

Question 5

In January, in response to an inquiry, Seller sent Buyer a letter offering to sell 10,000 tires, assorted sizes to be selected by Seller and delivered at the rate of 1,000 each month for ten months. This letter stated the price for each size and specified that payment was due on delivery of each shipment. Buyer sent a letter agreeing to purchase 10,000 tires, assortment to be specified by Buyer. Buyer's letter contained its standard provision that any disputes arising under the agreement were to be resolved by commercial arbitration. The letter also contained Buyer's specification of the size assortment for the first month's shipment of tires.

On February 1, Seller's driver arrived with the first installment, which consisted of the assortment specified in Buyer's letter. The driver left the tires without asking for payment. Four days later Buyer sent Seller a check for the first installment and a letter specifying the assortment for the second installment. On March 1, Seller's driver arrived with the second installment, again containing the assortment specified in Buyer's letter. Again the driver left the tires without getting payment.

Three days later Buyer sent a check for the second installment and specifications for the third installment. On April 1, Seller's driver arrived, but the assortment was not exactly what Buyer had specified. Buyer accepted the tires anyway and seven days later sent a check for the third installment, along with specifications for the fourth installment.

On May 1, Seller's driver arrived, again with an assortment that was not exactly what Buyer had specified. Buyer agreed to take delivery, but Seller's driver insisted on payment. When Buyer was unable to pay, Seller's driver refused to leave the tires and took them back to Seller's warehouse.

Buyer called Seller to complain about the driver's refusal to leave the tires and insisted upon immediate redelivery. Buyer said he would pay "as usual, a few days after delivery." Seller refused and told Buyer, "If you don't like it, why don't you take me to arbitration?" Buyer replied, "Look, I have no intention of arbitrating this dispute. But I'm not accepting that last shipment unless it meets my specifications precisely and unless you allow me the same leeway for payment as with past shipments."

Seller sued Buyer for breach of contract. Buyer simultaneously filed a counterclaim against Seller and moved the court for an order staying the suit and compelling arbitration. Seller opposed the motion.

1. How should the court rule on the motion for an order staying the suit and compelling arbitration? Discuss.
2. What are the rights and obligations of Seller and Buyer, and who should prevail on the merits of the litigation? Discuss.

ANSWER A TO QUESTION 5

Contracts

Applicable Law/UCC

Goods

The Uniform Commercial Code applies to these facts because the contract involves the sale of goods. Here, the contract is for the purchase/sale of tires. (Items moveable at the time of identification to the contract.)

Merchants

Similarly, the specific provisions of the UCC apply in this instance because both the buyer and seller are merchants. Merchants are individuals who deal in goods of the kind, or otherwise hold themselves out as having knowledge with respect to the goods involved. Here, both Buyer and Seller are charged with the knowledge of "tires."

OFFER

In January, Seller's response to inquiry from Buyer, resulting in a letter offering to sell Buyer 10,000 tires. This communication was directed at the Buyer, manifesting an intent by Seller to be bound by the terms of the offer.

Namely, the terms of offeror's (seller's) offer were.

- 1) to sell 10,000 tires of assorted sizes
- 2) sizes to be determined by Seller
- 3) delivered at a rate of 1000/month
- 4) payment due on delivery of each shipment.

Since the offer was communicated to an identified offeree, namely Buyer contained definite and certain terms (as stated above) and was sufficient to indicate offeror's (seller's) intent to be bound by contract, there was an offer.

Acceptance

Acceptance under the UCC can be accomplished in any reasonable manner. Promise or performance (prompt performance). Acceptance with the UCC, however, need not be the "mirror image" of the offer.

UCC 2-207

Under 2-207, an acceptance (definite and reasonable) which purports to add or change (new or different terms) will be an acceptance, so long as the offer is not expressly limited to its terms.

Here, the offer was not expressly limited to its terms, so Buyer's "new and additional terms" did not result in a counteroffer.

Under 2-207, an acceptance which contains new and different terms between merchants - which we have here, will become part of the contract, unless the offeror expressly rejects the terms, or the terms materially alter the agreement.

Therefore, since the facts do not indicate that seller objected to the terms of Buyer's acceptance. Buyer's terms will become part of the contract unless they materially alter the contract.

Buyer's terms of acceptance

Buyer acceptance (letter agreeing to purchase)

- 1) 10,000 tires
- 2) Assortment specified by Buyer
- 3) provision regarding any disputes

arising under the agreement were to be resolved by arbitration.

Buyer's letter also included Buyer's specification of the size assortment for the first month's shipment of tires.

Having established that there was a valid offer and acceptance under the UCC, the issue becomes what terms control.

Terms

Under the UCC, clauses with regard to arbitration have not been considered material alterations of the contract. Since arbitration (commercial arbitration) is a standard practice in the commercial world, Buyer's insertion of this new clause (not addressed by the Seller's offer) will be deemed to be part of the contract (between merchants).

1. How should court rule on the motion for an order staying the suit and compelling arbitration?

Since the Seller's offer did not contain contrary indications with respect to resolving disputes, Buyer's requirement that parties resolve their differences by commercial arbitration should not be deemed a material alteration of the contract, and therefore, the motion should be granted. Court should grant Buyer's order staying the suit and compelling arbitration.

Note: Facts indicate that when the relationship between Buyer and Seller began to sour, Seller suggested that Buyer take Seller to "arbitration"; thereby implying that he did not find the provision offensive.

Again, while Buyer may have stated that "he had no intention of arbitrating this dispute," he may have been suggesting that the parties reach some other agreement before jeopardizing the entire relationship. This comment by Buyer does not suggest that he had concerns about the provision's validity.

When the terms of the offer and the acceptance conflict, 2-207(3) applies which essentially knocks out the conflicting terms as stated in each and supplies the contract with either a UCC gap filler or other implied terms as construed by the parties' course of performance, course of dealing or usage of trade.

Here, the Seller's terms with respect to who makes the assortment stated it was Seller's option.

The Buyer's terms with respect to who is to decide the assortment is Buyer's option.

Since these two terms conflict, the parties' subsequent conduct will determine what term to apply.

As stated, along with the Buyer's acceptance, Buyer sent (along with the letter) to Seller the Buyer's specifications of the size and assortment for the first month's shipment of tires.

On February 1, Seller delivered the first installment as specified by Buyer.

Four days later, Buyer sent another letter to Seller specifying the assortment for the second installment, on March 1 the Seller complied.

Out of four deliveries before the alleged breach by Buyer, Seller had complied with the specifications as supplied by Buyer.

Course of dealing thus far would suggest that the term was understood as specified by Buyer.

However, on April 1, Seller arrived with an assortment not exactly as Buyer specified, nevertheless Buyer accepted the tires.

On May 1st, the same thing occurred and Buyer accepted.

Buyer's conduct at this point may be construed as a waiver of the term. Since he did not reject the improper delivery.

2. What are the rights/obligations of Seller and Buyer? Who should prevail?

According to the terms of the agreement Buyer is entitled to delivery of tires as specified by Buyer. Since the Seller did not object to the change in his acceptance.

Therefore, when Seller failed to deliver as specified by the Buyer, there may have been a breach.

Breach

Under UCC installment contract are divisible contracts which can properly be divided into separate performance by each party entitles party to sue for breach only when nonconformity of the installment substantially impairs the value of the whole.

Here, although there was a nonconformity (didn't meet Buyer's exact specification) Buyer accepted and did not give Seller appropriate notice). Therefore once accepted, Buyer waived any nonconformity in the supply.

While Buyer may have waived previous nonconforming deliveries, his statement, "I'm not accepting that last shipment unless it meets my specifications precisely," retracted the waiver. Seller must comply with the contract.

Therefore Buyer's right to delivery includes specifications as supplied by Buyer.

Seller's Right to Prompt Payment

Seller's right under the contract to prompt payment was not contradicted by the Buyer's acceptance.

However, over the course of their performance Buyer on numerous times made late payments which the Seller accepted.

Likewise, the continued conduct could be construed as a waiver, this waiver however was retracted when Seller's driver insisted on payment from the Buyer.

In both instances, appropriate notice of retracting the waiver may have been required.

Never the less Seller's right to prompt payment and Buyer's obligation to pay on delivery is established by retraction of the waiver.

Breach

Since both Seller and Buyer's nonperformance of the installment contract was not sufficient to render the entire contract breached (each party breached as to one installment following the retraction of the waivers).

The contract should be interpreted by the court to require delivery according to Buyer's standards and payment according to seller's offer (prompt payment on delivery).

ANSWER B TO QUESTION 5

The UCC, Article 2, applies to the sale of goods. Also, special UCC rules apply when Seller and Buyer are merchants who deal in goods of the kind transacted.

Here, UCC and merchant rules apply because tires are goods and the quantity involved suggest both seller and buyer deal in tires.

1. Should Court Order Arbitration?

The court should order arbitration only if the arbitration clause was a term in a valid contract between Buyer and Seller.

A valid contract must consist of (1) an offer manifesting intent to a reasonable person to be bound by acceptance (2) acceptance (3) consideration or a substitute. Also, under the UCC, the terms must state the parties and the goods involved, although quantity and price may be left open.

Offer

This letter, although it does not have language stating how acceptance might be made, is characterized as an "offer," with intent to sell goods as set forth in the letter. This offer does not contain language expressly limiting acceptance to the terms of the written offer.

Acceptance

Can be made in any reasonable manner, where none is requested. Here, Seller responds with a letter indicating agreeing to purchase tires from seller.

Consideration: payment for goods is consideration

Terms: Under common law, the mirror image rule states an acceptance must mirror, or reflect identical terms of an offer. Under the UCC, however, between merchants, an acceptance can create a contract even though additional or different terms are stated. (2-207) Such terms will be part of the contract unless: 1. they materially alter the agreement, 2. offer expressly limits acceptance to terms of offer, 3. other party objects within a reasonable time.

Here, the offer contained no expressly limiting language. The arbitration clause was an addition which likely does not substantially alter the terms of the parties' agreement. Seller did not object to the clause, in fact, Seller is trying to enforce it.

Thus, the arbitration clause is enforceable as term in a valid contract and is enforceable here because the dispute has arisen as to payment and conforming shipments under the contract.

2. The Rights and Obligations of Buyer and Seller Depend on Contract Terms and Performance Under the Contract

A. TYPES OF TIRES

a. Terms: As discussed above, a valid contract exists. Seller's offer stated that it could select the sizes to be delivered. Buyer's acceptance stated that it could select the sizes to be delivered and so specified.

Per the 2-207 discussion above, Buyer's acceptance states a term that would materially alter the contract by affecting the type of goods involved, which goes to Buyer and Seller's willingness to have entered into the contract in the first place.

Such a material alteration would knock out the tire-type language. This language could be filled by trade usage or, even better when possible, the actions of the parties.

b. Performance: Here, the first two installments conformed with Buyer's specifications. This may suggest that Seller was aware of and had agreed to deliver tires to Buyer's stated specifications. If so, this performance indicates that Buyer's specifications control.

However, it is more problematic if two deliveries to Buyer's specification were merely coincidence, which is not very likely.

If so, look to tire retailing custom to see whether Buyer's usually select the type they want.

Obligations: If Buyer's specifications control, Buyer is entitled to reject a nonconforming installment and withhold payment for that installment. As to the April I installment, Buyer is not entitled to any damages because he accepted an installment he knew was nonconforming.

Regarding Buyer's rejection of the May 1 installment, Buyer is only entitled to sue for breach for a nonconforming installment if Buyer's selection terms control. Because Buyer's acceptance stated specifications and the first two installments conformed to Buyer's needs, and Seller never notified Buyer of its desire to not accept Buyer's changed term, Buyer is able to sue for breach on the May 1st nonconforming shipment. Buyer's acceptance of one nonconforming shipment does not waive his right to receive conforming shipments for the remainder of the installment contract.

PREVAIL: Buyer will prevail regarding nonconforming shipment on May 1st.

B. SELLER'S RIGHT TO PAYMENT ON DELIVERY

a. Terms: Seller's offer stated payment was due on delivery. Buyer's acceptance was silent. Thus, Seller's term controls.

b. Performance: Although contractually entitled to payment on delivery, Seller accepted payment after delivery on three straight deliveries, during which the driver never asked for payment on delivery until the 4th installment. Because Seller had allowed late payments for 30% of the total payments, Seller has likely waived his contractual right to payment on delivery.

c. Obligation: Thus, Buyer was not contractually obligated to pay Seller on delivery. Buyer was not in breach and thus, Seller is responsible for providing Buyer with a conforming shipment for May 1st.

d. Prevail: Seller will not prevail on breach of contract for buyer's failure to pay on May 1st delivery

CONCLUSIONS:

1. Seller can force arbitration clause
2. Buyer entitled to tires of his specifications
3. Buyer not entitled to damages for April 1st installment
4. Buyer did not breach by failing to pay on May 1st
5. Seller not excused from providing conforming May 1st shipment.