

Question 4

GravelCo is a distributor of high quality gravel used on construction projects. In August, GravelCo found itself with more gravel than it could easily store. On August 15, GravelCo's sales director sent a fax on company stationary with GravelCo's logo at the top and the sales director's name printed just beneath it to Builder, GravelCo's biggest customer. The entire text of the fax stated, "Because of an oversupply, we are offering to sell up to 5000 tons of high-quality gravel at \$8 per ton, full payment due on delivery. We can guarantee this price for only thirty days."

On August 17, the purchasing agent for Builder faxed back a response stating, "We do not wish to order at \$8 per ton, but would consider a purchase at \$7 per ton."

On September 1, a railroad strike caused a gravel shortage and an immediate rise in the market price for gravel. On September 5, GravelCo entered into several contracts with major contractors to sell large quantities of gravel at \$11 a ton.

On September 7, GravelCo received an overnight letter from Builder signed by its purchasing agent. The letter stated, "We accept your offer for 5000 tons of gravel at \$8 per ton. Terms attached." Attached to the letter was Builder's standard purchase order form, one of the terms of which stated that payment would be made within 90 days after delivery of the purchased product.

In order to deliver 5000 tons of gravel to Builder, GravelCo would now be forced to purchase some of the gravel on the open market at over \$10 a ton.

1. Is GravelCo obligated to sell 5000 tons of gravel to Builder at \$8 per ton? Discuss.
2. If GravelCo is bound to sell the gravel to Builder, can Builder be required to make full payment upon delivery? Discuss.

Answer A to Question 4

4)

Since this question involves the sale of goods it will be governed by the UCC.

Is Gravelco obligated? Gravelco would be obligated to sell Builder 5000 tons of gravel at \$8 per pound if there was an enforceable contract in place. The formation of any contract requires mutual assent (valid offer and acceptance) supported by consideration with no legal defenses.

Gravelco's Offer: A valid offer is manifestation of a willingness to be bound which is communicated by the offeror to the offeree, contains all the essential terms (product, price, time for performance [,] etc[.] and creates the power of acceptance in the offeree. Here Gravelco's sales director sent Builder a signed, written offer stating all of the essential terms (gravel, for \$8 per ton, payment due on delivery and good for 30 days). This would constitute a valid offer[.]

Builder's rejection: A valid acceptance occurs if the offeree communicates his acceptance of the terms of the offer to the offeror, in the manner and time frame specified by the offeror[;] however, in its first communication Builder replied back to Gravelco stating that they "did not wish to order at \$8 per ton but would consider a purchase at \$7 per ton.[" Builder did not accept the terms in Gravelco's offer and in fact rejected those terms and made a counteroffer of \$7 per ton. No contract was formed because Builder did not accept the offer.

Builder's acceptance: See rule above. In its 2nd communication, Builder sent a signed letter and purchase order to Gravelco stating that they accepted their offer for 5000 tons at \$8 per ton and that payment would be made within 90 days of delivery. The issue is whether or not the offer was still open at the time of acceptance.

Merchant's firm offer rule: Under the UCC a merchant[']s firm offer is valid for up to 90 days if in writing and signed by the merchant. Here, we know that Gravelco's offer was in writing (although it's not clear if it was signed it will likely qualify because the sales director[']s name was printed and it was on company letterhead). In the offer, Gravelco expressly stated that the offer was only open for 30 days so Builder would have needed to respond within that time frame. The letter from Gravelco was sent on August 15th and Buildco responded on Sept. 7th that they accept[ed] the offer so they were within the 30 day limit.

The issue is whether or not the offer was terminated by Builder's rejection on August 17th. An offer is terminated if it is rejected by the offeree. Here Builder clearly stated that they did not "wish to place an order at \$8 per ton". That would constitute a rejection of the offer. Had they said that they were not sure if they wanted to make a purchase then Gravelco would be obligated to hold the offer open for 30 days. The offer was no longer valid at the time of [B]uilder's acceptance.

Defenses to the contract:

If for some reason it is determined that the offer was still open at the time of Builder's acceptance, Gravelco might be able to defend based on impracticability. Impracticability can come into play where some unforeseeable, intervening event makes performance extremely difficult (although technically possible) and where neither party assumed the risk. Here we know that there was a railroad strike [that] created a gravel shortage and caused an immediate rise in the market price of gravel. Generally a market increase in price will not be considered an unforeseeable event but the fact that it was a railroad strike that caused it might allow Gravelco to make that argument. However, if Gravelco should have been aware that there was the possibility of a railroad strike that would impact the cost of gravel they will not be able to establish impracticability as a defense to the contract.

Payment Terms: Again, if for some reason it is determined that the offer was still open at the time of Builder's acceptance then the issue is when Builder is obligated to pay for the gravel. Gravelco's original offer stated that payment was due upon delivery and Builder's acceptance stated that payment would be made in 90 days from delivery.

Battle of the forms: Under the UCC when both parties are merchants as is the case here and there are additional terms both parties[] terms will be included in the agreement. However, where there are conflicting terms the conflicting term (net 90 [day] payment terms) must be agreed to. However, courts can look to a course of dealings between the two companies to determine if there is implied agreement on the term. Here we know that Gravelco and Builder had done business in the past and, in fact, Builder was Gravelco's biggest customer. If[,] historically, Builder has paid in 90 days and Gravelco has never objected previously then Buildco's payment is due in 90 days.

Answer B to Question 4

4)

GRAVEL CO. (G) vs. BUILDER (B)

Is Gravel Co. obligated to Sell 5000 tons @ \$8 per ton?

A contract is a promise or set of promises the performance of which the law will treat as a duty and for the breach of which the law will remedy. The rights and remedies available to the parties depend on whether a valid contract existed. Every contract is based on Offer, Acceptance & Consideration.

UCC or Common Law?

The UCC governs contracts for the sale of goods (movable, tangible items identifiable at the time of the contract);] otherwise common law governs.

Here, G&B contracted for the sale of gravel, which is a movable and tangible good.

Therefore, the UCC, Article 2 governs.

MERCHANTS

Under the UCC, a merchant is one who regularly deals with or holds out as [being] knowledg[e]able in the goods of the contract[.]

G is a distributor of gravel and as such is knowledg[e]able in gravel. B is ordering 5000 tons of gravel, which shows B is also knowledg[e]able in gravel.

Therefore, B&G are Merchants and will be held to merchandise standards under the UCC.

Firm Offer - UCC2-205?

Under UCC2-205, a firm offer is a signed, written offer by a merchant which holds itself open for a stated time (not to exceed 90 days). A firm offer is irrevocable for the stated time. Unlike common law options, no consideration is required for a firm offer.

Here, G made a written offer to B which was held open because it said G would sell 5000 tons of gravel to B and would guarantee the price for 30 days. This was from a merchant because G is a merchant.

G will argue the offer isn't signed, and therefore can't be a UCC2-205 firm offer.

B will argue G's logo at the top of the fax, and the sales director's name at the bottom are

sufficient to meet the signature requirement.

Therefore, G made a Firm Offer under UCC2-205.

OFFER by G

An offer is a communication of present contractual intent which a reasonably objective person understands assent would form a bargain. Under the UCC, the offer must be clear and definite as to quantity and parties[;] the other terms can be replaced by UCC gap fillers.

G made a communication of contractual intent to B because G offered to sell gravel to B. A reasonable person would understand assent would form a bargain because B could accept within 30 days. The UCC requirements for clear quantity - 5000 tons and parties - B&G are met.

Therefore, G made a valid offer[;] this was an irrevocable firm offer as discussed above[.]

Rejection by B on 8/17?

A rejection is a statement by the offeree they do not accept the offer. A counteroffer is an implied rejection.

G may argue B's fax on 8/17 was a rejection because it stated "we do not wish to purchase at \$8/ton." B will argue the language in their fax was vague, and merely a statement of their "wish", not contractual intent. B can further argue a reasonable person reading the fax wouldn't understand it was a rejection because B's statement was only a "wish."

Therefore, B did not reject G's firm offer.

Acceptance by B on Sept. 7?

Under UCC2-206, an acceptance can be made by any reasonable means after a reasonable time. Quantity and Parties must be clear and definite.

B can show they accepted G's offer because they stated in the 9/7 letter "We accept your offer[.]"

Quantity & Parties are clear and definite – 5000 tons and G&B.

B can show they accepted by reasonable means – letter, in a reasonable time – within the 30 days mentioned by G.

B's acceptance did contain terms which differed from G's offer. However, under UCC2-207, a seasonable expression of acceptance with varying terms can be effective. The varying terms may be objected to by the offeror.

Therefore, B made a valid acceptance for 5000 tons of gravel at \$8/ton.

STATUTE OF FRAUDS - UCC2-201

The UCC2-201 requires contracts for the sale of goods over \$500 in value must be in writing, signed by the party against whom it is to be enforced.

Here, G sent B a fax with the terms of the contract with company logo & a sales director's name. B sent a signed letter accepting G's offer[.]

Therefore, the UCC2-201 writing requirement is met.

CONSIDERATION

B gave G a promise to pay \$8/ton in exchange for G's shipment of gravel.

Therefore, a valid exchange of legal detriment can be shown because both parties must give performance in exchange for return performance.

Therefore, a valid contract exists based on offer, acceptance and consideration.

FRUSTRATION OF PURPOSE

Frustration of purpose excuses performance when an essential purpose for the contract (known to both parties) becomes an implied condition and is frustrated by unforeseeable events beyond the parties['] control.

Here, G may argue the unexpected rise in gravel prices and the sale by G to other distributors frustrated the purpose of the contract. G will argue B&G knew the reason for the contract's existence was G's oversupply because G said to B "because of an oversupply...." in their original offer. This oversupply was frustrated when G sold the gravel elsewhere.

B can argue G's frustration was within their control because they didn't have to sell to other parties.

Therefore, because G could control its oversupply by not selling to other parties, B can show frustration or purpose doesn't apply.

IMPOSSIBILITY/COMMERCIAL IMPRACTICABILITY?

A party is excused from performance when events beyond their control make performance objectively impossible or extremely commercially impractical.

B will argue G had control over keeping the gravel and shouldn't be excused from performance because G sold the gravel elsewhere. Also, B will argue it isn't objectively

impossible for G to perform because they can still ship gravel to B, even if it is more expensive.

Therefore, G cannot assert impossibility or commercial impracticability.

Therefore, for the facts and legal reasoning discussed, G is obligated to sell 5000 tons of gravel at \$8/ton because G & B had a valid, enforceable contract.

② Can G require B [to] make full payment upon delivery?

UCC2-207 - ACCEPTANCE varying from OFFER

As previously mentioned, an Acceptance which is a reasonable expression of acceptance can contain varying terms from the offer provided the acceptance is between merchants and: ① The offer doesn't expressly limit itself to its terms ② The offeror doesn't object to the new terms ③ The acceptance isn't conditioned upon accepting the new terms and ④ The new terms don't materially affect the offer.

Here, G will argue the term B changed regarding payment after 90 days materially altered the offer because it changed when G was to be paid.

Using the Knockout Rule, the court would likely knock out the varying term and replace it with a UCC Gap Filler. Or the court can enforce G's original term regarding payment made due on delivery.

Therefore, G may be able to require immediate payment, or the court will knock out the contradicting terms and replace with a reasonable UCC Gap Filler.