Welcome to this podcast on UCC § 2-206, Offer and Acceptance in Formation of Contract, brought to you by CALI. I am Professor Scott J. Burnham.

The topic of this podcast is how an offeree can accept an offer for the sale of goods under UCC § 2-206. Since we are looking at a rule found in Article 2 of the Uniform Commercial Code, we are dealing solely with a transaction in goods, usually for the sale of goods. *See* UCC § 2-102. The manner of acceptance under an offer for services or land is not covered by this rule.

Subsection (1) starts off by telling us that the rules that follow apply “unless otherwise unambiguously indicated by the language or circumstances.” This language tells us that this is a default rule that the parties are free to change, as long as they do so unambiguously; that is, the offeror must be “quite clear” if the intention is to limit the method or manner of acceptance. *See* § 1-302, Variation by Agreement, which states that many of the Code rules are default rules. We will later look at an example of an offeror exercising that freedom to vary the rule.

The first rule, in subsection (1)(a), discusses an offer to make a contract. When a word is defined in the Code, you want to check the Code definition. However, the word *offer* is not defined in the Code. When the Code does not define words, though, we read in the common law definition. This rule is found in § 1-103(b), which tells us that unless displaced by a Code rule, we read into the Code the general principles of law and equity. Therefore, because the word *offer* is not defined in the Code, we would read in the common law definition.

The rule of subsection (1)(a) tells us that an offer “shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.” The *manner* of acceptance means that it can be accepted by either a return promise, a performance, or either a promise or a performance – whatever is reasonable. See the CALI podcast on The Manner of Acceptance for more information on this topic.

The *medium* of acceptance means a medium such as telephone, email, regular mail, etc. There were some common law cases that held that the acceptance had to be in the same medium as the offer. This rule makes clear that any medium can be used, as long as it is reasonable. In general, a medium of acceptance is reasonable if it is the same or better than the medium used for the offer. But remember – this is a default rule that the parties are free to change. A party is free in an offer made by email to state: “This offer can be accepted only by a certified letter sent through the U.S. Mail.” The offeror has now changed the default rule so that an acceptance is effective only if made by a certified letter.

Subsection (1)(b) is more complicated, so we are going to take it one step at a time. It starts by telling us that “an order or other offer to buy [goods](https://www.law.cornell.edu/ucc/2/2-105#Goods_2-105) for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by [the] prompt or current shipment.” This rule changes the rule we just learned in subsection (1)(a) regarding the manner of acceptance. The rule kicks in when the offer invites the shipment of goods. That sounds like the manner of acceptance would be performance – the shipment of the goods. But the rule tells us that the offer can be accepted either by promise to ship or by the performance of shipping. So if a buyer sends an email to a seller that states, “Please ship me 100 cases of Beck’s beer,” the seller can accept either by the performance of actually shipping the beer or by promising to ship it, such as by sending an email that states, “We accept your offer. The beer will be shipped tomorrow.”

This might be a good time to look at subsection (2). As a practical matter, one of the problems with acceptance by performance is that the offeror does not know if the offeree is accepting or not. In our hypothetical, the buyer would like to know whether it is going to get the beer. So subsection (2) tells us that if the offeree does not give the offeror reasonable notice, then the offeror can treat the offer as having lapsed and can look elsewhere for the goods. When you study Article 2 in greater depth, you will learn that when the parties enter into a shipment contract, one of the requirements is that the seller inform the buyer that the goods have been shipped. *See* § 2-504. Note that in many common law cases involving acceptance by performance notice is not necessarily required. That is because many of those cases involve contests or rewards where the offeror would not reasonably expect notice. But in a commercial case, a buyer of goods usually needs to know that the goods are coming. So here the Code rule differs from the common law rule.

Let’s now return to subsection (1)(b). Picking up where we left off, it tells us that the offer may be accepted by the shipment “of conforming or non-conforming goods.” When the Code refers to conforming goods, it means goods that are in accordance with the terms of the contract. *See* § 2-106. This rule is interesting because it changes the common law rule. To see why the rule was changed, let’s return to our hypothetical. The offeror invites the shipment of 100 cases of Beck’s beer and the offeree ships 100 cases of Coors beer. Is the offeree in breach? At common law the answer is no. Under the common law, the acceptance must be the mirror image of the offer and if it is not, then it is a counter-offer rather than an acceptance. So at common law, when the offeree shipped Coors, it was not accepting the offer to ship Beck’s. If an offer is not accepted, there is no contract. And if there is no contract there is no breach of contract. The offeree got away with what is called “the unilateral contract trick.”

But the Code changes that rule, because it tells us that the offer can be accepted by the shipment of *either* conforming or non-conforming goods. In our hypothetical, it can be accepted by the shipment of either Beck’s or Coors. So when it shipped Coors, the offeree has accepted an offer to ship Beck’s, thus forming a contract for the sale of Becks, and at the same time the offeree has breached that contract by shipping Coors. Pretty clever, eh?

But wait – there’s more. You can count on the Code to be practical. What if the offeree was not trying to pull a fast one but was out of Beck’s and thought the buyer would rather have Coors than no beer at all? The last part of the subsection tells us that “such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.” So if the seller ships the Coors along with a notice that it was just trying to accommodate the buyer, then the shipment of Coors is not an acceptance. What is it? As with the common law, it is a counter-offer, and the buyer is free to accept it or not.

In summary, remember that we apply § 2-206 only to a transaction in goods. When we apply Article 2 of the Code, we often apply rules and definitions from Article 1. And be aware that the Code may change the common law rules. Section 2-206 does just that by permitting acceptance to be made in any manner and medium reasonable under the circumstances, but it specifically states that 1) an offer that invites the seller to ship the goods can also be accepted by a promise to ship them, and 2) if the offeree does accept by shipment, it is an acceptance even where the seller ships non-conforming goods.

I hope you’ve enjoyed this podcast on UCC § 2-206, Offer and Acceptance in Formation of Contract.

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