

Article 16

[Acceptance; Time of effect of acceptance]

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph (3) of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article.

PRIOR UNIFORM LAW

ULF, articles 2 (2), 6 and 8.

Commentary

1. Article 16 sets out the conduct of the offeree which constitutes acceptance and the moment at which an acceptance is effective.

Acts constituting acceptance, paragraph (1)

2. Most acceptances are in the form of a statement by the offeree indicating assent to an offer. However, article 16 (1) recognizes that other conduct by the offeree indicating assent to the offer may also constitute an acceptance.

3. In the scheme used in this Convention, any conduct indicating assent to an offer is an acceptance. However, subject to the special case governed by article 16 (3), article 16 (2) provides that the acceptance is effective only at the moment the indication of assent reaches the offeror.

4. Article 16 (1) also makes it clear that silence in itself does not amount to acceptance. However, if the silence is coupled with other factors which give sufficient assurance that the silence of the offeree is an indication of assent, the silence can constitute acceptance. In parti-

cular, silence can constitute an acceptance if the parties have previously so agreed. Such an agreement may be explicit or it may be established by an interpretation of the intent of the parties as a result of the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties as provided by the rules of interpretation in article 7.

Example 16A: For the past 10 years Buyer regularly ordered goods that were to be shipped throughout the period of six to nine months following each order. After the first few orders Seller never acknowledged the orders but always shipped the goods as ordered. On the occasion in question Seller neither shipped the goods nor notified Buyer that he would not do so. Buyer would be able to sue for breach of contract on the basis that a practice had been established between the parties that Seller did not need to acknowledge the order and, in such a case, the silence of Seller constituted acceptance of the offer.

Example 16B: One of the terms in a concession agreement was that Seller was required to respond to any orders placed by Buyer within 14 days of receipt. If he did not respond within 14 days, the order would be deemed to have been accepted by Seller. On 1 July Seller received an order for 100 units from Buyer. On 25 July Seller notified Buyer that he could not fill the order. In this case a contract was concluded on 15 July for the sale of 100 units.

Moment at which acceptance by declaration is effective, paragraph (2)

5. Article 16 (2) provides that an acceptance is effective only at the moment a notice of that acceptance reaches the offeror. Therefore, no matter what is the form of the acceptance under article 16 (1), a notice of that acceptance must in some manner reach the offeror in order to bring about the legal consequences associated with the acceptance of an offer.

6. There are two exceptions to this rule. The first exception is mentioned in the opening words of article 16 (2) which state that the rule is subject to article 16 (3). Under article 16 (3), in certain limited circumstances, it is possible for an offer to be accepted by the performance of an act without the necessity of a notice. The other exception follows from the general rule in article 5 that the parties may, subject to article 11, derogate from or vary the effect of any provision of this Convention. In particular, if they have agreed that the silence of the offeree will constitute acceptance of the offer, they have by implication also agreed that no notice of that acceptance is required.¹

7. It is not necessary that the indication of assent required by article 16 (2) be sent by the offeree. A third party, such as a carrier or a bank, may be authorized to give to the offeror the notice of the conduct which constitutes acceptance. It is also not necessary for the notice to state explicitly that it is notice of acceptance, so long as it is clear from the circumstances surrounding the notice that the conduct of the offeree was such as to manifest his intention to accept.

8. Article 16 (2) adopts the receipt theory of acceptance. The indication of assent is effective when it reaches the offeror, not when it is dispatched as is the rule in some legal systems.

9. Article 16 (2) states the traditional rule that an acceptance is effective only if it reaches the offeror within the time fixed or, if no such time was fixed, within a reasonable time. However, article 19 provides that an acceptance which arrives late is, or may be, considered to have reached the offeror in due time. Nevertheless, the sender-offeree still bears the risk of nonarrival of the acceptance.

Acceptance of an offer by an act, paragraph (3)

10. Article 16 (3) governs the limited but important situation in which the offer, the practices which the parties have established between themselves or usage permit the offeree to indicate assent by performing an act without notice to the offeror. In such a case the acceptance is effective at the moment the act is performed.

¹ No specific rule is given as to when acceptance by silence is effective. See, however, example 16B in which it is concluded that the acceptance was effective at the expiration of the relevant period of time. In at least one legal system the effect of silence is related back to the time when the offer is received by the offeree. Swiss Code of Obligations, art. 10, subs. 2.

11. An offer might indicate that the offeree could accept by performing an act by the use of such a phrase as "Ship immediately" or "Procure for me without delay . . .".

12. The act by which the offeree can accept in such a case is that act authorized by the offer, established practice or usage. In most cases it would be by the shipment of the goods or the payment of the price but it could be by any other act, such as the commencement of production, packing the goods, opening of a letter of credit or, as in the second illustration in paragraph 11 above, the procurement of the goods for the offeror.