

Advanced Contracts, Tendering and Public Procurement
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Lecture 6 Formation of Contract - Offer

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Offer: proposal



- 1. Offer
 - Various methods of making a proposal
 - Who can make an offer [Powell v Lee: Interview case]
 - Invitation to treat [Sale'-Harris v Nickerson: auction case]

Case
 * *Harris v Nickerson*
 An auctioneer advertised in a newspaper that a sale of office furniture would be held. A broker came from a distant place to attend that auction, but all the furniture was withdrawn. The broker demanded said the auctioneer to his loss of time and expenses.
 * **Held** - A declaration of intention to do a thing did not create a binding contract with those who acted upon it, so that the broker could not recover.



Classification of Offers/Kinds of Offers



Powell v Lee (1908)

• **Fact:** The P applied for a job as headmaster and the school managers decided to appoint him. One of them, acting without authority, told the P he had been accepted. Later the managers decided to appoint someone else. The P brought an action alleging that by breach of a contract to employ him he had suffered damages in loss of salary.
 • **Held:** there was no contract as there had been no authorized communication of intention to contract on the part of the body, that is, the managers, alleged to be a party to the contract.



The various essentials that make an agreement a contract. Now, the first essential ingredient for an agreement to be treated as a contract and to be enforceable as a contract is that there must be an offer. The term 'offer' is used in common law and in UK contract law. Whereas, if you refer to the same word being used in the Indian Contract Act 1872, it is termed as 'proposal.' To be honest, offer and proposal are essentially an initiation of a commercial relationship.

Of course, we know that for any contract or commercial relationship, you need two parties. So, one party typically makes an offer, and the other party makes an acceptance. For example, the seller may say, 'I am willing to sell my house to you,' and the buyer then responds by saying, 'I am willing to accept your offer.' This offer and acceptance create a contractual relationship. This can also be related to receiving an offer letter in employment, where a company may offer a job and you can respond with an acceptance letter or a joining letter.

Therefore, the offer serves as the foundation for the start of the contractual relationship. Interestingly, there are certain requirements for what constitutes a valid offer. Sometimes, the offer is expressed, meaning it can be communicated through spoken or written words. As

mentioned before, in the early days, contracts were generally oral contracts, as seen in most cases decided under common law.

So, even if it is orally expressed, it is still considered an expressed contract because the offer can be understood. Interestingly, we also have what we call implied contracts. These contracts are based on conduct or actions. For example, if I place my phone on your table and say, 'Use it, let's see,' it implies a contract based on our conduct.

Similarly, when an auto rickshaw is standing at a designated stand, it implies an offer. The implied offer is that the auto driver is willing to transport you from destination A to destination B if you are willing to pay the fare. This kind of offer is implied by the nature of the situation. The same goes for a bus that arrives at a bus stand. You can board the bus, and there is a destination displayed, indicating that it will take you there if you are willing to pay the price.

These are examples of the different types of offers or proposals that can be made. Offers can be made through various methods. Some offers are very specific, meaning they are made from one individual to another, and no other person can accept the offer. It is limited to two parties. For instance, I may state that this offer is only open to Mr. P and no one else. In specific offers, most details regarding the subject matter of sale and the terms of the contract are clearly stated.

And, will notice that in a specific offer, it is often stated that if you don't accept before 5pm today, the offer will expire. Everything is clear in a specific offer, and it is not open-ended. The terms are very explicit. In most modern-day commercial transactions, offers tend to be very specific. For example, in employment, they clearly state not to join before the first of April, indicating that the offer will be terminated after that date. The specificity is crucial in such cases.

The distinction between a specific offer and general offers is that in a general offer, the offer is made to the world at large. It's a public offer. For instance, an IPO (Initial Public Offering), which is an offer by companies for share subscription, can be considered a general offer. Anyone from the public can apply for it. A general offer is like making a request and providing a reward. For example, if I say, 'Whoever is willing to find my dog, I will give them a reward.' It is open to anyone who is willing to fulfill the specified condition.

An offer is made when a person makes a promise or proposal and invites anyone in the public to accept it. For example, in a class, someone might say that anyone who achieves the highest marks will receive a gold coin. This offer is not directed at any specific individual but is open to anyone in the class, regardless of the group's size (whether it's 100, 200, or 1000 students). Accepting such an offer would be considered accepting a general offer.

In contrast, a counter offer occurs when parties engage in a back-and-forth exchange of offers. For instance, if someone offers to sell their house for 15 lakhs and the potential buyer responds by offering to purchase it for 12 lakhs instead, that would be considered a counter offer. Conditional acceptance, such as expressing a willingness to buy at a lower price, creates a new proposal that the original offeror needs to accept or reject.

So, Counter offers can be considered as a form of conditional acceptance, but they are not considered as actual acceptance. Instead, a counter offer is subject to acceptance itself. In modern contracts involving negotiations and bargaining, offers and counter offers are exchanged between the parties. It is important to understand that counter offers, although they are offers, do not automatically lead to a binding contract. They do not amount to acceptance, and unless a counter offer is accepted as it is, a contract will not come into existence. Therefore, it is crucial to have a clear understanding of what a counter offer entails.

A continuing offer. A continuing offer is like a standing offer, where the offeror states their willingness to supply goods or services for an extended period. For example, a stationery shop owner may offer to supply various items such as pencils, erasers, papers, and more to a university for the next year, specifying the rates and available items. This type of offer is commonly seen in long-term contracts, such as the supply of coal to a thermal plant, where the offeror commits to providing the specified goods over an extended duration.

Continuing offers involve ongoing transactions rather than one-time exchanges. They are sought after for business arrangements that require consistency, uniformity, and a reliable source for the goods or services. Businesses often prefer continuing offers when they seek long-term partnerships and a predictable supply of commodities or products.

Lastly, the concept of a cross offer in terms of the timing and nature of offers. A cross offer occurs when both the buyer and the seller simultaneously propose offers to each other for the same item, without knowing if the other party is willing to accept the proposal. In essence,

these offers "crisscross" each other. However, it is important to note that cross offers do not result in a binding contract.

One of these offers, which is exchanged between the parties, must be accepted by the other party. Therefore, it is important to consider this type of offering. To clarify, cross offers are subject to acceptance. Just because they have been made at the same time between the same parties and are still in the proposal stage, they are still considered offers. However, unless the offer is accepted, a contract does not come into existence. Therefore, offers require acceptance for a contract to be formed. These are some of the jurisprudential aspects of the contract offer that you should understand.

Understanding who can make an offer in a contract is the next important point. Firstly, it is crucial to note that a person of unsound mind is disqualified from making an offer and forming a contract. The essential condition is that the person must be of sound mind. We will discuss other essential conditions shortly.

Now, the reason why this element is important is that if you are a natural person and meet physically with two other individuals, the offer can be made and accepted in person. However, when you make an offer as a natural person on your own behalf, there is no problem. I can assess whether you are of sound mind and whether you are of legal age, and then your offer can be considered serious. But when it comes to institutions or corporate entities, the question arises: who can make such an offer? Whether it's a company, a university, a partnership firm, a cooperative society, or a trust – these legal entities have to determine who within their organization has the authority to make an offer.

Let us take the example of a university. We might assume that the Vice Chancellor, as the highest authority in the university, can make an offer. However, that is not necessarily the case. It could be the registrar who has the authority to make an offer on behalf of the university. Therefore, it is crucial, particularly for institutions, to understand who can make the offer, as it involves the delegation of authority. Unless the delegation of authority is established, the offer will not be considered valid. For instance, when the government enters a contract, it is essential to determine who within the government has the authority or capacity to make that kind of offer. Only then can the offer be legally recognized and validated by law.

Now, an interesting case that highlights this point is Powell versus Lee. If you want to know the facts of this case, let me explain. A gentleman applied for a job at a school. He went through the application process, attended the interview, and performed exceptionally well. He returned home, expecting a confirmation call for the job. Eventually, he received a call informing him that he had been selected. Filled with enthusiasm, he immediately resigned from his current job, believing he had secured the position of headmaster.

However, after some time passed, he received no official offer letter, only the call. Confused and concerned, he went to the school and asked why they had not contacted him. The school responded by saying that they had not officially confirmed his appointment or issued an offer letter.

The gentleman argued that he had received a call stating he was selected. But the school countered, asking whether he had verified the caller's authority to make the offer. In this case, it is noteworthy that if a clerk from the school made the call without proper authorization, the call and any offer made cannot be considered valid. Without a valid offer from someone with the authority to make it, there can be no acceptance. The initiation of the commercial relationship must be valid and enforceable for acceptance to occur. If this requirement is not met, a contract cannot be formed.

The basis of a call can indeed be an offer, without a doubt. However, it is essential to consider who made the call and whether they had the authority to do so. Additionally, it is crucial to examine whether the caller clearly communicated an offer or simply communicated the selection without providing the details of the offer, which would typically be included in an appointment letter. This forms the basis upon which acceptance can proceed. Therefore, this case emphasizes the significance of understanding that not everyone can make an offer. It is important to identify who has the authority to make an offer.

For instance, let us consider the joint Hindu family system, known as the HUF (Hindu Undivided Family), which represents the joint family system in India. In this context, there is a head of the family called the Karta, along with other coparceners. While everyone in the family is an owner of the property, determining who can make an offer on behalf of that property becomes a critical question.

Similarly, in a partnership firm, being a joint owner does not automatically grant the right to make an offer. One must consider whether they are an executive or managing partner, or even

a sleeping partner. Only the executive or managing partner, as authorized by the partnership deed, can represent the partnership, and make an offer on its behalf.

Therefore, it is crucial to understand that not every individual has the capacity or authority to make an offer. Identifying the person with the proper capacity and authority is necessary for an offer to be made and subsequently accepted, leading to the formation of a contract.

Joint owners can indeed make an offer, but it is important to note that the offer can only be made in relation to their share of ownership, not the entire property. Unless the other joint owner has given consent or the proposal is joint, the offer will not be considered valid. This distinction is crucial for our understanding.

Additionally, it is important to grasp the difference between offers and invitations to treat. Let's explore this concept. You may have visited a shopping mall with a grocery store. As you enter the grocery store, you are provided with a cart, whether it's physically or online. You take this cart and begin shopping, moving around the store and encountering various displayed products. Now, can we consider these displayed products as invitations to offer? Take a moment to consider this.

The goods displayed in the shop can be seen as an invitation to offer. However, the act of picking up the goods does not necessarily imply acceptance. Although the displayed goods are considered an offer since they are available for sale, picking them up does not automatically result in acceptance and the formation of a contract. This is because, in a shopping mall, consumers have the flexibility to change their minds and switch between products or even withdraw certain goods at the cashier. Similarly, the cashier retains the right to decline the sale if the consumer is dissatisfied.

Therefore, it is crucial to understand that in a shopping mall scenario, it is not the mall itself that is making the offer. Instead, the mall is simply inviting customers to view the goods available for purchase, and it is the consumers themselves who are making the offer to buy the selected goods.

Once you have selected the goods you wish to purchase, you present them to the shopping mall or store owner. It is then up to the owner to make the final acceptance. They may refuse to sell the goods for various reasons, such as if they have been reserved for someone else or if there are no stocks available. They might also indicate that certain promotional offers are

subject to specific conditions of sale. Ultimately, the shopping mall or store owner will determine whether they will sell the goods to you and at what terms.

Understanding the concept of an invitation to treat is crucial, as it precedes the actual offer. It is a stage where individuals are invited to view and consider the goods or services, and then decide whether they want to make a purchase. As the consumer, you hold the final decision-making power to either proceed with or decline the offer.

Now, let us consider the role of advertisements in contracts. Advertisements come in various forms, such as online ads, print ads, radio ads, and social media promotions. Today, advertisements are a prominent method of marketing. When advertisements mention sales, discounts, promotional schemes, or other enticing offers, it is important to understand how they are treated in contract law.

Suppose you come across an advertisement for a government or Development Authority auction of plots, with a fixed date and time for the auction. You express interest in purchasing a plot and arrive at the designated location on time, only to discover that the auction has been canceled. In such a case, can you take legal action against the government for the promise made in the advertisement to conduct the auction?

Advertisements are not typically considered binding promises. They serve the purpose of providing information rather than making specific contractual commitments. Advertisements lack the necessary specificity and clarity to be treated as offers. Generally, advertisements are regarded as invitations to make an offer. Thus, attending the auction and placing a bid would be considered making an offer, which is subject to acceptance by the auctioneer (in this case, the government). If the auctioneer accepts the bid, a contract is formed.

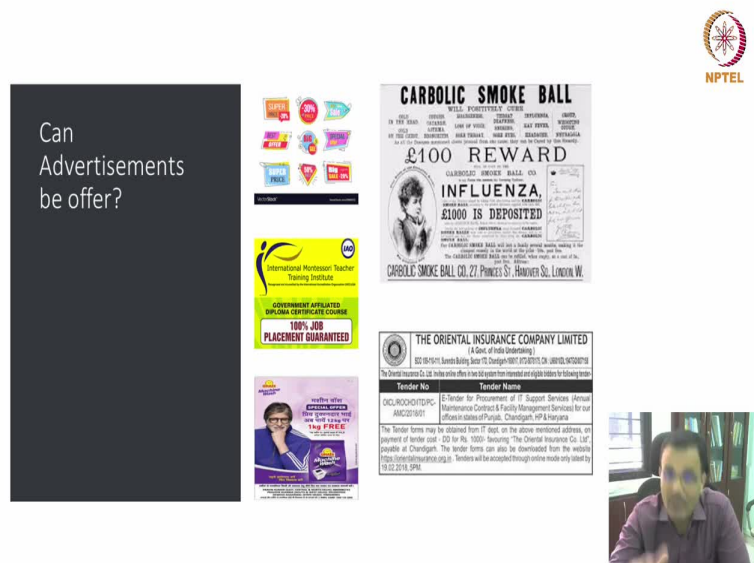
Bidders are required to make an offer, and the act of calling for bids is generally an invitation to make that offer. Therefore, anything preceding the offer should be treated as either an invitation to treat, where individuals are encouraged to visually explore and evaluate the goods or services before deciding, or as an invitation to make an offer, where individuals are invited to a specific location to consider and potentially make an offer.

In contract law, judges recognize that not every kind of proposal or initiation can be considered a formal offer. Certain proposals are considered pre-offer or simply informational in nature. The proposal needs to contain specific obligations and promises to be treated as an offer; otherwise, it should be regarded as new information.

The content of the offer and its specificity play a crucial role in determining whether it qualifies as an offer under contract law, capable of being accepted by the offeree. In a contract, there are two parties involved: the offeror and the offeree. The exchange of promises between these parties is what establishes a contract, as contract law revolves around the exchange of promises, which must demonstrate the intent of the parties involved.

Intention is a critical factor because an offer must be intended to be binding; otherwise, it fails to be a valid offer. Additionally, there must be a degree of definiteness and clarity in what is being communicated as part of the offer. The offer must be communicated clearly, whether through electronic means, physical documentation, or oral communication. The offeror needs to ensure that the offer reaches the offeree for it to be considered valid. Once the communication of the offer is complete, it can be enforced to that extent.

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The next issue for consideration is whether advertisements can be considered offers. While advertisements are primarily intended for providing general information, there are cases where advertisements can be deemed as offers. There are two types of advertisements to distinguish: those containing genuine offers and those that make specific promises.

In the famous case of *Carlill v. Carbolic Smoke Ball Company*, Mrs. Carlill filed a lawsuit against the pharmaceutical company for failing to fulfill a promise made in their advertisement. The company had advertised a product that claimed to prevent influenza, and they further stated that if the product failed to work, they would pay £100 as a reward. The company argued that the advertisement was merely informational and not an offer, as they could not identify who had read it or purchased the product.

However, the court determined that this advertisement went beyond mere information and constituted a binding offer. The court held that when a reward is announced in an advertisement, fulfilling the conditions stated in the advertisement becomes acceptance of the offer. In this case, Mrs. Carlill's act of purchasing and using the product as instructed constituted acceptance of the offer, and the company was obligated to pay the reward.

It is essential to categorize advertisements clearly. Some advertisements make specific promises and obligations, such as job placement guarantees or reward offers for providing information about a crime. In such cases, these advertisements can be treated as offers, and failing to fulfill the obligations outlined can result in a breach of contract.

However, not all advertisements qualify as offers. Many advertisements, particularly tendering contracts announced by the government, are invitations for individuals or companies to participate in a bidding process. These advertisements generally lack specific promises or obligations and are considered pre-offers or invitations to treat, rather than binding offers.

In summary, advertisements can be considered offers if they contain specific promises and obligations. When an offer is made in an advertisement, fulfilling the conditions stated in the offer constitutes acceptance, leading to a binding contractual obligation. Contract law revolves around fulfilling obligations, and advertisements that create identifiable and certain obligations can initiate legal implications, where failure to fulfill those obligations may result in a breach of contract.

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'Intention' in Offer: reading the mind

Should an offer be made with the 'Intention' to create a legal relationship?



DEES v PRADHANTON (2016)
 Parties agreed with the disclaimer that if the daughter got a job in the USA and read for the bar in England, she would pay for an allowance of £2000 a month. In this case, the daughter came to England and became a solicitor in Birmingham. She then applied for a job in the USA and was offered a job. She then applied for the bar in England and was offered a job. She then applied for the bar in England and was offered a job. She then applied for the bar in England and was offered a job.



Balfour v Balfour (1919) 2 KB 571

- **Facts:**
 - Mr B promised to pay his wife £20 per month.
 - Mr B had to return to Ceylon. Mrs B was to remain in England for medical reasons.
 - The couple later separated.
 - Mrs B claimed £20 per month pursuant to Mr B's promise.



Moving forward, let us discuss the importance of understanding offers as an essential aspect of making agreements or contracts. In the Indian Contract Act of 1872, Section 2(a) defines a proposal or offer as when one person signifies to another their willingness to do or abstain from doing something with the intention to obtain the other person's assent. This signifies the making of a proposal.

Furthermore, Section 2(e) of the Indian Contract Act defines an agreement as every promise and every set of promises that form consideration for each other. This highlights the requirement of separate promises to constitute an agreement.

When considering offers, it is crucial to examine the intention behind them. An offer should be made with the intention to establish a serious or commercial relationship. Additionally, for an offer to be binding and create a contractual obligation, it should be made by a person who has the capacity, such as being an adult or above 18 years old, and possesses the necessary resources, like money.

It is important to differentiate between social contracts and legal contracts. While legal contracts are enforceable by law, social contracts and agreements are not. A notable case that illustrates this distinction is *Mr. Balfour v. Mrs. Balfour*. In this case, Mrs. Balfour filed a lawsuit to compel her husband to fulfill his promise of providing her with maintenance money while she stayed in England. However, the court ruled that social promises made within a household or existing relationships, like between family members, do not create binding contractual obligations unless there is a clear intention to do so.

The concept of intention becomes crucial in contract law. Judges must determine whether an offer or promise was made with the intention to create a legal obligation and result in a binding relationship. Social promises, such as those made between friends or within a household, are generally not considered contractual promises unless there is a clear intention to create a legal relationship.

It is worth noting that in commercial contracts, even a memorandum of understanding (MOU) can be either binding or non-binding. Not every agreement or understanding leads to a contract, and an MOU can serve as evidence of the parties' intentions but may not be legally enforceable.

Another case, *Jones v. Padavatton* (1969), involved a mother promising her daughter to support her studies in England. However, when the daughter did not show seriousness in completing her studies, the mother stopped providing financial support. The court held that this was not a legally binding obligation of the mother to maintain her daughter. While statutory obligations exist for maintenance claims, a social promise like this lacks the necessary intention to create a legal relationship and enforceable contract.

The theory of intention is particularly relevant when oral contracts were prevalent, often involving existing or subsisting relationships like family ties. Nowadays, when two parties without a pre-existing relationship make promises, the intention is typically presumed to create a legal relationship and contractual obligations unless otherwise disputed. However, an

MOU can still be used as evidence of the parties' intentions, whether it is binding or non-binding.

In conclusion, understanding offers is crucial in the formation of agreements or contracts. Offers can be explicit or implicit, but communication of the offer is essential. Intention plays a vital role, and specific or general offers, as well as advertisements, can all be considered offers depending on the specific obligations they entail. With this understanding, let us now proceed to the second aspect of contract formation, which is acceptance.

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The slide is titled "2. Acceptance" and features the NPTEL logo in the top right corner. A central text box contains the following bullet points:

- Acceptance is like a lighted match stick to a train of gun powder
- Mirror Image rule
- Knowledge of offer relevant [Lalman Shukla case]
- Who can make an acceptance [Powell v Lee]
- Acceptance must be communicated: Is Silence a acceptance? [Horse case/credit card] LIC v Vasireddy AIR 1984
- UK Unsolicited Goods Act 1971: no need to communicate acceptance
- Acceptance by conduct-Implied [Carill case]

Illustrative images on the slide include: a silhouette of a person looking at a mirror image; a megaphone with the text "SILENCE ACCEPTANCE"; a person's face in a video call window; a bottle of "SPECIAL RESERVE" whisky; the LIC logo (Life Insurance Corporation of India); and an illustration of a person with a cart labeled "Unsolicited Goods Scam".

Now, interestingly, in the context of contracts, an offer needs to be accepted and communicated to a second party. According to Hanson, a jurist and author in contract law, acceptance is like a lighted matchstick to a train of gunpowder - once it happens, it cannot be revoked. The legal obligation is formed, and the contract becomes enforceable in a court of law. Acceptance must be absolute, unconditional, and communicated in the usual or reasonable manner.

Acceptance is comparable to a mirror image of the offer. If any additional conditions or changes are made to the offer, it becomes a counter offer. Furthermore, acceptance can only take place if the person has knowledge of the offer. This rule was exemplified in the *Lalman Shukla v. Gauri Dutt* case, commonly known as the missing nephew case.

In that case, the landlady announced a reward for finding her missing nephew. Lalman Shukla, the domestic servant, found the boy and returned him to the landlady without

knowledge of the reward. Later, when he learned about the reward, he claimed it, but the court ruled that he was not entitled to it since he had no prior knowledge of the offer.

Acceptance can only be made by the specific person to whom the offer was directed. It cannot be assigned to a third party. Silence generally does not constitute acceptance, as communication is crucial in contract law. There have been cases where silence was interpreted as acceptance, such as when specific conditions were communicated beforehand, or when actions were taken indicating acceptance.

It is important to note that communication of the offer and acceptance is essential for a contract to be formed. Internal processes within an organization, like document preparation or premium deposit, do not necessarily constitute acceptance unless there is communication with the offeror. Communication can sometimes be dispensed with in certain cases of conduct or implied acceptance, but generally, it is a fundamental requirement for the formation of a binding contract.