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AGREEMENT

Agreement may be shown by offer and acceptance.

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.

“An offer may be described as the indication by one person to another of his or her willingness to enter into a contract with that other person on certain terms” – leaves nothing to be negotiated.

The courts use objective standard, i.e. the view of a reasonable person in the offeree’s position.

An offer must be sufficiently certain and promissory, e.g. not “may be prepared” (*Gibson*).

A mere puff (exaggerated sales talk) is not an offer (*Carlill*).

Unilateral Contracts

Must be a relation of *quid pro quo*, i.e. this for that (*Australian Woollen Mills*).

The offer is accepted by performing the act, and the performance of the act is all that the contract requires of the offeree (no need to give notice of acceptance prior to performance).

It is possible to make offer to the public at large. There is no rule that an advertisement cannot be an offer (*Carlill v Carbolic Smoke Ball*).

Invitations to Treat

An offer is distinguished from an invitation to treat which is an invitation to others to make offers or enter into negotiations. Not an offer because lacks sufficient indication of willingness to be bound.

Shop Sales

Goods displayed on shelves are an invitation to treat and customers make an offer to buy at the checkout but are not bound until cashier accepts that offer (*Pharmaceutical Society v Boots Chemist*).

Online Proposals

14B. Invitation to treat regarding contracts (ETA)

- 1) 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) Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.

Goods or services offered online generally to be treated as an invitation to treat (unless clear intention to be bound by acceptance) (s 14B).

Analyse particular offer of goods. Are they intending to be bound by acceptance?

The offer is not invalid on the grounds that a natural person was not involved in the process (s 14C).

Where a natural person makes an “input error” while transacting with an automated system, and the system provides no opportunity to correct that error, the person is entitled to “withdraw the portion of the communication in which the input error was made”, provided that they do this as soon as possible after learning of the error and provided that they have not received any benefit from goods or services provided by the other party (s 14D).

Auctions

General rule is that:

- the auction is an invitation to treat – auctioneer invites offers from those present at auction;
- each bid is an offer; and
- the offer is accepted by the auctioneer's "fall of the hammer" (*AGC v McWhirter*).

The bidder is entitled to withdraw their bid before it is accepted (*Payne v Cave*).

A bid may be retracted until the auctioneer announces the auction as complete (s 64 *Goods Act*).

Auctioneer not obliged to sell to highest bidder (*AGC v McWhirter*).

The seller can withdraw the property before acceptance of a bid.

The general rule is said to apply even when the auctioneer says a property is "on the market", or advertised for auction "without reserve" (*AGC v McWhirter*).

Tenders

A tender process involves each interested party submitting a single bid without knowing what other bids have been made.

A person calling for tenders may stipulate the basis on which the tender process will be conducted and will be bound by any conditions which they said will govern the tender process, e.g. in *Harvela* where a call for tenders was held to amount to an offer because the vendor promised to accept the highest bid.

The general rule is:

- request for tenders is an invitation to treat – unless it indicates that the best tender will be accepted (*Harvela*)
- tender from interested supplier is the offer

But there are exceptions:

- Sometimes the call for tenders may be an offer (*Harvela*):
 - "...we bind ourselves to accept" – invitation to treat becomes offer
- Sometimes the call for tenders will create a contract re: tender process (*Hughes Aircraft Systems*) – assessment criteria?

CISG: Offers and Invitations to Treat

(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.

WEEK ONE

OFFER

Gibson v Manchester City Council – ITT not offer

1979 UK

Tories' council - 'may be prepared to sell' to G. Council changed to Labour. Labour sought to withdraw from all negotiations not already executed. G sued for breach of CN.

Council's letter was ITT. G's response was offer which was accepted by Council. No CN.

Wording – 'may be prepared to sell' and request for a 'formal **application**'.

An offer must be sufficiently certain and promissory; ordinarily must be mirrored by clear acceptance for there to be agreement.

Carlill v Carbolic Smoke Ball Co – offer not ITT

1893 UK

Carbolic placed ad in paper. 100p reward to anyone using the ball for two weeks who then gets flu. 1000p deposit in bank – sincerity. P purchased on faith of ad. Got flu.

Carlill performed all necessary conditions on faith of ad; thus unilateral CN existed.

Unilateral contract – notification of acceptance need not *precede* performance.

Not a 'mere puff' bc of deposit = ITCLR.

P's use of ball was sufficient detriment for consideration/ advantage of sales to Carbolic sufficient benefit.

Offer can be made to the world at large.

MacRobertson Miller Airline Services v Commissioner of State Taxation – airline re: ticket cases

1975 HCA

Mac issued ticket with flight details in return for fare. Pax presented ticket to secure seat on flight. Condition on - right to abandon or cancel flight and airline will be under no liability to passenger other than return of fare. Was it an agreement/memo of agreement for stamp duty?

Barwick CJ: ticket is a receipt of payment, passenger makes the offer by presenting at the airport, airline accepts by carrying passenger.

Stephen J: ticket is an offer to passenger (re: t&c on ticket). Acceptance occurs when passenger acts consistently w the offer or fails to reject the offer within a 'reasonable time' ('**conventional analysis of contract formation**').

Jacobs J: there are 2 CNs. Pax accept airline's offer, consequently forming an executory CN.

OFFERS DISTINGUISHED FROM INVITATIONS TO TREAT

SHOP SALES

Pharmaceutical Society of Great Britain v Boots Cash Chemists – chemist re: offer/ITT

UK 1953

Drug store drugs processed by cashier with pharmacist supervision. When was the CN made?

Drugs on shelves ITT. Offer made at cashier. Cashier accepts by processing purchase.

Items on shelves/catalogues/etc. generally invitations to treat.

Electronic Transactions Act (Vic) 14B. Invitation to treat regarding contracts

1. 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 systemsis 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. Subsection (1) extends to proposals that make use of interactive applications for the placement of orders through information systems.

Goods or services offered online are to be generally treated as an invitation to treat, unless there is a clear intention to be bound by acceptance.

AUCTIONS

***AGC (Advances) Ltd v McWhirter* – auctions**

1977 NSW

P, mortgagee, had mortgage over property. Ds, McWs, directors of owning company and became liable under guarantee on default. Highest bid of 70k less than reserve. Auctioneer withdrew reserve. McWhirter bid 70.5k. Auctioneer did not accept because of previous mortgage issues. Property knocked down to previous bidder at 70k. Ds lodged caveat preventing transfer of title. P sought a court order to remove caveat. No CN. Open to auctioneer to accept/reject any bid.

Bids are mere offers not binding until assented to by the auctioneer, usually by fall of the hammer.

TENDERS

***Harvela Investments Ltd v Royal Trust Co of Canada* – tender - ‘highest offer’**

1986 UK

Harvela & Outerbridge were requested to submit tenders for the purchase of shares. Whoever was successful would become majority holder.

Invitation stipulated offers to be made by sealed tender or confidential telex, not to be divulged before expiry of invitation, when the vendors would accept “the highest offer”.

Harvela offered. 2.175m, Leonard offered. 2.1m ‘or 100k in excess of any other offer expressed in fixed terms’. Royal Trust accepted Leonard’s bid. Harvela sought injunction.

Tender process was a fixed bid sale [depends on construction of telex]. Referential bidding not permitted. Due to terms of RFT, vendor bound to accept highest fixed bidder.

Tenders are generally fixed bidding process where referential bids not accepted and tenderer obliged to accept highest [or ‘best’, according to established criteria] bid.

***Hughes Aircraft Systems v Airservices Australia* – tender - aircraft**

1997 FCR

Hughes was the unsuccessful tenderer in a 2 party bid for air traffic control services & claimed the tendering process wasn’t complied with. Issues arisen on first tender process and a fresh process began. To avoid issues they both signed a letter setting out criteria for assessment. Contract awarded to other party under different assessment criteria.

A party calling for tenders can only issue a ITT, but steps taken may result in making contractual commitments re: the tendering process.

If parties enter into agreement about tender process, may be an implied duty of good faith to evaluate in accordance with established procedures.