

Latin Terms

Latin Term	Definition
<i>ab initio</i>	from the beginning
<i>Caveat emptor</i>	Buyer beware
<i>consensus ad idem</i>	meeting of the minds - where all parties have the same understanding of the terms of a contract
<i>contra proferens</i>	any ambiguity in an exclusion clause will be construed against the benefiting party
<i>cortum est quot cetum reddi potest</i>	if essential terms are left to be agreed upon, there is no contract
<i>de minimis no curae lex</i>	the law does not concern itself with trivialities
<i>ex dolo malo no oritor actio</i>	no court will lend its aid to a man who founds his cause of action on an illegal or immoral act
<i>ex gratia</i>	something extra to show goodwill
<i>ex turpi causa non orityr actio</i>	a court will not allow a party to base a cause of action upon an illegal act
<i>force majeure</i>	frustration will not apply where the parties foresaw the event and inserted a term in the contract to cover the event
<i>in pari delicto portior est condition possidentis</i>	where both parties are at fault, property should remain with the party who has possession of it when the matter is disputed
<i>inter alia</i>	amongst other things
<i>nemo dat quod non habet</i>	one cannot give what one does not have
<i>non est factum</i>	this is not my deed
<i>non haec in foedera veni</i>	it was not this I promised to do
<i>prima facie</i>	on its face
<i>quantum meruit</i>	the amount deserved; action for the reasonable value of services performed
<i>quid pro quo</i>	something for something
<i>res extincta</i>	the subject matter has ceased to exist
<i>res sua</i>	the purchaser already owns the subject matter
<i>restitutio in integrum</i>	restoration to initial condition
<i>solus</i>	trade regulation clause
<i>sui juris</i>	an adult of sound mind
<i>uberrimai fidea</i>	with utmost good faith/in full confidence
<i>ultra vires</i>	a company is only able to contract if about a matter specified in its constitution (no longer valid)
<i>verba ita suni intelligenda ut res insgis ral eat quam pereat</i>	words are to be construed so that the thing may avail rather than perish

Topic 2: Contract Formation

2(a)(b): Agreement: Offer and Acceptance

- **CONSENSUS AD IDEM** = meeting of the minds (**SMITH V HUGHES (1871)**).

Offer

- An offer can be bilateral (between two people) or unilateral (made to the world) (**CARLILL**).
- An offer is only valid if it identifies a valid **consideration** and manifests an **intention** to create a legal obligation. It must also have an element of **certainty** (**AUSTRALIAN WOOLLEN MILLS V COMMONWEALTH (1954)**).
- The offer must be definite → the test is **objective**: would a reasonable person in the position of the offeree believe that an offer was intended and that a binding agreement would be made upon acceptance? (**JOHN HOWARD V J P KNIGHT (1969)**).
 - Motive of acceptor is immaterial (**WILLIAMS V CARWARDINE**)
 - Knowledge essential; offer must be in the mind of the acceptor at the time of accepting (**R V CLARKE**).
- If the offeree is unaware of an offer, then it would be impossible to accept it (*Fitch v Snedaker*).
- An offer must be distinguished from:
 - 'mere puffs' (exaggerated statements that a reasonable person would know to be false) (**LEONARD V PEPSICO INC 88 SUPP 2ND (1999)**).
 - A request for information (**HARVEY V FACEY (1893)**).
 - Invitation to treat (**PARTRIDGE V CRITTENDEN (1968)**).
 - Advertising goods for sale in brochures (**GRAINGER V GOUGH (1896)**).
 - Display of goods for sale (**PHARMACEUTICAL SOCIETY OF GREAT BRITAIN V BOOTS (1953)**).
- Termination of the offer → an offer may be revoked at any time prior to the moment of acceptance.
- There may be conditions of acceptance within the contract and it may lapse – if a contract has lapsed, it cannot be accepted.

Auctions

- The bidder makes an offer, the owner accepts at the fall of the hammer = there is no legal relationship prior to the fall of the hammer (or selection of tenderer) (**PAYNE V CAVE (1789)**).
 - Codified under **s59 SALE OF GOODS ACT 1923 NSW**.
- There is no claim if the auction is cancelled (although the auctioneer may be at risk). (**HARRISON V NICKERSON (1873)**).
- **Auctions with a reserve**: the call for bids = invitation to treat.
- Online auctions were simply a different form of auction, with the same standard set of rules that applied to a conventional auction (*Smythe v Thomas (2007)*).

Tenders

- A tender does not usually constitute as an offer (*Spencer v Harder (1870)*) BUT liability may arise if:
 - The wording indicates the highest or lowest bid may be accepted could be interpreted as an offer (*HARVELA INVESTMENTS LTD V ROYAL TRUST CO OF CANADA (CI) LTD (1986)*).
 - Failure to comply with the agreed tendering process (NB: this does not mean you will necessarily win the tender) (*BLACKPOOL AND FYLDE AERO CLUB LTD V BLACKPOOL BOROUGH COUNCIL (1990)*).
- There is a preliminary process contract which includes an implied term to act in good faith and engage in fair dealing (*HUGHES AIRCRAFT SYSTEMS INTERNATIONAL INC V AIRSERVICES AUSTRALIA (1997)*).

Options

- A form of offer which also contains a promise not to withdraw it for a certain time.
- The offeree must provide a consideration for the benefit of being given the exclusive right to accept for a certain period. This consideration usually consists of a nominal sum of money
- Breach of option = breach of contract = remedy for the breach of main contract should be applied (*GOLDSBOROUGH MORT V QUINN (1910)*).

Tickets

- A ticket may be an offer but is not evidence of a contract (*MACROBERTSON MILLER AIRLINE SERVICES V COMMISSIONER OF STATE TAXATION (WA) (1975)*).
- Automatic vending machines = offer and passenger accepts when taking ticket. Any terms appearing on the ticket issued by the machine that were not drawn to the passenger's attention beforehand could not be regarded as forming part of the contract (*THORNTON V SHOE LANE PARKING LTD*).

Termination

Revocation

- An offer may be revoked by the offeror any time before it has been accepted.
- A revocation of an offer is ineffective until it is communicated to the offeree.
 - Postal rule does not apply to withdrawal of an offer (*BYRNE AND CO V LEON VAN TIENHOVEN AND CO (1880)*).
- There does not need to be an express or actual withdrawal of the offer – communication through a third party will suffice (*DICKINSON V DODDS (1876)*).
- Revocation in unilateral contracts:
 - No decided Australian cases on the subject.
 - Prior to performance can withdraw offer as long as it is publicised as prominently as the original offer (*SHUEY V UNITED STATES (1875)*).
 - A unilateral offer cannot be withdrawn once the offeree has partly performed the requested act (*DAULIA V FOUR MILBANK NOMINEES; ERRINGTON V ERRINGTON*).
 - **BUT NO** general principle preventing revocation of offer in unilateral contracts, regardless of part performance; part of obiter judgement in (*MOBIL OIL AUSTRALIA LTD V WELLCOME INTERNATIONAL PTY LTD (1998)*).

Rejection

- A request for information about an offer does not constitute a rejection (STEPHENSON JACQUES V MC LEAN (1880)).

Counter-Offer

- An offer is terminated if the offeree makes a counter offer.
 - A counter offer is a response that indicates a willingness to contract but on different terms from the offer.
- A counter offer can only be accepted by the original offeror (HYDE V WRENCH (1840)).
- Two approaches suggested in BUTLER MACHINE TOOL CO V EX-CELL-O CORP [1979]:
 - Synthesis approach: per Denning preferred the view that the “**documents** were to be **considered as a whole**, and the important factor was finding the decisive document”.
 - Conflict approach: Lawton and Bridge LJ preferred traditional offer-acceptance analysis, and considered that the last counter-offer killed all preceding offers (“**Last shot**” approach).

Lapse

- When an offer lapses, it no longer legally exists and the offeree can no longer accept it.
- An offer may lapse through:
 - Effluxion of time (offer without a time limit lapses after a reasonable time) (RAMSGATE VICTORIA HOTEL CO LTD V MONTEFIORE (1966)).
 - The death of the offeror/offeree (FONG V CILLI (1968)).
 - Failure of a condition; condition precedent (FINANCINGS LTD V STIMSON [1962]; GILBERT J MCCAUL (AUSTRALIA) PTY LTD V PITT CLUB LTD (1959)).
 - If the offeror becomes incapable of performing, the offer will lapse (e.g. loss of capacity).

Acceptance

- Acceptance is the moment of contract.
- Acceptance must generally be communicated (CARLILL).
 - May be express (oral/writing) or implied (conduct) (BROGDEN V METROPOLITAN RAILWAY CO. (1877)).
 - Silence does not generally constitute acceptance of an offer (FENTHOUSE V BINDLEY (1862)) BUT exceptions (EMPIRNALL HOLDINGS PTY LTD V MACHON PAUL PARTNERS PTY LTD (1988)).
- Conditional acceptance is NOT acceptance; must have final and unequivocal acceptance.
 - Where negotiating parties reach agreement upon contractual terms but make their agreement dependent upon formal documentation, the agreement may be (MASTERS V CAMERON (1954)):
 - i. Where the parties have reached finality (and intend no departure) and merely wish to reflect their agreement in a fuller and more precise form = BINDING CONTRACT.
 - ii. Where the parties have reached finality (and intend no departure) but have made performance of one or more of the terms conditional upon the execution of a formal document = BINDING CONTRACT.

- iii. Where the intention of the parties is not to make a concluded bargain at all until they execute a formal contract = NO BINDING CONTRACT.
- iv. Parties will be bound from this point, but can be replaced by a clearer more revised contract (additional category made in SINCLAIR SCOTT V NAUGHTON [1929]).
- Where the personality of a contracting party is of importance, that person must accept the offer (BOULTON V JONES (1857)).
- Where the offer can be accepted by more than one (even though there can be only one contract) the liability will depend on the ways the terms are construed (PATTERSON V DOLMAN (1908)).

Postal Acceptance Rule

- Where the parties contemplate acceptance by mail, acceptance will be complete as soon as the letter is posted (HENTHORN V FRASER [1892]).
- This rule stands, even if the letter is lost (ADAMS V LINDSELL (1818)).
- Exceptions:
 - **Intention:** acceptance by post MUST have been contemplated (expressly/impliedly) by the parties (HENTHORN V FRASER [1892]).
 - Postal rule can be negated by requiring actual communication instead of constructive (postal) communication (ELIZABETH CITY CENTRE V CORRALYN (1994)).
 - **Revocation:** rule only applies to acceptance – i.e. cannot use for revocation of OFFER (BYRNE AND CO V LEON VAN TIENHOVEN AND CO (1880)).
 - **Instantaneous communication:** The rule does not apply to means of instantaneous communication such as telex (ENTORES V MILES FAR EAST CORP [1955]), telephone or facsimile transmission (REESE BROS PLASTICS V HAMON (1988)).
 - Telegrams have been treated as ordinary mail, exception to public telex (LEACH NOMINEES V WALTER WRIGHT)-DON'T WORRY ABOUT THIS CASE TOO MUCH.
- No universal law about contracts formed by email – look to intentions of the parties and apply general principles of acceptance.
 - Electronic Transactions Act 2000 (NSW) s13 → based on the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996).
 - E-mail not covered by postal acceptance rule, probably acceptance when e-mail has arrived in your inbox and you've seen it in your inbox.