

Diagram 2A is a flow diagram that gives you an overview of contract formation. It asks questions in the order that they would naturally arise in a **problem question**. The diagram will also help for revision.

1. The first question is: Is there an **offer** that can be converted into an agreement by an acceptance? Or, is there something less than an offer, called a mere 'invitation to treat', which *can't* be turned into a agreement by acceptance?

This distinction between 'an offer' and an 'invitation to treat' depends on 3 things:

- 1st, the **objective test of intention**: the question is- would the *reasonable person* interpret the words or conduct in question as manifesting an intention to be bound on the addressee's acceptance?
- 2nd, are **situation specific rules**; e.g. that displays and advertisements are generally only 'invitations to treat'. But note that these rules are all subject to exceptions.
- 3rd, are **policy considerations**, such as 'consumer protection' and the 'avoidance of unfair results' that clearly influence how courts interpret the parties' conduct. We can see them in operation in the exceptional cases like *Chapelton v Barry*, *Carlill v Carbolic Smokeball* - and the rule that you cannot accept by silence.

2. **If** there's no offer, but just an 'invitation to treat', there's nothing to accept and so no agreement. You have to look for some *other* words or conduct that can qualify as an offer.
3. **There's** an offer if there's 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.
4. 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 is *accepted*, and
 - On how the acceptance is *communicated*.

5. A **unilateral** offer stipulates a promise for an *act*.
- It's accepted by *completed* performance of the stipulated act, even if the offeror doesn't yet know of it.
 - So *communication* of the fact of completion is *not* required for the contract to be made - though, of course, the offeree must let the offeror know when she 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. But, again, there are exceptions.

6. In contrast, a **bilateral** offer stipulates a promise for a reciprocal *promise* and it becomes a binding contract as soon as the reciprocal promise (or acceptance) is given, even before anyone has started performing, let alone *completed* performance of the contract.

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

- 1st, correspond with the offer- in theory, 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 (which then can't be accepted). This is where the 'battle of forms' issue is located.
 - 2nd, a valid acceptance must be *in response to the offer* (so that matching cross offers don't amount to a contract)
 - 3rd, a valid acceptance must be made in an appropriate way (e.g. as stipulated in the offer or as is reasonable)
7. If any of these conditions are not met, there is no valid acceptance and so no contract.
8. 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 the door is closed; neither party can thereafter *change* the terms or get out of the contract.

9. 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.
 - If the postal acceptance rule *does apply*, then acceptance takes effect *when the letter is sent*. After that, the offeror can't validly revoke her offer although she has yet to receive the acceptance; - and the offeree can't validly withdraw his acceptance even if he uses a quicker method, like phoning the offeror before his own letter arrives.

10. The 'postal acceptance rule' doesn't apply just because post is used- it may **not** apply:

- if it's unreasonable in the circumstances, or
- if it prejudices the offeror or
- if the offeror says she 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 the letter is actually *received* by the offeror. Note that the offeror is expected to behave reasonably, she should not just throw the letter away or give it to the dog; she should act reasonably- open and read it.

11. In contrast to post, if the offeree uses 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, and it's easy to remedy any problems.

12. 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. This is the common

scenario for exam PQs. For example, with email, there are 5 possible points of acceptance:

- 1st- When it's sent by analogy with the postal rule- but given the controversy over the postal rule, it should not be followed.
- 2nd, when it arrives on the offeror's server- this is certain but it may not be accessible to the offeror due to the spam filter or firewall setting. So the
- 3rd option =, when the email is accessible- having got through the spam filter or firewall- the problem is that the email may be accessible but not yet accessed, therefore the
- 4th option is that an email arrives when it's reasonably accessible by the offeror.

whether an email is reasonably accessible depends on the time it arrives in the inbox (eg if it's 3am, it may not be reasonable to expect the offeror to access at that time); it may also depend on the particular email account the message was sent to (was it one that the offeror is *known* to use and checks?); and would it depend on any automatic response email? (saying for eg that the recipient wont be checking her emails for 3 days).

- 5th, the email should not be construed as having been communicated only when it is read by the offeror- that would allow the offeror to behave unreasonably by not opening or reading the email.

13. Once we've fixed the time of acceptance, the question arises whether the **offer** was still 'live' at that time.

14. The offer can be **terminated** by

- The offeror's revocation, or
- The offeree's 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.

If the offer is validly terminated, then the purported acceptance is invalid and there is no contract.

15. If the offer remains 'alive' at the time of acceptance, then you have a valid agreement. But a fully enforceable contract must also satisfy 3 other requirements:
16. First, it must be sufficiently **certain**; in practice, the question is whether any uncertainty or incompleteness is **curable** by the courts. The courts can cure by reference to:
- i. The parties' *previous dealing*, or
 - ii. *The 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.
17. The Second additional requirement is called the '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.
 - What the requirement *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,
 - Courts *will* enforce commercial agreement unless the parties very clearly indicate otherwise.
 - And courts will generally *not* enforce agreements made in a family or social context, - unless:
 - It's really commercial in nature and the parties' relationship is merely incidental; or
 - The agreement is made to *end* the parties' relationship as when a couple is splitting up.
18. Thirdly, the agreement must satisfy one of the 3 requirements of *enforceability*.
- The most common one is the requirement called '**consideration**': an agreement will only be enforceable if each party has given the other something that the other values as part of a bargain.
 - But, exceptionally, an agreement may be enforceable because it has satisfied formality requirements, as where it is made in the form of a **deed**.
 - Lastly, the court may enforce a promise where the promisee has reasonably relied on the promise to her prejudice. This is the doctrine of **promissory estoppel**.