

FORMATION

[A] will argue that a binding contract exists, and seeks to enforce [B]'s promise of _____. In this case, the elements of _____ and _____ are likely uncontentious, but [A] will have to make out _____ and _____.

Offer

[A] will argue an offer was made in [X]. To do this [A] must prove the offer was sufficiently clear and promissory in nature, and did not terminate before acceptance occurred.

(1) Introduction

An offer is an objective manifestation of willingness to be bound by certain terms, upon the acceptance of those terms by the relevant party (*Gibson v Manchester*).

(2) Elements

- Sufficiently clear and promissory (*Gibson v Manchester*)
- More than a mere puff (*Carbolic Smoke Ball*)

2.1 Distinct from an Invitation to Treat

- An invitation to treat lacks sufficient indication of willingness to be bound

2.1.1 Advertisements

- Advertisements are usually non-contractual (*Carbolic Smoke Ball*)

2.1.2. Shop Sales

- *Pharmaceutical Society v Boots Chemist*
 - o Goods displayed on shelves are an invitation to treat.
 - o Offer occurs when the customer presents their chosen item at the counter.
 - o The store can thus choose to accept or reject this offer by allowing or refusing sale.

2.1.3 Online Sales

- The mere advertisement of an item for sale falls under invitation to treat – extension of *Boots* principle.
- *s14B ETA* – A proposal is considered to be an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

2.1.4 Auctions

- *AGC v McWhirter*
 - o General rule is auction is invitation to treat
 - o Bid = offer
 - o Acceptance = fall of the auctioneer's hammer

2.1.5. Tenders

- General rule is a request for tenders is an invitation to treat
- Tender from an interested supplier constitutes an offer – but depends on the circumstances
 - o The wording of the call for tender may be such that certain bids must be accepted (*Harvela Investments v Royal Trust Co.*)
 - o Sometimes the call for tenders in itself will create a contract regarding the tender process (*Hughes Aircraft v Airservices Australia*)

2.2 Ticket Cases

2.2.1 Conventional Approach

MacRobertson v Commissioner of State Tax

- Ticket = offer
- Purchaser can then choose to accept or reject after they have had a reasonable opportunity to read the terms

More on ticket cases in **Express Terms**

(3) Termination of an Offer

3.1 Revocation by Offeror

- Can occur at any time before acceptance, even if there has been a previous promise by the offeror to keep offer open (as the offer itself has no contractual force)
- Revocation effective when communicated to the offeree (*Dickinson v Dodds*)

3.1.1 Exceptions

- If the offeree has paid to keep the offer open (*Goldsborough Mort v Quinn*)
 - o Conditional contract (exercising option to proceed with sale) vs two separate contracts (one to keep initial offer open, second to sell the land)
- If performance of a unilateral contract has already commenced, and it is unfair to revoke the offer (NB: not a general rule) (*Mobil Oil v Wellcome*)
 - o There may be times where there is an ancillary contract not to revoke the offer once the offeree commences performance, considering:
 - Does the offeror know of the offeree commencing performance?
 - Does the offeree understand that incomplete performance is at their own risk?
 - Did the parties intend that the offeror should be able to revoke the offer?
 - Is the performance beneficial or detrimental?

3.2 Lapse of Time

- Offer may be open for a specified period, and will lapse at the end of that period
- If no period is specified, the plain objective text says that it will lapse after a “reasonable time”
 - o Judged on context

3.3 Death of Offeror

3.3.1 Contract for Personal Services

- Contract will terminate immediately if the contract involved personal services of the offeror
 - o i.e. if it is essential for the personality of the contract that the offeror remains alive

3.3.2 Contract **not** for Personal Services

- The contract will terminate on receipt of notice of death of the offeror
 - o Unless there is an enforceable option contract (*Fong v Cilli*)
 - Option contracts remain enforceable against deceased estates unless the intent of the option was not to be exercisable after death (*Laybutt v Amoco Australia*)

3.4 Change of Circumstances or Failure of Condition

- Offers may be subject to specific conditions or events occurring
 - o If the condition is not express (implied), the change or failure must be sufficiently **fundamental** to the offer to cause cessation (*Neilson v Dysart Timbers*)

3.5 Rejection by Offeree

- Once an offer has been rejected, and this rejection communicated to the offeror, it is no longer available for acceptance (*Stevenson, Jacques & Co v McLean*).

3.5.1 Counter Offer v Mere Inquiry

- Counter offer constitutes rejection of the initial offer, and transfers onus of acceptance to initial offeror.
- Mere inquiry (e.g. “would you accept?” or “is there room for movement?”) does not terminate an offer.

(4) CISG

If the contract is one to which the *United Nations Convention for the International Sale of Goods* (‘CISG’) applies:

- Article 14: Invitation to Treat
 - o A proposal that is not sufficiently definite and does not indicate the intention of the offeror to be bound in case of acceptance is to be considered as merely an invitation to make offers, unless the contrary is clearly indicated.
- Article 16:
 - o An offer may be revoked before contract is concluded if revocation reaches the offeree before acceptance.
 - o An offer cannot be revoked if it indicates that it is irrevocable:
 - By stating fixed time for acceptance; or
 - If it was reasonable for offeree to rely on the offer as being irrevocable and offeree has acted in reliance of the offer
- Article 19: Rejection and Counter-Offer
 - o A reply to an offer which contains additions, limitations or other modifications is a rejection of the offer, and constitutes a counter-offer.
- If the reply to the offer contains additional or different terms that do not materially alter the terms of the offer, this may constitute acceptance, unless without delay the offeror objects to the discrepancy.

Acceptance

[A] will argue that acceptance was established by [X]. To do this, [A] must show that it was the objective intention of [B] to accept the offer, and this acceptance was communicated to the offeror.

(1) Introduction

Acceptance is unqualified assent to the terms of an offer.

(2) Intention

Objective test for intention to accept an offer = **would the reasonable person consider the parties to have reached agreement having regard to their external manifestations?** (*Fitness First v Chong*)

- Does not require a “meeting of the minds” as in *Smith v Hughes* which applied subjective intention of the parties.
- Parties need not be of the same mind, or have read and understood the terms of the agreement (*Fitness First v Chong*).

2.1 Consciousness of the Offer

For unilateral offers, there must be knowledge of the offer, and acceptance must be in response to the offer (*The Crown v Clarke*)

- Exception to the general rule of external manifestations

(3) Communication of Acceptance

General Rule

- Acceptance must be communicated to the offeror, and does not occur otherwise (*Latec Finance v Knight*)

3.1 Exceptions

- Acceptance may be inferred from conduct (*Empirnall Holdings, Brambles*)
- Offeror may dispense with need to communicate depending on the terms of the offer (*Carbolic Smoke Ball*)
 - o Common in unilateral contracts

3.2 When is communication effective?

General Rule

- Contract is formed when and where acceptance is received by the offeror (*Brinkibon Ltd v Stahag Stahl*)
- Applies for instantaneous communication
 - o E.g. telephone, face-to-face

3.2.1 Exceptions

Postal Acceptance Rule

Applies to **non-instantaneous communication**

- Acceptance occurs when the letter is posted, even if it is received some time later or is lost in the post (*Adams v Lindsell*)
- May apply depending on the intentions of the parties

NB: postal acceptance rule does not apply under CISG Articles 18(2), 24

Electronic Transactions (Victoria) Act 2000 (Vic)

Applies to electronic communication of acceptance

- Electronic communications sent to a designated address are effective when capable of being retrieved by addressee (s13A ETA)
 - o s3 ETA: “electronic communication” definition
 - o s13A(1)(b): If no electronic address has been designated, the time when both:
 - The electronic communication becomes capable of being retrieved by the addressee; AND
 - The addressee has become aware that the electronic communication has been sent to that address
 - o Parties may agree otherwise

3.3 Non-verbal Acceptance

3.3.1 Silence

Acceptance **may not** be inferred from silence alone (*Felthouse v Bindley*)

- Even if the contract stipulates silence as the prescribed method of acceptance

3.3.2 Conduct

Conduct **may** amount to acceptance (*Empirnall v Machon Paull, Brambles Holdings*)

- Test = would a reasonable bystander regard the conduct of the offeree as signalling to the offeror that the offer has been accepted?

(4) Correspondence Between Offer and Acceptance

- It is common business practice to accept some terms and propose new ones without rejecting an offer.

4.1 Battle of the Forms

If both parties attempt to impose their own terms on the contract there are two approaches to determine included clauses (*Butler Machine v Ex-Cell-O*).

4.1.1 Conflict Approach

Traditional approach whereby the “last shot” prevails (*Lawton and Bridge LJJ*)

- When the last form was agreed and uncontested

4.1.2 Synthesis Approach

Requires analysis of the contract as a whole to identify the terms included. (*Denning LJ*)

- May have a combination of terms
- In most cases, the battle is won by whoever fires the last shot, but in some cases the battle is won by whoever gets in first.

(5) CISG

Article 19: Rejection and Counter-Offer

- Allows for certain non-material discrepancies between the offer and acceptance