1-1-1963

In Defense of Certain Provisions of the Uniform Commercial Code Relating to Formation of Sales Contracts: A Partial Reply to Professor Babb

Frederick M. Hart
University of New Mexico - Main Campus

IN DEFENSE OF CERTAIN PROVISIONS OF THE UNIFORM COMMERCIAL CODE RELATING TO FORMATION OF SALES CONTRACTS: A PARTIAL REPLY TO PROFESSOR BABB

*Frederick M. Hart**

INTRODUCTION

During the past two years, the former *Portland Law Review* and the reestablished *Maine Law Review* have carried articles by Professor Babb commenting on many provisions of the uniform Commercial Code.[1] The adverse tenor of Professor Babb's comments causes some concern lest his views serve as a source of restrictive interpretation in the event that the Code is enacted in Maine. It is unlikely that an alert and careful court, confronted with a problem requiring construction of a Code provision, would reach its decision by following the rationale of decisions overruled or made obsolete by the Code, or that it would ignore the stated purposes of the Code in seeking to ascertain the meaning of particular provisions. But the possibility exists that busy judges in courts of first instance might yield occasionally to the temptation to apply rules and principles from cases decided under an entirely different statutory scheme, to narrow the scope of Code provisions, especially where they might find support in doing so in scholarly criticism of the new legislation.

Within the compass of one law review article of reasonable length it is impossible to review all Professor Babb's observations on the Uniform Commercial Code. It seems to the writer, however, that his conclusions about certain provisions relating to the formation of sales contracts should not go unchallenged, since those provisions exemplify the approach of the Code to many problems of commercial law. In general, the Code's approach is to bring the legal duties of the parties to a lawful

* Professor of Law, Boston College Law School. B.S. 1951, LL.B. 1955, Georgetown University; LL.M. 1956, New York University.

[1] Babb, *The Proposed Uniform Commercial Code*, 7 PORTLAND U.L. REV. 16 (1961); Babb, *The Proposed Uniform Commercial Code*, 14 MAINE L. REV. 1 (1962).

commercial transaction as closely as possible into accord with the normal understanding of persons of good faith situated in similar circumstances.[2] Relevant to that understanding are the parties' own express agreement, the course of dealing between them, and the usage of the trade in which their transaction occurs.[3]

Such an approach downgrades somewhat the desirability of definite-looking rules of thumb for the solution of commercial controversies. Without the Code, the courts have often been concerned with the difficult problem of fitting a just decision under the circumstances into a rather rigidly logical system of legal rules.[4] Sensible application of the flexible provisions of the Code should lead the courts more easily to results that accord with what the parties should have reasonably expected when their transaction occurred. The Code, especially in Article 2—Sales, is drafted to achieve the basic aim of assuring, as far as possible, that persons realize the reasonable expectation of their negotiations. Certainly that basic aim is not revolutionary in a society that insists upon leaving the distribution of goods to private contractual arrangements. If freedom of contract is generally desirable in the distribution process, as our economic system assumes, then a body of sales law that is designed basically to give the parties to a selling transaction the power to spell out the rights and obligations to be annexed to their bargain can hardly be criticized on principle.

True, in the distribution process, as elsewhere in our complex society, regulatory legislation is necessary at some points. But in the absence of specific needs for a proscription of activity, freedom of contract should be the keynote of our sales law. The Code, with few exceptions, is not regulatory—following in that respect the tradition of the Uniform Sales Act. However, the Sales Act, by leaving to general contract law the rules governing formation of sales contracts, tolerated certain limitations placed by the common law upon the power of individuals to make legally enforceable arrangements. Thus, for example, absence

[2] The approach is so pervasive in the Code that citation without discussion of particular provisions out of the context of the total scheme is not especially meaningful. However, see, *e.g.*, UNIFORM COMMERCIAL CODE, 1958 Official Text (hereinafter cited as UCC) §§ 1-102(2) (purposes and policies of the Code); 1-106 (remedies to be liberally administered); 1-208 (option to accelerate to be exercised in good faith).

[3] UCC § 1-205.

[4] For example, both at common law and under the Uniform Sales Act, a buyer who resells nonconforming perishables in order to hold down losses runs a serious risk of being held to have accepted the goods. See UNIFORM SALES ACT § 48. To avoid discouraging buyers from following that generally desirable practice, the courts have sometimes resorted to a fictitious agency *ex necessitate*. Descalzi Fruit Co. v. William S. Sweet & Son, Inc., 30 R.I. 320, 75 Atl. 308 (1910).

of consideration rendered the "firm offer" unreliable, and the requirement of definiteness left many useful open-term business arrangements doubtful with respect to their enforceability.

The Code has a substantial number of provisions dealing with the formation of contracts for sale. In its treatment of the specifics of contract formation, as in its general approach to sales law, the Code is far from revolutionary. There is a definite relaxation of the tests for authenticity,[5] but this clearly follows judicial developments of the past forty years.[6] That the effect of this evolution in the case law of contract formation is likely to be a greater realization by both promisors and promisees of their expectations is especially important in commercial transactions. That the Code recognizes the movement, and perhaps even gives it a gentle push now and then, is of far greater significance than the fact that a particular section may overrule a nineteenth century case.[7]

The purpose of what follows is basically to question some of the conclusions that might be drawn from Professor Babb's discussion of the Code provisions on the formation of contracts for sale. No attempt is made to explore his ideas on other aspects of Article 2.

Formation of Contract for Sale

The principal effect of the Uniform Commercial Code in the area of contract formation,[8] namely, expansion of the legal power of persons to enter into binding consensual arrangements, is accomplished in two ways: (1) by allowing the parties to contract themselves out of the effect of most of the provisions of the Code, and (2) by permitting the parties to make agreements enforceable where prior law cast doubt upon their validity as contracts.

Contracting Away Provisions of the Code

Section 1-102(3) of the Code provides:

> 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

[5] See UCC §§ 1-206, 2-201, 8-319, 9-203.

[6] "... In respect of the tests for authentication and the remedies for breach ... the doctrinal and statutory developments favorable to plaintiffs in the period from 1920 to the present day have been more numerous than in any other forty-year period in the history of Anglo-American law." Havighurst, The Nature of Private Contract 60 (1961).

[7] For an excellent discussion of the Code's effect on the law of contract, see Note, 105 U. Pa. L. Rev. 836 (1957). See also Holahan, *Contract Formalities Under the Uniform Commercial Code*, 3 Vill. L. Rev. 1 (1957); Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 Harv. L. Rev. 561 (1950).

[8] See generally UCC art. 2, pt. 2, entitled "Form, Formation and Readjustment of Contracts."

> 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.

Article 2 contains few exceptions to this general position. Of course, the parties may not draft away the Statute of Frauds, and there are minor restrictions upon a party's right to limit or vary the remedies provided by the Code,[9] but, in general, the obligations and rights of the parties are left to their own choosing—if they do in fact elect to make a choice.[10]

The most important limitation on the parties' freedom to contract is contained in the controversial[11] "unconscionability" provision, section 2-302, which reads as follows:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

This provision is clearly restrictive. It is regulatory. It entails some policing of contract, and it is a nuisance to the "hard bargainer." The section is vague and uncertain as any provision must be that vests a considerable range of discretion in the courts. It places in the hands of judges a convenient vehicle for deciding "hard cases." Does it, however, bring a "new social concept" into the law as Professor Babb has suggested?[12] Does it invite "the Courts to disregard—by a conclusion of law—the 'assent approach' to private agreements." [13] and enable them to police contracts or clauses, "striking down in their discretion all of a contract if a given judge happens to think it 'one-sided,' or expunging part of it and enforcing the rest (which standing alone a party might well never have cared to make)?" [14]

Professor Babb says that the law never before had such a concept, except perhaps in the courts of equity.[15] Yet it is hard to believe that

---

[9] See UCC §§ 2-718, 2-719.

[10] See Bunn, *Freedom of Contract Under the Uniform Commercial Code*, 2 B.C. IND. AND COM. L. REV. 59 (1960).

[11] See Corman, *The Law of Sales Under the Uniform Commercial Code*, 17 RUTGERS L. REV. 14, 27 (1962).

[12] Babb, *The Proposed Uniform Commercial Code*, 14 MAINE L. REV. 1, 10 (1962).

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

the law courts are not sometimes shocked by the viciousness of the "assented to" provision[16] into disregarding the apparent "assent" of the parties. The Comment to the section cites many examples which can be so classified.[17] It is true that the courts in such cases have felt compelled to grasp at some technical rule to support their decisions, often at the expense of the rule's clarity, but it is reasonably certain that the judges were more concerned with the fairness of their decision than they were with whether it was demanded by legal doctrine or the apparent assent of the parties. The advocate who doubts this might ask himself how important he believes it is to convince a court that his client's cause is fair and just as well as supported by precedent.

Nor is the doctrinal law devoid of specific provisions developed for the protection of the oppressed. The concepts of fraud, duress, incapacity, reasonableness of liquidated damage clauses, implied warranties, all have the same general purpose of relieving people from their assent given while they were at a serious disadvantage, or of protecting them by imposing certain minimal obligations on the other party. Of course, each of these devices is aimed at a particular and closely defined area of oppression, and it may be argued that section 2-302 of the Code goes too far in giving discretion to the judiciary.

So to argue, however, is to read the section out of context. As a whole, Article 2 of the Code requires that the assent of the parties be given effect. It is only where the court finds *"as a matter of law"* that the agreement is unconscionable that it can rightfully invoke the section. The jury has no part in this decision; thus it will be the legally trained mind, aware of the importance of giving effect to the parties' expressed intent and of the dangers inherent in deciding cases on a rough concept of equity, that will hear evidence on the unconscionability of the agreement.[18] Also, the Comment to section 2-302 indicates limits to the judge's discretion:

---

[16] For a recent example involving the right of automobile manufacturers to disclaim their warranty obligations, see Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[17] *E.g.*, Hardy v. General Motors Acceptance Corp., 38 Ga. App. 463, 144 S.E. 327 (1928); Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), Kansas City Wholesale Grocery Co. v. Weber Packing Corp., 93 Utah 414, 73 P.2d 1272 (1937).

[18] In addition, it would seem that the proof required to support a conclusion by the court that the contract was unconscionable would be more than a mere preponderance of the evidence. Professor Pasley suggests that a fair reading of the section, is that "*if* the facts [on the question of unconscionability] are undisputed, or the evidence is such that any jury verdict that unconscionability did *not* exist would have to be set aside, *then* the court may refuse to enforce the contract or make (sic) strike or limit the effect of the unconscionable clause." N.Y. LAW REVISION COMMISSION, STUDY OF UNIFORM COMMERCIAL CODE, ARTICLE 2—SALES, 1955 N.Y. LEG. DOC. No. 65 (C), p. 400.

> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise. . . .[19]

It is clear from the Comments that the section is not intended to disturb the normal inequality of bargaining power existing between the parties, but is designed to permit the courts to do in a more straightforward manner what they have been doing all along.[20] Instead of twisting the language of the parties, or avoiding the rules of offer and acceptance or of consideration, the court may reach the same result by a direct application of section 2-302. There is no reason to doubt that the judiciary will exercise their considered judgment in applying the section only where the situation calls for it.

Additional Opportunities for Contracting.—The fact that the Code has few restrictions on the right to contract is but half of the picture. Its most important effect upon the formation of contracts will be to expand a person's power to enter into an enforceable agreement. This is accomplished, in part, by modifying the common law devices for separating contracts from unenforceable agreements: in particular, the law of offer and acceptance and the doctrine of consideration. The net effect of the modifications is to make it more permissible to contract.[21]

Offer and Acceptance

Offer and acceptance are the first essential elements of most informal contracts. The Code affects the theory of offer and acceptance in three ways: (1) open terms do not necessarily defeat the existence of a contract, (2) a communication purporting to be an acceptance may form a contract even though it varies the terms of the offer, and (3) the method or manner of acceptance is less formalized.

Open terms.—Section 2-204 provides, in part:

> 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.

---

[19] UCC § 2-302, comment 1.

[20] "Because section 2-302 is not intended to change the results that courts have been reaching in cases involving unconscionable contracts, but is intended merely to make it possible for courts to pass directly on the question of unconscionability, the operative results of the section can be predicted by looking to the cases in which the courts have actually employed the doctrine of unconscionability by adversely construing language or manipulating concepts." Hawkland, Sales and Bulk Sales 23 (1958).

[21] Professor Babb warns that the Code "renders the making of sales extremely—not to say dangerously—easy." Babb, *supra* note 12, at 2.

This provision, which should be read in connection with section 2-305, which controls the price term, is thought by Professor Babb to change significantly the prior law.[22] Note, however, that section 2-204 requires, before a contract comes into existence, that the parties intended to make a contract and that there be a reasonably certain basis for giving relief. In essence, those two requirements are the reason for the rule that an agreement must be "definite" before it is enforceable. There is no sharp reversal of prior law here; the Code merely rejects the convenient, but sometimes harsh, rule that the failure to specify a particular term is *per se* fatal to enforceability of the arangement.

Consider, for a moment, the case of *Wilhelm Lubrication Co. v. Brattrud,*[23] which Professor Babb cites[24] in connection with the price term. Here there was a written agreement whereby the defendant promised to purchase definite quantities of motor oil. Buyer had the opportunity to select which weight of oil he wanted after the agreement was signed, each weight having a different price. Three weeks after the agreement was made, the defendant repudiated, and the seller sued for damages. Recovery was denied on the ground that it was impossible to measure damages accurately because the defendant buyer had not exercised his option as to the weight of oil and seller's loss depended upon his selection.

Here there was a promise by the defendant and a breach; yet because the agreement was held indefinite and uncertain no recovery was allowed. But it was not the mere fact of indefiniteness that made the promise unenforceable; it was the fact that, to use the language of the Code, there existed no "certain basis for giving an appropriate remedy." Since this was the reason for the decision, neither section 2-204 nor section 2-305 of the Code affect the result.[25] Plaintiff's attorney would still have to convince the court that a way of giving relief existed.

Indefiniteness has another bearing on the formation of contracts. Where the issue is whether a particular communication is to be given effect as an offer, the completeness of the suggested terms is a helpful guide to the communicator's intent. If a number of important elements of the projected transaction are omitted from the alleged offer, courts have been inclined to hold that the parties were in the preliminary negotiation stage.[26] In other words, failure to work out the details

[22] Babb, *supra* note 12, at 2.

[23] 197 Minn. 626, 268 N.W. 634 (1936). Criticized: 10 So. CAL. L. REV. 504 (1937), 35 MICH. L. REV. 139 (1937), 37 COLUM. L. REV. 309 (1937).

[24] Babb, *supra* note 12, at 10.

[25] However, UCC § 2-311 might compel a different result. See text accompanying note 31 *infra.*

[26] 1 CORBIN, CONTRACTS § 29 (1950).

of the arrangement is indicative of a failure to reach any agreement. The Code makes no change in this doctrine, for it is required by section 2-204 that the parties "intended to make a contract," and the Comment to the section states that "the more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement."

Section 2-204 gains strength from a number of other sections of the Code which fill in the gaps where the parties have failed to agree. In a sense, such suppletive sections "make a contract for the parties", for the law thereby implies certain terms even though the parties did not expressly agree upon them. However, except perhaps for the price term, there has been little expansion in this direction beyond the limits of the Uniform Sales Act. Section 2-307 provides that in absence of agreement or circumstances indicating otherwise, goods are to be delivered in a single shipment.[27] Section 2-308 provides that in the absence of contrary agreement the goods are to be delivered at the seller's place of business.[28] Section 2-309 states that, unless provided in the Code or agreed upon, the time for shipment or delivery or any other action under a contract shall be a reasonable time.[29] Section 2-310 provides that, unless otherwise agreed, payment is due at the time and place the buyer is to receive the goods.[30]

Section 2-311 of the Code is worthy of note since there is no comparable provision in the Uniform Sales Act. It first permits the parties to leave details of performance to be filled in by either of the parties provided there is a contract under section 2-204. Absent agreement otherwise, specifications relating to assortment of the goods are at the buyer's option, and arrangements relating to shipment are at the seller's option. Subsection (3) is perhaps the most important in that it gives specific remedies to a party where the other party has failed or refused to elect an option under the contract. This subsection might be construed to compel a different result in such a case, for instance, as *Wilhelm Lubrication Co. v. Brattrud.*[31] In that case the refusal of the buyer to select the weight of oil he desired under the contract was held to require a judgment in his favor. It would seem that section 2-311(3) would permit the seller, upon the buyer's repudiation, to make a selection

[27] Compare UNIFORM SALES ACT § 45(1). The Code, to a greater extent than the Sales Act, recognizes that circumstances may affect the intent of the parties as well as their express words.

[28] Compare UNIFORM SALES ACT § 43(1).

[29] Compare UNIFORM SALES ACT § 43(2).

[30] Compare UNIFORM SALES ACT § 42.

[31] 197 Minn. 626, 268 N.W. 634 (1936), discussed in text accompanying note 23 *supra*. For a case reaching an opposite result from *Wilhelm*, see George Delker Co. v. Hess Spring & Axle Co., 138 Fed. 647 (6th Cir. 1905).

for him in a reasonable manner and then send the goods. Refusal of the goods by the buyer would then constitute an actionable breach.

Since price is one of the most important terms of a contract for sale, it is important to consider what effect the Code has upon its omission. Section 2-305 provides:

> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
>
> (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
>
> (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
>
> (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

Again, the keynote is the intention of the parties. If they intend to make a contact and completely omit the price term or any reference to it, a reasonable price is inferred. This provision is no departure from the Uniform Sales Act.[32] If the parties intend to make a contract and the price is to be fixed by some external standard or by some party, then the price set by the standard or third party prevails. This arrangement is again in line with the prior Act.[33]

Under the Uniform Sales Act, if the external standard failed, or if the third party did not set the price, then the contract was automatically avoided.[34] Under the Code, whether the contract will thus be avoided depends upon the intent of the parties. If they intended that it should fail in such circumstances, their intention will be carried out, but if they express no intention, a reasonable price is substituted and the contract is enforceable.

Another change made by the Code is that the parties may "agree to agree" to the price in the future. If they do in fact come to a later agreement, then the subsequently agreed upon price becomes a part of the contract. If they cannot agree at a later time, what happens will depend again upon their intent at the time the transaction was entered into.

---

[32] See UNIFORM SALES ACT § 9.

[33] *Ibid.*

[34] See UNIFORM SALES ACT § 10(1).

If they expressed an intent that the contract should fail, then the contract will be avoided, but if they expressed no intent about what should happen in such a case then the Code will imply a reasonable price.

In section 2-305 the Code recognizes that in the great majority of cases where the parties willingly assent to an arrangement for sale without setting a definite price, the price is not the predominant inducement to the bargain. That line of thought was implicit in Section 9 of the Uniform Sales Act, but that statute only partially followed through on the concept. The Code, on the other hand, implements this basic idea in all cases in which it is likely to arise. Still, if the parties desire, they can make their own subsequent agreement, or valuation by an external standard, an essential condition to liability.

Although the provisions of section 2-305 are subject to those of section 2-204 previously discussed, a reasonably certain way of giving relief will generally be present because there is usually an ascertainable market price for the goods which will operate to measure damages for a present breach. Where there is an anticipatory breach, the Code provisions on cover,[35] resale rights of the seller,[36] and specific performance [37] will often provide a satisfactory remedy.

Acceptance Varying Terms of Offer.—An attempted acceptance which varies the terms of an offer has been traditionally treated as inoperative to form a contract.[38] The logic of the rule is neat, and in practice it usually works well. However, in some contexts it undoubtedly negates the existence of a contract when the parties intended and believed that enforceable promises had been exchanged. In modern commercial practice the buyer often uses one form—an order or purchase blank; while the seller uses another—a confirmation form or acknowledgement. Each form contains a number of provisions, some essential, some of secondary importance. Not infrequently, the forms conflict in the less important details. Whether a contract should be found where there is such disagreement is the question covered by section 2-207. As before, the Code attempts to give effect to the reasonable expectations of the parties in such a situation.[39]

Under section 2-207 the offeree's response to the offer forms a con-

---

[35] UCC § 2-712.

[36] UCC § 2-706.

[37] UCC § 2-716.

[38] RESTATEMENT, CONTRACTS § 60 (1932).

[39] UCC § 2-207 was construed by the United States Court of Appeals for the First Circuit in Roto-Lith, Ltd. v. F. P. Bartlett & Co., Inc., 297 F. 2d 497 (1st Cir. 1962). Although the result reached may be correct, unfortunately the court's treatment of the Code provisions is directly opposed to the clear meaning of the statute. Corman, *The Law of Sales Under the Uniform Commercial Code,* supra note 11, at 25 n. 67; Note, 3 B.C. IND. & COM. L. REV. 573 (1962).

tract even though it varies the terms of the offer if it is "a definite and seasonable expression of acceptance." Here is an example of statutory flexibility at its best. If, but only if, the offeree definitely indicates that his answer is to be an acceptance, should it be construed as such. If, but only if, the offeree's objective manifestation evidences an intent that he wanted to enter into a contract is he to be held. The essential issue for the tribunal is no longer an automatic test bearing no real relation to the party's intent; instead the Code focuses directly on the question of intent.

If it is found that the communication was a definite expression of an intent to accept, the section provides rules for determining whether the additional or different terms become a part of the contract. Basically, they do so between merchants[40] unless the offer expressly limits acceptance to the terms of the offer, *or* the additional terms would materially alter the offer, *or* the offeror gives, or has already given, notice that he objects to additions.

Method of Accepting an Offer.—Professor Babb strikes hard at section 2-206 of the Code, relating to offer and acceptance. He states, *inter alia,* that the section abrogates "the common law principle that the offeror is 'the master of his offer.' " [41] That this is not true is indicated in the introductory words of the section: "unless otherwise unambiguously indicated by the language or circumstances." If the offeror has the power to alter the rule of the section, clearly he is still able to dictate the terms of how his offer is to be accepted. What the section does do is to impose a rule which is most likely to be in accord with the expectation of the parties where the offeror has not exercised his power to its fullest extent.

The section first states that an offer shall be construed as inviting acceptance in any manner reasonable in the circumstances. This general rule is supplemented by a specific provision in subsection (1)(b) which states, in effect, that an order, or other offer to buy goods for prompt or current shipment, may be accepted either by a return promise or by an actual shipment of goods. This is not far removed from the result indi-

[40] The special treatment afforded under the Code to a "merchant," roughly defined as "a professional in business" (see UCC § 2-104 for the exact definition), seems to be disapproved by Professor Babb. See Babb, *The Proposed Uniform Commercial Code*, 7 PORTLAND U. L. REV. 16, 18 (1961). Yet this is one of the most important steps taken in commercial legislation. It is a recognition that there is a difference between transactions involving businessmen only and those where one or more of the parties are inexperienced in the commercial community. A selling transaction between General Motors and DuPont may bear a close doctrinal relationship to the sale of a desk from one physician to another; yet, if we are interested in intent, it is unreasonable to expect that the parties in each case would be acting under the same assumptions about the legal effect of their outward manifestations.

[41] Babb, *supra* note 12, at 7.

cated by the Restatement of Contracts. Under the Restatement, contracts are classified as unilateral and bilateral.[42] If the offer is to enter into a unilateral contract then "no contract exists until part of what is requested is performed or tendered." [43] Where the offer calls for a promise it is an offer to enter into a bilateral contract and "no contract exists . . . until that promise is expressly or impliedly given." [44]

To those simple hornbook rules, however, the Restatement adds many modifications and deviations. Under section 31, in case of ambiguity the offer is to be construed as bilateral. Under section 63, an offer to enter into a bilateral contract can be accepted by performing the act which was to be promised. In effect, therefore, under the Restatement view—which is probably accepted by the large majority of jurisdictions—an ambiguous offer can be accepted either by a return promise or by performance. And an order for goods is perhaps the best example of an ambiguous offer.[45]

Thus, section 2-206(1) of the Code is largely an adoption of the Restatement view with a slight change in emphasis and with fewer intricacies.[46] An offeror, if he wants to, can require the other party to accept in a particular way, but if this is his wish he must clearly so state in his offer. Such a statement is not too much to expect or require when consideration is given to the position of the offeree. As a general rule an offeree has the right to interpret the offer in any reasonable manner. Where there is an order for goods which does not designate whether an act or promise is required for an acceptance, it is entirely reasonable to suppose that either method of accepting is permissible.

Professor Babb does not discuss in detail one highly important feature of section 2-206. Under subsection (1)(b) a shipment of non-conforming goods will operate as an acceptance unless the sender seasonably notifies the buyer that the shipment is made merely for the buyer's accommodation. At first blush such a rule seems incomprehensible since it is "at once an acceptance and a breach." Where logic has rebelled, the section has been condemned.[47] But the section does cure an ill, some-

[42] RESTATEMENT, CONTRACTS § 6 (1932).

[43] RESTATEMENT, CONTRACTS §§ 45, 52 (1932).

[44] *Ibid.*

[45] See Annot., 29 A.L.R. 1352 (1923).

[46] It is true that under the Restatement there is this difference: if the offer is clearly to enter into a unilateral contract then part performance forms a contract under § 45, whereas § 63 requires that there be full performance of the act before the contract is made. However, there is the additional possibility, often used by the courts, of saying that the starting of performance is an act that is equivalent to a return promise. So long as there is communication of the fact of commencement of performance, this is an acceptable theory.

[47] See Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 577 (1950).

times referred to as the "unilateral contract trick." Where a buyer orders goods and his order clearly specifies that the mode of acceptance is to be by shipment, if the offeree ships goods that are defective, then the buyer should have a cause of action to recover any resulting damages. However, the seller in such cases can urge that he is not liable for a breach of contract on the ground that he never accepted. Some courts have permitted the seller to escape liability on that ground, and section 2-206(1) (b) is designed to overrule those decisions.[48] Under the section, the shipment of the defective goods, otherwise than as an accommodation, would constitute an acceptance, and a contract would be formed. If the goods should be defective, the buyer would have his remedy for any resulting loss. However, the Code permits the seller to disclaim expressly that the shipment is to be construed as an acceptance.

Professor Babb also states that section 2-206 abrogates "the common law rule that acceptance of an offer to a unilateral contract by the offeree's doing the acts requested cannot be found where such acts are part only of those requested by the offer." [49] He states that "such an offer can be accepted at common law only in accordance with its terms, namely by full performance." [50] If the Code does require a finding that there is an acceptance by commencing performance, it does so only by implication. Subsection (2) provides that where the beginning of a requested performance is a reasonable mode of acceptance, the offeror who is not seasonally notified of acceptance may treat the offer as having lapsed before acceptance. The subsection does not say when, if ever, an offer can be accepted by commencing performance. Comment 3 to the section does state that nothing in the section "bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer." But again this is only a negation of an intent to change prior law.

It should be noted that if the common law rule is as stated by Professor Babb, then section 45 of the Restatement of Contracts is contrary to the common law. So are the many cases, decided both before[51] and after[52] the Restatement was published, which hold that the substantial com-

---

[48] See HAWKLAND, SALES AND BULK SALES 6 (1958).

[49] Babb, *supra* note 12, at 7.

[50] *Ibid.*

[51] *E.g.*, Brackenbury v. Hodgkin, 116 Me. 399, 102 Atl. 106 (1917). Professor Babb cites Petterson v. Pattberg, 248 N.Y. 86, 161 N.E. 428 (1928) as an example of the common law which this section rejects. But the *Petterson* case has been overruled by statute in its own state and its demise preceded the Code. N.Y. PERS. PROP. LAW § 33-b. Also, the *Petterson* case is subject to a much narrower interpretation than Professor Babb gives it. See SIMPSON AND DUSENBERG, THE NEW YORK LAW OF CONTRACTS § 229 (1963).

[52] See WILLISTON, CONTRACTS § 60A (3d ed. 1957).

mencement of performance has the effect, at least, of preventing a revocation. The Code goes no further than this; in fact, it simply incorporates the "common law" of the individual jurisdiction.

CONCLUSION

In the writer's judgment, the Uniform Commercial Code does not change radically the preexisting law relating to formation of contracts for the sale of goods. In general, the Code adopts and carries forward the tendency of recent decisional law to enlarge the domain of commercial arrangements that parties may make legally effective by their own manifested consent. In particular, the provisions governing offer and acceptance in the law of sales are designed to remove certain conceptual barriers from the enforceability of private arrangements in types of situations where experience has shown that the normal purpose of parties acting in good faith is to bind themselves legally. Even so, techniques for avoiding legal obligation in such situations are available under the Code.

The Code will be evaluated more wisely and used more effectively in practice by the lawyer who approaches its individual provisions thoughtfully, seeking to understand the problems they are designed to solve and their relationship to the purposes of the Code as a whole. When the Code first came up for consideration in the State of New York over ten years ago, one writer used the following language to suggest the philosophy with which it should be approached:

> This statute is complex. One easily gets bogged down in its many details. It is proposed as *uniform* legislation, however, and the value of uniformity in commercial law must not be lost sight of. This is not to say that the Code should not be scrutinized in its details. It should be. But it is to emphasize that the scrutinizer must come up for air frequently, and refresh his recollection of the Code's main purposes and test his thinking about details against the main approach and objectives of the Code and the great benefits of national uniformity in this field. . . . [O]ur approach to it should be somewhat similar in spirit to the approach to a federal constitution. I would not want to press the analogy too far. But it should be a large-minded approach.[53]

[53] Godfrey, *Preview of the Uniform Commercial Code*, 16 ALBANY L. REV. 22, 37 (1952).