

PART II. FORMATION OF THE CONTRACT

Article 12

[Offer]

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

PRIOR UNIFORM LAW

ULF, article 4.

Commentary

1. Article 12 states the conditions that are necessary in order for a proposal to conclude a contract to constitute an offer.

Proposal sent to one or more specific persons

2. In order for a person to accept an offer, that offer must have been addressed to him. In the usual case, the requirement causes no difficulties since the offer to buy or sell goods will have been addressed to one specific person or, if the goods are to be bought or sold by two or more persons acting together, to those specific persons. The specifications of the addressee will usually be by name, but it could be made in some other way such as "the owner or owners of . . .".

3. It is also possible that an offer to buy or sell will be made simultaneously to a large number of specific persons. An advertisement or catalogue of goods available for sale sent in the mail directly to the addressees would be sent to "specific persons," whereas the same advertisement or catalogue distributed to the public at large would not. If an advertisement or catalogue sent to "specific persons" indicated the intention to be bound to a contract in case of acceptance and if it was "sufficiently definite", it would constitute an offer under article 12 (1).

Proposal sent to other than one or more specific persons, paragraph (2)

4. Some legal systems restrict the concept of an offer to communications addressed to one or more specific persons while other legal systems also admit of the possibility of a "public offer". Public offers are of two types, those in which the display of goods in a store window,

vending machine or the like are said to be a continuing offer to any person to buy that article or one identical to it, and advertisements directed to the public at large. In those legal systems which admit of the possibility of a public offer, the determination as to whether an offer in the legal sense has been made depends upon an evaluation of the total circumstances of the case, but does not necessarily require a specific indication of intention to make an offer. The fact that the goods are on display for sale or the wording of the advertisement may be enough for a court to determine that there was a legal offer.

5. This Convention, in article 12 (2), takes a middle position in respect of public offers. It states that a proposal other than one addressed to one or more specific persons is normally to be treated merely as an invitation for the recipients to make offers. However, it constitutes an offer if it meets the other criteria for being an offer and the intention that it be an offer is clearly indicated. Such an indication need not be an explicit statement such as "this advertisement constitutes an offer" but it must clearly indicate an intention to make an offer, for example, by a statement that, "these goods will be sold to the first person who presents cash or an appropriate banker's acceptance".

Intention to be bound, paragraph (1)

6. In order for the proposal for concluding a contract to constitute an offer it must indicate "the intention of the offeror to be bound in case of acceptance." Since there are no particular words which must be used to indicate such an intention, it may sometimes require a careful examination of the "offer" in order to determine whether such an intention existed. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was labelled by the parties as an "offer" or as an "acceptance". Whether there is the requisite intention to be bound in case of acceptance will be established in accordance with the rules of interpretation contained in article 7.

7. The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he intends the offer to be irrevocable. As to the revocability of offers, see article 14.

An offer must be sufficiently definite, paragraph (1)

8. Paragraph (1) states that a proposal for concluding a contract must be "sufficiently definite" in order to constitute an offer. It goes on to state that an offer is sufficiently definite if it:

- indicates the goods, and
- expressly or implicitly fixes or makes provision for determining the quantity, and
- expressly or implicitly fixes or makes provision for determining the price.

9. The remaining terms of the contract resulting from the acceptance of an offer which only indicates the goods and fixes or makes provision for determining the quantity and the price would be supplied by usage or by the provisions in Part III on the law of sales: If, for example, the offer contained no term as to how or when the price was to be paid, article 53 (1) provides that the buyer must pay it at the seller's place of business and article 54 (1) provides that he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal. Similarly, if no delivery term is specified, article 29 provides how and where the goods are to be delivered and article 31 provides when they are to be delivered.

10. Nevertheless, the fact that a proposal contains only the three terms necessary for the offer to be sufficiently definite may indicate, in a given case, that there was no intention on the part of the offeror to be bound in case of acceptance. For example, it would be necessary to interpret the proposal in the light of article 7 to determine whether there was an intention to be bound in case of acceptance where a seller offered to sell equipment to be manufactured with the only specifications being the type and quantity of the goods and a price of Swiss francs 10 million. It would normally be the case that a seller would not contract for such a large sale without specification of delivery dates, quality standards, etc. Therefore, the lack of any indication in respect of these matters suggests that there might have been as yet no intention to

be bound to a contract in case of acceptance. However, even in the case of such a large and complicated sale, the applicable law of sales can supply all of the missing terms if the intention to contract is found to have existed.

Quantity of the goods, paragraph (1)

11. Although, according to article 12, the proposal for concluding a contract will be sufficiently definite to constitute an offer if it expressly or implicitly fixes or makes provision for the quantity of goods, the means by which the quantity is to be determined is left to the entire discretion of the parties. It is even possible that the formula used by the parties may permit the parties to determine the exact quantity to be delivered under the contract only during the course of performance.

12. For example, an offer to sell to the buyer "all I have available" or an offer to buy from the seller "all my requirements" during a certain period would be sufficient to determine the quantity of goods to be delivered. Such a formula should be understood to mean the actual amount available to the seller or the actual amount required by the buyer in good faith.

13. It appears that most, if not all, legal systems recognize the legal effect of a contract by which one party agrees to purchase, for example, all of the ore produced from a mine or to supply, for example, all of the supplies of petroleum products which will be needed for resale by the owner of a service station. In some countries such contracts are considered to be contracts of sale. In other countries such contracts are denominated as concession agreements or otherwise, with the provisions in respect of the supply of the goods considered to be ancillary provisions. Article 12 makes it clear that such a contract is enforceable even if it is denominated by the legal system as a contract of sale rather than as a concession agreement.

Price, paragraph (1)

14. Article 12 provides the same rule in respect of the price that it does in respect of quantity. Thus, for the proposal to constitute an offer it must expressly or implicitly fix or make provision for the price. It is not necessary that the price could be calculated at the time of the conclusion of the contract. For example, the offer, and the resulting contract, might call for the price to be that prevailing in a given market on the date of delivery, which date might be months or even years in the future. In such a case the offer would expressly make provision for determining the price.

15. Where the buyer sends an order for goods listed in the seller's catalogue or where he orders spare parts, he may decide to make no specification of the price at the time of placing the order. This may occur because he does not have a price list of the seller or he may not know whether the price list he has is current. Nevertheless, it may be implicit in his action of sending the order that he is offering to pay the price currently being charged by the seller for such goods. If such is the case, the buyer has implicitly made provision for the determination of the price and his order for the goods would constitute an offer.

16. Similarly, where the buyer orders goods from a catalogue for future delivery it may be implicit in his order and from other relevant circumstances that the buyer is offering to pay the price currently being charged by the seller at the time of the delivery.

17. In order to determine whether a proposal implicitly fixes or makes provision for determining the price it is necessary to interpret the proposal in the light of article 7, and in particular paragraph (3) of that article.