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A2 GCE LAW

G156/01/RM Law of Contract Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

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G156 LAW OF CONTRACT

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extracts from Macdonald and Atkins, *Koffman & Macdonald's Law of Contract*, 8th Edition, OUP, 2014, pages 9, 17, 19

An offer is a promise by one party (the offeror) to enter into a contract, on a particular set of terms, with the intention of being bound as soon as the other party (the offeree) signifies his, or her, acceptance. ...

Although an offer may be withdrawn at any time before the offeree has accepted it, the withdrawal has to be communicated to the offeree. ... Of course, an offer may be withdrawn by someone whom the offeror has authorized to communicate that to the offeree, but ... unless the offeree believes the offer has been withdrawn, third party notification of withdrawal should be restricted to the situation where the third party would be seen as a reliable source of that information, whom the reasonable person would believe. ...

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What constitutes acceptance of an offer? It is the final expression of assent, in words or conduct, to the offer or proposal. It is important that the acceptance is both final and unequivocal. It must be an acceptance of the offeror's proposal without varying the terms or adding new terms. (For obvious reasons, this is sometimes referred to as the 'mirror image rule'.) A purported acceptance which attempts to introduce new terms, or vary those contained in the offer, will be a counter offer and not an acceptance of the original offer. ...

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A counter offer amounts to a rejection of the original offer, which cannot thereafter be accepted. In *Hyde v Wrench* (1840) 3 Beav 334, D made a written offer to sell his farm to C for £1,000, to which C replied that he would give £950 for it. D refused to sell at the lower price and, a few days later, C wrote to D agreeing to pay £1,000. D had not withdrawn his original offer, but he now refused to sell to C. The court held that there was no contract. C's counter offer (of £950) was a rejection of D's original offer and brought it to an end. It could not be revived afterwards by C simply purporting to accept it.

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However, there are situations where the offeree does not put forward a new proposal, but merely seeks clarification of the offer, or further information about it, from the offeror. In such a case the offer is not to be regarded as rejected and it is still open to the offeree to accept it. ...

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SOURCE 2

Extracts from McKendrick, Ewan, *Contract Law*, 10th Edition, Palgrave Macmillan, 2013, pp34–36

The general rule is that acceptance must be communicated to the offeror. The acceptance is generally only validly communicated when it is actually brought to the attention of the offeror. The operation of this rule was illustrated by Denning LJ... He said that if an oral acceptance is drowned out by an over flying aircraft, such that the offeror cannot hear the acceptance, then there is no contract unless the acceptor repeats his acceptance once the aircraft has passed over. Similarly, where two people make a contract by telephone, and the line goes dead so that the acceptance is incomplete, then the acceptor must telephone the offeror to make sure that he has heard the acceptance. ... 5

Where the offeror prescribes a specific method of acceptance, the general rule is that the offeror is not bound unless the terms of his offer are complied with. However, the offeror who wishes to state that he will be bound *only* if the offer is accepted in a particular way must use clear words to achieve this purpose. ... 10

The general rule is that acceptance of an offer will not be implied from mere silence on the part of the offeree and that an offeror cannot impose a contractual obligation upon the offeree by stating that, unless the latter expressly rejects the offer, he will be held to have accepted it. The rationale behind this rule is that it is thought to be unfair to put an offeree to time and expense to avoid the imposition of unwanted contractual arrangements. The principal English authority on this point is *Felthouse v Bindley* (1862) 11 CB (NS) 869. The claimant and his nephew entered into negotiations for the sale of the nephew's horse. The claimant stated that if he heard nothing further from his nephew then he considered that the horse was his at £30 15s. The nephew did not respond to this offer but he decided to accept and told the defendant auctioneer not to sell the horse because it had already been sold. Nevertheless, the auctioneer mistakenly sold the horse, and so the claimant sued the auctioneer in conversion (a tort claim in which it is alleged that the defendant has dealt with goods in a manner inconsistent with the rights of the true owner). The auctioneer argued that the claimant had no title to sue because he was not the owner of the horse as his offer to buy the horse had not been accepted by the nephew. This argument was upheld by the court on the ground that the nephew's silence did not amount to an acceptance of the offer. The application of the general rule to the facts of *Felthouse v Bindley* has been the subject of criticism ... (Miller, 1972, *Felthouse v Bindley Revisited*, Modern Law Review 34, 489). 15 20 25 30

...the rule itself has not emerged unscathed from the line of cases ... where the House of Lords held that a contract to abandon a reference to arbitration could be concluded by the silence of both parties. 35

SOURCE 3

Extracts from Elizabeth Macdonald, 'Dispatching the dispatch rule? The postal rule, e-mail, revocation and implied terms.' *European Journal of Current Legal Issues*, Vol 19, No 2 (2013)

The postal rule is an exception to the "general rule ... that a contract is formed *when* acceptance of an offer is communicated by the offeree to the offeror" (*Brinkibon v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34, at p41). It stems from *Adams v Lindsell* (1818) 1 B & Ald 681, and under it a contract is formed when a letter of acceptance is posted. It applies when it is reasonable to use the post (*Henthorn v Fraser* [1892] 2 Ch 27), and is subject to the offeror not ousting its application (*Holwell Securities Ltd v Hughes* [1974] 1 WLR 155). It means that an offer can no longer be revoked once the acceptance has been posted (*Re Imperial Land Co of Marseilles (Harris' Case)* (1872) LR 7 Ch 587), and it is generally irrelevant that it never arrives, or arrives late (*Household Fire and Accident Insurance Co v Grant* [1874–80] All ER Rep 919), although the rule will not apply if the loss or delay is due to the fault of the offeree, who has, for example, misaddressed it... 5 10

...

A number of justifications for the postal rule have been put forward in the past which have long been recognised to be fatally flawed and dismissed accordingly. These include the meeting of minds (note 1), the idea of the post office as an agent (2), the notion that the offeror chose the method of communication and anyway could have stated that the postal rule was not to apply (3), that it is necessary to avoid an endless chain of correspondence (4), and that it is the better rule evidentially (5). 15

...

The revocation issue should now be addressed as a basis of the postal rule ... the particular difficulty which is occasioned by revocation, and is dealt with by the postal rule, is that of a revocation which arrives with the offeree after the acceptance has been dispatched, but before the acceptance is received by the offeror, and this is what concerned Mellish LJ in *Re Imperial Land Co of Marseilles*. He said that he had been (at 594) 20 25

"forcibly struck with the extraordinary and very mischievous consequences which would follow if it were held that an offer could be revoked at any time until the letter accepting it had been actually received." ...

The significance of the potential for revocation in this context is emphasised by its treatment under other systems. [American law has a rule which is largely the same as the postal rule.] Under German Law an offer is generally irrevocable unless otherwise stated... Under French Law, there is protection against revocation... The revocation issue is dealt with under the United Nations Convention on International Sale of Goods ... and the Draft Common Frame of Reference... 30 35

At least to the extent of a need to deal with the revocation issue, there is an explanation of the postal rule. That does not, however, answer the question of whether a dispatch rule should be extended to an emailed acceptance. ...

Posner takes the view that the postal rule is economically efficient as it

"enables the offeree to begin performance (or preparatory measures) but does not delay the offeror's performance, which in any event cannot begin until the offeror received the acceptance, for until then he wouldn't know whether there was a contract." 40

In *Household Fire and Accident Insurance Co v Grant*, in recognising that the risk of the loss or delay of the acceptance could not “fall equally upon the shoulders of both parties”, Thesiger LJ emphasised the significance of performance being able to commence as soon as possible... 45

...the balance point of economic efficiency can be strongly contended to be different in relation to more modern, and much faster, means of communication. There are now multiple fast, cheap, means by which the offeree can accept, and can check receipt of acceptance. They not only markedly reduce the potential for an intervening revocation, they also very significantly diminish the time before performance by both parties can safely commence. Allocating the non-fault risk of the loss, or delay, of acceptance, to the inappropriate party – the offeror – should no longer be viewed as a price which has to be paid for the benefit of performance commencing swiftly. 50 55

SOURCE 4

Extracts from *Holwell Securities v Hughes* [1974] 1 WLR 155, CA

Taken from McKendrick, E, *Contract Law, Text, Cases and Materials*, 5th Edition, OUP, 2012, 106–107

Under a contract with the defendant, the plaintiffs were granted an option to purchase land. Clause 2 of the agreement provided:

‘The said option shall be exercisable by notice in writing to the [defendant] at any time within six months from the date hereof...’

The plaintiffs purported to exercise that option by a letter sent by their solicitors on 14th April 1972 but the defendant never received the letter. The defendant refused to accept that the option had been validly exercised. The plaintiffs sought specific performance of the option agreement. Their claim was rejected on the ground that the option had not been validly exercised. The plaintiffs had failed to comply with the requirements of clause 2 of the agreement in that they had failed to give the defendant notice that they were exercising the option. 5 10

Russell LJ:

It is the law in the first place that, prima facie, acceptance of an offer must be communicated to the offeror. Upon this principle the law has engrafted a doctrine that, if in any given case the true view is that the parties contemplated that the postal service might be used for the purpose of forwarding an acceptance of the offer, committal of the acceptance in a regular manner to the postal service will be acceptance of the offer so as to constitute a contract, even if the letter goes astray and is lost. Nor, as was once suggested, are such cases limited to cases in which the offer has been made by post. It suffices I think at this stage to refer to *Henthorn v Fraser*... In the present case ... Templeman J concluded that the parties here contemplated that the postal service might be used to communicate the acceptance of the offer (by exercise of the option); and I agree with that. 15 20

But that is not and cannot be the end of the matter. In any case, before one can find that the basic principle of the need for the communication of acceptance to the offeror is displaced by this artificial concept of communication by the act of posting, it is necessary that the offer is in its terms consistent with such displacement and not one which by its terms points rather in the direction of actual communication. ... 25

The relevant language here is ‘The said option shall be exercisable by notice in writing to the intending vendor...’, a very common phrase in an option agreement. ... the requirement of ‘notice ... to’, in my judgement, is language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or notified to the offeror, and is inconsistent with the theory that acceptance can be constituted by the act of posting... 30

SOURCE 5

Extracts from Entores Ltd v Miles Far East Corporation [1955] 2 QB 237, CA
Taken from McKendrick, E, *Contract Law, Text, Cases and Materials*, 5th Edition, OUP, 2012, 98–99

The plaintiffs, a company based in London, made an offer by telex (similar to a fax machine) to the defendants, a company based in Amsterdam who acted as agents for an American corporation. The defendants sent their acceptance of the offer by telex. The plaintiffs applied for leave to serve notice of a writ on the American corporation in New York. Their entitlement to do so turned on the answer to the question: where was the contract made? Was the contract made when the defendants sent their acceptance by telex (i.e. in Amsterdam) or was it made when the telex was received on the plaintiffs' machine (i.e. in London)? It was only if the contract was made in England that the court had jurisdiction to grant leave to serve out of the jurisdiction. It was held that the contract was formed when the communication of the acceptance was received by the plaintiffs in London... 5 10

Lord Denning:

When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing. ... 15

...take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes 'dead' so that I do not hear the words of his acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off, because people usually say something to signify the end of the conversation. ... 20

...take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. ... 25

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound... But if there should be a case where the offeror without any fault on his own part does not receive the message of acceptance – yet the sender of it reasonably believes that it has got home when it has not – then I think there is no contract. 30 35

My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. 40

SOURCE 6

Extracts from McKendrick, E, *Contract Law, Text, Cases and Materials*, 5th Edition, OUP, 2012, 100–101

The decision of the court of appeal in *Entores* has since been approved by the House of Lords in *Brinkibon Ltd v Stahag-Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34. The issue in *Brinkibon* was the same as that which arose on the facts of *Entores* and the conclusion of the House of Lords was the same, namely that, in the case of communications by telex, the acceptance is effective when it is communicated to the offeror... Their Lordships expressly declined the invitation to overrule *Entores*...

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Lord Wilberforce:

In this situation, with a general rule covering instantaneous communication *inter praesentes*, or at a distance, with an exception applying to non-instantaneous communication at a distance, how should communications by telex be categorised? In *Entores* the Court of Appeal classified them with instantaneous communications. Their ruling ... appears not to have caused either adverse comment, or any difficulty to business men. I would accept it as a general rule. Where the condition of simultaneity is met, and where it appears to be within the mutual intention of the parties that contractual exchanges should take place in this way, I think it is a sound rule, but not necessarily a universal rule.

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Since 1955 the use of telex communications has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach or be intended to reach the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or upon the assumption, that they will be read at a later time. ... No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie: see *Household Fire and Accident Insurance Co v Grant* per Baggallay LJ and *Henthorn v Fraser* per Lord Herschell.

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