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WEEK 2

I Agreement - Offer Part II

A How Long Does an Offer Last?

It will last until it is terminated or revoked

How may an Offer be Terminated?

- By the lapse of time that is specified in the offer or by the lapse of a reasonable time
 - Parties can still reach an agreement after the specified time or put forward a counter offer
 - A counter offer terminates the offer and becomes a new offer as it changes the essential terms
 - Reasonable time is determined on the basis of the facts and case - **Empirnall Holdings Pty Ltd v Machon Paul Partners Pty Ltd (1988) NSWLR**
- By rejection - may be express or by way of a counter offer

Hyde v Wrench (1840)

Facts	• Wrench wrote to Hyde and offering to sell him his property for 1000 pounds • Hyde wrote back offering 950 pounds - Wrench refused • Hyde wrote to Wrench purporting to accept the original offer of 1000 pounds
Judgement	• Hyde had rejected the original offer with his 950 pound counter offer • The original 1000 pound offer was terminated and could not be accepted
Held	There was no contract

- A counter offer must be distinguished from a request for information or inquiry - judged objectively by the words used

Stevenson Jacques & Co v McLean (1880)

Facts	• McLean offered to seal goods to Stevenson Jacques at a set price for cash on delivery • Stevenson Jacques asked if the price could be paid by instalments • McLean saw this as rejection and sold the goods to someone else • Stevenson Jacques could sue as the goods were sold before McLean had withdrawn or revoked its offer
Judgement	English CA found that a request for payment by credit terms was not a rejection but an inquiry or request for information and should have been answered

- By failure of a condition if the offer was made subject to an express or implied condition
 - e.g., implied condition - a certain state of affairs continues to exist (condition of product)
 - e.g., express condition - an offer to buy land is subject to development approval

B Revocation

The offeror is free to revoke or withdraw the offer - **Routledge v Grant (1828)**

To be valid the revocation must satisfy 2 basic requirements:

1. It must take place before acceptance
2. Revocation only becomes effective upon communication to the offeree

Communication of revocation

- Revocation may be communicated by the offeror or by someone who may reasonable be seen as a reliable source e.g., agent

Dickinson v Dodds (1876)

Facts	• Dodds offered to sell land to Dickinson but sold it to Alan before revoking the offer • Dickinson found out about the sale to Alan and purported to accept the offer
Judgement	Dickinson knew about the sale to Alan before he tried to accept as it was communicated by a reliable source (agent)
Held	There was valid revocation of the offer

- For non-instantaneous communication (by post) - the general rule is that the revocation takes place when it is received by the offeree ('receipt rule')
- Instantaneous communication is regulated by statute legislation (State and *Cth*) - Electronic Transactions Act to deem the time and the place in which electronic communications are received
 - Implementation of the United Nations Convention on the Use of Electronic Communications in International Contracts or ECC (2005)
 - ECC was designed to supplement the CISG
 - NB: Australia has not ratified the convention

Revocation - Communication by Electronic Means

- Electronic Transactions Act (sections are from the ETA 2000 (NSW))
- Time of 'receipt' is deemed by the Act for 'electronic communications'

s 5 ETA: 'Electronic communications'

Include: automated systems, data texts, images and sounds (where sounds are processed at their destination by automated voice recognition)

s 13A ETA: Time of receipt

Rules for determining the time of receipt of an electronic communication

- 1a)** If the addressee has 'designated' an electronic address (e.g., email address, phone number specified for SMS) the communication is deemed 'received' when the message is 'capable of being retrieved' at that address
- 1b)** If the addressee has not designated an electronic address the communication is deemed 'received' only when the message becomes 1) 'capable of being retrieved' 2) the addressee has become aware the communication has been sent to that address

s 13A(2) Retrievable once it reaches the information system of the addressee - presumption

s 13B The place the communication is 'received' is deemed to be place addressee has their business

Promise by offeror not to revoke the offer

e.g., the offeror promises not to revoke the offer before a certain time

- Offeror can validly revoke the offer at anytime before the promised deadline - promise is considered gratuitous/unenforceable
- A promise by the offeror not to revoke must be supported by consideration (value) → enforceable contract to keep offer open (option) - **Goldsbrough Mort & Co Ltd v Quinn (1910)**
- e.g., Sale of land
 - Purchasers may be interested but need time to check on finances
 - Purchasers must give an option fee (consideration)
 - If purchasers agree to buy the property within the specified time the option contract is discharged and the parties enter a new contract of sale for the property
 - If the purchasers do not agree to buy the property within the specified time the offeror takes the option fee and can sell to someone else

Revocation of unilateral contracts

- The offeror must communicate revocation in the same way the offer was communicated (same coverage) - will be effective even if an offeror is not aware of the revocation
- Even if the offeree has commenced acceptance (necessarily takes time) the revocation can be effective provided it is not unjust in the circumstances e.g., acts of acceptance were beneficial

Mobil Oil Australia v Lyndel Nominees (1988)

Facts	• Mobil advised its petrol station franchisees about a new programme whereby they would give extensions to franchises if they achieved certain sale targets over a number of the years - Mobil withdrew its programme • Lyndel argued it had already worked on achieving those targets and it was too late for Mobil to revoke the offer
Judgement	• Federal Court agreed • Full Federal Court on appeal reversed the decision
Held	• There was no clear offer made by Mobil • Reasoning in obiter dicta - even if there was an offer it is not always unjust to revoke an offer after acceptance has started • Not unjust to allow the offer to be revoked because the acts of acceptance were beneficial to the offerees - increasing sales was beneficial to the franchisees

II International Contract Law - Offer

A What is an Offer Under the CISG?

- The labels that parties use is less important but rather what a court/tribunal thinks in terms of whether the elements for an offer are met e.g., invoice may be an offer
- Objective approach is the primary approach
- NB: arbitration (tribunal) is preferred to courts in resolving disputes for international contracts

Art. 14 (1) CISG: Formation of the contract

A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

Art. 14(1) CISG elements:

Requires the proposal to be:

- Sufficiently definite AND
- Intention of the offeror to be bound

Interpreting the meaning a proposal by words and conduct

- Courts conduct an objective test (reasonable person standard): **Art. 8(2) CISG**
- **Art. 8(1) CISG**: Allows the court to uphold the subjective intent of parties but only applies when both parties at the relevant time were aware of the subjective intention (rarely used)
- CISG requires courts to account for all surrounding circumstances: Art. 8(3) CISG
- Required to consider evidence of:
 - Past practices (usages) established between parties through their prior dealings: **Art. 8(3) & Art. 9(1) CISG**
 - International trade usages: **Art. 9(2) CISG**
 - Preliminary negotiations: **Art. 8(3) CISG**
 - Subsequent conduct: **Art. 8(3) CISG**
- NB: CISG gives courts more evidence than is permitted by domestic contract law in the application of the objective test e.g., preliminary negotiations, subsequent conduct
 - Courts will only permit evidence of negotiations for limited purposes e.g., determining the subject matter of the contract
 - Courts are prohibited from looking at subsequent conduct
 - Justification of the common law is that these items are poor forms of evidence and tend to be irrelevant, unreliable or confusing

Elements of an offer

(1) Sufficiently definite

- Requires the proposal to contain the essential terms
- In the CISG there are 4 essential matters:
 - Parties
 - Goods
 - Some features of the goods may be inferred e.g., size or colour
 - Quantity
 - Not always necessary to specify an amount e.g., a formula may be specified to work out the quantity
 - Price
 - Main requirement is that the mechanism is agreed e.g., list price, price-setting mechanism
 - If no mechanism is nominated - **Art. 55 CISG** substitutes a reasonable price to fill the gap left by missing price or mechanism (rescue provision)

(2) Intention to be bound

- Objective test - Would a reasonable person, standing in the shoes of the party receiving the proposal, conclude that it manifested an intention to be bound? **Art. 8(2) CISG**
- Words used in proposal will be relevant but not determinative (e.g., “non-binding” or “without obligation” likely indicate no intention to be bound)

B Invitation to Make an Offer

- NB: difference between ‘invitation to make an offer’ and ‘invitation to treat’
- Include proposals which are not sufficiently definite or lack intention to be bound

Art. 14 (2) CISG: Formation of the contract

Presumption: A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

NB: Contrary indication proposing party shows an intention to be bound (contrary indication) e.g., first person to accept

C When Does the Offer take Effect?

Art. 15(1) CISG: Formation of the contract

An offer becomes effective when it reaches the offeree ‘receipt rule’

D Termination of Offer

How can an offer be terminated under the CISG?

- By rejection of the offer (even an irrevocable offer) via express or counter offer: **Art. 17 CISG**
- By withdrawal before the offer becomes effective - only if you notify the offeree with the withdrawal before or at the same time the offer is received by them: **Art. 15(2)**
- By revocation?

NB: Australian Domestic Contract Law

- Australian domestic law permits revocation even if you promise not to revoke or call it an irrevocable offer until acceptance unless supported by consideration (option)
- Most countries in the world do not follow this rule - Civil Law countries and the USA have a notion that some offers were irrevocable
- A compromise was reached when negotiating the CISG to serve a fairer outcome in relation to when you can and when you cannot revoke

Is Revocation of an Offer Permitted under the CISG?

Art. 16 CISG: Formation of the contract

- 1) An offer may be revoked if the revocation reaches the offeree before an **acceptance is sent**
- 2) However there are 2 situations where revocation is not permitted:
 - a) Where the offer indicates an intention to be irrevocable (e.g., by fixing a time for acceptance, firm offers)
 - b) Where the offeree has reasonably relied on the offer being irrevocable

NB: Art 16(2)(b) demonstrates one of the general principles of the CISG that parties are precluded from contradictory behaviour

E Comparison with Australian Domestic Law

Objective approach

- Interpretation of words and conduct under both regimes is by reference to a reasonable person test.
- CISG requires the court to take into account evidence of preliminary negotiations and subsequent conduct:

Art 8(3) CISG

Issues of intention & certainty

- CISG integrates these concepts onto its definitions of Offer & Acceptance
- Australian domestic contract law treats them as separate elements of Formation

Revocation

- Australian domestic contract law permits revocation and requires consideration or the offeree to experience detriment before an offer is considered irrevocable
- CISG allows revocation but is prohibited if:
 - An offer displays an intention to be irrevocable ('firm offer')
 - Offers that have been reasonably relied on by the offeree as being irrevocable
 - The offeree has reasonably relied on the offer being irrevocable

III Agreement - Acceptance Part I

A Nature of Acceptance

- Acceptance is clear indication that the offeree agrees to be bound by the terms of the offer
- Court uses an objective test to analyse the parties' words and actions - looks for a meeting of the minds
- Acceptance must be in the exact terms as the offer/mirror image
- A valid acceptance cannot be conditional
- Any condition/new terms that the offeree puts on the acceptance turns it into a counter-offer

B Rules for a Valid/True Acceptance

Acceptance Must be in Reliance on the Offer

- The offeree must be relying on and responding to the offer - offeree must be aware of the offer
- If the offeree is proved to know about the offer - a rebuttable presumption arises acceptance as in reliance on the offer

<i>R v Clarke (1927)</i>	
Facts	• Clarke was arrested for murder and gave police information that led to the arrest of certain criminal offenders - charges against him were dropped • He admitted he did this to protect and exculpate himself • Later on he found out there was a police reward for information - pointed to the information he provided as evidence for acceptance of the reward • claimed the reward and pointed to the information he provided as evidence as acceptance
Judgement	HC found that Clarke did not give information as reliance on the reward offer - he was unaware and on his own admission had given the information for other reasons
Held	No acceptance

Silence Alone Cannot be Acceptance

- Valid acceptance may be express or implied by the conduct of the offeree however it cannot be silence or lack of response
- Offeror cannot stipulated in the offer that a mere lack of response will be treated as acceptance

<i>Felthouse v Bindley (1862)</i>	
Facts	• Uncle wrote to his nephew that he would buy his horse with these words "If I don't hear from you, I assume the horse is mine at 30 pounds" • Nephew did not reply but told the auctioneer to withdraw his horse from sale • Auctioneer failed to do so and sold the horse to a third-party • Uncle sued the nephew on the basis that he had accepted the offer through his silence
Held	Court held the nephew had done nothing to communicate the intention to accept or bind himself

- NSWCA added 2 clarifications to the ***Felthouse v Bindley*** rule in ***Empirnall Holdings Pty Ltd v Machon Paul Partners Pty Ltd (1988)***
 - Silence may constitute acceptance if an equitable estoppel can be raised against the offeree or where the conduct of the offeree implies the offer is accepted
 - e.g., offeree is acting in a way that is consistent with the existence of an agreement or objectively looks like they are performing the contract
 - J McHugh 'The ultimate [factual] issues is whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted'

Acceptance Must be Communicated

- Acceptance is only effective once it has been communicated to the offeror - ***Tinn v Hoffman & Co (1873)***
- Communication of acceptance take place when it is received by the offeror ('receipt rule')
- Contract is formed when the offeror finds out about the acceptance not when offeree accepts

Exceptions to the 'receipt' rule

Unilateral offers

- Communication of acceptance is unnecessary as proof of performance is acceptance
- Terms of the offer make it clear the offeror has dispensed with the need for communication

Postal acceptance rule

- Where acceptance is sent through way of letter - acceptance occurs when the postal mail is sent
- Irrelevant if the mail never arrives - require evidence the letter was sent and addressed properly
- Puts risk on the offeror as the contract exists before the offeror is aware of the acceptance
- Justification - offeror had the opportunity to exclude the operation of the postal acceptance rule (stipulate conditions of acceptance in the offer)
- Rule only applies where it is "reasonable, authorised or contemplated" that acceptance can be by postal mail - *Henthorn v Fraser* [1892]
 - "The general rule is that a contract is not completed until acceptance of an offer is actually communicated to the offeror...A finding that a contract is completed by the posting of a letter of acceptance cannot be justified unless it is to be inferred that the offeror contemplated and intended that his offer might be accepted by the doing of that act" - Kay L.J
 - e.g., if the offer was made by post and contained no demands or conditions about acceptance - postal acceptance would probably be reasonable
- Situations are rare because the postal system is not used very frequently for contractual negotiations
- If circumstances are unreasonable to expect a reply by postal mail then the general 'receipt rule' remains in place
- Courts are reluctant to extend the operation of the postal acceptance rule because it binds the offeror when they are unaware acceptance has happened

Tallerman & Co v Nathan's Merchandise (1957)

Facts	• Parties were engaged in highly contentious communications through their lawyers to resolve the dispute • One of the parties purported to send an acceptance by post
Held	• HC held this was not valid acceptance because of the nature of negotiation precluding the operation of the postal acceptance rule • Acceptance by post in these circumstances was not reasonable, authorised or contemplated

- Offeror can specify in the offer conditions of acceptance - method of communication, time during which the acceptance must be received e.g., acceptance will only take effect once received by me

Bressan v Squires [1974] NSWLR

Facts	• Squires gave Bressan an option to purchase land • Clause 1 provided that it could be exercised 'by notice in writing addressed to me at any time on or before 20 December' • Bressan posted a notice by postal mail exercising the option on the 18 December - not received until 21 December
Issue	Does the offer makes it sufficiently clear that actual communication is necessary in order for acceptance to be valid? Does the receipt rule or the postal acceptance rule apply?
Judgement	• NSWCA found the language used in the option suggested the acceptance had to be received before it took effect
Held	Acceptance was ineffective

Acceptance communicated by electronic means

- Electronic Transaction Act (sections referred to below are from the ETA 2000 (NSW))
- ETA rules deem when an electronic communication is received under the 'receipt rule'
- Does not matter if the offeror never opens or reads the content of the message - received under the 'receipt rule' - for both designated and non-designated electronic addresses
- If the electronic address was designated the offeror does not need to be aware the message was sent - deemed to have received it once the message is 'capable of being retrieved' at that address (contract is formed)
 - 'receipt rule' still applies even if the offeror has a problem with their information system and is not necessarily aware of the acceptance
 - By designating the electronic address the offeror takes on the risk

IV Agreement - Acceptance Part II

Revocation of postal acceptance by speedier means

- An unresolved question in Australia is whether (where the postal acceptance rule applies) a posted acceptance may be revoked by advising the offeror of rejection before postal acceptance arrives?
- View 1: A contract was created as soon as the acceptance was posted so revocation is impossible - **Wenkheim v Arndt (1873)**
- View 2: Revocation is valid since the offeror was unaware of the acceptance at the time they became aware of the rejection and has therefore not been disadvantaged - **Dunmore v Alexander (1930)**

A Alternatives to Offer and Acceptance Analysis

- Strict application of offer and acceptance analysis is sometimes unsuitable esp. in complex and protracted negotiations
- Courts have various approaches to determine which terms form part of the contract - **Tekdata Interconnections Ltd v Amphenol Ltd [2010]**
- Battle of the forms cases often involve conflicting terms with no meeting of the minds on which terms apply
 - e.g., each commercial party offer and respond in their own standard form of terms and conditions which are contradictory/different
 - How is the court going to determine if there is agreement and which set of terms and conditions governs the relationship between them?

Butler Machine Tool Co v Ex-Cell-O Corp [1979]

Facts	• Butler agreed to provide a machine to Ex-Cell-O • Butler sent a standard form offer with a set price to buy the machine - in the standard terms there was a price escalation clause • Ex-Cell-O placed an order for the machine at the set price with its own form containing no provision allowing for price escalation • Ex-Cell-O order form had a tear off slip at the bottom for Butler to sign and send back • Butler signed and wrote that the confirmation was in accordance with his original offer • When the machine was finished - Butler increased the price in accordance with the price escalation clause and Ex-Cell-O refused to pay the difference
Judgement	• English CA used the offer and acceptance framework in favour of Ex-Cell-O - the order form was a counter-offer which was accepted by Butler with the tear off slip • Butler's notation on the tear off slip failed to affect the terms of agreement and reinstate the original offer terms

NB: Court used the last shot approach method

- Between 2 competing standard terms and conditions it is the last shot fired in chronological order that prevails and form part of the contract
 - Usually the last shot is the standard terms and conditions sent by the accepting party
- Courts are reluctant to hold no contract has been formed when performance of the contract occurs as it does not reflect commercial reality → falls on the court to determine the terms of the contract
- Main approach that is taken and the default approach esp. when performance has not begun when dispute goes to court

Goodman v Cospak [2004] NSWSC

Master Macready identified 3 approaches that courts have used in various situations in a battle of the forms scenario:

1. Last shot approach - contract is formed completely on either A or B terms
2. Higher status approach - the court should give effect to the document that has a higher status/more formal
3. Global or synthesis approach - combination of A and B terms to form a contract or a contract based on the implied terms by law

V International Contract Law - Acceptance

- Objective approach to determine whether an agreement has been reached
- Considered from the point of view of a reasonable person: **Art. 8(2) CISG**
- Consider all surrounding circumstances/evidence: **Art. 8(3) and Art. 9(2) CISG**
 - Incl. preliminary negotiations and subsequent conduct: **Art. 8(3) CISG**

A What is Acceptance in the CISG?

Art. 18 CISG: Formation of the contract

- 1) Indication of assent to an offer
 - Must display an intention to be bound by the offer
- 1) Silence or inactivity does not amount to acceptance
 - Silence + conduct = acceptance
 - Silent + past practices established between parties = acceptance
- 2) Communication of assent to the offeror
 - Can be by words or conduct that show an intention to be bound
 - Offer can prescribe method of communication in advance e.g., state the offer may only be accepted in writing
 - Assent can come from 3rd party and not just directly from offeror e.g., bank pays price on behalf of buyer

B Time Limits for Acceptance

Art. 18 CISG: Formation of the contract

- 2) Offer will lapse if not accepted within a fixed time or a 'reasonable time'
- 2) Oral offers must usually be accepted immediately

C When Does Acceptance Become Effective?

Art. 18(2) CISG: Formation of the contract

No acceptance is effective until it 'reaches' the offeror forming a contract

Art. 24 CISG: Formation of the contract

Any communication involved in the formation of a contract 'reaches' the addressee to his place of business or mailing address or to his habitual residence - 'receipt rule'

NB: No postal acceptance rule

D When is Acceptance Received?

- Oral communication (phone/in person) deemed received immediately as long as they are perceptible (needs to be audible): **Art. 18(2) & Art. 24 CISG**
 - NB: Oral communication does not include voicemail
- Acceptance by conduct becomes effective once the conduct reaches the attention of the offeror
- Communication by postal mail communication becomes effective once delivered to the place of business of the addressee: **Art. 24 CISG**

Electronic Communication

If the country where communication occurs is not a UN Electronic Communications Convention country then:

- CISG supplies the contract rule (receipt rule) to deem when electronic communication is received
 - Interpretation of **Art. 18(2) & Art. 24 CISG**
 - **CISG Advisory Council Opinion No. 1** - 'An acceptance becomes effective when an electronic indication of assent has reached the offeror's server, provided that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address.'
 - NB: it does not matter if the communication is not 'received' due to technical problems as it is within their 'sphere of influence'

If the country where communication occurs in a UN Electronic Communications Convention country then:

- CISG supplies the contract rule (receipt rule)
- ECC deems the point in time when electronic communication is received

Interactive Websites

Communication through a website

- Clickwrap - standard terms and conditions agreements
 - Generally binds as a form of acceptance in that standard form
- Browsewrap - standard terms and conditions are made available to you but there is no active acknowledgement of having read them e.g., hyperlink, available on the page
 - Generally binds as a form of acceptance
 - Less likely the standard form will form the contract

NB: **CISG Advisory Council Opinion No 13** addresses when the standard terms will be incorporated into a contract

- Automated response systems
 - ETAs in Australia all have provisions allowing for offering/acceptance to form a contract even when both parties are not human in countries (where the ECC has been implemented)

E *Must the Terms in the Offer and Acceptance Correspond?*

Art. 19 CISG: Formation of the contract

- 1) If acceptance contains material alterations or additions to terms it is a rejection of the offer (terminates) and constitutes a counter offer
- 2) If acceptance contains additional or different terms a contract is formed with the terms of the offer with modifications contained in the acceptance if: i) changes contained in the acceptance do not materially alter the terms of the offer ii) the offeror does not object without undue delay
- 3) List of changes that are presumptively 'material in nature': price, payment, quality and quantity of goods, place and time of delivery...

NB: Can rebut that presumption by evidence to the contrary

Non-Material Changes:

An acceptance with different terms under the CISG could still be effective in the following situations:

- If the change/s are to the advantage of the other party (offeror) then likely upheld
- If the change concerns very minor details e.g., delivery address, bank account number

F *Battle of the Forms*

- Battle of the forms solutions only apply when parties have begun performance and neither have advanced objections in advance to formation on a basis other than their standard terms
- In domestic contract law in Australia and the UK the 'last shot' approach is preferred
- The 'last shot' approach is not approach taken in most other countries
- **Art. 19(1) CISG** suggests the 'last shot' approach
- Past cases and scholarship suggest the 'last shot' approach is not appropriate for the CISG
- Majority view is the 'knock out' approach should be taken
 - NB: found favour with the German Federal Supreme Court in a CISG case
 - Fairer - blend of terms from both parties
 - More closely aligns with party expectations

r 10 CISG Advisory Council Opinion No. 13

Describes the outcome of applying the 'knock out' approach: "...a contract is concluded on the basis of the negotiated terms and any of the standard terms which are common in substance"

- Negotiated terms - any terms the parties have actually negotiated e.g., price, quantity, delivery
- Standard terms - line up 2 sets of standard terms and only the ones that appear in both sets/substantially the same will form the contractual terms

G *Comparison with Australian Domestic Law*

Communication of acceptance

- Australian domestic contract law and CISG use the 'receipt rule' and prohibit silence alone from being acceptance
- CISG does not contain a postal acceptance rule - postal mail has to be received to be effective as acceptance

How closely acceptance must 'mirror' terms of offer?

- Australian domestic contract law requires the acceptance to mirror the offer terms - only allows enquiries but no additional or alterations of terms
- CISG permits acceptances that contain non-material alterations to the terms of the offer which do not prevent formation unless objection by offeror

Battle of the Forms

- Australian domestic contract law favours the 'last shot' approach
- CISG favours the 'knock out' approach