

Contracts

TOPIC 1 - OFFER

1.1 Offer

Indication by one person to another of their **willingness** to enter into a contract with that other person on certain terms.

- However, it may be difficult to identify conduct that can be characterised as an offer on one side, and conduct that can be characterised as acceptance by the other.
 - o Courts still use traditional offer and acceptance approach despite deficiencies.

To determine whether there is an offer, look to whether it appears to a **REASONABLE PERSON** in the **position of the offeree** that an offer was **intended**, and that a **BINDING** agreement would be made upon acceptance. (Carlill)

- Does not matter that the offeror may not have intended, look to the **objective behaviour** of the parties.
- **Sufficiently clear and promissory** (Gibson)

1.2 Types of Contract

Bilateral Contract – 2 parties each exchange 2 or more promises to do something in the future (executory).

Unilateral Contract – 2 parties only exchange promises where one is completed at the time of the formation of the contract (executed) and the other is to be completed in the future (executory).

1.3 Distinguishing from Offer

Invitation to treat - an invitation for **others** to make **offers** or to enter into **negotiations**.

Mere puff – exaggerated sales talk, some sort of action to enforce the promise is taken (i.e \$1000 deposit into bank) (Carlill).

Ambiguous Situations

Shop Sales

Display of goods for sale, whether in a show window or self-service store, is ordinarily treated as an invitation to treat, and not an offer (*Boots Cash Chemist*).

- i.e if customers can take the items and return them without entering into contract, **them bringing the item to checkout is the offer** (*Boots Cash Chemist*).

Auctions

Holding of a public auction would usually be regarded as an invitation to treat. Auctioneer **does not make an offer to sell**, but merely **invites offers** from those present. **Bid constitutes as the offer** and auctioneer accepts by hammering.

- No contractual breach for cancelling auction, bidder is able to withdraw before bid accepted, and **auctioneer not obliged to sell to highest bidder** (*AGC v McWhirter*).
 - o Even if auction is **without reserve did not constitute an offer** and did not bind the vendor to sell to the highest bidder.

Tenders

A call for written tenders is considered an invitation to treat, with each tender being an offer. However, a person calling tender can **stipulate the process** and will be **bound by any conditions**.

- If party states that they would be bound by the highest bid, **it converts the invitation to treat into an offer** (*Harvela Investments*).

Ticket Sales

Ticket cases relate to **when** an offer and acceptance has occurred. Multiple views have been put forth (*MacRobertson Miller*)

- General view is that a ticket is an **offer** that the passenger can either **accept or reject** after they have had a **reasonable opportunity** to do so.
- Potentially different view where the ticket is an invitation to treat and the passenger handing it to the airline is the offer, and the airline offering a seat is the acceptance.

Electronic Transactions/Adverts (*Electronic Transactions (Vic) Act 2000, s14B; CISG*)

Agreement in electronic transactions happen the same way as other forms of communication. Online adverts that:

- a) Are not addressed to specific party
- b) Generally accessible through information systems

Are **invitations to treat**, unless made clear that offeror intends to be bound in case of acceptance.

Person can still create agreements with an automated system.

1.4 Termination of Offer

Offer will **cease** to be available when it is **withdrawn** by the offeror, **lapses or is rejected** by the offeror.

Withdrawal

Offer may be revoked at any time before it is accepted (*Dickinson v Dodds*).

Option = Promise to hold an offer open for a specified period is **not binding** unless the offeree has given **consideration** for that promise (*Goldsborough*).

- Article 16 CISG if you state that you will keep offer open for fixed time, you are bound by it.

Rejection and Counter Offer

Once an offer has been rejected, it is no longer available for acceptance. A **rejected offer** may later be revived or form basis of a new agreement (*Brambles*). Must be **communicated** to the offeree.

- A rejected offer may in all circumstances be treated as remaining open and available for acceptance on the **basis of mutual assent manifested by conduct** (*Brambles*)

A **counter offer** is treated as a **rejection** of original offer and will extinguish it.

- Difference between counter offer and **inquiry**, offeree is not intending to reject the offer but seeking **guidance** as to accept or reject the offer (*Stevenson*).
 - o Look to intention of parties.

Unilateral Contracts

No issue if offer is revoked before performance has occurred. However, even if performance has **begun to occur, the offeror may still rescind the offer before it is completed** (*Mobil*).

- Can only be prevented through an ancillary contract or estoppel claim.

Lapse of Time

Offer expressed to be available for acceptance for a particular period of time **will lapse at end of period**. If no period given, will lapse after **reasonable period of time**. Will depend on the circumstances, subject matter and form of contract.

Death of Offeror

If offeree **accepts offer without knowledge** that offeror died, and the obligation can be performed by executor, the **contract is valid** (*Fong v Cilli*). In all other circumstances, the contract will be void at death of one of the parties.

- Option can be held by offeree's representatives if offeree dies, if it isn't personal to them. Also, option can be enforced against offeror's representatives if offeror dies (*Laybutt v Amoco*)

Failure of Condition and Changed Circumstances

Offer can be made subject to an express or implied condition before it can be accepted. Alternatively, offer may become void once condition fulfilled.

Not every change in circumstances will cause the offer to lapse. Level of change which is required to lapse is a fundamental change in circumstances (*Nielsen*).

- Look to objective intention offeror having regard to terms of offer and circumstances to which it was made.
- High threshold, fundamental change would be rare (*Nielsen*).

1.4 CISG

Article 14 – Invitation to Treat

- 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 –

- An offer may be revoked before contract is concluded if revocation reaches the offeree before acceptance.
- An offer cannot be revoked if it indicates that it is irrevocable:
 - o By stating fixed time for acceptance; or
 - o If it was reasonable for offeree to rely on the offer as irrevocable and offeree has acted in reliance of the offer.

Article 19 – Rejection and Counter Offer

- 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 may constitute acceptance, unless without delay the offeror objects to the discrepancy,

Conclude – Would a reasonable person in place of offeree consider that an offer had been made?

Case	Facts	Issue	Held
<i>Carlill v Carbolic</i>	D sold a device to P, stated in ad that they would pay 100 pounds to anyone that contracts influenza. Put 1000 pounds in bank. P contracted influenza	Was there an offer? Offer made to whole world rather than individual person. No intention? Mere puff?	Look to objective intention. Offer can be made to the whole world. Intention found in the 1000 pounds deposited in bank.