Introduction

✓ Contracts are the very hub of commercial life
✓ People and organisations enter into contracts virtually every day; when they purchase the daily necessities of life or larger consumer item, buy or lease property, borrow money, buy goods off eBay

**Definition:** A contract is an agreement between two or more parties under which legal rights and obligations are created which can be enforced, if necessary, in the courts

**Evolution of Contract Law:**

- 19th century origins in the common law (law made by judges in cases) but since mid-20th century statute law (legislation made by parliament) is increasingly important
- The common law creation is a product of a capitalised society

**Functions of Contracts:** possible because legal promises matter

- Planning (re major contracts) – who does what and when (planning commercial lives)
- Risk allocator (eg. property and investment contracts) – buying shares
- Tool for a transfer of ownership (car, land, shares)

**Types of Contracts:**

**Simple Contracts** – oral, written or a combination – every simple contract must be supported by consideration

**Contracts Under Seal** – derives its validity from its particular form, it must be in writing and signed, sealed and delivered (distinction between simple contracts – the latter does not require consideration)

**Express Contract** – where the intentions of the parties are stated in explicit terms, either orally or in writing, all of the terms are agreed upon and expressed in the written contract (eg. buying a car)

**Implied Contract** – the terms of the contract are inferred from the conduct of the parties and the surrounding circumstances (eg. hailing a taxi) Example: buying a coffee – if it was poisoned, breach of the implied condition

**Bilateral Contract** – an exchange of mutual promises (ie. steel manufacturer entering into a contract with a coal supplier)

**Unilateral Contract** – one in which an offer is made inviting acceptance by actual performance rather than by a promise (ie. offer of a reward for the return of a lost dog is accepted when the dog is returned) – comes into existence when one party promises to do something in return for acts performed by the other party”

**Valid Contract** – where all essential elements are present, it is enforceable against both parties

**Voidable Contract** – a contract which one may avoid

**Void Contract** – as far as the law is concerned, one that never existed at all

**Unenforceable Contract** – on the face it is a valid contract but because there is a technical defect it is not capable of being enforced by action by one of both of the parties

**One-Off (spot) Contract** – buying a mars bar, buying a coffee

**Relational (long term) contracts** – mining

**Life cycle of a contract** – Formation – Performance – Completion/Termination

**Formation** – the essential elements of an enforceable contract:

- Offer and Acceptance
- Intention
- Consideration
- Capacity
- Consent
- Legality
OFFER AND ACCEPTANCE

There must be an agreement for a legally binding contract to exist

- For an agreement to arise it must be shown that one person has made an offer and there has been an acceptance of that offer by the person to whom the offer was directed
- The following cases concern situations where one party says there is an agreement and the other party says there is not
- Often this is not an issue, it is obvious there is a contract, but a dispute arises later on
- The first question may be whether there is an offer and an acceptance of that offer

What is an offer?

An offer is a proposal by one party to enter into a legally binding contract with another. If the other person accepts a contract is made

▲ The person making the offer must intend that it can be converted into a binding obligation by acceptance
▲ When the courts are required to determine whether statements amount to offers, we see them distinguishing them from other commonly occurring categories of statements ie. mere puffs, invitations to treat and statements supplying information
▲ Puffs can be easily dismissed as they are statements that no reasonable person would take seriously, many advertisements contain puffery

Rules as to Offer

1. May be made to one or more people
2. All major terms must be included
3. May specify conditions to be followed
4. Must be communicated to offeree
5. May be revoked or lapse

Invitations to Treat or Statements of supplying – An invitation to treat is just an indication of willingness to deal or trade and statements that purely provide information without intending to make an offer, are not offers

* Gibson v Manchester
* Harvey v Facey

Shop displays, catalogues and advertisements – In general shop displays, catalogues and advertisements are invitations to treat, the offer is made when the buyer takes the item to the register and acceptance is the shop employees selling the item to the consumer

* Pharmaceutical Society of Great Britain v Boots Cash Chemists
* Partridge v Crittenden

Auction Sales – In the case of typical auction sale, the auctioneer’s call for bids is an invitation to treat, where a bid is made, it is an offer from the bidder to the buyer at the price offered. The auctioneer may then either accept or reject the offer on behalf of the principal

* Harris v Nickerson

Online Auctions – auctions conducted online, like eBay, create binding contracts with the buyer and the seller as the online site creates a framework for the auction in which the buyer and the seller were willing participants

* Smythe v Thomas
Tenders – A statement that goods are to be sold by tender is usually regarded as an invitation to treat. A party submitting a tender makes the offer and there is no contract until the person who called for tenders accepts the tender

* Harvela Investments v Royal Trust Co of Canada

Persons as to who an offer can be made

An offer can be made to:

- A specific person or persons
- A particular class of persons
- To the ‘world at large’ – it may be accepted by anyone who reads the advertisement

* Carlill v Carbolic Smoke Ball Co
* Distinguish from: Lenard v Pepsi Co

Communication of an offer

The offer must be communicated, brought to the notice of the person to whom it was made

- Unless an offer is communicated there can be no acceptance therefore no contract
- Cannot take up an offer you don’t know about

* R v Clarke

Revocation of the Offer

An offer is revoked when the offeror formally withdraws the offer

- On revocation the offer comes to an end and cannot be subsequently be accepted
- The offeror can give notice of the revocation of the offer at any time before acceptance
- The revocation must be communicated to the offeree

* Byrne v Lean Van Tienhoven

Options

A promise to keep an offer open for a period of time is not enforceable unless the offeree provides consideration

- Needs to be paid for (consideration) to create an enforceable contract
- Or it is invalid (gratuitous) and the promise to keep the offer open is unenforceable

* Goldsborough, Mort v Quinn

Lapse of an Offer

An offer will lapse:

a) If not accepted within the time stated
b) If not accepted within a reasonable time, where no time for acceptance has been stated
c) If a counter-offer is made

* Hyde v Wrench

A request for information is not a counter offer: it is not unusual for the offeree to want to clarify or seek more information about the terms of the offer

* Steven Jaques v McLean
d) An offer will lapse on the death/incapacitation of either party before acceptance

* Carter v Hyde pg. 81
Acceptance

An agreement is concluded when the offeree communicates an unconditional acceptance of the offer to the offeror. The form of acceptance will vary according to whether it is a unilateral offer (performance of the act is acceptance) or bilateral (a verbal or written response communicated to the offeror or by conduct).

Rules as to Acceptance

1. The acceptance of an offer must be communicated to the offeror for there to be a binding contract. Can be communicated by express words or in writing, by conduct or by performance of an act.

2. Acceptance can be implied from the conduct of parties. Empirnall Holdings v Machon Paull Partners

3. Acceptance cannot be inferred from the silence or inaction of the offeree. Felthouse v Bindley

4. There can be no acceptance is the offeree is unaware of the offer. R v Clarke

5. In a unilateral contract the offeror has waived its right to communication of acceptance. Carlill v Carbolic Smoke Ball Co

6. Acceptance must be unconditional. Where the acceptance is made “subject to contract” or “subject to a formal contract to be drawn up by our solicitors”, then there will be no binding agreement between parties until a formal document has been drafted and signed. Masters v Cameron – Three alternatives possible

7. Acceptance must follow the conditions, if any, stated in the offer. Gilbert J McCaul v Pitt Club

8. Acceptance can be made only by the party to whom the offer was made.

9. Acceptance can be revoked at any time prior to acceptance being communicated.

10. Acceptance must be made within the time prescribed or, if no time has been prescribed, within a reasonable time.

11. Communication of acceptance must be made in a regular and authorised manner.

12. The postal acceptance rule. Where acceptance by post is contemplated by the parties, acceptance is complete as soon as the letter of acceptance is posted. Where the postal acceptance rule applies, a person who makes an offer cannot revoke the offer once the offeree has posted the letter of acceptance (this creates a binding contract).

   Henthorn v Fraser
   Adams v Lindsell
   Holwell Securities v Hughes
   Elizabeth City Centre v Corralyn
13. Electronic or instantaneous communications

- Where this type of communication is used as method of acceptance, the usual applies – acceptance is effective only when it is communicated to the offeror

  * Brinkbon v Stahag Stahl – common law: contract formed where acceptance received

Statutory Reform – The Electronic Transactions Act 1999

- The Act contains rules that aim to “facilitate the use of electronic transactions”
- An electronic communication will commonly be email
- **Section 14** says an electronic communication is dispatched when it leaves an information system under the control of the originator
- **Section 14A** says an electronic communication is received by an addressee when it enters the information system designated by the addressee for the purpose of electronic communication
  
  - In practical terms a person is deemed to have received an email or other electronic communication when it enters their electronic or email system, whether or not they have seen or read it, provided that the communication was sent to the email specified by the person
- Under **Section 14B**, the place of dispatch and the place of receipt shall be where the originator and the addressee have their place of business

Vagueness, Uncertainty, Incompleteness

- If the “contract” is too vague, uncertain or incomplete it will not be enforceable
- Courts will attempt to make the contract work if it senses the parties have agrees on the essentials BUT will not make the contract for the parties

  * Council of the Upper Hunter v Australian Chilling and Freezing pg. 92
  * Godecke v Kirwan pg. 92
  * ANZ Banking Group v Frost pg. 93