

A radio manufacturer and a retailer, after extensive negotiations, entered into a final, written agreement in which the manufacturer agreed to sell and the retailer agreed to buy all of its requirements of radios, estimated at 20 units per month, during the period from January 1, 2017 to December 31, 2019, at a price of \$50 per unit. A dispute arose in late December 2019, when the retailer returned 25 undefective radios to the manufacturer for full credit after the manufacturer had refused to extend the contract for a second three-year period.

In an action by the radio manufacturer against the retailer for damages due to return of the 25 radios, the manufacturer introduces the written agreement, which expressly permitted the retailer to return defective radios for credit but was silent as to return of undefective radios for credit. The retailer seeks to introduce evidence that during the three years of the agreement it had returned, for various reasons, 125 undefective radios, for which the manufacturer had granted full credit. The manufacturer objects to the admissibility of this evidence.

How will the trial court probably rule as to the admissibility of the evidence proffered by the retailer?

- A. Admissible, because course-of-performance evidence, when available, is considered the best indication of what the parties intended the writing to mean.
- B. Admissible, because the evidence supports an agreement that is not within the relevant statute of frauds.
- C. Inadmissible, because the evidence is barred by the parol evidence rule.
- D. Inadmissible, because the express terms of the agreement control when those terms are inconsistent with the course of performance.

Explanation:

UCC parol evidence rule

	Description	Priority of evidence
Inadmissible	Prior/contemporaneous agreements that contradict written contract	Express terms always control
Admissible	Course of performance	Sequence of conduct under contract involving repeated occasions for performance
	Course of dealing	Sequence of conduct pertaining to previous contracts
	Trade usage	Regular practice or method of dealing in that particular business/industry
		Course of performance > course of dealing & trade usage
		Course of dealing > trade usage
		N/A

UCC = Uniform Commercial Code.

Contracts for the sale of goods (eg, radios) are governed by Article 2 of the Uniform Commercial Code (UCC). Under the **UCC's parol evidence rule**, the express terms of a final, written contract **cannot be contradicted** by evidence of inconsistent prior or contemporaneous agreements. But when a **contract is silent** on an issue, its terms **can be supplemented** with evidence of a **course of performance**—ie, a sequence of conduct under a contract that involves repeated occasions for performance.

Here, the radio manufacturer and the retailer entered a final, written requirements contract for the sale of radios. Near the end of the contract, the retailer returned 25 undefective radios for credit, as it had previously done with 125 undefective radios. The contract expressly permitted the return of *defective* radios, but it was silent as to the return of *undefective* radios (**Choice D**). Therefore, evidence of this course of performance is admissible since it is the best indication of what the parties intended the writing to mean (**Choice C**).

(**Choice B**) Under the [statute of frauds](#), certain types of contracts—eg, contracts for the sale of goods greater than \$500—are only enforceable if they are written and signed by the party against whom enforcement is sought. But here, the contract is within the statute of frauds since it called for the sale of an estimated 20 radios per month, at \$50 per radio, for 36 months (ie, greater than \$500).

Educational objective:

The parol evidence rule prohibits evidence of inconsistent prior agreements that contradict a final, written contract. But when a contract is silent on an issue, its terms can be explained or supplemented with evidence of a course of performance—ie, a sequence of conduct under a contract involving repeated occasions for performance.

References

- U.C.C. § 2-202 (Am. Law Inst. & Unif. Law Comm'n 2020) (parol evidence rule).

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