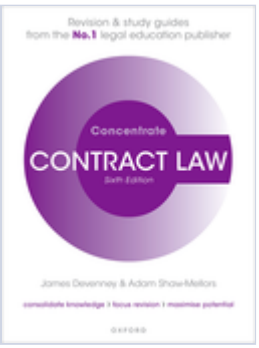

Contract Law Concentrate: Law Revision and Study Guide (6th edn)
Adam Shaw-Mellors and James Devenney

1. Agreement

James Devenney, Head of School and Professor of Transnational Commercial Law, School of Law, Reading University, UK, Visiting Full Professor, University College Dublin, Ireland & Visiting Professor Dalian Maritime University, China. and Adam Shaw-Mellors, Senior Lecturer in Commercial Law, Law School, Aston University, UK

https://doi.org/10.1093/he/9780198904618.003.0001
Published in print: 05 August 2024
Published online: August 2024

Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses the components of agreement; an essential ingredient of a contract. Traditionally, an agreement is comprised of an offer and a corresponding acceptance. There are two types of agreement: bilateral and unilateral. Bilateral agreements are by far the most common in practice and consist of a promise in exchange for a promise. Unilateral agreements consist of a promise in exchange for an act. This chapter analyses the agreement process in terms of offer, acceptance, and revocation of offers in bilateral and unilateral scenarios in order to provide structures and scenarios for future use. It also explains the two-contract analysis which is used to impose pre-contractual liability in English law.

Keywords: agreement, bilateral agreement, unilateral agreement, offer, invitation to treat, acceptance, counter-offer, postal rule of acceptance, instantaneous communications, two-contract analysis

Key facts

- Agreement is normally determined by the existence of **offer** and **acceptance**.
- You should ensure you can distinguish between **bilateral agreements** (promise in exchange for promise) and **unilateral agreements** (promise in exchange for act).
- An offer is a definite promise to be bound, without more, if the offeree agrees to the offer **terms**. An offer must be distinguished from an **invitation to treat**, which is an invitation to negotiate or make offers.

- All responses must be communicated in order to be effective. The correct communication rule must be used.

- Acceptance is the final and unqualified agreement to all the terms contained in the offer—and thus must be in response to the offer. It follows that adding or amending an offer term amounts to a **counter-offer** which itself constitutes an offer and is not an acceptance. A counter-offer also destroys the original offer so it is no longer available for acceptance. Counter-offers must be distinguished from requests for further information before deciding whether to accept. Requests for further information do not have the effect of a counter-offer.

- Acceptance must actually be communicated (operates on receipt) although postal acceptances are effective on posting (operate on dispatch). The postal rule can be avoided, and it may even be possible to overtake a postal acceptance with another communication.

p. 2

- Actual communication in the case of non-instantaneous communications using instantaneous means (e.g. leaving messages on telephone answering machines) depends on who has the onus of communicating and the question of fault. In the case of communications to businesses which are not instantaneous, the point when they become effective depends on what the parties would reasonably expect so that communication to the machine (business communications sent during business hours) will be actual communication. Communication on the next working day is to be anticipated where messages are sent to businesses outside business hours.

- **Revocation of an offer** can occur at any time before acceptance. In the context of unilateral offers, this will generally mean before the offeree has started to perform.

- Revocation of an offer must be communicated to the offeree (although need not be communicated by the offeror) and communication via the same channel as the offer will suffice where the revocation relates to a unilateral offer to the whole world.

1.1 Introduction

Agreement is an essential ingredient of a contract. Traditionally an agreement is comprised of an offer and a corresponding acceptance. It sounds simple and *is* simple if you have a structured approach to identifying these different ingredients making up agreement and the relationship of these ingredients to one another.

1.1.1 What is a contract?

A contract is a legally enforceable agreement.

(a) There must be an agreement (Chapter 1 focuses on determining the existence of agreement and Chapter 2 looks at events that may prevent that agreement).

(b) It must be a legally enforceable agreement (see Chapter 3). The question of who may enforce the agreement is then examined in Chapter 4.

1.1.2 The question for this topic

Have the parties reached agreement?

Practical example

Throughout the chapter, we will use the example of a sale of a bicycle from Alex to Becky for £150.

To ascertain whether Alex and Becky have reached agreement for the sale of the bicycle, we need to consider the following: has Alex made an offer to Becky to sell his bicycle to her for £150 and has there been an acceptance of that offer by Becky?

p. 3 ↵ There may be other related issues, for example:

Suppose Becky claims to have accepted Alex's offer in relation to the bicycle. Alex claims to have changed his mind about selling his bicycle and claims he has revoked (withdrawn) his offer. Has Becky accepted Alex's offer before Alex revoked the offer?

In addition, there may be other potential agreements to sell the same bicycle to other people—for example, a potential agreement between Alex and Charlie—so that you need to determine which agreement was the first to be made and the effect this has on the position of any other people who allege they are entitled to the bicycle.

Revision tip

Ask the correct questions and use the correct terminology for this topic.

1.1.3 The terminology for agreement questions

We are seeking to determine *the existence of agreement* by assessing whether the offeror's (Alex in the example) offer or promise has been accepted by the *offeree* (Becky).

Notice there is no reference to the making of any *contract* as there are other elements to consider before coming to such a conclusion.

Think like an examiner

This book is structured to help you to focus from the outset on the types of questions typically set as assessments and to provide templates that you can adapt to address the assessment question set for you.

The topic of agreement is frequently assessed using hypothetical problem scenarios so the primary focus of this chapter is on the approach to take to the various formats for problem questions covering agreement, highlighting the issues that tend to preoccupy the minds of examiners. There are limited topics that could justify an essay-style question (see 'Key debates').

Agreement is typically one of the first topics studied by students who may have little, if any, experience of problem-style questions. Examiners know this and want to guide you, using short problem scenarios.

Revision tip

It is important to be pragmatic when thinking like your examiner. Agreement problem questions are easier to set than problem questions on some other topics. It is rare for this topic to be excluded from an examination paper, and it usually takes the form of a problem question.

p. 4

1.1.4 Structure for answering all problem questions on agreement

Examine each piece of correspondence or each action by the parties in chronological order and determine:

- whether as a matter of fact it is capable in law of operating as an offer, acceptance, or revocation in the agreement process (*fact*); and
- whether, and if so when, it has been effectively communicated (*communication*).

Both the factual and communication requirements must be fulfilled.

The communication question requires us to consider two further questions:

- **What is the relevant communication requirement?** This may mean, for example, the offer, acceptance, or revocation must have been *actually communicated* or, if it is a letter of acceptance, it is effective and binding from the moment it is posted.
- Has the correct communication requirement been complied with?

1.2 The objective approach to agreement

When ascertaining whether there is agreement, the courts apply an objective analysis, which means looking at what the parties said and did, to ascertain whether it creates the outward appearance of a contract: per Lord Denning MR in ***Storer v Manchester City Council*** *(1974)*. This involves considering what the reasonable person would consider the parties to have meant (see the analysis of Blackburn J in ***Smith v Hughes*** *(1871)*).

1.3 The key distinction: Bilateral and unilateral agreements

Broadly, agreements will be one of two types:

- bilateral;
- unilateral.

Definition

Bilateral agreements: by far the most common in practice and consist of a promise in exchange for a promise. Bilateral means both parties are bound on the exchange of promises, although there has yet to be any performance of those promises.

p. 5 A typical sale of goods agreement is bilateral. ↵

Practical example of a bilateral agreement

Alex offers (or promises) to sell his bicycle to Becky for £150 and Becky accepts, thereby promising to pay £150. (We will use this as our example of a bilateral agreement and look at variations and additions to the facts throughout this chapter.)

Definition

Unilateral agreements: consist of a promise in exchange for an act. It follows that only one party is bound at the outset by a promise. The other's acceptance is the performance of the requested act.

For example, a typical unilateral agreement will involve an offer of a reward and may be phrased as an 'if' contract: I promise to pay £50 to anyone who finds and returns my lost dog (I am bound to make the payment of £50 only *if* the other party finds and returns my lost dog).

Practical example of a unilateral agreement

Daniel offers (or promises) a free watch to anyone who returns three tokens from the packets of cereal he manufactures, together with a cheque for £5. Emily accepts by returning the three tokens with her cheque for £5. (We will use this as our example of a unilateral agreement and return to it later in the chapter.)

Don’t fall into the trap

Making the correct distinction. It is not possible to accept a unilateral offer by promising to find and return the lost dog or by promising to collect and return the tokens and the cheque. By comparison, the agreement to sell the bicycle cannot be unilateral. Students sometimes suggest that a simple sale contract is unilateral by interpreting the act of paying for the bicycle as the requested act. This is incorrect since, as long as it is possible to accept by promising to buy (which it is in the example), the agreement will be bilateral.

Let us suppose that you have identified the scenario you are faced with as involving reciprocal promises (bilateral: promise in exchange for a promise) rather than a reward situation and now need to establish that these apparent reciprocal promises have resulted in agreement.

1.4 Scenario 1: Bilateral agreement

Step 1: Does the communication amount to an offer? Distinguish offers from invitations to treat.

To address this question you need to know what amounts to an offer in law so that you can determine whether the particular communication qualifies (i.e. is an offer in fact). ↵

p. 6

Definition

Offer: a definite promise to be bound, without more, if the offeree agrees to the offer terms.

It follows that on acceptance an agreement will result.

Definition

Invitation to treat: an invitation to others to make offers as part of the negotiating process.

It follows that the reply to an invitation to treat can be only, at best, an offer and may be no more than another invitation to treat.

1.4.1 How do we distinguish an offer from an invitation to treat?

In practice, the analysis will tend to focus on which party the law considers should have control over the agreement process, i.e. which party should be making the acceptance.

Guidance questions for distinguishing offers and invitations to treat

- Is it possible to respond to the communication by saying 'yes' so that a concluded agreement will result? If not, it is likely that further negotiation is envisaged and the statement will be no more than an invitation to treat.
- The language used may lack the necessary firmness or specificity to qualify as an offer, e.g. ***Gibson v Manchester City Council*** *(1979)*: the council replied that it 'may be prepared to sell' the council house and had invited the plaintiff to complete an application form. If the parties have been negotiating in an attempt to reach agreement, identifying the point that a firm offer was made might require an (objective) assessment of the communication and circumstances (***Dana UK Axle Ltd v Freudenberg FST GmbH*** *(2021)*). Labels used by the parties are not always conclusive (***Evergreen Timber Frames Ltd v Harrington*** *(2021)*—Employment Appeal Tribunal finding in the circumstances that a contractual offer was made for a car described as a 'gift').

There are recognized instances of invitations to treat in the context of bilateral agreements:

- **Advertisements, circulars, and brochures:** ***Partridge v Crittenden*** *(1968)* justified the conclusion that the advertisement was an invitation to treat using the limited stocks argument (Lord Herschell in ***Grainger & Son v Gough*** *(1896)*), i.e. if a brochure constituted an offer, the acceptance would be the customer's order and the supplier would be bound to supply when their stocks were necessarily limited. The law considers that in a bilateral situation the supplier should have control over the making of the agreement.

Don’t fall into the trap

Since the position is different if the advertisement, circular, or brochure is unilateral (i.e. they may be offers, see ‘1.5 Scenario 2: Unilateral agreement’), it is important to check whether the advertisement or brochure requests a promise (bilateral) or an act (unilateral).

p. 7

- Displays of goods in shop windows (***Fisher v Bell*** *(1961)*) or on supermarket shelves (***Pharmaceutical Society of Great Britain v Boots Cash Chemists*** *(1953)*): in a shop the offer is made by the customer (*on presenting* the goods to the cashier and so communicating the *offer to buy*) *whereas the shop controls the making of the agreement* via its acceptance (‘acceding to the sale’ by moving the goods over the barcode reader).
- **Retailers’ websites**: these are probably invitations to treat, although as yet there is no definitive authority on this point. **Regulation 12 of the Electronic Commerce (EC Directive) Regulations 2002** *suggests* the customer’s order may well be the offer so that the website would be an invitation to treat.
- **Requests for bids or tenders** (***Spencer v Harding*** *(1870)*): this is an invitation to treat, which enables the requestor to control the making of the bilateral contract to sell, buy, or perform a service. The contract is awarded to the bidder selected by the person requesting the bids. It follows that in general there is no liability for failure to award the bilateral contract to the highest or lowest bidder or for any failure to consider a particular bid (although see ‘1.6.1 Tenders or bids’ for exceptions).
- **Requests for bids at an auction or an advertisement that an auction is to be held** (***Harris v Nickerson*** *(1873)*): again, it is the auctioneer or advertiser who controls agreement by determining acceptance. The goods can be withdrawn from sale at a general auction, or an advertised auction can be cancelled, without incurring any liability (although see ‘1.6.2 Auctions “without reserve”’).

Step 2: Was the offer communicated?

An offer must be actually communicated to the offeree(s) in order to be effective.

Looking for extra marks?

What is meant by ‘actually communicated’ is invariably crucial in any hypothetical bilateral problem question and is considered in detail in ‘Telephone and fax communications’ later in this section, since it is usually more of an issue in relation to acceptances and revocations of offers. Avoid referring to the need for ‘communication’ in a general sense if you are intending to refer specifically to the need for the relevant communication to be *actually* communicated to the recipient.

Communication of the offer is vital since a related principle concerning factual acceptance states that an offeree cannot accept an offer that the offeree does not know about and acceptance must be in response to an offer.

Step 3: Did the offeree accept that offer or was the offer withdrawn before acceptance?

Definition

Acceptance: the *final* and *unqualified* agreement to all the terms contained in the offer.

↲ **Step 4: Can the response to the offer constitute an acceptance in law?**

There are three requirements:

- The response must correspond with the exact terms in the offer (mirror-image rule).
- It must be a response to the offer, i.e. made with knowledge of the offer.
- As a general rule, the response must follow any method for acceptance which has been prescribed in the offer (prescribed method).

Mirror-image rule

Is the response a mirror image of the offer or has the response amended or added new terms? Is it an acceptance or a counter-offer?

In order to constitute an acceptance a response must correspond with the exact terms in the offer.

If the offeree either (i) introduces a new term, or (ii) amends a term in the offer, the response will be a counter-offer rather than an acceptance.

Practical example of a counter-offer

Alex offers to sell his bicycle to Becky for £150. Becky says she will have the bicycle but will not pay more than £120 for it.

Applying ***Hyde v Wrench*** *(1840)*, two consequences follow from this:

(i) Becky's counter-offer (changing the price in her response) has destroyed Alex's original offer so that it is not possible for Becky to claim there is a binding contract by later agreeing to pay the full price of £150.

(ii) Becky's counter-offer is an offer which Alex can accept. If he does so, there will be a contract to sell the bicycle for £120.

These consequences will not follow, however, if the response, while not yet constituting an acceptance, amounts to a request for further information (***Stevenson, Jacques & Co. v McLean*** *(1880)*) rather than a counter-offer. ↵

p. 9

Distinguishing counter-offers and requests for further information before offeree makes up its mind whether to accept

Definition

Counter-offer: purports to be an acceptance but has either added a new term or, more usually, amended an existing term.

Definition

Request for further information: *asking* for more information or whether a particular means of performance will be possible before finally committing via acceptance.

Practical example of request for further information

Alex offers to sell his bicycle to Becky for £150 cash. Becky replies by asking whether Alex would be able to deliver the bicycle to her home.

Since Becky is not yet purporting to accept and is not seeking to modify an existing term, this is not a counter-offer. It follows that it does not destroy the original offer and Becky can accept by simply promising to pay £150. Similarly, in ***Stevenson v McLean***, the offer was to sell at '40s net cash per ton' and the response asked *whether it would be possible* to pay 40s but have delivery over a two-month period.

If Becky had responded by agreeing to pay £150 for the bicycle and stating 'although it must be delivered to my home', she would be adding a new term so that Alex could decide whether to agree to (i.e. accept) this counter-offer.

Revision tip

Examiners are extremely fond of the acceptance, counter-offer, and request for further information distinction, so you should know the definitions and be able to apply and illustrate the principles by reference to ***Hyde v Wrench*** and ***Stevenson v McLean***.

Battle of forms: The counter-offer analysis

This acceptance or counter-offer analysis is applied by English law to determine whether an agreement on the terms has resulted after the parties exchanged their own (differing) standard terms and conditions.

Practical example

Axel Ltd makes an offer to Brandon Ltd to sell some manufacturing machinery to Brandon Ltd. The offer states that it is made on Axel Ltd's terms and conditions, which shall prevail, and which contain a clause allowing for the price to be increased to reflect inflation between the date of the agreement and the date of delivery. Brandon Ltd purports to accept, but does so on its own terms and conditions, which state that the price is fixed. The parties will each probably believe they have reached agreement, although they will disagree as to the applicable terms.

Have the parties reached agreement and, if so, whose terms govern that agreement?

In ***Butler Machine Tool Co. Ltd v Ex-Cell-O Corp. (England) Ltd*** *(1979)*, the majority of the Court of Appeal (CA) applied ***Hyde v Wrench*** to this scenario so that, since the buyer (Brandon Ltd in the example) has altered the price term, the buyer is making a counter-offer. It follows that at this point there is no agreement between the parties. The counter-offer is, however, itself an ↵ offer available to be accepted by the seller (Axel Ltd in the example). This acceptance, like all acceptances, can occur in one of two ways:

p. 10

(i) by explicit agreement to the terms and conditions, and in ***Butler Machine*** this occurred because the sellers had completed and returned a tear-off slip at the bottom of the buyers' order stating that they accepted the buyers' order on the basis of its terms and conditions. Therefore, the buyers' terms governed; or

(ii) by conduct (***Brogden v Metropolitan Railway Co.*** *(1877)*) so that if Axel Ltd said nothing in response to Brandon Ltd's order and simply delivered the machinery to Brandon Ltd, the agreement would be made on the basis of Brandon Ltd's terms (***Tekdata Interconnections Ltd v Amphenol Ltd*** *(2009)*). Thus, the 'last shot' frequently wins the battle of forms (and, if a party does not wish for this to occur, they should be careful to draft their agreement in a way that ensures that their own terms prevail: ***TRW Ltd v Panasonic Industry Europe GmbH*** *(2021)*, ***BP Oil International Ltd v Glencore Energy UK Ltd*** *(2022)*).

In ***Butler Machine***, Lord Denning MR reached the same overall conclusion as the majority, i.e. that the buyers' terms prevailed, but his analysis was different because he considered that there could be agreement despite the differences in the parties' terms and conditions, as long as the parties were 'broadly in agreement' and there were no material differences. He then offered a number of solutions for determining the question of content (whose terms governed), e.g. last shot, first shot, or shots of both with gaps caused by irreconcilable differences to be replaced with reasonable implication.

The difficulty with this approach is that it effectively destroys the mirror-image rule as a requirement for the existence of acceptance since the essence of this rule is the interdependence of formation and content rather than its separation.

Respond to the offer

Acceptance must be made in response to the offer, i.e. with knowledge of the offer

It follows that cross-offers cannot result in agreement (***Tinn v Hoffman & Co.*** *(1873)*).

Practical example of cross-offers

On Monday at 9 a.m. Alex posts a letter offering to sell his bicycle to Becky for £150. At the same time Becky posts a letter to Alex offering to buy his bicycle for £150. Objectively there is no agreement between the parties (i.e. it is not possible to say which is the offer and which the acceptance) despite the fact that subjectively Alex and Becky are in agreement.

This response principle has particular relevance in the context of unilateral (or reward) offers and will therefore be discussed further in this context.

Prescribed method of acceptance

If the offer prescribes the method of acceptance, will acceptance by a different method suffice as a factual acceptance?

Practical example of how this can arise

Alex offers to sell his bicycle to Becky for £150 and asks her to send an email to his personal email address by the end of the day if she accepts. Becky sends an immediate fax acceptance to Alex's personal fax.

p. 11

(i) If the method prescribed in the offer was mandatory, then it must be complied with so that the use of any other method prevents the 'acceptance' from operating as an acceptance. In order to conclude that a method was mandatory, however, the offer must have made it clear that this method *must* be followed and that no other method will be permitted as an acceptance. Therefore, simply prescribing the method of acceptance will not have this effect.

(ii) If the method was not mandatory (as in the practical example), any other method will suffice as long as it fulfils the purpose behind prescribing the method in a way which is no less advantageous. It is necessary to decide:

- What was the purpose in prescribing this method? It may be to benefit the offeror who wants a quick response in writing and so prescribed acceptance by email. On the other hand, it may be to benefit the offeree (and be inserted at the offeree's request), e.g. the use of a certificate of postage for a postal acceptance.
- If the method was to benefit the offeree, then the offeree can waive (give up) the benefit of this stipulation in its favour, e.g. by taking the risk of the ordinary post (***Yates Building Co. Ltd v Pulleyn & Sons (York) Ltd*** *(1975)*).
- Alternatively, was the actual method used no less advantageous in fulfilling the purpose behind prescribing the method of acceptance? (***Manchester Diocesan Council for Education v Commercial & General Investments Ltd*** *(1970)*: stipulation for benefit of offeree which offeree could waive and/or the actual method used was no less advantageous to the offeror in terms of receipt of the acceptance.)

Practical example

A fax, assuming the machine is working correctly, may be just as effective as email in fulfilling the offeror's purpose for a quick response in writing. If, however, Becky sent her email acceptance to Alex's work email address, the purpose in prescribing the method might not necessarily be fulfilled, e.g. the evidence may be that Alex was not at work on that day, assumed Becky was not interested when he did not receive a message to his personal email address, and therefore sold the bicycle to Charlie. It is arguable that Becky's 'acceptance' in these altered circumstances would be ineffective.

Step 5: Was this acceptance communicated to the offeror? When was it communicated?

The general rule is that acceptances need to be *actually communicated* to the offeror. There are some
p. 12 difficulties with the meaning of 'actual communication', e.g. will communication to ↵ the offeror's business premises suffice? Will communication to the offeror's fax machine or email server suffice, or does the acceptance have to be seen by the offeror? Let us assume for the present that it means 'received' by the offeror ('receipt rule').

Silence as acceptance

It follows from the receipt principle for communications that an offeror in a *bilateral contract* cannot (as a general rule) stipulate that silence will constitute acceptance (***Felthouse v Bindley*** *(1862)*).

Practical example

If Becky is silent in response to an offer from Alex stipulating 'If I hear nothing from you by Friday, I will assume that you want the bicycle at £150', there is no acceptance.

There are a number of exceptions and some interesting academic arguments relating to acceptance by silence. These are considered further later as they lend themselves to essay-style questions.

The postal rule of acceptance

There is an important exception to the 'receipt rule' since, if the post is a proper method on the facts in order to communicate acceptance (***Henthorn v Fraser*** *(1892)*: if the parties are at a distance a postal acceptance is one possible method of acceptance unless the circumstances indicate that a quick response was required),

acceptance is complete as soon as the letter is posted ('dispatch rule') (***Adams v Lindsell*** *(1818)*) and it is irrelevant that the acceptance letter is lost in the post and never arrives (***Household Fire and Carriage Accident Insurance Co. (Ltd) v Grant*** *(1879)*). This rule, known as the postal rule of acceptance, has been developed for its 'pragmatic convenience' (Lord Sumption in ***Brownlie v Four Seasons Holdings Inc*** *(2017)*), although the development of modern communication methods and the digital age might mean it is increasingly less relevant (Leggatt, 'A Restatement of the English Law of Contract (Publication Review)' (2017) 133 LQR 521). It follows that where the postal rule applies to the acceptance, the offeree is protected on posting and the risk that the acceptance may never arrive lies with the offeror. It should therefore be in the offeror's interests
p. 13 expressly to avoid the application of the postal rule. ↵

Don't fall into the trap

The postal rule applies only to acceptances. It has no application to offers, or to revocations of offers, to which the actual communication requirement applies. It is a serious error to apply the postal rule to, for example, a revocation of an offer. Hence, it is important to identify the particular communication correctly.

Examiners' favourites

Don't fall into the trap

Do not assume that the postal rule will apply to every acceptance that has been posted. In practice, it is relatively easy to draft an offer in order to avoid the application of the postal rule and ensure that the offeror controls the point at which the agreement (and therefore the contract) takes effect. All the offeror needs to do is use words requiring actual communication of the acceptance (***Holwell Securities Ltd v Hughes*** *(1974)*: 'notice in writing to [the offeror]').

What other forms of wording do you think will suffice? Examples: 'Let me know your answer', 'I must know by …' Compare these forms of wording with 'send your response to …'

Examiners may set this particular trap, so you need to be aware of it.

In addition, the postal rule of acceptance may also be inapplicable on the facts either because:

(i) a postal response is out of line with the general context for contracting, e.g. all previous communications have been by instantaneous means and it is known that a quick response is required; or

(ii)

having regard to all the circumstances the parties cannot have intended to be bound until receipt of any acceptance (Lawton LJ in ***Holwell Securities v Hughes***: application of the postal rule would produce 'manifest inconvenience and absurdity'. Lawton LJ gives examples in his judgment).

Don't fall into the trap

Another examiner's favourite is to include a *communication* which attempts to undo (or overtake) an acceptance sent by post. Let us assume that the postal rule applies in principle (although examiners like to inject some complexity and will often draft so that there is the possibility of ousting the postal rule) and the particular postal communication is overtaken by another communication indicating there is no wish to accept.

Is it possible to overtake a postal acceptance?

Practical example

What if Becky posts her acceptance on Monday morning but later that afternoon she contacts Alex by telephone to withdraw it? The postal acceptance does not reach Alex (the offeror) until Tuesday. Is there a valid acceptance on Monday morning, or has it been withdrawn so that there is no agreement between the parties?

This question tends to puzzle students because the natural reaction is to treat the postal rule as a 'rule' so that once an acceptance has been posted it is binding and cannot be undone. It ↵ is argued that any other position would give the offeree the best of all worlds, i.e. protection against revocation on posting *and* the ability to revoke if market conditions made acceptance less palatable.

p. 14

There is, however, an opposing argument (e.g. Hudson, 'Retraction of Letters of Acceptance' (1966) 82 LQR 169) which places emphasis on what is known by the parties and the avoidance of disadvantage.

When Becky contacts Alex by telephone on Monday afternoon she may simply tell him that she does not want the bicycle. Alex would therefore know nothing about the acceptance posted earlier that day. It would be quite reasonable for Alex to act on Becky's telephone call and sell the bicycle to Charlie. Should he be in **breach** of contract by doing so?

Therefore, we could argue that Alex has not been disadvantaged if we allow the telephone call to overtake the postal acceptance; indeed, on these facts, he will be disadvantaged if the postal acceptance prevails.

The case law on this question is equivocal (which may explain why examiners are fond of this particular moot point). ***Countess of Dunmore v Alexander*** *(1830)*, a Scottish case, may suggest it is possible to overtake a postal acceptance, but it is far more likely that the case is actually allowing an overtaking revocation of an offer, which is possible at any time before acceptance. While *dicta* in the New Zealand decision of ***Wenkheim v Arndt*** *(1873)* suggest that overtaking a postal acceptance is not possible, the other case frequently cited in support of this position, the South African decision in ***A to Z Bazaars (Pty) Ltd v Minister of Agriculture*** *(1974)*, only provides this support at first instance. By comparison, in the Appellate Division there are *obiter* remarks suggesting that it did not necessarily follow that a postal acceptance could not be overturned.

Telephone and fax communications

The actual communication (receipt rule) applies to communications by telephone and other instantaneous methods of communication such as telex and fax, which are treated as if they were made face-to-face (***Entores Ltd v Miles Far East Corp.*** *(1955)*). It follows that a contract will be made in the jurisdiction in which the acceptance is received, i.e. the offeror's jurisdiction.

Problems that can occur in communicating using instantaneous means

Denning LJ in ***Entores*** identified problems that might occur in communicating using instantaneous means and resolved these problems by stating that the onus was on the communicator to get the message through and by focusing on 'fault' in the communication process:

(i) *Communicator fault*: if the telephone line goes dead, the communicator will know that their message must be repeated if they are to ensure it is received. Denning LJ used the analogy of shouting an acceptance across a river to the offeror just at the moment when an aircraft flies overhead and drowns out the acceptance. The offeree would know that the message must be repeated. This position will clearly apply to fax acceptances where the communicator is informed if the message has been successfully communicated.

p. 15

(ii) *Recipient fault*: where the recipient is aware that a message is being sent but it has not been received, and the communicator wrongly believes the message *has* been communicated, it is the recipient who must ask for the message to be repeated. If they fail to do so, they will be estopped (i.e. prevented) from denying that the communication was effectively received. If a fax communication is complete (in terms of the number of pages) but illegible, the onus would be on the recipient to request that it be re-sent since it will be reasonable for the communicator to act on the notification of successful transmission.

(iii) *No fault*: acceptance does not reach the recipient, but the communicator reasonably believes the message was communicated. The recipient was unaware that any message had been sent. There had been no effective communication of the acceptance and therefore there is no contract.

Taking these principles further:

Is there actual communication when the acceptance appears on the offeror's telex or fax machine, or is it when the offeror actually reads it? Does 'actual communication' of an acceptance mean communication to the machine or to the offeror?

The key statement is an *obiter* one of Lord Wilberforce in ***Brinkibon Ltd v Stahag Stahl GmbH*** *(1983)* concerning such non-instantaneous telex (and presumably fax) messages: '**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 judgement where the risks should lie**.'

This provides general guidance, but more specific guidance is given in the case law in the context of communications to businesses.

Guidance: The distinction based on business hours in the business context

In this context, a distinction—based on the onus on the communicator, what the communicator could reasonably expect, and the fault principles in ***Entores***—can be seen to exist between messages sent within ordinary business hours and messages sent outside those hours:

- With communications to a business sent within business hours when it might reasonably be expected that the messages will be read, communication to the machine is actual communication because the communicator has done all it might reasonably be expected to do (***The Brimnes, Tenax Steamship Co. Ltd v The Brimnes (Owners)*** *(1975)*). Indeed, in ***Brinkibon Ltd v Stahag Stahl GmbH*** Lord Fraser stated it was the recipient's fault if they did not monitor their telex machine during business hours, i.e. messages would be at the recipient's risk in this period.
- With communications to business addresses sent outside business hours when it must be clear that the message will not be read until the next working day, communication to the machine is not sufficient to constitute actual communication. This will not occur until the message might reasonably be expected to be seen, normally on the next working day (***Mondial Shipping and Chartering BV v Astarte Shipping Ltd*** *(1995)*—reflecting what Gatehouse J referred to as a solution based on commercial common sense).

p. 16

The key issue here is the uncertainty over the meaning of 'ordinary business hours'. Examiners often exploit this. Note the following:

(i) The message in ***The Brimnes*** was sent and received between 17.30 and 18.00 hrs. This was considered to be within 'business hours', whereas the message in ***Mondial Shipping*** was very clearly sent and received outside business hours (23.41 hrs on a Friday). It did not take effect until the following Monday. *Obiter* in ***Thomas v BPE Solicitors (a firm)*** *(2010)*, Blair J considered that the receipt rule applied to email acceptances. He did not consider 18.00 hrs to be outside business hours. The email was available to be read within business hours despite the fact the recipient had gone home at 17.45 hrs. Furthermore, in ***Lehman Brothers International (Europe) (In Administration) v Exxonmobil Financial Services BV*** *(2016)*, Blair J accepted evidence that business hours extended to 19.00 hrs (although he stressed that his finding was limited to the facts of the case—involving business hours

of commercial banks and a complex financial transaction—and that he was not laying down any general statement of law). An assessment of the facts and context, and the type of industry in question, will be crucial.

(ii) Friday afternoons may feature in questions in the context of a business that has 'closed' for business on a Friday earlier than it usually does on other days. Equally, messages may be sent and received during holidays and bank holidays. The communicator should reasonably assume that a bank holiday is taken as holiday but arguably should otherwise be entitled to believe that a machine is monitored unless the recipient communicates the fact that the business is closed, e.g. holiday closure. Thus, objective knowledge will be assumed but matters which depend on subjective knowledge of business practices of the particular firm may not be. In the case of the latter, the onus would be on the business recipient to make its practices clear.

Telephone answering machines

Is communication of a message to a telephone answering machine sufficient as actual communication or must the message be listened to?

There is no case law on telephone answering machines, but the very fact that an answering machine is operational should indicate that communication is not instantaneous so that the principles discussed earlier should apply, i.e. ***Entores*** principles with the onus on the communicator to keep repeating the communication until it is listened to. Professor Brian Coote ('The Instantaneous Transmission of Acceptances' (1971) 4 New Zealand UL Rev 331) argued, however, that the postal rule should apply so that communication to the machine would be sufficient. This conclusion can be reached if it is possible to argue that in leaving the message (equivalent to dispatch), the communicator has effectively put the message out of its control. This is, however, difficult to sustain since the mere fact that the answering machine is

p. 17 ↵ operational would indicate that the recipient is not receiving communications on an instantaneous basis and therefore, if a business, not accepting the risk usually associated with not monitoring machines during normal business hours (***The Brimnes***).

Electronic contracting

A distinction exists between website trading and contracting via email since the **Electronic Commerce (EC Directive) Regulations 2002** apply only to website trading.

Website trading (i.e. placing order on a retailer's website)

The Regulations apply and indicate that the receipt rule is applicable to such communications.

By **reg. 12** it is likely that the website will be the invitation to treat since the order *may be* the offer. Receipt of orders must be acknowledged electronically and without undue delay (**reg. 11**) and, although this acknowledgement may serve only to warn customers of orders placed unintentionally, if it acts as the acceptance it is clear that both this and the order are *deemed to be received* when the parties to whom they are

addressed are able to access them (**reg. 11**). It follows that once the message is received by the recipient's machine (which could be in the middle of the night) it is available to be accessed, and therefore such a message would not need to be read in order to be actually communicated.

Contracts by exchange of emails

Such contracts are explicitly excluded from the operation of the Regulations (**regs. 9(4)** and **11(3)**), but it would seem that, by analogy, the same principles should apply as for websites. On the other hand, it can be argued that the postal rule should apply to electronic 'mail' so that an acceptance email would be effective on dispatch. This assumes, however, that on sending an email the communicator has put the message outside his or her control, whereas emails can, in some circumstances, be recalled.

Obiter in ***Thomas v BPE Solicitors (a firm)*** Blair J considered that the receipt rule applied to email acceptances. The same conclusion was reached by Andrews J in ***Greenclose Ltd v National Westminster Bank plc*** *(2014)*.

Looking for extra marks?

Understand the meaning of actual communication for instantaneous and non-instantaneous communications, e.g. machine failures or out-of-hours communications. If you can explain and apply the correct principles and understand the rationale, you will convince the examiner that there is depth to your knowledge.

Step 6: Was there a communication which purported to revoke the offer and was it capable in law of acting as a revocation?

p. 18 ↵ Once acceptance has occurred, a purported revocation of the offer will be too late (***Payne v Cave*** *(1789)*). It follows that revocation is possible at any time before acceptance.

Can revocation occur before any acceptance if the offer period has not yet elapsed?

Suppose the offeror states that the offer will remain open for a specified period of time but then changes their mind and purports to revoke the offer before the specified period of time has expired.

Practical example

On Thursday Alex offers (or promises) to sell his bicycle to Becky for £150 and states that the offer is open for acceptance until 4 p.m. on Friday. Can Alex change his mind and revoke his offer at 9 a.m. on Friday?

This is a firm offer, i.e. the offeror has stated that he will keep the offer open for a certain period. It is clear that after 4 p.m. on Friday the offer will lapse, but would an earlier revocation be effective to **terminate** the offer? Yes, **in English law the offeror is free to revoke as long as the offeree has given or promised nothing in exchange for the promise to keep the offer open until 4 p.m. on Friday** (***Routledge v Grant*** *(1828)*).

Step 7: Has the revocation been effectively communicated before any acceptance takes effect or is it too late?

Revision tip

In a bilateral context this is likely to involve questions about the point at which the acceptance and the revocation take effect and, in particular, the operation of the postal rule of acceptance, whereas revocations must be actually communicated.

Byrne & Co. v Van Tienhoven & Co. (1880)

FACTS: On 8 October the defendants in Cardiff posted a revocation of their offer to the plaintiffs in New York. The revocation arrived on 20 October. On 11 October the plaintiffs telegraphed their acceptance of the defendants' offer (postal rule applies to telegrams).

HELD: The acceptance took effect on 11 October (when the telegram was sent). The revocation needed to be actually communicated to take effect. It therefore did not take effect when it was sent (8 October) but when it arrived (20 October), and accordingly the revocation was too late.

Revocation need not be communicated by the offeror itself. Thus, in ***Dickinson v Dodds*** *(1876)* there was an effective revocation when the plaintiff knew from a third party that the ↵ defendant no longer intended to sell the property to him. This places a burden on the offeree to decide whether the third party can be relied upon.

p. 19

1.5 Scenario 2: Unilateral agreement

Unilateral agreements consist of a promise in exchange for an act, i.e. they exist in 'reward' situations.

There are a number of special principles which apply to unilateral offers and agreements, or principles that are more likely to arise in this context. These principles are listed as follows and then considered in more detail later:

- Unilateral advertisements are offers rather than invitations to treat.
- Acceptance must be in response to the offer—and with knowledge of it. This is particularly likely to arise as an issue in the unilateral context of rewards, although the principle also applies in the bilateral context.
- There is an implied waiver of the need to communicate acceptance of a unilateral offer.
- There are special principles applicable to attempts to revoke unilateral offers in terms of both (i) whether it is possible to revoke at all and (ii) the meaning of actual communication in the context of a revocation of a unilateral offer to the whole world.

Revision tip

You should look for these principles once you have identified the problem context with which you are faced as unilateral.

Unilateral contracts may also be employed as a means of imposing liability in respect of a particular pre-contractual promise ('the two-contract analysis'). This is explained later in this chapter.

1.5.1 Unilateral advertisements

A unilateral advertisement (a promise in exchange for an act) is an offer (***Carlill v Carbolic Smoke Ball Co.*** *(1893)* and ***Bowerman v Association of British Travel Agents Ltd*** *(1996)*).

This ensures that the promise is enforceable if performance of the requested act has occurred.

Practical example of unilateral advertisement (offer)

If Daniel advertises a free watch to anyone who returns three tokens from the packets of cereal he manufactures together with a cheque for £5, this advertisement will constitute an offer rather than an invitation to treat, so that Emily will accept when she performs the requested act; namely returning the three tokens with her cheque for this amount.

p. 20

1.5.2 A unilateral offer of reward cannot be accepted if there is no knowledge of the offer (*R v Clarke* (1927))

It may be necessary to look at the precise terms of the offer to determine whether there is knowledge at the crucial time (***Gibbons v Proctor*** *(1891)*: terms of the offer required the information to be given to a particular person and at the time the information was received by that person the offeree had the required knowledge). As long as the offeree has knowledge of the offer, however, the motive in responding is irrelevant (***Williams v Carwardine*** *(1833)*).

1.5.3 Implied waiver of the need to communicate acceptance of unilateral offer (*Carlill v Carbolic Smoke Ball Co.*)

In a unilateral contract it is the performance of the requested act which constitutes the acceptance. There is no need to communicate the fact that the offeree is attempting to perform that act, e.g. attempting to find the lost dog or attempting to collect the three tokens from the cereal packets.

Revision tip

It follows that the principles determining the communication of acceptances, e.g. instantaneous and non-instantaneous communications, are likely to be encountered in the bilateral context only.

Of course, if the unilateral offer is a reward for the supply of information, the communication of that information is necessarily part of the requested act.

1.5.4 Special principles applicable to revocation of unilateral offer

Is it possible to revoke a unilateral offer once the offeree has started to perform the requested act?

If we applied the general rules on acceptance and revocation to unilateral contracts, it would be very harsh on the offeree. This is because with unilateral contracts acceptance is the performance of the requested act and to apply the general rules would mean revocation would therefore remain possible at any time before complete performance of that act.

English law has now accepted that:

- The terms of the offer may contemplate that it is not possible to revoke once the offeree has 'started to perform the act', although the exact theoretical basis for this is unclear.
- Equally, the terms of the offer may contemplate that revocation should be possible despite commencement of the performance of the act (***Luxor (Eastbourne) Ltd v Cooper*** *(1941)*: commission payable on completion of sale, so the offer contemplated that the offeror was reserving the right to revoke at any time before completion occurred).

p. 21

Practical example

Daniel could cancel his offer at any time before Emily had finished collecting the cereal tokens and returned them with her cheque. Although this may appear harsh to Emily, it would be equally unfair to Daniel to expect him to keep his offer open indefinitely in order to allow anyone to finish collecting the tokens. Daniel, the manufacturer, will, at some stage, stop issuing packets containing the qualifying tokens.

Errington v Errington & Woods (1952) (CA)

FACTS: There was a promise by the father (to transfer the house in exchange for the act of paying all the mortgage instalments).

HELD: This unilateral promise could not be revoked once the couple had started to perform this act.

This could be because:

(i) A unilateral offer involves two promises:

- an express promise to pay on performance of the requested act; and

- an implied promise (or offer) not to revoke once performance of the act has been commenced.

Unfortunately this analysis (see McGovney (1914) 27 Harv L Rev 644, 659) does not prevent revocation. It merely provides a remedy in **damages** (for breach of the implied promise) if revocation occurs once performance has commenced. This is clearly the analysis relied upon by Goff LJ in *obiter* comments in ***Daulia v Four Mill Bank Nominees Ltd*** *(1978)* and is also the analysis considered by the House of Lords (HL) in ***Luxor v Cooper***, although on the facts their Lordships refused to imply any term that the vendors had undertaken not to prevent the sale.

(ii) Alternatively, revocation could be prevented if acceptance of the unilateral offer occurs once the offeree commences performance of the act, although the reward would not be payable until it has been completely performed. This analysis was adopted by the Law Revision Committee in its 6th Interim Report, 1937.

The problem with this analysis is that it appears contrary to the one-sided nature of the unilateral contract since it would compel the offeree to perform. Normally only the offeror is bound to perform at the outset, whereas the offeree should be free to change his or her mind and discontinue the performance. This point was made clear by Goff LJ in ***Daulia v Four Mill Bank Nominees Ltd***.

Practical example

Unless the terms of the offer contemplate otherwise, either Emily will accept by starting to collect the tokens or there may be an implied offer not to revoke. It would seem, however, that breach of the implied offer would entitle Emily to damages but Daniel could prevent her from being in a position to claim a watch.

p. 22

Communication of revocation of unilateral offers made to the whole world where the offerees are necessarily not identified

In this situation it is impossible for the offeror to comply with the normal rule requiring actual communication of revocation to the offeree. In the American case of ***Shuey v US*** *(1875)* it was held that it was sufficient if 'the same notoriety' is given to the revocation as the original offer. Thus, if the same channel is used for the revocation, the fact that an individual offeree does not see it will be irrelevant.

1.6 The two-contract analysis: Bilateral and unilateral contract

This analysis is employed in order to impose liability in respect of a particular pre-contractual promise.

1.6.1 Tenders or bids

Express promise to award the work to the lowest tender or to sell goods to the highest bidder

Normally, a requestor of tenders is free to accept or reject any tender to do the work, even if it is the lowest. This is because the tender is an offer and the bilateral contract is controlled by the requestor's decision as to which bid to accept (***Spencer v Harding***).

If the requestor has expressly undertaken to award the work to whichever party submitted the lowest tender, however, it would be wrong not to recognize that promise. In ***Harvela Investments Ltd v Royal Trust Co. of Canada (CI) Ltd*** *(1986)* Lord Diplock considered this promise to amount to a unilateral offer and therefore adopted a two-contract analysis of the tender situation (explained in Table 1.1 and illustrated with a practical example at Figure 1.1). ↵

p. 23

Table 1.1 Request for tenders and express promise to accept highest or lowest

	Main Bilateral Contract ***(Awarding Goods/Services)***	**Unilateral Contract** ***(Promise: Accept Most Competitive Tender)***
Invitation to tender	Invitation to treat.	Offer: express promise to accept most competitive tender (e.g. lowest tender).
Tenders	Each tender is an offer.	Acceptance: submitting lowest tender (act).
Requestor decision (determines which tender (if any) will be accepted)	Acceptance of tender = contract awarding work.	If bilateral contract is not awarded to lowest tenderer = breach of unilateral contract (damages).

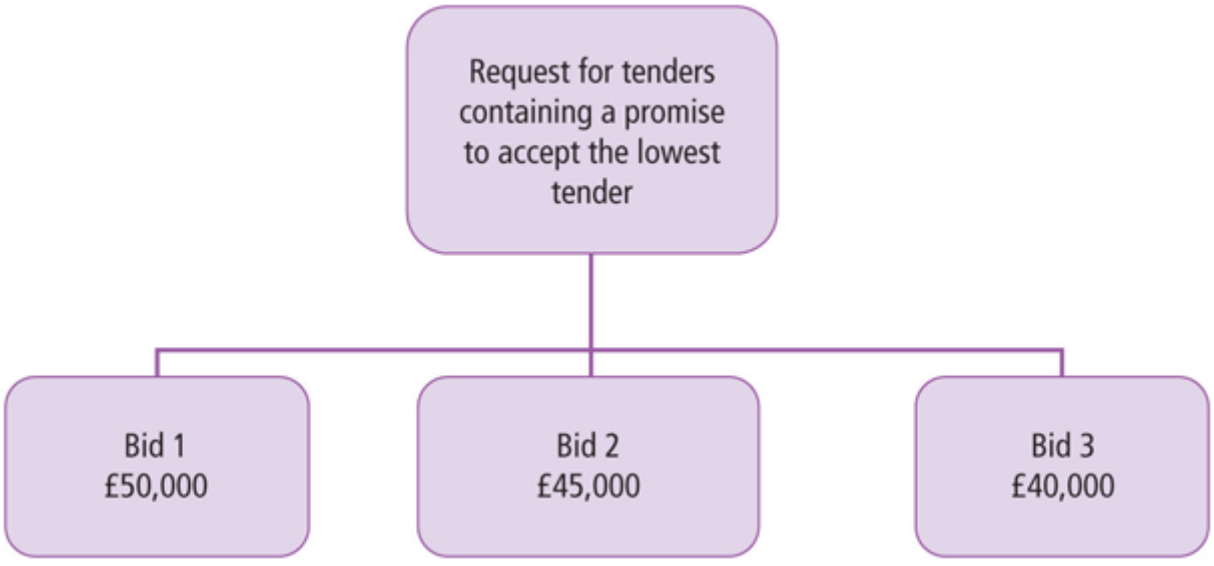

Figure 1.1 Practical example: tenders

Practical example

In Figure 1.1, the contract is awarded to Bidder 1, but Bidder 1 is not the lowest bidder. Bidder 3 makes the lowest bid. The offer by Bidder 1 has been accepted under the bilateral contract and Bidder 1 has been awarded the work. This, however, necessarily involves a breach of the unilateral contract based on the promise to award the contract to the lowest bidder. All bidders accept this unilateral contract by making their bids, but it is Bidder 3 that suffers loss. Bidder 3 is entitled to damages to compensate for the loss suffered as a result of the breach of this unilateral contract.

In some circumstances there may be a binding contractual obligation to consider conforming tenders

This arises where the requestor promises to consider all tenders that comply with a particular stipulation, e.g. 'I will consider all tenders I receive by 12 p.m. on Friday.'

- The request to submit tenders in this instance *also* amounts to a unilateral offer to consider all tenders that conform to the bid condition (i.e. all those received by 12 p.m. on Friday).

This unilateral offer is accepted by submitting a conforming tender. If the conforming tender is then not considered, there will be a breach of this binding unilateral contractual promise to consider such tenders, and the requestor of the tenders will be liable in damages for this breach.

- There is a bilateral contract with the tenderer whose bid is actually accepted, i.e. this contract determines the person who gets the work.

Additionally, an obligation to consider conforming tenders might be *implied* from the circumstances. In ***Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council*** *(1990)* an obligation to consider tenders received before a set deadline was implied on the basis that the council had invited a limited number of parties to submit tenders according to a prescribed procedure. ↵ Nonetheless, in ***Central Tenders Board v White (t/a White Construction Services)*** *(2015)* Lord Toulson suggested the implied contract principle would not necessarily extend to the situation where a private citizen had invited offers for the sale of a personal possession and set a deadline for offers, only to accept an offer before the expiry of that deadline or an offer made after the deadline.

p. 24

1.6.2 Auctions 'without reserve'

If an auction is advertised as being held 'without reserve' the auctioneer is promising that no reserve price will be applied and that the owner will not bid in an attempt to raise the bidding price. There is a unilateral promise to sell to the highest genuine bidder (see Table 1.2).

Table 1.2 Auctions without reserve

	Main Bilateral Contract ***(Awarding Goods/Services)***	**Unilateral Contract** ***(Promise: Auction Without Reserve)***
Advertised auction	Invitation to treat.	Offer (promise) to sell to highest bidder, without reserve (vendor will not bid).
Bids	Each bid is an offer.	Acceptance: making the highest genuine bid (act).
Auctioneer decision (on successful bidder)	Acceptance by auctioneer = the fall of the hammer.	If bilateral contract is not awarded to highest bidder = breach of unilateral contract (damages, but not entitled to property sold).

What if the owner bids and the property is 'knocked down' to the owner? Can the next-highest bidder seek any relief?

Yes, ***Warlow v Harrison*** *(1859)* (*obiter*). As a result of the two-contract analysis, there is a unilateral offer to hold the auction without reserve. The next-highest bidder will, however, only be entitled to damages for breach of this unilateral contract. The bilateral contract determines who gets the goods under the bidding process.

What if the auctioneer refuses to accept the highest (and only) bid at such an auction and withdraws the goods? Does the bidder have a remedy?

Yes, ***Barry v Davies (t/a Heathcote Ball & Co.)*** *(2000)*. The result of the two-contract analysis is that there is a binding unilateral contract not to apply any reserve price and therefore to sell if there is one bona fide bidder at such an auction. That person is entitled to damages to compensate in the event that the goods are withdrawn from the sale, i.e. damages amounting to the cost of purchasing replacements minus the amount of the auction bid.

p. 25

Key debates

Typical essay question issues on agreement might include:

1. **How the existence of agreement is determined**. This involves examining the meaning of objectivity in this context (see Merkin KC and Saintier, *Poole's Textbook on Contract Law*, 16th edn (Oxford University Press, 2023), 2.1) and the external evidence used to determine the existence of agreement, i.e. the conventional approach based on offer and acceptance (the importance of which was analysed in ***LNT Aviation Ltd v Airbus Helicopters UK Ltd*** *(2022)*) and the non-traditional methods such as that employed by Lord Denning MR in ***Butler Machine Tool Co. Ltd v Ex-Cell-O Corp. (England) Ltd***, in ***GHSP Inc. v AB Electronic Ltd*** *(2010)*, and by

the CA (majority) in ***Gibson v Manchester City Council*** *(1978)*. It also appears that the courts will find it easier to find the existence of agreement where there has been performance: ***Trentham Ltd v Archital Luxfer*** *(1993)* per Steyn LJ.

2. **The use of the two-contract analysis in order to create a unilateral contract based on a particular promise and thereby impose pre-contractual liability** (discussed in '1.6 The two-contract analysis').
3. **Difficulties inherent in the analysis of the silence principle in *Felthouse v Bindley*** (see Miller (1972) 35 MLR 489 and discussion in *Poole's Textbook*, 2.4.5.1.1) and exceptions where silence can constitute acceptance. Exceptions where silence can constitute acceptance in bilateral context include where:
    - a course of dealing exists between the parties and the offeree has taken the benefit of services (e.g. window cleaning or insurance policy renewals);
    - the offeree is seeking to hold the offeror to a silence stipulation made by the offeror, e.g. if the nephew in ***Felthouse v Bindley*** had acted on the uncle's statement and delivered the horse but the uncle had refused to take delivery of it;
    - the offeree was responsible for the silence stipulation in the contract, i.e. for the statement that the offeree's silence would constitute acceptance.
4. **Critique of the communication principles, especially in the digital age**. This may involve issues such as the relevance and scope of application of the postal rule of acceptance, non-instantaneous communications, etc.

Final point to note: always be guided by the emphasis placed in your particular module on the issues within this topic but bear in mind the practical fact noted at the outset: **agreement lends itself to the setting and answering of problem-style questions**.

p. 28

Key cases

Case	Facts	Principle
Gibson v Manchester City Council *(HL)*	Council had written 'may be prepared to sell' council house. HL held that language used indicated this was invitation to treat, inviting tenant to make offer to purchase, rather than an offer to sell which the tenant had accepted.	Distinction between invitation to treat and offer. Response to invitation to treat does not result in a contract at that point.
Hyde v Wrench	Offer to sell for £1,000. Response offering £950 was counter-offer which destroyed original offer. Original offer was thus no longer available to be accepted.	Effect of counter-offer—not acceptance and destroys the original offer.
Butler Machine Tool Co. Ltd v Ex-Cell-O Corp. (England) Ltd *(CA)*	Seller offered to sell machine tool on terms including price variation clause. Buyers placed order on their own terms (no price variation) and sellers completed tear-off slip at bottom of this order stating that they accepted the order on terms in the order. Each	Battle of forms—counter-offer analysis is applied. The battle was won by last shot since this had been expressly accepted. The last shot

Case	Facts	Principle
	considered the contract had been made on its terms. CA held there was a contract on buyers' terms since (majority applying ***Hyde v Wrench***) the buyers' order was a counter-offer which had been expressly accepted by sellers when they returned the tear-off slip.	often wins through acceptance by conduct of the last form, e.g. taking delivery of the goods.
Household Fire Insurance Co. v Grant *(CA)*	D applied for shares in P company which allotted the shares and sent a postal acceptance, but it never arrived. Held: D had become a shareholder. The letter was effective on posting (postal rule of acceptance), and it was irrelevant that the letter of acceptance did not arrive.	Postal rule: where the acceptance is posted but is never received. Remember that the postal rule can be ousted by requiring actual communication of the acceptance (***Holwell Securities Ltd v Hughes***).
Entores v Miles Far East Corp. Ltd *(CA)*	English company received telex offer from Dutch company. English company sent a response (a counter-offer). This counter-offer was accepted by the Dutch company. Where was the contract made? CA held it was where the acceptance was received, and that was in England because the acceptance had been sent by the Dutch to the English company.	Actual communication (receipt) principle applied to telex communications, so the communication took effect when received. Denning LJ analysed the position where problems existed in the communication process, e.g. telephone line goes dead or message is drowned out by aircraft overhead.
Byrne & Co. v Van Tienhoven & Co.	On 1 October Ds in Cardiff made offer in letter to Ps in New York. Ps received this on 11 October and immediately sent telegram accepting (postal rule applies). On 8 October, however, Ds had sent a revocation of their offer. This arrived 20 October. Held: there was a binding contract on 11 October when acceptance was dispatched since the revocation needed to be communicated to be effective.	Postal rule does *not* apply to the revocation of offer. Revocation is not effective until received, whereas a postal acceptance sent after dispatch of revocation but before its arrival would result in an immediately binding contract.
Carlill v Carbolic Smoke Ball Co. *(CA)*	Ds advertised that they would pay £100 to any person contracting influenza after using their smoke ball three times daily for two weeks. CA held the advertisement was a unilateral offer of reward which was intended to be legally binding. This offer was accepted by anyone who performed the requested act. Since P had used the smoke ball as directed and had caught influenza, she was entitled to £100.	Most famous example of a unilateral contract (promise in exchange for an act). Unilateral advertisement is an offer. Acceptance was the performance of the requested act so that there was no requirement to communicate the fact that an offeree is attempting to perform.
Errington v Errington *(CA)*	Father promised son and daughter-in-law that if they paid all of the mortgage instalments on the house where they lived, he would transfer the house to them. CA held that the father's promise was unilateral	It is not possible to revoke a unilateral offer once the offeree has commenced performance of the requested act.

Case	Facts	Principle
	(promise in exchange for an act) and, once they had started to pay the instalments, they had a contractual right to remain in possession and seek to complete the act.	
Luxor v Cooper *(HL)*	Commission was payable to an agent on completion of the sale of cinemas, and there was no implied promise by the vendors not to revoke that promise before completion occurred.	The terms of a unilateral offer may contemplate that the offeror is to remain free to revoke the offer at any time before complete performance of the requested act.

Exam questions

Problem question

On Monday 1 October, Pine Trees Ltd, manufacturers of pine furniture, wrote to World of Bedrooms, its usual retailer, offering to supply pine bedroom suites. The letter stated Pine Trees ↵ could supply 500 such suites on 30-day credit terms at £250 per suite. The letter ended with the following words:

p. 28

> It would be helpful if you could reply in writing if you wish to take advantage of this offer. The offer is open for 14 days from the date of this letter.

On Wednesday 3 October, World of Bedrooms contacted Pine Trees by telephone and informed Harry, Pine Trees' managing director, that World of Bedrooms wanted 60-day credit terms. Harry insisted the offer was non-negotiable, so World of Bedrooms stated it would need to consult its bank.

On Friday 5 October, Anisa, World of Bedrooms' managing director, agreed the necessary finance facility with the bank and at 4.30 p.m. contacted Pine Trees by telephone to inform Harry the purchase was to go ahead. Anisa had to leave a message on Pine Trees' telephone answering machine. Anisa assumed this was because all employees were busy. In fact, Pine Trees had recently adopted a policy of closing at 4 p.m. on Fridays and the message was not played back until 9 a.m. on Monday 8 October. Pine Trees had, however, posted a letter at 3 p.m. on the Friday afternoon withdrawing the offer.

World of Bedrooms claims there is a binding contract to supply the bedroom suites, which Pine Trees denies. Advise the parties.

Head to the Outline Answers *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-1-outline-answers-to-essay-questions?options=showName>* **section of the online resources for help with this question.**

Essay question

Critically discuss the courts' approach to the principles relating to unilateral contracts.

Online Resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-1-outline-answers-to-essay-questions?options=showName>*
- Interactive key cases *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-1-interactive-key-cases?options=showName>*
- Multiple-choice questions *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-1-multiple-choice-questions?options=showName>*

You can also find an interactive glossary *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-interactive-glossary?options=showName>* on our online resources. Additionally, to help you focus your revision, there is also a diagnostic test *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-diagnostic-test?options=showName>* available. For general advice on your revision and exam technique, you can listen to our podcast *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-audio-podcast?options=showName>*, or alternatively, you can access the transcript here *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-podcast-transcript?options=showName>*.

Related Books

View the Essential Cases in contract law

Related Links

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/poole-devenney-shaw-mellors-concentrate5e-student-resources/poole-devenney-shaw-mellors-concentrate5e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780198904618>*