



Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 10 - agreement

1. There can be no valid contract unless the parties are in agreement as to all its fundamental terms.
2. The offer and acceptance approach is the primary method used by the courts to determine agreement. However, courts have used alternative approaches, including the last shot approach and a global test.
3. Generally, the courts determine that parties have reached some sort of agreement by the technique of offer and acceptance. A party, the offeror, makes an offer to another party, the offeree. If the offeree accepts the offer, an agreement comes into existence at the moment of acceptance and, provided that all essential elements are also present, there may be a contract.
4. It is difficult to define an offer. It can be described as a proposal or submission that creates an agreement when it is accepted.
5. An offer may be in writing, verbal, via the internet, email or SMS or any other methods.
6. An offer followed by its acceptance is evidence of an agreement. Provided all other essential elements are present it can ultimately produce a contract.
7. There are various transactions that are not offers.
8. An invitation to treat is not an offer. In reality, it is an invitation to others to make offers.
9. A call for tenders is not an offer but a request for offers.
10. A request for information is not an offer: see *Harvey v Facey* [1893] AC 552.
11. An option is not an offer but, if given for consideration, is a binding contract to keep an offer open.
12. Auction sales have special rules and are usually seen as invitations to treat. However, where an auction is conducted on eBay with a reserve price it might be held to be an offer.
13. There are various rules about offers from the common law.
14. An offer can be made to one person and only that person can accept. An offer can also be made to the world at large: see *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.



15. The offeror can prescribe the manner of acceptance, in which case the offeree can only accept in that manner.
16. An offer must generally be communicated for it to be accepted.
17. An offer will continue to exist, and can be accepted, until it lapses. An offer can lapse in several ways:
 - **Rejection or counter offer.** If the offeree rejects the offer or makes a counter offer, the original offer lapses: see *Hyde v Wrench* (1840) 49 ER 132.
 - **Revocation.** If the offeror revokes the offer before acceptance, the offer lapses. Revocation of an offer made by mail is not effective until it reaches the offeree: see *Byrne v Van Tienhoven* (1880) 5 CPD 344.
 - **Lapse of time.** An offer lapses if not accepted within a time specified by the offeror, or after a reasonable time.
 - **Failure of a condition.** An offer made subject to a condition lapses if that condition fails.
 - **Death of a party.** Death of the offeror or offeree before acceptance generally causes the offer to lapse: see *Fong v Cilli* (1968) 11 FLR 495.
18. Acceptance of an existing offer results in formation of an agreement at the moment of acceptance. If all remaining essential elements are present, then a contract is formed.
19. In a bilateral contract, acceptance takes the form of a promise; in a unilateral contract, acceptance takes the form of an act. In *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, the court held that there was a unilateral contract. The company made an offer; Mrs Carlill accepted the offer by buying the product and using it as directed.
20. There are various common law rules about accepting an offer.
21. Acceptance must be complete and absolute.
22. Acceptance must comply with the manner required in the offer.
23. The acceptance must be in response to the offer: see *R v Clarke* (1927) 40 CLR 227 and *Carlill v Carbolic Smoke Ball* [1893] 1 QB 256.
24. Acceptance must be made by the offeree or someone authorised by the offeree: see *Powell v Lee* (1908) 99 LT 284.
25. Silence is usually treated as not being acceptance: see *Felthouse v Bindley* (1862) 11 CB (NS) 869.



26. Traditionally, the offeree must communicate acceptance to the offeror. There are two exceptions to this rule:
 1. unilateral contracts (see *Carlill v Carbolic Smoke Ball* [1893] 1 QB 256); and
 2. where the postal rule applies.
27. For emails and SMS messages, a message is deemed to have been mailed at the time it is sent but acceptance occurs when the offeree logs into the system and opens the email or reads the SMS message.
28. **Incomplete agreements.** The law will generally not recognise the parties have reached agreement where they are still negotiating terms and conditions. In *Masters v Cameron* (1954) 91 CLR 353, the High Court refused to recognise a contract because it was not final and complete and had yet to be accepted by the purchaser.
29. **Uncertain agreements.** The courts will always try to find a contract if they can, particularly in a business situation. However, they will not fill in spaces left by the parties if the contract is too unclear or incomplete: see *Hillas v Arcos* [1932] All ER 494. Where the terms, or some of the terms, in an agreement are unclear or have no precise meaning, then the courts might refuse to recognise a binding contract.
30. **Statutory modifications.** If the making of an offer is held to be misleading or deceptive conduct in a trade or commerce, up until 2011 it may be a breach of s 52 of the *Trade Practices Act 1974* (Cth) or of State and Territory fair trading legislation. After 2011 the misleading conduct may be a breach of s 18 of the *Competition and Consumer Act 2010* (Cth). See Chapter 19.