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Irrevocable Acceptance: A New Case Sheds Doubt on a Sure Thing

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March 25 2009

Law of Revocation of Acceptance under the Uniform Commercial Code Recent Case Development Applicability to Aircraft Deliveries

Aircraft manufacturers and sellers of used aircraft typically require buyers to sign an acceptance certificate at the time of delivery of the aircraft. These acceptance certificates may include language stating that the buyer irrevocably accepts the aircraft, or that the buyer expressly waives any right it may have to revoke its acceptance of the aircraft later. A recent decision of the US Court of Appeals for the Eighth Circuit calls into question whether such language in a contract, when considered in the context of the course of the parties' performance under the agreement, may actually prevent a buyer from later exercising its right to revoke acceptance pursuant to Section 2-608 of the Uniform Commercial Code.

Law of Revocation of Acceptance under the Uniform Commercial Code

Section 2-608 of the code provides that a buyer may revoke acceptance of a commercial unit whose non-conformity substantially impairs its value to the buyer if the buyer has accepted it (i) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured, or (ii) without discovery of such non-conformity, if the buyer's acceptance was reasonably induced by the seller's assurances.⁽¹⁾

Regarding aircraft delivery, Section 2-608 is relevant in a variety of situations, including if (i) the aircraft is delivered with a latent defect that is impossible to discover until after acceptance, or (ii) the aircraft is accepted with known defects because the seller has made assurances that the defects are not material or will be cured some time after delivery. Unless there is an affirmative waiver of the right to revoke, Section 2-608 allows the buyer to revoke its acceptance and sue for all remedies available under the code, or as otherwise provided for under the contract.

Aircraft sellers often mitigate the effect of Section 2-608 by including language in the acceptance certificate to the effect that the acceptance is irrevocable or that the buyer expressly waives its right to revoke acceptance of the aircraft later. However, the Eighth Circuit decision analyzed below raises a question as to the ultimate effectiveness of such language.

Recent Case Development

Trinity Products, Inc v Burgess Steel, LLC⁽²⁾ involved a commercial dispute stemming from the defective fabrication of a tower designed for installation on a Manhattan skyscraper. Burgess hired Trinity to fabricate two towers for installation on the skyscraper. Beginning with Burgess's initial review of the tower prior to shipment to Manhattan, and continuing until post-installation, Burgess identified and notified Trinity of potential warping defects in the tower installation plate. The defect eventually necessitated removal of the first tower and fabrication of a new replacement tower by Trinity, at a substantial cost to both Trinity and Burgess.

Trinity sued Burgess in the Missouri courts and Burgess asserted counterclaims against Trinity. The principal focus of the parties' claims and counterclaims was with respect to the first tower that was delivered to the Manhattan job site, erected and then rejected by Burgess as unacceptably defective.

The district court granted summary judgment dismissing Burgess' counterclaims on the grounds that Burgess did not assert its breach of contract claim in the five-day time period required by the contract. A clause of the Trinity-Burgess sales contract stated "[a]ny claim(s) for damaged or incorrect material must be

made in writing within five (5) days of receipt of material to be considered valid".⁽³⁾

The US Court of Appeals for the Eighth Circuit, while agreeing that parties to a commercial agreement may generally agree upon a reasonable timeline by which the buyer must reject damaged or incorrect goods under the code, disagreed that the aforementioned contract clause was the operative clause to the dispute because the dispute did not involve "damaged or incorrect material". Instead, the court concluded the dispute concerned a potential warping defect in the tower installation plate that both parties knew about throughout the entire fabrication and installation process, and for which Trinity made repeated assurances to Burgess that the defect either did not exist or would be cured after installation. Of particular importance to the court was a statement made by Trinity's vice president and sales manager in a letter sent before the shipment of the tower to Manhattan that the "warpage will not affect the base plate to girder connection in any way".⁽⁴⁾

The Eighth Circuit reasoned that the contract provision with relevance to the dispute was a defective goods term that provided as follows:

"If the goods which are being sold hereunder are defective, the [s]eller, at its sole option, will either repair the goods, replace the goods, or will take back the goods and refund to the [p]urchaser any purchase price that the [p]urchaser may have paid for the goods. If the purchaser fails to notify Seller of any defects in the goods upon the arrival of the goods at [p]urchaser's business location, [p]urchaser will be deemed to have unequivocally accepted the goods."⁽⁵⁾

The court reasoned that the clause governed the dispute because it mirrored various provisions of the Uniform Commercial Code that require an aggrieved buyer to notify a seller of defective goods within a reasonable time of discovery or when the buyer should have discovered the defect.⁽⁶⁾

In reversing the district court's summary judgment for Trinity, the Eighth Circuit reasoned that:

"the reference to 'irrevocable' acceptance in that provision [of the contract] may not reasonably be construed to eliminate the buyer's right under the [code] to revoke an acceptance or to preserve other remedies in the case of a non-conformity that was unknown or could not be cured, or when acceptance was reasonably induced by the seller's assurances."⁽⁷⁾

The court apparently concluded that Trinity's continued assurances to Burgess that there was no warping defect or that any such defect would be cured was a significant factor which induced Burgess to accept the tower at the job site, since Trinity was amply aware of the alleged defect in the plate at the time of the tower's installation. Accordingly, the court concluded that Burgess would have all remedies available to it as an aggrieved buyer, including revocation of acceptance under Section 2-608, notwithstanding the clause in the agreement which provided for unequivocal acceptance of the tower when delivered.

Although the court never specifically cited Section 2-208, the crux of its reasoning appeared to focus on the parties' course of performance and waiver of the clause in regard to irrevocable acceptance. Section 2-208 states that:

"[w]here the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement."⁽⁸⁾

Furthermore, Section 2-208(3) provides that such course of performance "shall be relevant to show a waiver or modification of any term inconsistent with such course of performance".⁽⁹⁾ In this case, it appears from the facts that Trinity and Burgess had a clear course of performance. Burgess notified Trinity from the time of its initial inspection of the tower up to and including the installation that there was a potential warping defect, and Trinity repeatedly insisted that the defect either did not exist or would be repaired post-installation. Rather than merely concluding that the irrevocable acceptance term could not be construed to eliminate the buyer's right to revoke acceptance, the court could equally have concluded that the parties' course of performance in regard to the defect constituted a waiver of the term in regard to irrevocable acceptance.⁽¹⁰⁾

Applicability to Aircraft Deliveries

Although the Eighth Circuit's decision in *Trinity Products* could have been better reasoned to include explicit references to the law on course of performance and waiver, the ultimate decision appears consistent with the mandates of the Uniform Commercial Code. Trinity made numerous assurances to Burgess that the tower would not experience a warping defect and, in the event that it did, that Trinity would make all necessary

repairs. This course of performance between the two parties modified the express terms of the contract, thus preventing Trinity from arguing that Burgess had irrevocably accepted the tower upon its delivery to Burgess.

Trinity Products has relevance for both new and used aircraft deliveries. With respect to new aircraft deliveries, manufacturers routinely issue discrepancy letters, whereby they agree to resolve all noted discrepancies post-delivery. If a manufacturer issues such a discrepancy letter, then applying the rationale of *Trinity Products* and the code, a court may construe such a discrepancy letter as evidence of the parties' course of performance that effectively modifies any irrevocable acceptance certificate that is simultaneously executed between the manufacturer and buyer. Conversely, in a used aircraft sale where the aircraft is traditionally sold in 'as is where is' condition, a court may be much more likely to enforce an irrevocable acceptance unless additional evidence can be presented by the buyer indicating a course of performance contrary to an irrevocable acceptance. Ultimately, *Trinity Products* acts as a warning, particularly to aircraft manufacturers, that the irrevocable acceptance certificate may be worth less than originally contemplated.

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Endnotes

- (1) Uniform Commercial Code, § 2-608(1).
- (2) *Trinity Products, Inc v Burgess Steel, LLC*, 486 F 3d 325, 329 (8th Cir 2007).
- (3) *Id* at 330.
- (4) *Id* at 329.
- (5) *Id* at 330-31.
- (6) *Id* at 331, referring to Uniform Commercial Code § 2-607 (where a tender has been accepted the buyer must, within a reasonable time after it discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy) and § 2-608.
- (7) *Id* at 331-32.
- (8) Code § 2-208(1).
- (9) Code § 2-208(3).
- (10) Code § 2-208(3), § 2-209(4).

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