

Study Session 2: Offer

Introduction

A valid contract starts by an **offer** being made by a party known as the offeror to another known as the offeree. This consists of a definite statement clearly and precisely stating the terms under which the offeror is willing to be bound. Once this **offer** is accepted by the offeree, we say a contract has come into existence between the parties. This topic seeks to discuss the following issues with you: the meaning of the term **offer**, the elements of a valid **offer**, how to distinguish between an **offer** and an **invitation to treat** and the importance of this distinction, ways by which an **offer** can be terminated. As this topic is so closely related to Acceptance (discussed in Study Session 3), some concepts that are also applicable to this study session would be discussed under Acceptance.

Learning Outcomes for Study Session 2

When you have studied this session you should be able to:

- 2.1. Define and use correctly all the key words printed in **bold** (SAQ 2.1)
- 2.2. Define (and differentiate) between an **offer** and an **invitation to treat** (SAQ 2.2)
- 2.3. List and discuss some common examples of **invitation to treat** (SAQ 2.3)
- 2.4. Discuss the various means by which an **offer** can be terminated (SAQ 2.4)

2.1. What is an Offer?

An offer has been defined as a definite undertaking or promise made by one party to another with the intention that it shall become binding on the party making it as soon as it has been accepted by the party to whom it is addressed. In other words if Mr. A makes an *offer* to buy property from Mr. B for N2m and Mr. B *accepts*, then Mr. A becomes bound by the terms of his **offer**. According to *Nikki Tobi JCA in Orient Bank Plc. v Bilante International (Supra)*, “*the offeror must place at the doorstep of the offeree, a clear intention and desire to enter into a contract with the offeree on clearly defined terms.* The person who makes the offer is called the

offeror while the person to whom the offer is made is called the **offeree**. See *Olaopa v Obafemi Awolowo University*.

For a statement or promise to constitute an **offer** capable of acceptance, it must satisfy the following:

1. It must be definite, certain and unequivocal.
2. It must emanate from the party liable to be bound, i.e. the offeror or his authorised agent.
A person cannot make an offer on behalf of another unless he has been expressly authorised to do so.
3. The offer must be communicated to the offeree as an offer cannot be accepted in ignorance of the offer.

Name any 2 elements of a valid **offer**

It must be definite and it must be communicated to the offeree

An **offer** can be specific or general. It is specific where it is made to a particular person and only that person can accept the **offer**. On the other hand an **offer** can be general where it is made to a class of person or to the general public. This was the case in *Carlill v. Carbolic Smoke Ball, (supra)*; a typical example of a Unilateral Contract where an **offer** was made to the whole world and was accepted by the plaintiff when he fulfilled the conditions of the **offer**.

Activity 2.1

Read the facts of *Carlill v. Carbolic* again. What was the decision of the court and what were the reasons for the decision?

An **offer** (and by extension acceptance) can be made in several ways, orally, written or can even be inferred or construed from the conduct of the parties to the contract. For instance Mr. A drives up to a toll gate and offers money to the attendant. The attendant collects the money and opens up the barrier to allow Mr. A pass by to his destination. Mr. A by driving to the toll gate and offering money to the attendant makes an **offer** (money in exchange for passage) to the

attendant, the attendant then collects the money from Mr. A to signify his acceptance of the **offer** and lets Mr. A through. A contract has come into effect without the exchange of any words from both parties. The test

Activity 2.2.

Read the example above again. From our discussions in Study Session 1, what type of contract is being described?

See *Brogden v. Metropolitan Railway Co. (Supra)*, where, the plaintiff made a written offer to the defendant requesting that the defendants append their signature and send back a form signifying their acceptance of the terms of an offer. The defendant failed to do this but however carried out the contract on the terms contained in the offer. It was held that the defendants had accepted the offer by their conduct and were therefore bound by the terms of the offer.

See also *Major Oni v. Communication Associates*; in that case the plaintiff made an offer to let his flats to the defendants. The defendants replied agreeing to the offer but requested that the plaintiff install new air conditioners in the flats. The plaintiff promptly installed the air conditioners. It was held by installing the air conditioners the plaintiffs had accepted the new offer or counter offer of the defendants and that a contract existed between the parties.

See also *Nigerian National Supply Company Ltd. (NNSC) v. Agricor Incorporation of USA*

You should note that in cases where the courts infer the existence of a contract by the conduct of the parties, the test is an objective one and not the subjective intention of the parties. In other words would a reasonable man infer the existence of a contract by the conduct of the parties? If the answer is yes then we have a contract.

Name any 2 methods by which an offer can be made

It can be made orally or it can be inferred from the conduct of the parties

2.2. Offer and Invitation to Treat

Sometimes an invitation to make an **offer** or a preliminary move in negotiations is sometimes confused with an **offer** itself. An invitation to make an offer is called an **invitation to Treat**. Some problems arise in distinguishing between expressions used by parties which are intended to lead to contractual relations and certain other statements which are not intended to have legal consequences. The importance of the distinction lies in the fact that if an **offer** is made by the offeror and such an **offer** is accepted the offeree is bound and on the other hand if a statement is a mere **invitation to treat** or an invitation to make an **offer**, the other party cannot by saying I accept, bind the offeror to a contract. *In other words, while an **offer** is capable of acceptance, an **invitation to treat** is not.*

As discussed earlier an **offer** must be clear, definite and unequivocal leaving the offeree with the option of either accepting the terms of the **offer** or not. On the other hand, an **invitation to treat** is merely a means of instigating negotiations which may or may not result in an agreement. *It results in an agreement when one of the parties, the offeror makes a definite and unshifting position of preparedness to be bound if the other party accepts the terms of an **offer** and the offeree does indeed accept on those terms.*

See *Olaopa v. Obafemi Awolowo University, Akinyemi v. Odu'a Investments Co. Ltd (Supra)*

2.2.1. Examples of Invitation to Treat

Judicial authorities have over the years provided several examples of instances of **invitation to treat**. Some examples are discussed below.

1. Advertisements

An advertisement (on the face of it) in the newspapers or of goods in a catalogue has been judicially stated to be an **invitation to treat** rather than an **offer**. In *Carlill v. Carbolic Smoke Ball Co. (Supra)*, Bowen L.J stated that when a person issues advertisements that he has certain goods to sell, there is “*no offer to be bound by any contract*”, such an advertisement is merely an invitation to members of the public that they should come forward with suitable offers that the advertiser is at liberty to accept or refuse. The same principle would apply to an advertisement made to members of the public requesting them to buy shares in a particular company. See *Berliet Nig. Ltd v. Francis (1987) 2 NWLR (Pt. 58) 673*.

An **invitation to treat** placed in the Newspapers or a catalogue should be distinguished from an offer in a unilateral contract as in the latter the offeror places a definite promise in the newspapers showing his willingness to be bound by the terms of his **offer** once the conditions he stipulates are performed by any member of the general public or the group of persons the offer was addressed to. See *Carlill v. Carbolic Smoke Ball Co.*

Activity 2.3. Invitation to Treat

Read Study Session 1 again and mention any 2 examples of advertisements that could be construed as **offers** instead of **invitation to treat** and discuss why this is so.

2. Display of Goods in a Shop Window, Supermarket Shelf, Market Stalls etc.

It has been held that display of goods in a shop window, supermarket shelf, market stall, etc., constitute an **invitation to treat** and not an **offer**. The **offer** is made when the customer picks up a particular article and presents it to the shop owner or cashier who may then accept or refuse the **offer**. Such a shop owner cannot be compelled to sell the article as the stock may be limited or may be on display for promotional purposes only. It would be absurd to hold a shopkeeper liable for breach of contract if two customers simultaneously demanded the last article in his shop window and he was obliged to disappoint one of them or even both.

See *Fisher v. Bell*: *by virtue of the Restriction of Offences Weapons Act, 1959, it was an offence to offer for sale a flick knife. A shopkeeper exhibited such a knife and he was prosecuted for contravention of the Act. It was held as that the exhibition of the knife in the shop window was merely an invitation to treat and not an offer the shopkeeper was thus not in contravention of the Act.*

See also *Pharmaceutical Society of Great Britain v. Boots Cash Chemists*, a case where *goods were displayed in Boots Chemists under a self-service system. Under the law certain dangerous medicines were required to be sold only under the supervision of a chemist. Although the store had a chemist in store for such purposes, the question arose as to whether the display of goods on the shelf constituted an offer and as soon as a customer picked up the drugs the offer was accepted and it would be too late to prevent the customer from taking the drugs as a contract would have already been concluded. It was held that the contract was made not when the*

customer put the goods in the basket but approached the cashier or the self service desk with his offer to buy the drugs and acceptance occurred by the receipt of such payment.

What is a possible reason why the courts classify goods displayed on a supermarket shelf or a shop window as **invitation to treat** and not an **offer**

If they were classified as **Offers**, a shopkeeper would be bound to sell to every customer that picks up goods from the shelves even if the goods are for promotional purposes or have already been sold to other customers (e.g. a previous online sale).

3. Invitation to make tenders

As discussed above, an invitation placed in the newspapers or any other public forum requesting for tenders for a particular purpose would amount to only an **invitation to treat** and not an **offer**. So if the Lagos State Government requires contractors to repair a particular stretch of road and requests for bids from interested contractors, such a request for a bid to be tendered is merely an **invitation to treat** and **offers** only occur with each individual bid received by the Lagos State Government. Any of these **offers** can then be accepted. Note that as all the bids are mere **offers**, the Government is not even obliged to accept the lowest bid and they cannot not be sued if such a bid is refused as their request for tenders was merely an invitation to suitably qualified persons as the first stage in negotiations.

4. Auction Sales

As regards auctions, note that an auctioneer's advertisement that an auction sale would take place at a particular time and place is not a promise to potential bidders that the auction would actually take place.

In *Harris v. Nickerson*, an auctioneer advertised in the newspapers that a sale of office furniture would be held at a particular venue. A broker with a commission to buy furniture travelled a far distance to attend the sale but the sale was ultimately cancelled. The broker then sued for a loss of time and expenses. *It was held that a declaration of an intention to do a particular thing did not create a binding contract with those who acted upon it. The broker could therefore not recover from the auctioneer for any loss of time or expenses.*

Furthermore once the auction commences, an auctioneer's request for bids is not an **offer** but merely an attempt 'to set the ball rolling'. *It was held in Payne v. Cave that the bid is the offer which can be accepted by the auctioneer by the fall of his hammer, or in any other customary manner. There is then a complete contract with the particular bidder to whom the lot is knocked down.* In other words, the bidder is the offeror; his bid is the **offer**. The auctioneer accepts the **offer** by striking the table with his hammer and until he does this, any article may be withdrawn and a higher bid accepted. It appears that each bid lapses as soon as a higher bid is made. Thus if a higher bid is made and then withdrawn, the auctioneer can no longer accept the bid made before it. These principles have now been recognised by statute.

Mention any 2 examples of Invitation to treat

Auction sales and Advertisements

5. Buses, Trains or other Modes of Transportation of Passengers

It is important to note here that an advertisement of the timetables of buses, trains etc. are not **offers** but mere **invitations to treat**. As regards the transportation of passengers itself, there has been some controversy as to who makes the **offer** and when? *Sagay suggests that the key moment should be when it is no longer possible for the parties to withdraw from the transaction and that that point would be when acceptance occurred.* It would then be easy to deduce when the **offer** was made and what was done preliminary to the **offer**.

So where a passenger who is waiting for a bus at a bus stop, gets on a bus that stops for him and pays the bus driver his fare; at what point would it be no longer possible for the parties to withdraw from the transaction. In this case it must be when the passenger got on the bus and paid. Therefore the passenger waiting at the bus stop is an invitation to treat, the bus stopping is an **offer** to the passenger and the passenger getting on the bus is then the acceptance of the **offer** from the bus driver.

Case Study 2.1: Offer and Invitation to treat

GTBank PLC placed an advert in the Guardian Newspapers on 20th October 2015. The advert stated *inter alia* that the Bank was offering for sale 1 million ordinary shares at N1.00 each. Daniel on seeing the advert sent a cheque of N100,000 to the head office of the Bank accepting their offer. A week later the Bank wrote a letter to Daniel at his home address stating that they were unable to allot any shares to him and enclosed Daniel's cheque. Daniel intends to sue the Bank for a breach of contract as he feels he validly accepted the bank's offer. Advise the parties.

Who made the offer?

Was the bank right in returning Daniel's cheque?

2.3. Termination of an Offer

An **offer** can be terminated in 5 ways; by revocation, lapse of time, death, rejection and non-occurrence of a Condition.

2.3.1. Revocation

An **offer** can be revoked or withdrawn at any time before acceptance. This principle remains operative even if the **offeror** has promised to keep the offer open over a given period. In other words the **offeror** can still revoke his **offer** even if the time promised to the **offeror** has not expired. Thus in *Routledge v. Grant*, the defendant Grant, offered to buy the plaintiff's house and he gave the plaintiff six weeks within which to accept his offer. The defendant withdrew his offer three weeks later with the plaintiff purporting to accept the offer at the expiration of the six week period. It was held that the defendant could withdraw his offer at any time even though the time he promised the plaintiff had not expired.

See also *Dickinson v. Dodds*

Note that the position would have been different if the **offeree** has purchased the option (i.e. given something in exchange for the promise) to leave the offer open. In other words the **offeree** has offered some valuable **consideration** to the **offeror** as the price of his promise. See *Mountford v. Scott*, where it was held that an offer could not be revoked before a given period as the other party to the contract had purchased the option to keep the offer open.

Note also that for a **revocation** to be effective, it must be communicated to the offeree. The **revocation** must reach the offeree before the offeree accepts the offer, once acceptance occurs, the offer can no longer be revoked. See *Byrne v. Van Tien Haven* (1880) 5 C.P.D

Note that **revocation** is also valid if the notice of **revocation** reaches the offeree from a reliable third party and not the offeror himself. See *Dickinson V Dodds (Supra)*

When can an offer revoked?

Any time before the offer is accepted. Once acceptance occurs an offer can no longer be revoked

As regarding **unilateral contracts**, where performance equates to acceptance, the question arises: at what point can the offeror still revoke his **offer**? Would it be any time before performance is completed or is he barred from revoking once performance has started? It has been suggested by *Cheshire and Fylfot* that much would depend on the nature of the **offer** as in some instances the circumstances of the **offer** would dictate that it can be revoked any time before performance is complete and in other cases the facts would suggest that the offeror cannot revoke once performance has started. For instance in *Errington v. Errington*, the court held that in cases where it can be implied from words or conduct of the offeror that continued performance acts as a bar to revocation, the offeror cannot revoke once the offeree commences performance and continues performance.

Sagay suggests that if parties contract in each other's presence, it would be safe to assume that the right to revoke would be lost once performance commences.

When can a unilateral offer be revoked

It depends on the nature of the offer and the circumstances of the offer. Some types of contracts may carry the implied promise not to revoke an offer once performance commences while others may not and in the latter case an offer can be revoked any time before completion of performance. See *Errington v. Errington*.

2.3.2. Lapse of Time

If an **offer** is stated to be open for a particular period of time, it cannot be accepted after that period has elapsed. The **offer** automatically lapses after the expiration of the fixed period. Where there is no fixed time within which the **offer** must be accepted, the **offer** must be accepted within a reasonable time. What amounts to a reasonable time would depend on subject matter of the contract and the circumstances of each case. See *Ramsgate Victoria v. Montfiore (1866)* and *Loring v. City of Boston*.

2.3.3. Death

The death of the **offeree** or **offeror** can determine or terminate an **offer**. Where the **offeror** dies before the **offer** is accepted, the **offeree** can no longer accept the offer. However where the **offeree** accepts without notice of the **offeror**'s death, then the **offer** will not lapse if the **offer** is such as can be performed from the **offeror**'s estate. In other words, the **offer** will not lapse where the contract is not one requiring personal performance from the offeror. See *Bradbury v. Morgan (1862)*. The death of the **offeree** before acceptance terminates an **offer** whether the **offeror** has notice of this or otherwise. See *Kennedy v. Thomassen (1929) 1 Ch. 426*

2.3.4. Rejection

An **offer** terminates if an offeree rejects the **offer**. The notice of rejection must however be communicated to the **offeror** before it can become effective. Note that an **offeree** who changes his mind can still accept the offer as long as his acceptance reaches the **offeror** before the notice of rejection. A common method of rejecting offers is done by making a *counter offer*. This would be discussed in detail in the next study session. In a situation where an offer has been rejected by post and the offeree later changes his mind, he is allowed to do so as long as this is done by a faster means. In this situation it is generally believed that the rule of acceptance by post cannot apply. This rule will be discussed in detail in Study Session 3.

2.3.5. The Occurrence of a Condition

If an **offer** is expressly or impliedly made to terminate on the occurrence of some condition, it ceases to exist and becomes incapable of acceptance after the condition has occurred. Thus an **Offer** to insure the life of a person should impliedly terminate if the person dies and cannot be accepted after.

Summary of Study Session 2

In Study Session 2, you have learnt that:

1. An **offer** is a definite promise made by one person to another stating the terms on which he is willing to be bound and the **offer** becomes binding on the person making it as soon as it is accepted by the person to whom it is addressed.
2. An **invitation to treat** involves an invitation from one party to another to make the former an **offer**. It is a preliminary move in negotiations that may lead to a contract.
3. An **offer** can be distinguished from an **invitation to treat** in that only an **offer** is capable of acceptance.
4. Examples of **invitation to treat** include; advertisements in newspapers, invitation to tender, display of goods on supermarket shelves or shop windows, etc.
5. An **offer** can be terminated by **revocation, rejection, death, lapse of time** and the occurrence of a condition.

Self-Assessment Questions (SAQs) for Study Session 2

Now that you have completed this Study Session, you can assess how well you have achieved its learning outcomes by answering these questions. Write your answers in your notebooks and discuss them with me during lectures.

SAQ 2.1 (tests Learning Outcome 2.1)

What is an offer?

SAQ 2.2 (tests Learning Outcome 2.1 and 2.2)

What is an invitation to treat? Distinguish between an invitation to treat and an offer

SAQ 2.3 (tests Learning Outcome 2.3)

With the aid of decided cases, list and discuss any 3 examples of invitation to treat

SAQ 2.4 (tests Learning Outcome 2.4)

Describe the various methods by which an offer can be terminated