

## 2. Offer

### Offer vs Invitation to Treat

Situation	General Rule	Key Case / Exception
Advertisement / catalogue	Invitation to treat	<i>(Carlill v Carbolic Smoke Ball)</i> -- unilateral offer to world if clear and definite
Goods displayed in shop	Invitation to treat	<i>(Pharmaceutical Society v Boots)</i> -- offer made at counter
Goods displayed online	Invitation to treat unless clear intention to be bound	Electronic Transactions Act s 14B
Auction bid	Bid = offer; hammer fall = acceptance	<i>(AGC v McWhirter)</i> -- 'on the market' does not change this rule
Request for tenders	Invitation to treat	<i>(Harvela)</i> -- tender call can be offer if sufficiently definite; <i>(Hughes Aircraft)</i> -- process contract possible
Price quotation / inquiry	Invitation to treat	No binding offer unless all essential terms present with intent to be bound
CISG proposal (Art 14)	Offer if sufficiently definite + intent to be bound	Must specify goods, quantity, price (or mechanism); addressed to specific persons

### Step 1: Identify the Alleged Offer

An offer is 'an indication by one person to another of a willingness to contract on certain terms' (*Carter, Peden & Tolhurst, citing Australian Woollen Mills v Cth*). The test is objective: would a reasonable person in the offeree's position consider the communication to be an offer -- i.e., that acceptance would conclude the contract? (*Gibson v Manchester Council*).

## SCRIPT -- Is There a Valid Offer?

**Step 1: Objective test:** Would a reasonable person in the offeree's position consider this a **binding offer** rather than a mere invitation to treat or a mere puff? (*Gibson v Manchester Council*; *Carlill v Carbolic Smoke Ball*).

- -> IF clearly promissory, definite terms, addressed to offeree: likely offer -- proceed.
- -> IF advertisement, shop display, auction announcement, or request for tenders: likely invitation to treat -- see below.
- -> IF boastful exaggeration with no serious intent (e.g. 'Red Bull gives you wings'): mere puff -- no offer.
- -> COUNTER-ARGUMENT: [D] may argue the communication lacked a definite price or subject matter and was therefore not sufficiently certain to constitute an offer, relying on the general rule that advertisements are invitations to treat.

**WRITE:** *[The communication by [offeror]] [is / is not]* a valid offer because, applying the objective test, a reasonable person in the position of *[offeree]* would *[/ would not]* consider it an expression of willingness to be immediately bound on acceptance. *[It contains all essential terms / It is too indefinite because [reason]]* (*Gibson v Manchester Council*).

**Step 2: Bilateral vs Unilateral:** Determine the contract type. **Bilateral** -- both parties exchange promises (most contracts). **Unilateral** -- offeror promises performance in exchange for the offeree's act; no communication of acceptance required before performance (*Carlill v Carbolic Smoke Ball*; *Mobil Oil v Wellcome*).

- -> IF 'if you do X, I will pay Y': unilateral -- acceptance occurs on completion of act.
- -> IF exchange of promises for future performance: bilateral.
- -> COUNTER-ARGUMENT: [D] may argue a unilateral offer was revoked before full performance and no contract was formed; consider whether estoppel or implied ancillary contract applies (*Mobil Oil v Wellcome*).

**WRITE:** The contract is *[bilateral / unilateral]* because *[offeror] [promised to do X in exchange for [offeree]'s promise / offered to pay [amount] upon [act]]*. *[Acceptance therefore requires communication / Acceptance occurs when [offeree] performs the stipulated act]* (*Carlill v Carbolic Smoke Ball*).

**Step 3: Invitation to Treat vs Offer:** Apply the objective test to the specific situation. Shop displays (Boots), most advertisements, auction announcements (*AGC v McWhirter*), and tender calls are generally invitations to treat. Exceptions: clear unilateral offers (*Carlill*); referential tender calls (*Harvela*); process contracts (*Hughes Aircraft*).

- -> IF goods on shelf: invitation to treat -- customer's presentation at counter = offer; pharmacist's acceptance = acceptance (Boots).
- -> IF auction with 'reserve': invitation to treat; bid = offer; hammer = acceptance -- seller can withdraw before hammer (*AGC v McWhirter*).
- -> IF tender call to specific parties with fixed acceptance criteria: may be offer (*Harvela*).

- -> IF website listing to general public: invitation to treat under Electronic Transactions Act s 14B unless clear intent to be bound.
- -> COUNTER-ARGUMENT: [D] may argue the communication was a binding offer because it contained all essential terms and indicated intent to be bound if accepted, distinguishing (*AGC v McWhirter*) on the basis that [distinguishing fact].

**WRITE:** *[The [advertisement / shop display / auction call / tender]] is an [offer / invitation to treat] because [reason -- e.g., it was addressed to the world at large and contained certain definite terms / it lacked specificity and intent to be bound]. [Therefore, [offeree]'s response [constitutes / does not constitute] an acceptance / [offeree]'s response is itself an offer which [offeror] has [accepted / not yet accepted]].*

## Step 2: Termination of Offer

An offer can only be accepted while it is still on foot. An offer terminates by: (1) revocation; (2) lapse of time; (3) death; (4) failure of condition; or (5) rejection/counter-offer by offeree.

Method of Termination	Rules and Exceptions
Revocation	Can occur any time before acceptance, even if offeror promised to keep open ( <i>Dickinson v Dodds</i> ). Must be communicated (by any reliable source). Exceptions: (1) option contract supported by consideration ( <i>Goldsborough Mort v Quinn</i> ); (2) unilateral contract -- performance commenced -- implied ancillary contract or estoppel ( <i>Mobil Oil v Wellcome</i> ). CISG Art 16: irrevocable if fixed time stated or reasonable reliance.
Lapse of time	Express time limit: lapses at end of that period. No limit stated: lapses after 'reasonable time' determined objectively by context.
Death	Offer lapses on offeror's death if offeree knows. Unclear if lapses without notice (depends on intent and whether personal services required). Option contracts survive unless personal services required or intent otherwise ( <i>Laybutt v Amoco</i> ).
Failure of condition	Express or implied condition may cause lapse if circumstances change ( <i>Financings v Stimson -- car stolen and damaged before acceptance</i> ).
Rejection / Counter-offer	Outright rejection terminates offer. Counter-offer = rejection of original + new offer (offeree cannot later accept original). Mere inquiry is not a rejection ( <i>Stevenson Jacques v McLean</i> ).

## Key Cases -- Offer

Case	Principle / Rule	Watch Out / Application
Gibson v Manchester Council (1979 HL)	Objective test for offer/acceptance. 'I Accept' test: accepting a chance to make an offer is not acceptance of an offer. Must identify O and A by conventional approach.	Use where sequence of events is unusual or where party claims no offer was made.
Carlill v Carbolic Smoke Ball (1893)	Offer can be made to the world at large (unilateral). Acceptance by performance -- no communication required. Deposit in bank shows serious intent. Mere puff distinguished.	Use for unilateral contracts and for puff vs offer distinction.
AGC v McWhirter (1977 NSWSC)	Auction = invitation to treat even when property 'on the market'. Bid = offer. Fall of hammer = acceptance. Seller may withdraw before hammer.	Distinguish from Harvela where tender call held to be offer.
Harvela Investments v Royal Trust (1986 HL)	Tender call addressed to specific parties with commitment to accept highest fixed bid = offer. Referential bid did not comply.	Use where tender call is directed to named parties with binding commitment.
Dickinson v Dodds (1876)	Offer can be revoked any time before acceptance, even where offeror promised to keep open, unless consideration given for that promise. Revocation can be communicated by any reliable third party.	Check whether option consideration exists before applying revocation rule.
Goldsborough Mort v Quinn (1910 HCA)	Option supported by consideration is binding; specific performance available.	Use where revocation of open offer is in issue and consideration was paid to keep it open.
Mobil Oil v Wellcome (1998)	Unilateral offer revocation while performance commenced. Possible remedy via implied ancillary contract not to revoke or estoppel. Court examines: offeror's knowledge, offeree's understanding of risk, benefit/detriment of performance.	Use whenever a unilateral offer is revoked after offeree has started performing.
Financings Ltd v Stimson (1962)	Offer to purchase car subject to implied condition that car remain in same condition. Offer could not be accepted after car stolen and damaged.	Use for implied conditions attached to offers.

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## 3. Acceptance

Acceptance is an unqualified assent to the terms of an offer. It must correspond exactly with the offer, be communicated to the offeror, and be in response to the offer. The general rule is that acceptance is effective when and where it is received by the offeror.

### RED FLAGS -- Issue Triggers

- Parties negotiating at a distance (post, email, fax, telex) -- postal rule / Electronic Transactions Act may apply
- Silence or inaction -- generally cannot constitute acceptance (*Felthouse v Bindley*)
- Standard form contracts exchanged by both parties -- Battle of the Forms
- Ticket or receipt issued after payment -- notice timing issue
- Terms in acceptance differ from terms in offer -- counter-offer vs acceptance
- Unilateral contract -- subjective intention of offeree may be relevant (*Crown v Clarke*)

### SCRIPT -- Is There a Valid Acceptance?

**Step 1: Conduct constituting acceptance:** Objective test -- would a reasonable person consider the parties to have reached agreement having regard to their external manifestations? (*Fitness First v Chong*). Signing a document = acceptance of its terms even if unread, absent fraud or misrepresentation (*Toll v Alphapharm*).

- -> IF unilateral contract: subjective intention of offeree IS relevant -- acceptance must be in response to the offer (*Crown v Clarke* -- *Clarke did not act on faith of the reward*).
- -> IF bilateral contract: objective test applies -- subjective intent irrelevant.
- -> COUNTER-ARGUMENT: [D] may argue in a unilateral contract context that [offeree] did not subjectively act in response to the offer, relying on *Crown v Clarke*.

**WRITE:** *[The conduct / signature / act of [party]] [constitutes / does not constitute] acceptance because, applying the objective test, a reasonable person would [ / would not] conclude that [party] assented to the terms of the offer. [In the alternative, this is a unilateral contract and [party]'s own admission shows they did not act in response to the offer, which rebuts the presumption of acceptance (Crown v Clarke).]*

**Step 2: Communication of acceptance -- general rule:** Acceptance must be communicated to and received by the offeror (*Latec Finance v Knight; Brinkibon*). Effective when and where it is RECEIVED.

- -> IF face-to-face or telephone: received when heard -- general rule applies straightforwardly.
- -> IF posted letter: postal acceptance rule may apply -- effective when posted (*Adams v Lindsell*).
- -> IF fax or telex: instantaneous -- general rule applies; effective on receipt (*Brinkibon*).