



Contracts Law

By Zohra Arbabzada

Offer

Finding agreement

- Have the parties moved beyond the negotiation stage and reached a binding agreement?
Developed during the 19th century, offer and acceptance analysis has traditionally provided the framework within which to determine whether in fact an agreement exists. This analysis is largely derived from the classical theory of contract that presupposes the parties are free to negotiate and protect their interests. According to this analysis, the parties' negotiations are broken down into discrete elements and classified as offers, counter-offers, acceptances etc. A clear offer and unequivocal acceptance indicate the moment the contract comes into being. However, obviously transactions do not necessarily follow this clear path and application of this analysis can tend to be highly artificial (*MacRobertson Miller Airline Services*).
- Nonetheless, despite the difficulties associated with offer and acceptance analysis in many contexts including 'imposed contracts' (where there is no room to negotiate or no discussion of terms) or voluminous pre-contract discussion, the courts have continued to routinely use this mode of analysis (*Gibson*). Of course, laws relating to estoppel, misrepresentation and misleading conduct have had a significant impact in this area.
- Essentially, the tools of offer and acceptance require a clear indication by the offeror to be bound - the offeror makes an offer to contract. The agreement is completed when that offer is followed by an unqualified assent by the offeree to that offer (acceptance). Whether or not there is an agreement is a matter determined objectively by the courts. The law is not concerned with what the parties actually thought but whether or not particular documentation, conduct, words, circumstances or events may be interpreted as demonstrating an intention to be legally bound (*Australian Woollen Mills*).

Identifying an offer

- An offer is a statement by the offeror that he or she is willing to enter into a contract on particular terms. An offer should be distinguished from the following:
 - Invitations to treat or negotiate (*Pharmaceutical Society of Great Britain*)
 - Puffery (*Carlill*);
 - Supply of information (*Stevenson Jacques*); and
 - Counter-offers (*Stevenson Jacques; Butler Machine Tool; Turner Kempson & Co*).

Recipients of offers

- An offer will only be effective when it (all of its terms) is communicated to the offeree. An offer cannot be accepted unless the acceptor is aware of the existence of the offer and its terms (*Carlill; MacRobertson Miller Airline Services*).

Termination of an offer

- An offer lasts until a time specified in the offer, it is revoked or it is rejected.

Revocation

- An offer is revoked when it is withdrawn and it may be revoked any time before acceptance provided it is brought to the notice of the offeree prior to acceptance (*Dickinson*)
- The offeror will not normally be bound by a promise to keep an offer open for a period of time, unless that promise is embodied in a deed or is supported by consideration, such as an option (*Goldsbrough Mort*).
- If the offer is made to the whole world, then the offeror must use appropriate means to communicate the revocation of the offer to all potential offerees (*Mobil Oil Australia*).

Rejection

- An offer may be rejected. The rejection can be express or it can be inferred from the offeree's actions that are inconsistent with an intention to accept, such as the making of a counter offer (*Stevenson Jacques*).

Lapse of time

- If there is no time period stipulated in the offer then an offer will end at the expiration of a reasonable period of time. What is 'reasonable' will depend upon the circumstances. What is the nature of the subject matter? If it is dealing with perishable goods, then it is likely that the offer is not to remain open for long. What means were used to communicate the offer? Was there a sense of urgency?

Non-occurrence of a condition

- Assume that Kerry offers to buy Bart's champion racehorse for \$950,000 provided it is in a sound condition. If Bart tries to accept this offer after the horse has become unsound, the acceptance is ineffective. The condition of soundness qualifies the offer and its failure causes the offer to lapse. Common conditions include, 'subject to finance', 'subject to zoning approval' (*Meehan*).

Death

- In the event a party dies before acceptance of the offer, the offer lapses. In the event of the death of the offeror, the offeree may accept the offer at any time prior to the receipt of notice of death.

Acceptance

Finding agreement

- An offer by itself has no contractual force; it merely confers on the offeree the ability to create a contract by accepting the offer. Subject to terms of the offer, acceptance may be in writing, oral or implied from the offeree's conduct. To form a contract, an acceptance must be unconditional and correspond to the offer; the offer is accepted without deletions, additions or qualifications. Whether or not an offer has been accepted is decided objectively. Was there an apparent intention to contract, to be legally bound? How would a reasonable person understand the words and actions of the offeree?

Knowledge and compliance

- Generally an offer can only be accepted by those persons to whom it is made. (*Boulton*) An offeree must be aware of the existence and the terms of the offer when acceptance occurs, otherwise there is no acceptance. (*Clarke*)

Mode of acceptance

- To be effective, acceptance must be communicated to the offeror prior to the termination of the offer. The method by which the acceptance is to be communicated is a matter for the parties and the offeror may prescribe a particular mode of acceptance other than silence (*Manchester Diocesan Council; Felthouse*). Although the offeror cannot prescribe silence as a method of acceptance, the offeror can waive the right to have acceptance communicated, such as in a unilateral contract (*Carlill*).
- If the offeror has not prescribed a particular mode of acceptance, then the offeree may communicate his or her acceptance in any manner he or she wants provided that the acceptance comes to the notice of the offeror before the offer terminates. The law requires some objective manifestation of acceptance and it may be appropriate to infer acceptance in some circumstances (*Empirnall Holdings*). For instance, silence of an offeree in conjunction with other circumstances, may indicate acceptance of an offer (*Empirnall Holdings*).
- Generally, if no mode of acceptance is stipulated, acceptance should be communicated by the same means that were used to send the offer or by more efficient means.

The postal acceptance rule

- The postal acceptance rule deals with communication of acceptance at a distance. It is an exception to the rule that acceptance must first be communicated to the offeror to be effective. Where the parties contemplate acceptance by post or snail mail, acceptance will be complete as soon as the letter is properly posted (*Brinkibon*). If after properly posting a letter it fails to arrive, the posting of the acceptance is nevertheless effective so long as the rule applies (*Adams*). Of course this will raise significant evidential issues for the person seeking to rely on the postal acceptance rule.] The rule was developed during the 19th century to overcome problems arising from transacting at a distance, in particular the delays occurring between posting and receipt of letters. It has also been extended to telegrams.

When do parties contemplate acceptance by mail?

- When the parties intend that the rule should apply (*Bressan*). Clearly, this will be the case where this mode has been prescribed by the terms of the offer. However, the rule does not necessarily

apply in all circumstances where the offer has been made in writing. Dealings may have been protracted, or its application may be inconvenient or absurd (*Tallerman*).

- In the case of instantaneous or near instantaneous communications such as telex, facsimile or email the general rule is that acceptance is not complete until it is received (*Brinkibon*). The provisions of the *Electronic Transactions Act 2000 (NSW)* apply to email communications generally and have an impact upon issues concerning writing, signature and time and place of and dispatch and receipt of the email.