
CONTRACT A SHORT NOTES

POLICY

CLASSICAL CONTRACT THEORY

- Contract: commonly defined as an agreement or set of promises that the law will enforce.
- Principles of contract law: govern transactions throughout the business world and in sales of goods and land, defining negotiated (rather than legally imposed) rights and obligations
- 'Classical Age of English Contract Law'
 - Extensive development of legal principles and precedents in UK/USA during 19th century
 - Consistent with prevailing ideology at the time - liberal individualist philosophy (*laissez faire*)
 - Such principles continue to influence Australian contract law
- 'Will Theory'; a contract is an **expression of the joint will** of parties engaged in a transaction
 - Consensus ad idem: a meeting of minds – being in full agreement about the same things.
 - Underlying principle: a contract involves self-imposed liability/obligations which are **voluntarily** assumed making a **conscious** choice to give a promise or performance

Criticisms of Classical Approach to Contract

1. Rights/obligations do not necessarily represent the will of the parties
 - Litigation almost invariably reveals the absence of agreement between parties
 - Liability for breach: tort-like (negligent conduct), rather than self-imposed liability emanating from the will of the parties
2. Reasonable Bystander Influence
 - Courts unconcerned with the subjective intention of parties (*Smith 'Oats Case', Blackburn J*); (*Butler Machine Tool, Lord Denning 'synthesis approach' reviewing the 'conduct of parties'*)
 - Prevailing objective test (*Fitness First; Toll*) operates similarly to the law of tort – the state, though Courts imposed to protect persons who rely on promises.
3. Assumes contracts are negotiated between parties
 - Most written contracts made on a standard form basis (*s 27 ACL*);
 - Not typically negotiable by the non-drafting party (*usually the consumer, s 3*)
 - Widespread use of standard form contracts, from 19th century, undermines classic principles
 - Lack of 'ad idem'; intention; consideration (bargain element); etc.
 - Inequality of bargaining powers and asymmetry of information between supplier and consumer
4. Dismisses the Influence / Role of the State
 - State plays a decisive role in both the enforcement and formation of contract
 - *Laissez faire*/notion of 'freedom of contract' undermined because it will be inherently enforced by the standards of an intelligent bystander (*Oscar Chess Ltd, Lord Denning*)

FORMATION

- Requires the establishment of 4 material elements:
 - **AGREEMENT** – between parties through offer and acceptance
 - **CONSIDERATION** – each party must give something in return for the other's promise
 - **INTENTION** – to create legal relations between the parties
 - **CERTAINTY** – terms must be certain, complete and not illusory
- Other aspects of formation:
 - **Formalities** – required for some types of contract
 - **Privity** – only parties to the contract are bound
 - **Capacity** – only parties with capacity are bound

AGREEMENT

- The traditional approach to establishing Agreement is through O&A
 - o **Offer** ("the Offeror": person making offer) + **Acceptance** ("the Offeree": accepts/rejects offer)
 - o Agreement: **communication** of acceptance by the Offeree to the Offeror, unless a unilateral contract: where acceptance occurs by performance
- There are limits to this approach and there may be agreement without distinct O&A

Bilateral Contracts	Unilateral Contracts
Most contracts; both parties exchange a promise/set of promises for each to do something in the future; Both promises are executory (i.e. to be performed at some point after contract formation)	Typically reward schemes; only one promise made; contract formed when B performs their obligation under it (performance is acceptance); at formation, A's promise is executory and B's obligation has been executed (<i>Carlill; Mobil Oil</i>)

OFFER

- Objective standard: "Objective manifestation of willingness to be bound by certain terms, upon the acceptance of those terms" (*Gibson*)
- Offers may be made to the public at large (*Carbolic*)

Required:	Language must be sufficiently certain and promissory (<i>Gibson</i>)
Distinct from:	<p><u>Mere Puff</u> (<i>Carlill</i>)</p> <ul style="list-style-type: none"> - Exaggerated sales talk, not intended by the speaker, or intended to be taken by the reasonable person, as literally (objective test) - Unilateral contracts generally not considered 'mere puff' where language is sufficiently promissory, nor where a deposit is made (<i>Carlill</i>) <p><u>Invitation to Treat:</u> (<i>Boots</i>)</p> <ul style="list-style-type: none"> - An invitation to make an offer/enter into negotiations which lack sufficient indication of a willingness to be bound - Objective test (<i>Gibson, Carbolic</i>) <ul style="list-style-type: none"> o Most <u>advertisements</u> o Goods displayed in <u>shops</u>: (<i>Boots</i>) <ul style="list-style-type: none"> ▪ Items displayed in stores/on shelves are considered ITT, especially where unworkable to require customers make a final decision prior to payment o <u>Auctions</u>: (<i>AGC v McWhirter</i>) <ul style="list-style-type: none"> ▪ Property declared "on the market" considered ITT ▪ General rule: bid is the offer, acceptance is fall of hammer <ul style="list-style-type: none"> • Applies whether or not auction is "without reserve" (of buyer) (<i>AGC</i>) ▪ Seller can: <ul style="list-style-type: none"> • Withdraw property before acceptance of bid • Refuse to accept a bid ▪ Buyer can: <ul style="list-style-type: none"> • Withdraw a bid before acceptance o <u>Tenders</u>: <ul style="list-style-type: none"> ▪ General rule: request for tenders considered ITT and tender is the offer <ul style="list-style-type: none"> • <i>Unless</i>: the wording of request is sufficiently promissory so as to be seen as an offer, e.g. "the highest bid will be successful" (<i>Harvela Investments Ltd</i>) • <i>Unless</i>: the request creates a contract regarding tender process (a contract to enter into a tender process), or a strong element of good faith (<i>Hughes Aircraft Systems International</i>)

- CISG: **Article 14**

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.

- Goods offered for sale online (**Electronic Transactions Act s 14B**)
 - Application of common law understanding of shop sales to online sales

Electronic Transactions Act: s 14B

- A proposal to form a contract made through one or more electronic communications that –
 - (a) is not addressed to one or more specific parties; and
 - (b) is generally accessible to parties making use of information systems –
is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.
- (2) ... (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.

Consider

Ticket Cases:

- Conventional approach:
 - Ticket is the offer and purchaser can accept/reject after he has had reasonable opportunity to accept/reject (**MacRobertson v Commissioner of State Tax**)
- **Exceptions:** typically in incorporation of terms
 - **Baltic Shipping:** contract formed when ticket issued to passenger
 - Retention of ticket does not indicate acceptance where the passenger would have had no knowledge of, nor opportunity to influence the conditions and regulations printed on the ticket (no notice of unusual provisions)
 - Booking form made it obvious that it was not the contract of carriage
 - **Oceanic Sun Line:** contract formed when exchange order issued by NSW by travel agent to passenger
 - Where it could hardly have been the parties' intention that the offer would only be made after a great expense in cost/travel had been incurred
 - Contract is made when the passenger pays the fare, when some exchangeable document is issued and is too late to alter contractual conditions
 - **eBay v Creative:**
 - When the reasonable person could not be expected to obtain their ticket, read it and object to it; terms are incorporated into the contract for sale of tickets
- In determining if/when a contract was formed, consider:
 - Particular facts and arguments of both parties;
 - Conventional approach (different approaches taken by judges) in *MacRobertson*
 - Approaches taken in *Baltic* and *Oceanic Sun Line*
 - Note: approach of pinpointing moment of O&A can be difficult/artificial

Termination of Offer

Revocation:	<ul style="list-style-type: none"> - May occur any time before acceptance, regardless if offeror promised (as a non-option) to keep it open or a time frame has been given and not yet expired (<i>Dickinson v Dodds</i>) - Effective when it reaches the offeree; communicated by offeror or some other reasonably reliable source (<i>Dickinson v Dodds</i>) - <u>Exceptions:</u> <ul style="list-style-type: none"> o <u>Option contract/subsidiary agreement</u>: if consideration has been given in return for a promise to keep an offer open for a specified time (<i>Goldsborough Mort</i>). Option contract is binding and specific performance can be given. <div style="border: 1px solid black; padding: 10px; margin: 10px 0;"> <p><u>CISG: Article 16</u> – if there is a promise to hold an offer for the international sale of goods open</p> <ul style="list-style-type: none"> - <i>Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.</i> - (2) <i>However, an offer cannot be revoked –</i> <ul style="list-style-type: none"> o (a) <i>if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or</i> o (b) <i>if it was reasonable for the offeree to rely on the offer as being irrevocable and offeree has acted in reliance on the offer.</i> </div> o <u>Unilateral contract</u>: if performance (acceptance) commenced, offeror can revoke unless there is an implied ancillary contract not to revoke (<i>Mobil Oil</i>) <ul style="list-style-type: none"> • No universal rule that a unilateral offer cannot be revoked before acceptance. Remedy may be sought under an implied ancillary contract not to revoke <i>or</i> estoppel.
Lapse of Time	<ul style="list-style-type: none"> - If neither revoked/accepted, offer will lapse at end of specified time; or if no time is stipulated, at the end of a reasonable time (<i>Ramsgate Victoria Hotel Co v Montefiore</i>) <ul style="list-style-type: none"> o Objective test: dependent on context
Death of Offeror	<ul style="list-style-type: none"> - Offer will lapse on death of offeror, where offeree has notice of death (<i>Fong v Cilli</i>) - Offer may still be accepted before notice of death, unless personal services required (<i>Fong v Cilli</i>) - No clear authority as to whether an offer will lapse on death of offeror when offeree doesn't know of the death (dependent on parties intentions/circumstances) - Option contracts remain enforceable against deceased estate unless: <ul style="list-style-type: none"> o Personal services of the deceased are required; or o Intent of the option was that it not to be exercisable after death (<i>Laybutt v Amoco Australia Pty Ltd</i>) - No clear authority as to whether an offer will lapse on <u>death of offeree</u>, however it seems that an offer would generally lapse (dependent on intentions/circumstances)
Failure of Conditions/ Changed Circumstances	<ul style="list-style-type: none"> - Offeror may stipulate circumstances in which an offer will stay open or lapse. - If not expressly stated, may still be evident to an objective observer that the offer was made on the basis of certain circumstances and that, if these circumstances were to change, the offer would lapse. - Must be a fundamental change in circumstances to cause the offer to lapse – rare occurrence; high test (<i>Nielsen v Dysart Timbers</i> – <i>change in circumstances was reasonably foreseeable</i>) - Focus on objective intention of offeror

Rejection and Counter-Offer

- Rejection of an offer terminates the offer
- A counter-offer kills the original offer and transfers onus between parties (*Stevenson, Jaques & Co v McLean*)
 - o Distinguished from 'mere inquiry': not a rejection (*Stevenson*)
 - o However, a rejected offer may in all the circumstances be treated as remaining open and available for acceptance on basis of mutual assent manifested by conduct (Heydon J, *Brambles*)

CISG: **Article 19** – Counter Offers

- *A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.*
- *(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.*
- *(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.*