

# AGREEMENT

## Nature of an Offer

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** (*Gibson*)

OR

A proposal amounts to an offer if the person making it **indicated** that **an acceptance is invited** and will conclude the agreement between parties

- OBJECTIVE TEST: does it appear that a RP in the position of the offeree that an offer was intended, and that a binding agreement would be made upon acceptance (*Gibson*)
  - Doesn't matter if the offeror intended to make the offer
- Offeree has the option between acceptance and rejection (*Brambles Holdings Ltd*)

## Bilateral Contracts:

- 2 parties to the contract
- Both parties exchange a promise or set of promises for each to do something in the future
- Both promises are executory
  - Performed after the contract is formed

## Unilateral Contracts:

- Reward scenario
  - Acceptance of the offer is doing the act
- A's obligations are executory and B's obligations have been executed
  - *Carlill v Carbolic Smoke Ball Co*
- This contract must only have two parties and one has performed their obligations by the time of formation
- *Australia Woollen Mills Pty Ltd v Commonwealth*: the presence of a request does not in itself establish a contract
- **Mere Puff**: exaggerated sales talk which a RP would not consider a serious offer
  - Offer to the world at large
    - *Carlill v Carbolic Smoke Ball Co*

## *CISG Article 14 – Offer v Invitation to Treat*

### **Invitations to Treat**

An invitation to others to make negotiations or make offers and lacks sufficient indication of willingness to be bound

- Catalogues
- Items in a shop (*Pharmaceutical Society v Boots*)
  - *Fisher v Bell*: owner who displayed a flicker-knife has not breached statutory offence of 'offering' knives because it was an invitation to treat
- Auctions: offers are accepted at the fall of the hammer
  - *Sale of Goods Act 1958 s 62; AGV (Advances) Ltd v McWhirter*

Online Sales: *ETA s 14B – Invitation to Treat regarding Contracts*

- CL PRESUMPTION
- Unless there is an indication to be bound
  - Offer: going to the checkout
  - Acceptance: confirmation of order
- Proposal to make a contract through electronic communication which is not addressed to a particular person
- ETAs provide contracts formed between natural person and automated system/two automated systems is not invalid
- ETAs provide that when a natural person makes an 'input error' during the transaction, the system provides no opportunity to correct the error
  - Person making the error is entitled to withdraw the portion of the communication where error was made
  - Provided they do not receive any material benefits from the goods and services
  - There is no right in this to rescind the whole contract
    - This may sometimes impact the validity of the contract

#### Tenders:

**Tender Process:** whereby interested parties submit an offer without knowing what other offers have been made

- Request for tenders is an invitation to treat, the tender being an offer

#### Government Use:

- Process have obliged tenderers not to withdraw their tenders
  - Govt. has obligation to tenderers

#### Exceptions:

1. *Harvela*: call for tenders may be considered an offer
2. *Hughes Aircraft Services*: invitation to tender can follow particular processes in the tender assessment if that is set out

#### **Ticket Cases**

##### Conventional Analysis:

- Ticket is an offer (*MacRobertson Miller Airline Services v Commissioner of State Taxation*)
- Looking at the ticket is acceptance
- Courts may have to decipher **when** a contract is made to decide whether terms are part of the contract

#### **Termination of an Offer**

1. Withdrawal/Revocation
2. Lapse
  - a. Death of Offeror/Offeree
3. Failure of Condition or Changed Circumstances
4. Rejection and Counter Offer

##### Withdrawal/Revocation:

- Offer may be revoked any time before acceptance (*Dickinson v Dodds*)
  - By word or action inconsistent with the offer

- Effective when it reaches the offeree (*Dickinson v Dodds*)

#### Exceptions:

- CL: promise to hold offer open for a specific time period is not binding unless there has been consideration (*Goldsbrough, Morr & Co Ltd v Quinn*)
  - Can be revoked before the time period is over
  - Unilateral: part performance, implied contract not to revoke (*Mobil Oil*)
- **Option**: an agreement between the option holder and the grantor under which the option holder is entitled to enter into a contract with the grantor on specified terms
- If there is a promise to hold open an international sale of goods (**CGIS Art 16**)

#### Lapse:

- Stipulated period of time: lapse at the end of period
- No stipulated period: lapse when a reasonable amount of time has passed
  - Can be implied or decided by court that offeror has not accepted in a reasonable time

#### Reasonable Time:

- Depends on the circumstances
  - Nature of the subject matter
  - Offer form
    - Verbal offers lapse quicker
  - What a RP could consider reasonable time

#### Death of Offeror/Offeree:

- Personal service contracts always lapse (*Laybutt*)
- Offeree is aware of the death of the offeror, offer lapses (*Fong v Cilli*)

#### Failure of a Condition or Changed Circumstances:

- Condition may be that an offer lapses after the happening of a certain event
- Change must be substantial/fundamental in the circumstances (*Neilson v Dystart Timbers Ltd*)

#### Rejection and Counter Offer:

- **Counter Offer**: intention to reject the original offer
- **Inquiry**: no intention to accept or reject and offer is still open (*Stevenson, Jaques & Co v McLean*)

CISG Article 19: allows counter-offers to constitute acceptance as long as it does not materially change the terms of the contract