I. Understand the Roles of Offer and Acceptance in the Formation of a Contract*

I. Basic Contract Concepts and Types

Contracts have traditionally been classified as bilateral or unilateral, depending on whether on or both of the parties have made a promise. In unilateral contract, only one party makes a promise. For example, Perks Café issues "frequent buyer" cards to its customers, and stamps the cards each time a customer buys a cup of coffee. Perks promises to give any customer a free cup of coffee if the customer buys 10 cups of coffee and has his "frequent buyer" card stamped 10 times. In this case, Perks has made an offer for a unilateral contract, a contract that will be created with a customer only if and when the customer buys 10 cups of coffee and has his card stamped ten times. In a bilateral contract, by contrast, both parties exchange promises and the contract is formed as soon as the promises are exchanged. For example, if Perks Café promises to pay Willowtown Mall $1,000 a month if Willowtown Mall will promise to lease a kiosk to Perks for the holiday season, Perks has made an offer for a bilateral contract because it is offering a promise in exchange for a promise. If Willowtown Mall makes the requested promise, a bilateral contract is formed at that point- even before the parties begin performing any of the acts that they have promised to do.

A valid contract is one that meets all of the legal requirements for a binding contract. An unenforceable contract is one that meets the basic legal requirements for a contract but may not be enforceable because of some other legal rule. If a contract is one of those for which the statute of frauds requires a writing, but no writing is made, the contract is said to be unenforceable. Another example of an unenforceable contract is an otherwise valid contract whose enforcement is barred by the applicable contract statute of limitation.

Voidable contracts are those in which one or more of the parties have the legal right to cancel their obligations under the contract. For example, a contract that is induced by fraud or duress is voidable (cancelable) at the election of the injured party. The important feature of a voidable contract is that the injured party has the right to cancel the contract if he chooses. That right belongs only to the injured party, and if he does not cancel the contract, it can be enforced by either party.

Void contracts are agreements that create no legal obligations and for which no remedy will be given. Contracts to commit crimes, such as "hit" contracts, are classic examples of void contracts.

In an express contract, the parties have directly stated the terms of their contract orally or in writing at the time the contract was formed. However, the mutual agreement necessary to create a contract may also be demonstrated by the conduct of the parties. When the surrounding facts and circumstances indicate that an agreement has in fact been reached, an implied contract (also called a contract implied in fact) has been created. When you go to the doctor for treatment, for example, you do not ordinarily state the terms of your agreement in advance, although it is clear that you do, in fact, have an agreement. A court would infer a promise by your doctor to use reasonable care and skill in treating you and return promise on your part to pay a reasonable fee for her services.

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* Reprinted from Jane Mallor, Business Law in the Regulatory Environment (11th. ed. 2001).

II. Sources of Law Governing Contracts

Two bodies of law- Article 2 of the Uniform Commercial Code and the common law of contracts- govern contracts today. The Uniform Commercial Code, or UCC, is statutory law in every state. The common law of contracts is court-made law that, like all court made law, is in a constant state of evolution. Determining what body of law applies to a contract problem is a very important first step in analyzing that problem.

Article 2 of the UCC expressly applies only to contracts for the sale of goods. The essence of the definition of goods in the UCC is that goods are tangible, movable, personal property. So, contracts for the sale of such items as motor vehicles, books, appliances, and clothing are covered by Article 2.

Article 2 of the UCC applies to contracts for the sale of goods, but it does not apply to contracts for the sale of real estate or intangibles such as stocks and bonds, because those kinds of property do not constitute goods. Article 2 of the UCC also does not apply to service contracts. Contracts for the sale of real estate, services, and intangibles are governed by the common law of contracts.

Many contracts involve a hybrid of both goods and services. The test that the courts most frequently use to determine whether Article 2 applies to such a contract is to ask which element, goods or services, predominates in the contract. Is the major purpose or thrust of the agreement the rendering of a service, or is it the sale of goods, with any services involved being merely incidental to that sale? This means that contracts calling for services that involve significant elements of personal skill or judgment in addition to goods probably are not governed by Article 2 of the UCC. Construction contracts, remodeling contracts, and auto repair contracts are all examples of mixed goods and services contracts that may be considered outside the scope of the Code.

III. Requirements for an Offer

An offer is the critically important first step in the contract formation process.
The person who makes an offer (the offeror) gives the person to whom she makes the offer (the offeree) the power to bind her to a contract simply by accepting the offer.
Not every proposal qualifies as an offer. To distinguish an offer, courts look for three requirements. First, they look for some objective indication of a present intent to contract on the part of the offeror. Second, they look for specificity, or definiteness, in the terms of the alleged offer. Third, they look to see whether the alleged offer has been communicated to the offeree.

A. Intent to Contract
B.

For a proposal to be considered an offer, the offeror must indicate present intent to contract. Present intent means the intent to enter the contract upon acceptance. It signifies that the offeror is not joking, haggling, or equivocating. It makes sense that intent on the part of the offeror would be required for an offer-otherwise; an unwilling person might wrongly be bound to a contract. The desire to meet the needs of the marketplace by affording predictable and consistent results in contracts cases dictated a shift toward an objective theory of contracts. Following the objective theory of contracts, an offeror's intent will be judged by an objective standard- that is, what his words, acts, and the circumstances signify about his intent. If a reasonable person familiar with all the circumstances would be justified in believing that the offeror intended to contract, a court would find that the intent requirement of an offer was satisfied even if the offeror himself says that he did not intend to contract.

B. Definiteness of Terms:

A proposal that fails to state specifically what the offeror is willing to do and what he asked in return for his performance is unlikely to be considered an offer. One reason for the requirement of definiteness is that definiteness and specifically in an offer tends to indicate an intent to contract, whereas indefiniteness and lack of specificity tend to indicate that the parties are still negotiation and have not yet reached agreement.

1. Definiteness Standard under the Common Law: Classical contract law took the position that courts are contract enforcers, not contract makers. Traditionally, contract law required a relatively high standard of definiteness for offers, requiring that all the essential terms of a proposed contract be stated in the offer. The definiteness standard, like much of contract law, is constantly evolving. The trend of modern contract law is to tolerance a lower degree of specificity in agreements than classical contract law would have tolerated.

For example, in an offer for the sale of real property, the offer will lack the necessary definiteness if the offer does not include price.

2. Definiteness Standard under the UCC: Under Article 2 of the Uniform Commercial Code a contract can be created "in any manner sufficient to show agreement, including conduct, which recognizes the existence of a contract". So, if the parties are acting as though they have a contract by delivering or accepting goods or payment, for example, this may be enough to create a binding contract, even if it is impossible to point to a particular moment in time when the contract was created. An important difference between the Uniform Commercial Code ("Code") and classical common law standard for definiteness is that under the Code, the fact that the parties left open one or more terms of their agreement is not too indefinite to enforce. A sale contract is created if the court finds that the parties intended to make a contract and that their agreement is complete enough to allow the court to reach a fair settlement of their dispute ("a reasonably certain basis for giving an appropriate remedy"[2-204(3)]. Intention is still at the heart of these modern contract rules; the difference is that courts applying Code principles seek to further the parties' underlying intent to contract even though the parties have failed to express their intention about specific aspects of their agreement.

3. Communication of an Offer:

When an offeror communicates the terms of an offer to an offeree, he objectively indicates intent to be bound by those terms. The fact that an offer has not been communicated, on the other hand, may be evidence that the offeror has not yet decided to enter into biding agreement. For example, assume that Sevens and Meyer have been negotiating over the sale of Meyer's restaurant. Stevens confides in his friend, Reilly, that he plans to offer Meyer $150,000 for the restaurant. Reilly goes to Meyer and tells Meyer that Stevens has decided to offer him $150,000 for the restaurant and has drawn up a written offer to that effect. After learning the details of the offer from Reilly, Meyer telephones Stevens and says, "I accept your offer." Is Stevens now contractually obligated to buy the restaurant? No. Since Stevens did not communicate the proposal to Meyer, there was no offer for Meyer to accept.

II. Special Offer Problem Areas

A. Advertisement:

Generally speaking, advertisements for the sale of goods at specified prices are not considered to be offers. Rather, they are treated as being invitations to offer or negotiate. The same rule is generally applied to signs, handbills, catalogs, price lists, and price quotations. This rule is based on the presumed intent of the sellers involved. It is not reasonable to conclude that a seller who has a limited number of items to sell intends to give every person who sees her ad, sign, or catalog the power to bind her to contract. Thus, if Customer sees Retailer's advertisement of Wizbang XL laptop computers for $2,000 and goes to Retailer's store indicating his intent to buy the computer, Customer is making an offer, which Retailer is free to accept or reject. This is so because *Customer* is manifesting a present intent to contract on the definite terms of the ad.

In some cases, however, particular ads have been held to amount to offers. Such ads are usually highly specific about the nature and number of items offered for sale and what is requested in return. This specificity precludes the possibility that the offeror could become contractually bound to an infinite number of offerees.

B. Rewards

Advertisements offering rewards for lost property, for information, or for the capture of criminals are generally treated as offers for unilateral contracts. To accept the offer and be entitled to the stated reward, offerees must perform the requested act- return the lost property, supply the requested information, or capture the wanted criminal.

III. Termination of Offers

A. Lapse of Time

Offers that fail to provide a specific time for acceptance are valid for a reasonable time. What constitutes a reasonable time depends on the circumstances surrounding the offer. Offers involving things subject to rapid fluctuation in value, such as stocks, bonds, or commodity futures, have a very brief duration. The same is true for offers involving goods that may spoil, such as produce. The context of the parties' negotiations is another factor relevant to determine the duration of an offer. For example, most courts hold that when parties bargain face-to-face or over the telephone, the normal time for acceptance does not extend past the conclusion of their conversation unless the offeror indicates a contrary intention. Where negotiations are carried out by mail, the time for acceptance would ordinarily include at least the normal time for communicating the offer and prompt response by the offeree. Finally, in cases where the parties have dealt with each other on a regular basis in the past, the timing of their prior transactions would be highly relevant in measuring the reasonable time for acceptance.

B. Revocation:

1. General Rule: As the master of their offers, offeror can give the offeree the power to bind them to contracts by making offers. They can also terminate that power by revoking their offers. The general common law rule on revocations is that offerors may revoke their offers at any time prior to acceptance, even if they have promised to hold the offer open for a stated period of time.

2. Exceptions to the General Rule: In the following situations, however, offerors are not free to revoke their offers:

a. Options: An option is a separate contract in which an offeror agrees not to revoke her offer for a stated time in exchange for some valuable consideration. You can think of it as a contract in which an offeror sells her right to revoke her offer.

For example, assume that Ray offers to sell his house to Edna for $200,000 and promises to hold the offer open for ten days if Edna pays Ray $100 in exchange for that promise. Ray may not revoke the offer to sell his house for ten days, assuming that Edna has paid Ray the $100 for the option to accept the contract within ten days.

b. Offers for unilateral contract: Some courts have held that once the offeree has begun to perform under a unilateral contract, the offeror's power's to revoke is suspended for the amount of time reasonably necessary for the offeree to complete performance. Another approach to the unilateral contract dilemma is to hold that a bilateral contract is created once the offeree begins performance.

c. Promissory estoppel: In some cases in which the offeree relies on the offer being kept open, the doctrine of promissory estoppel can operate to prevent offerors from revoking their offers prior to acceptance. Section 87(2) of the Restatement (second) says: An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

For example, assume that X offers to pay $250,000 to the first person who flies across the English Channel in a human-powered aircraft before a December 31, 2002. Several interested parties, including Y spend substantial time and money on research, development and training for the attempt. X revokes the offer and thereafter Y performs the act prior to December 31, 2001. Y probably has no rights under the unilateral contract exception to the general rule of revocation because Y had not begun to perform the requested act prior to revocation by X. Hence, Y would have no right to the prize money. However, Y might prevail under the promissory estoppel exception.

d. Firm offers for the sale of goods: [Note: this applies to offers for the sale goods by merchants ONLY!]. The Code makes a major change in the common law rules governing the revocability of offers by recognizing the concept of a firm offer [2-205]. Like an option, a firm offer is irrevocable for a period of time. In contrast to an option, however, a firm offer does not require consideration to keep the offer open. Not all offers to buy or sell goods qualify as firm offers, however. To be a firm offer, an offer must:

- Be made by an offeror who is merchant
- Be contained in a signed writing
- Give assurances that the offer will be kept open.

An offer to buy or sell goods that fails to satisfy these three requirements is governed by the general common law rule and is revocable at any time prior to acceptance. If an offer does meet the requirements of a firm offer, however, it will be irrevocable for the time stated in the offer. If no specific time is stated in the offer, it will be irrevocable for a reasonable time. Regardless of the terms of the offer, the outer limit on a firm offer's irrevocability is three months. For example, if Worldwide Widget makes an offer in a signed writing in which it proposes to sell a quantity of its XL Turbo Widget to Howell Hardware and gives assurances that the offer will be kept open for a year, the offer is a firm offer, but it can be revoked after three months if Howell Hardware has not yet accepted it.

3. Time of Effectiveness of Revocations

The question of when a revocation is effective to terminate an offer is often a critical issue in the contract formation process. For example, Davis offers to landscape Winter's property for $1,500. Two days after making the offer, Davis changes his mind and mails Winter a letter revoking the offer. The next day, Winter, who has not received Davis's letter, telephones Davis and attempts to accept. Contract? Yes. The general rule on this point is that revocations are effective only when they are actually received by the offeree.

C. Rejection:

1. General rule: An offeree may expressly reject an offer by indicating that he is unwilling to accept it. He may also impliedly reject it by making a counteroffer, an offer to contract on terms materially different from the terms of the offer. As a general rule, either form of rejection by the offeree terminates his power to accept the offer.

2. Time of Effectiveness of Rejections: As a general rule, rejections, like revocations, are effective only when actually received by the offeror. Therefore, an offeree who has mailed a rejection could still change her mind and accept if she communicates the acceptance before the offeror receives the rejection.

D. Death or Insanity of Either Party

The death or insanity of either party to an offer automatically terminates the offer without notice.

For example, Arnie offer you a job as an assistant in his hot-air balloon business. Before you can even accept, Arnie falls out of a balloon at 3,000 feet. The offer terminates along with Arnie.

E. Destruction of Subject Matter

If, prior to an acceptance of an offer, the subject matter of a proposed contract is destroyed without the knowledge or fault of either party, the offer is terminated. So, if Marks offers to sell Wiggins his lakeside cottage and the cottage is destroyed by fire before Wiggins accepts, the offer was terminated on the destruction of the collage. Subsequent acceptance by Wiggins would not create a contract.

F. Intervening Illegality

An offer is terminated if the performance of the contract it proposes becomes illegal before the offer is accepted. So, if a computer manufacturer offered to sell sophisticated computer equipment to another country, but two days later, before the offer was accepted, Congress places an embargo on all sales to this country, the offer was terminated by the embargo.