related use of contracts of adhesion, have been under study in both civil273 and common law countries.274

Although trade usage is established factually, the UCC authorizes judicial interpretation where usage is expressed in written trade codes.275 Trade associations, representing various interested groups within an industry, have occasionally joined together to develop mutually agreeable standard contract forms, such as the order form prepared by the National Retail Dry Goods Association. Similarly, the Worth Street Rules were established by thirteen associations, representing all interests in the cotton industry, to cover transactions in cotton grey goods.276 In addition, standard provisions have been incorporated into order forms used by both sellers and purchasers of goods due to the joint efforts of associations representing their interests.277

Documents used in the formation of commercial sales contracts indicate existing practices, and the standardized printed forms represent typical procedure. Nevertheless, there are many sales transactions

273 Leaute, Les Contrats-Types, 51 PEYRE TRIMESTRIELLE DE DROIT CIVIL 429 (1953); Saleilles, DE LA DECLARATION DE VOLUME 229 (1901) (origin of the term "A contract of Adhesion").
275 UCC § 1-205(2) ; Wright, Opposition of the Law to Business Usages, 26 COLUM. L. Rev. 917, 930 (1926)

In the first place, when there are standardized contracts, what otherwise would possibly be fixed by usage is fixed by the contract. Everyone's interest is concentrated on what the contract means and requires. There is no room for the growth of usage—nothing, or rather very little, out of which a customary way of dealing will arise.
276 The Worth Street Rules include a standard salesnote, specifications for goods, and a statement of trade custom. See ASSOCIATION OF COTTON TEXTILE MERCHANTS OF NEW YORK (1943); Note, Private Lawmaking by Trade Associations, 62 HARV. L. Rev. 1346, 1350 (1949).
277 Basic Trade Provision No. 1, agreed upon by the National Retail Dry Goods Association and the Trade Council of the Garment Association for incorporation as a standard provision of order forms, provides: "It is mutually agreed and understood that all the terms and conditions set forth on this order are satisfactory unless the Seller notifies Purchaser to the Contrary, before shipment is made, within 15 days from the date of this order." Cf. UCC § 2-207(2) (b) (material alterations); UCC § 1-102(3) (freedom of contract).
FORMATION OF CONTRACTS

in which neither the manner of contract formation nor the mercantile practice (including the extent of reliance placed upon legal sanctions) can be determined except by direct investigation. One such investigation indicates that purchasing agents frequently enter into contracts for goods which are not of a highly speculative nature, with the understanding derived from business practice that the executory order can be cancelled, subject only to the payment of any expenses incurred by the manufacturer prior to receipt of notice of cancellation. Standardized contracts of the garment industry recognize the trade practice that permits the manufacturer to cancel style orders with immunity, if he has given his purchaser advance notice. Ehrlich has correctly observed that "the center of gravity of legal development lies not in legislation, not in juristic science, nor in judicial decision, but in society itself."

---

278 Ehrlich, Fundamental Principles of the Sociology of Law 498 (Moll tr. 1936, 1962 reprint): "To be sure, to ask a jurist to learn from actual observation and not from sections of a code or from bundles of legal papers is to make an exacting demand upon him; but it is inavoidable, and marvelous results can be achieved in this manner."

For an analysis of 500 contract cases published in the National Reporter System for the year 1961, see Shepherd, Contracts in a Prosperity Year, 6 Stan. L. Rev. 208 (1953).

279 Macaulay, supra note 271, at 61: "Yet all ten of the purchasing agents asked about cancellation of orders once placed indicated that they expected to be able to cancel orders freely subject to only an obligation to pay the seller's major expenses as to scrapped steel." See also 2 Harv. Bus. Rev. 238-40, 367-70, 496-502 (1923-1924) (case study of cancellation of contracts).

280 Basic Trade Provision No. 5, 1949 agreement of the National Retail Dry Goods Association and the Trade Council of the Garment Association: "In the event that the Seller should be unable to manufacture, or determine not to manufacture, any style contained in this Order, he shall immediately notify the Purchaser to that effect and thereupon the Seller shall not be liable for nondelivery of such merchandise. Purchaser shall, however, accept delivery and pay for all other merchandise." (Emphasis added.) Note, Private Lawmaking by Trade Associations, 62 Harv. L. Rev. 1346, 1355 n.45. (1949).

281 Foreword to Ehrlich, op. cit. supra note 278.