**AGREEMENT (OFFER AND ACCEPTANCE)**

In order for parties to reach an agreement, one party must make an offer (i.e. a definite promise to be bound by specified terms) which is accepted by the other. So the first thing you really need to know is what is meant by an ‘offer’ in the eyes of the law.

**1. OFFER**

Professor Treitel has defined an offer as *“an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed*”.

* The person who makes the offer is called the offeror and the person to whom the offer is made is called the offeree.
* The ‘*expression*’ referred to in the definition may take many different forms, e.g. a letter, newspaper advertisement, fax and even conduct, as long as it communicates the basis on which the offeror is prepared to contract.
* The ‘intention’ referred to in the definition does not necessarily mean the offeror’s actual intention. The courts adopt what is primarily an ‘objective’ approach to deciding whether there was agreement between the parties (Smith v Hughes (1871) LR 6 QB 597). Clearly, they cannot discover as a matter of fact what was going on in the minds of the parties at the time of the alleged agreement. Nor are they prepared simply to accept what the parties themselves say was their intention at that time (which would be a ‘subjective’ approach). Instead, the courts look at what was said and done between the parties, from the point of view of a ‘reasonable person’, and try to decide what a reasonable person would have thought was going on.

In Allied Marine Transport v Vale do Rio Doce Navegação SA (The Leonidas) [1985] 1 WLR 925, Goff LJ approved the following statement of the law relating to the making of an offer:

*If the offeror so acts that his conduct, objectively considered, constitutes an offer, and the offeree, believing that the conduct of the offeror represents his actual intention, accepts the offer, then a contract will come into existence.*

Note from the quotation that, although the test is predominantly an objective one, the offeree must believe that the offeror actually intended to make an offer. This introduces a subjective element to what is otherwise an objective test of intention. Therefore if a reasonable person believed that the alleged offeror implied by his words or conduct that  he intended to be bound then this may be sufficient for the offer actually to be valid in law, regardless of his actual state of mind. Examples of this include:

* a university which made an unconditional offer of a place to an applicant in error (Moran v University College Salford (No. 2) [1994] ELR 187);
* a solicitor who mistakenly offered to settle a claim for £150,000 rather than the $155,000 which he had been instructed to offer by his client (OT Africa Line Ltd v Vickers plc [1996] 1 Lloyd’s Rep 700).

Finally, Treitel’s definition of an offer refers to ‘the person to whom it is addressed’. This may be one person, a class of persons or even the whole world. The point is that you can only accept an offer that was addressed to you.

**Invitations to treat**

Although beyond the scope of this course, a brief but important distinction must be made between an offer and an invitation to treat:

An **invitation to treat** is a preliminary statement expressing a willingness to receive offers.

An invitation to treat, therefore, is a statement made by a party inviting offers which that party is then free to accept or reject. An invitation to treat always precedes any offer.

Where there is an invitation to treat, this will precede the offer and reverse the parties who make the offer and acceptance.

Although it might seem difficult to distinguish between a genuine offer and a mere invitation to treat since this will depend on the intention of the party making the statement, there are certain situations in which the distinction can be made by applying rules of law. These include:

* advertisements
* self-service and shop window displays
* auctions
* invitations to tender
* mere statements of price.

**Unilateral offer; bilateral contract; unilateral contract**

A unilateral offer is made when one party promises to pay the other a sum of money (or to do some other act) if the other will do something (or forbear from doing so) without making any promise to that effect. Unilateral contracts (which result from unilateral offers) are distinct from bilateral contracts in which a promise is exchanged for a promise. Remember that in a unilateral contract the party to whom the offer is made does not have to promise to do anything in return.

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| **Bilateral contract** | **Unilateral contract** |
| A promise in return for a promiseOffer and acceptance are both promisesBoth parties are immediately bound (provided there is consideration and intention to create legal relations)For example, I promise (offer) to sell you my car for £7,000 and you agree (ie you promise) to buy it for £7,000. The offer and acceptance both take the form of promises. Both parties are immediately bound | A promise in return for an actAn ‘if . . . ’ contract–offer is a promiseOfferor is bound only if the specific act is performed (provided there is consideration and intention to create legal relations) A typical type of unilateral contract is an offer of reward (*Williams v Carwardine*). The offeror usually promises to pay a sum of money to anyone providing information or finding and returning lost property. This amounts to an offer and the act of providing the information or finding and returning the property is acceptance of the offer |

Let’s take another example, if an advertisement indicates that the advertiser promises to pay something in return for a particular course of action then the advertiser is bound by that promise. For instance, an advertisement that states ‘£100 will be paid to anyone who can find my dog, Lassie’ is a unilateral offer; however, saying to someone ‘I will give you £100 if you find my dog, Lassie’ is a bilateral offer which, if accepted, would give rise to a bilateral contract. It is the promise that is important here: the fact that it is made in the form of an advertisement is irrelevant.

**Communication of offers**

In order to be valid an offer must be communicated to the offeree. This means that no party can be bound by an offer of which they were unaware (*Taylor v Laird (1856) 25 LJ Ex 329*). This is true for unilateral as well as bilateral offers: therefore, the offeree must have clear knowledge of the existence of the offer for it to be valid (and thus enforceable) (*Inland Revenue Commissioners v Fry [2001] STC 1715*). You have already seen that a unilateral offer can be made to the whole world and may be accepted (by performing the conditions named in it) by anyone who had notice of the offer (*Carlill v Carbolic Smoke Ball Co*).

**Termination of offers**

Offers may cease to exist in a number of ways. Acceptance and express rejection are straightforward situations. If an offer is accepted then a contract is formed (provided that the other elements of the contract – intention to create legal relations and consideration – are present). The offer may simply be refused (in which case there is no contract) or extinguished by a counter offer. In addition, offers may be terminated by:

* revocation
* lapse of time
* failure to comply with a condition precedent
* death of one of the parties.
* Rejection by the offeree

**Revocation**:

Revocation refers to the rescinding, annulling or withdrawal of an offer. Generally speaking, an offer may be withdrawn at any time prior to acceptance (*Routledge v Grant (1828) 4 Bing 653)*. The revocation must also be communicated to the offeree:

The case *Byrne v Van Tienhoven (1880) 5 CPD 344*, concerns the communication of revocation. On 1 October, a letter offering to sell tin plates was posted from Van Tienhoven in Cardiff to Byrne in New York. On 8 October, the offerors changed their minds and posted a letter of revocation withdrawing the offer made by letter on 1 October. On 11 October, Byrne received the letter offering to sell (from 1 October) and accepted by telegram. On 15 October, Byrne confirmed the acceptance (from 11 October) by letter. On 20 October, Byrne received the letter of 8 October withdrawing the offer. The legal principle held by the court was that “the offer of 1 October had not been withdrawn at the time that it was accepted and therefore the contract was formed on acceptance on 11 October. This was so despite the lack of agreement between the parties.”

Although any revocation of an offer must be communicated, it does not always have to be communicated by the offeror themselves. Revocation made by a third party is valid provided that:

* the third party is a reliable source of information; and
* the third party is one on whom both parties can rely (*Dickinson v Dodds (1876) 2 Ch D 463*).

The situation is different with regard to unilateral offers. Since a unilateral offer is a promise in return for an act, it may be accepted by anyone who performs the act stipulated in the offer. Therefore, in order to revoke a unilateral offer (to the world at large) the offeror must take reasonable steps to notify those persons who might be likely to accept. *Shuey v United States (1875) 92 US 73* is the generally accepted authority for this proposition, although it is an American case and therefore carries only persuasive authority in England and Wales.If the offeree has started performance of the act specified in a unilateral offer then it may not be revoked, even if the act is incomplete.

*Errington v Errington & Woods [1952] 1 KB 290* is the key precedent here. The case is concerning the revocation of a unilateral offer. In the case, a father bought a house with a mortgage for his son and daughter-in-law to live in. He promised that he would transfer legal title to the property to them if they paid off all the mortgage repayments. The couple did not make any promise in return. The father died after some repayments had been made. Other family members claimed possession of the house, title to which remained in the name of the father. Their claim failed.

The legal principle held by the court was that the contract was a unilateral contract, since it involved an act (payment of the mortgage) in return for a promise (to transfer the house once all the payments had been made). Once performance had commenced (by the mortgage repayments being made) then the father’s promise could not be revoked. However, Lord Denning also stated that the promise would not be binding if the act was left incomplete and unperformed. Therefore, as long as the couple continued to make all the mortgage payments until it was fully paid off then the father’s promise to transfer the house to them would still be binding.

The principle from Errington v Errington & Woods was also accepted by the Court of Appeal obiter in the later case of *Daulia Ltd v Four Millbank Nominees Ltd [1978] Ch 231* where Goff LJ stated that:

In unilateral contracts the offeror is entitled to require full performance of the condition imposed otherwise he is not bound. That must be subject to one important qualification – there must be an implied obligation on the part of the offeror not to prevent the condition being satisfied, an obligation which arises as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance, it is too late for the offeror to revoke his offer.

**Lapse of time**

An offer may not stay open forever. An offer may state that it is to terminate on a particular date or after a certain fixed period, after which it is no longer capable of acceptance. Alternatively, where there is no particular date specified for the offer to terminate, then it will in any case lapse after a reasonable time has passed

In the case *Ramsgate Victoria Hotel Co Ltd v Montefiore (1866) LR 1 Ex 109* the claimant had offered to buy shares in the hotel company in June, but the company did not issue the shares for sale until November. The court held that an offer would lapse after a ‘reasonable time’. What is reasonable would depend on the offer and the subject matter of the contract. In cases where the value of the subject matter of the contract could fluctuate rapidly (like the shares in this particular case) or where the subject matter was perishable, then the offer would terminate after a short time.

This principle is also true of offers made by telegram (*Quenerduaine v Cole (1883) 32 WR 185*) or similar expedient means of communication such as telex (a system of telegraphy in which printed messages are transmitted and received by teleprinters using the public telecommunication lines) or fax.

**Failure to comply with a condition precedent**

An offer may also terminate if the parties to it had agreed to meet certain conditions and then failed to do so. For instance, an offer to sell a car on hire-purchase was considered to be subject to the condition that it would remain in the same condition from the time of the offer to the time of acceptance. Therefore, when the car in question had been damaged due to its being stolen from the showroom before the contract was concluded, the offer was rendered incapable of being accepted (*Financings Ltd v Stimson [1962] 1 WLR 1184*). The same situation applies where job offers are made subject to satisfactory references, Criminal Records Bureau checks or medical reports.

**Death of one of the parties**

*Death of the offeror*

Where the offeror dies before the offer is accepted, then the offeror’s personal representatives may still be bound by an acceptance provided that:

* the contract does not involve the personal services of the deceased; and
* the offeree is ignorant of the offeror’s death (*Bradbury v Morgan (1862) 1 H & C 249*).

*Death of the offeree*

Where the offeree dies before acceptance, then the offer lapses and the offeree’s personal representatives will be unable to accept on behalf of the deceased (*Reynolds v Atherton (1921) 125 LT 690*).

**Rejection by the Offeree**

An offeree may reject an offer either expressly or impliedly.

An acceptance must match exactly the terms of an offer, otherwise there can be no contract. Consequently, where the response to an offer suggests something different it will not be an acceptance, but a ‘counter offer’ and as such an implied rejection of the original offer.

In *Hyde v Wrench (1840) 3 Beav 334*, the defendant offered to sell his farm for £1,000. The claimant at first made a counter offer of £950, but two days later agreed to pay £1,000 and tried to accept the original offer. The defendant refused to complete the sale and the claimant sued. It was held that there was no contract, since the offer to buy for £950 was an implied rejection of the original offer and as such had destroyed it. Consequently it was no longer available to be accepted.

What if the claimant in Hyde v Wrench had not put forward a different price but simply asked about possible methods of payment? Would that have been  a counter offer? No, because by simply querying the method of payment, a prospective buyer is not saying ‘I do not want to buy at the stated price’; in other words he is not impliedly rejecting the offer. He is simply making an inquiry, the reply to which may determine his decision whether or not to accept. It is for this reason that a simple request for information does not affect the offer. It still stands and can be accepted. Authority for this principle is Stevenson Jacques and Co v McLean (1880) 5 QBD 346.

**2. ACCEPTANCE**

So far, we have considered “offer”, which is the first constituent of an agreement. An acceptance is a final and unqualified expression of assent to the terms of an offer and as such, it must correspond exactly with the offer made. It must be unequivocal and unconditional.

The principle that a valid acceptance must correspond exactly with the terms of the offer is sometimes referred to as the mirror image rule.

**Counter offers**

Since an acceptance must correspond exactly with the terms of the offer in order for it to be valid, it follows that a response that introduces new terms or attempts to vary terms proposed in the offer is not valid. In this case the response becomes a counter offer which destroys the original offer, rendering it incapable of acceptance.

In Hyde v Wrench (1840) 49 ER 132 concerning acceptance; counter offer Mr Wrench offered to sell a farm to Mr Hyde for £1,000. Hyde rejected this price and offered to pay £950. Wrench rejected Hyde’s offer. Wrench then sold the farm to a third party. Hyde attempted to accept the original offered price of £1,000 and sue Wrench for breach of contract when Wrench sold the farm to another party. The legal principle emanates from Hyde’s claim being rejected. The court held that the counter offer of £950 had impliedly rejected the original offer and, since the original offer had been destroyed, it was no longer open for Hyde to accept.

Lord Langdale stated that:

If [the offer] had at once been unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff [now referred to as the claimant] made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties.

Since a counter offer destroys the original offer, the roles of offeror and offeree become reversed. The party who made the original offer may accept the counter offer, reject the counter offer, or make a counter offer in return (in which case the roles reverse again). This can continue until agreement is finally reached as depicted in the figure below:



**Requests for information**

A mere request for information is treated differently to a counter offer:

In Stevenson, Jacques & Co v McLean (1880) 5 QBD 346 concerning: acceptance; request for information Mr McLean telegraphed Mr Stevenson offering to sell 3,800 tons of iron ‘*at 40s net cash per ton, open till Monday*’. On Monday morning Stevenson telegrammed McLean: *‘Please wire whether you would accept forty for delivery over two months or if not longest limit you would give*.’ McLean did not respond and at 1.34 p.m. Stevenson telegrammed again, accepting the original offer. McLean had already sold the iron to a third party of which he advised Stevenson by telegram at 1.25 p.m. That telegram crossed with Stevenson’s second telegram. Stevenson sued for breach of contract.

The legal principle is based on the fact that Stevenson’s first telegram was not a counter offer. It was a mere request for information. Consequently, McLean’s offer was still open at 1.34 p.m. It was validly accepted. Therefore, there was a valid contract of which McLean was in breach. As Lush J said:

Here there is no counter-proposal. The words are: ‘Please wire whether you would accept forty for delivery over two months, or if not, the longest limit you would give.’ There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer.

Therefore, if a response is made to an offer that does not attempt to vary the terms of the offer it is not a counter offer, since it does not reject the terms of the offer. It is therefore still open to acceptance by the offeree.

**Communication of acceptance**

Generally speaking, an acceptance has no effect until it is communicated to the offeror. In Entores v Miles Far East Corporation [1955] 2 QB 327 Lord Denning explained the principle as follows:

Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound.

In Smith v Mansi [1962], the court held that physical exchange of contacts isn’t necessarily a legal requirement for a contract for the sale of land, but where a contract is drawn up by solicitors it is usual for the contract to be prepared in 2 identical parts – one being signed by buyer and the other signed by seller. When the 2 parts are physically exchanged, so that the buyer receives the seller's signed contract and vice versa, a binding contract comes into existence.

The time the contract comes into force depends on the method which has been used to effect the exchange. Since exchange isn’t a legal requirement, a contract   can   comprise  a  single document signed by both parties. In this case, the contract becomes binding and enforceable when the 2nd signature has been put on the document. However, this is uncommon because the same solicitor is usually unable to act for both parties (para 6.2 SRA Code of Conduct for Solicitors).

**Silence cannot amount to acceptance**

Since acceptance must be communicated, it follows that silence can never constitute acceptance.

In Felthouse v Bindley (1863) 142 ER 1037 an uncle and nephew were negotiating the sale of the nephew’s horse. The uncle had stated that ‘if I hear no more from you I shall consider the horse mine at £30 15/-’. The nephew did not reply but asked an auctioneer to withdraw the horse from an auction. The auctioneer forgot the instruction and the horse was sold to another party. In order to claim against the auctioneer, the uncle needed to prove that there was a contract between him and his nephew for the sale of the horse. The court held that there was no contract since the nephew had never communicated his intention to accept to his uncle ‘or done anything to bind himself’.

This principle was also considered in The Leonidas D [1985] 1 WLR 925 where Goff LJ commented that it was ‘*axiomatic that acceptance of an offer cannot be inferred from silence, save in the most exceptional circumstances*’.

**Acceptance by conduct**

Acceptance may be inferred from conduct without it being expressly communicated.

In Brogden v Metropolitan Railway Co (1877) 2 App Cas 666 Mr Brogden was a colliery owner in Wales who supplied the Metropolitan Railway Company. In November 1871 a representative of Brogden suggested that a contract should be entered into. A draft contract was prepared and sent to Brogden, who filled in the arbitration clause by nominating an arbitrator, appended the word ‘Approved’ and returned it to the railway. The railway’s agent did not acknowledge it. In December 1871 the railway placed an order on the terms of the document, which Brogden fulfilled. The parties traded on the terms of the document until December 1873, when Brogden refused to continue to supply on that basis. The railway brought an action against Brogden for breach of contract. Brogden claimed that since the railway had never acknowledged the altered draft, which was a counter offer, there was no contract.

The House of Lords accepted that the completion of the arbitrator’s name technically rendered it a counter offer. However, since the parties to the contract had traded on the terms of the contract then they had accepted the counter offer as part of the agreement and Brogden, therefore, could not claim that there was no contract.

**Stipulated methods of acceptance**

Although acceptance can generally be in any form, as long as it is communicated to the offeree (other than in the case of a unilateral contract), where the offer stipulates a particular method of acceptance, such as ‘by return of post’, ‘by fax’ or ‘by telegram’, then if the offeree uses a different method there may not be a contract (Eliason v Henshaw (1819) 4 Wheaton 225; 4 US (L Ed) 556) if the offeror clearly states that only the stipulated method of acceptance will be sufficient.

If the offeree uses an equally expeditious method of acceptance to that stipulated, then that should be sufficient. In Tinn v Hoffmann (1873) 29 LT 271 the offeree was instructed to reply to an offer ‘*by return of post*’ to which Honeyman J said: ‘*That does not mean exclusively a reply by letter or return of post, but you may reply by telegram or by verbal message or by any other means not later than a letter written by return of post.*’ This principle was also applied in Manchester Diocesan Council for Education v Commercial & General Investments Ltd [1970] 1 WLR 241 such that an acceptance which meets the offeror’s objective in prescribing a method of acceptance (albeit not by the method prescribed) will remain valid.

Finally, if the offer does not state a method of acceptance, the required speed of acceptance can be deduced from the means by which the offer was sent: therefore, for example, if an offer is made by telegram, then it is implied that acceptance should be made by an equally speedy means. Therefore, an acceptance by post would be ineffective (Quenerduaine v Cole).

**Acceptance by post – the postal rule**

Acceptance by post is an exception to the general rule that acceptance must come to the attention of the offeror before it is valid.

In Adams v Lindsell (1818) 1 B & Ald 681 Mrs Lindsell made an offer by post to sell Mr Adams some wool, asking for a reply ‘in course of post’. The offer letter was sent on 2 September, but it did not arrive until 5 September, whereupon Adams posted a letter of acceptance at once. By the time the letter of acceptance had arrived (which was after some lengthy time), Lindsell, who had assumed that her offer had been rejected, had sold the wool to a third party. Adams claimed breach of contract. The court held that the contract was made at the time the letter was posted.

The postal rule also applies:

* if the letter of acceptance is received after notice of revocation of the offer has been sent (Henthorn v Fraser);
* if the letter of acceptance is never received by the offeror (Household Fire Insurance Co v Grant (1879) 4 Ex D 216).

**Non-instantaneous communication of acceptance**

Since the postal rule was developed, advances in communications technology have led to a number of situations where its use is irrelevant. Virtually instantaneous communications methods, such as telephone conversations, are treated in the same way as face-to-face personal conversations and are, therefore, relatively unproblematic: acceptance takes place when and where the acceptance is received (Entores v Miles Far East Corporation).

However, the situation is more difficult when answering machines are used. A message may be left which is not played back for some time. The same is true of telex, fax and email: all systems (when working correctly) deliver messages virtually instantaneously, but those messages may not be read instantly if the receiving party is away from the receiving machine. The question then becomes one of if, when and where a contract is formed with such non-instantaneous methods.

**Intention to create legal relations**

In order to prevent the courts from being troubled by disputes concerning agreements which are not intended to be legally binding, the courts have sought to distinguish agreements that should be legally enforceable and those which should not. These fall into a number of categories:

* social and domestic agreements
* commercial agreements
* advertisements.

**Social and domestic agreements**

There is a presumption that there is no intention to create legal relations in social or domestic agreements. This presumption may be rebutted.

*Husbands and wives*

Agreements between husband and wife are presumed not to create legal relations unless the agreement itself states that it does.

In Balfour v Balfour [1919] 2 KB 571 A husband worked overseas and his wife lived with him overseas. They came back to England during his leave. The wife developed rheumatoid arthritis and her doctor advised her not to return overseas. The husband promised to pay £30 per month until she was able to return overseas. The husband eventually wrote to say that it was better that they remained separated. The wife sued to enforce continued payment of the £30 monthly.

The Court of Appeal held that the agreement was not enforceable since there was a general presumption that there is no intention to create legal relations between family members.

In Balfour, the couple were not separated at the time of making their agreement. The Court of Appeal stated that the principle from Balfour did not apply where the couple were not living together amicably, about to separate or, indeed, had separated. In these cases, the parties are considered to be required to sort out their finances in more precise terms and therefore any agreement between them is more likely to carry an intention to create legal relations (and hence to be legally binding) (Merritt v Merritt [1970] 1 WLR 1211).

*Parents and children*

Domestic agreements between parents and children are presumed not to create legal relations (Jones v Padavatton [1969] 1 WLR 328). Parties sharing a house Where an agreement is made between parties who share a dwelling but are not related, then the court will consider all the circumstances of the agreement. They are more likely to find the intention to be legally bound where money has changed hands (Simpkins v Pays [1955] 1 WLR 975).

*Other social agreements*

The courts are reluctant to find contractual intention in social agreements. For instance, in Lens v Devonshire Club (1914) The Times, 4 December, it was held that the winner of a competition held by a golf club could not sue for his prize since ‘no one concerned with that competition ever intended that there should be any legal results flowing from the conditions posted and the acceptance by the competitor of those conditions’.

**Commercial agreements**

Just as there is a presumption that there is no intention to create legal relations in social or domestic agreements the converse is true in commercial agreements: it is presumed that there is an intention to create legal relations.

This presumption can generally be rebutted only by express provision in the contract.

In Rose & Frank Co v Crompton Bros Ltd [1925] AC 445 it was held that a commercial agreement between a British manufacturer and their appointed distributor in the USA which expressly stated that it was ‘not subject to legal jurisdiction’ in either country was sufficient to rebut the presumption that it was intended to be a contract.

This is so even if the agreement appears to be gratuitous in nature, such as those involving an ex gratia payment (Edwards v Skyways [1969] 1 WLR 349).

However, it does not apply to so-called ‘comfort letters’ which are interpreted as a statement of fact rather than as a contractual promise (Kleinwort Benson Ltd v Malaysian Mining Corporation [1989] 1 WLR 379). It also does not apply to agreements (such as the football pools) which are stated to be ‘binding in honour only’ (Jones v Vernons Pools [1938] 2 All ER 626).