

A Quintessential “Battle of the Forms” Case



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It's ideal for both a buyer and seller of goods to have a clear, mutual understanding of the terms and conditions that apply to their transactions and relationship generally. In a perfect world, the parties to a sale would agree to the operative terms and conditions via a signed writing. But for a variety of practical reasons, that isn't necessarily how things play out—in many instances, there is ambiguity as to whose (if anyone's) terms and conditions apply to a particular sale of goods.

So, how does a court determine the terms of a sale where the buyer's and seller's terms differ? A recent decision by the U.S. District Court for the Eastern District of Michigan, in *TE Connectivity Corporation v. Sumitomo Electrical Wiring Systems, Inc.*, provides some insight.

Some Background on UCC Article 2 and the “Battle of the Forms”

Article 2 of the Uniform Commercial Code (UCC) governs the sale of goods, including (among other things) the formation of a contract for the sale of goods. A contract is generally formed via an offer by one party (such as a buyer's purchase order) and acceptance by the other party (such as a seller's acknowledgment or confirmation). However, a “Battle of the Forms” ensues when a party's acceptance includes

additional or different terms in response to an offering party's terms. UCC § 2-207 establishes the guidelines for determining the terms of a contract in response to a Battle of the Forms dispute as follows:

- (1) **A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.**
- (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - a. the offer expressly limits acceptance to the terms of the offer;
 - b. they materially alter it; or
 - c. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the

parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.¹

A novel (or more likely a horror story) could be written about UCC § 2-207's provisions. But, here, we're focusing specifically on the meaning of **conditional acceptance** established by UCC § 2-207(1). The *TE Connectivity* case provides a great example of how a seller conditions its acceptance of a buyer's purchase order (PO) on the buyer's assent to the seller's terms and conditions under UCC § 2-207(1), and the impact of such a conditional acceptance.

Relevant Background Regarding the *TE Connectivity* Case

TE Connectivity Corporation (TE) and Sumitomo Electrical Wiring Systems, Inc. (SEWS) were parties to supply contracts under which TE supplied electrical parts to SEWS as follows:

- At SEWS' request, TE provided SEWS with a quotation for parts that incorporated by reference TE's Terms and Conditions of Sale ("Ts and Cs").
- From time to time afterward, SEWS issued POs to TE, which incorporated by reference SEWS' Ts and Cs. Critical to the *TE Connectivity* case, SEWS' Ts and Cs contained a provision that required the parties to participate in binding arbitration with respect to certain disputes.
- In response to SEWS' POs, TE issued "order acknowledgements" to SEWS that did not include an arbitration clause. These order acknowledgements stated that TE's "acceptance of customer's order is expressly conditioned upon customer's acceptance of" TE's Ts and Cs. TE's Ts and Cs included the following provision:

"The terms and conditions set forth herein as well as any terms and conditions printed on the face of Seller's order acknowledgment constitute the sole and entire agreement between Seller and the buyer ("Buyer")

of goods and/or services from Seller with respect to the subject matter hereof. Any term or condition in any printed form of Buyer, including but not limited to any order, confirmation or other document, which is in any way inconsistent with or in addition to the terms and conditions hereof is hereby expressly rejected, and Seller's acceptance of any offer or order of Buyer is hereby expressly made in reliance on Buyer's assent to all terms and conditions hereof. **If Buyer objects to any of the terms or conditions hereof, such objection must be made in writing and received by Seller within ten (10) calendar days after placing a purchase order. Failure to so object shall be conclusively deemed to be acceptance of the terms and conditions hereof."**²

So, SEWS sought to bind TE to SEWS' Ts and Cs by incorporating them into SEWS' POs. But, TE's order acknowledgments rejected SEWS' Ts and Cs and conditioned TE's acceptance of SEWS' POs on SEWS' acceptance of TE's Ts and Cs by requiring SEWS to object to TE's Ts and Cs or otherwise be bound by them. In other words, the parties were primed for a "Battle of the Forms"—they just didn't know it quite yet.

The contractual disconnect didn't rear its head until the COVID-19 pandemic hit. TE had allegedly failed to timely supply parts, causing SEWS to assert a damage claim of approximately \$26.1 million against TE. SEWS served TE with a notice of arbitration (consistent with SEWS' Ts and Cs), to which TE responded by filing a complaint seeking a declaration that TE was not legally bound to arbitrate. SEWS then moved to dismiss the complaint.

The Parties' Arguments: What Constitutes Conditional Acceptance?

TE argued that its order acknowledgments were "conditional acceptances" under UCC § 2-207(1)—i.e., that TE's acceptance was subject to SEWS agreeing to be bound solely to TE's Ts and Cs, which lacked an arbitration provision. TE asserted that

SEWS had assented to TE's Ts and Cs by accepting delivery of parts without objecting to TE's Ts and Cs. TE also argued that if SEWS did not agree to TE's Ts and Cs, then the parties' contract was governed by the terms they had agreed to under UCC § 2-207(3), which did not require the arbitration of TE's and SEWS' disputes.

SEWS argued that TE's order acknowledgments did not qualify as conditional acceptances under UCC § 2-207(1) and amounted to acceptances of SEWS' POs, which included the arbitration clause. SEWS argued that a conditional acceptance must "clearly reveal" that TE was unwilling to proceed with the sale unless assured of SEWS' assent to the additional or different terms contained in TE's Ts and Cs. SEWS asserted that TE's attempt to bind SEWS to TE's Ts and Cs only via mere silence indicated that TE was not "unwilling to proceed" absent affirmative assurance from SEWS, because silence is an insufficient manner of acceptance as a matter of law.

The Decision

The Court denied SEWS' motion to dismiss TE's complaint. The Court ruled that TE's order acknowledgment was a conditional acceptance under UCC 2-207(1) based on language that TE's acceptance of SEWS' order was expressly conditioned on SEWS' acceptance of all of TE's Ts and Cs. The Court reached this conclusion by looking to other court decisions for examples of what does, and does not, constitute a conditional acceptance:

- **Conditional acceptance:**
 - Statement that "The terms set forth on the reverse side are the *only ones upon which we will accept orders*."
 - Statement that "Seller's acceptance of any order is expressly subject to Buyer's assent to each and all of the terms and conditions set forth below."
- **Not a conditional acceptance:**
 - Provision stating that "[B]uyer expressly limits acceptance to the terms hereof and no different or additional terms proposed by seller shall become part of the contract."
 - Statement that acceptance "is subject to" the seller's Ts and Cs.

- PO's statement that acceptance was limited to its terms but did not clearly indicate that the other party's failure to assent to those terms voids the transaction.

Against the backdrop of these examples, the Court concluded that the language in TE's order acknowledgments satisfied the requirement that SEWS' assent to TE's terms must be directly and distinctly stated or expressed rather than implied or left to inference. And, the Court held that TE's order acknowledgments met this standard. The language in TE's order acknowledgments that TE's "acceptance of [SEWS'] order is expressly conditioned upon [SEWS]' acceptance of all TE Connectivity's standard Terms and Conditions" meant that acceptance was limited to the terms in TE's T & Cs and to SEWS' assent to those terms.

The Court rejected SEWS' argument that TE's order acknowledgments were not conditional acceptances because they sought SEWS' assent to TE's Ts and Cs through mere silence. The Court noted that the U.S. Court of Appeals for the Sixth Circuit (the decisions of which are binding on the *TE Connectivity* Court) had previously held that a seller's acceptance was conditional even though that acceptance indicated the

buyer's assent would be gleaned from the buyer's silence. The Court also noted that SEWS was improperly conflating the issue of whether TE's order acknowledgments were conditional acceptances with the separate issue of whether the condition of that acceptance could be satisfied (i.e., whether SEWS could have assented to TE's Ts and Cs via mere silence).

As for whether SEWS had assented to TE's Ts and Cs and, ultimately, whether SEWS could enforce its binding arbitration provision, well, that's a question the Court had left unanswered for the time being. While SEWS' assent to TE's Ts and Cs was irrelevant to the issue of conditional acceptance, it is dispositive of the ultimate issue of whose (if anyone's) Ts and Cs applied. The Court held that the answer will ultimately turn on whether SEWS had accepted TE's Ts and Cs by accepting delivery of and paying for TE's parts without objection—and the Court had insufficient facts to make that call at this stage.

Takeaways from the Decision

The *TE Connectivity* decision is a great example of a buyer's and seller's competing Ts and Cs, and the factors a court considers when deciding which Ts and Cs are enforceable. The *TE Connectivity* decision is a great reminder that a written

agreement between and signed by a buyer and seller that clearly lays out the transaction's terms can help avoid headaches (and costly lawsuits) down the road. ■■■■■

1 Emphasis added.

2 Emphasis added.

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