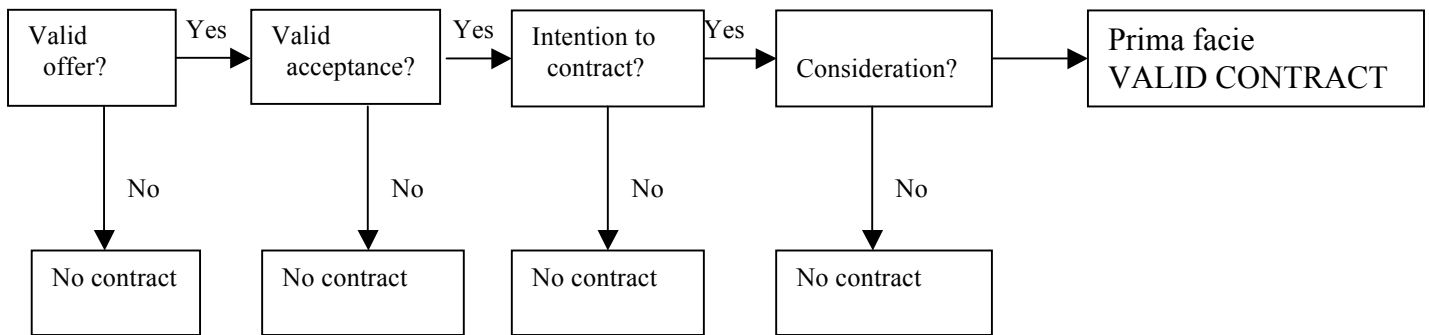


## Forming a Contract



To be a contract, the arrangement between the parties must show certain elements. If those elements are not present, the agreement is not a contract and the courts will not assist in its enforcement.

## Offer and Acceptance

### Definitions and Rules:

“Offer” = indication of willingness to enter into contract on certain terms;  
 = a proposal by the offeror intended to create an agreement upon its acceptance by the offeree  
 - Offeree can, accept, reject, make a counter offer, ask for info, or do nothing

An offer is not: (1) sales puff  
 (2) mere supply of information (*Harvey v Facey*)  
 (3) an invitation to treat (*Partridge v Crittendon* – advertisement;  
*Pharmaceutical Society v Boots Cash Chemists* – display of goods)

Termination of Offer: (1) revocation is effective when communicated (*Byrne v Van Tienhoven*; *Dickinson v Dodds*)  
 (2) counter offer destroys original offer (*Hyde v Wrench*)  
 (3) lapse of time destroys offer (*Ramsgate Victoria Hotel v Montefiore*)  
 (4) Revocation must be communicated before acceptance (ryne can Tienhoven)  
 (5) If the offeror uses the post to revoke the offer it is not effective until received

Note also: (1) advertisements can sometimes be offers (*Carlill v Carbolic Smoke Ball*)  
 (2) a request for information is not a counter offer (*Harvey v Facey*)  
 (3) option = irrevocable offer (*Goldsborough Mort & Co Ltd v Quinn*)

“Acceptance” = assent to terms of offer in manner specified

Rules: (1) with knowledge of and in reliance on offer (*R v Clarke*)  
 (2) communicated to offeror (*Felthouse v Bindley*; *Powell v Lee*), but note exceptions.  
 (3) postal rule – acceptance on posting (*Adams v Lindsell*)

(4) however, postal rule probably does not apply to emails, so that an acceptance email should be received to be effective. Under s 14A(1) of the Electronic Transactions Act 1999 (Cth) an electronic communication is received when it becomes capable of being retrieved by the receiver.

(5) must be clear and certain

(6) cannot be conditional (Masters v Cameron)

(7) method of acceptance: as specified or by means no less advantageous to offeror

### **Intention to Contract**

1. If the agreement is social or domestic, there is a presumption that the parties do not intend to be legally bound (Balfour v Balfour). However, this presumption can be rebutted, eg if the consequences of the agreement are serious (Wakeling v Ripley)
2. If the agreement is made in a commercial context, the court will presume that it is intended to be legally enforceable. However, this presumption can be rebutted by evidence that the parties do not intend to be legally bound (Rose and Frank v Crompton).

### **Consideration**

Consideration is the price given by one party for the promise received from the other party.

Defined in (Curie v Misa) as:

‘ some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other’

Consideration may take the form of (a) payment of money, (b) provision of goods and/or services, (c) refraining from doing something, (d) undertaking some obligation, or (e) a promise to do any of the above.

Rules:

- (1) consideration must occur in response to the promise
- (2) consideration cannot be past (Roscorla v Thomas; Anderson v Glass)
- (3) consideration need not be adequate (Thomas v Thomas)
- (4) however, consideration must be sufficient – something of value. Hence,
  - (a) consideration cannot be vague (White v Bluett)
  - (b) consideration cannot be a prior legal obligation (Stilk v Myrick) unless the party does something more than what the original contract required (Hartley v Ponsonby) or if the practical benefit test is satisfied (Musumeci v Winadell)
  - (c) consideration cannot be part payment of a debt (Foakes v Beer), unless something extra or different is done, eg part payment before the due

date, part payment with additional consideration, part payment in a different currency, part payment by a third party

- (d) consideration is not sufficient if the consideration is a public or legal duty (*Glasbroek Bros v Glamorgan County Council*)
- (5) Promissory estoppel is an equitable principle which does away with the requirement for consideration. In the *High Trees* case and *Waltons Stores v Maher*, it was held that a promise is enforceable even if the promisee has not provided consideration for the promise as long as the promisee relied on the promise to their detriment and it would be unfair for the promisor to break their promise.