Table of Contents

Chapter 1: The Nature and Importance of Contract Law

What is a Contract?

A contract is a promise that is legally binding; the law will compel the person making the promise to perform or to pay damages to compensate the person to whom it was made for non-performance. The two parties include the promisor and the promisee. For a promise to give rise to a contract, it must in substance amount to an undertaking by the promisor that is proffered in exchange for something sought in return from the promisee.

The defining characteristic of a contract is the notion: 'I will do something if you do something in return'. When courts order that damages be paid, to purpose is to remedy the injustice caused by D having infringed P's rights.

Utilitarian approach: Everyone is better off, as they exchange something for another thing, which will be of more use to them.

Economic approach: Contract law facilitates the making and performing of deferred exchanges, by providing remedies for breach of contract; either by an order of 'specific performance' or an order to pay damages.

The Competition and Consumer Act 2010 (Cth) pertains to areas of contract law, such as misrepresentation, implied terms, manufacturers' liability, and unconscionable conduct.

In the classical theory of contract law, the doctrine of sanctity of a contract states that a contract, once made, is sacred, and should therefore be enforced according to its terms and not rewritten by the courts because they may think that the parties have made a bargain that is unsatisfactory in some way.

Modern contract law is often referred to as neoclassical contract law; neoclassical contract law encompasses the use of policy analysis, empirical inquiry, and practical reason. It supports and regulates economic transactions. It provides a framework for parties to engage in business planning, and provides a background set of norms for fair market relations. This allows business people to set standards and limits for their conduct.

Parts of a Contract

For a promise to be contractual, the following preconditions must be satisfied:

1. The promise must arise through an agreement reached between two or more parties about its subject matter.

2. The language must be sufficiently clear to reveal the intention of the parties and deal with all the matters that the law regards as essential for this purpose.

3. The promisee must pay for the promise by providing what is known as 'consideration'; alternatively the promise must be recorded as a deed (recorded in a document that is signed, sealed, and delivered by the person making the promise - the promisor - and intended by that person to be a deed.

4. The parties must intend that their agreement is to be a contract and be enforceable as such.

5. The parties must have the legal capacity to enter into the contract in the terms of the agreement

6. Any formalities prescribed for the enforcement of the agreement in question must be complied with

Chapter 2: Agreement (*consensus ad idem*)

The Nature of an Agreement

In a contract there is a mutual agreement between at least two parties, all whom of which promise to fulfill their contractual obligations. There must be a meeting of minds of the parties, and at least one promise. It is essential that the agreement is entered into voluntarily.

Offer and Acceptance

The promisor must make an offer, which the promisee accepts, consequently forming an agreement. An offer is a promise by one person (the offeror) to do something or to refrain from doing something. An acceptance is an affirmative response to an offer by an offeree. Agreement is reached when the offeree's acceptance is communicated to the offeror. An offer can be made to a particular person, to a group of people, or to the whole world.

Bowen LJ in *Carlill v Carbolic Smoke Ball Company [1893]* stated, "If this is an offer to be bound, then it is a contract the moment the person fulfills the condition".

The display of goods in a self-service store or in a shop window, a regarded as an 'invitation to deal' rather than an offer to sell. The advertisement of an auction is an 'invitation to treat' rather than an offer to sell. In an auction, the auctioneer accepts the offer when the hammer drops. An advertisement, being an invitation to deal, does not constitute an offer.

Where the offer is clear, definite, and explicit, and leaves nothing open to negotiation, it constitutes an offer, acceptance of which will complete the contract.

Acceptance of a unilateral offer is only present if the person(s) to whom the offer is made, fulfill the contractual obligation merely for the purpose of receiving the incentive, on which the contract is based. The opposite is evident in the case of *Crown v Clarke [1927]*, whereby Clarke was arrested and the Crown offered money to anyone who provides information on the murderers; Clarke provided the information required by the Crown in order to be released by police, and subsequently sued the Crown for the reward on offer. Clarke won the case on appeal. If responding to the offer was at least one of the reasons for the offeree's action, it seems clear that acceptance will be found to have occurred, even though it was not the offeree's principal motivation.

Bait Advertising: The practice of advertising certain goods at extremely low prices to attract customers to the store with the intention of selling them other goods, at normal prices, rather than, or in addition to, those advertised.

Acceptance must be communicated in all situations, unless:

- The offeror waives the need to communicate (evident in *Carlill v Carbolic Smoke Ball Company [1893]*).
- The silence of the offeree, in the special circumstances of the case, constitutes acceptance.
- The offeror is estopped from denying communication.
- The 'postal acceptance rule' operates.
- The offeror has specified a special mode for indicating acceptance that does not involve communication.

Unsolicited Goods

The provisions relating to unsolicited goods are pertinent to s 41 of the Australian Consumer Law. The provisions state that a recipient of unsolicited goods is not liable to make a payment, as well as not being liable for any loss or damage caused to the goods.

Battle of the Forms

A battle of the forms is when one party makes an offer to another party, and the other party responds with a counter-offer introducing new terms. There is a battle between the two parties, as to on who's terms the parties will agree.

Refer to: *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1979]*

- Battle of the forms; appeal was given in favour of the defendant (the buyer), as the buyer's offer was the final offer made and did not include a price variation clause that was evident in the seller's offer.

Waivers

In regards to waiving acceptance, Carbolic Smoke Ball Company, in *Carlill v Carbolic Smoke Ball Company*, waived the need for acceptance to be communicated. Bowen LJ stated, unless the offeror "intimates a particular mode of acceptance", acceptance is effective once the offeree has decided to accept.

Acceptance by Conduct

Acceptance does not have to be verbally communicated, however mere conduct may constitute the communication of acceptance, thus the formation of a contract.

Benefit Without Acceptance

Judge Levine in the Court of Appeals for Maryland, stated "Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances, which would indicate to a reasonable person that they were offered with the expectation of compensation, he assents to the terms proposed and thus accepts the offer.

This is evident in the case of *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd*, whereby Machon Paull submitted a contract to Empirnall for signature and return, although the document was never signed. Machon continued work on the property and Empirnall continued to pay. Eventually Empirnall became insolvent, however they were under an obligation to pay Machon Paull for the work done, otherwise Machon Paull would be granted a charge over the land, according to Machon Paull's contract; this contract stands, according the principle discussed above.

Estoppel

Estoppel arises when conduct of the offeror prevents that party from asserting that communication of acceptance has not occurred. In such cases, the law treats the offeree's acceptance as having been communicated to the offeror even though, in fact, it has not been.

E.g. suppose that the offeree does not know that his message of acceptance using the telephone did not get home; he thinks it has. This may happen if the listener of the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated. The person, who sends an acceptance, reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be 'estopped' from saying that he did not receive the message of acceptance. It is his/her own fault that he/she did not get it.

Postal Acceptance Rule

Acceptance is deemed to be effective at the time and place a letter of acceptance is posted, rather than when and where it is received. Furthermore, where the rule operates, an acceptance will still be deemed to have been communicated even though the letter becomes lost in the postal system and is never delivered, so long as this is not the offeree's fault.

This does not apply to the revocation of an offer - a contract will be formed even though a letter of acceptance is posted after a letter of revocation has been dispatched to the offeree, but before it arrives. The offeree can still countermand the acceptance prior to it being received by the offeror.