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21世纪法学系列教材

普通法系合同法与侵权法导论

——法律专业英语必读(2)

张新娟 主编　高树超 著

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张新娟，女，法学博士，中国青年政治学院法律系教授，中国法学会WTO法研究会理事，中国国际私法学会理事。曾任第11届亚运会兴奋剂检测中心英语翻译、亚足联万宝路戴拿斯杯足球锦标赛英语翻译。著有《反倾销法律的理论与实践》、《重返关贸总协定－企业面临的国际经济环境与对策》、《外商投资法律实务》（合著）、《合同法》（注释本，Brian A. Blum著），参编《中华法学大辞典》，参与翻译《法律冲突法》、《牛津法律大辞典》，并在《法学家》等刊物上发表学术论文多篇。

高树超，英国伦敦大学学院法学硕士，美国范德比尔特大学法学博士。曾任世界贸易组织上诉机构秘书处首名中国律师，后被聘为世界贸易组织秘书处服务贸易司顾问。现任香港大学法学院助理教授，并兼任北京WTO事务中心法律专家，亚太地区区域性贸易政策培训课程学术主任，中国法学会WTO法研究会理事。主要研究领域是WTO、国际贸易法、公司法和法与经济学。

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Part I

Contract Law

Chapter 1

Introduction

Ever since you enter into this world, you are in a web of contractual relationships. When you are buying a book in the university bookstore, ordering a meal in the school canteen, renting an apartment, and going to work for a company after graduation, you are entering into contracts, no matter whether you are aware of it or not.

Thus, it is no surprise that contract is one of the most important concepts in every legal system, be it Civil Law or Common Law. The two legal systems, however, deal with contract law in different approaches. In Civil Law countries, contract generally is not regarded as an independent area of law and only regulated as part of the Civil Code. In Common Law countries, there are usually no comprehensive Civil Codes and contract is regarded as one of the most important areas of law in its own right. Many other important areas of law, such as company law, securities law, agency law, are all based on the basic principles of contract law. Thus, it is very important for one to have a clear understanding of contract law before he can have a more advanced study of other subjects of the Common Law.

This book is written to introduce the students to some of the basic concepts and principles of contract law. We will first discuss how to form a contract. Next, we will survey the main contents of a contract. Then we will go on to examine the ways to discharge a contract. Finally, we will study the remedies available if a contract is breached.

Chapter 2

Offer

A contract is an agreement between two or more parties that is enforceable at law. In order to have an agreement, we need to have offer and acceptance; in order to make the contract enforceable at law, we need to have consideration as well as the intention to create binding relations. Thus, this definition brings about the three essential elements of a contract, i. e., (a) an agreement (offer and acceptance), (b) consideration, and (c) intention to create legal relations.

An offer is defined as a *definite promise or proposal* made by the *offeror* (the person who makes the offer) with the *serious intention* of being *bound* by such promise or proposal if it is *accepted* by the *offeree* (the person to whom the offer is made). From this definition, we can see that the core of the concept of "offer" is that it must be something definite. The definiteness is what distinguishes an offer from an invitation to treat. Different from an offer, an invitation to treat is only the expression of the willingness to receive offers for consideration. As the following cases illustrates, common forms of an invitation to treat include advertisements, and shop displays.

Partridge v. Crittenden

2 All ER 421 (1968)

The appellant inserted an advertisement in the issue for Apr. 13, 1967, of a periodical "Cage and Aviary Birds" containing the words "Quality British A. B. C.

R. ... Bramblefinch cocks, Bramblefinch hens, 25s. each". It was inserted under the general heading "Classified Advertisements". In no place was there any direct use of the words "offer for sale". T., having seen the advertisement, wrote for a hen, which was sent to him and arrived on May 2, 1967, wearing a closed-ring. T. was able to remove the ring without injury to the bird. The appellant was charged with unlawfully offering for selling a certain wild live bird, viz., a brambling, other than a close-ringed specimen bred in captivity, contrary to s. 6 (1) * of, and Sch. 4 to, the Protection of Birds Act, 1954. Section 6, so far as material, provides: "(1) If... any person sells, offers for sale... (a) any live wild bird... including in Sch. 4 to this Act of a species which is resident in or visits the British Isles in a wild state, other than a close-ringed specimen bred in captivity;... he shall be guilty of an offence..." Schedule 4 has the heading: "Wild birds which may not be sold alive unless close-ringed and bred in captivity" and amongst the names in the schedule is "brambling".

A central issue in this case is whether the advertisement of the appellant constituted "offer for sale". Lord Parker, in rendering his opinion, stated that "when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale".

Held: The advertisement in the present case constituted in law an invitation to treat, not an offer for sale, and the offence which was charged against the appellant was not, therefore, established.

Fisher v. Bell

1 QB 394 (1961), 3 All ER 731 (1960)

A shopkeeper displayed in his shop window a knife with a price ticket behind it. He was charged with offering for selling a flick knife, contrary to s. 1 (1) of the Restriction of Offensive Weapons Act, 1959.

The issue is whether this knife exhibited in the shop window with the price ticket behind it was an offer for sale within the meaning of section 1 (1) of the Restriction of Offensive Weapons Act, 1959.

Held: The shopkeeper was not guilty of the offense with which he was charged because the displaying of the knife in the shop window was merely an invitation to treat and the shopkeeper did not thereby offere the knife for sale

within the meaning of s. 1 (1) of the Act of 1959.

Rationale: In the absence of a definition in the Act of 1959, the words "offer for sale" ought to be construed as they were in the law of contract, so that, in this instance, the respondent's action was merely an invitation to treat and not a firm offer which needed but a customer's acceptance to make a binding contract for sale.

An offer, once made, is like a seed in the field. Just as a seed can either die or grow into a plant, an offer can either die in a couple of ways or grow into a contract. Let's first consider how an offer can die. Generally, four events can lead to the death of an offer. They are rejection, revocation, lapse of time, and death of a party.

When an offer is made by the offeror to the offeree, the offeree can either accept the offer, or reject the offer. Say Tom makes an offer to Mike to sell him a PC for $1000. If Mike says, "No, I don't want to buy the PC", the offer will die immediately and nothing will be left. If, however, Mike says, "I don't want to buy this PC for $1000, but I will take it for $500", then do we still have an offer? The answer depends on which offer you refer to. If you are talking about the original offer made by Tom, that offer has died. This might seem to be confusing for some of you, as you probably think that Mike is still willing to buy the PC from Tom. However, as we are going to discuss later, in order for the acceptance of an offer to be effective, it must be on the *same terms* as the original offer. This is called the "*Mirror Images*" rule: an acceptance has to be the "mirror images" of the offer. In this case, Mike does not agree with Tom on one of the most important terms of the contract, i. e., the price. Therefore, Mike rejects the offer. Mike's rejection, however, also creates a new offer, which is usually called a counter-offer. The term for this offer is $500 for the PC, rather than the $1000 that Tom originally proposed. The following case illustrates this important point:

Hyde v. Wrench

3 Beav 334 (1840)

In this case, Wrench made an offer for the sale of his property for £ 1200 to Hyde. When Hyde rejected that offer, Wrench made a further offer to sell for £ 1000. Hyde replied that he was prepared to buy the property for £ 950, but this was unacceptable to Wrench. After Wrench had refused to sell for £ 950, Hyde then wrote to him advising that he (Hyde) was now prepared to accept Wrench's earlier offer of £ 1000 for the property. The issue for determination was whether Wrench was bound to sell the property to Hyde for that amount.

The Court of Chancery held that Hyde had rejected both offers made by Wrench and that an offer, once rejected, could not be revived. There was, therefore, no contract in existence and, accordingly, the action failed. The facts clearly indicated that Hyde made a counter offer and also tried to accept an offer which he had previously rejected.

Also, you need to distinguish the rejection from bargaining or request for further information. In the example above, if, instead of saying "I don't want to buy this PC for $ 1000, but I will take it for $ 500", Mike replies "Well, I am a bit short on cash these days. How about I pay you $ 500 right now, and the other $ 500 in a month?" In this case, Mike has agreed to the main terms of the contract, i. e. "$ 1000 for the PC". He is merely trying to sweeten up the deal by paying in installments. Thus, instead of taking the offer as dead, we would regard Mike has accepted the offer in this case. Of course, things would be different if Tom expressly states in his offer that no installment is accepted. Also, some people can make the argument that $ 500 today plus $ 500 in two months is less than $ 1000 today due to the simple fact that money can earn interests. For our purposes, however, we will limit our discussion to the simple issues raised and disregard those complexities.

An offer can also be taken back by the offeror. We call this

revocation. In common law, there is no question that the offeror can withdraw the offer any time before the offer reaches the offeree. Similarly, once the offeree has communicated his acceptance of the offer to the offeror, the offeror can no longer revoke the offer any more. These two are the easy cases. The most difficult case arises between the points of time after the offeror makes the offer but before the offeree accepts the offer. Can the offeror revoke the offer during that time? If he can, when will the revocation become effective? These questions are illustrated by the following case.

Dickinson v. Dodds

2 Ch D 463 (1876)

On June 10, 1874, the Defendant John Dodds (seller) signed and delivered to the Plaintiff, George Dickinson (buyer), a memorandum, of which the material part was as follows:

"I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of oe800. As witness my hand this tenth day of June, 1874."

"P.S. — This offer to be left over until Friday, 9 o'clock, A.M. J. D. (the twelfth), 12th June, 1874."

"(Signed) J. Dodds."

Plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the right to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the Plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to another buyer. Despite efforts by Plaintiff to twice deliver formal acceptance of the offer, he was informed by Dodds that a contract was signed to sell the property to somebody else, with the deposit already paid. Plaintiff buyer sued both the seller and the buyer who succeeded in the transaction for specific performance.

The issue is whether an offer to sell property may be withdrawn without any formal notice to the person to whom the offer is made before a formal acceptance

is tendered, given that the memorandum signed by defendant seller specified that the offer was to be left open until a future date.

Held:

(a) The June 10 memorandum was only an offer to sell, not an agreement to sell, and it was, therefore, not binding upon the defendant.

(b) An offer to sell property may be withdrawn before acceptance. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person.

Rationale:

(a) There was no consideration given for the undertaking or promise to keep the property unsold until 9 o'clock on Friday morning.

(b) To constitute a contract, there must be a meeting of the mind that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance came to nothing.

(c) Since there was no contract between Dickinson and Dodds, the contract between Dodds and Allan (the ultimate buyer of the property) took priority.

An offer may also expire due to the lapse of time. If the offeror indicates that the offer will only be open for a certain period, then the offer will lapse at the end of the stated period. Moreover, even if there is validity period stated in the offer, courts will often hold that the offer expires after a reasonable time period. This is illustrated by the following case.

Ramsgate v. Montefiore

(L R) 1 Exch 109 (1866)

The Ramsgate company was completely registered 6th June, 1864. The prospectus of the company contained the following words:

"Deposit on application 1 pound per share, and 4 pound on allotment." And it was further stated that if no allotment was made the deposit would be returned.

The defendant was sued for non-acceptance of shares. He applied for

shares on June 8. He turned in the application and the deposit of 50 pounds, and a receipt was sent to him. On the 2nd November the secretary submitted a list of subscribers to the directors, but they did not deem it advisable to proceed to an immediate allotment, and entered a minute to that effect. On the 8th of November the defendant, having received no communication from the company, withdrew his application.

On the 23rd November the secretary prepared another list of subscribers, including the defendant's name. The secretary notified the defendant of the allotment and requested a payment of the remaining balance. The defendant having refused to accept the shares or pay the call, the company brought the present action against him.

The facts in the other action were the same, except that the defendant had never withdrawn his application.

Held: The allotment must be made within a reasonable time. It was not so made, and, therefore, the defendant was not bound to accept the shares allotted.

An offer may also expire due to the death of a party. Here we need to distinguish the death of the offeror with the death of the offeree. If the offeror dies before the offeree accepts the offer, and the offeree knows of the offeror's death, then there is no contract even if the offeree later accepts the offer. If, however, the offeree does not know of the offeror's death, and, at the same time, the contractual obligations are capable of being performed by the offeror's personal representatives, and then if the offeree goes on to accept the offer, we will have a valid contract. The death of the offeree, on the other hand, does not entail serious consequences. Generally, unless the offeror expressly states that only the offeree himself can accept the offer, or the nature of the offer is such that it cannot be accepted by anyone other than the offeree (such as a contract for artistic performance), an offer can be accepted by the offeree's estate after his death.

Notes and Questions

1. How do you understand the statement that "the core of the concept of

'offer' is that it must be something definite"?

2. Tom makes an offer to Mike to sell him a PC for $1000. Mike says, "I only have $950 with me right now. Will it do?" Is that an offer or counter offer?

3. Suppose in *Dickinson v. Dodds*, Dickinson did not know of Dodds deal with the other buyer until after he was trying to deliver his acceptance to Dodds. Is Dodds bound to accept Dickinson's acceptance?