

Diagram 3A is a flow diagram. It gives you an overview of contract formation. It asks questions in the order that they would naturally arise in a problem question. The diagram should also help, come time for revision.

1. The first question is: Is there an **offer** which can be converted into a contract by an acceptance? Or, something less, called a mere 'invitation to treat' which *cannot* be turned into a contract by acceptance? This distinction between 'an offer' and an 'invitation to treat' depends on 3 things:
 - First, the **objective test of intention**: the question is would the *reasonable person* interpret the conduct in question as manifesting an intention to be bound?
 - Second, there are **situation specific rules**; e.g. displays and advertisements are generally treated as only 'invitations to treat'.
 - Third, **policy considerations**, such as 'consumer protection' and the 'avoidance of unfair results' clearly influence how courts interpret the parties' conduct. We can see this in cases like *Chapelton v Barry* and *Carlill v Carbolic Smokeball*.

2. **If** there is no offer, but merely an 'invitation to treat', there is nothing to accept and so there can be no contract. You must see whether some *other* conduct could qualify as an offer.

3. **There is** an offer if there is a manifestation of willingness to be legally bound by the terms of the offer as soon as it is accepted by the person to whom it is addressed. It may be important to decide whether the offer is 'unilateral' or 'bilateral' because different rules apply:
 - On when the offer can be revoked,
 - On how the offer can be accepted, and
 - On how the acceptance is communicated.

4. A **unilateral** offer stipulates a promise for an act. It is accepted by *completed* performance of the stipulated act, even if the offeror does not yet know of it. So *communication* of the fact of completion is *not* required for the contract to be made although, of course, the offeree must let the offeror know when he tries to enforce the contract.

The other point to note is that while an offer can normally be revoked any time before acceptance, a unilateral offer cannot normally be revoked once the offeree has commenced performance. This protects the offeree's reliance.

5. In contrast, a **bilateral** offer stipulates a promise for a reciprocal promise and it is binding as soon as the reciprocal promise is given, even before anyone has started performing, let alone completed it.

For the reciprocal promise to be a valid acceptance, it must:

- First, correspond with the offer, it's all or nothing, there can be no deviation from the terms of the offer. If there IS a deviation, this may be regarded as a 'counter-offer', and this kills the original offer (so that it can't thereafter be accepted)
- Second, a valid acceptance must be *in response to the offer* (hence matching cross offers do not make a contract)
- Third, a valid acceptance must be made in an appropriate way (e.g. as stipulated in the offer or as is reasonable)

6. If any of these conditions are not met, there is no valid contract.
7. If there IS a valid acceptance, we still have to fix the **time of acceptance**; this is the time when the contract was made and everything is set hard; neither party can thereafter *change* the terms or get out of the contract. The answer to the timing question depends on *how* the acceptance was **communicated**:
- If the offeree sent the acceptance by **post**, then the question is whether the 'postal acceptance rule' applies.

- The 'postal acceptance rule' may **not** apply if it is unreasonable in the circumstances, if it prejudices the offeror or if the offeror says he must actually receive or know of the acceptance. In these cases, then unless it's unreasonable to use the post at all, acceptance takes effect when it's actually *received* by the offeror. Note that the offeror is expected to behave reasonably, he should not just throw the letter away or give it to the dog; he should open and read it.
 - If the postal acceptance rule *does apply*, then acceptance takes effect *when the letter is sent*. After that, the offeror can't validly revoke his offer even if he hasn't yet received the acceptance; and the offeree cannot validly withdraw his acceptance even if he uses a quicker method, like phoning the offeror before his own letter arrives.
8. In contract to post, If the offeree uses what is called an **instantaneous method of communicating** his acceptance, then it takes effect **when** and **where** the offeror *receives the message*. In *Brinkibon v Stahag Stahl*, Lord Wilberforce explained that this was because 'the condition of simultaneity is met' e.g. with telephone or face-to-face conversation communication is **2-way instantaneous**. Each party is present and it's reasonably obvious whether the message has got through or not.
9. But what if 'the condition of simultaneity' is **not** met, where communication is only **1-way instantaneous** like answerphone, email or text. An acceptance by these methods can arrive almost instantaneously, but the offeror recipient is not necessarily at the other end ready to receive the message. The problem arises when either party tries to withdraw before the message is actually accessed. In such cases, drawing on the analogy and reasoning of the other categories, acceptance should take effect when *a reasonable offeror would access the message*. This requires a careful acceptance of *all the circumstances*.
10. Once we've fixed the time of acceptance, the question arises whether the **offer** was still 'live' at that time. It may not be if it has been **terminated** by

- The offeror's prior revocation, or
- The offeree's prior rejection or counter-offer, or
- Lapse of the offer through the expiry of the stipulated or otherwise reasonable period of time; or
- The death of either the offeror or the offeree.

11. If none of these things apply, then you have a valid agreement. But a fully enforceable contract must satisfy other requirements:

- First, it must be sufficiently **certain**; in practice, the question is whether any uncertainty or incompleteness is curable by the courts. The courts can do this by reference to:
 - i. The parties' *previous dealing*, or
 - ii. *Custom* of the relevant trade, or
 - iii. The standard of *reasonableness*, or by
 - iv. The court *substituting its own mechanism* for the defunct but non-essential mechanism stipulated by the parties.
- Second, is the requirement called 'intention to create legal relations'. Of course, you already need a serious intention to be bound to find a valid offer and a valid acceptance in the first place. What it *really* means *here* is that the agreement must be one that the courts regard as *appropriate* for it to support (by putting the weight of the law behind its enforcement). As a general rule of thumb,
 - i. Courts *will* enforce commercial agreement unless the parties very clearly indicate otherwise.
 - ii. And courts will generally *not* enforce agreements made in a family or social context, unless:
 - is really commercial in nature and the parties' relationship is merely incidental; or
 - it is made to *end* the parties' relationship as when a couple is splitting up and said not to be 'living in amity'.
 - iii. Thirdly, the agreement must satisfy one of the three requirements of *enforceability*. First, the agreement may satisfy formality requirements, as

where it is made as a **deed**. Second, it may satisfy the requirements of **promissory estoppel**. That's where the promisee reasonably relies on the agreement to his prejudice. But most commonly, an agreement will be enforceable because each party has given the other something that the other values as part of a bargain. This satisfies the requirement called 'consideration'.