OFFER AND ACCEPTANCE

Agreement

- **objective** test = how the **reasonable** and **honest** person would interpret parties' intentions from their conduct in all the circumstances;

- objectivity **perspectives**:
  - **detached objectivity** — independent interpretation of facts;
  - **promisor objectivity** — interpretation from an honest and reasonable promisor/ actor's point of view;
  - **promise objectivity** — interpretation from an honest and reasonable promisee/ addressee's point of view.

- **types** of objectivity:
  - **formal —** establishes a hierarchy based on probative value according to which conduct may amount to an offer;
  - **contextual** — court ought to take into account all reasonably available information to which the parties were exposed when the contract was made.

- ***Hartog v Colin & Shields (1939) —*** the seller's subjectivity trumps the buyer's objectivity when the buyer knows that the seller has made a mistake as to terms (re: knows of the seller's subjective intention)

- ***Smith v Hughes (1871) LR 6 QB 597 (CA)*** —- affirmed objective test for determining the intentions of the parties concerning contract formation;

  - *'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms*' (per Lord Blackburn at 607)

Offer

Distinctions

- offer = manifestation by the offeror of willingness to be bound by the terms proposed to the offeree as soon as the latter accepts said terms, per ***Storer***.

  *** c.f. assessed objectively, re: reasonable man standard;

- ***Harvey v Facey [1893] AC 552 (PC) —*** offer distinguished from supply of additional information;

- offer distinguished from **invitation to treat:**

  - ***Storer v Manchester City Council (1974) —*** willingness to be bound objectively manifested through conduct => offer, not invitation to treat;

  - ***Gibson v Manchester City Council [1979] 1 WLR 294 (HL) —*** vague wording => no contract.

    *** in ***Gibson***, the Council specifically mentioned that they "*may be prepared to sell*" the council house, thus being an invitation to treat and in the negotiation phase, whereas in ***Storer***, the Council sent a letter titled "*agreement of sale*", a behaviour which amounts to an offer due to the intention to be bound.

Communication

- must be communicated to offeree, re: offeree cannot be bound without knowledge, per ***Taylor v Laird***;
- must provide certain terms, per ***Gunthing v Lynn.***

Conventions

- displays & advertisements — generally invitations to treat, re: the customer is regarded as the party who makes the offer when they proceed to the cash register + the seller may accept or reject the customer's offer.
  - ***Spencer v Harding (1869-70)* LR 5 CP 561 (CCP) —** use of word 'offer' not determinative outside legal context.
  - ***Pharmaceutical Society of Great Britain v Boots Chemists Ltd* [1953] 1 QB 401 (CA) —** display of goods is an invitation to treat, not an offer.
  - ***Fisher v Bell (1961)* —** display of goods in shop windows = ITT**.**
  - ***Partridge v Crittenden* [1968] 1 WLR 1204 —** advertisements = ITT.
    - BUT ***Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA) —** the advertisement was an offer because a unilateral contract would be established with those who used the product as advertised, re: performance of the conditions constitutes acceptance of the offer. It is implied from the nature of the transaction that the offeror has dispensed with any notice of acceptance being given by the offeree before the offeree has performed the conditions and claimed performance of the contract by the offeror. The consideration for such a contract is, on the one side, the inconvenience which the offeree suffers in performing the conditions, and, on the other, the advantage which the offeror has through his offer being accepted.
- auctions — offer = bid + fall of hammer = acceptance;
  - ***Harris v Nickerson (1873)* —** advertisement for auction is ITT;
  - ***British Car Auctions Ltd v Wright (1972)* —** making goods available for sale is ITT;
  - if auction is 'without reserve' different rules apply:
    - ***Barry v Davies (2000)* —** auctioneer must sell to the highest bona fide bidder;
    - ***Warlow v Harrison (1858) 1 El & El 295 (****obiter)* — transaction should be analysed as two separate contracts:
      - a unilateral collateral contract - highest bidder + auctioneer (auctioneer = obliged to accept highest bid from the bidder making it);
      - a main contract - highest bidder + owner
- tenders — submission of tender = offer + acceptance of tender = acceptance;
  - ***Spencer v Harding* (1870) LR 5 CP 561 —** invitation to tender = ITT;
    - ***Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195 (CA) —** failure to consider validly submitted tender may result in liability in requestor so stipulated in their invitation, re: some invitations to tender are accompanied by a collateral contract implying that the requestor will give due consideration to any timely bid => offer as opposed to ITT;
    - ***Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207 (HL) —** failure to accept highest tender may result in liability if requestor so stipulated in their invitation;
- tickets & automatic vending machines — generally offers;
  - ***Denton v Great Northern Railway Co [1856] 5 E. & B. 860*** — train timetable, passenger accepts offer when buying ticket;
  - ***Wilkie v London Passenger Transport Board [1947] 1 All E.R. 258*** — acceptance occurs on boarding bus;

- ***Thornton v Shoe Lane Parking [1971] 2 QB 163*** — acceptance on insertion of money in vending machine;

Acceptance

- unequivocal expression of consent to the proposal contained in the offer and has the effect of immediately binding both parties to the contract;
- must mirror/ not deviate from offer;
- must be made as a response to offer;
- must be communicated to the offeror in cases involving instantaneous communication (by appropriate means), per ***Entores;***

Distinctions

- ***Hyde v Wrench (1840) 3 Beav 334* —** acceptance distinguished from counter-offer, re: offeree who varies the terms of the original offer does not accept them, but makes a counter-offer, which terminates the original offer, save for cases where the offeror's rejection of the counter-offer includes a renewal of original offer;

- ***Stevenson, Jacques & Co v McLean*** **(1879-80) LR 5 QBD 346 (QBD) —** demand for additional information (e.g. as to availability of better terms) distinguished from counter-offer;

Battle of the Forms — exchange of forms with competing terms;

- ***Butler v Ex-Cell-O Corp (England) Ltd*** **[1979] 1 WLR 401 (CA) —** last shot rule = the party who presents his terms last without provoking objection from the recipient who acts on the 'contract' succeeds in binding the recipient on his terms;

  *** per Lord Denning (404-405) defended alternative method on the grounds that offer/ acceptance model outdated, re: the courts should determine reasonable compromises on the disputed terms if the parties are agreed on all material terms => two-stage analysis:

  - the commitment question: assessed by looking at the correspondence as a whole and the parties' conduct to see whether or not they 'have reached agreement on all material points, even though there may be differences between the forms and conditions';

  - the content question: 'If [the parties' terms] can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication.'Only 'material' inconsistencies undermine contract formation (eg, price, payment, quality, quantity, etc.)

Nexus

- acceptance must be in response to known offer:

  - ***Williams v Cawardine —*** offeree must be aware of reward in order to claim it;

    - BUT ***Gibbons v Proctor*** **(1891)** — offeree became aware of reward by the time relevant information reached relevant party => could claim reward;

  - ***Tinn v Hoffman*** **(1873) 29 LT 271** — cross offers made in ignorance of each other do not create a contract;

Method of Acceptance

- if unprescribed — objective test, eg, signature, reliance, etc.
- if prescribed — offeror only bound if communication of acceptance complies with their stipulated requirements;

  - ***Manchester Diocesan Council for Education v Commercial and General Investments Ltd*** **[1970] 1 WLR 242** — must make prescribed method of acceptance clear BUT if offeror does not insist that only acceptance in said method will be binding, acceptance communicated by any other method that is no less advantageous to the offeror will conclude the contract;

- ***Felthouse v Bindley*** **(1862) 6 LT 85** — silence does not amount to acceptance;

Communication

- ***Adams v Lindsell*** **(1818) 1 B & Ald 681 —** acceptance effective on posting = 'postal rule';
- ***Household Fire Insurance v Grant*** **(1879) 4 Ex D 216 —** even if letter is lost;
- ***Holwell Securities Ltd v Hughes*** **[1974] 1 WLR 155 (CA) —** postal rule does not apply if expressly / impliedly excluded by offeror;

    ***postal rule does not apply where it would lead to absurdity / produce manifest inconvenience (*obiter)*

- ***Entores v Miles Far East Corp*** **[1955] 2 QB 327 (CA) (Denning LJ) —** postal rule does not apply to instantaneous means of communication, re: acceptance is effective when + where received by offeror;
- c.f. ***Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH*** **[1983] 2 AC 34 (HL);**
- ***Tenax Steamship Co v Owners of the Motor Vessel Brimnes (The Brimnes)*** **[1975] QB 929 (CA) —** communication sent to a business within office hours amounts to actual communication, re: effective even if not read;
- ***Mondial Shipping and Chartering BV v Astarte Shipping Ltd. (1995) —*** communication sent to a business outside office hours is not actual communication, re: effective when reasonably expected to be seen.

Termination

- revocation/ withdrawal:
    - ***Routledge v Grant —*** offer may be withdrawn anytime before acceptance is provided;
    - ***Byrne v Van Tienhoven*** **(1879-1880) LR 5 CPD 344 (CPD) —** postal rule does not apply to revocation of offer, re: effective only when communicated to offeree;
    - ***Dickinson v Dodds*** **(1875-76) LR 2 Ch D 463 (CA)** — revocation by reliable third-party possible;
- lapse of time / reasonable passage of time — ***Ramsgate Victoria Hotel v Montefiore;***
- death of one of parties:
    - death of offeree ***— Reynolds v Atherton (***c.f. ***Re Irvine);***
    - death of offeror ***— Coulthart v Clemenston;***
    - does not apply if offeree is not aware of offeror's death — ***Bradbury v Morgan;***

Unilateral contracts = exchange of promise for act;

- different rules:
    - ***Carlill v Carbolic Smoke Ball Co —*** acceptance on commencement of performance, re: need not be communicated;
    - ***Errington v Errington*** **[1952] 1 All ER 149 (CA)** — implied duty not to revoke once performance has commenced + not to prevent completion of performance;
        - c.f. ***Daulia v Four Millbank Nominees;***
        - ***Luxor (Eastborne) Ltd v Cooper*** **[1941] AC 108 (HL)** — unless offeree should bear risk;

OFFER AND ACCEPTANCE

common law's insistence on objectivity in contract formation;	- common law has committed itself to an objective theory on contract formation, re: ***Smith v Hughe***s about outward appearance of willingness to contract;
	- **Smith** — apparent promise must be binding because it produces the same degree of dependence to the party to whom it is addressed;
	  - **Spencer** — words/ conduct given the meaning they would by assigned by a reasonable person in the position of the addressee
	  - **Howarth** — argues for position of wholly detached objectivity ('fly on the fall') as opposed to choosing between promisor/ promisee => avoid uncertainty as opposed to having to choose between the two undistinguishable options.
	  - BUT **Vorster** — terminology of promisor/ promisee unhelpful in bilateral contracts;
	  - BUT **Spencer** — 'fly on the wall' could result in imposition of contract / denial of contract where both parties believed they were/ were not contracting => absurdity;
	  - **Chen** — law must take the perspective of the observer rather than the actor;
	  - reasonable observer approach is objective, re: the RO would not rely on the appearance of an agreement when he ought to realise the actor's true intentions do not match it => not a subjective exception, rather an application of the objective theory of contract (see e.g. *Hartog)*;
	  - when the observer is responsible for the divergence between the actor's intention and appearance, they cannot hold the actor to the appearance (see e.g. *Scriven)*
	- **Bayern —** contracts should not become fully and irrevocably binding at the moment of agreement because most parties neither expect or desire such a result + commercial norms permit a fluidity over withdrawal.
	- **Atiyah** — criticises general failure to distinguish between executory contracts and contracts where partial performance, reliance or conferral of benefits have taken place (actions over intentions)
	  => contract law should prioritise compensation of reliance interest, as opposed to expectation interest, re: in many cases, reliance damages more appropriate than enforcement of contract;
	  - see this approach in civil law — in comparison, fully objective English law appears too harsh on the ostensible promisor and wasteful **(Kessler, Fine)**
	  - **Collins —** English position is all or nothing (full-blown contract or no remedies at all) which leads to manipulation or distortion of classical rules to find a contract in cases where there has been ancillary reliance => would be easier to compensate reliance;
	  => justification of objectivity on the basis of estoppel untenable because estoppel seeks to alleviate detriment, which is not always present when observers rely on outward appearances of actors.
	  - more pertinent justifications = pragmatism (hard to prove subjective intentions) + necessity (reference point available to all cases, cannot each communicate in 'private language')

offer and acceptance rules / parties' intentions:	- **Bayern** — rules criticised as artificial, formalistic and complex + may actually serve to defeat parties' intentions, e.g. of over-reliance on formality = postal rule — easily rebuttable, no principled basis for continued existence, serves no practical advantages.
	  - the doctrine obscures substantive underlying questions => overcomplicates the issue;
	  - needless categories are adopted which have a poor practical application;
	  - focus should be on reasonable confidence, as opposed to absolute certainty, since the latter is difficult to find precisely in every case + in some cases it is not even what the parties envisage/ desire;
	  - proposes that determining whether a contract was formed should be an interpretative exercise based on the intentions of the parties, as opposed to a mechanical application of a single rule;
	- **Collins —** rules are mere formalist mask for various policy choices, e.g discouraging opportunism, protecting reliance, preserving room for manoeuvre;
	  - BUT arg. overstated — the law does not always insist on formalistic approach, re: flexibility at the cost of certainty, comparison to Roman law (*stipulatio)*, e.g. acceptance by conduct possible in English contract law as opposed to civil systems*;*
	  - BUT see 'battle of forms' cases below, where courts strain traditional approach boundaries to fit contractual situation in a 'mirror analysis' framework;
	  - BUT see cases concerning contractual alterations where consideration is not recognised as sufficient to enforce contract — arguably does not enforce objective intentions of the parties;
	  - BUT see cases where party is *prima facie* bound by their signature as acceptance of an offer even where their objective intention would clearly point to a different conclusion.
	- **Lord Wilberforce** — the traditional approach is 'often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration', re: implies that there are cases which do not fit the traditional model;

‘battle of the forms’ vs. mirror approach to contract formation:	- issue with strict mirror approach arises when two negotiating parties each use their own different standard terms of business during negotiations;
	- *Butler Machine Tool Co v Ex-Cell-O Corp:*
	  - **facts***:* B had offered to see E machinery for a certain sum which was subject to B’s enclosed standard terms of business, including a price escalation clause. E replied to said offer and ordered the machinery on their own terms, which did not contain a price escalation clause. E also sent a tear-off slip which was signed and returned by B. B also sent a letter which referred to the terms of their own original offer. On the delivery of the machine, B sought to invoke the price escalation clause.
	  - **held**: when E sent an order on different terms, B’s original order was effectively killed. B then accepted E’s counter-offer by signing the tear-off slip. B;’s subsequent letter was equivocal and could not override the plain acceptance in the tear-off slip.
	  - **criticisms:** hides real basis for decision, re: based on the extent of reliance of the parties, as oppose to the ‘last shot’, does not fit with what actually occurred, re: the extent and complexity of the whole transaction/ communication, may lead to unjust results, re: can be matter of chance who gets ‘last shot’.
	  - **Denning LJ:** traditional approach outdated, should base decision on whether the parties were agreed in terms of material terms, re: commitment question + content question => more flexibility;
	- the mirror approach to battle of the forms contracts almost inevitably leads to the conclusion that there was no contract since the parties were plainly not mirroring each other’s proposals.
	  - rather absurd — esp. when conduct shows that the parties were in fact agreed, re: B manufactured machinery at E’s request => contract?
	  => law of contract fails its basic duty — to recognise and enforce agreements;
	  - **Beale** + **Dugdale —** business people rarely interact with contract law *per se*, which is why such situations are explicable on the basis that the parties believe they are agreed and thus have a contract, as opposed to intentionally giving rise to a ‘battle of the forms’;
	  - ‘paper disagreement’ diverges from practical reality => more flexible approach to contract formation necessary to reflect expectations in such sit.
	- **McKendrick** — courts need not force language of contract => restitutionary remedies available because contractual duties are onerous and should not lightly be imposed;

CONSIDERATION

- *'A valuable consideration, in the sense of the law, may consist of some right, interest or profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other'* (per Lush J, ***Currie* v *Misa* (1875) L.R. 10 Ex 153)**

  => in order to acquire the right to enforce another's promise one must undertake to give / give something in return to that individual, as stipulated by them (usually in the form of detriment to the promisee and/ or benefit to the promisor);

Rules of consideration

1. Consideration need not be adequate but it should be sufficient;

- generally, it is for the parties to decide what constitutes adequate consideration => freedom of contract;
- **BUT** the courts have the right to conclude whether valid consideration was ultimately given or not;
- ***Thomas* v *Thomas* [1842] 2 QB 851 —** *'consideration means something which is of some value in the eyes of the law'*
  - BUT this appears to be at odds w/ later cases, see below;
- ***Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 (HL) —** *'A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn*' (per Lord Somervell at 114);
  - Lord Reid — Nestle was not trying to sell gramophone records but to boost chocolate sales, and vast majority of record-purchasers would have been people induced to buy Nestle chocolate for this reason, re: '*The requirement of wrappers should be sent was of great importance for the Nestle Co… It seems to me quite unrealistic to divorce the buying of chocolate from the supplying of the records*'
  - Lord Somervell of Harrow — chocolate bar wrappers part of consideration as aim was to '*increase sales of chocolate*'.

VS.

- ***Lipkin Gorman* v *Karpnale Ltd* [1992] 2 AC 548 —** gaming chips not good consideration;
  - difficult to reconcile with *supra* **—** in reaching this decision, the court was concerned with protecting the victim of theft, re: public policy considerations;
- a gratuitous promise may be made binding if **nominal consideration** is provided.
- the following will not be regarded as good consideration:
  - intangible benefit;
    - ***White* v *Bluett* (1853) 23 L.J. Ex 36 —** abstaining from something one does not hold a right to do in the first place does not suffice;
      - BUT ***Hamer* v *Sidway* (1891) 124 NY 538, US decision —** waiving legal right suffices;
      - AND ***Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327** — promise not to sue for an injunction found sufficient;
  - part payment of debt — ***Pinnel's Case* (1602) 5 Co Rep 117:**
    - c.f. ***Foakes* v *Beer* (1884) 9 App Cas 605**