

1. Offer

Was There an Offer?

1. Definition

- *An expression of willingness to enter into a contract on certain terms*
 - The courts use **objective** standard, i.e. the view of a reasonable person in the offeree's position

2. Reasonable Person

- It must appear to the **Reasonable Person** in the position of the offeree that an offer was intended giving rise to a **binding agreement upon acceptance** (*Carlill v Carbolic Smoke Company Co*)
 - Offeror's outward manifestations signal intent to make a binding agreement
 - Is it an offer or a "mere puff"? (Boasting but not legally binding)
- Apply conventional approach
 - Look at wording – is it there an "offer" capable of being accepted, and "acceptance"? (*Gibson v MCC*)
- Commands and **preemptory language** will not amount to an offer. Conventional approach to offer and acceptance requires consulting the actions, words and communication between parties (*Gibson v Manchester City Council*)
- Distinct from a Conditional Gift (*AWM v Commonwealth*)

Ticket Cases

- The "conventional analysis", is considered the usual approach:
 - The ticket is an offer which the purchaser can accept or reject after he or she has had reasonable opportunity to accept or reject it (consider the conditions of the ticket)
 - Ticket contained terms of an offer which is subsequently accepted by conduct (*MacRobertson Miller Airline Services v Commissioner of State Taxation*)
- The "conventional" approach isn't always taken (courts have taken various analyses as to when a contract is formed in ticket cases). There is no one-size-fits-all approach to determine when a contract is formed in a ticket scenario. The particular facts need to be carefully considered.

Invitation to Treat

- An invitation to treat is an invitation to others to make an offer or enter into negotiations
 - Not an offer because lacks sufficient indication of willingness to be bound
 - An ITT is not an offer, not binding upon acceptance
- Requires other party to make an offer, which may then be accepted/declined (*Pharmaceutical Society v Boots Chemist*)

Shop Sales

- If customers are entitled to return items from their basket to the shelf, the offer must occur at the time they present the items at the register and are not bound until the cashier accepts their offer. (*Pharmaceutical Society v Boots Chemist*)
- Displaying of goods (even with price) is not an offer, but an invitation to treat
 - The customer offers to buy and the shopkeeper accepts that offer

Online Sales

Goods or services offered online generally to be treated as an invitation to treat (unless clear intention to be bound by acceptance) (*Electronic Transactions Act s14B*)

Auctions

- General Rule: The holding of public auctions will be regarded as an **invitation to treat**
 - Each bid constitutes an offer and the auctioneer communicates his acceptance with the “fall of the hammer” (may or may not be accepted)
 - It is the Auctioneer inviting offers from bidders
 - Auctions without reserve will not alter the general rule (*ACG Advances Ltd v McWhirter*)
- This means:
 - the seller can withdraw the property before acceptance of a bid;
 - the seller can refuse to accept a bid (doesn't have to sell to the highest bidder); and
 - the buyer can withdraw a bid before acceptance.
- Auctioneer is not obliged to sell to the highest bidder
 - An announcement withdrawing the reserve is not an offer and doesn't bind the vendor to sell to the highest bidder (*ACG Advances Ltd v McWhirter*)

Tender

- A request for tenders is an ITT, unless it comprises an express promise
- Tender process involves each interested party submitting a single bid without knowing what the other bids.
- The **general rule** is:
 - request for tenders is an invitation to treat by the caller;
 - tender from interested supplier submitted is the offer
 - Tender accepted by caller is acceptance
- Referential bids shall not be allowed (unless indicated in the terms of an invitation to submit tenders) (*Harvela*)
- **Exceptions:**
 - Sometimes the call for tenders may be an offer depending on the wording of the request for tenders (*Harvela Investments v Royal Trust Co - 1986 HL*)
 - Call for tenders with promise attached = offer of a unilateral contract
 - Submission of tender satisfying terms of vendor's invitation = acceptance, where a contract is entered with the performance of these terms
 - Sometimes the call for tenders will create a contract re: tender process contract (*Hughes Aircraft Systems v Airservices Australia – 1997 FC*)
 - Tenderor accepts this contract by committing to the tender process
 - There exists an implied duty upon parties of good faith & fair dealing
 - Parties must comply with terms of “tender process contract” (i.e. support equal opportunity to tenderers)

CISG: offers and invitation to treat

CISG: Article 14:

(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.

3. Termination of an Offer

An offer will cease to be available for acceptance where:

Revocation (withdrawal)

- Revocation can occur at any time before acceptance, (even if the offeror promised to keep it open) (*Dickinson v Dodds*)
- Effective when it reaches (i.e. communicated to) the offeree (by offeror or some other reasonably reliable source) (*Dickinson v Dodds*)

Exceptions:

- If consideration has been paid to keep the offer open – options (*Goldsborough Mort v Quinn*)
 - this is called an option agreement
 - An ancillary contract is made to keep offer open
 - Consideration distinguishes a mere offer from an option agreement
- If there is a promise to hold an offer for the international sale of goods open (*CISG, Article 16*)
- If a unilateral contract, performance (acceptance) has commenced, and there is an implied contract not to revoke or an estoppel (*Mobil Oil Australia v Wellcom Intern'l Pty Ltd*)

Unilateral Contracts

- There is no universal rule that a unilateral offer can't be revoked before acceptance (even where offeree has begun performance). Generally, a unilateral offer can be revoked before acceptance, however a remedy may be available under:
 - an implied contract not to revoke
 - estoppel
- But If circumstances are appropriate, court may bind the offeror to not revoke offer (*Mobil Oil*)

CISG and UPICC: Revocation of offer

- (1) Offer may be revoked before contract concluded if revocation reaches the offeree before acceptance (*Article 16*)
- (2) However, offer cannot be revoked:
 - (a) If it indicates that it is irrevocable (eg by stating fixed time for acceptance); or
 - (b) if it was reasonable for offeree to rely on the offer as being irrevocable and offeree has acted in reliance on the offer.
 - Similar provision in *Article 2.1.4 UPICC*

Lapse of Time

- Offer may be open for specified period – will lapse at end of specified time
- If no period specified – will lapse after a “reasonable time”
 - What is “reasonable” will depend on the context – apply objective test
 - Eg. Verbal offer to buy car = less time than written offer to purchase land

Death of Offeror

- Offer will lapse on death of offeror (where offeree knows of the death) (*Fong v Cilli*)
 - No clear authority as to whether an offer will lapse on death of offeror when offeree doesn't know about the death (depends on the parties' intentions and the circumstances)
 - Option contracts remain enforceable against deceased estate unless:
 - Personal services of deceased required (skill/judgement); or
 - Intent of option was that it not be exercisable after death (only intended to be enforced against that specific party
- (Laybutt v Amoco Australia Pty Ltd) (1974 HCA)*