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Failure to Include All Material Terms under the Uniform Commercial Code - The Open Terms Contract

Franklin D. Bayless

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FAILURE TO INCLUDE ALL MATERIAL TERMS
UNDER THE UNIFORM COMMERCIAL CODE
"THE OPEN TERMS CONTRACT"

Parties when contracting occasionally intentionally or inadvertently fail to provide for terms such as price, time of delivery, place of delivery, delivery in a single or several lots, time, place and manner of payment, and warranties. The purpose of this article shall be to examine the legal consequences under the *Uniform Commercial Code* as compared to prior law of this inadvertent or intentional failure to include or agree in a reasonably definite manner on all essential terms.

When terms are left open, it is necessary in order to determine whether or not there is a binding and enforceable contract to differentiate between preliminary negotiations and final agreement. This article shall include a discussion of the preliminary negotiations problem in open terms contracts and the preliminary negotiations problem involved where parties reach agreement on material terms of a contract but contemplate the execution of a more formal agreement before being bound by the contract.

Parties when contracting may leave essential terms for some method or manner of future agreement. This article will include a comparison of Code Law and prior law of three methods of leaving essential terms for future agreement which methods are as follows: 1. Leaving the term to be set by future negotiation and agreement of the contracting parties which is the so called "agreement to agree", or "contract to make a contract." 2. Giving one of the contracting parties the right to determine and fix the term which has been left open. and 3. Providing for an external standard such as going or market price as set or recorded by a third party or agency to fix the material term left open.

LAW PRIOR TO THE UNIFORM COMMERCIAL CODE

Prior to the *Uniform Commercial Code*, the legal consequences of leaving material terms open or for some method or manner of future agreement was controlled by the *Uniform Sales Act* where applicable or by the common law. The two principal defenses to the enforcement of open terms agreements under prior law were that the parties were still negotiating the contract and did not intend to be bound until all essential terms were fixed and that even if the parties did intend to be bound, though terms were left open, the contract should fail for being too incomplete and indefinite to be enforceable.

PRELIMINARY NEGOTIATIONS

Under prior case law communications that included mutual expressions of agreement could fail to consummate a contract because some essential term was not included. As long as the parties knew there was an essential term to be agreed upon, there was no contract for the parties were still negotiating.

Preliminary agreement on specific items was mere "preliminary negotiation"¹ building up to the terms of the final offer. Even though one of the parties believed that the negotiations had been concluded, all items agreed upon, and the contract closed, there was still no contract unless he was reasonable in his belief and the other party ought to have known that he would so believe. The contract was not enforceable until agreement was reached on all essential terms, the preliminary and partial agreements being expressly or impliedly incorporated into the final offer and acceptance.²

Professor Corbin uses the following classification to illustrate the preliminary negotiations problem.

(1) At one extreme, the parties may say specifically that they intend not to be bound until the formal writing is executed. (2) Next, there are cases in which they clearly point out one or more specific matters on which they must yet agree before negotiations are concluded. (3) There are many cases in which the parties express definite agreement on all necessary terms, and say nothing as to other relevant matters that are not essential but that other people often include in similar contracts. (4) At the opposite extreme are cases like those of the third class, with the addition that the parties expressly state that they intend their present expressions to be a binding agreement or contract; such an express statement should be conclusive on the question of their intention.

If the facts of the case fall within the third or fourth class in the Corbin view, a binding contract has been made even though either of the parties may be aware that the formal contract when prepared will contain other provisions to be agreed upon³.

Where the parties had already rendered some substantial performance or had taken some material action in reliance upon existing expressions of agreement, though terms remained open, the courts were more ready to find an incomplete agreement complete and require the payment of a reasonable price or performance on reasonable terms. The fact that the parties had acted was evidence of the completeness of the agreement⁴.

FORMAL CONTRACT CONTEMPLATED

A further illustration of the preliminary negotiation problem is where the parties or one of the parties does not intend to be bound until a formal document is executed. If the expressions of the parties convinces the court that they intended to be bound without a formal document, their contract is consummated, and the expected formal document is regarded as a mere me-

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1. 1 Corbin, Contracts sec. 29; 1 Corbin, Contracts sec. 22, "Preliminary negotiations are those communications and other events in a bargaining transaction that are antecedent to acceptance, that is, antecedent to the completion of the contract."
 2. 1 Corbin, Contracts sec. 29.
 3. 1 Corbin, Contracts sec. 30.
 4. 1 Corbin, Contracts sec. 29.

morial of that contract, but, if the court is convinced that the parties intended not to be bound until the formal document is executed, there is no contract until the execution of the formal contract. Usage and custom, the complexity and importance of the transaction, the mere fact that the parties did contemplate the execution of a formal document, and the subsequent conduct and interpretation of the parties themselves are relevant in determining whether the parties are in fact bound before execution of the formal document even though the parties contemplated the execution of a formal contract. Where the negotiating parties have inconsistent intentions as to whether the consummation of a contract shall await the execution of a formal document no contract exists until the document is executed unless the party intending this result knew or had reason to know that the other party intended and understood that their mutual expressions should be operative before execution of the document⁵.

THE INDEFINITENESS RULE

The second defense to enforcement of the open terms contracts under prior law was that the agreement was too incomplete and indefinite to be enforceable. Courts would often say that they do not make contracts for the parties, very often in cases in which they wash their hands of the difficult problem thrust upon them by reason of incompleteness or indefiniteness in the expression of terms in a written instrument by which the parties clearly intended to be bound. In similar situations other courts would say they were not making a contract for the parties but merely determining the legal effect of the contract that the parties made and would thereupon supply the missing term because the parties clearly intended to be bound⁶

TIME FOR PERFORMANCE LEFT OPEN

Parties often made contracts without specifying a time for performance. When a dispute arose it was necessary for the court to decide whether the time for performance was left to the discretion of the one promising it and therefore lacked mutuality. The result generally reached was that time for performance was not discretionary with the one promising it. Contracts were usually not held too indefinite for enforcement because they fixed no time for an agreed performance. If the performance was something that was simple and could be rendered at any one or more of many moments in time, the court would infer that the parties had agreed upon performance within a reasonable time⁷.

TIME FOR DELIVERY AND PAYMENT LEFT OPEN

Where an agreement for the sale of goods was made without expressing in words any time for delivery or payment the courts would seldom say that the agreement was too indefinite for enforcement. Usage and custom would generally furnish a basis for determining whether the transaction was to be a

5. 1 Corbin, Contracts sec. 30.

6. 1 Corbin, Contracts sec. 95.

7. 1 Corbin, Contracts sec. 96.

cash sale or a credit sale, including the length of the credit period. In the absence of agreement or course of dealing to the contrary the price was to be payable on delivery. The courts would usually find that delivery is promised within a reasonable time⁸.

THE PRICE TERM; OPEN OR INDEFINITE

While negotiating an agreement, a term frequently left indefinite and to be settled by future agreement is price. If the parties provided a practicable objective method for determining the price—usually on the basis of some external standard such as market price, not leaving it the future will of the parties themselves—under prior case law there was no such indefiniteness or uncertainty which would prevent the contract from being enforceable. This was also true where the parties agreed upon the payment of a reasonable price. Where the parties did not agree upon a reasonable price or prescribe a practicable method for its determination the agreement was to indefinite and uncertain for enforcement⁹.

The agreement was sufficiently definite if it provided that the price should be the amount that arbitrators or a specified third person should fix as a fair price. If the third person without fault of the seller or buyer, could not or did not fix the price or terms, the contract was void; but if the third person was prevented from fixing the price by fault of the seller or buyer he could have such remedies as were specified by the *Sales Act*¹⁰.

An agreement that provided that the price to be paid or other performance rendered would be left to the will and discretion of one of the parties was held not enforceable. Such agreements were held unenforceable because the party having the discretion made no real promise to pay or perform thus creating an illusory promise which was not sufficient consideration for a return promise. The fact that one of the parties reserved the power of fixing or varying the price or other performance was not fatal if the exercise of the power was subject to prescribed or implied limitations as that the variation must be in proportion to some objectively determined base or must be reasonable¹¹.

After goods had actually been delivered and accepted, the buyer was bound to make reasonable compensation therefor, whether the agreement under which the benefit was received was too indefinite or not¹².

AGREEMENT TO AGREE

Prior to the *Code*, it was possible for the parties to make an enforceable contract binding them to prepare and execute a subsequent documentary agreement, however, it was necessary that agreement be expressed on all essential

8. *Ibid.*

9. 1 Corbin, Contracts sec. 97, 98; Uniform Sales Act sec. 9.

10. Uniform Sales Act sec. 10; 1 Corbin, Contracts sec. 97.

11. 1 Corbin, Contracts sec. 98.

12. 1 Corbin, Contracts sec. 99.

terms that were to be incorporated in the document. If the contract which the parties agreed to make was to contain any material term not already agreed upon, no contract was made and the "contract to make a contract" or "agreement to agree" was unenforceable because it was too indefinite. However, the fact the parties did not give verbal expression to such vitally important matters as price, place and time of delivery, time of payment, and amount of goods did not of itself render the contract incomplete and indefinite for the parties may have actually agreed on them. This agreement could be shown by their antecedent expressions, their past actions and custom, and other circumstances. Even though certain matters were expressly left to be agreed on in the future, they may not have been regarded by the parties as essential to their agreement or the terms could be left for future agreement within definite and prescribed limits and in such cases the agreements were binding. In addition, substantial performance or a material action in reliance on the agreement to agree, would spur the courts to find an apparently incomplete agreement complete, thus rejecting the defeat of the contract on the grounds of indefiniteness of contract or because the parties were still negotiating¹³.

WHY THE UNIFORM COMMERCIAL CODE WAS NECESSARY

The foregoing was the state of the law under the *Sales Act* and common law prior to the *Code*. The law as it stood required that too many problems be solved by abstract considerations such as the indefiniteness rule rather than resolving cases to promote just results. The traditional legal concepts as they stood prior to the *Code* simply did not comply with commercial practices of leaving terms open nor did it comply with commercial needs. The enforceability of open terms contracts was often left to the good faith of the parties and the dishonest party to the open terms contract or the party who had made a bad deal although fully intending to be bound by the contract at the time of its making was often allowed to escape the enforcement of the open terms contract. The objective of the *Code* is therefore to remove technicalities that inhibit the flexibility beneficial to trade and to promote just and practicable results when disputes arise in open terms contracts¹⁴.

PROVING THE CONTRACT UNDER THE UNIFORM COMMERCIAL CODE

Under the *Code* just as under prior law, it is necessary first to determine what the agreement of the parties is and whether or not there are open terms before determining the enforceability of such contracts. Therefore, it is necessary to show how and from what the agreement of the parties is to be determined and proven before making the determination that terms have been left open.

13. 1 Corbin, Contracts sec. 29.

14. Derhart and Brennan, The Pennsylvania Uniform Commercial Code, 12A P.S. § 101 to 3-806, p. XL.

UNIFORM COMMERCIAL CODE CONTRACT FORMATION

Under the *Code* "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognized the existence of such a contract." This is true although the writings of the parties do not otherwise establish a contract¹⁵. This continues the basic policy of recognizing any manner of agreement oral, written or otherwise. However, the statute of frauds section generally requires that there be a writing before a contract is enforceable for it provides that a contract for sale of goods for the price of \$500 or more is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties unless the contract qualifies under the specially manufactured goods exception or the party against whom enforcement is sought admits the contract or payment for or delivery of the goods has been received and accepted. This required writing need only be signed by the party against whom enforcement is sought and *contain only the quantity term*. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted. If the contract is under \$500 it may of course be oral¹⁶.

DETERMINING THE MEANING OF THE CONTRACT AS WRITTEN

Before determining whether the writing may be supplemented by additional terms not contained therein it is necessary to determine what the meaning of the terms contained in the writing is. The terms which are actually contained in writing "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained and supplemented by course of dealing and by usage of trade and by course of performance¹⁷." The meaning of the agreement of the parties is to be determined by the language used by them and by their action, read, and interpreted in the light of commercial practices and other surrounding circumstance¹⁸. Course of performance is especially important and revelant in determining the meaning of the agreement for the parties themselves know best what they have meant by their words of agreement and their actions under the agreement is the best indication of what that meaning was¹⁹. The express terms of the agreement are of course the primary means of proving what the agreement is and therefore control course of

15. Wyo. Stat. sec. sec. 34-2-204(1), -2-207(3) (Supp. 1963), Uniform Commercial Code sec. sec. 2-204(1), 2-207(3).
16. Wyo. Stat. sec. 34-2-201 (Supp. 1963), Between merchants an unobjected to letter of confirmation may satisfy the requirements of a signed writing; Uniform Commercial Code sec. 2-201 comment.
17. Wyo. Stat. sec. 34-2-202 (Supp. 1963), Uniform Commercial Code sec. 2-202.
18. Wyo. Stat. sec. 34-1-205 (Supp. 1963), Uniform Commercial Code sec. 1-205 comment.
19. Wyo. Stat. 34-2-208(1) (Supp. 1963), Uniform Commercial Code 2-208(1), "Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and the opportunity for objection to at by the other, any course of performance accepted as acquiesced in without objection shall be relevant to determine the meaning of the agreement."

performance, course of dealing and usage of trade when inconsistencies develop²⁰.

SUPPLYING OPEN TERMS BY PAROL EVIDENCE

The problem just discussed of determining what and from where the meaning of the writing is determined is only part of the problem of proving the contract. A further problem exists where terms are left out of the writing. The new accent by repetition on conduct, trade usages and custom delineates a broad frame of reference in addition to any required writing in which the open terms agreement can be found and proven²¹. The parol evidence section states that "the writing may be explained or supplemented by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement"²². Thus, terms expressly agreed on or implied by course of dealing, or usage of trade and course of performance which have not been included in the writing may be shown under proper circumstances.

Assuming that the agreement has been proven by the writing and by other additional terms not inconsistent therewith, but essential terms are still not agreed on or any of the other problems incorporated in this article exist, is the contract enforceable under the *Code*?

THE OPEN TERMS SECTION; A REJECTION OF THE INDEFINITENESS RULE

The open terms provision states that "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 remedy²³." This recognizes as valid open terms contracts and states the principal of law underlying other sections of Article II of the *Code* which provide a means for contracting parties and courts to determine how the terms left open shall be ascertained²⁴.

The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement and the more likely it is they are still

20. Wyo. Stat. sec. 34-2-208 (Supp. 1963), Uniform Commercial Code sec. 2-208, Course of performance controls course of dealing and usage of trade.

21. See Wyo. Stat. sec. 34-2-208, -2-207(3), -1-205, -2-204, -1-201(3), -1-201(11), -1-103; (Supp. 1963), Uniform Commercial Code sec. sec. 2-208, 2-207(3), 1-205, 2-204, 1-201(3), 1-201(11), 1-103; 1-201(3) "agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance"; 1-201(11) "Contract means the total legal obligation which results from the parties agreement as affected by this act and any other applicable rules of law"; 1-103 Whether an agreement has legal consequences is determined by this act if applicable; otherwise by the law of contracts which are applicable if not displaced.

22. Wyo. Stat. sec. 34-2-202 (Supp. 1963), Uniform Commercial Code sec. 2-202.

23. Wyo. Stat. sec. 34-2-204(3) (Supp. 1963), Uniform Commercial Code sec. 2-204(3).

24. Uniform Commercial Code sec. 2-204 comment.

involved in preliminary negotiations²⁵. However, it should again be noted in connection with the preliminary negotiations and indefiniteness problem, that course of dealing, usage of trade, and most important course of performance may be frequently conclusive on the open terms despite their omission in the express contract. The tests of enforceability of the open terms contract is not certainty as to what the parties were to do nor the exact amount of damages nor is the fact that one or more terms are left to be agreed upon enough to defeat an otherwise adequate agreement, for commercial standards on the point of indefiniteness are intended to be applied²⁶.

TESTS FOR DETERMINING ENFORCEABILITY OF OPEN TERMS CONTRACTS

There are two tests enumerated in the Open Terms provision by which the enforceability of such contracts is to be determined. They are: (1) Have the parties intended to make a contract? and, (2) Is there a reasonably certain basis for giving an appropriate remedy²⁷?

THE INTENT TO CONTRACT TEST

Embraced within the first test of intent to make a contract is the problem of proving facts that indicate the requisite intent to contract rather than preliminary negotiations which is in effect proving the parties intended to make a binding obligation at some point in time even if that point in time is not known and even if terms have been intentionally or inadvertently deleted²⁸. The price section, which is applicable when the price term is left open on the making of an agreement which is nevertheless intended by the parties to be a binding agreement, amplifies the validity of open terms contract and adds emphasis to the preliminary negotiations problem by its dual reference to intent. The price section states "the parties if they so intend can conclude a contract for sale even though the price is not settled . . . 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 contract²⁹."

THE INTENT TO BE BOUND TEST WHERE TERMS ARE LEFT FOR FUTURE AGREEMENT OR A FORMAL CONTRACT CONTEMPLATED

The first test of intent of the parties to be bound has been discussed thus far primarily in reference to the preliminary negotiations problem in cases where the parties may still be negotiating the term or a method or manner for arriving at the term in the future. Where the contracting parties leave terms open to be later agreed upon by some method or manner of future agreement or where the parties contemplate the execution of a formal contract, agreement

25. *Ibid.*

26. *Ibid.*

27. *Ibid.*

28. Wyo. Stat. sec. 34-2-204(2) (Supp. 1963), Uniform Commercial Code sec. 2-204(2).

29. Wyo. Stat. sec. 34-2-305(1)(4) (Supp. 1963), Uniform Commercial Code sec. 2-305(1)(4).

by the method intended or execution of a formal contract may or may not be a condition precedent to an enforceable contract.

This article will diverge for a moment from the discussion of intent to be bound to show how methods for leaving terms for future agreement are provided for by the *Code* and then will show the significance of conditions precedent in relation to methods of future agreement.

The price section specifically allows the parties to leave the price for their future agreement, or to be fixed in terms of some agreed market standard as set or recorded by some third person or agency, or to be fixed by the buyer or seller³⁰. Other terms such as delivery in a single lot or several lots, place of delivery, time for shipment or delivery, time for payment or running of credit, and specifications relating to assortment may be left to be determined by these methods of future agreement by virtue of the "unless otherwise agreed" clauses of the sections relating to these terms.

To return to the discussion of how conditions precedent relate to the foregoing methods of future agreement, it is necessary to restate the second reference to intent to be bound within the price section. It is: "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 contract³¹." This means that where the parties leave the price to be fixed or agreed by any of the methods for future agreement and do not intend to be bound until the price is fixed in the manner provided, then agreement in the manner provided is a condition precedent and the contract is unenforceable until the price is so fixed. Intent to be bound in such cases will be a very critical issue where, in the absence of express language, there are differences of opinion between the contracting parties on whether they intended to be bound at the time of execution of the contract or not until the price is fixed in the manner agreed. Parol evidence problem would also be present in such a situation. The principles just discussed may be implied to be applicable to other material terms under the *Code*. This is true because questions of fact on the intent of the parties to create or not to create conditions precedent to the enforceability of the contract are involved.

The time at which the parties intend to be bound is critical in those cases where the parties intend the execution of a formal contract. It will often be necessary to determine whether the execution of a formal contract is a condition precedent to an enforceable contract. The laws relating to this problem which were in effect prior to *Code* remain applicable since they have not been displaced by the *Code*³².

30. *Ibid.*

31. *Ibid.*

32. Wyo. Stat. sec. 34-1-103 (Supp. 1963), Uniform Commercial Code sec 1-103.

SUMMARY OF THE INTENT TO BE BOUND TEST

Where the parties do not intend to be bound unless all material terms are negotiated and agreed upon, then no contract has been concluded, the agreement being merely preliminary negotiation. If the parties do intend to be bound even though the term is intentionally or inadvertently left open the contract is enforceable and the *Code* will provide a method for fixing the term. Where the parties have agreed specifically to leave the term or terms either for their future agreement, or to be set by one of the parties or a third party or agency, or to be set in accordance with some agreed market standard but do not intend to be bound unless and until the terms are so set or agreed, then such setting or agreement on the term is a condition precedent to an enforceable contract. Where the parties intend to be bound at the time of the making of the contract rather than at the time the terms are set or agreed in the method or manner of future agreement provided for, then the contract is binding even though the term is not so set or agreed and the *Code* will supply the term. From the foregoing discussion it can be seen that proving the intent to be bound is necessary in order to determine whether the parties have made a binding obligation or are negotiating and to determine whether the fixing of a term left for future agreement in the manner provided is a condition precedent to an enforceable contract.

THE REASONABLE CERTAIN REMEDY TEST

The second test of whether or not there is a reasonable certain remedy is a question of law and is important where the price term is left open or for some method of future determination.

Reasonable certain remedy does not mean there must be certainty as to the exact amount of damages³³. The remedies provided for by the *Code* are "too be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed³⁴," thus damages need not be calculated with mathematical certainty since compensating damages are often at best approximate and have to be proved with whatever definiteness and accuracy the facts permit but no more³⁵.

The *Code* provides remedies for the seller such as resale and recovery of damages, recovery of damages for non-acceptance, or in a proper case the price. The buyer, when the seller is in breach, may cover and collect damages, recover damages for non-delivery or in a proper case may obtain specific performance or replevy the goods³⁶. The buyer's and seller's remedies are equally extensive. This article does not comport to cover all the buyer's or seller's remedies or cover them in detail. It should suffice to say that where any of the remedies require a determination of the contract price on which to base dam-

33. Uniform Commercial Code sec. 1-204 comment.

34. Wyo. Stat. sec. 34-1-106 (Supp. 1963), Uniform Commercial Code sec. 1-106.

35. Uniform Commercial Code sec. 1-106 comment.

36. See Wyo. Stat. sec. sec. 34-2-701 to 721 (Supp. 1963), Uniform Commercial Code sec. sec. 2-701 to 721 for the sellers and buyers remedies.

ages, the price section will supply a reasonable price at the time for delivery as the contract price when the price is not settled³⁷.

Not only do the buyer and seller have new remedies available, but also the rules of evidence applicable in proving the open price have been liberalized. For example, "if the evidence of price described in Article II are not readily available, the price prevailing within any reasonable time before or after the time described or at any other place which in the commercial judgement or under usage of trade would serve as a reasonable substitute for the one described may be used³⁸." However, the aforesaid liberalized method for determining price does not rule out any other reasonable method for determining market price or of measuring damages if the circumstances of the case make other methods for determining price or damages necessary³⁹. It should also be noted that market quotations are made admissible in evidence when the price or value of goods traded in any established market is in issue⁴⁰.

Since the *Code* recognizes remedies such as cover, resale and specific performance which go beyond any mere arithmetic formula, there is usually a reasonably certain basis for granting an appropriate remedy so that the contract need not fail for indefiniteness where terms, especially price, have been left open⁴¹.

COURT INTERPRETATIONS OF THE OPEN TERMS PROVISION

Since the *Code* only recently became law in many states there are very few cases interpreting the open terms provision. In one case for specific performance on a contract for the sale of corporate stock, the court applied the open terms provision. In that case, after previous negotiations, the plaintiff corporation had written to the defendant that subject to approval of its board of directors it desired to purchase certain stock at a specified price and asked the defendant to endorse acceptance on the letter. The letter contemplated a later formal contract containing additional terms. The defendant accepted the offer, the plaintiff's board of directors approved the purchase but the formal contract wasn't completed. The court in denying the defendant's motion for summary judgement held there was sufficient evidence to go to the jury on the question of whether the parties intended to be bound even though the formal agreement was not executed. The court stated that the contemplated execution of a formal agreement did not ipso facto negate an intent to be bound and further, the omission of even an important item does not prevent the finding that the parties intended to make a contract. In addition, the court said that the plaintiff was not bound to the letter evidencing the contract in determining a reasonable certain remedy, and that a contract could be too indefinite for

37. Wyo. Stat. sec. 34-2-305(1) (Supp. 1963), Uniform Commercial Code sec. 2-305(1).

38. Wyo. Stat. sec. 34-2-723 (Supp. 1963), Uniform Commercial Code sec. 2-723.

39. Uniform Commercial Code sec. 2-723 comment.

40. Wyo. Stat. sec. 34-2-724 (Supp. 1963), Uniform Commercial Code sec. 2-724.

41. Uniform Commercial Code sec. 2-305 comment.

specific performance but sufficiently definite for awarding damages⁴². In another case involving the open terms provision the plaintiff sought recovery of a deposit made as a tentative purchase of a restaurant business. The court concluded, after deciding that the statute of frauds requirements were not satisfied, that the notation on the check issued for the deposit stating "tentative deposit on a tentative purchase," was not indicative of an intent to be bound. The dicta of the case seemed to indicate that the open terms provision was applicable only to a formal as distinguished from an informal agreement. It was indicated there could be no agreement to agree where the contract was based on an informal writing⁴³. There is no support for this proposition either within the statute of frauds or open terms section. The open terms section which makes agreement to agree possible should be applicable to both formal and informal contracts including those contracts for goods valued under \$500 which do not need to be in writing.

PARTICULARS OF PERFORMANCE LEFT OPEN

It has been shown that the parties may leave terms open when contracting and that such contracts are enforceable, but the contract is also enforceable even though the parties leave particulars of performance open or to be specified by one of the parties. The *Code* states that an agreement for sale which is otherwise sufficiently definite is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties thus eliminating the prospect of invalidating the contract for indefiniteness. The party to whom the agreement gives the power to specify the missing details (such agreement may be found by implication from the contract, or in course of dealing or usage of trade) must exercise good faith in accordance with reasonable commercial standards. Unless otherwise agreed, options as to assortment of goods are specifically reserved to the buyer by the *Code* and shipping arrangements are specifically reserved to the seller⁴⁴.

OPEN TERMS; THE CODE PROVISIONS FOR THEIR DETERMINATION

Since the *Code* recognizes that terms may be left open where the parties nevertheless intend to be bound, it has provided methods for determining what the open terms shall be in such cases. This article will now examine these methods and provision for arriving at the open terms.

THE PRICE SECTION; CASE LAW APPLYING THE SECTION

The price section, as previously stated, applies where the price terms is left open on the making of an agreement which is nevertheless intended by the parties to be binding. This section has been partially discussed with reference to the open terms tests of intent to be bound and reasonable adequate

42. *Pennsylvania Company v. Wilmington Trust Company*, 166 A.2d 726 (Del. 1960).

43. *Arcuri v. Weiss*, 198 Pa. Super. 506, 608, 184 A.2d2t A.2d 24 (1962).

44. Wyo. Stat. sec. 34-2-311 (Supp. 1963); Uniform Commercial Code sec. 2-311 comment.

remedy because of the close relationship of the sections. The section will now be discussed primarily in reference to the method for determining price when it is left open. The indefiniteness rule is specifically rejected by subsection (1) of the price section which provides that the price is a reasonable price at the time for delivery if the price is not mentioned, if the parties leave the price for their future agreement but fail to agree or if the price is to be set by a third person or agency in terms of some agreed market or other standard and it is not so set. Subsection (2) deals with the situation where the price is to be fixed by either the buyer or the seller. The price must be fixed in good faith. Good faith includes reasonable commercial standards of fair dealing in the trade if the party is a merchant. Normally "posted price" or a future seller's or buyer's "given price," "price in effect," "market price," or the like satisfies the good faith requirement. Subsection (3) provides that if the person empowered by the contract to fix the price refuses to fix it, or when a price left to be fixed otherwise than by the 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. Under Subsection (4) discussed *supra* where it is found that future agreement in the method or manner provided for is a condition precedent to an enforceable contract, the buyer must return goods delivered or if unable to do so, he must pay a reasonable price at the time of delivery and the seller must return any portion of the price already paid⁴⁵.

The cases applying the open price provision are limited. In one case, where the seller sought to recover the price of goods sold and delivered, the court noting there was no agreed price for the goods, inferred a reasonable price determined from the plaintiff's catalogs which had formed the basis of pricing in prior dealings⁴⁶. In another Pennsylvania case the court noted that the statute of frauds section permits the omission of the price term⁴⁷.

45. Hawkland, Sales and Bulk Sales under the Uniform Commercial Code 18-19 (A.L.I. 1958); Wyo. Stat. 34-2-305 (1963 Supp).

Open Price Term

- (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 of 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 return any portion of the price paid on account.

46. Republic-Oden Appliance Corp. v. Consumers Plumbing and Heating Supply Co. 45 Erie Leg. J. 121 (Pa. 1961).

47. *Arcuri v. Weiss*, *supra* note 55.

PLACE OF DELIVERY

In the absence of a specified place for delivery and “unless otherwise agreed the place for delivery of goods is the seller’s place of business or if he has none his residence; but in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and documents of title may be delivered through customary banking channels⁴⁸.” The place of delivery is supplied by this section only unless the parties do not otherwise agree which means that the surrounding circumstances, usage of trade, course of dealing, course of performance and the express language of the parties controls whether or not this section is applicable.

TIME FOR SHIPMENT OR DELIVERY

In the absence of a specified time for shipment or delivery or any other action under the contract if not provided for in Article II of the *Code* or agreed upon, the time shall be a reasonable time⁴⁹. The words “if not agreed upon” carry the same connotation as “*unless otherwise agreed*” as stated above. “What is a reasonable time for taking any action depends on the nature, purpose, and circumstances of such action⁵⁰.” The element of what is a reasonable time is of acute importance where the price and time for delivery have both been left open and the courts are required to determine both time for delivery and a reasonable price at the time for delivery. The courts might in such cases say that the parties were still negotiating or conclude there is no reasonable adequate remedy rather than determine both reasonable price and reasonable time for delivery. This would be contrary to the spirit of the *Code* but could be justified where other factors enter the picture. Such other factors might be the necessity to determine which party is in breach when a dispute arises as to whether a reasonable time for delivery has elapsed or when other material terms such as time for payment are left open.

DELIVERY IN A SINGLE LOT OR SEVERAL LOTS

In the absence of specification for delivery in single lot or several lots and “*unless otherwise agreed* all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded by lot⁵¹.” This section assumes that in the absence of an unless otherwise agreed situation the

48. Wyo. Stat. sec. 34-2-308 (Supp. 1963), Uniform Commercial Code sec. 2-308; see also Wyo. Stat. sec. 34-2-503, -2-504, -2-512, (Supp. 1963), Uniform Commercial Code sec. 2-503, -504, -512.

49. Wyo. Stat. sec. 34-2-309 (Supp. 1963), Uniform Commercial Code sec. 2-309.

50. Uniform Commercial Code sec. 2-309 comment.

51. Wyo. Stat. sec. 34-2-307 (Supp. 1963), Uniform Commercial Code sec. 2-307; see also Wyo. Stat. sec. 34-2-508, -2-601, -2-503, -2-608, -2-609 (Supp. 1963, Uniform Commercial Code sec. 2-508, -601, -503, -608, -609.

parties intended delivery to be in a single lot. The words "where circumstances give either party the right to make or demand delivery in lots" are designed primarily to allow delivery in lots where inadequate shipping facilities, transportation facilities, storage facilities, production facilities or other circumstances make delivery in a single lot commercially unfeasible⁵².

TIME FOR PAYMENT OR RUNNING OF CREDIT

In the absence of a time for payment or running of credit and "*unless otherwise agreed* (a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery and (b) if the seller is authorized to send the goods, he may ship them under reservation and tender the documents of title and the buyer may inspect the goods after their arrival before payment is due. . . and (c) if delivery is authorized and made by way of document otherwise than by (b) above . . . then payment is due at the time and place where the buyer is to receive the documents. . . and (d) where the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period⁵³." Thus it is apparent, that in the absence of an "otherwise agreed" situation in which time for payment and running of credit cannot be proven as part of the contract, time for payment is keyed to time and place of receipt of the goods or inspection or time of delivery of the documents. Running of credit is keyed to time of shipment or the invoice date or date of dispatch of the invoice.

THE QUANTITY TERM IN OUTPUT, REQUIREMENTS, AND EXCLUSIVE DEALING CONTRACTS

In the case of output and requirements contracts "a term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output and requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded⁵⁴." The section requires the reading of commercial background and intent into the language of the agreement to determine the quantity term and it further demands of the parties good faith in the performance of the agreement. The section rejects prior law which might defeat such contracts on the grounds of indefiniteness and the lack of mutuality of obligation⁵⁵.

In exclusive dealings contracts the quantity terms is normally left indefinite. The *Code* provides that "a lawful agreement by either the seller or the

52. Uniform Commercial Code sec. 2-307 comment.

53. Wyo. Stat. sec. 34-2-310 (Supp. 1963), Uniform Commercial Code sec. 2-310; see also Wyo. Stat. sec. 34-2-509, -2-505, -2-511, -2-512, -2-513, -2-308(b), (Supp. 1963) Uniform Commercial Code sec. 2-509, -505, -511, -512, -513, -308(b).

54. Wyo. Stat. sec. 34-2-306(1) (Supp. 1963), Uniform Commercial Code sec. 2-306(1).

55. Uniform Commercial Code sec. 2-306 comment.

buyer for exclusive dealing in the kind of goods concerned imposes *unless otherwise agreed* an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale⁵⁶." The quantity is controlled by the requirement of good faith effort by the buyer to use reasonable methods and due diligence in the expansion of the market or the promotion of the product as the case may be⁵⁷.

IMPLIED WARRANTIES

In addition to providing for methods for determining what various terms shall be when such terms have been left open, the *Code* makes implied warranties a part of every contract unless they are excluded. There are basically three types of warranties which may become a part of the contract if not excluded expressly or by circumstances of the transaction. They are warranty of title, merchantability, and fitness for a particular purpose.

In the case of warranty of title, "there is in a contract for sale a warranty by the seller that the title conveyed shall be good, and its transfer rightful and the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge (actual as distinct from constructive notice)⁵⁸." The above warranty can be excluded "only by specific language or by circumstances (such as sales by executors, sheriffs, or foreclosing lienors) which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have⁵⁹." In the absence of a specific provision in the contract as to warranty of title, the basic purpose of this section is to insure that the buyer receive a good clean title, free from exposure to law suits, that he could in good faith expect to acquire⁶⁰. In addition to good title free from claims against the goods, there may arise a warranty against claim of infringement of a patent or trademark, for "*unless otherwise agreed* a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications⁶¹." The warranty against infringement applies only to merchants dealing in the merchants normal stock sold in the normal course of business⁶². The duty to hold either the buyer or seller free and clear of liability for infringement is a part of every contract within its scope of application in the absence of an "unless otherwise agreed" situation.

56. Wyo. Stat. sec. 34-2-306(2) (Supp. 1963), Uniform Commercial Code sec. 2-306(2).

57. Uniform Commercial Code sec. 2-306 comment.

58. Wyo. Stat. sec. 34-2-312 (1) (Supp. 1963), Uniform Commercial Code sec. 2-312 (1).

59. Wyo. Stat. sec. 34-2-312(2) (Supp. 1963), Uniform Commercial Code sec. 2-312(2).

60. Uniform Commercial Code sec. 2-312, comment.

61. Wyo. Stat. sec. 34-2-312(3) (Supp. 1963), Uniform Commercial Code sec. 2-312(3).

62. Uniform Commercial Code sec. 2-312 comment.

The second warranty to be discussed is that of merchantability. "Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind⁶³." In addition implied warranties may arise from course of dealing or usage of trade unless excluded or modified⁶⁴. This warranty applies to merchants present sales as well as contracts for sale and to sales for use as well as sales for resale. The warranty of merchantability would not apply to a person making an isolated sale of goods for he is not a merchant, however, such person's knowledge of any defects not apparent on inspection must, without need of express agreement, be disclosed. Also, the definitions of merchantability within the section may be a guide to the resulting express warranty where the seller states the goods are guaranteed even though the seller is not a merchant.⁶⁵

A contract may include both an implied warranty of merchantability and an implied warranty of fitness for a particular purpose. "When the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified. . . an implied warranty that the goods shall be fit for such purpose⁶⁶." The warranty of fitness for a particular purpose arises when goods are used by the buyer for purposes peculiar to the nature of his business. The seller need not have actual knowledge of the peculiar or particular purpose for which the goods are to be used if the circumstances are such that the seller has reason to know the purpose intended or that reliance exists. There must be actual reliance on the seller by the buyer⁶⁷.

SUMMARY

In summary the assertion that the parties are still negotiating the contract and do not intend to be bound remains a valid defense under the *Code* just as it was under prior law. However, the negotiations need not be nearly so complete under the *Code* as was previously required. As a general rule the only essential term under the *Code* is quantity whereas under prior law agreement was usually required on all material terms. The effect of the open terms provision and other provisions relating to price, time of delivery, and so forth plus the new accent on conduct, trade usages and custom, and course of dealing is that the element of definiteness and the stage of negotiations need not go far past the point indicated by the colloquial expression "it's a deal." Even though negotiation need not be nearly so complete as under prior law, if the

63. Wyo. Stat. sec. 34-2-314(1) (Supp. 1963), Uniform Commercial Code sec. 2-314(1).

64. Wyo. Stat. sec. 34-2-314(3) (Supp. 1963), Uniform Commercial Code sec. 2-314(3).

65. Uniform Commercial Code sec. 2-314 comment.

66. Wyo. Stat. sec. 34-2-315 (Supp. 1963), Uniform Commercial Code sec. 2-315.

67. Uniform Commercial Code sec. 2-315 comment.

parties intend the execution of a formal contract before being bound there is no contract until such formal contract is executed. The prior law relating to intent of the parties to execute a formal contract has not been displaced by the Code.

Although there may be a determination made that the parties intended to be bound, the contract can still be defeated because there is no reasonably adequate remedy. It is true that remedies have been liberalized under the *Code*. However, the contract price must be fixed by the price section for the purpose of determining the amount of damages for contract breach where the price is left open. The contract price would be a reasonable price at the time for delivery in such cases. In cases where the price of goods fluctuates rapidly, it may be a difficult task for the courts to fix the contract price where both the price and time for delivery have been left open. Also, since time for delivery may be a determining factor in breach of contract cases, the deletion of that term may be fatal to invoking a remedy for breach.

The defense of indefiniteness, and incompleteness, which occasionally caused contracts to be held unenforceable, although the parties fully intended to be bound, has lost most of its potency. The *Code* is basically an adoption of those liberal decisions which supplied the reasonable price where the parties had decided on the payment of a reasonable price, which supplied a reasonable time for performance when no time was specified and which supplied such other terms as time for payment when no time was specified. These liberal decisions supplied the missing terms rather than holding such agreements unenforceable on the grounds of indefiniteness.

Prior to the *Code*, courts held the contract too indefinite and incomplete to be enforceable where nothing was said as to price, and where the external standard by which the price was to be determined was too indefinite. Prior law also held the agreement lacked mutuality and was unenforceable where one of the parties had the right to fix the price term, unless the party had to fix the term in accordance with some definite external standard. Where the price and other essential terms were left to the future agreement of the parties prior law held such agreements unenforceable. Under the *Code* price section, the indefiniteness rule is specifically rejected. The *Code* supplies the missing price term where nothing is said as to price, where the price is left to be agreed by the parties and they fail to agree, and where the price is left to be fixed in terms of some agreed market or other standard as set or recorded by some third party or agency and it is not so set or recorded. Other terms such as time of delivery, place of delivery, time, method, and manner of payment, delivery in a single lot or several lots and warranties are supplied by the *Code* when they are intentionally or inadvertently left out. Leaving out one or more of such terms is not fatal to the contract even though the courts under prior law may have deemed such terms as are left out essential.

The open terms and open price provisions are the keys to flexibility and freedom in negotiating and concluding contracts for the sale of goods. The end result of the provisions is greater justice to the parties. The provisions will tend to promote honor among the contracting parties in situations where one of the parties has determined he has made a bad deal, by removing temptations to resort to conceptualistic contract law to defeat an agreement which both parties had made in good faith with full intent to be bound.

Where the sales price of goods is significantly affected by fluctuation of manufacturing, merchandising and shipping costs, tariffs, competitive conditions, government regulations, or taxes, the businessman will derive the benefits necessary for sound planning which a firm contract provides. Business concerns which have shied away from the open terms contract for fear they may be unenforceable are now free to do business on businessmen's terms in conformity to the economics of the situation. Hart in *Drafting Techniques Under the Uniform Commercial Code* states:

The attorney should consider with caution the following methods of postponing agreement:

1. The term (e.g. price, date of delivery, place of delivery), may be entirely omitted from the contract. If this is done, the Code itself will often supply the omitted term, or provide that the courts infer that the parties intended a reasonable price, date, etc.
2. The term may be left to be fixed by one of the parties, or a third party or agency at a later date.
3. The term may be made to depend upon some external standard or event, e.g. cost of living index.
4. The term may be left open for negotiation between the parties.⁶⁸

If the parties leave terms open they should specifically state in the agreement that they intend to be bound since the large number of missing terms may be interpreted as indicative of a lack of intent to contract. If the parties are merely negotiating a contract they should in correspondence of informal agreements specifically state they do not intend to be bound since otherwise the courts may find an intent to contract and supply the missing terms. If the term is left for some method or manner of future agreement, it should be provided that the parties either do or do not intend to be bound if agreement in the method or manner provided is not reached. If the parties intend the execution of a formal contract before being bound, they should so state. In case the parties wish to exclude or modify the warranties of title, merchantability, and fitness for a particular purpose, they must explicitly comply with the exclusion and modification provisions concerning warranty. Above all, the quantity term should be stated in as definite a manner as possible and should not be left for some method or manner of future agreement. The quan-

68. Hart, *Drafting Techniques Under the Uniform Commercial Code*, 32, (1962).

tity term in a written contract cannot be supplied by course of dealing with the possible exception of output and requirements contracts.

When drafting open terms contracts, it should be borne in mind that one or more terms other than quantity may be left open, with provision made by the *Code* for fixing such terms, that the remedy must be reasonably adequate in case of breach of contract but that remedies have been liberalized, and that the *Code* is to be liberally construed and the obligation of good faith imposed on the contracting parties.

Franklin D. Bayless