

CHAPTER TWO

REAL AGREEMENT (OFFER AND ACCEPTANCE)

2.1 Introduction

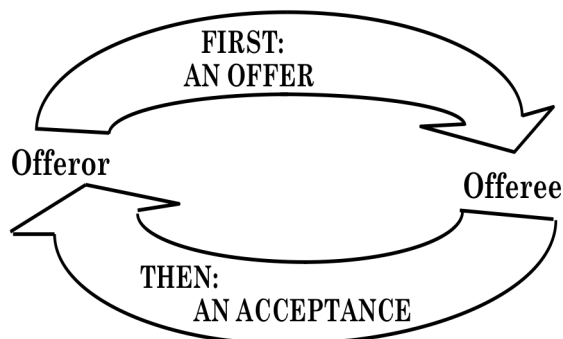
Perhaps the most basic formation requirement for an enforceable contract to exist is real agreement. Real agreement means that the parties to a contract actually agree to make a legally binding agreement together. This may sound simple, but it can be fairly complex. So there are many rules that govern whether real agreement exists. This Chapter explains many of the more important of these rules. The rules were already discussed much more briefly in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4a.

In many free market jurisdictions, real agreement requires a valid offer and a proper acceptance. So in these jurisdictions, in order to meet the important requirement of real agreement, there must be:

- (1) a valid offer to make a contract by one party, and
- (2) a proper acceptance of that offer by another party.

The party who makes the offer is called the offeror. The party to whom the offer is made, and who can make a proper acceptance, is called the offeree. The following chart shows in a very basic way how offer and acceptance can create real agreement.

Illustration: How Offer and Acceptance Create Real Agreement



Of course, in order for a contract to exist, the agreement of the parties must also meet the other formation requirements explained in this book. These are requirements as to consideration (in common law jurisdictions), capacity, legality, formality, and other formation problems. These important requirements are explained in more detail in Chapters 3-7.

Offers and acceptances may take many different forms. As explained in Chapter 1, parties may make their contracts in a variety of ways, such as expressly or impliedly, orally or in writing. Valid offers and proper acceptances can also be made in all these different ways, and in combinations of these different ways. So when there is any dispute about whether real agreement exists, courts are careful to look at all the circumstances surrounding the dispute to see if there is a valid offer and proper acceptance, in some form.

It is also important to realize that it is not always possible to identify a distinct "offer" and "acceptance." This is especially true when the parties make an implied contract. It can be also be the case where the parties make an express contract through a long exchange of communications back and forth. In these kinds of cases, it may be difficult or impossible to say: "this was the offer, and that was the acceptance." That is because the various elements of offer and acceptance might be found in several different expressions of the parties, such as in a number of different documents. But what matters is that, whatever the form of the agreements, a court can find all the elements needed for a valid offer and proper acceptance to exist.

This Chapter explains how many jurisdictions analyze whether real agreement exists. As noted above, this requires a valid offer. First, Section 2.2 explains that an offer is a proposal to make a contract. Then, the Chapter explains that a valid offer must be: (1) seriously intended; (2) definite and reasonably clear; and (3) communicated to the offeree. However, preliminary negotiations and invitations to negotiate are generally not valid offers. Valid offers are discussed in Section 2.3. Offers terminate--and are no longer valid--in several ways. First, as Section 2.4 explains, the offeror may end the offer by revoking it, although that may not be possible in situations involving option contracts, irrevocable or firm offers for the sale of goods, part performance of certain unilateral contract offers, or promissory estoppel. Second, as Section 2.5 explains, the offeree may end the offer by rejecting it or making a counter-offer. Third, as Section 2.6 explains, other specific events or circumstances may end the offer. These other events include lapse; the occurrence of a condition specified in the offer; the death or adjudicated incompetence of a party or person essential to the proposed contract; the destruction of the specific subject matter of the contract; and a change in the law making the offer illegal.

Real agreement also requires a proper acceptance. As Section 2.7 explains, an acceptance is an offeree's indication of agreement with an offer. In general, only the intended offeree can make a proper acceptance,

as discussed in Section 2.8. How offerees can properly accept an offer depends on whether the offer is for a unilateral or bilateral contract. In common law jurisdictions, offerees can properly accept unilateral contract offers by fully performing the act requested in the offer. Section 2.9 explains this. Offerees can properly accept bilateral contract offers by communicating in a proper manner the promise requested. This important rule, as discussed in Section 2.10, generally requires that the acceptance: be communicated to the offeror; be unequivocal and unconditional; be identical to the terms of the offer (a "mirror image"); and occur in a proper manner, including meeting any special requirements of the offeror. Acceptances may be effective either on dispatch or on receipt by the offeror, depending on the situation. If it is not clear whether an offer is one for a unilateral or bilateral contract--whether it is requesting an act or a return promise--most jurisdictions appear to say that the offeree can accept either by performing the act or making the return promise. This is explained in Section 2.11.

Finally, Section 2.12 discusses the approaches of the Cambodian legal tradition and the civil law tradition to real agreement. Section 2.13 contains Questions for Review.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4a contains a more concise discussion of real agreement (offer and acceptance).

2.2 An Offer Is a Proposal to Make a Contract

As noted in Section 2.1 above, the first element required for real agreement to exist is a valid offer.

*** **DEFINITION:** An **offer** is a proposal to make a contract.

As also noted above, the party who makes the offer is called the offeror, and the party to whom the offer is made is called the offeree.

*** **DEFINITION:** An **offeror** is a party who makes an offer.

*** **DEFINITION:** An **offeree** is a party to whom an offer is made.

A valid offer creates the potential for a contract. It is an invitation from the offeror to the offeree to create a contract according to the terms of the offer. The offeror is basically saying to the offeree: "Here is a proposal for a contract between you and me. If you agree to this proposal, then we will have a contract as stated in this proposal."

For example, suppose Rith says to Mony: "I will sell you this mango for 2,000 riels." Rith has made an offer to Mony. Rith is the offeror, and Mony is the offeree.

Offers may take many different forms. Some of the situations in which offers can occur are:

- (1) in face-to-face negotiations between the parties;
- (2) in a document such as a letter or note;
- (3) in a phone call;
- (4) through special forms prepared for particular transactions; and
- (5) through non-verbal conduct of one of the parties.

CASE STUDY 25

FACTS One day at the market, Chinda sees his old friend Bunny. Chinda says to Bunny: "I will give you this watch if you pay me \$25."

QUESTION OF LAW Has Chinda made an offer to Bunny?

DECISION Yes. Chinda has made an offer to Bunny.

Offers exist where one party makes a proposal to make a contract with another party. In this case, Chinda promised to give Bunny a watch if Bunny paid \$25 for it. This is an offer to make a contract on those terms. Chinda is the offeror, and Bunny is the offeree. If Bunny properly accepts the offer, then Chinda and Bunny will have a contract.

Only valid offers can result in contracts. Sections 2.3-2.6 of this Chapter discuss how many jurisdictions analyze whether an offer is valid, and whether it has terminated.

Section 2.3 explains that a valid offer must be:

- (1) seriously intended (Section 2.3a);
- (2) definite and reasonably clear (Section 2.3b); and
- (3) communicated to the offeree (Section 2.3c).

Preliminary negotiations and invitations to negotiate are generally not valid offers, as Section 2.3d explains.

The idea of these three important requirements is to measure whether the offeror really wanted to make a legally binding agreement--a contract. For example, in the Case Study 25 situation, suppose Chinda had said to Bunny, "I may be able to give you this watch for \$25," or "I can give you some watches for some money." Or suppose that Chinda had never communicated his offer to Bunny. In these cases, it seems unlikely that Chinda really wanted to make a binding agreement. And in these situations, at least one of the three requirements above would not be met. So there would be no valid offer.

Sections 2.4-2.6 explain how offers terminate--and are no longer valid. An offer that has been properly accepted cannot be terminated, since a contract has already been formed. But before a proper acceptance, an offer can generally terminate where:

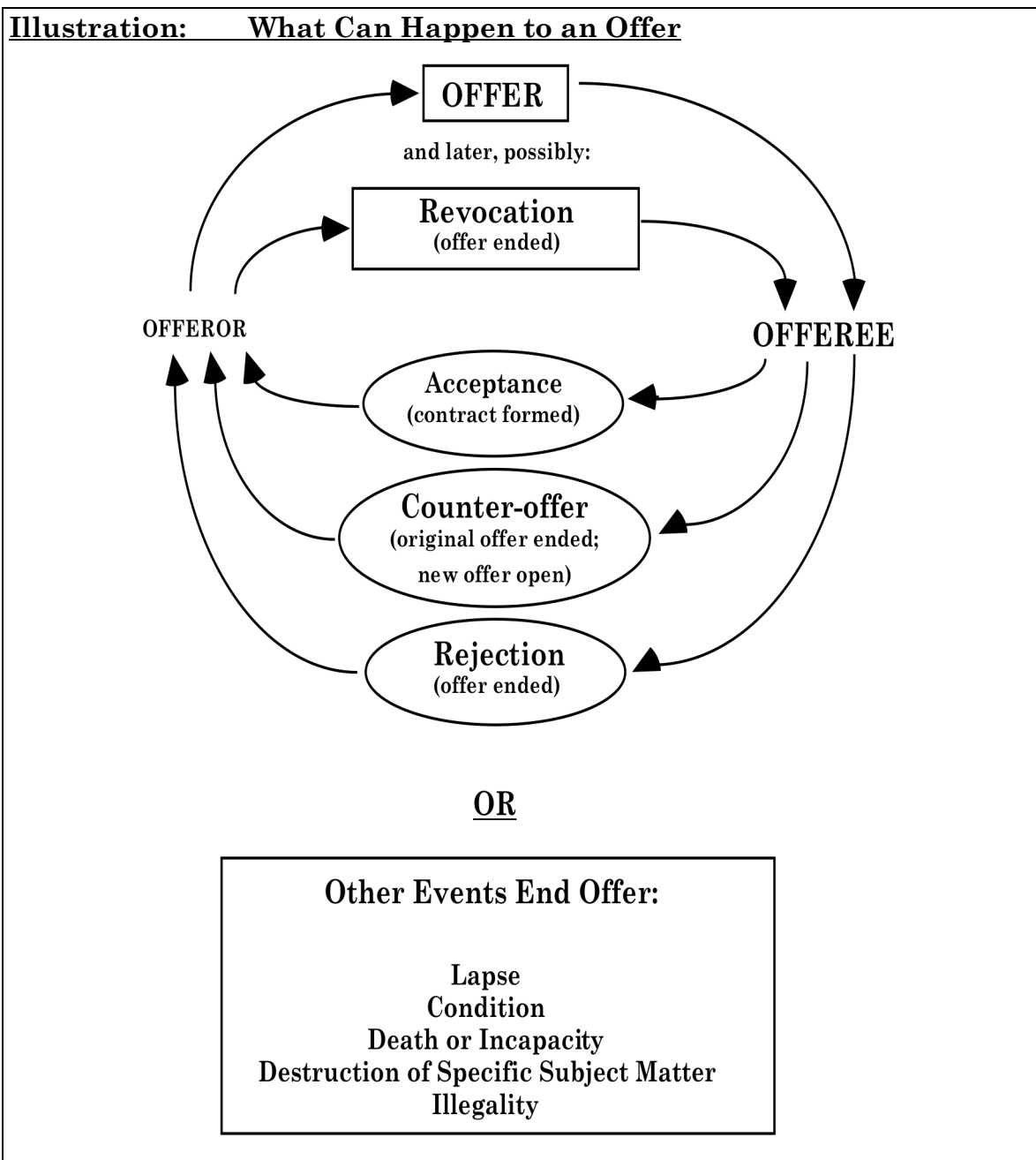
- (1) the offeror terminates the offer by revoking it (Section 2.4a), which may not be possible in situations involving:
 - (a) option contracts (Section 2.4b),
 - (b) special statutes governing certain types of offers, such as those for the sale of goods or bids submitted to public agencies (Section 2.4c),
 - (c) part performance in response to certain unilateral contract offers (Section 2.4d), or
 - (d) promissory estoppel (Section 2.4e); OR
- (2) the offeree terminates the offer by making:
 - (a) a rejection (Section 2.5a); or
 - (b) a counter-offer (Section 2.5b); OR
- (3) the offer ends through other specific events or circumstances, such as:
 - (a) lapse (Section 2.6a);
 - (b) the occurrence of a condition specified in the offer itself (Section 2.6b);
 - (c) the death or adjudicated incompetence of a party or person essential to the proposed contract (Section 2.6c);
 - (d) the destruction of the specific subject matter of the proposed contract (Section 2.6d); or
 - (e) a change in the law making the offer illegal (Section 2.6e).

The basic idea behind these rules about the termination of an offer is that offers should not be open forever, or for an indefinite time. Offers provide the offeree with the ability to form a contract. This gives the offeree a lot of power. The law wants to limit this power, in order to protect the offeror, and to avoid the formation of a contract that would violate legal policy.

For example, in the Case Study 25 situation, suppose Chinda made his offer and Bunny did not respond right away. Many jurisdictions believe that, as long as Bunny has not made a proper acceptance, Chinda should generally have the right to revoke the offer, and that a rejection or counter-offer from Bunny should end the offer. In addition, many jurisdictions say that if too much time passes without any response from Bunny, or if the watch is suddenly destroyed by someone else, the offer terminates automatically.

This is because it would be unfair to Chinda and against legal policy for Bunny to have to power to accept in that kind of situation.

The following chart illustrates some of the basic possibilities where a party makes an offer.



***** WHY IS THIS IMPORTANT?** Why are the rules about the validity and termination of offers important?

The rules about offers which are discussed in this Chapter are important for several reasons. One reason is that a valid offer is essential

for the creation of a contract. A contract cannot exist without an offer. The offer is the tool the offeror uses to tell the offeree--and the court--that she really wants to make a legally binding agreement, and what she would like the terms of that agreement to be. So it is crucial that parties and courts be able to decide whether a valid offer exists. The rules about offer discussed in this Chapter help parties and courts to determine that.

Another reason the rules about offers are important is that, as a practical matter, offers generally contain all the important terms that the parties will indicate about the proposed contract. Often, the response of the offeree to an offer is basically a "yes" or a "no." So offers often contain the whole contract except a "yes" from the offeree. This makes it very important to analyze offers to see not only if they meet the requirements discussed in this Chapter, but all the contract formation requirements discussed in this book.

2.3 An Offer Must Be Valid in Order to Form a Contract

As noted above, only valid offers can result in contracts. This Section explains how courts in many jurisdictions decide whether an offer is valid. Specifically, a valid offer must be:

- (1) seriously intended (Section 2.3a);
- (2) definite and reasonably clear (Section 2.3b); and
- (3) communicated to the offeree (Section 2.3c).

Preliminary negotiations and invitations to negotiate are generally not valid offers, as Section 2.3d explains.

2.3a First Requirement: The Offer Must Be Seriously Intended

The first requirement for an offer to be valid is that it be seriously intended. This means that the offer must show that the offeror seriously intends to create a binding legal obligation--a contract. If the offer does not show this, then it is not valid, and it cannot result in a contract.

In many jurisdictions, whether an offer is seriously intended is generally judged by an objective, reasonable person standard. As explained in Chapter 1 ("Basic Aspects of Contract Law"), an objective standard is one that asks what reasonable persons in the same situation as the parties would think or do. With regard to whether offers are seriously intended, this standard means that the court asks whether a reasonable offeree would think that the offer was seriously intended to create legal obligations, based on the offer itself and the surrounding circumstances. If the answer is "no," then the offer is not valid. It does not matter whether the particular offeror really did--subjectively--want to make a contract.

CASE STUDY 26

FACTS One day on the street, Rasy said to his friend Soriya: "Maybe we should trade our cars. If we do, you will probably have to give me some extra money." Soriya immediately replied: "I accept."

Rasy said there was no contract. But Soriya said there was a contract, and asked a court to order Rasy to obey it.

QUESTION OF LAW Did Rasy make a valid offer to Soriya in this case?

DECISION No. Rasy did not make a valid offer here, because Rasy's words do not show that he seriously intended to make one.

In order to be valid, an offer must be seriously intended to create legal obligations, based on an objective, "reasonable person" standard. In this case, Rasy told Soriya that "maybe" they should trade cars, and that if they did, Soriya would "probably" have to give Rasy some extra money. This does not show that Rasy seriously intended to make a contract. Obviously, Rasy was thinking about trading cars with Soriya. But his use of words like "maybe" and "probably" shows that he had not actually decided to do that yet. In fact, a reasonable person would probably say that Rasy was just starting to negotiate with Soriya. So in this case, there is no valid offer, and no contract.

In Case Study 26, Rasy's words were not seriously intended to create legal obligations. But suppose Rasy had written to Soriya: "I offer to trade you my car for your car and \$500." That would probably be a valid offer, because it shows Rasy's serious intent to make a contract. So if Soriya properly accepted, it would form a contract.

Sometimes persons make offers in an emotional state which shows they do not have the serious intent to make a contract, even though the actual words or conduct showing the offer may seem to suggest that they do. For instance, parties may make an offer jokingly, or in great fear or anger. Many jurisdictions say an offer is not seriously intended where:

- (1) the emotional state of the offeror suggests that the offer was not seriously intended, and
- (2) the offeree had a reason to know that.

Again, this analysis is based on what reasonable person in the same circumstances would know. The reason for this rule is that it would not be fair to an offeror to hold her to an offer made in these situations. Of course, commercial transactions rarely occur in these kinds of circumstances. But consider the following Case Study.

CASE STUDY 27

FACTS Hak and Machara were on a boat on the Tonle Sap. The boat capsized, and Hak fell out. Unfortunately, Hak could not swim. So he shouted to Machara in a very agitated voice, "I can't swim! I will give you my new house if you save me!" Machara risked his own life to save Hak.

Later, Hak thanked Machara and offered him a substantial sum of money. But Machara said he wanted the house, and asked a court for help.

QUESTION OF LAW Was Hak's offer to Machara seriously intended?

DECISION No. In this situation, there is no valid offer, because Hak's emotional state suggested that he did not seriously intend his offer to create a contract, and Machara had a reason to know that.

An offer is not valid where the offeror's emotional state suggested that she did not seriously intend her offer to create a contract, and the offeree had a reason to know that. In this case, Hak shouted an agitated offer to Machara as he was about to drown, offering to give Machara his house if Machara saved him. In this extreme emotional state of fear, Hak probably did not seriously intend to bind himself to give up his house. And Machara certainly had a reason to know that, based on the circumstances of the parties. So there is no valid offer, and no contract.

It might be argued that parties like Hak in Case Study 27 do have a serious intent to make a contract. Hak was obviously serious about wanting Machara to save him! However, the above rule may be based on the idea that what parties like Hak are really serious about is being saved--not making an enforceable agreement. Of course, in a situation like this, Machara might be able to recover under the doctrine of quasi-contract, as explained in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5.

On the other hand, sometimes an offeror makes an offer that she does not seriously intend--in her mind--but the offeree has no reason to know that. That is, a reasonable person would think that the offer was seriously intended. In that situation, the offer actually is "seriously intended" for the purpose of creating a valid offer! And so a contract can result. What the offeror really thought--in her own mind--does not matter.

CASE STUDY 28

FACTS Yuon offered to sell Kileng a painting for \$10, in a very serious voice. The painting was very unusual, and most people might say it was ugly and not worth much. In fact, the painting was worth \$250, and Yuon was just trying to find out if Kileng knew the value of the painting, as a joke. Kileng did not know much about painting. But he did know about contracts, and he promptly accepted Yuon's offer.

QUESTION OF LAW Did Yuon make a valid offer in this case?

DECISION Yes. Yuon's offer will be considered to be seriously intended, and therefore valid, because Kileng had no reason to know Yuon was not serious.

Where an offer is not seriously intended but the offeror has no reason to know that, the offer will be considered seriously intended under the law. In this case, Yuon offered to sell Kileng a painting for much less than its real value as a kind of joke, just to see if Kileng knew about painting. Kileng accepted the offer. In this case, there was a valid offer. This is because Kileng had no reason to know--under an objective standard--that the painting was actually worth much more. And Kileng's acceptance means the requirement of real agreement is met. So this is probably a valid contract.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Sections 1.3d and 1.4g contain further discussion of how the law uses objective, reasonable person standards, and Section 1.5 discusses quasi-contract.

2.3b Second Requirement: The Offer Must Be Definite and Reasonably Clear

The second important requirement for a valid offer is that the offer must be definite and reasonably clear. The purpose of this requirement is make sure the parties and the court understand what is being agreed in the proposed contract.

As explained above, the offer generally contains the terms of the proposed contract, and it gives the offeree the power to create a contract by accepting it. But if the offer is not definite and clear enough in its terms, then the contract it proposes will not be definite and clear enough for the parties to follow and the court to enforce! An offer like that may be only an invitation to negotiate. So in that kind of situation, the law does not want the offeree to have the power to accept the offer and form a contract.

In order for an offer to be definite and reasonably clear, many jurisdictions say that:

- (1) the offer must include the truly essential terms of the proposed contract;
- (2) all the material (important) terms in the offer must be reasonably clear;
- AND (3) the contract must be definite and reasonably clear at the time it is accepted--not at some later time.

The "truly essential" terms are those the parties themselves must decide, or there can be no contract. Courts cannot supply these for the parties. "Material" terms are those that are important, but that in some cases a court may be able to supply, if the parties have not included them. This will be further explained below.

There are certain special situations where offers do not have to be quite so definite and clear in order to be valid. Two of these situations are in certain cases where there is part performance in response to an offer, and in some jurisdictions with regard to sale of goods contracts. These situations are also discussed below.

(1) The Offer Must Include the Truly Essential Terms

A basic element of a definite and reasonably clear is that the offer include the truly essential terms of the proposed contract. These terms are more than just important--they are essential if the parties are to be able to follow the agreement, and for the court to be able to enforce it. Courts cannot supply (or imply) these terms based on the surrounding circumstances, as may be possible with some other material terms, such as price terms in sale of goods contracts. The possibility of implying terms will be discussed in more detail below and in Chapter 8 ("Interpretation of Contracts").

Which terms are truly essential depends on what type of offer the offeror makes. Different terms will be essential in different types of contracts. For example, in many jurisdictions, sale of goods contracts must include at least the identity and quantity terms. Land sale contracts should generally include at least the price and some description of the land being sold. And it would seem that employment contracts should include at least a starting date for the work and some way to calculate the rate of compensation. In all of these cases, it would not be reasonable for a court to try to supply these particular terms if the parties have not.

CASE STUDY 29

FACTS Monivong Motors sent a purchase order to Samaki Steel Corp. ordering "grade B steel ingot at \$100 per ton." Monivong had never bought steel from Samaki before. After Samaki received the purchase order, it sent a note to Monivong that said: "We accept your offer to purchase grade B steel at \$100 per ton."

A few weeks later, before anything more happened between the parties, the market price for this type of steel dropped to \$92 per ton. After this price drop, Samaki tried to enforce the agreement it had with Monivong. But Monivong said there was no contract.

QUESTION OF LAW Did Monivong and Samaki have a contract for the purchase of steel in this case?

DECISION No. There is no contract here because the offer Monivong made failed to include an essential term--the quantity of the steel--so it failed to meet the requirement that it be definite and reasonably clear.

For an offer to be valid, it must include at least the essential terms of the proposed contract, in order to be definite and reasonably clear. In this case, Monivong Motors offered to buy steel from Samaki Steel at \$100 per ton. Samaki tried to accept this offer. But unfortunately, the offer failed to state the quantity of steel that Monivong wanted! In this case, the quantity is an essential term, as it is in other sale of goods contracts. There is no way a court could fairly and reasonably imply the quantity of steel Monivong wanted from the facts here. So the offer is not definite and reasonably clear. There is no valid offer, and no contract in this case.

(2) The Material (Important) Terms in the Offer Must Be Reasonably Clear

The second key element of the requirement that a valid offer be definite and reasonably clear is that the material (important) terms in the offer be reasonably clear.

***** DEFINITION:** A **material term** in a contract is basically one that is important to a party's decision to make or not make a contract.

Of course, what terms are "material" will be different in every contract, since they will depend to some extent on the particular situation. But in general, terms that are often material include terms regarding price, identity, quantity, and place and time of performance. How clear is "reasonably clear" will also depend on the circumstances of each particular contract. That will be further discussed below.

First, it is important to understand how material terms compare to the "truly essential" terms described above. Courts cannot supply essential terms if the parties omitted them. All truly essential terms are material. But not all material terms are essential. Sometimes, courts can imply material terms the parties omitted, if that is reasonable based on all the circumstances. For example, this is often the case with a number of material terms in sale of goods contracts, such as price and delivery terms.

However, if contract parties try to include a material term, but fail to do so clearly enough that a court can interpret the term, the court cannot supply a reasonable term. This might violate the will of the parties, who tried to specify their own term, not a reasonable one. In these cases, the offer is generally not valid, and any agreement that results probably cannot be enforced. This is discussed further in Chapter 8 ("Interpretation of Contracts"), Sections 8.3j and 8.5a.

Material terms must be reasonably clear in order for an offer to be valid. This means they need not be completely or absolutely clear. They need only be clear enough that the parties and a court can understand the rights and duties are under the contract--what the parties have agreed. Of course, many contracts are very detailed and precise, such as important business agreements, and agreements for the sale of land. And it is a good idea to be as clear as is practical about all contracts, in order to avoid disputes and enforcement problems.

But it is not practical to ask parties to always be completely clear about every important term of every contract. This could be a real burden on the parties, and on important economic activity. Parties would have to stop many times a day and spend a great deal of time thinking of every possible area of confusion before making a moto taxi contract, or a contract to buy bananas. To require complete clarity could also mean that there would be very few valid offers, since it seems likely that some tiny lack of clarity could be found in almost any offer. So courts require only that material terms be reasonably clear.

What is "reasonably clear" depends on the particular circumstances in every contract. Consider the following two Case Studies.

***** CASE STUDY 30**

FACTS Mr. Phalkun offers to buy one ton of mangoes from Mr. Eng. The offer says that Mr. Phalkun will buy the goods at Mr. Eng's cost, plus "a nice profit" for Mr. Eng. Mr. Eng accepts the offer.

QUESTION OF LAW Is there a contract here between Mr. Eng and Mr. Phalkun?

DECISION No. The offer Mr. Phalkun made was not valid, because it was not clear enough about a material term: the price of the mangoes.

In order to be clear enough to be valid, offers must be reasonably clear about the material terms they include. In this case, Mr. Phalkun offered to buy mangoes from Mr. Eng for Mr. Eng's cost plus "a nice profit." The price term in this offer is not reasonably clear, because there is no fair and reasonable way to determine what a "nice profit" is. If the parties had simply stated no price term at all, the court might have been able to imply a reasonable one. But the parties tried to set their own term--and failed. The court cannot guess what the parties meant by a "nice profit." So this offer is not clear enough to be valid, and it did not form a contract.

***** CASE STUDY 31**

FACTS Mr. Sombok, the owner of a huge chicken production company, offered to sell 500 "chickens" each month at a certain price for the next year to

Mr. Cheep, the owner of a big new restaurant. Although Mr. Cheep had never done business with Mr. Sombok before, Mr. Cheep accepted the offer. The parties signed a contract for the chickens.

However, when the first truckload of 125 chickens arrived, Mr. Cheep said the chickens were not what he expected. Although the contract did not describe the specific kind of chicken to be provided, Mr. Cheep said he wanted only young chickens--and Mr. Sombok had delivered old chickens instead! So Mr. Cheep refused to accept and pay for the chickens. Mr. Sombok, however, insisted that he had delivered the chickens in compliance with the contract. The parties argued back and forth for several weeks. During that time, Mr. Cheep did not serve any chicken in his restaurant. As a result, he lost a lot of money, and possibly some customers also.

Now Mr. Sombok and Mr. Cheep ask the court for help. On one side, Mr. Sombok asks the court to order Mr. Cheep to pay him the contract price of the chickens, plus interest. On the other side, Mr. Cheep asks the court to order Mr. Sombok to pay compensation for the damage caused when Mr. Sombok delivered the wrong kind of chicken. After hearing the claims of the parties, the judge asks her research assistant to help her find out if the contract is clear enough to be enforced at all, and if so, what it means.

QUESTION OF LAW Was Mr. Sombok's offer definite and reasonably clear enough to be valid, and result in a contract?

DECISION Yes. The offer and resulting chicken sale contract between Mr. Sombok and Mr. Cheep were definite and clear enough, because the material term "chicken" was reasonably clear.

In order for an offer to be valid, and to result in a contract, the offer must be definite and reasonably clear. Part of this analysis is that the offer must be reasonably clear--but not absolutely clear--about the material terms it includes. What is "reasonably clear" depends on the particular circumstances of every case.

In this case, Mr. Sombok offered to sell a certain quantity of "chickens" to Mr. Cheep at a certain price. Mr. Cheep accepted the offer. "Chicken" was the subject of the offer and contract, and obviously a material term: the identity term. But unfortunately, the offer did not specify exactly what kind of chicken. It only said "chicken." Now the parties claim they had different ideas about what the material term "chicken" meant in their contract. So the basic issue in this case is: what is "chicken?" Specifically, the court must decide if the word "chicken" was definite and reasonably clear enough in Mr. Sombok's offer. If it was clear enough, then there was a contract between the two parties. In that situation, the court would also have to decide if Mr. Sombok delivered "chickens" according to the contract. However, if the court decides that the agreement's reference to "chicken" was not reasonably clear, then the court will be unable to enforce the agreement between the parties.

When parties disagree about the meaning of a term in their contract, courts apply a number of rules of interpretation to see if they can find the meaning. Many jurisdictions first ask whether they can find one subjective meaning that the parties shared--a meaning that the particular parties in the case actually had in their minds. If courts can find such a meaning, they enforce that meaning. If they cannot find such a meaning, then the courts apply a number of objective rules of interpretation, to see if they can find a meaning based on what reasonable parties in the same situation would likely have meant. There are many rules to help courts do this, and they will be discussed in detail in Chapter 8 ("Interpretation of Contracts").

In this case, it appears that the parties did not have the same subjective meaning about what chickens meant. Mr. Sombok's offer did not define the word "chicken." Mr. Sombok says he thought it meant any chickens--old or young. Mr. Cheep says he thought it meant young chickens, not old chickens. Assuming neither party knew or had a reason to know of the other party's subjective understanding of "chicken," the court would probably turn to objective rules of interpretation. These rules include an analysis of the ordinary meaning of chicken in situations like these. To find this, a court might examine the ordinary meaning, including the definition of "chicken" in dictionaries and technical manuals. A court might also examine the circumstances surrounding the contract, such as any prior transactions between the parties (the "course of dealing"), and any relevant trade practices ("trade usages"). Many other rules of interpretation might help the court also.

Suppose the court finds that the word "chicken" is clearly defined in the dictionary, and also in relevant Ministry of Agriculture regulations. Neither definition says anything about "young" chickens or "old" chickens. With respect to the circumstances surrounding this transaction, this was the first time Mr. Sombok and Mr. Cheep had done business together. So there was no course of dealing between them that could show that they probably shared a particular idea about the word "chicken." However, the court finds the ordinary trade practice in the restaurant business is that if someone wants a special type of chicken--such as young, or large--that person must specify the exact type clearly in the contract. Mr. Cheep did not do that.

So in this case, based on objective rules of interpretation, the word "chicken" does not seem to mean "young chicken." It would appear to mean any chicken, or at least any chicken that was fit to eat. In this situation, the court would probably find that the material term "chicken" was reasonably clear enough in Mr. Sombok's offer and in the contract. And Mr. Sombok complied with the contract by delivering chickens, even though they were not as young as Mr. Cheep seemed to want. If Mr. Cheep had really wanted a special kind of chicken, such as young chickens, he should have said so in the contract. In this situation, Mr. Cheep has breached the contract by failing to pay for the chickens. The court will award Mr. Sombok a remedy for the harm this breach caused.

***** ADDITIONAL REFERENCE:** Chapter 8 ("Interpretation of Contracts") contains further discussion of contract interpretation, including how courts can interpret contracts based the ordinary meaning (Section 8.3f) and surrounding circumstances (Section 8.3h), how courts can supply certain terms if the parties did not (Section 8.3j), and how agreements probably cannot be enforced if a material term cannot be interpreted (Section 8.5a).

(3) The Offer Must Be Definite and Reasonably Clear at the Time It Is Accepted

One final aspect of the rule that offers must be definite and reasonably clear is that offers must meet this requirement at the time they are accepted. That means they cannot be made sufficiently definite and clear at some time after a contract is formed. At the time of acceptance, the offer must be clear enough--by containing the essential terms, and being reasonably clear about the material terms it includes--or else no contract can be formed.

The phrase "an agreement to agree is no agreement" summarizes this general principle of contract law. Parties do not generally create a contract when they just agree that at some future time they will make a contract, or that they will make a contract based on terms that they will have to agree about later. In certain situations courts may imply a duty of good faith and fair dealing at the contract negotiation stage. That may limit to some extent a party's right to not agree later, as will be further discussed in Chapter 8 ("Interpretation of Contracts"), Section 8.3i. But the general rule remains.

***** ADDITIONAL REFERENCE:** Chapter 8 ("Interpretation of Contracts"), Section 8.3j explains how many jurisdictions say the duty of good faith and fair dealing is part of every contract.

CASE STUDY 32

FACTS Ratana wrote to Navy: "I offer to lease your building at 13333 Monivong Boulevard for one year at \$2,000 per month, with further construction, alterations and floor layout to be mutually agreed upon later." Navy accepted the offer. But later, Ratana changed her mind and refused to lease the building.

QUESTION OF LAW Was Ratana's offer definite and reasonably clear enough to be valid and form a contract with Navy?

DECISION No. Ratana's offer was not definite and reasonably clear enough to be valid, because it left material terms about further construction and alterations to be "agreed upon later."

Offers must be definite and reasonably clear enough at the time they are accepted--not at some later time--or else they are not valid, and no contract is formed. In this case, Ratana's offer to rent Navy's building stated

the essential terms. But it said that certain material terms about further construction and alterations to the building would be "mutually agreed upon later." This cannot be a valid offer, because it was not definite and reasonably clear when Navy tried to accept it. In this kind of situation, the court cannot know what the parties might have agreed upon later. So no contract was formed here.

However, it is possible for an offer to be definite and reasonably clear where it offers the offeree a choice about which terms to accept. For example, suppose Ratana's offer in Case Study 32 had not discussed construction or alterations. However, suppose the offer had given Navy the choice of renting Ratana the building at 13333 Monivong Boulevard for \$2,000 per month, or renting him the building at 22222 Norodom Boulevard for \$3,000 per month. That could be a valid offer. It is not certain at the time of the offer which of the two options Navy will select. But the parties and a court could determine how any resulting contract should be performed. Both potential options are clear. Whatever Navy chooses to do, the parties will know how to proceed. That was not true of the situation in Case Study 32.

***** WHY IS THIS IMPORTANT?** What are the practical effects of the rule that requires offers to be definite and reasonably clear in order to be valid?

The most basic reasons for this rule are that parties must know what the contract requires in order to perform it, and courts must know what it requires in order to enforce it. Parties cannot be expected to follow a contract that is not clear. And such a contract would be likely to lead to many disputes. If such disputes came to court, the judge would also have no way to tell how to enforce the contract. Courts cannot and do not wish to create contracts for the parties. In a free market economy, it is generally the responsibility of the parties to create their own contracts, within certain limits. Otherwise, there could be a great deal of uncertainty and economic inefficiency.

So the law requires that, in order for offers to be valid, they must at least include the essential terms, and be reasonably clear about all the material terms they include, at the time they are accepted. If these requirements are not met, courts will not enforce any resulting agreement.

(4) Two Special Situations Where the Offer May Not Need to Be Quite So Definite and Clear: Part Performance and Sale of Goods Exceptions

In many jurisdictions, there are certain special situations where offers need not be quite so definite and clear as they must be in general. These rules exist in order to achieve justice or economic efficiency in special situations where the regular rules might not do that.

Two important situations where offers need not be quite so definite and clear are:

- (1) where there has been part performance in response to the offer in certain situations; and
- (2) in sale of goods contracts in some jurisdictions.

These special situations are briefly discussed below.

(1) Part Performance -- In some situations, an offeror makes an offer that is not really definite and reasonably clear under the rules discussed above, but the offeree actually performs in response to the offer in a reasonable way, perhaps with some performance, or at least a failure to object, by the offeror. In these situations, a contract may actually be formed based in part on the later conduct of the parties, even though the original offer was not really definite and reasonably clear.

What happens here could be analyzed in different ways. The offeree's performance could be considered an acceptance, or a new offer the original offeror accepts by her conduct. This could also be considered a way of interpreting the contract based on the "course of performance" of the parties, which is one of the important surrounding circumstances courts use to interpret contracts generally. That will be further discussed in Chapter 8 ("Interpretation of Contracts"), Section 8.3h. But the basic idea here is that the performance of the offeree or both parties appears to supply whatever definiteness and clarity are missing in the original offer.

CASE STUDY 33

FACTS Kim San says to Chhat, "I offer to employ you at \$20 a day." Chhat accepts this offer, and then performs construction work for Kim San at Kim San's house for the next six days. Kim San supervises this work and does not object to it. But he says there was no contract between him and Chhat.

QUESTION OF LAW Do Kim San and Chhat have a contract that requires Kim San to pay Chhat \$20 per day for the six days Chhat worked?

DECISION Probably. Even though Kim San's offer was probably not definite and clear enough by itself, the course of performance of the parties here probably supplied the definiteness and clarity the original offer lacked.

Offers may not need to be as definite and clear as usual where the course of performance of the offeree, and possibly the offeror, provides the definiteness and clarity the original offer lacks. In this case, Kim San offered to employ Chhat for \$20 per day. This offer was probably too indefinite and unclear to be valid under the regular rules discussed above, since it failed to indicate what the work would be, when it would start, and possibly other essential terms. However, Chhat's performance in response to the offer,

along with Kim San's supervision of the work and failure to object--the course of performance--probably supplied the definiteness and clarity lacking in the original offer. So a court would probably say that Chhat and Kim San did have a contract for these six days of work at \$20 per day, and that Kim San now has the duty to pay Chhat \$120.

(2) Sale of Goods -- Another situation in which many jurisdictions say offers need not be quite so definite and clear is with regard to sale of goods contracts. Commercial laws in some jurisdictions (such as the Uniform Commercial Code in the United States) do not require sale of goods contracts to be so definite in certain ways.

In particular, some commercial laws say that a court can sometimes imply reasonable terms--even certain material terms--in sale of goods contracts where the parties did not specify them. Such laws try to account for how parties actually do business. Parties do not always have the time or the desire to be so clear about some of their contract terms in the fast-paced commercial setting in which many sale of goods contracts occur. Rules like this are designed to promote greater economic activity.

For example, sometimes sellers and buyers of goods do not state price, delivery, or payment terms when they make their offers. They may not have time, or they may simply wish the law to imply a reasonable term. The law will often do so, as long as the offeror has included the truly essential terms, which are generally the identity and quantity of the goods. Again, this will be further discussed in Chapter 8.

CASE STUDY 34

FACTS Neam wants to buy some special tires for his new car. Unfortunately, none of the tire shops in the city have any of those particular tires left to sell him.

But Saray, who operates an import-export trading company, tells Neam that inside of one month he can find and get the tires that Neam wants. Saray then offers to find and deliver five of the special tires to Neam. After thinking about Saray's offer for two days, Neam accepts.

QUESTION OF LAW Was Saray's offer definite and clear enough to be valid and form a contract with Neam?

DECISION Yes. Even though Saray's offer seems indefinite and unclear because it did not include a price for the tires, courts in many jurisdictions will generally imply a reasonable price for sale of goods contracts.

In many jurisdictions, offers for sale of goods contracts may not need to be quite so definite and clear as other offers. This is because courts

may be able to imply certain reasonable terms even where the parties did not actually state them.

In this case, Saray offered to sell Neam some tires. But he included no price term. Even though this offer might normally be too indefinite and unclear, it is not too indefinite and unclear for a sale of goods contract like this. In this situation, the court can supply a reasonable price for the tires, which will generally be a reasonable price at the time for delivery. So when Neam accepted Saray's offer to sell him the tires, he formed a contract.

CASE STUDY 35

FACTS Reaksa, the manager of the new World Trade Office Tower, and Peou, the owner of the Fine Furniture Co., are very busy. After a fast conversation together, Reaksa offers to buy 100 "Big Boss" brand office desks and chairs from Peou's company. Peou accepts. Neither Reaksa nor Peou mentions any other terms, though they do both send signed notes confirming the terms they did discuss.

But when Peou calls Reaksa one week later to tell him that all the desks and chairs have arrived, Reaksa denies any obligation to take or pay for them! He says the agreement cannot be enforced because it had no price or delivery terms.

QUESTION OF LAW Did Reaksa make a valid offer even though he said nothing about price or delivery?

DECISION Yes. Reaksa's offer for the furniture was valid even though it did not include price or delivery terms, because courts in many jurisdictions can imply such terms.

Many jurisdictions do not require sale of goods offers to be quite so definite and clear as others. That is because they will imply reasonable terms in many situations where the parties did not state them.

In this case, Reaksa offered to buy a certain amount of furniture from Peou for a certain price, but the offer included no price or delivery terms. The offer is still valid. This is because the court can imply a reasonable price, and will probably imply that delivery should occur within a reasonable time at Peou's place of business. And the parties included the truly essential terms: the identity (Big Boss desks and chairs) and quantity (100) of the goods. So in this case, the offer was valid, and a contract was formed.

In addition, there are two special types of sale of goods contracts that some jurisdictions say need not even be so definite about the quantity term. These are output contracts and requirements contracts. An output contract occurs where a seller of goods agrees to sell all of a certain kind of goods that that seller produces in a certain period to a specific buyer.

A requirements contract is one where a buyer of goods agrees to buy all of a certain kind of goods that that buyer needs in a certain period from a specific seller. Of course, in these cases, it is possible that no goods at all will be produced by the seller or required by the buyer. So the agreements seem indefinite as to quantity.

But courts will generally enforce these contracts anyway. In a way, such contracts are reasonably definite in the sense that the parties have said exactly the quantity they mean: whatever is actually produced or required! This is more specific than omitting the quantity term, or saying "whatever I might choose to sell," or "whatever I might choose to buy." In addition, the parties to these contracts are usually businesses that have calculated their needs and abilities, based on past situations. But despite this, sometimes such parties simply cannot say exactly how much they will produce or require in a given period, because of market conditions or other factors. These special contracts allow such parties the flexibility they need. And courts will not enforce these contracts if the amount actually produced or required turns out to be "unreasonably disproportionate" to any estimate the parties made, or if there is no estimate, disproportionate to any normal comparable quantity. Chapter 3 ("Consideration"), Section 3.5d explains output and requirements contracts in more detail.

***** WHY IS THIS IMPORTANT?** Why do commercial laws in many jurisdictions say offers for sale of goods contracts can be less definite and clear than offers in other kinds of contracts?

Commercial laws have several basic goals. One is to try to protect the expectations of parties who make commercial contracts. Another key goal is to try to promote of commercial activity, including the purchase and sale of goods.

The "sale of goods exception" tries to accomplish both of these goals by recognizing that many buyers and sellers of goods make contracts every day without specifying some terms that are important. In particular, as described in Case Studies 34 and 35 above, parties in sale of goods contracts often omit information about price, payment and delivery. And they may not even be specific about quantity, as in output and requirements contracts. Obviously, these terms are important in sale of goods contracts.

But even though the parties in sale of goods contracts often omit such terms, such parties generally understand that the terms will be implied to be reasonable ones under the circumstances. For instance, parties who do not say anything about a time and place of delivery of the goods probably expect that the buyer will get the goods at the seller's place soon. So commercial laws about contracts imply such normal expectations. And courts apply those commercial laws in order to try to fulfill the normal expectations of the parties. This also encourages sales transactions, because the result is that buyers and sellers of goods can make more contracts. And courts will often enforce

those contracts even though some of the material terms are missing. In this way, commercial law tries to protect contracts and promote commercial activity.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3d contains further discussion of how the law can sometimes imply contract terms; Chapter 3 ("Consideration"), Section 3.5d explains output and requirements contracts; and Chapter 8 ("Interpretation of Contracts"), Section 8.3 discusses rules of contract interpretation, including the course of performance (Section 8.3h) and how courts can supply certain terms (Section 8.3j), and Section 8.5a discusses what courts do when a material term cannot be interpreted.

2.3c Third Requirement: The Offer Must Be Communicated to the Offeree

The third key requirement for an offer to be valid is that it is communicated to the offeree. It is unlikely that an offeror really wanted to make a contract with someone if the offeror never communicated her offer to that person! But when an offeror does communicate her offer to another person, it is strong evidence that the offeror did want to make a contract with that person. So it is a key rule of contract law that an offer is not valid--and a contract cannot be formed--until the offeror has communicated the offer to the offeree. So each offeror must make sure that her offer is communicated to the offeree she wants, in the way she wants.

This rule also protects the offeror, by giving her the freedom to choose with whom she wants to make a contract, as well as the time and manner in which she will communicate the offer to that other party. In general, "the offeror is the master of her offer," as an old contract law saying goes.

***** CASE STUDY 36**

FACTS Mr. Khemara dictated a letter to his secretary. In the letter, Mr. Khemara said he was offering to sell to Ms. Theory some stock he had in an oil company. But before Mr. Khemara mailed the letter to Ms. Theory, he heard on the radio that the company had made a huge new discovery of oil. This would cause the stock's value to go up.

Ms. Theory also heard the news. And she also learned about the unmailed letter from Khemara's secretary, who was not authorized to make offers for Khemara. Ms. Theory immediately called Khemara on the telephone and tried to accept his offer--even though he had not communicated it to her.

QUESTION OF LAW Was Mr. Khemara's letter a valid offer which could create a contract when Ms. Theory accepted it?

DECISION No. Mr. Khemara's offer was not valid because he had never communicated it or directed that it be communicated to Ms. Theary.

An offer is not valid unless the offeror has communicated it, or directed that it be communicated, to the offeree. In this case, it was clear that Mr. Khemara had the idea to make an offer to sell some oil company stock to Ms. Theary. But his dictation of the letter to his secretary was only one step leading to his actual communication of the offer. Khemara never finished the process of communicating his offer to Ms. Theary, because Khemara never authorized his secretary to make the offer for him. Only the offeror can decide when and how to make his offer. So even if an offeror (like Mr. Khemara) writes an offer, and the correct offeree (like Ms. Theary) hears about it, the offer is not valid until the offeror actually communicates it, or directs that it be communicated. That did not happen in this case. So Mr. Khemara's offer was not valid, and Ms. Keary could not accept it. No valid offer = no contract.

A related rule about offerees is that only the specific offeree or offerees the offeror choose(s)--the "intended offeree(s)"--can generally accept the offer. There can be multiple offerees, but they must be chosen by the offeror. In general, no one else can create a contract with the offeror just by accepting her offer. This is because in free market jurisdictions, people generally have a right to choose the people with whom they deal. The law in such jurisdictions often calls this right the "freedom of contract." This rule is actually part of the rules about acceptance, and it will be discussed in much more detail later in Section 2.8 of this Chapter.

CASE STUDY 37

FACTS Sanna sent a letter to Bun Rouen. In the letter, Sanna clearly offered to sell her house to Bun Rouen for \$50,000. Although Bun Rouen himself did not want to buy Sanna's house, he told his friend Kek about her offer. Kek immediately delivered a signed letter to Sanna which said: "I accept your offer."

QUESTION OF LAW Is there a contract between Sanna and Kek?

DECISION No. Sanna's offer was valid, since it was communicated to her intended offeree Bun Rouen, but no other party (like Kek) could accept it.

In general, only the intended offeree can accept an offer. In this case, Sanna had communicated her offer only to Bun Rouen, and it was clearly intended only for Bun Rouen--not Kek. So it is clear that she intended to make a contract with Bun Rouen, and no one else. Kek cannot make a proper acceptance of this offer. So there is no contract here.

2.3d What Are Not Valid Offers: Preliminary Negotiations, and Invitations to Negotiate or Make Offers

It is important to stress certain types of activities that do not generally meet the above requirements for a valid offer. This is because certain activities may be easily mistaken for valid offers, even though they are not.

Two important groups of activities that some people may view this way but which are not generally valid offers are:

- (1) preliminary negotiations, and
- (2) invitations to negotiate or make offers, such as marketing activities and bid solicitations.

The reason for this rule is that people involved in such activities are generally just starting to think about making a contract. Or perhaps they just want to know if others are interested in making a contract with them. In preliminary negotiations, the parties are just talking about possibilities for a contract. In invitations to negotiate or make offers, one party is basically searching to find people who might want to make a contract with her. In both cases, one or more of the parties may communicate ideas and possibilities for a contract. But they are not ready to make a contract yet. So such activities are really not offers, though they may sometimes appear to be. Instead, they are more like "pre-offer" activities.

***** WHY IS THIS IMPORTANT?** What is the practical effect of the general rule that preliminary negotiations and invitations to negotiate or make offers are not offers?

As explained earlier, if there is no offer, there can be no contract. So when jurisdictions say that activities such as preliminary negotiations and invitations to negotiate or make offers are not themselves "offers," the practical effect is that the parties involved in those activities must do more if they really want to create a contract. If they do no more than just negotiate or make invitations, there is no contract between them. This is true even if one of the parties says "I accept," because there was no "offer" for that party to accept! These rules are important to understand, because preliminary negotiations and invitations to negotiate or make offers--such as marketing activities and bid solicitation--are so common in modern commercial activity.

(1) Preliminary Negotiations

Before parties actually make a contract together, they often discuss what they are looking for, and the potential terms of the contract. These are preliminary negotiations.

Preliminary negotiations are not offers unless they meet all the requirements discussed above, such as showing a serious intent to make

a contract and that the proposal for a contract be definite and reasonably clear. Statements like "I'm interested in this," or "I plan to do that," or even "I think I might be able to give you \$100," do not usually meet these requirements. So in order for a valid offer to exist, there must be more than just preliminary negotiations.

CASE STUDY 38

FACTS Mouly writes a letter to Sovannarit. The letter says: "I am planning to sell my house for \$60,000. I would really like to get rid of it." Sovannarit immediately writes a reply saying: "I accept and will buy your house at the price stated in your letter."

QUESTION OF LAW Did Mouly make a valid offer which Sovannarit could accept to make a contract?

DECISION No. There was no offer here--only preliminary negotiations--because Mouly was only discussing the possibility of selling his house.

Preliminary negotiations are not usually valid offers. In this case, Mouly merely expressed a plan or intention to sell his house. By itself, a wish or a plan is not a valid offer which can create a contract when another party accepts it. A party cannot "accept" something that was never even offered to him! So Mouly has actually made no valid offer here, though he may wish to engage in further discussions with Sovannarit, and perhaps even make a contract at some later time. But for now, no offer = no contract.

(2) Invitations to Negotiate or Make Offers, Such as Marketing Activities and Bid Solicitation

Other types of activities that may look like offers, but generally are not offers, are invitations to negotiate or make offers. Many public communications may seem to be real offers, and may even use the word "offer." However, the law does not consider them to be offers whose acceptance creates a contract unless they meet all the requirements for a valid offer. If they do not, they are probably only invitations which ask the public to negotiate or to make offers.

There are many important types of "invitations to negotiate or make offers." Two of the more common ways that parties make such "invitations" are through:

- (1) marketing activities, including general advertising, window displays, price lists, price tags, catalogs, and circular sales letters;
- AND (2) formal solicitation of bids.

These will be discussed in more detail below.

(1) Marketing Activities -- Perhaps the most common types of "invitations" are general advertisements, window displays, catalogs, price lists, price tags and circular sales letters. Generally, such communications describe or display a product or service the seller wants to sell, and the price at which she wants to sell it.

The reason most marketing efforts are not valid offers is that they are usually too general. In particular, marketing efforts are usually more general than valid offers in one or both of the following ways:

- (1) unlike most valid offers, most marketing efforts are directed at the general public (not to any specific party); and
- (2) unlike the situation with valid offers, the goal of most marketing efforts is to invite parties to negotiate a sale.

These two key differences are explained more fully below.

(a) Marketing efforts like advertisements are usually directed at the general public, whereas most valid offers are directed at particular parties. If an advertisement or other marketing effort is not specifically intended for any particular party or parties, but at the general public, then it is generally only an invitation to negotiate, not a valid offer. So even if someone tries to accept such an invitation, the party who made the invitation may generally refuse to agree. This is because the invitation was probably not an offer. In fact, it was probably the response of the party who received the invitation that was the offer.

CASE STUDY 39

FACTS Dr. Sethyk typed a document which said, in large letters: "For sale: My house at 33333 Sihanouk Boulevard, for \$100,000." After making 100 copies of the letter, Dr. Sethyk posted and circulated the copies at the medical school where he taught, at the hospital where he worked, and at many places near his house. Soon he received a letter from Polita which said: "I accept your offer."

QUESTION OF LAW Did Polita's letter create a contract with Dr. Sethyk?

DECISION No. Polita's letter did not create a contract because Dr. Sethyk's communication was actually a circular sales letter--an invitation directed at the general public--and not a valid offer.

Marketing activities such as circular sale letters are generally not valid offers, but only invitations to negotiate. In this case, Dr. Sethyk distributed 100 copies of a document advertising the sale of his house. This was a circular sales letter. Dr. Sethyk distributed this document in order to invite as many people as possible to contact him about buying his house. The document was clearly not directed at any one specific person or specific group of persons.

So it was only an invitation to negotiate, and not a valid offer. Polita could not "accept" it. No offer = no contract.

Parties like Polita in Case Study 39 do not create contracts just by trying to "accept" the marketing invitations of parties like Dr. Sethyk. In fact, the invited party's attempted "acceptance" is probably just an offer which she makes to the party who made the marketing effort! So when a party makes a marketing effort to the public, and someone tries to "accept," that person's attempted "acceptance" is generally an offer. Then, the party who made the marketing effort can decide to accept or reject the other party's offer. If the marketing party decides to accept it, then there is a contract. But if that party rejects the offer, then there is no contract.

***** WHY IS THIS IMPORTANT?** Why are most marketing efforts not valid offers, but only invitations to negotiate or make offers?

It appears that most marketing efforts are not considered offers primarily in order to protect the marketer or advertiser. Marketers could have problems if they were bound by every attempt by a member of the public to buy the advertised product or service. This could lead to many more offerees than the marketer wanted, and could cause her real problems. This possibility could deter business people from doing marketing--since they would be afraid that they would become legally obligated to vast numbers of people every time they did any advertising! In the end, that could restrict the free flow of information about products in the marketplace, and limit economic activity.

However, reward advertisements are an important exception to the above rule about public offers. As noted in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3b, in the discussion of common law unilateral contracts, advertisements offering rewards generally are valid offers, even though they are directed at the general public. This is because reward offers--unlike most other advertisements--usually are very clear and definite about what they offering. Most ask for the performance of one specific act, not further negotiation. The performance of the act is generally the acceptance. Often, this act can or will be performed only once. So in most of these situations, there is less danger that more offerees will accept the offer than the offeror really wanted.

***** CASE STUDY 40**

FACTS Vannath put an advertisement in a newspaper which said: "I will pay \$1,000 to the first person who gives me information which leads to the arrest and conviction of the person who set fire to my property." A clever university student named Pon saw the advertisement. He decided to investigate the matter in order to get the reward. As a result of evidence that Pon discovered and provided to Vannath, the police arrested a man named Chhum.

At the end of his trial one month later, Chhum was convicted of the crime of arson. But when Pon demanded the \$1,000 reward from Vannath, she refused to pay him.

QUESTION OF LAW Was Vannath's advertisement a valid offer, which Pon accepted by performing the act requested?

DECISION Yes. Vannath's advertisement was a reward offer which promised to pay \$1,000 to the first person who performed a certain act, so it was a valid offer which Pon accepted when he performed that act.

Although most advertisements are not valid offers, advertisements including reward offers often are. This is because a person who advertises a reward often does not want to negotiate, but instead wants only one specific thing: the requested act.

In this case, Vannath made a reward offer requesting a specific act: the provision of information leading to the arrest and conviction of the arsonist who burned her property. This was a specific offer which only one party could accept. Pon performed the specific act Vannath requested in her offer. This performance was an acceptance of Vannath's offer. So Vannath must pay the \$1,000 to Pon.

(b) Most marketing efforts are intended only to invite parties to negotiate with the advertiser, whereas valid offers generally enable parties to accept immediately. People and organizations usually advertise in order to attract and negotiate with others who are interested in what they are advertising. This goal is usually implied--and is often expressed--in the various forms of marketing, including window displays, catalogs, price lists, price tags and sales letters.

***** CASE STUDY 41**

FACTS The Happy Shoe Store put a pair of shoes with a price tag of \$8.95 in the shop window. Sochivin saw the shoes and said that he accepted the Store's offer and would buy them at that price.

But the price was a mistake. The price tag should have said \$18.95. So the owner of the shop told Sochivin that \$8.95 was not enough, and if he really wanted the shoes, he had to pay the correct price of \$18.95. Then the owner walked to the shop window and changed the price tag to the higher price.

QUESTION OF LAW Was the \$8.95 price that the shop advertised a valid offer that Sochivin could accept?

DECISION No. The window display was not a valid offer, but merely an invitation to Sochivin (and the rest of the world) to make an offer for the shoes.

Advertisements are generally not valid offers, but merely invitations to negotiate or make offers. In this case, the erroneous \$8.95 price tag in the Happy Shoe Store was not an "offer" to Sochivin or to anyone else. In fact, it was only asking for offers related to those shoes, probably at that price. It was an invitation to negotiate. So neither Sochivin nor anyone else could "accept" it. And the Shoe Store need not sell the shoes for \$8.95.

The result in Case Study 38 above would be the same even if the price tag for the shoes had been correct. It does not generally matter if the advertised price was right or wrong, or even if the seller really intended to sell her goods at all. There is no contract because a mere invitation to negotiate--such as a price tag on goods--by itself is not an offer.

Generally, this rule also applies to newspaper, radio, television, and electronic advertisements. For example, a "FOR SALE" advertisement in a newspaper is usually just an invitation to negotiate. It is not an "offer" to every reader of the newspaper. It would be impossible for the seller if everyone who read that newspaper could create a contract with the seller just by saying "I accept!" So even though the seller almost certainly wants to sell the advertised item, and even though she probably has the advertised item, she probably has no contract obligation to sell it.

On the other hand, in practice most sellers like the one in Case Study 41 do accept offers that parties like Sochivin make in response to advertisements. Most sellers really do want to sell the goods they advertise, at the advertised price. And sellers normally try to avoid damaging their business reputations by changing goods or prices after they are advertised. Consumers do not like this, and in most free market jurisdictions, businesses that do this do not do very well. In addition, even though contract law may allow such conduct by sellers, many jurisdictions have other types of laws--including criminal and consumer protection statutes--which prohibit false advertising and other fraudulent conduct by sellers. A seller who regularly attracted customers with low prices, then regularly switched them to higher prices when customers tried to buy, might violate such laws.

(2) Formal Solicitation of Bids -- When a party asks for or "solicits" bids--offers--that party is obviously just looking for offers. Bid solicitation occurs when a government or other party requests bids for various projects, such as the construction of a new highway or power plant, or the management of a hospital or university. These bids are the offers. So the request for bids is just an invitation to parties to make offers to the government. Many private persons and firms use a similar bid solicitation procedure when they want to complete a large construction or management project.

Of course, the party soliciting bids does not make a contract with each company that submits a bid! Instead, the bid solicitor carefully analyzes all the bids to see one which is the best, based on all the relevant circumstances, including price, experience, and other factors. Then it chooses one of the bids--

that is, it accepts one of the offers. For very large projects, it may accept a number of bids, each for different work or materials. In any case, it is the party soliciting bids--not the companies submitting bids--who has the power to make a contract in such cases.

Generally, procurement statutes closely regulate how a government must conduct this bidding process. Most jurisdictions require the government to advertise widely to get competitive bids for the performance of such projects. To do this, the government normally publishes newspaper advertisements and detailed information circulars about the project. In these documents, the government asks private companies to submit bids to do the work. For substantial projects, these statutes generally require the government to choose the lowest practical bid, assuming it chooses any, except in special circumstances. Such statutes forbid bribes in the bidding process, since corruption can lead to poor quality work done by parties who did not deserve to win the contracts. The private party whose bid is chosen then has the duty to do the job, and the government has the obligation to pay the bid price.

CASE STUDY 42

FACTS The Ministry of Education decided to build a big new law school. The Ministry advertised in several major newspapers and on radio for bids from construction companies. The Angkor Empire Construction Corporation and Khmerco were two of many companies that submitted bids to the Ministry according to the proper bidding procedure.

The Ministry chose the bid of Khmerco, and signed a contract with that company. But Angkor Empire sued the Ministry, claiming that the Ministry had violated its contract with Angkor Empire.

QUESTION OF LAW Did Angkor Empire create a contract when the Ministry received its bid to consider?

DECISION No. Angkor Empire's bid could not create a contract because it was only an offer--made in response to the Ministry's invitation for such offers--which the Ministry was free to accept or reject.

Bid solicitation is a process in which governments or others invite parties to make bids--offers--to perform work or supply materials for various kinds of important projects. In this case, the Ministry of Education solicited bids for the construction of a new law school. When the Ministry solicited the bids, it did not make a valid offer about the construction job--it invited offers. So a bid which any company submitted in response could not possibly be an acceptance which created a contract with the Ministry. Obviously, the Ministry was looking for many bids to consider, in order to choose the best one.

When Angkor Empire, Khmerco, and the other construction companies submitted their bids, the Ministry received the bids only to consider them.

The Ministry had the right to accept or reject the bids. So between the Ministry and Angkor Empire, there was only the offer (bid) from Angkor Empire. The Ministry decided to accept Khmerco's bid, and not Angkor Empire's bid. The Ministry had no duty to accept Angkor Empire's offer, and it never did. So there was no contract between these parties.

***** WHY IS THIS IMPORTANT?** What is the purpose of the rule which says that parties generally can solicit and receive bids without becoming obligated to the bidder?

In general, this important rule gives governments and other parties the freedom and flexibility they need to get and analyze good offers for substantial projects. The rule recognizes two basic aspects of modern commercial activity.

First, the rule recognizes the way most people and groups actually do business: they look around for the best price. A simple, everyday example is a person who wants to buy something in the market but first walks around and asks different sellers what their prices are.

The second aspect of modern commercial activity is the frequent need to ask for detailed offers for the performance of complex jobs or services. Case Study 42 is a good example. Bid solicitation enables governments and others to do all this in an organized, efficient way. If such parties were obligated to accept every bid they received, they obviously would never ask for bids at all! The law allows them to solicit and get as many bids as they want, because the bids are just offers, which they can accept or reject. This is crucial to commercial activity, especially with respect to big or expensive projects.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3b contains further discussion of unilateral contract offers, such as reward offers.

2.4 The Offeror Can Terminate the Offer

As explained briefly in Section 2.2 above, before a proper acceptance, an offer can generally terminate in a number of ways. It can end because of the offeror, the offeree, or some other event or circumstance outside the direct control of the parties.

Section 2.4a discusses how offers can end where the offeror terminates the offer by revoking it. In common law jurisdictions, this can generally occur any time before a proper acceptance. However, such revocations may not be possible in many civil law jurisdictions. Many of these jurisdictions appear to say that offers cannot be revoked for a reasonable time unless the offer itself

says otherwise. In addition, even in common law jurisdictions, revocation may not be possible in situations involving:

- (1) option contracts (Section 2.4b);
- (2) special statutes such as those governing offers for the sale of goods or bids submitted to public agencies (Section 2.4c);
- (3) part performance in response to certain unilateral contract offers (Section 2.4d); or
- (4) promissory estoppel (Section 2.4e).

These ideas are discussed below.

2.4a The Offeror Can Revoke Her Offer

In common law jurisdictions, the offeror can generally revoke her offer before the offeree has made a proper acceptance.

***** DEFINITION:** A **revocation** is the act of withdrawing an offer.

This ability to revoke can be viewed as part of the offeror's general status as "master of her offer." Common law jurisdictions generally want the offeror to have the power to change her mind prior to acceptance. In a way, this could be viewed as part of the "freedom of contract"--the freedom to change one's mind and not make a contract. However, because this general rule does not always achieve justice or efficiency, there are several exceptions. These are discussed below.

It appears that many civil law jurisdictions say that an offeror generally cannot revoke her offer for a reasonable time, unless the offer itself says otherwise. This seems to be the case in Germany and France. This rule offers more protection to offerees. And it might reduce the need for some of the exceptions discussed later in this Section.

***	CASE STUDY 43	(Common Law)
FACTS	Somaly is a customer of the Friendly Drinks Shop. On Monday, he mails a letter to the shop ordering 20 cases of beer to use for a big party Saturday night.	
	However, on Wednesday, Somaly changes his mind about the order, and he goes to tell the Friendly shop owner. The shop owner has just received the order in the mail. Somaly tells him, "Never mind. I do not want the beer anyway. Just throw my letter away."	
QUESTION OF LAW	Did Somaly successfully revoke his offer to buy the beer?	

DECISION Yes, in common law jurisdictions. Offerors like Somaly can generally revoke their offers any time before a proper acceptance, so this offer ended when Somaly revoked it before the shop owner accepted.

In common law jurisdictions, offerors can generally revoke any time before acceptance. In this case, the offeror Somaly sent an offer to buy some beer to a drinks shop, but then told the shop owner to throw the offer away just after the shop owner had received the offer. This was a revocation which ended the offer. So it does not matter if the shop owner tries to accept Somaly's offer now. No offer (anymore) = no contract.

(1) The Offeror Can Generally Revoke by Communicating the Revocation to the Offeree Before Acceptance

In general, in common law jurisdictions, an offeror can revoke by communicating the revocation to the offeree before acceptance. The revocation is effective on receipt by the offeree. Of course, if the offeree makes a proper acceptance before the revocation is effective, a contract is formed.

This general rule about how an effective revocation occurs can actually be divided into four key elements:

- (1) the offeror can revoke only before acceptance;
- (2) the revocation must be communicated;
- (3) the communication must be to the offeree; and
- (4) the revocation is effective only when received by the offeree.

These four elements are discussed below.

First Element: Revocation Can Occur Only Before Acceptance -- For a revocation to be effective, it must occur before the offeree makes a proper acceptance. After a proper acceptance, a contract is formed.

Common law jurisdictions usually--though not always--allow an offeror to revoke her offer at any time before the offeree accepts it, even if the offeror has stated that she will keep the offer open for a certain period! The idea is that if an offeror is generally the master of her offer, then she should generally have the right to withdraw the offer when she wants.

*** CASE STUDY 44 (Common Law)

FACTS Kolab says to Srey Toch: "I have only \$500. I offer to lend it to you if you promise to pay me back in 3 months at the rate of 10% interest per year. You do not have to decide now, because I will leave this offer open for you for at least one more week from today."

However, only three days later, before Srey Toch makes any acceptance, Kolab makes an agreement to lend the \$500 to Sathya instead! Kolab immediately tells Srey Toch that she is revoking, and Srey Toch is angry. She realizes that the 10% interest rate is better than she can find anywhere else. Srey Toch thinks that Kolab has the obligation to keep her offer open to Srey Toch until the end of the week, as Kolab promised. Srey Toch also thinks that if she now tells Kolab that she accepts, then they have a valid contract.

QUESTION OF LAW Did Kolab have the right to revoke her offer to Srey Toch even though she had promised to keep that offer open a full week more?

DECISION Yes, in common law jurisdictions. Kolab's revocation was effective--even though she promised to keep the offer open a week--because it occurred before any acceptance by Srey Toch.

Except in certain special circumstances, many common law jurisdictions say an offeror may revoke her offer any time before the offeree has accepted that offer--even if the offeror promised to keep the offer open longer. In this case, Kolab communicated a revocation of her loan offer directly to Srey Toch before Srey Toch made any acceptance. This ended the offer. And it does not matter that Kolab had promised to keep the offer open longer. Common law jurisdictions generally allow a revocation even in that situation, as long as it occurs before the offeree accepts.

Of course, if the offeree properly accepts the offer before the offeror revokes it, then there is a contract between them. In that situation, it does not matter if the offeror really wanted to revoke, or if she had good reasons to revoke, or even if she had already started to revoke! That is, if the offeree's acceptance is effective first, there is a contract. But if the offeror's revocation is effective first, then there is no contract. So in some cases, it can be a kind of "race" to see which was effective first: the revocation or the acceptance.

CASE STUDY 45**(Common Law)**

FACTS One of the people who rented cars in front of the Hotel Indochine was named Meas. On Thursday, Meas offered to rent his new car to two of the hotel's honored guests, Harry and Matthew, so they could go to the beach at Kompong Som that weekend. Harry and Matthew thanked Meas for the offer. They told him that they would tell him the next day if they wanted to rent his car.

That night, Harry and Matthew went to the hotel restaurant to talk about their plans for the trip. They agreed that they would rent the car from Meas. Suddenly, they saw Meas enter the restaurant, so they waved him over to their table. But just as Matthew was about to tell Meas that he and Harry accepted the offer, Meas said to him, "Sorry, sir. I have already rented my car to another guest. You will have to find another car to rent if you want to drive to Kompong Som this weekend."

QUESTION OF LAW Did Meas have the right to revoke his offer in this way?

DECISION Yes. Meas' revocation was effective because it occurred before Matthew and Harry accepted his offer.

In common law jurisdictions, an offeror can generally revoke her offer any time before the offeree accepts it, even if the offeree wants to accept and is about to do so. In this case, Meas offered to rent his car to Matthew and Harry for a trip to Kompong Som. But he revoked that offer before they accepted. Even though Harry and Matthew had decided to accept the offer--and even though they were about to accept--they had not yet actually told Meas that they accepted his offer. Meas revoked the offer first. So in fact there was nothing left for these offerees to accept! In the "race" between the revocation and the acceptance, the revocation won.

Second Element: The Revocation Must Be Communicated -- For a revocation to be effective and terminate an offer, the offeror must communicate it. So if an offeror has not communicated a revocation, her offer remains open whether she wants it to be open or not. An offeror's intention or plan to revoke is not enough. As in many other areas of contract law, secret intentions have no legal effect.

CASE STUDY 46

FACTS Pich, the manager of the Holiday Travel Agency, offers a special package to the student organization at the School of Commerce. Specifically, Pich offers to take the 80 students of the graduating class on his agency's boat up to Angkor Wat for five days and four nights during the Khmer New Year break, for only \$50 per person. Pich agrees to let the leaders of the student organization talk to the other students that week to see if they want to accept his offer or not. But two days later, without telling the student organization or revoking his offer, Pich offers the same package to a new marketing association in the city, for \$80 per person. The marketing association accepts immediately.

Pich writes a short letter of revocation and tells his assistant to give it to the student organization. But the assistant forgets. One day later, the leader of the student organization tells Pich that the students accept his offer. Pich is surprised, because he thought he had revoked his offer. The student leader is surprised to hear of the attempted revocation, because no one had told him about it. And Pich's assistant is very surprised, because the students say that, as a result of his failure to communicate Pich's revocation to them, there is a contract between Pich's travel agency and their group!

QUESTION OF LAW Is there a contract between the Holiday Travel Agency and the student organization?

DECISION Yes. There is a contract between the travel agency and the student group because the travel agency failed to communicate its attempted revocation, so the revocation was never effective.

Revocations must be communicated in order to be effective and terminate an offer. In this case, Holiday Travel made an offer to take a group of students to Angkor Wat. Pich tried to revoke that offer before the students accepted. Unfortunately for him, he never effectively revoked. Although Pich had decided to revoke the offer, and had even written a letter to do that, he failed to communicate the revocation, because his assistant forgot. In this case, the revocation went no further than Pich's assistant. So the students still had the power to accept Pich's offer. When they did accept the offer, they created a contract with Pich's travel agency.

Third Element: The Revocation Must Be Communicated to the Offeree -
 - For a revocation to be effective and terminate an offer, the offeror must not only communicate it, but communicate it to the offeree (or her agent). It is not enough for the offeror to simply communicate the offer generally; it must be to the offeree. This is because the offeree should have the opportunity to know that the offer that she is considering has been terminated. Otherwise, the offer remains open, and the offeree can accept it and form a contract.

CASE STUDY 47

FACTS Suppose that the story in Case Study 46 happened in a somewhat different way. Suppose that Pich's assistant does not forget about Pich's revocation.

But the assistant does forget which students are the offerees. Instead of giving Pich's revocation to the students at the School of Commerce, Pich's assistant delivers the revocation only to some students at the School of Communications. The students who receive the letter there do not know what to do with it. Before they can do anything, the students at the School of Commerce accept Pich's offer.

QUESTION OF LAW Is Pich's revocation of his travel offer effective in this situation?

DECISION No. The revocation of Pich's travel offer is still not effective because he has failed to communicate it to the offerees--the students at the School of Commerce.

A revocation must be communicated to the offeree in order to be effective and end an offer. In this case, Pich's assistant did communicate the revocation of the travel offer. Unfortunately, the assistant failed to communicate the revocation to the offerees: the School of Commerce students. Those students never received the revocation. Then they accepted Pich's offer.

So as in Case Study 46, the School of Commerce students created a contract with Pich's travel agency.

Fourth Element: The Revocation Is Not Effective until the Offeree Receives It -- A revocation is effective only when the offeree (or her agent) receives it. This element is really related to the third element explained above. Many jurisdictions say that a revocation is adequately communicated to the offeree at the time the offeree receives it. It does not matter when the offeror actually sends or communicates the revocation, or even how the offeror does that.

Sometimes it may be hard to say exactly when an offeree "receives" a revocation. When an offeror revokes face-to-face or by phone with the offeree, obviously the offeree "receives" that revocation immediately, and the revocation is effective at that time.

But when the offeror sends her revocation by methods that are generally not immediate, such as regular mail, electronic mail, fax, or messenger, the revocation generally becomes effective only when it is delivered to the address of the offeree or the offeree's agent. So revocations communicated in those "non-immediate" ways are generally not effective when they are written, and not effective even when they are sent!

CASE STUDY 48

FACTS On Monday, while Phirun was talking on the telephone with his favorite cousin Soubert, he offered to sell his rice mill to Soubert. Phirun said he would let Soubert think about the offer for a while.

However, on Saturday morning, Phirun changed his mind. He wrote a letter telling Soubert that he revoked his offer to sell the rice mill. Coincidentally, just after Phirun gave his letter for Soubert to the clerk at the post office, the clerk gave Phirun a letter addressed to him which the post office had just received from Soubert. In the letter, Soubert accepted Phirun's offer to sell the rice mill!

QUESTION OF LAW Did Phirun effectively revoke his offer in time to prevent Soubert from creating a contract by accepting the offer?

DECISION No. Phirun's attempted revocation was too late, because Soubert had already made a proper acceptance before he received the attempted revocation.

A revocation sent by "non-immediate" methods such as regular mail, fax, e-mail, or messenger terminates an offer only when that revocation actually arrives at the address of the offeree. In this case, Phirun wrote and even sent his revocation before he received Soubert's acceptance. But Phirun's revocation obviously did not arrive at Soubert's address before Soubert made

his acceptance, since Phirun got the acceptance before his revocation had even left his post office! So Phirun had not yet effectively revoked his offer when Soubert's acceptance arrived, and the offer was still alive. Soubert accepted that offer and formed a contract. Now Phirun must sell his rice mill to Soubert or provide a remedy.

This rule only requires that such revocations arrive at the address of the offeree (or agent) in order to be effective. That means they are effective at the moment that the revocation is delivered to the offeree's address. This rule does not require the offeree (or agent) to actually receive the revocation in her own hands, or even personally see or know about the revocation.

CASE STUDY 49

FACTS The director of the Career English Company offered a teaching job to Kirany, whose English language ability was good. Kirany replied that she would consider the offer.

But one week later, the director hired someone else for the teaching position. So the director sent a messenger to Kirany's house with a letter in which the director revoked the job offer to Kirany. The messenger arrived at Kirany's house at 10:00 a.m., and when he saw that Kirany was not there, he left the letter in her mailbox.

At that time, Kirany was at work. She had decided to accept the director's offer, and she had already written her acceptance. So after finishing lunch, at 1:00 p.m. that same day, she went over to the Career English Company to personally deliver her acceptance to the director. But the director told her that the position was no longer open.

QUESTION OF LAW Did the director revoke his offer in time to prevent Kirany from creating a contract by accepting that offer?

DECISION Yes. The director's revocation was effective at the time it arrived at Kirany's house, so the offer ended before Kirany tried to accept it later that day.

Non-immediate revocations such as those sent by messenger are generally effective at the time they arrive at the address of the offeree. In this case, the director of the Career English Company tried to revoke his offer of a teaching job by sending a message to Kirany's house. This revocation was effective at 10:00 a.m., when the messenger delivered it to Kirany's house. This was three hours before Kirany tried to accept the offer. So the offer had been effectively revoked before Kirany tried to accept it. It does not matter that Kirany had already decided to accept the offer, or that she had actually written an acceptance. And it does not matter that Kirany did not even know that the director had revoked his offer! As soon as that revocation arrived at Kirany's house, the offer ended. No offer (anymore) = no contract.

***** WHY IS THIS IMPORTANT?** What is the effect of the rule that a non-immediate revocation like one sent by mail or messenger is effective when it arrives at the offeree's address, even if the offeree does not personally receive or know about it?

This "effective on receipt" rule for revocations means an offeror only has to deliver her revocation to the offeree's address in order to terminate the offer. The offeror need not personally communicate the revocation, or even make sure that the offeree really knows about the revocation. This rule tries to be reasonable about what it requires offerors to do in order to revoke their offers. It would be a great burden on offerors if they had to make sure the offeree actually knew about a revocation, and it might be very hard to prove they did--much harder than proving the revocation had arrived at the offeree's address. This rule might seem harsh in some cases, such as where a different person at the offeree's address loses the revocation and the offeree never sees it. But the rule is based on the idea that people are generally responsible for receiving and reading communications that are delivered to their addresses. The law assumes this happens, and wants to encourage it to happen.

The rule also allows courts to work more efficiently. When parties ask a court to resolve a dispute related to revocation of an offer, the court need only determine if the revocation arrived at the offeree's address or not. The court does not have to try to determine if the offeree actually got the revocation, or saw it, or understood it. Obviously, that could be quite difficult in many cases, especially if the offeree denied it.

(2) The Manner of Revocation Can Be Direct or Indirect

As the above Case Studies suggest, there are generally no special procedures that an offeror must use when she wants to revoke her offer. The fact that the revocation is communicated to the offeree before acceptance is more important than the manner.

In fact, a revocation can occur in two ways:

- (1) directly, where the offeror or her agent communicates it; or
- (2) indirectly, which occurs where the offeree learns in some other way that the offer is no longer open.

These two ways are briefly discussed below.

Direct Revocations -- Offers can be revoked directly by a communication from the offeror (or her agent) to the offeree (or her agent). This is probably the most common way, and obviously the best way the offeror can be sure revocation occurs.

An offeror can directly revoke her offer through words (oral or written) or conduct that clearly shows that she is terminating the offer.

For example the offeror may say or write to the offeree, "I revoke my offer." Or the offeror may just tear up the piece of paper on which she wrote the offer. These are effective revocations. Case Studies 43-45 and 49 are examples of direct revocations. A direct revocation may also be made by an authorized agent of the offeror, as was attempted in Case Studies 46 and 47.

Indirect Revocations -- Offers can also be revoked indirectly where the offeree learns in some other way that the offer is no longer open because of the actions of the offeror. This means it is not necessary for the offeror herself to communicate a revocation to the offeree. For example, if an offeree learns from a reliable third party that the offer is no longer open, then the offer is revoked. An indirect revocation can also occur where the offeree simply observes that the offer is no longer open.

CASE STUDY 50

FACTS On 1 July, Mealy wrote a letter to the City Textile Corporation in which he offered to lease the company a building for five years for \$2,000 a month. Although Mealy knew that City Textile was very interested in the building and the terms of his offer, Mealy said he would allow City Textile 30 days to accept or reject the offer.

However, ten days later, Mealy leased the same building to the Elegant Fashion Company! Elegant Fashion immediately put up a big sign in front of the building which said, "New Headquarters of the Elegant Fashion Company-Grand Opening 21 July."

When the President of City Textile saw the sign, he was angry, and determined not to lose the chance to rent the building cheaply. He called a meeting of City Textile's Board of Directors. The Board voted to accept the lease and authorized the corporation's Executive Vice President to sign the offer from Mealy. Mealy insists that he had revoked his offer to City Textile.

QUESTION OF LAW Was Mealy's offer to City Textile revoked before City Textile tried to accept?

DECISION Yes. Although Mealy did not directly revoke the offer to City Textile, the offer was indirectly revoked when the President of City Textile saw the "Elegant Fashions" sign in front of the building.

Offers can be revoked indirectly--even where the offeror has communicated no revocation--where the offeree learns in some other way that the offer is no longer open because of some conduct of the offeror. In this case, the President of City Textile saw Elegant Fashions' "Grand Opening" sign on the same building that Mealy had previously offered to rent to City Textile. This sign clearly showed City Textile that Mealy's offer was no longer open, since Mealy had obviously rented the building to a different company. So this offer was revoked, and City Textile could no longer accept it.

***** WHY IS THIS IMPORTANT?** Why can revocations occur indirectly?

Revocations can occur indirectly because in some cases that is more practical for the offeror. This rule is especially important in transactions involving the sale of land (as in Case Study 50), or some other kind of unique asset, such as a rare car or art. In such cases, offerors often offer the one piece of land or other asset to many offerees. Many jurisdictions generally assume that if the offeror actually makes a contract with one of those offerees, and other offerees find out about it indirectly (as City Textile did), those other offerees realize that the offeror can no longer perform her original offer to them. They understand that the offeror no longer intends her offer to be open. Offerees cannot make contracts by accepting offers which they know from a reliable third party or their own observation that the offeror has revoked.

Of course, if an offeree never learns about such a revocation indirectly, and the offeror also fails to revoke directly, the offer is probably still open, at least for a reasonable time. So if a party like City Textile in Case Study 50 had not learned about Mealy's revocation from the Elegant Fashions sign or any other way, the offer would have still been open. So City Textile could have accepted the offer, and Mealy would have been required to lease City Textile the building or provide a remedy.

(3) Public Offers Can Be Revoked in the Same Way They Were Made

Where a party makes an offer to the general public, such as a reward offer, that party can effectively revoke in the same way she made the offer. Such a revocation is effective even with respect to someone who saw only the offer, and not the revocation. So unlike the usual rule on revocation--which requires communication of a revocation to each offeree--this special rule allows a general public revocation for general public offers. Consider the following Case Study.

***** CASE STUDY 51**

FACTS In an attempt to try to find the famous wild Koprey of Cambodia, a biologist named Suvidhya puts an advertisement in six newspapers offering a \$1,000 reward for evidence which clearly proves the animal's present existence, and a \$25,000 reward for a captured Koprey. In less than a week, however, Suvidhya receives so much information and so many claims for the \$1,000 reward that he decides to revoke his offer before he goes crazy and bankrupt. So he puts another advertisement in the same six newspapers thanking everyone for responding so enthusiastically to his request for information, but revoking his \$1,000 reward offer.

Unfortunately, a man named Nate had seen the first advertisement but did not see the second one. So Nate continues to look for evidence of the Koprey. After about a month, he finally finds some bones which an expert

tells him are in fact the bones of a Koprey that died some time in the prior six months. Nate is very excited, especially because he is sure that Suviddya will pay him the \$1,000 reward offered in the advertisement. But when Nate presents the bones to Suviddya, Suviddya refuses to pay him the \$1,000, saying the offer has been revoked.

QUESTION OF LAW Did Suviddya effectively revoke his reward offer to all offerees when he put the revocation in the same newspapers in which the offer appeared?

DECISION Yes. Suviddya's revocation of his reward offer was effective because he revoked in the same way he made the offer, and this effectively revokes public offers.

An offeror can effectively revoke a public offer by revoking in the same way she made the original offer. Such a revocation is effective even against someone who saw only the offer, and not the revocation.

In this case, Suviddya revoked his offer of a reward for anyone giving him evidence of the Koprey's existence in the same way he made the offer: by advertisements in the same six newspapers in which he had made the offer. This was an effective revocation, even against parties like Nate who did not actually see it. So Suviddya's offer was revoked before Nate tried to accept, and Suviddya has no contract obligation to pay \$1,000 to Nate.

***** WHY IS THIS IMPORTANT?** Why can parties revoke public offers in the same way they made them, even though some offerees may not see the revocation?

Many jurisdictions allow this kind of public revocation of public offers because they want public offerors to have the right to revoke their offers. The law recognizes that in situations involving public offers--especially offers advertised in the media--it could be difficult or impossible for the offeror to actually communicate her revocation to every person who read the original offer. In order to give offerors a practical alternative, the law allows a manner of revocation that matches the manner of the offer. This protects the offeror, while giving offerees at least a reasonable chance of seeing the revocation. Otherwise, people might be deterred from making public offers at all.

2.4b An Option Contract May Prevent an Offeror from Revoking

As noted above, there are some situations where an offeror cannot revoke her offer, despite the general common law rule that offerors can revoke any time before acceptance. This text will examine four of these special situations, in Sections 2.4b-2.4e.

One of the most important of these situations is where the parties have an option contract.

***** DEFINITION:** An **option contract** is a contract whose purpose is to keep an offer open.

An option contract is generally created when an offeree gives the offeror some money (or something else of value) in exchange for the offeror's promise to keep her offer open for a specific period of time. So the offeree actually buys the offeror's promise to keep her offer open for a limited period. The option contract is a separate contract, enforceable like any other contract. The only difference is that the purpose of the option contract is to hold open an offer for a different potential contract. Of course, as with any offer, the offeree is free to accept or reject the offer the option holds open. But by making the option contract, the offeree actually buys the right to accept that offer at any time during the option's stated period. And on the other side of the option, the offeror receives money (or some other valuable thing) in exchange for giving up her right to revoke during that period.

***** CASE STUDY 52**

FACTS Udom offered to sell Sambath his house for \$60,000. In response, Sambath told Udom that he was very interested, but he would need about a month to collect the money. Although Udom was not so sure that Sambath would be able to raise so much money, he promised that if Sambath gave him \$100, he would keep his offer open exclusively for Sambath for 30 days. Sambath, who really wanted to buy the house, immediately gave Udom \$100. In return, Udom promised in writing to hold the offer open for 30 days.

But ten days later, Sambath heard that Udom had decided to sell the house to another buyer, without waiting for Sambath. Udom said his offer to Sambath was revoked. But Sambath told Udom he still had the right to accept the offer.

QUESTION OF LAW Does Udom have the right to revoke his offer to Sambath?

DECISION No. Udom made an option contract whose purpose was to keep the offer open for Sambath for 30 days, so Udom cannot revoke until the end of that period.

Option contracts hold offers open and prevent offerors from revoking them for the period stated in the option. In this case, Udom and Sambath had created a valid option contract whose purpose was to keep Udom's house sale offer open, only for Sambath, for 30 days. When Sambath bought that option, he purchased the exclusive right to decide any time during that 30 days whether to accept Udom's house sale offer. Udom gave up for 30 days the right he normally would have had to revoke his offer, in exchange for \$100 from Sambath. So in this case, Udom cannot revoke his offer to Sambath for the 30 days stated in the option contract.

Although an option contract always relates to some offer, the option contract itself is a contract, separate from that other potential contract. In fact, that other potential contract may or may not ever be formed! This does not affect the option contract. And since an option contract is a contract, it cannot be "revoked" like an offer normally can.

For example, in Case Study 52, Udom could not revoke (for 30 days) his offer to let only Sambath buy his house, because the option he sold to Sambath did not allow it. Nor could he revoke the option contract, because binding contracts cannot be "revoked."

***** WHY IS THIS IMPORTANT?** Why are option contracts important?

Options are popular and important in modern commercial activity. They are useful to both offerors and offerees. They have several key functions.

First, as illustrated in Case Study 52, option contracts give the offeree time to really think about the offer and whether she wants to (or can) create a contract with the offeror based on that offer. This is common in transactions where the offeree needs to raise money--often borrow it--in order to make a big purchase. But options can also occur in commercial situations where the offeree is a partnership, corporation, or other organization which has strict rules that require group or management approval before the organization can make an important contract.

Second, options try to reduce or "hedge" risk by allowing the offeree to "lock in" the right to do something, such as buy or sell some specific goods at a specific price during a specific period of time. In Case Study 52, Sambath wanted the option in order to "lock in" for 30 days his right to buy Udom's house for \$60,000. Clearly, the option reduced Sambath's risk that Udom would sell his house to someone else, because the option prohibited that. It also reduced Sambath's risk that Udom would raise the price of the house, because the option locked in the \$60,000 price. In many large contracts--such as those involving the sale of goods, huge amounts of money, or future sales or payments--the parties try to protect themselves against future changes in prices, or even money exchange rates, by creating options that lock in specific prices or rates for a stated period.

Finally, options earn money for the party who sells the option. This is sometimes easy profit for the option seller, because that party might have kept the offer open for some time without receiving any money for it! Of course, the option seller is giving up a right for a certain period, and sometimes that right can be valuable.

2.4c Special Statutes May Prevent an Offeror from Revoking Certain Types of Offers, Such as Offers for the Sale of Goods or Bids Submitted to Public Agencies

Another situation in which an offeror may be unable to revoke is where a special statute says the offeror cannot revoke for a certain time. These kinds of legislative limits on the revocability of offers really create another kind of option contract. And they have the same basic goal as options: to give the offeree time to think about whether to accept the offer or not.

One important example is where the offeror has made an "irrevocable" or "firm" offer to buy or sell goods. Commercial laws in some jurisdictions (such as the Uniform Commercial Code in the United States) basically say that if a merchant signs her written promise to keep open an offer for the sale of goods, that merchant may not revoke the offer until it expires. This is especially true when the merchant signs an offer which uses words such as "firm offer," "irrevocable," or "will be held open". Such offers will generally expire either at the time the offer specifies, or after a reasonable time if the offer does not state an expiration time. There may be upper limits on how long these periods can be, such as the three month limit under the Uniform Commercial Code.

Another important type of offer that statutes may prevent an offeror from revoking is a bid submitted to a public agency for the supply of goods or services. This kind of bidding process was already explained in Section 2.3d, and it will be further discussed in Section 2.4e below, which explains how promissory estoppel can also keep an offer open in the bidding process.

2.4d Part Performance in Response to a Unilateral Contract Offer May Prevent an Offeror from Revoking

Part performance in response to an offer for a unilateral contract will generally prevent the offeror from revoking for a reasonable time, in many common law jurisdictions. A few jurisdictions may still allow the offeror to revoke in this situation, but even in those jurisdictions the offeree could probably recover restitution of the benefit she provided to the offeror under the doctrine of quasi-contract.

In common law jurisdictions, a unilateral contract is basically an exchange of a promise for an act. This was already explained in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3b. Unilateral contracts are created only when the offeree actually performs the specific act the offeror requested in her offer. So there is no contract until the offeree finishes that specific act. This is because there is no acceptance of the offer until the offeree finishes the act which the offeror asked for in her offer. Common law jurisdictions also generally say that an offeror generally may revoke her offer at any time before the offeree accepts. But in cases involving offers to create unilateral contracts, this general rule could create big problems--

and real injustice--if the offeror revoked her offer after the offeree started performing the act but before the offeree finished.

Because of this problem, common law jurisdictions generally say that part performance in response to a unilateral contract offer prevents the offeror from revoking for a reasonable time--basically creating an option contract. In this way, such jurisdictions allow the part performance of the offeree to make the offeror's offer irrevocable for a reasonable time. However, the only obligation that the offeror has during that time is the obligation to keep her offer open for a reasonable time. The offeror has no obligation to perform her side of the contract until the offeree has fully completed the requested act. And of course, the offeree has no duty to perform that act, since she has made no promise to do so. Consider the following Case Studies.

CASE STUDY 53

FACTS Cambox Sports Events, Inc. put an advertisement in the major newspapers, on radio, and on television in which Cambox offered a \$1,000 prize to the winner of the "Rainy Season Boxing Tournament" that it was organizing at the Olympic Stadium. According to the advertisement, there would be boxing matches every Monday and Thursday for six weeks, and the final championship match would be on the last Sunday of that period.

In response to the advertisement, many people joined the tournament and boxed. And there were many spectators, which meant Cambox was making a lot of money. As a result of all the boxing, the two boxers remaining at the end of the 6th week were Sok Rith and Ek Virek. But on the Saturday before the championship fight, Cambox canceled the final match and announced that the tournament was over. Cambox did not give any reason for the cancellation. And Cambox refused to pay Sok Rith and Ek Virek.

The lawyers for Cambox said that Cambox had no obligation to Rith and Virek, because Cambox had revoked its offer before they could accept it. The lawyers said that the offer Cambox had made was a unilateral contract offer which could only have been accepted by full performance--that is, by the two boxers actually fighting the final match. The lawyers said: "No completed performance = no acceptance = no contract = no obligation for Cambox = no money for Rith and Virek."

QUESTION OF LAW Could Cambox revoke its offer to Sok Rith and Ek Virek in this situation?

DECISION Probably not. In many common law jurisdictions, Cambox could not revoke its offer here because the boxers had partly performed in response to Cambox's offer of the \$1,000 prize--a unilateral contract offer.

Even though an offeror can generally revoke her offer any time before the offeree accepts, part performance by the offeree in response to

unilateral contract offers can prevent the offeror from revoking. In many jurisdictions, where there is part performance, the offeror cannot revoke such offers for a reasonable time, in order to give the offeree a reasonable opportunity to finish doing what she had started in response to the offer.

In this case, Cambox offered a \$1,000 prize to the boxer who fought all the way through its boxing tournament to be the champion. However, just before the final two fighters (Rith and Virek) were about to fight for the championship, Cambox tried to revoke its offer. This was after Rith and Virek had already boxed for six weeks in response to its prize offer--making Cambox a lot of money because of all the spectators and advertising revenue--and just before they would be able to finish their performance of the act Cambox had requested in its offer. In this situation, Cambox must keep its offer open for a reasonable time, and assuming Rith and Virek fight, pay the \$1,000 prize to the winner, or otherwise provide a remedy.

CASE STUDY 54

FACTS Prasith says to Someth, "I will give you \$100 to plow my 50 hectares of land." Someth decides to accept Prasith's offer, and he starts plowing Prasith's land the next day.

But after Someth has plowed 20 hectares, Prasith tells him, "Sorry, Bong. I have run out of money because my wife is very sick, and she needs health care. So I have changed my mind about the plowing offer. I revoke my offer to you."

QUESTION OF LAW Can Prasith revoke his offer to Someth in this situation?

DECISION Probably not. In many common law jurisdictions, Prasith could not revoke his unilateral contract offer to Someth because Prasith had partly performed in response to the offer.

Even though an offeror can generally revoke her offer any time before the offeree accepts, many common law jurisdictions say part performance by the offeree in response to a unilateral contract offer can prevent the offeror from revoking for a reasonable time. In this case, Prasith's offer to Someth was an offer to create a unilateral contract, because it said that Prasith would pay Someth \$100 if Someth performed the specific act of plowing Prasith's 50 hectares of land. The only way that Someth could accept Prasith's offer and create a contract with him was to plow all 50 hectares of Prasith's land. So there was no contract between Someth and Prasith at the time that Prasith told Someth that he revoked the offer.

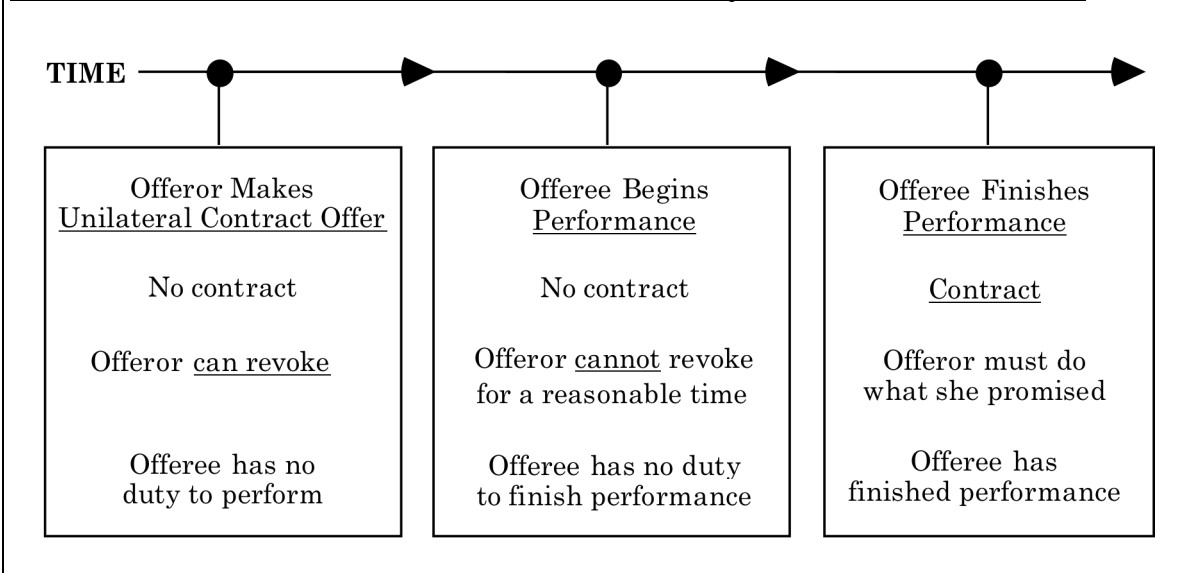
However, at that time, Someth had already plowed 20 hectares of Prasith's land. Because of the potential unfairness to Someth in this kind of situation, many jurisdictions say that Prasith cannot revoke his offer

for a reasonable time. Instead, he must give Someth a reasonable opportunity to finish the plowing.

Not all activity of offerees in response to unilateral contract offers is considered to be part performance that prevents an offeror from revoking. In fact, activity that is considered only preparation for performance will not generally stop the offeror from revoking. It appears that offeree activity in response to offers such as reward offers and client-broker offers often falls into this category. In these situations, the offerees often do many things--including spending substantial time and money--trying to accept the offer. For example, a reward offeree may spend time and money looking for a lost item.

However, it appears that such activities will generally not make the offer irrevocable, because they will not be considered part performance of the act requested. First, it may be that the act requested is really an act that can be done quickly, such as returning a car, or providing a buyer or seller for an item. Preparing to do such an act may not really be a part of the act. In addition, in these cases, the offeree does not generally provide any real benefit to the offeror unless she actually performs the whole act. And the offerees in these situations generally understand the risks that they take by trying to perform--the risks that they will not be compensated for their efforts. This is very different from the situation in cases like Case Studies 53 and 54, where the offerees clearly gave a benefit to the offerors, and had reason to expect that they would be given a reasonable opportunity to finish the act requested.

Illustration: How Part Performance May Prevent Revocation



A few common law jurisdictions may still permit an offeror to revoke her offer in this situation, under the general rule that offerors can revoke any time before a proper acceptance. However, even if a jurisdiction did allow that, the offeree could probably still recover restitution of the reasonable value of what she had provided to the offeror, under the doctrine of quasi-contract.

Otherwise, it would be unjust to offerees who provided a benefit to the offeror with a reasonable expectation that they would be allowed to finish their performance.

For example, if a court allowed Cambox to revoke in Case Study 53, it would probably still allow the boxers to recover the reasonable value of the benefit they had given to Cambox. And Someth could recover the reasonable value of the plowing he had already finished for Prasith. Otherwise, there would be unjust enrichment of the offerors.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3b contains further discussion of unilateral contract offers, and Section 1.5 contains further discussion of quasi-contracts.

2.4e Promissory Estoppel May Prevent an Offeror from Revoking

Promissory estoppel may also prevent an offeror from revoking an offer in common law jurisdictions.

*** **DEFINITION: Promissory estoppel (detrimental reliance)** is a doctrine courts in common law jurisdictions use to avoid injustice by enforcing promises on which parties justifiably rely, even though there is no valid contract.

As explained in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4f, promissory estoppel (or detrimental reliance) is a doctrine which some common law jurisdictions use to avoid injustice where one party justifiably relies on the promise of another party, even though there is no valid contract. Courts may use it when one (or more) of the elements of valid contracts is missing--such as where the parties have not met the requirements of offer and acceptance, consideration, or formality--but for extraordinary reasons, the only way to avoid injustice is to enforce a promise one party made. The power of courts to use promissory estoppel is very limited. It appears that civil law jurisdictions do not use promissory estoppel, but they may have other ways to protect parties in these situations. Promissory estoppel is discussed in much more detail in Chapter 7 ("Other Contract Formation Problems"), Section 7.8.

One of the important situations where courts may use promissory estoppel is where an offeree justifiably relies on an offer--actually on a promise or promises in an offer--even though no contract has been formed yet. In these situations, a court may say that the offer cannot be revoked for a reasonable time, if that is necessary to achieve justice. Courts may actually say that there is a kind of "implied promise not to revoke" in these situations, even if the offeror does not expressly promise to hold the offer open.

However, in order for a court to use promissory estoppel to prevent an offeror from revoking an offer, the following five elements of promissory estoppel must be present:

- (1) there must be a real case;
- (2) there must be a promise by one party;
- (3) another party must actually rely on that promise;
- (4) that party's reliance must be justified;
- AND (5) the party who relied on the promise will suffer an unjust loss or damage if the promise is not enforced.

Because it is very difficult to meet all five of these requirements, the power of the courts to use promissory estoppel is very limited. Courts cannot use promissory estoppel to enforce every promise that is made outside of a valid contract! The reason is that the law wants parties to meet all the requirements of valid contracts if they want promises to be enforced. Another important limit on promissory estoppel is that, when courts do enforce promises on this basis, they enforce them only to the extent that justice requires. This means that a party using promissory estoppel to enforce a promise will probably not be able to access the full range of legal remedies that are normally available with valid contracts. This issues will be discussed in more detail in Chapter 7.

One situation where promissory estoppel may be used to prevent an offeror from revoking her offer is in the important process of commercial bidding. Consider the following Case Study.

CASE STUDY 55

FACTS The government asked an Investor Group to build a huge new Royal Theater. In order to prepare its bid to become the general contractor in charge of the construction of the Theater, the Prosperity Construction Corp. invited many sub-contractors to submit bids to do different parts of the work, under the supervision of Prosperity Construction. One sub-contractor, the Central Electric Company, submitted to Prosperity a bid to do all of the electrical work for the new theater for \$50,000. Central's bid was the lowest that Prosperity received, and Central's reputation was generally good. So Prosperity used Central's \$50,000 figure to calculate its own bid, which it submitted to the Investor Group.

The Investor Group chose Prosperity's bid, which made Prosperity the general contractor for the entire construction project. But before Prosperity could tell Central, Central informed Prosperity that it could not (and would not) do its part of the job, because of the rising costs of electric wire and labor! In fact, Central said it revoked its offer to Prosperity.

Prosperity immediately checked with other electric firms, and found that \$70,000 was the lowest price that any of them would charge Prosperity to do that work. Prosperity signed a contract for that amount with one of the other firms, and then claimed \$20,000 from Central. However, Central refuses to negotiate with Prosperity directly, and also rejects Prosperity's efforts to have an arbitrator help them solve their dispute. Now Prosperity asks the court to make a decision.

QUESTION OF LAW In this situation, could Central revoke its bid (offer) to Prosperity to do all the electric work for \$50,000?

DECISION No. Central cannot revoke its bid (offer) to Prosperity in this situation under the doctrine of promissory estoppel because Prosperity justifiably relied on the bid in making its larger bid to the Investor Group, and injustice would result if Central was allowed to revoke.

Although common law jurisdictions generally let an offeror revoke any time before acceptance, offerors cannot revoke where the doctrine of promissory estoppel applies. Promissory estoppel applies where there is a real case, a promise by one party, reliance by another party, justifiable reliance by that party, and injustice will result if the promise is not enforced.

In this case, Central made a \$50,000 bid to do the electrical work on the new Royal Theater for which Prosperity was bidding to be the general contractor. Central's bid was basically an offer. Prosperity became the general contractor using Central's bid, but then Central tried to revoke. Prosperity acted reasonably to find another sub-contractor, but that sub-contractor charged \$70,000 for the work.

In this situation, all the elements of promissory estoppel seem to be present. First, Prosperity has brought the case to court, so the court can make a decision. Second, Central made a promise to Prosperity: Its \$50,000 bid was actually a promise to do the electrical work on the project if Prosperity won the contract from the Investor Group. Third, Prosperity relied on Central's bid when it used Central's \$50,000 figure to calculate its own bid. Fourth, even though they had no contract together, Prosperity's reliance on Central's promise (bid) was reasonable and foreseeable. Central knew that Prosperity might choose to rely upon its bid. And Central wanted Prosperity to choose and rely on its \$50,000 bid--that was why Central submitted it to Prosperity. Fifth, if the court does nothing or lets Central revoke, Prosperity will probably lose at least \$20,000 as a result of its reliance on Central's bid.

So in this case, under promissory estoppel, Prosperity's reliance will keep Central's offer to Prosperity open for a reasonable time. During that time, Central cannot revoke its offer (bid). And Prosperity can decide whether to accept the bid, which will automatically create a contract with Central, or to reject it. If Prosperity chooses to accept the offer (bid) and create a contract with Central, Central must either do all the electric work for \$50,000,

or provide a remedy for any damage which Prosperity suffers as a result of Central's failure to do the work (here, at least \$20,000).

Case Study 55 above is a good example of how common law jurisdictions may use promissory estoppel to protect the rights of general contractors (like Prosperity) who need to rely on bids from sub-contractors (like Central) in order to make their own bids. Specifically, promissory estoppel may say that sub-contractors like Central do not have the right to revoke their offers to general contractors like Prosperity which they might otherwise have, where general contractors have justifiably relied on the bids. In this way, the doctrine of promissory estoppel protects the important process of commercial bidding.

Of course, as explained in Section 2.4c above, special statutes may also protect public agencies from this kind of situation in some jurisdictions. These statutes often limit the rights to revoke of those who submit bids to such agencies.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4f contains a concise discussion of promissory estoppel; Chapter 3 ("Consideration"), Section 3.8g discusses how promissory estoppel might be used to enforce promises even where there is no consideration; and Chapter 7 ("Other Contract Formation Problems"), Section 7.8 contains a detailed discussion of promissory estoppel.

2.5 The Offeree Can Terminate the Offer

An offer can also be ended by the offeree. This Section explains how that can happen. In particular, it discusses:

- (1) how the offeree can terminate the offer by rejecting it (Section 2.5a);
- (2) how the offeree can terminate the offer by making a counter-offer (Section 2.5b); and
- (3) potential offeree responses to the offer that are neither rejections nor counter-offers (Section 2.5c).

2.5a The Offeree Terminates the Offer If She Rejects It

The most obvious way an offeree can end an offer is to reject it.

***** DEFINITION:** A **rejection** is a refusal to accept an offer.

A rejection is basically a negative response which shows the offeree will not accept or further consider the offer. A rejection terminates the offer. So after an offeree rejects, the offer can no longer be accepted to form a contract. Rejections end offers even if the period which the offeror agreed to keep

the offer open has not yet expired. Of course, after an offeree has rejected the offer, its offeror may decide to renew the offer. But if the offeror does not renew her offer, there is no longer any offer for the offeree to accept!

In order to be effective, a rejection must be communicated to the offeror. But an offeree need not use the word "reject" to reject an offer. An offeree can communicate her rejection to the offeror:

- (1) by words (oral or written), such as when an offeree tells the offeror "no thank you" in response to an offer; or
- (2) by conduct which clearly shows that the offeree has decided not to accept that offer, such as when the offeree tears up the offer in front of the offeror, or sends it back to the offeror unsigned.

CASE STUDY 56

FACTS Chhom offered to sell ten rubies to Vanna for \$2,000, and said: "Special for you, only \$2,000. Final offer! No further negotiation!" Vanna really wanted the rubies, and she thought that she could bargain with Chhom even though he had said "final offer." So Vanna responded, "Oh Chhom! Your stones are much too expensive for me! There is no way that I can accept and pay you \$2,000 for them! Sorry!"

Vanna then waited for a reaction from Chhom. But she was surprised when he said, "Well, that's unlucky for you!" and walked away. Vanna ran after him, saying, "No, no, forget what I just said. I will accept your offer at \$2,000."

QUESTION OF LAW Did Vanna's attempted acceptance create a contract with Chhom which now requires him to sell the rubies to her for \$2,000?

DECISION No. Vanna could not accept Chhom's offer because she had already terminated the offer by rejecting it.

A contract is created when the offeree properly accepts a valid offer. But if the offeree rejects the offer, she terminates that offer. So after that, there is nothing for the offeree to accept!

In this case, Vanna tried to accept Chhom's offer to sell her some rubies. Unfortunately, she had already rejected the offer when she tried to do that. This is because she said that there was "no way" she could accept and pay the price Chhom asked. This terminated Chhom's offer. So after that, there was nothing left for Vanna to accept. No offer (anymore) = no contract.

As discussed above in Section 2.4a, words or conduct are also the two principal ways in which an offeror can revoke her offer. In fact, rejections by offerees are similar in many ways to revocations by offerors. The following illustration shows some of the most important similarities between them.

Illustration: Comparison of the General Rules about Revocations and Rejections of Offers

<u>QUESTION</u>	<u>REVOCATION</u>	<u>REJECTION</u>
1. Who makes it?	The Offeror	The Offeree
2. How is it made?	By offeror's <u>words</u> or clear <u>conduct</u>	By offeree's <u>words</u> or clear <u>conduct</u>
3. When is it generally possible?	Any time before acceptance (common law)	Any time before acceptance
4. When is it effective?	When <u>received</u> by offeree	When <u>received</u> by offeror
5. What is the result?	Terminates the offer	Terminates the offer

As noted above, a rejection of an offer is generally not effective until the offeror receives the rejection. As with revocations, for non-immediate rejections this means the time when the rejection arrives at the offeror's address. So an offeree who sends a rejection to the offeror can change her mind if she makes a proper acceptance to the offeror before the rejection arrives.

In such cases, it can be a kind of race to see which happens first: the rejection or the acceptance. If the offeror receives the rejection before the offeree makes a proper acceptance, that rejection immediately terminates the offer--so there is no contract. But if the offeree makes a proper acceptance before the offeror receives the rejection, that acceptance immediately creates a contract, and the rejection has no effect. When an acceptance is effective--on dispatch by the offeree or on receipt by the offeror--may differ in different situations. That is discussed in more detail in Section 2.10e of this Chapter.

CASE STUDY 57

FACTS Sinarau offered to install new electric wire between Van Than's house and the electric cabin of a private company in the city for \$150. Van Than told Sinarau that he would think about it for a few days. The next morning Van Than decided not to accept Sinarau's offer. He wrote a short note to Sinarau thanking Sinarau for the offer, but explaining that he had decided against it. Van Than gave the note to one of the drivers for the company where he worked, and the driver promised Van Than that on his way home after work that afternoon he would personally deliver it to Sinarau.

However, at lunch, Van Than's friends convinced him that Sinarau's offer was actually cheap and reasonable. Van Than rushed back to the office, but he could not find the driver anywhere. So he called Sinarau on the telephone and said, "I have decided to accept your offer. Please disregard

any letter you might receive from me later today, and go ahead with your work to install the new electric line." Five minutes later, the driver arrived and gave Sinarau the rejection Van Than had written.

QUESTION OF LAW Did Van Than and Sinarau have a valid contract?

DECISION Yes. Van Than was able to accept Sinarau's offer because Sinarau had not yet received Van Than's rejection, so the offer was still open.

Rejections take effect--and terminate offers--only when they are received by the offeror, which for non-immediate rejections means when they arrive at the offeror's address. In this case, even though Van Than had decided to reject Sinarau's offer to install the electric wire--and even though Van Than had actually sent his rejection letter with the driver--Van Than had not yet terminated Sinarau's offer when he accepted. This is because Van Than made his acceptance to Sinarau before his driver delivered the rejection to Sinarau. If an offeree's proper acceptance precedes the arrival of the offeree's rejection, the result is a contract between the parties. That is what occurred in this case. So Van Than and Sinarau had a valid contract.

2.5b The Offeree Terminates the Offer If She Makes a Counter-Offer

An offeree can also terminate an offer where she makes a counter-offer.

***** DEFINITION:** A **counter-offer** is an offer that the original offeree makes back to the original offeror, in response to the original offer.

As Section 2.5a explained, when an offeree responds negatively to an offer--rejecting it--that response terminates the offer. Often, such rejections also end the involvement of the parties with each other in that potential transaction.

But sometimes offerees say "no" only to certain aspects of the offer, in the hope that the offeror might agree to some change or changes. That is, the offeree may respond to an offer with interest, but with some different ideas about what she wants from the offeror. The offeree here is basically making a new offer back to the original offeror. This kind of response is a "counter-offer."

Sometimes counter-offers can actually look like acceptances. That might occur where the offeree appears to say "yes" to the original offer, but actually includes terms in her response that differ from those in the offer.

***** CASE STUDY 58**

FACTS Pokul offers to hire Chieng to be an accountant for a salary of \$400 per month. Chieng says he agrees to work for Pokul for \$500 per month.

QUESTION OF LAW What effect does Chieng's response have on Pokul's offer?

DECISION Chieng's response terminates Pokul's offer, because it is a counter-offer.

When offerees respond to offers with interest but include different terms in their response, that is generally a counter-offer which terminates the original offer. In this case, Chieng made a response to Pokul's offer of an accountant job that showed he was interested, but that differed in an important way from the offer. Specifically, Chieng indicated that he was interested in working as Pokul's accountant, but that he wanted more than the \$400 salary that Pokul had offered him in the original offer. Chieng's response included a salary of \$500 per month.

When Chieng responded to Pokul with a higher salary (\$500), he did two things. First, Chieng terminated Pokul's offer of \$400 per month. Second, he gave Pokul a new offer to consider. So Chieng himself became the new offeror! Now it is up to the new offeree (Pokul) to either accept or reject Chieng's counter-offer.

Obviously, counter-offers differ from acceptances. In Case Study 58, Chieng said that he "agreed" to work for \$500 per month. But Pokul's offer had set the salary at only \$400 per month. Chieng clearly does not "agree" to this lower salary. So his response is not an acceptance, but a counter-offer. It cannot be a proper acceptance because it requires Pokul's consent to different terms--it is not identical to the offer. This will be discussed in more detail in Section 2.10c of this Chapter, which explains that offeree response must generally be identical to offers in order to be proper acceptances.

In addition, while counter-offers are similar to rejections, they are also different. Specifically, counter-offers are similar to rejections because counter-offers terminate offers in the same way that outright rejections terminate offers. However, counter-offers differ from rejections because they are more than just a refusal of the offer. In fact, a counter-offer is actually a new offer, which the offeree makes back to the offeror! As a result, the original offeror can then decide if she wants to accept that counter-offer (and create a contract) or reject it.

The following chart compares acceptances, counter-offers, and rejections.



Illustration: Acceptance, Counter-Offer and Rejection**OFFEROR****OFFEREE****Makes Offer to
the Offeree:****Responds to the
Offeror with:****RESULT:****1. ACCEPTANCE****CONTRACT**based on the offer
of the offeror**--or--****2. COUNTER-OFFER****NO Contract Yet;
Original Offer ENDED:
Counter-Offer OPEN**
for original offeror to
accept if she wishes.**--or--****3. REJECTION****NO Contract;
NO Offer Left Open**

As illustrated above, when an offeree makes a counter-offer, she gives the original offeror the power to create a contract just by accepting the counter-offer! In such situations, the parties actually change roles:

- the original offeree becomes the new offeror;
- AND** • the original offeror becomes the new offeree, gaining the power to either accept or reject the counter-offer.

**********CASE STUDY 59*****FACTS**

Lundi wanted to lend Mardi money that Mardi needed in order to buy some land. So Lundi wrote and delivered a letter to Mardi which said: "My offer to you is as follows: a loan of \$2,000, at an annual interest rate of 12%, to be repaid in monthly installments of \$150, with the first payment due one month from the date of our agreement."

Mardi was happy about the offer, but he wanted to pay a lower interest rate. He quickly wrote Lundi a note that said, "Thanks for your offer, Lundi! I accept all of your terms, but I will only pay you 10% interest." Lundi knew that the basic interest rate which most other lenders were receiving on similar loans was only 8.5%, so Lundi immediately wrote "Okay" on Mardi's note and signed his name, and delivered the note to Mardi.

Everyone was smiling until two days later, when Mardi realized that he would have to pay 1.5% more interest than most other borrowers. Mardi called Lundi back to demand the 8.5% rate for his loan, but Lundi refused. Lundi said they had already made a loan contract at 10%. But Mardi insists that he never accepted Lundi's offer of the loan, so Mardi has no obligation to Lundi.

QUESTION OF LAW Did Lundi and Mardi have a contract in this case?

DECISION Yes. Lundi and Mardi had a contract because Lundi accepted Mardi's counter-offer for the loan at 10% interest.

Counter-offers terminate the original offer, but leave open a new offer that the original offeror may choose to accept. In this case, Lundi made an offer for a loan contract to Mardi. Mardi is correct when he says that he did not accept that offer. In fact, although Mardi responded positively to the idea and most of the terms of Lundi's offer, Mardi expressed a different idea about a material term in the offer: the interest rate. Such a response is a counter-offer, which terminates the original offer.

But responses like Mardi's do more than just terminate the original offer: they are counter-offers that replace the original offer, in the opposite direction. Mardi's response is a counter-offer back to the original offeror Lundi, because it shows a present intent to make a loan contract at 10%. So now it is Lundi's turn to decide if he wants to accept the counter-offer or reject it. If Lundi accepts the counter-offer, he creates a contract with Mardi.

So when Lundi wrote "okay" on Mardi's note, signed it and delivered it to Mardi, he accepted Mardi's counter-offer with the 10% interest rate. This created a contract with Mardi based on that counter-offer. Mardi must respect that contract.

***** WHY IS THIS IMPORTANT?** Why does it matter whether an offeree makes a rejection or a counter-offer in response to an offer?

Rejections and counter-offers by offerees both terminate the offer from the offeror. But rejections can have a much more final effect on negotiations than counter-offers. That is because a rejection by an offeree is a negative response that often terminates not only the offer itself, but also the communication between the parties about the offer!

By contrast, counter-offers are generally more positive responses by the offeree. They often lead to further negotiations between the parties--and even a contract.

In practice, when parties make counter-offers, they usually try to change offers in one or both of the following ways:

- (1) the offeree may try to change some term or terms the offeror included in her offer; and/or
- (2) the offeree may try to add new terms the offeror did not include in her offer.

In general, these kinds of changes cannot create a proper acceptance.

In fact, as discussed in Section 2.10c of this Chapter, free market jurisdictions generally require proper acceptances to be identical to--or "mirror images" of--the offer. That is, in order for the offeree to immediately make a contract with the offeror based on the original offer, the offeree's response to the offeror must (if it discusses contract terms) look exactly like the offer--like a reflection in the mirror! That means no changes and no new terms at all. This does not mean the contract terms must be stated in reverse order, or that numbers become reversed, as they would in a real mirror (for example, "\$18" does not become "\$81"). It means only that when an offeree responds to an offer with any different or new terms, there is no proper acceptance and no valid contract. The offeree generally must accept the offer as it is.

This "mirror image" rule generally applies to all kinds of contracts except sale of goods contracts in some jurisdictions. Commercial laws in many jurisdictions (including the Uniform Commercial Code in the United States) say that in situations involving the sale of goods, the acceptance does not have to be totally identical to the offer in order to be proper, as long as it is a definite expression of acceptance. The rules governing this situation can be complex. They are discussed in Section 2.10c of this Chapter.

***** WHY IS THIS IMPORTANT?** Why is an offeree response that changes or adds to the offer generally a counter-offer which terminates the original offer, rather than a proper acceptance?

When the offeror makes an offer, her goal--and reasonable expectation--is to create a contract based on the offer she made. The offeror may generally change her ideas about the potential contract later, either because the offeror simply makes that decision, or because the offeree asks for the change. But it is generally up to the offeror alone to decide if, when, and how to make such a change. So an offeree cannot generally create a contract just by accepting an offer that the offeree changed without the offeror's consent! An offeree has the power to create a contract based on the offer the offeror made. But the offeree generally cannot create a contract based on anything else.

Counter-offers (like rejections) are generally effective only when the offeror receives them. So an offeror's offer terminates when the offeror receives a counter-offer from the offeree. It is sometimes possible under this "effective on receipt" rule for an offeree to create a contract by accepting

an offer after the offeree has already sent a counter-offer to the offeror. However, this can happen only in circumstances (such as in Case Study 57) where the offeree makes a proper acceptance of the offer before the offeror receives the counter-offer.

2.5c Potential Offeree Responses That Are neither Rejections nor Counter-Offers

Not every response by an offeree to an offer is a rejection or a counter-offer. In fact, many responses which offerees make are neither rejections nor counter-offers. Specifically, an offeree is not making a rejection or a counter-offer when she:

- (1) just makes an inquiry about the offer, by asking a question about its terms, without indicating a rejection or counter-offer;
- (2) properly accepts but complains about the offer, which may be called a "grumbling acceptance," but which still forms a contract because it still expresses agreement;

OR (3) simply accepts the offer.

So there are at least five different types of responses an offeree may make to an offer: a rejection, a counter-offer, an inquiry, a "grumbling acceptance," and an acceptance. Case Study 60 illustrates these five possibilities.



CASE STUDY 60

PRELIMINARY FACTS The Khmae Boon Rung Company ("KBR") offers to pay the Painting Partnership \$500 per unit to paint the 60 units in KBR's new office and residential complex, with \$100 per unit in advance, the balance on completion, and the work to commence that week. When the Painting Partnership meets to discuss the offer, the partners consider the possibility of each of the following potential responses to KBR's offer:

<u>FINAL FACTS-OPTIONS</u>	<u>QUESTION OF LAW</u>	<u>DECISION</u>
Actual Partnership (Offeree) Response	Type of Response	Result
1. "No thank you, we are too busy right now."	= Rejection.	NO acceptance, NO contract, Offer from KBR terminated.
2. "Yes, but we want \$250 per unit in advance."	= Counter-offer.	NO acceptance, NO contract, Original offer from KBR terminated and replaced by counter-offer from Partnership back to KBR.
3. "Sounds interesting, but can you raise the payment?"	= Inquiry.	NO acceptance, NO contract, but original offer (from KBR) NOT terminated.
4. "OK, we'll do it, but that's a lot less than we usually get."	= "Grumbling Acceptance."	CONTRACT.
5. "OK, we accept."	= Acceptance.	CONTRACT.

*** **WHY IS THIS IMPORTANT?** Why is it essential to distinguish among all the potential responses to an offer?

It is important to be able to tell the difference between all these potential responses because, as illustrated in Case Study 60, the different responses have such different effects. Offerees who make rejections or counter-offers no longer have any offer to consider, because they have terminated the offer made to them. However, when the offeree's response is neither a rejection nor a counter-offer, she does not terminate the offer, and so does not lose the power to create a contract just by accepting that offer. So when offerees just ask questions or make remarks, the offerees are not ending the offer. The offer stays open.

This is very important, because offerees often ask questions and make remarks when they consider offers. If each such question or remark had the same offer-killing, power-ending effect as a rejection or counter-offer, then there would be far less negotiation between parties--and perhaps

fewer contracts, and less efficient economic activity as well. Here again, contract law tries to accommodate how parties actually negotiate contracts.

2.6 A Specific Event or Circumstance Can Terminate the Offer

Even if neither the offeror nor the offeree terminates an offer, it is possible for some other specific event or circumstance to terminate it. This Section will discuss some of these events and circumstances.

In many jurisdictions, some important events which frequently terminate offers are:

- (1) a lapse (passage) of a specified or reasonable amount of time after the offeror made the offer (Section 2.6a);
 - (2) the occurrence of a condition specified in the offer (Section 2.6b);
 - (3) the death or incompetence of a party to the contract or someone essential to the performance of the contract (Section 2.6c);
 - (4) destruction of the subject matter of the contract (Section 2.6d);
- and (5) a change in the law that makes the offer illegal (Section 2.6e).

2.6a A Lapse Can Terminate the Offer

Sometimes offers end simply because of the passage of time, under the doctrine of "lapse."

***** DEFINITION:** A **lapse** is a termination of some right or power because of a failure to exercise that right or power within some period of time, or because some particular thing fails to happen.

Time will eventually terminate an offer if it has not already been accepted or terminated in some other way. Specifically, an offer will lapse and terminate:

- (1) according to the specific time stated in the offer or in any option contract related to that offer;
- OR (2) if the offer or option does not state a specific time, after a reasonable time has passed since the offeror communicated the offer to the offeree.

These possibilities are discussed below.

(1) An Offer Terminates When It or a Related Option Contract Expressly Says It Will Expire

The offeror can control when her offer will lapse by specifying a time in the offer itself, or in a related option contract. For example, an offer may say, "This offer is good for a period of 10 days, beginning November 15." Or it may say, "You must accept this offer no later than December 1." In such cases, the offer terminates automatically at the end of the stated time. The offeror need not do anything else to terminate the offer. The offer expires by itself.

CASE STUDY 61

FACTS Kanitha wanted to buy some land from the Delta Development Company. She sent a letter to Delta in which she offered \$40,000 for the land. But Kanitha specified that Delta would have to accept within 15 days of the date on her letter.

On the 16th day after the date on the letter, Delta faxed Kanitha to tell her that it accepted her offer to buy the land. Kanitha replied that it was too late, and she refused to buy the land from Delta. Now Delta is asking the court to order Kanitha to pay what she had offered to pay for the land.

QUESTION OF LAW Did Delta and Kanitha have a contract here?

DECISION No. Delta and Kanitha did not have a contract, because Kanitha's offer to Delta had already lapsed before Delta tried to accept it.

Offers lapse and terminate at the time the offer itself specifies. In this case, Kanitha's offer to buy Delta's land had specifically stated that it was open for 15 days from the date on her letter. The words "within 15 days" mean 15 days maximum--not 16 days, and not even 15 and 1/2 days! So at the end of the 15 days, Kanitha's offer lapsed, and Delta's attempted acceptance by fax on the 16th day did not create a contract. No offer (anymore) = no acceptance = no contract.

Although many offers clearly state when they will expire--as in Case Study 61--some offers use more general terms. For example, many offers include phrases such as: "For immediate acceptance," or "Offer open for a limited time only." Unfortunately, such language often causes problems, not only for offerees who want to know when an offer will expire, but also for courts which may need to decide whether an offeree accepted an offer before it lapsed. If the parties are not clear about this, then the court may have to refer to the other rules about lapse discussed later in this Section. In that situation, general terms about when an offer lapses may be only one factor in a court's analysis of how much time is a "reasonable" time for the offer to remain open before it lapses.

In fact, such general terms can be a problem even when an offer seems clear about when it ends. For example, an offer which says "This offer good for 10 days" may seem clear about when it terminates. But it is really not so clear unless the offeror also specifies exactly when the "10 days" starts. It may start on a particular date which the offer itself specifies, on the date the offeror sends the offer, or on the date the offeree receives it. Courts usually assume that the time starts from when the offer is received by the offeree, but this is not always clear, especially if there is some delay in delivery of the offer.

So careful offerors should be as specific as possible when they state that their offers will end at a particular time. For example, in Case Study 61, Kanitha was careful to state that her offer was open for 15 days starting from the date on her letter.

(2) Where neither the Offer nor a Related Option States a Time for Expiration, the Offer Will Lapse After a Reasonable Time

If neither the offer nor a related option states a specific time when the offer will expire, and no other event ends the offer, then the offer will end a reasonable time after the offeror communicated the offer to the offeree. This rule may seem straightforward, but it is not always easy to say how much time is reasonable in a particular case.

In order to determine how much time is reasonable, courts look at the offer itself and the surrounding circumstances. In particular, many jurisdictions say the offer will terminate after a reasonable time based on:

- (1) the subject matter of the offer,
- AND** (2) the circumstances surrounding the offer.

Of course, many civil law jurisdictions say not only that offers do not generally lapse for a reasonable time, but that offerors cannot generally revoke them for a reasonable time, unless the offer permits that.

Briefly, if the subject matter of an offer is some kind of perishable goods (such as fruit), or an item whose price can change quickly (such as currency), then unless the offeror indicates otherwise, the offer will usually have a very short life. This is because for such offers, it is reasonable to assume that the offeror made her offer only for a limited period. Offers involving other types of subject matters that are more durable or have more stable prices (such as land) will probably last longer.

The circumstances surrounding an offer are also considered. Relevant circumstances include: the wording of the offer; the manner in which it was made; the general market conditions at the time; other economic forces; and prior dealings between the parties.

Both of these factors are explained in more detail below.

(1) Subject Matter -- The subject matter of an offer can have an important effect on how long the offer lasts. Consider the following Case Study.

CASE STUDY 62

FACTS One Monday morning, Suthirak, the manager of the electric company, received a fax from his oil supplier. The supplier offered him 1,000 barrels of oil at \$48 per barrel, which was the current price in a very busy, rapidly changing market. Suthirak immediately sent a brief fax back to the supplier, saying that he would think about the offer.

On Tuesday, the price of oil rose to \$52 per barrel. Late Tuesday afternoon, Suthirak sent the supplier a fax accepting the supplier's offer at \$48 per barrel. The fax arrived at the supplier's office after the office had already closed for the day.

By the time the supplier saw Suthirak's acceptance fax on Wednesday morning, the price of oil had risen to \$56 per barrel. The supplier called Suthirak to say that his acceptance had arrived after the offer had already expired. Suthirak argued that he had accepted the very next day after the offer was made. He claimed that his acceptance created a binding contract which required the supplier to provide the 1,000 barrels at \$48 per barrel, as the supplier had offered to do. Now Suthirak is asking a court to order the supplier to either obey the contract or pay compensation to Suthirak.

QUESTION OF LAW Had the supplier's offer already expired before Suthirak accepted it?

DECISION Probably. The supplier's offer for the sale of oil had probably expired because offers for the sale of goods whose prices change so rapidly generally lapse very quickly.

If an offer itself does not indicate a specific time for expiration, and the offer does not end in any other way, that offer will expire after a reasonable time. In many jurisdictions, what is "reasonable" depends on both the subject matter and the circumstances of the offer.

In this case, the subject matter of the offer was oil, a type of goods whose price can rise and fall dramatically in a free market. Both parties here understood this. Ordinarily, offerors do not keep their offers for such goods open for a long time. In fact, such offers normally expire very soon if the offeree does not accept immediately. But it is not necessary for such an offeror to actually say that her offer will expire so quickly. So it does not matter that the oil supplier here did not say when his offer would expire. And of course,

Suthirak's fax to the supplier which said that he "would think about" the supplier's offer had no effect on the offer.

The circumstances of the case also indicate that the supplier's offer was to be open only for an very short time. First, the fact that the supplier chose to send a fax to Suthirak--a very fast way to communicate--suggests that the supplier wanted to make his offer and receive Suthirak's acceptance fast. Second, the price of the oil in fact did change between the time that the supplier made his offer to Suthirak (on Monday morning) and the time that Suthirak finally responded to the offer (after the close of business on Tuesday afternoon). As with the subject matter analysis above, it would be unreasonable to say that the supplier's offer stayed open that entire time.

So in this case, the offer had probably lapsed before Suthirak tried to accept it. If the supplier had wanted his offer to stay open for more than a very short time, he should have said so clearly. And if Suthirak had really wanted to create a contract at the original price, he should have accepted the offer much sooner--in fact, he should have accepted immediately. But these things did not happen. So the oil supplier's offer probably expired after a period of time that is reasonable for offers like this to expire--and that was long before Suthirak finally tried to accept. No offer = no acceptance = no contract.

Although this subject matter rule can be important in all kinds of contracts, it is very important in the trade and finance activities of businesses and governments. There are thousands of transactions every day, together worth billions of dollars, in which the value of the subject matter can rapidly change, and where the offeror normally does not indicate when her offer will expire. Such transactions include the sale of:

- stocks and bonds;
- commodities, such as oil; gold and other precious metals; rice, wheat, cotton, rubber and other agricultural products; and
- currencies (the exchange of the money of one country for the money of another country, such as riels for baht).

The above rule about how the subject matter affects the life of an offer protects and encourages offerors. That promotes the important trade and finance activities in which they are involved. Specifically, even if an offeror selling or buying such items did not specify when the offer would expire, she almost certainly did not intend the offer to be open forever! And if such an offer is not open forever, then who decides when it does expire? The offeror failed to say, and it would clearly be unjust to let the offeree decide when the offeror's offer would expire. So the law must decide when such offers expire. Of course, the law cannot anticipate every situation, so it simply says offers expire after a reasonable time. And it is reasonable for offers with subject matters like these to be open only a short time.

In addition, when an offeror makes an offer, she gives a great power to the offeree: the power to make a contract by properly accepting the offer. So when an offer relates to goods whose value rapidly changes, there can be great risk for the offeror while her offer is open. Specifically, in an offer to sell at a certain price (as in Case Study 62), the offeror risks a loss if the general market price goes up but the offeree is still able to accept the offer at the earlier lower price. In an offer to buy at a specific price, the offeror risks a loss if the general market price goes down but the offeree is still able to accept the offer at the earlier higher price. But there is normally no risk at all for the offeree, because she is free to accept the offer or not!

Of course, if the subject matter of an offer with no specific expiration time is more durable or has a more stable value, the reasonable time for the offer to be open will be longer. In fact, the length of time that is "reasonable" for an offer to remain open generally increases with the stability of its subject matter. For example, if an offeror of land or other interests in real property did not say when her offer would expire, a reasonable time for the offer to remain open would probably be at least several days, and possibly much more.

(2) Circumstances -- In order to determine what is a "reasonable time" for an offer to expire when the offer itself does not clearly say, it is also important to consider the circumstances surrounding the offer. This requires a close analysis of the facts in the case, because each case is different. Among the circumstances which often affect how much time is "reasonable" are:

(a) The words the offeror used when she made the offer. Even where an offer does not say specifically when it will expire, the offer may contain some indication of how much time it is open. For example, words like "First come, first served!" and "Offer ends soon!" obviously indicate a short life for the offer. This was already noted above, in the Section about what happens when an offer uses general terms to describe when it expires.

(b) The manner in which the offeror made the offer. For example, in Case Study 62, the supplier chose to make his offer by using one of the fastest ways available for him to communicate in writing to a distant person: a fax. Other offerors might use a telephone, or make their offers face-to-face. Sometimes (though not always) such a manner suggests that it is reasonable to expect that offer will be open only a short time.

(c) The general market or business conditions at the time the offeror made the offer. In Case Study 62, the market price for oil rose nearly 10% within a day after the supplier made his offer to Suthirak. Although such price changes may be normal for goods such as oil, similar circumstances might also occur with other types of goods whose value does not normally change so much.

For example, suppose there is a sudden shortage of clean water or candles, and the market price for such goods (which usually does not

change much) rises rapidly. In that situation, it is reasonable to expect offers for the sale of such items to be open only a short time, unless the offeror says otherwise.

(d) Other economic forces affecting the offer, such as supply and demand pressures and competition. Unless the offeror indicates otherwise, an offer for the sale of goods of which there is a low supply and for which there is a high demand (like a valuable painting or an ancient statue) will probably not last long. The same is true of offers relating to things for which there is a lot of competition, such as a good job or a desirable piece of land.

(e) Prior business dealings between the parties. As with many other areas of contract law, it is important to consider any transactions the parties have already had with each other. These might suggest how long an offer is open, even if the offer does not say specifically.

(3) Limits on the "Reasonable Time" Rule -- The "reasonable time" rule explained above has two major limits. The first limit is that the rule applies only in cases where the offer itself did not clearly specify its expiration time. For example, offers of goods whose value changes rapidly might specify a long period of time before expiration. And offers as to items with a stable value might specify only a short period before expiration. Courts enforce such statements. So if the offeror specifies an expiration time that turns out to be too long, and as a result the offeror ends up with a contract that is unfavorable to her, she will not be protected by the "reasonable time" rule.

The second limit is the element of "reasonableness." The rule says "reasonable" time; it does not say "best" or "ideal" time. The rule only protects the offeror from the offeree's attempt to accept the offer at a later time than is "reasonable." This gives a lot of protection to offerors. But it does not protect them from every risk, or prevent every acceptance or contract that an offeror no longer likes. It will not protect offerors from their own mistakes, or from a bad deal or bad luck. If the offeree properly accepts an offer within a reasonable time, then even though the goods' value or the offeror's plans may have changed during that period, the offeree creates a legally binding contract with the offeror. The offeror must obey that contract.

***** WHY IS THIS IMPORTANT?** Why does the law impose these two limits on the "reasonable time" rule?

One of the most important principles in free market contract law is the freedom of contract. That means that the parties are generally free to make their contracts as they choose. But freedom carries both opportunities and risks! True freedom of contract means not only the freedom to make a contract that turns out to be profitable, but also the freedom to make a contract that may not turn out to be so profitable! Courts generally enforce contracts without regard to whether it was wise for a party to make them or not.

And each contract starts with an offer, so freedom of contract also includes the freedom to make offers that may turn out to be unwise.

In free market jurisdictions, the role of the law and the job of courts is not to rewrite offers. Nor is it to revise contracts so that every contract is good, fair or reasonable for every party. Of course, if courts did this, it might seem to achieve greater "fairness" in particular cases. But the idea of rules like these two limits is that if the courts rewrote contracts in that way, courts would in fact be interfering in contracts--and restricting or destroying the "freedom of contract" of the parties. Then parties could not rely on the contracts they made! This would increase risk and could discourage economic activity. Parties might even be afraid to make profitable contracts, for fear that the courts might rewrite them. Or they might not bother to make good contracts, since they could always ask the courts to do it for them. The courts themselves might be overwhelmed by parties trying to get their contracts rewritten in this way. The result might be a less productive economy.

So in order to promote freedom of contract, free market jurisdictions generally try only to make sure that the process for making and enforcing contracts is basically fair for all the parties. So if an offeror uses her freedom of contract to make an offer which includes a specific expiration date, the law will ordinarily respect that particular date--whether it seems reasonable or unreasonable. If an offeror does not clearly state an expiration date, only then will the law and the courts apply the "reasonable time" rule.

2.6b The Occurrence of a Condition Which the Offer Specified May Terminate the Offer

Sometimes offerors say that their offers terminate if a certain condition occurs.

***** DEFINITION:** In contract law, a **condition** is a particular future event which is not certain to occur, but whose occurrence will affect the formation or performance of a contract.

In general, a condition can be summarized in two words: if-then. For example, if it rains, then rice can grow. As with other conditions, it may or may not rain. If it does rain--if the condition occurs--then rice can grow. But if it does not rain--if the condition does not occur--then rice cannot grow.



Illustration: How Conditions Work in General

X happens
(the condition),



Y will happen
(the consequence).

This also means that:

If X does not happen, **then** Y will not happen. That is, the occurrence of Y actually depends on the occurrence of X.

In contract law, conditions are generally particular events whose occurrence will have some effect on the formation or performance of a contract. The role of conditions with regard to contract performance was discussed in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4h, and it will be discussed in detail in Chapter 9 ("Performance and Discharge of Duties"). But for now, this text will focus on the role of conditions in affecting the formation of contracts--and specifically in affecting whether an offer ends.

Sometimes offers say that they will terminate if a certain event occurs. In other words, if some event occurs, then the offer ends. The occurrence of such a condition will terminate an offer if:

- (1) the offeror communicated the condition in the offer; and
- (2) that condition occurs before the offeree properly accepts the offer.

The reason for this rule is that the offeror is generally the master of her offer, and the law generally wants her to be able to control when her own offer may be accepted. The following Case Study demonstrates the ability of such a condition to terminate an offer.

CASE STUDY 63

FACTS Rathanak, an engineer who works full time for a big construction company in Phnom Penh, says to a shop owner in the city: "I offer to fix the roof on your shop for \$900. My offer will terminate exactly three weeks from today. But if my boss tells me I have to leave Kandal Province to work on a job somewhere else before three weeks from today, the offer expires at the time my boss tells me."

The shop owner decides to accept the offer. But he does not say "OK" to Rathanak until 8 days later. When the shop owner tells Rathanak, Rathanak replies, "Sorry! My boss told me 3 days ago that I have to go up to Battambang to work on a project there." Now the shop owner asks the court to order Rathanak to either fix his roof for \$900 or provide some other remedy.

QUESTION OF LAW Did the shop owner's attempted acceptance create a contract with Rathanak?

DECISION No. The shop owner could not create a contract because the condition specified in Rathanak's offer had already terminated the offer.

Conditions can terminate offers. In this case, Rathanak made an offer to fix the shop owner's roof. But his offer contained a condition. Specifically, Rathanak said his offer would stay open for three weeks unless Rathanak's boss told him before the end of three weeks that his job required him to leave the province. If that condition occurred, then the offer would expire at that time. So the shop owner had three weeks to accept Rathanak's offer unless Rathanak's boss told Rathanak that he had to leave before that time.

Unfortunately for the shop owner, Rathanak's boss did tell him, before three weeks had passed, that Rathanak had to go work in Battambang. And under Rathanak's offer, that event was a condition which automatically terminated Rathanak's offer. It did not matter whether the shop owner found out about the termination or not. No offer (anymore) = no contract.

Illustration: How a Condition Terminates an Offer

When an offer says that it will terminate if a specific condition occurs, the result is that:



The termination of the offer in such cases is automatic. The offeror need not do anything. She need not revoke the offer, or even tell the offeree about the termination. In fact, the offeree need not find out about the termination at all! And the occurrence of a condition will terminate the offer any time before the offeree has properly accepted the offer. So in Case Study 63, Rathanak's offer could have expired two days or even one minute after he made the offer, if that was when his boss told him that his job required him to leave the province. But if the shop owner had properly accepted the offer before Rathanak's boss told Rathanak, then a contract would have formed.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4h contains a concise discussion of how conditions affect contract performance; and Chapter 9 ("Performance and Discharge of Duties"), contains a detailed discussion of how conditions affect contract performance.

2.6c The Death or Adjudicated Incompetence of the Offeror, the Offeree, or Any Other Person Necessary to Perform the Proposed Contract Can Terminate the Offer

In many jurisdictions, if an offeree has not yet properly accepted an offer, the offer will terminate as to that offeree at the time that the offeror,

the offeree, or any other person essential to the performance of the contract dies or is declared incompetent by a court. Many jurisdictions say someone who is dead or judicially declared incompetent cannot make a real agreement about an offer. Of course, it might appear that the real problem, at least with an adjudicated incompetent person, would be a lack of capacity. And many courts view other persons essential to the performance of the contract in a similar way: their death or adjudicated incompetence generally means no real agreement can occur. It might appear that the real problem there would be mistake or impracticability, rather than a lack of real agreement. But in any event, many jurisdictions say there can be no real agreement in these situations, so the offer terminates.

Of course, where there are multiple offerees (as in public offers), and one offeree dies or is adjudicated incompetent, that event will not terminate the offer as to the other offerees, unless the affected offeree is essential to the proposed contract between the offeror and other offerees. For example, if an offeree named Kolab dies, the offer will immediately terminate as to Kolab, but not as to an offeree named Keary, unless Kolab was somehow essential to the proposed contract between the offeror and Keary.

It is also important to note that, as explained in Chapter 4 ("Capacity"), Section 4.5, a party who is incompetent but has not been declared incompetent by a court can generally make a voidable contract. So it would seem that this rule about the termination of offers would not generally apply to offers involving such persons, though some legal authority says the offer still terminates if the offeror becomes incompetent and the offeree knows about it. The reason for this general distinction between adjudicated and unadjudicated incompetent persons is that many jurisdictions say a judicially declared incompetent person no longer has any legal capacity to make a contract. In fact, the person's legal capacity is transferred to someone else: a guardian.

Where a person who is essential to a contract dies or is judicially declared incompetent after an offer is made but before acceptance, many jurisdictions say the offer terminates automatically. So as with offers that terminate when a specified condition occurs, no special act or communication is needed to terminate the offer. In fact, it is generally not even necessary for one party to know about the other party's death or incompetence!

At a minimum, in order for an offer to be properly accepted, many jurisdictions say the persons necessary to the proposed contract must be alive and not judicially declared incompetent at the moment the offeree accepts the offer. Otherwise, there is no offer to accept--because it terminated--and as a result, there is no contract.

CASE STUDY 64

FACTS Boran offered in writing to sell 50,000 bricks to Huot for \$10,000. But on the way home from work that afternoon, Boran died in a car accident.

A few days later, Huot, who was not aware of Boran's death, sent a letter addressed to Boran in which he accepted Boran's offer.

When Huot found out what had happened to Boran, he called Boran's house to express his condolences. But Huot also wanted to make sure that Boran's family had received his acceptance of Boran's offer and would respect the contract which Huot thought resulted. Boran's family thanked Huot for his concern about Boran, but politely refused to recognize any contract with Huot based on Boran's offer.

QUESTION OF LAW Did Boran's offer to Huot survive after Boran's death so that Huot could make a contract by accepting it?

DECISION No. Boran's offer terminated at the time Boran died, so Huot could no longer accept it.

Many jurisdictions say offers terminate when the offeror dies. In this case, the offeror Boran died before the offeree Huot tried to accept Boran's offer for the sale of bricks. So there was no offer at the time Huot sent his acceptance to the factory. No offer (anymore) = no contract.

This rule generally terminates offers not only when a party to a potential contract dies or is judicially declared incompetent, but also when such events affect any other person who is essential to the performance of the proposed contract.

CASE STUDY 65

FACTS Nath was the most famous painter in the country. Nath's brother wrote and mailed a letter to Damnang. In the letter, Nath's brother offered to sell Damnang a new, special painting by Nath of Angkor Wat for only \$200, and to deliver the painting to Damnang as soon as Nath finished it.

Damnang received the letter two days later, and immediately wrote to Nath's brother to accept the offer. But as Damnang was driving to the post office to mail his acceptance to Nath's brother, Damnang saw a funeral procession coming towards him, on its way to the wat, carrying a big picture of....Nath, and the body of the dead Nath behind it!

Damnang realized that Nath's paintings would now become even more valuable than before. So he rushed up to Nath's brother, gave him the letter and said, "I am sorry about your brother, but I am happy about your offer. I accept!" Damnang knew that Nath could not possibly have finished the new painting for him. But he also knew that Nath had given his brother several good paintings of Angkor Wat before he died. Damnang insists that, because he properly accepted the offer from Nath's brother, he now has a right to receive one of the old paintings from Nath's brother, in order to satisfy the brother's obligation under the contract.

QUESTION OF LAW Did Damnang create a contract with Nath's brother when he accepted the brother's offer in this way?

DECISION No. The offer which Nath's brother made terminated when Nath died, so Damnang can no longer accept it.

Many jurisdictions say an offer automatically terminates if a person who is essential to the performance of the potential contract dies before the offer is accepted. In this case, Nath's brother offered to sell Damnang a painting to be painted by Nath. Nath was the key to the performance of this proposed contract. Obviously only Nath could paint the new "painting by Nath!" When Nath died before Damnang accepted, the offer died too. So there was no offer left for Damnang to accept. No offer (anymore) = no contract.

This rule applies only to offers which the offerees have not yet properly accepted, like all the other rules discussed in this Section on termination of offers. But if the offeree properly accepts an offer and a contract is formed, and later a party or person necessary to the performance of the contract dies or is adjudicated incompetent, then other rules apply. There the problem is what happens to an existing contract. In that case, conditions may be excused and contract duties may be discharged under doctrines such as impossibility and impracticability. Such situations are discussed more fully in later Chapters.

***** ADDITIONAL REFERENCE:** Chapter 4 ("Capacity"), Section 4.5 discusses the ability of incompetent persons to make contracts; Chapter 7 ("Other Contract Formation Problems"), Section 7.3 discusses when agreements may be invalid because of mistake; Chapter 9 ("Performance and Discharge of Duties"), Sections 9.4j and 9.8a discuss how impossibility and impracticability of performance can affect conditions and contract duties; and Chapter 10 ("Remedies") discusses potential remedies in such situations.

2.6d Destruction of the Particular Subject Matter of the Offer Can Terminate the Offer

Many jurisdictions say an offer terminates if its particular subject matter is destroyed before the offeree properly accepts the offer. Of course, as with the rules about the death or incompetence of persons needed to perform a proposed contract explained in Section 2.6c, it might seem that the real problem here would be mistake or impracticability, rather than a lack of real agreement.

In any case, this rule applies when the offer is about a specific, particular thing. An example would be an offer to sell a particular ship called the "Green Giant." This rule does not apply to an offer without such a specific subject matter, such as one for the sale of "five kilograms of rice."

CASE STUDY 66

FACTS Sastra owned the most popular restaurant in Kompong Som. This restaurant had for many years had the biggest New Year's party in all of southern Cambodia.

A Cambodian-French investor named Sok LaBete made a written offer to buy Sastra's restaurant for a high price. The offer required Sastra to give LaBete a letter of acceptance in French in Phnom Penh if Sastra wanted to accept the offer. Sastra immediately said he would probably accept the offer, but that he would not be able to write his acceptance until the 18th of April, because he did not know much French and he would not be able to find a qualified Khmer-French translator in Kompong Som until after the holiday.

Unfortunately for Sastra, a lightning storm caused a big fire on the night of April 15th, and Sastra's restaurant burned to the ground. Although Sastra was at first dismayed, he soon realized that he could completely rebuild the restaurant and still make a profit by selling it to LaBete at the price LaBete had offered. So on April 18th, Sastra hired a translator and together they wrote an acceptance letter in French. On the 19th, Sastra hired a taxi, traveled to Phnom Penh, and personally gave the letter to LaBete. But LaBete replied, "*Quoi? Non! We do not have a contract. Your restaurant is fini! It's too late, Monsieur.*"

Now Sastra asks the court to order LaBete either to pay him for the restaurant, or provide some other remedy.

QUESTION OF LAW Could Sastra accept LaBete's offer and make a contract that would obligate LaBete to buy the restaurant from Sastra?

DECISION No. LaBete's offer terminated when the restaurant was destroyed by fire, so Sastra could no longer accept it after that time.

In many jurisdictions, an offer ends at the time its particular subject matter is destroyed. In such cases, an offeree no longer has the power to make a contract with the offeror just by accepting her offer, because there is no longer an offer for that offeree to accept!

In this case, LaBete offered to buy Sastra's restaurant. The particular subject matter was Sastra's original restaurant--not just "a restaurant," or even a new or rebuilt restaurant. So while that restaurant existed, LaBete's offer to Sastra existed, and Sastra's power to make a contract with LaBete based on that offer also existed. But Sastra had not yet properly accepted LaBete's offer when its particular subject matter (the restaurant) was destroyed. In this case, lightning caused the destruction. LaBete's offer was destroyed at the same time. Of course, Sastra and LaBete are free to negotiate a new contract for the land or for a new restaurant.

***** ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems"), Section 7.3 discusses when agreements may be invalid because of mistake; Chapter 9 ("Performance and Discharge of Duties"), Sections 9.4j and 9.8a discuss how impossibility and impracticability of performance can affect conditions and contract duties; and Chapter 10 ("Remedies") discusses potential remedies in such situations.

2.6e A Change in the Law That Makes an Offer Illegal Can Terminate the Offer

Even if an offer was legal at the time the offeror made it, many jurisdictions say the offer will generally terminate if the proposed contract becomes illegal before acceptance because of a change in the law. As with the events explained in Sections 2.6c and 2.6d, it might appear that the real formation problem here is something other than real agreement--in the case of a change in the law, it might seem to be legality.

In any case, this rule means that if the performance of the proposed contract becomes illegal after the offeror makes the offer but before the offeree properly accepts it, that offer is terminated. This occurs automatically. It does not require any act or awareness of the changed law by either party.

CASE STUDY 67

FACTS On November 10, Nagalogs Inc., a private timber corporation, offered to sell to the Dee Mak Wood partners 50,000 logs which Nagalogs would cut and process in a certain nation during the first six months of the following year. But on November 30, before all the partners in Dee Mak had a chance to consider the offer, the National Assembly of that nation passed a new law. This law prohibited the export of newly cut logs beginning January 1. Nevertheless, one week after the law came into effect, Dee Mak delivered its acceptance letter to Nagalogs headquarters, with 20% of the total price of the transaction as a down payment.

QUESTION OF LAW Did Dee Mak create a contract with Nagalogs by accepting its offer?

DECISION No. Dee Mak could not properly accept Nagalogs offer because the offer had become illegal and terminated prior to the attempted acceptance.

Many jurisdictions say that offers generally terminate if they become illegal after they are made. In this case, although Nagalogs' offer to sell logs was legal on November 10 when it was made, the offer was no longer legal when Dee Mak delivered its acceptance letter to Nagalogs. In fact, Nagalogs' offer was legal only until the effective date of the law which made the object of Nagalogs' offer--the export of newly cut logs starting January 1--illegal. As soon as that happened, Nagalogs' offer terminated. So Dee Mak's ability

to accept and make a contract for the logs also terminated. No offer (anymore)
= no contract.

This rule about offers that become illegal is similar to the basic contract law rules about illegal contracts. As explained briefly in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4d, courts generally refuse to enforce contracts that are illegal. Of course, the rule discussed above seems to incorporate the separate requirement of legality into the requirement of real agreement. But whether the legality of an offer is considered to be a "legality" problem or a "real agreement" problem, the result is the same: no valid contract can generally be formed.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4d briefly discussed the important formation requirement of legality; and Chapter 5 ("Legality") discusses legality more fully.

2.7 An Acceptance Is an Offeree's Indication of Agreement with an Offer

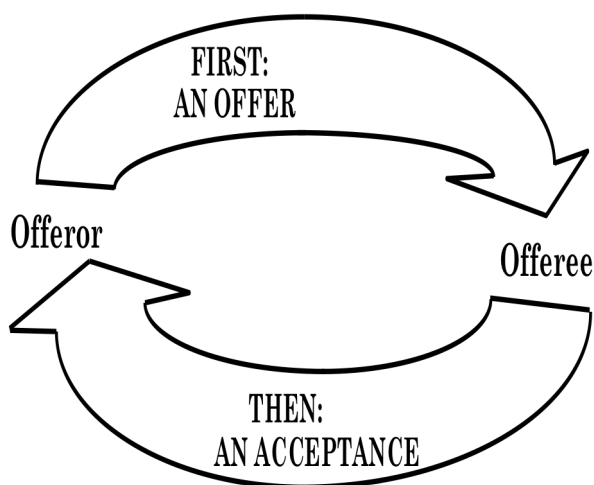
The other major element of real agreement is the acceptance.

*** **DEFINITION:** An **acceptance** is an offeree's indication of agreement with an offer.

A proper acceptance by at least one party is an essential part of every contract. As noted earlier in this Chapter, a valid offer plus a proper acceptance creates real agreement. Of course, not all attempted acceptances are proper. Only a proper acceptance creates a contract. At the moment that an offeree properly accepts a valid offer, she creates a legally binding contract with the offeror, assuming other formation requirements are met. The rest of this Chapter discusses the basic requirements for a proper acceptance to occur.

At the outset, readers might wish to review the following illustration from Section 2.1 of this Chapter.



Illustration: How Offer and Acceptance Create Real Agreement

So while the potential for a contract exists when a valid offer is made, the actual contract occurs only when there is a proper acceptance of that offer. The following chart compares offers and acceptances.

Illustration: Valid Offer vs. Proper Acceptance

QUESTION	<u>VALID OFFER</u>	<u>PROPER ACCEPTANCE</u>
1. Who makes it?	The <u>Offeror</u> makes an offer to an offeree.	The <u>Offeree</u> makes an acceptance back to the offeror.
2. Who has power to decide the form and manner?	The <u>Offeror</u> decides how to make her offer.	The <u>Offeror</u> decides how she wants the offeree to make a proper acceptance.
3. What does it do?	Gives the offeree the <u>power</u> to create a contract by properly accepting.	Actually <u>creates</u> a binding contract with the offeror.

In general, acceptances can be made expressly (using words) or impliedly (using conduct). Potential ways to accept offers include:

- (1) orally;
- (2) by a document such as a letter;
- (3) by telephone;
- (4) through special documents designed for particular transactions;
- (5) through conduct which clearly shows the offeror that the offeree has accepted the offer.

The first four possibilities above are examples of express acceptances, because the offeree is using words to make her acceptance. In fact, offerees who want to accept an offer usually respond directly to the offeror, either orally or in writing, using words such as "OK" or "I accept."

The fifth possibility on the list, however, is an implied acceptance. That can occur where the offeree's conduct (not words) demonstrates her acceptance to the offeror. In practice, parties sometimes indicate their acceptance of an offer through their actions. Some examples of this kind of acceptance follow.

- (1) An affirmative act or gesture by the offeree can be an acceptance. This might occur when the offeree nods her head in a way that shows agreement, or when she accepts payment from the offeror.
- (2) The offeree's performance of the particular act the offeror requested can be an acceptance. For example, when a customer requests a haircut and the barber cuts the customer's hair without saying anything, the barber's performance of the specific act the customer requested may be an acceptance of the customer's offer.
- (3) The offeree's use of services the offeror offered can be an acceptance. For example, when someone parks a moto in a parking lot, the moto owner's use of the parking service--even without words--can show that she accepts an obligation to pay for the parking service.
- (4) The offeree's possession or control of the offeror's property which the offeror offered can be an acceptance. For example, if an offeror who wants to sell a car lets a potential buyer (offeree) temporarily drive the car in order to decide whether to accept the offer, and the offeree keeps and drives the car a long time, the offeree's actions may indicate her acceptance of the offer.

However, there are limits on how an offeree can make a proper acceptance. Two major types of limits on how an offeree can accept are special requirements of the offeror and the law. The offeror or the law (or both) may say that if the offeree wants to make an enforceable contract based on an offer, then the offeree must make her acceptance in a specific way. In such cases, an offeree is not free to accept the offer in any way she wants!

The rest of this Chapter discusses the specific rules that govern how a proper acceptance can occur. In particular, many jurisdictions say that:

- (1) only the intended offeree can generally make a proper acceptance (Section 2.8), except that:
 - (a) a non-offeree can accept an offer made to her by mistake if she did not know and had no reason to know of the mistake (Section 2.8a); and

- (b) multiple offerees can accept an offer even if the offeror really wanted a contract with fewer of them (Section 2.8b);
- (2) unilateral contract offers can generally be accepted, in common law jurisdictions, by full performance of the requested act (Section 2.9);
- (3) bilateral contract offers can generally be accepted by the making of the return promise requested, where that promise:
 - (a) is communicated to the offeror (Section 2.10a);
 - (b) is unequivocal and unconditional (Section 2.10b);
 - (c) is identical to--a "mirror image" of--the terms of the offer (Section 2.10c); and
 - (d) is made in a proper manner, including meeting any special requirements of the offeror (Section 2.10d); and
- (4) where it is not clear whether an offer is for a bilateral or unilateral contract, it appears that most jurisdictions allow the offeree to accept either by performing the act or making the promise requested (Section 2.11).

Before readers review the ideas about acceptance presented in Sections 2.8-2.11, they might consider a few introductory thoughts about what may be the most basic part of the analysis of whether an acceptance is proper in common law jurisdictions. This is the analysis of whether the offer requests that the offeree perform an act or make a promise--whether it is an offer to form a unilateral contract or a bilateral contract.

***** WHY IS THIS IMPORTANT?** Why must parties in common law jurisdictions consider whether an offer requested an act (a unilateral contract offer) or a promise (a bilateral contract offer)?

This distinction is important for several reasons. One is that the two types of offers obviously have different basic requirements for a proper acceptance. For unilateral contracts it is the performance of an act, whereas for bilateral contracts it is the making of a promise. Offerees must know what kind of offer they have received in order to accept properly. If it is not clear, most jurisdictions basically say the offeree can accept either way, as will be discussed in Section 2.11 below.

In addition, there are more rules about how to make proper acceptances of bilateral contracts. This may be partly because such contracts are often more complex, and partly because bilateral contracts are considered to be more common. Contracts for land and other things of great value, including commercial and international contracts, are usually bilateral. Bilateral contracts generally provide more protection for offerors in business, who are usually seeking a firm commitment that the offeree will perform.

This is because the bilateral offeror receives a promise that what she wants done will be done, whereas the unilateral offeror does not.

Of course, as explained in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3b, many civil law jurisdictions use the terms "bilateral contract" and "unilateral contract" to mean different things. For example, in France, it appears that bilateral contracts are basically those with obligations on both sides, whereas unilateral contracts are basically those with obligations on only one side.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3b discusses unilateral and bilateral contracts.

2.8 In General, Only the Intended Offeree Can Make a Proper Acceptance

In general, only the party the offeror chose--the "intended offeree"--can make a proper acceptance of an offer. So an attempted acceptance by anyone else generally does not form a contract. In fact, it is often a new offer to the original offeror.

If the offeror directs her offer to a group of parties, then any member or members of that group can generally accept the offer. The same principle applies if the offeror directs the offer to the public in general, as in most reward offers: any member of the public who knows about the offer can accept it.

If an offeree authorizes someone (an agent) to accept on her behalf, that person can form a contract--but only between the offeror and the offeree. The person accepting on the offeree's behalf is not a party to the contract.

This purpose of this general rule about intended offerees is to make sure that the offeror can direct her offer to whomever she wants, with confidence that generally only that party can accept the offer and create a contract. As with many other rules of contract law, such restrictions are based on the idea that an offeror is the generally the master of her offer.

CASE STUDY 68

FACTS Souvann, a computer instructor, decided to sell his computer in order to buy a new one. Souvann's computer was old, but in excellent condition. Even though Souvann knew he could probably get \$500 for the computer, he decided to offer it to his students for less. So he told his students in class that he would sell his computer for only \$400 to the first student in the class who accepted the offer.

That afternoon, one of the other teachers, who was named Mareth, met Souvann outside the school. Mareth said, "I heard about your offer to the students today, and I accept." Souvann replied that he had offered the computer only to his students, but that he would sell it to Mareth if none of the students wanted to buy it. But Mareth insisted that his acceptance of Souvann's offer had already created a contract between them.

QUESTION OF LAW Did Mareth create a contract with Souvann by trying to accept Souvann's offer?

DECISION No. Mareth could not accept Souvann's offer because he was not an intended offeree--only the students in Souvann's class were.

In general, only the specific person to whom an offeror makes her offer--the intended offeree--can properly accept the offer. In this case, Souvann offered to sell his computer for \$400 only to the students in his class. So only one of them could accept the offer. Mareth could not accept the offer or create a contract. No offer (to Mareth) = no proper acceptance (by Mareth) = no contract (with Mareth).

The decision in Case Study 68 above is similar to the decision in Case Study 37 in Section 2.3c of this Chapter. In Case Study 37, someone who was not the intended offeree tried (but failed) to accept an offer to buy a house. Such acceptances are generally not valid, because contract rules about offer and acceptance try to protect the offeror's right to decide to whom she will make an offer--and with whom she might have a contract.

***** WHY IS THIS IMPORTANT?** Why do courts apply this general rule that only the intended offeree can accept an offer?

The power to accept an offer is the power to make a contract. This great power comes from the offeror, and the offeror must decide who she wants to receive the power. That is, contract offerors choose their offerees; offerees do not create themselves! This rule generally prevents offerees from creating themselves. If offerors could not generally decide who could accept their offers, then offerors could not control with whom they might have a contract. And there would be some contracts created by offerees with whom the offeror did not want to have a contract--even though the contract was based on an acceptance of her offer!

For example, a money lender might not want to make contracts with everyone--only those who she felt could repay the loan. Otherwise, there would be many problems of non-performance, and many conflicts which would not occur if the offeror had been able to control who could accept her offer. The rule avoids this result by giving the offeror that control.

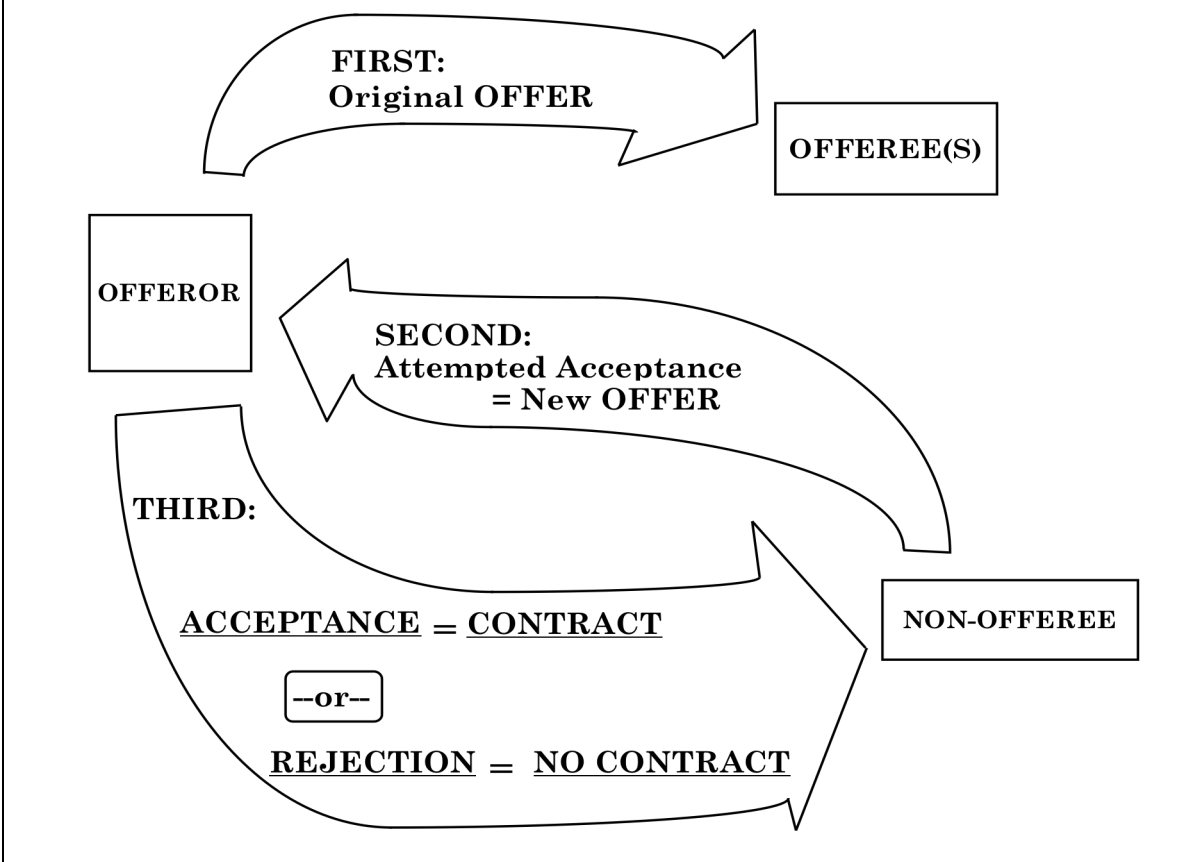
Although someone other than the intended offeree generally does not have the power to properly accept the offer, the attempted acceptance by

that other party is often a new offer back to the original offeror. So then the original offeror can either accept the new offer (and create a contract) or reject it.

For example, in Case Study 68 above, Mareth could not accept Souvann's offer, because Souvann had not made his offer to Mareth. But Mareth was free to make a new offer to Souvann for the computer--and Mareth probably did by making the attempted acceptance! If Souvann had wanted to accept Mareth's offer, they could have made a contract together. So the eventual result in many such situations is an enforceable contract.

Except for one difference, these rules are similar to those for counter-offers, which were discussed in Section 2.5b of this Chapter. The key difference is that, unlike with counter-offers, here the party responding to the offer is not the offeree to whom the offeror intended to make her offer. In fact, the party trying to accept here is a "non-offeree." So that party's attempted acceptance is just a new offer back to the offeror, and not a counter-offer.

Illustration: How an Acceptance Attempted by a "Non-Offeree" Can Be a New Offer, Which May Result in a Contract ("1" happens first, then "2" happens, then "3" happens)



However, offerors are not always protected by the general rule that lets them choose their own offerees. In fact, there are two situations in which the general rule does not prevent offerors from losing control of which parties have the power to accept their offers and make a contract with them. Specifically, those two situations occur when an offeror makes her offer:

- (1) to a non-offeree by mistake, and the non-offeree accepts without knowing or having a reason to know of the mistake (Section 2.8a);
- OR (2) to more than one offeree, and more offerees accept than the offeror thought would accept (Section 2.8b).

In both of these special situations, the offeror has made some mistake or error in judgement, and allowing her to avoid a potential contract might harm the reasonable expectations of others. So in these situations the law tries to balance its general protection of offerors with some protection for the reasonable expectations of other parties.

2.8a A Non-Offeree May Accept an Offer Made to Her by Mistake If She Did Not Know or Have a Reason to Know of the Mistake

Sometimes an offeror wants to make an offer to one particular party, but by mistake the offeror communicates the offer to a different party. This can be a big problem for the offeror. The reason is that many jurisdictions say that, even though it was just a mistake, the other party has the power to accept that offer if:

- (1) the other party does not realize the offer was a mistake; AND
- (2) a reasonable person in the other party's situation would not have realized it was a mistake.

This "reasonable person" standard is similar to the ones discussed earlier in this text. Consider the following Case Study.

CASE STUDY 69

FACTS The Tith Textile Company obtained some rare imported silk. The Company wanted to sell this silk to its best customer, Ouk. In fact, Ouk was such a good customer that the Company decided to offer him a price that was lower than the market price for the silk.

By mistake, however, the Tith Textile salesperson mailed the offer to another one of the company's customers, Chhim. Chhim was surprised and pleased at the good offer. He immediately accepted the offer in writing. As soon as the sales manager at the Textile Co. saw the letter from Chhim, he called Chhim to tell him the offer was a mistake, so there was no contract.

Chhim replied that he was sorry, but if the Textile Co. did not give him the silk at the price on the offer, then he would be forced to sue the company in court.

QUESTION OF LAW Is it possible for Chhim to accept the Textile Company's offer even though Chhim was not the intended offeree?

DECISION Yes. Chhim could have made a proper acceptance of this offer--even though he was not the intended offeree--if he did not know or have a reason to know of the Textile Company's mistake in sending the offer to him.

Although generally only offerees chosen by the offeror can properly accept an offer, a non-offeree may properly accept the offer if she did not know and had no good reason to know that the offer was really intended for someone else. In this case, the Textile Company sent an offer to sell some rare silk to its customer Chhim, even though it intended to make the offer only to a different customer, Ouk. Chhim tried to accept. To see if his attempted acceptance was proper, a court would try to determine whether he knew or should have known of the mistake.

Assuming Chhim says he did not know about the mistake, a court would examine other evidence. If the offer was addressed to Chhim, or if there was no name on the offer, and there was no other evidence to show that Chhim should have known the offer to him was a mistake, then the court would probably say the acceptance was proper. It would then enforce the contract, and require Tith Textile to deliver the silk or provide another remedy to Chhim.

However, suppose only the envelope was mistakenly addressed or delivered to Chhim--but the letter making the offer was correctly addressed to Ouk. In that case, Chhim might have had a reason to know of the mistake. So a court might not find that there was a contract in that situation.

Sometimes an offeror makes an offer to an offeree and intends to make the offer to that offeree, but the offeror is mistaken about the true identity of that offeree. For example, the offeror may believe the offeree is actually a different person with the same name. Agreements formed in this way may be voidable by the offeror in limited circumstances. This is explained in Chapter 7 ("Other Contract Formation Problems"), Section 7.3, which discusses agreements formed because of mistake.

***** ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems"), Section 7.3 discusses agreements formed because of mistake.

2.8b Multiple Offerees May Accept an Offer Even If the Offeror Thought (and Hoped) Fewer of Them Would Accept

As discussed above, when an offeror makes an offer, the offeror gives the power to accept to any offerees to whom she intentionally directs that offer. So if there are many intended offerees, all of those intended offerees have the power to accept, unless the offeror has imposed some limit on the number who can do so in the offer.

So when an offeror makes an offer to more than one offeree, more than one offeree can accept it and create a contract with the offeror. This can be a problem for offerors who really thought they would be making only one contract, or a limited number of contracts. The consequences can be very difficult for offerors who really had only a limited ability to do what they offered to do in their offers.

In a way, this is not really an exception to the general rule about intended offerees, but only a part of it, since the parties who are accepting in this situation are intended offerees. The offeror's real mistake here is simply creating too many intended offerees!

Offerors must accept the results of that mistake. Although the law does much to protect offerors, it is up to the offeror to protect herself in situations like this. For example, the offeror might limit the offer when she makes it, either by limiting the number of offerees, or by saying clearly that only a certain number of acceptances will create contracts (such as the first 10 acceptances). An offeror might also try to protect herself by revoking the offer as soon as she receives enough acceptances. But it is not always easy to do that.

CASE STUDY 70

FACTS The Big Bear Beer Corporation created a big prize program in order to promote its introduction of Big Bear Beer in big new bottles. The company placed big advertisements in the country's four biggest newspapers, and on big television stations. The advertisements promised a big \$1,000 prize to every person who could spell her family name using the Roman letters that the company would engrave, using a secret process, on the inside of each bottle cap. The company promised to print a new letter in its bottles at least once each month.

Immediately after the first advertisements appeared, sales of the new bottles of Big Bear Beer skyrocketed. In the first two months, the company printed the letter "I" and the letter "G." But no one came in with proper identification documents to show that her family name was either "IG" or "GI." In the next month, the company printed the letter "X," and again no one came. The fourth month, the letter "Q" did not create any winners.

At the same time, sales of the beer continued to increase, and the company was extremely pleased.

But after the company printed the letter "N" during the fifth month, people started coming to the company with the "N" and "G" bottle caps, and documents which showed that their family name was "NG." By the end of the second week, over 500 people had come in, and each demanded the \$1,000 prize.

The directors of Big Bear Beer realized that they had a big problem. They had not anticipated how many people had the family name "NG." They had not limited the prize offer to one person per family. They had not restricted their offer to citizens of one country. In fact, they had not restricted their offer at all! They immediately placed big advertisements revoking the offer in the same newspapers and on the television stations. But they feared that their company already owed over \$500,000 to all those "NGs"--and the company had only budgeted \$100,000 for the entire program that year!

QUESTION OF LAW Did all the "NGs" who tried to accept before Big Bear Beer's revocation have the power to accept and make a contract with the company?

DECISION Yes. All the offerees who met the requirements in Big Bear Beer's offer could accept and form contracts, because they were all intended offerees--even though the company did not expect so many acceptances.

When an offeror directs her offer to a group, any member of the group may accept the offer while it is open, unless there is some limit in the offer itself. In this case, the Big Bear Beer Corporation's advertisements were offers which the company made to the general public. And according to the terms of the offers, the offers could be accepted by anyone who could spell her family name using the letters that the company printed on its bottle caps. If there were 500 members in that group, then any or all of those 500 could make a contract with the company by accepting the offer while it was open.

In this case, Big Bear Beer did not restrict the number of offerees or acceptances. And the company only terminated its offer after it had already received more than 500 acceptances by people who could spell their name ("NG") with the bottle caps. Those acceptances were from offerees who had all properly received an offer from the company, and who properly responded to it while it was still open. So all those who met the requirements in the offer made proper acceptances, which formed contracts with Big Bear Beer.

2.9 In Order to Properly Accept a Unilateral Contract Offer, the Offeree Must Perform the Act Requested

When an offer requests a specific act--an offer for a unilateral contract--an offeree can accept only by actually performing the act. There is no contract until the offeree does that, although part performance may cause the offer to be irrevocable for a reasonable time, as explained in Section 2.4d above.

For example, suppose Heng makes a unilateral contract offer to Sambath, saying he will pay Sambath \$200 if Sambath rebuilds the broken wall around Heng's house. In that situation, a proper acceptance occurs only when Sambath finishes rebuilding the wall.

This basic rule about acceptance of unilateral contract offers can be divided into two important elements:

- (1) the offeree must fully perform the act requested (Section 2.9a); and
- (2) the offeree need not notify the offeror about her acceptance unless the offeror requests it, or in some jurisdictions if the offeror has no adequate way of learning of the performance (Section 2.9b).

2.9a In Order to Accept a Unilateral Contract Offer, the Offeree Must Fully Perform the Specific Act Requested

An offeree can accept an offer for a unilateral contract only by performing the specific act the offeror requested. Of course, if the offeree does not perform the specific act requested, the offeree has obviously not accepted the offer.

So there is no contract when, in response to an offer that is clearly for a unilateral contract, the offeree just makes a promise, or performs an act that is different from the act the offeror requested. Of course, a different promise by the offeree can be a counter-offer back to the offeror. But it is not an acceptance, and it does not create a contract.

CASE STUDY 71

FACTS Borai goes to the Samaki Real Estate Agency in order to buy some land. Borai says to one of the real estate brokers there, "If you find me a good shophouse near the market and I actually buy it, I will pay you 5% of the house's price as a finder's fee." The agent agrees. He says that he knows many shophouses for sale and is sure that he can find one Borai will like.

Two weeks later, the real estate broker is eating noodles in the market and reviewing the list of available shophouses that he has prepared for Borai. While the broker is doing this, he sees Borai in the garage of a building

across the street. Borai comes and tells the agent, "Never mind about a shophouse for me. I already found that one over there by myself."

Now the Samaki Agency is suing Borai, claiming Borai violated his contract obligation to pay Samaki if the broker found a building Borai liked.

QUESTION OF LAW Did Borai and Samaki have a contract together?

DECISION No. There was no contract between Borai and the agency, because the agency never accepted Borai's unilateral contract offer.

In order to accept a unilateral contract offer, the offeree must fully perform the specific act requested. In this case, Borai promised to give the Samaki agency a commission if Samaki found him a shophouse he liked and actually bought--a specific act. This was an offer for a unilateral contract. Samaki never performed this act. Borai's offer did not ask for a promise, so the promise from Samaki--to look for and find a shophouse--did not properly accept Borai's offer. Here the only way Samaki could properly accept Borai's offer was if Samaki actually did find a shophouse and Borai bought it. That did not happen. Borai revoked first. No (proper) acceptance = no contract.

It does not matter that the Samaki broker had already looked for a shophouse for Borai, and had even prepared a list for Borai to consider. In fact, the result in this case would be the same even if the Samaki broker had worked full time every day for those two weeks just trying to find a shophouse for Borai. The result would also be the same even if the broker found and showed Borai five shophouses which Borai decided not to buy! What matters is that Samaki had no legal obligation to look for a shophouse. Neither Borai nor Samaki had any legal obligation. So there was no contract here.

***** WHY IS THIS IMPORTANT?** Why is it important to know how this rule about acceptances of unilateral contract offers applies in client-broker situations?

It is important for several reasons. First, such situations are common. Many clients and brokers in free market jurisdictions have arrangements similar to Borai and Samaki in Case Study 71. In fact, there are a great variety of important client-broker relationships. Many of the transactions of such clients and brokers are worth a great deal of money. Parties who may form such relations include:

- individuals, businesses and governments who want to buy, sell, or rent property;
- individuals, businesses and governments who want to buy or sell securities;

- parties who want to buy or sell art; and
- employers and individuals who want to make employment contracts.

In addition, the rule has important legal effects. Clients in many jurisdictions generally have no obligation to pay their brokers unless they have specifically agreed to do that. This is because, as in Case Study 71, the relationship between clients and brokers is often based on the client's offer for a unilateral contract. So if there is no other arrangement between the client and the broker, then there is no contract between them, unless the broker performs the act that the client requested. So many brokers try to make a contract with their clients that specifically requires the client to pay the broker for her efforts, even if the broker does not achieve the final result the client wants.

Finally, the rule has important economic effects. When brokers face the possibility that they might do a lot of work and not get paid for it (as in Case Study 71), they often compensate for that risk by raising the price that they charge their clients. For example, if a broker knows that she will work for four clients but probably get paid by only one of them--because she will probably be able to do exactly what only one of the clients wanted--then the broker will probably make sure each client agrees to pay her a high price (commission) if the broker succeeds. The broker decreases her risk by transferring some of the cost of that risk to the client who must pay her the higher commission.

As explained earlier, it is not enough for the offeree to perform some part of the act requested: the offeree must fully perform the act requested. Logically, if only a completed act is an acceptance of an offer to create a unilateral contract, then an act which is not completed is not an acceptance.

In practice, this rule could have unjust effects if the offeree started performing the requested act, but the offeror changed her mind about the offer before the offeree finished the act. So even though such part performance cannot create a unilateral contract, many jurisdictions say that it often does make the offer irrevocable for a reasonable time after the offeree has started the performance requested. That way, although there is still no contract yet, the offeree gets a reasonable opportunity to finish her performance--and accept the offer. This was explained in detail in Section 2.4d above.

However, as noted in Section 2.4d, it appears that this irrevocability rule is not usually applied in situations like client-broker arrangements and reward offers. Most efforts of offerees in these situations--such as those of Samaki in Case Study 71--may not really be considered to be part performance, but only preparation for performance. Such activities may not enrich the offeror--as they did not in Case Study 71. And as in Case Study 71, the offerees probably understand that they are taking the risk that they will work, but they may not be compensated, especially since many offerees may be trying to accept the same offer, even though no more than one can succeed.

2.9b The Offeree Need Not Notify the Offeror about Her Acceptance, Unless the Offeror Requests It, or in Some Jurisdictions If the Offeror Has No Adequate Way to Learn of the Performance

In general, performance of the act requested is all that is required for a proper acceptance of a unilateral contract offer. An enforceable contract is created the moment that the offeree finishes the act that the offeror requested, and no notice to the offeror is required, since the contract already exists at that point. This is very different from the rules about bilateral contracts, which require communication of acceptance from the offeree to the offeror, as explained in Section 2.10 below.

However, there are two important exceptions to the general rule that offerees need not tell offerors about their acceptances of offers for unilateral contracts. These exceptions are:

- (1) the offeree must notify the offeror of the acceptance (performance) if the offeror specifically requests it; and
- (2) some jurisdictions say the offeree must use reasonable efforts to notify the offeror of the offeree's acceptance (performance) if the offeror has no adequate way of learning of the performance.

If one of these exceptions applies and the offeree fails to notify the offeror, she cannot enforce the contract. But the general rule remains: the offeree generally need not notify the offeror of an acceptance for a unilateral contract.

CASE STUDY 72

FACTS One day a 12-year-old girl named Puth disappeared. Her father, a business person named Son Soy, her mother, and the neighbors looked everywhere, but could not find her. Two days later, Son Soy hired a man who had a loudspeaker in a cart to walk around the streets, broadcasting a detailed description of Puth and her disappearance, including what she was wearing the day she disappeared, and also offering a \$1,000 reward from Son Soy for information which resulted in the return of his daughter.

The next morning, a cyclo driver named Kan Tip heard the broadcast while he was taking two people to the train station. As Tip's cyclo passed the cart of the man making the broadcast, Tip noticed the woman in his cyclo quickly putting a krama over the face of the unhappy little girl next to her in the cyclo. When the cyclo arrived at the train station and Tip's passengers got out of the cyclo to pay, Tip suddenly realized that the little girl looked a lot like the description he had heard in the broadcast earlier, and that she was wearing exactly the same clothes!

Immediately, Tip rode as fast as he could back to the man with the cart. Tip told the man what he had seen. Twenty minutes later, Son Soy and

the police found Tip's passengers on the queue for the train and rescued Puth. The police told Son Soy that they had found Puth because of Tip's information. The police arrested the lady for kidnapping, and made plans to bring her before a judge as soon as possible.

But when Tip went with the cart man to claim the \$1,000 reward later that afternoon, Soy refused to pay, saying: "You never told me that you would look for my daughter, and I never hired you. I made an offer, but an offer is not an obligation. Anyway, I know the police would have found my daughter without your help. You will get nothing from me. Go away!"

QUESTION OF LAW Did Tip's actions create a contract that requires Soy to pay Tip the \$1,000?

DECISION Yes. Tip properly accepted Soy's unilateral contract offer by providing the information which enabled the police to find Puth and return her to her family.

Offerees can properly accept unilateral contract offers by performing the specific act requested, and there is generally no need to notify the offeror of performance. In this case, Soy offered to pay a reward to anyone who performed the specific act of providing information leading to the return of his daughter--a unilateral contract offer. Such offers are accepted--and a contract exists--the moment that an offeree fully performs the act for which the offeror offered the reward. And as in most reward offers, Soy made his offer to the general public: anyone who heard the offer was an offeree who could try to do what Soy wanted and claim the \$1,000. Tip heard Soy's reward offer and accepted it by giving the police the information which resulted in the return of Puth. This created a contract. And under the general rule, Tip did not need to do anything else to accept Soy's offer. Tip did not have to make any communication or agreement with Soy.

And in this case, neither of the potential exceptions which might require Tip to notify Soy apply. Soy did not ask to be notified of performance. And Soy had an adequate way to learn of it--Soy learned of Tip's performance from the police when his daughter was rescued. So there was no need to tell him. Soy must pay the \$1,000 to Tip.

Of course, offerees like Tip in Case Study 71 usually do need to tell the offeror that they have completed the act in order to receive what the offeror promised in the offer (in that case, the \$1,000 reward). But such communications are not generally needed to make an acceptance and create the unilateral contract: the contract already exists.

Although bilateral contracts are generally considered to be more common than unilateral ones, there are still some important types of contracts which are often unilateral. Some of the more important types of contracts that are often unilateral are those based on:

- (1) reward offers (as in Case Study 72);
- (2) agency (client-broker) offers (as in Case Study 71); and
- (3) loan offers.

Of course, even such contracts can be bilateral. As explained above, each offeror can choose whether she wants to make an offer for a unilateral contract or a bilateral contract.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3b discusses unilateral and bilateral contracts.

2.10 In Order to Properly Accept a Bilateral Contract Offer, the Offeree Must Properly Communicate the Promise Requested

As explained above, a bilateral contract is formed by the exchange of a promise for a promise. It is generally believed that most contracts in the world today are bilateral, especially in modern business. In order to properly accept an offer to create a bilateral contract, the basic requirement is that the offeree must properly communicate the promise the offeror requested.

For example, suppose Reasmey wants to sell her house and Kalyann wants to buy it. Reasmey offers to sell the house to Kalyann for \$50,000. The parties then sign a standard legal form which includes all the terms related to the purchase of the house. In this situation, Kalyann will probably give Reasmey her promise to pay \$50,000 on a specific date, in exchange for Reasmey's promise to give Kalyann the house and its ownership documents the same day. Their contract is bilateral--not unilateral--because each party is making a promise in exchange for the other party's promise.

The following chart compares acceptances in unilateral and bilateral contracts.



Illustration: Acceptance in Unilateral vs. Bilateral Contracts		
	<u>UNILATERAL</u>	<u>BILATERAL</u>
IF the offeror makes: →	A PROMISE	A PROMISE
AND the offeror wants the offeree to: →	Perform a specific ACT	Make a specific PROMISE
THEN if that offeree: →	FULLY PERFORMS THAT ACT	MAKES THAT PROMISE
The automatic result is: →	A UNILATERAL contract.	A BILATERAL contract.
	↓	↓
	For offers to make <u>unilateral</u> contracts, full performance of the act = acceptance = a contract. But NO ACT = NO CONTRACT.	For offers to make <u>bilateral</u> contracts, the return promise = acceptance = a contract. But NO PROMISE = NO CONTRACT.

Offers to create bilateral contracts can be accepted only by a promise by the offeree. But as explained in Section 2.7, this promise can be made in words or conduct. So an act can be a proper acceptance of a bilateral contract offer when the offeree's actions clearly demonstrate the promise the offeror wanted. This is called an implied promise. Consider the following Case Study.

CASE STUDY 73

FACTS Sochua owned a tourist agency in Phnom Penh. A big part of Sochua's business was arranging plane visits to Angkor Wat for groups of tourists. In fact, Sochua spent an average of two weeks each month up at Angkor Wat, leading these tour groups and acting as their guide.

The night before taking a group of tourists up to Siem Reap, Sochua decided that her agency should rent a van on a long term basis, to transport clients from their hotels in Phnom Penh to the airport and back again when they returned from Siem Reap. Sochua knew a taxi driver named Him Youn, who also drove a van sometimes if there were a lot of passengers. Sochua had hired Youn to drive to the airport several times before. So Sochua contacted Youn and described her plan. First, she told Youn that she needed him and his van to go to Pochentong the next day, for their regular fee. Then she said that if Youn promised to meet her at the airport with a van every time she returned from Siem Reap, and to be her agency's full time driver every time

she was in Phnom Penh during the next year, she would promise to pay him \$200 every week of the year.

Youn thanked Sochua but said nothing else about the offer. The next morning, he took Sochua and her clients to the airport. Later, Youn decided that the \$200 per week salary would be a very good salary, especially during all the weeks when Sochua would not even be in Phnom Penh! So at the end of the week, Youn told Sochua's secretary that he would pick up Sochua's group at the airport. Sochua was surprised to see Youn, but happy when he brought everyone home.

However, the next day Youn was surprised when Sochua told him that she had hired a different van and driver to work for her full time--although she had agreed to pay this new driver less money. Sochua paid Youn the regular fee for the two trips he had made. But Youn was very unhappy.

QUESTION OF LAW Did Youn's actions make a proper acceptance of Sochua's offer and create a contract for the whole year with her?

DECISION No. Youn's actions in driving Sochua's one tour group to and from the airport were not enough to be an implied promise to drive for Sochua for the whole year, so there was no proper acceptance of her offer.

Offers for bilateral contracts are properly accepted when the offeree properly makes the promise requested. This can occur through conduct, where the conduct is actually an implied promise to perform the proposed contract.

In this case, Sochua had offered to pay Youn \$200 per week if he promised to drive her tour groups to and from the airport for one year. This was a request for a promise, not an act. If Youn promised to meet Sochua at the airport with a van and be her driver for a year, then she would hire him and pay him for that year. Youn did not expressly make that promise. Youn did only a few acts, on two days. The only question is whether Youn's acts--taking Sochua's one tour group to the airport, and then back to their hotels the day they returned--were enough to form an implied promise or not.

Here, Sochua wanted Youn's promise to work for her for a year. But Youn said nothing, and only drove her group briefly on two days! In this situation, there were probably not enough acts to make the implied promise that Sochua wanted. Perhaps if Youn had driven Sochua's groups on many more occasions, an implied promise might have existed. But here Youn did not do enough. No promise (express or implied) = no acceptance = no contract.

Of course, in situations like Case Study 73, there is often a strong possibility that the parties will eventually make a contract, even though the offeree's actions have not formed one. One reason is that, when an offeree performs an act in direct response to an offer, it is normally clear that she wants to make a contract with the offeror. So even though only a promise

from the offeree could create the contract with the offeror, many offerors will treat the offeree's acts as a promise that the offeree will do all that the offeror requested in the original offer. In addition, even if the act by the offeree is not considered a proper acceptance of an offer to create a bilateral contract, it may be a counter-offer from the offeree to the offeror. So it is then possible for the offeror to make the contract with the offeree by treating the offeree's act as a counter-offer--and then accepting it. Unfortunately for the offeree Youn in Case Study 73, the offeror Sochua did not do that. Section 2.5b of this Chapter contains further discussion of counter-offers.

As explained above, in order to properly accept a bilateral contract offer, an offeree must properly make the promise the offeror requested. This fundamental rule can be divided into four important general requirements. These requirements are the subject of the rest of this Section. Specifically, a proper acceptance of a bilateral contract offer must generally:

- (1) be communicated to the offeror (Section 2.10a);
- (2) be unequivocal and unconditional (Section 2.10b);
- (3) be identical to--or "mirror"--the terms of the offer (Section 2.10c);
- AND** (4) occur in a proper manner, including meeting any special requirements of the offeror (Section 2.10d).

The rules about when acceptances are effective, which can be complex, are discussed in Section 2.10e.

2.10a First Requirement: The Offeree Must Communicate Her Acceptance to the Offeror

An offeror makes an offer to create a bilateral contract because she wants to receive a particular promise from the offeree. So if the offeree really wants to accept the offer--and create a contract--the offeree normally must make that promise to the offeror! But if an offeree does not communicate her acceptance (her promise) to the offeror, there is no contract between them.

***** WHY IS THIS IMPORTANT?** What is the effect of the basic rule that requires an offeree to communicate her acceptance to the offeror in order to create a bilateral contract?

This rule about communication of acceptance to make a bilateral contract is one of the most important rules of contract law. This is because the key to a contract is the voluntary agreement of the parties, and the communication of agreement is what shows this agreement. An offeror demonstrates her consent to the terms of a contract when she makes her offer. An offeree demonstrates her consent to the terms of a contract when she makes her acceptance. So no consent (offer) from the offeror = no contract. No consent (acceptance) from the offeree = no contract.

This rule can also have a big effect on parties who ask courts to resolve contract questions. When there is a dispute about real agreement, the first thing courts look for before they enforce contracts is some clear indication of consent by all sides of the contract. Of course, it is often easy to see the offeror's consent: the offeror made her offer, either for a unilateral or bilateral contract, so she obviously wanted to make the contract. But sometimes the more difficult question is: did the offeree consent? In bilateral contracts, only a promise from the offeree can demonstrate her consent to the contract. Courts look for that promise before they consider enforcing a contract against either the offeror or the offeree. And courts will not generally enforce a bilateral contract unless the evidence shows that the offeree communicated her promise to the offeror.

Words are probably the most common way parties communicate acceptances of bilateral contract offers. Human communication often requires words. And offerees often use words to communicate their acceptances of offers to create bilateral contracts.

However, as explained in Section 2.10 above, parties can also communicate their acceptances of bilateral contract offers through conduct. Of course, people may also communicate without words. So it is also possible--in certain circumstances--for an offeree to use conduct to communicate her acceptance, and create a bilateral contract.

Silence is generally not a proper acceptance of an offer for a bilateral contract. That is because silence usually does not communicate the promise the offeror wanted.

However, silence can be a proper acceptance in several special situations. In particular, silence can be a proper acceptance of an offer for a bilateral contract because of: a prior agreement about it between the parties; prior similar dealings between the parties; a relevant trade usage or industry practice; or substantial use or control of the subject matter of the contract.

These rules about communication of acceptance will be discussed in more detail in the following Sections.

(1) Words Are Probably the Most Common Way Parties Communicate Acceptances of Bilateral Contract Offers

In general, offerees actually use words to communicate their acceptances to the offeror. Of course, the offeror cannot be expected to just guess or assume that the offeree has made the acceptance. That could be a big problem for the offeror--or unfair to the offeree if the offeror were wrong about such a guess. The offeree also cannot just assume that she has made a contract with the offeror--unless she actually makes the promise to the offeror. Obviously, if the offeree does not tell the offeror, the offeror may have no way to know that her offer has been accepted! It is not enough that the offeree

think about or even decide to accept an offer--she must communicate her acceptance.

CASE STUDY 74

FACTS After two weeks of negotiation, Leap makes a final, written offer to sell her rights in a very profitable market stall to Suor, if Suor promises to pay Leap \$30,000. Suor is pleased, because although he cannot afford to pay a higher price, he will be able to borrow enough money to pay the \$30,000 in Leap's final offer.

Suor decides to accept, and tells his friends that he is going to buy the market stall. He intends to send a note to Leap telling her that he accepts. But he forgets to send the note, because he is so busy arranging loans. In fact, Suor only has \$5,000 of his own money, so he spends the next week arranging loans for the other \$25,000. He borrows \$20,000 from several of his relatives and \$5,000 from a bank. He signs documents with each of the lenders in which he promises to repay the loans within two years at an annual interest rate of 20%.

But when Suor goes to give the \$30,000 to Leap, Leap tells Suor that she has already sold her market stall rights to a man named Ya Ya. Suor then goes and explains his story to Ya Ya, but Ya Ya says "No No" when Suor demands the market stall from him.

So Suor sues Leap and Ya Ya in court: Leap for breach of contract, and Ya Ya for wrongful interference with a contract. Leap says he had a contract with Suor. Suor asks the court either to enforce the contract by ordering Leap to sell him the rights to her market stall (specific performance), or to order Leap and Ya Ya to compensate Suor for the money Suor will lose because of the loan obligations he now has.

QUESTION OF LAW Was there a contract between Leap and Suor?

DECISION No. There is no contract because, even though Suor intended to accept Leap's offer to sell him the market stall, he failed to communicate his acceptance.

An acceptance of a bilateral contract offer must be communicated to the offeror to be proper. Offerees often use words to do that. In this case, Suor decided and intended to communicate his acceptance of Leap's offer to sell him a market stall using words. He even told his friends. But he forgot to tell Leap! Leap's potential contract to sell her market stall to Suor depended on Suor's communication of the promise that she had requested: the promise to pay \$30,000 for the stall. Here, although Suor intended to communicate this promise to Leap, he did not actually do so. So there was no acceptance of Leap's offer. No acceptance = no contract.

As Case Study 74 illustrates, if an offeree wants to make a bilateral contract, it is not enough that she decides to accept, intends to accept, or even tells others that she will accept. The offeree must communicate her acceptance to the offeror. Words are often the best way to do that.

(2) Parties Can Communicate Their Acceptances of Bilateral Contract Offers through Conduct

Although most people use words to communicate, people also sometimes communicate by their conduct (without words). So the law does not always require that the offeree use words to create a bilateral contract. Sometimes the offeree's conduct can communicate the acceptance necessary to create such a bilateral contract. This is an implied acceptance, and it was already discussed in Sections 2.7 and 2.10 above.

Acceptances through conduct can happen in various ways. Some were discussed in Section 2.7. One example might be where there is a pattern of conduct in response to an offer that communicates the promise requested, as the driver Youn tried but failed to do in Case Study 73. Another example might be an affirmative act or gesture--such as a nod of the head--in response to an offer. And in some cases, the parties make arrangements that mean a particular act--rather than words--can communicate the promise the offeror requested. This will be illustrated below in Case Study 75.

But in all such situations, it is important to remember that the offeror has requested only a promise from the offeree. The offer is for a bilateral (not unilateral) contract. So the offeree's conduct in such cases merely demonstrates the offeree's acceptance of the offer. That is, the offeree's conduct only shows that she is making the promise the offeror requested. It may be part of the performance of the contract, but that is not what makes it an acceptance. It is the implied promise that makes it an acceptance.

CASE STUDY 75

FACTS At a meeting with the manager of the Royal Anna Hotel, one of the owners of the Sabai Ice Co. made the following offer: "If you want us to deliver our pure ice to your hotel every morning at 5:00 a.m., put these special ice chests next to your service entrance in the back of the hotel. Our staff will fill the chests with \$200 worth of ice, and send you the bill later for that amount. If you do not want the ice, just call us and we will come back to get our chests." The ice maker then gave the hotel manager five enormous ice chests, each of which had the name "Sabai Ice" on the top and side and the special "smiling face" symbol of Sabai Ice.

The manager of the Royal Anna thanked the ice maker for his presentation and the chests. But he did not promise to pay for the ice if Sabai Ice delivered it. He said he would think about the offer, and would probably

decide when he returned from an international hotel conference the following week.

Because of the manager's words, the Sabai Ice driver was surprised the next morning when he saw the chests next to the Royal Anna's service entrance! But he assumed the manager had decided to accept before he left for his conference. So he filled the chests with ice, and did the same for six days.

However, after seven deliveries had occurred, the hotel manager called the owner at Sabai Ice and asked why Sabai Ice had delivered the ice when the hotel manager had not consented to the contract! The owner said that the hotel had, in fact, indicated its consent by putting its chests outside the service entrance door. The owner then asked to whom he should send the \$1,400 bill for the ice.

QUESTION OF LAW Did the hotel's conduct create a contract which now requires it to pay Sabai Ice?

DECISION Yes. The hotel's conduct in putting the ice chests out beside the hotel indicated that it was accepting Sabai Ice's offer to provide ice, so a contract existed between the parties for the ice deliveries that were made.

An offeree can accept a bilateral contract offer through conduct where that conduct shows that the offeree is making the promise the offeror requested. In this case, even though the manager of the Royal Anna Hotel did not use words to accept the offer from Sabai Ice, the hotel did precisely the act which Sabai Ice and the manager both knew would indicate the hotel's acceptance of the offer for the bilateral contract--the act that would make the implied promise. The offer said the only thing the hotel needed to do to accept the offer was to leave the five ice chests next to its service entrance. So according to the offer itself, that conduct was acceptance: it was the implied promise to pay for the ice.

In this case, the hotel performed that act--and so made the implied promise--by putting the ice chests out for seven days. So a contract existed for those deliveries between the hotel and Sabai Ice. The hotel must pay for the ice Sabai Ice delivered.

In situations like Case Study 75, it is important that both sides of such potential transactions understand which special act or form of conduct by the offeree will demonstrate that she accepts the offer. And of course, the offeror generally cannot choose some ordinary conduct of the offeree and say "If you do that, that means you accept my offer and we have a contract!" For example, the offeror cannot say the offeree will indicate acceptance if the offeree just parks her moto in the usual place, or eats rice at a restaurant! The act must be something the offeree would not normally do unless she wanted to accept the offer--like putting an ice company's ice chests outside a hotel service entrance.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3d contains further discussion of express and implied agreements.

(3) **Silence Is Generally Not a Proper Acceptance of an Offer for a Bilateral Contract**

As discussed above, a proper acceptance of a bilateral contract offer generally requires some words or conduct from the offeree showing that she really wants to make that contract with the offeror. So if an offeree is completely silent, and does not communicate in any normal way her acceptance to the offeror, there is generally no contract. That is because this lack of a response to an offer generally does not communicate the promise the offeror requested. So it generally does not create an acceptance.

*** **WHY IS THIS IMPORTANT?** Why is silence by an offeree generally not a proper acceptance of an offer to create a bilateral contract?

There are important legal and practical reasons for this general rule. The legal reason is that it is generally unlikely that an offeree who is silent about an offer really intends to accept the offer. In fact, the offeree's silence normally demonstrates her "non-acceptance" of the offer! Reasonable offerors know that. The practical reason is that the law does not want to force offerees to respond to every offer directed at them in order to avoid accepting. On the contrary, valid contracts are generally based only on affirmative responses from the offeree, not a lack of a response.

This general "silence is not acceptance" rule also has important effects. It protects both offerors and offerees from misunderstandings in cases where the offeree does not respond. And the rule protects offerees from fraud and abuse by offerors. That is because the rule generally prevents offerors from taking advantage of offerees who do not want to respond, cannot afford to respond, do not know how to respond negatively, or forget to reject an offer. This protects offerees against exploitation by aggressive sellers of books (such as encyclopedias), publications, electronics, cassettes, tickets, insurance, securities and other investments, and religious and medical goods. So sellers cannot profit by sending or offering their product to someone who has not asked for it, and then--without the offeree's consent--saying to the offeree: "If we do not hear from you, then you agree to pay us for our product." Under the general "silence is not acceptance" rule, the recipient of such products (the offeree) normally has no obligation to pay the seller (offeror) for the products. In fact, special laws in some jurisdictions (such as in the United States) say that a person who receives goods through the mail in this manner does not even have to return the goods. These laws further protect consumers from abusive sales practices by some sellers.

The following case illustrates the protection which even commercial offerees can receive from the general rule that silence is generally not an acceptance.

CASE STUDY 76

FACTS The Two-Ight Cinema bought a one-year, \$1,000,000 fire insurance policy from the Everguard Insurance Company, and paid Everguard a \$2,000 premium for the policy each month. The parties had never dealt with each other before. And the policy did not contain any provision for automatic renewal of the insurance contract.

One month before the end of the year, Everguard sent a letter to Two-Ight which included a renewal of the policy for the next year on the same terms, along with a bill for the \$2,000 premium for the first month of the new year. Everguard's letter stated that Two-Ight had to notify Everguard before the end of the year if Two-Ight did not want to renew its insurance on those terms.

Two-Ight, however, did not contact Everguard or do anything else regarding the letter or insurance from Everguard. Two months later, Everguard demanded \$4,000 (for two months of insurance), which Two-Ight had not paid. Everguard also insisted that Two-Ight continue to pay \$2,000 per month for the rest of that year under what it said was the renewed insurance policy. When Two-Ight refused and denied they had a contract together, Everguard sued Two-Ight.

QUESTION OF LAW Did Two-Ight's silence create a contract with Everguard?

DECISION No. Two-Ight's silence in response to Everguard's renewal offer was not an acceptance of Everguard's offer to renew the insurance policy, so there was no new contract here.

Silence is generally not an acceptance of an offer for a bilateral contract, no matter what the offeror claims. The law generally does not allow offerors to put offerees in a position where the offerees' failure to respond creates a contract. In fact, an offeree generally has no obligation to respond to an offer, unless that offeree agrees to such an obligation.

In this case, Everguard sent an offer for Two-Ight to renew the fire insurance policy the parties had together. The offer basically said that if Everguard did not hear from Two-Ight, then there would be a new insurance contract between the parties. Two-Ight did not respond. In this situation, it does not matter that Everguard's letter said that Two-Ight's silence would be acceptance. Everguard did not have the legal power to impose that standard on Two-Ight. And there was no evidence in this case that Two-Ight had agreed that its silence would be acceptance. Two-Ight and Everguard had no history

of making contracts together in that way, and there was no automatic renewal provision in the first insurance policy. So Two-Ight never accepted Everguard's offer of the new policy. No acceptance = no contract.

(4) Silence Can Be a Proper Acceptance Because of a Prior Agreement, Prior Similar Dealings between the Parties, a Relevant Trade Usage or Industry Practice, or Substantial Use or Control of the Subject Matter

Despite the general rule that silence is not acceptance, there are a few special situations where an offeree's lack of a response to an offer can actually communicate the acceptance needed to create a bilateral contract. In these special circumstances, silence actually becomes a form of communication!

Specifically, this text will discuss four situations in which an offeree's silence--her lack of affirmative words or conduct--in response to an offer can by itself create a bilateral contract with the offeror. These four situations occur where silence can be an acceptance because of:

- (1) a prior agreement between the parties;
- (2) prior similar dealings between the parties;
- (3) a relevant trade usage or industry practice; or
- (4) substantial use or control of the subject matter of the contract.

These special situations are discussed below.

(1) Prior Agreement -- Silence in response to an offer for a bilateral contract can be a proper acceptance if the parties previously agreed or consented that silence would be acceptance.

This kind of prior agreement between the parties may be express or implied, or partly both. For example, suppose an offeror makes an express offer. The offeree says, "If you do not hear from me in five days, I accept your offer," and the offeror agrees. In that case, the offeree's silence during those five days will create a valid contract.

But if there is no such prior agreement or understanding between the parties, the offeree's silence generally will not create a contract. So there is usually no contract when an offeror just tells the offeree (without the offeree's consent): "If you do not contact me to reject this offer, then we have a contract."

This first exception is based on some express or implied agreement between the parties. Both sides agree in some way, in advance, that no response to the offer is an acceptance of the offer. However, in the other three exceptions explained below, the law implies from the surrounding circumstances that the offeree's silence in those particular circumstances was really an acceptance of the offer.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3d contains further discussion of express and implied agreements.

(2) Similar Prior Dealings -- Silence can be a proper acceptance of a bilateral contract offer if similar prior dealings between the parties would indicate to a reasonable person that a contract could be formed in that way. Sometimes parties develop a way of dealing with each other in which silence can be acceptance as long as the offeree has a reasonable opportunity to object to the offer. Consider the following Case Study.

*** **CASE STUDY 77**

FACTS For five years, the Doh Wing-Doh Mohk Taxi Company (DWDM) brought its cars to the same mechanic whenever they needed to be repaired. The mechanic's habit was to check the broken car first, and then, before doing any repair work, notify the owner of DWDM about the problem and how much it would cost to fix it. Although DWDM's owner often contacted the mechanic within a day or two to discuss the mechanic's evaluation, or negotiate about the price, sometimes DWDM did not respond. In those cases, the mechanic always did the repair work within a few days, and DWDM always paid him for it according to the estimate.

One day, after checking one of DWDM's cars which the company had left with him, the mechanic sent his evaluation and cost estimate for some major repairs to the brakes and engine. However, the mechanic did not hear anything back from DWDM. On the third day, the mechanic sent a second note, but there was no reply from DWDM for two more days. So the mechanic repaired the car.

At the end of the week, the owner of DWDM came and demanded his car. The owner claimed that he did not have to pay the mechanic anything because he had not accepted the mechanic's offer to do those particular repairs.

QUESTION OF LAW Was the owner's silence an acceptance which created a bilateral contract with the mechanic?

DECISION Yes. Similar prior dealings would show a reasonable person that DWDM's silence for several days in this situation was actually an acceptance of the mechanic's offer to repair the car.

Although silence is not usually a proper acceptance, it can be where similar prior dealings between the parties would persuade a reasonable person that the parties intended to make a contract that way. In this case, the owner of the DWDM taxi company and the mechanic already had five years of similar dealings together. Each time DWDM brought a car to the mechanic, the mechanic evaluated it and notified DWDM. The mechanic's evaluation and

cost estimate was the offer. DWDM then had a reasonable chance to object to the evaluation or price. After waiting a few days, the mechanic repaired the car and DWDM paid for it--sometimes with and sometimes without a normal communication of acceptance from DWDM. So this case was clearly just a continuance of a course of dealing between the parties in which the silence of the offeree (DWDM) indicated his acceptance to the offeror (the mechanic).

In this case, the owner had a reasonable opportunity to reject the mechanic's offer, which the mechanic had delivered to the owner twice in writing, and about which the mechanic had waited five days for an answer. Although the law generally does not require offerees to reject offers that they do not want to accept, in this case the owner was obligated to make a rejection because of his past dealings with the mechanic. So if the owner did not want to accept the mechanic's offer in this case, he should have said so clearly. But he did not. So a contract was formed here. The owner must pay the mechanic for the repair work according to the estimate.

(3) Trade Usage or Industry Practice -- Silence can be a proper acceptance of a bilateral contract offer if some trade usage or industry practice clearly shows that silence can be acceptance in the particular transaction or business activity in which the parties are engaged.

CASE STUDY 78

FACTS The Chook Chhay Cigarette Company received 3,000 bales of tobacco and an invoice from a dealer in Kompong Chhnang. The parties made no special arrangements, and they did not communicate with each other in any other way. At the time, the practice in the tobacco industry was that tobacco sellers would send standard quantities of tobacco to bulk buyers like Chook Chhay, who then had up to one month to return to the seller any tobacco with which they were not satisfied. Otherwise, their failure to respond was considered an acceptance.

But Chook Chhay waited three months without saying anything to the dealer, and then returned the tobacco, saying it was damaged and of low quality. The dealer refused to take the tobacco back and demanded full payment from Chook Chhay. The dealer said that he was not sure who might have damaged the tobacco during all that time, but that the reason it was now of low quality was that it had become old and had not been properly stored! The dealer also said it was too late for him to try to do anything with that tobacco now, and that in any case, the parties already had a contract.

QUESTION OF LAW Was the cigarette company's three month silence an acceptance which obligated it to pay the dealer for the tobacco?

DECISION Yes. Chook Chhay's three month silence was an acceptance of the dealer's offer to buy the tobacco because of an industry

practice that Chook Chhay had to respond about the shipment within one month, or else the company's silence would be considered an acceptance.

Silence is not usually a proper acceptance, but it can be where trade usages or industry practices show that offerees can accept that way. In this case, Chook Chhay failed to respond about the tobacco the dealer sent to it for three months, then tried to reject it. In this situation, the cigarette company has the legal obligation to pay the dealer for that tobacco. This is because Chook Chhay was silent throughout the one month period within which the tobacco industry practice at that time generally required buyers to make their rejections. As a result of that industry practice, and in the absence of any different arrangement between the parties, the cigarette company's silence was a proper acceptance. So a contract was formed between the parties.

(4) Substantial Use or Control of the Subject Matter -- Finally, silence can be a proper acceptance of a bilateral contract offer if, under certain circumstances, the offeree substantially uses or controls the subject matter of the offer without otherwise communicating any acceptance. This situation could also be analyzed as a kind of acceptance through conduct, since the offeree is in a way doing something in response to the offer--using or controlling the subject matter.

With respect to property, such use or control is often called "exercise of dominion." That means that the offeree does something that is inconsistent with the offeror's ownership or possession of the property, generally after the parties have discussed the offer in some way. One example related to goods is the situation discussed in Section 2.7 of this Chapter, where a potential car buyer (the offeree) kept and drove the potential car seller's (offeror's) car for a very long time--even though the buyer was supposed to be merely evaluating the car to see if she wanted to buy it! Such use and control is inconsistent with the offeror's ownership of the car, and it may be considered an acceptance of the offer.

Of course, this "use or control" exception does not apply to situations like those described above where aggressive sellers of goods give persons items without their consent, and then claim there is a contract. In such cases, silence is not acceptance, and there is no contract.

CASE STUDY 79

FACTS In order to conduct a special economic survey of border provinces, a team of government officials from one of the ministries decided to rent two floors of a privately owned building in the middle of Sisophon. The officials signed a lease with the owner which required the officials to pay the owner \$500 in rent at the beginning of each month, for a term of six months.

When the owner came to collect the \$500 rent at the beginning of the sixth month, the owner asked the government officials if they would really be

leaving at the end of that month. The officials replied that they were not sure, because they did not yet know if they would be able to finish all of their work by then. The owner told them they could continue to stay in his building for three more months after the original lease term expired, but only if they agreed to pay rent of \$900 per month for those extra months. Otherwise, the owner said, the officials would have to leave.

The officials responded that they would have to check with their superiors in Phnom Penh, and they immediately sent a letter there with all the details. However, two and a half months later, the survey team was still in the same building, exactly as before. During that time, they had received no instructions from their superiors, made no special arrangement with the owner, and paid no rent to the owner!

The owner tried, without success, to get from the officials the higher rent which he had told them he would want for those extra months. Finally, the owner sued the government for payment in the appropriate tribunal.

QUESTION OF LAW Was the officials' silence an acceptance of the owner's offer of a lease at the increased rate of rent?

DECISION Yes. The officials' silence was an acceptance of the house owner's lease offer for the additional months, because the officials used and controlled the property during that time.

Silence is not normally an acceptance, but an offeree's use or control of the subject matter of an offer can demonstrate acceptance--even if the offeree does not communicate the acceptance in any usual way or is totally silent about the offer. In this case, a house owner made an offer to extend the lease of some government officials who were in Sisophon doing a survey. The subject matter of the owner's offer was renting the top two floors of his building at an increased price.

The government officials at first neither accepted nor rejected the offer. But though the officials did not communicate acceptance in any usual way, they did use and control those two floors for two and a half months of the period for which the owner had demanded the higher rent! The government officials knew that the six month lease was almost finished, and that they had to respond to the owner's offer of the higher rent if they wanted to stay in the building. This was because the owner had clearly told the officials, one month in advance, about the rent increase, and the fact that the officials would have to leave if they did not want to pay the increased rent. So the government officials clearly had a reasonable opportunity to reject the offer and leave, but they did not. In these circumstances, the officials' silent, continued use of the building was an acceptance of the offer the owner made. So the government must pay the owner the higher rent for the months the officials stayed.

This "use or control" exception also applies to contracts for services, or a combination of goods and services. Sometimes the parties discuss an offer of services for which the offeree knows or should know that the offeror expects compensation. But occasionally the offeree, without making any promise or protest, uses or profits from those services--and then refuses to pay, claiming she never technically "accepted" the offer! In these situations, the offeree's use of and benefit from such services can actually be an acceptance, provided that the offeree had a reasonable opportunity to reject the offer.

CASE STUDY 80

FACTS Ker Dak was a photographer who earned a lot of money by selling his pictures of wedding ceremonies and groups to the couples who got married. Although some of the couples hired Ker Dak in advance to take pictures of them the day of their marriage, Ker Dak also went to areas where newly married couples often went to offer his services to the couples there. Specifically, Ker Dak offered to take pictures of the couple and their group, develop them, deliver them to the couple, and charge the couple only a small standard fee, plus a reasonable charge for any pictures that they decided to keep.

One Sunday, Ker Dak politely made his usual offer to a couple he happened to know near the Independence Monument at the fountain. After listening to Ker Dak's plan and prices, the husband told Ker Dak: "You can take the pictures if you want to." Ker Dak helped the couple find good settings and poses for their photos, and took about 100 pictures, developed them, chose the best 30, and delivered them to the couple's house. The couple never objected to his help.

Three days later, the couple told Ker Dak that his photos were a wonderful.... gift, most of which they had already given to their families and friends! When Ker Dak reminded the couple that he expected payment for his photos and his standard fee, the husband told Ker Dak that they had never agreed to pay anything.

QUESTION OF LAW Did the couple have a contract obligation to pay Ker Dak?

DECISION Yes. The couple used the services and kept the goods which Ker Dak provided--encouraging him to take the photos and then keeping them--and this was an acceptance of his offer.

When an offeree uses and profits from goods and services from an offeror, this can be an acceptance of an offer, as long as the offeree had a reasonable opportunity to object. In this case, Ker Dak offered to take pictures of a newly married couple. Although the married couple never promised in any usual way to pay for Ker Dak's photos or pay his standard fee, they used his services and kept the photos, without protest, after discussing with him

his system. The couple had a reasonable opportunity to reject the services and the photos. And the couple knew that Ker Dak expected compensation for his work. So the couple accepted Ker Dak's offer even though they were basically silent about it. Now they must pay Ker Dak his standard fee, and pay for the photos they kept.

However, the key limit on this "use or control" exception for services is the requirement that the offeree had a reasonable opportunity to object but did not do so, either at the time the parties discussed the services or when the offeror provided the services. This is because the exception does not apply in cases where the offeror really just imposed her services on an unwilling offeree. For example, the couple in Case Study 80 would have had no contract with Ker Dak and no obligation to pay if they had told him not to help them or take the pictures.

In addition, it is important not to confuse this "use or control" exception with a quasi-contract. As explained in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5, a quasi-contract is a contract the court imposes only where there is unjust enrichment of one of the parties, even though the parties did not actually make an enforceable agreement together. By contrast, this "use or control" exception says that sometimes a party's "use or control" of the subject matter of an offer can actually be a valid acceptance. Of course, the two ideas are similar in that both are ways contract law tries to prevent unjust loss by parties who have given some benefit to other parties.

***** WHY IS THIS IMPORTANT?** Why can an offeree's silence--lack of affirmative words or conduct--create a bilateral contract in these four special situations?

As explained earlier, the general rule that "silence is not an acceptance" provides great protection to offerees. That is because it limits the ability of offerors to impose contracts on offerees who do not respond to their offers.

These four exceptions, however, provide some protection to offerors. It would be unfair to the offeror to apply the general "silence is not acceptance" rule in all cases. As demonstrated in Case Studies 77-80, the exceptions are needed to reduce the ability of offerees to benefit intentionally from offers, but then deny any obligation to the offerors, just because the offerees did not communicate their acceptances in the usual ways!

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5 contains further discussion of quasi-contracts.

2.10b Second Requirement: The Offeree's Acceptance Must Be Unequivocal and Unconditional

An offeree's acceptance of an offer to create a bilateral contract must show that she really intended to make a contract. Normally that is

not possible if the offeree's response to the offeror is equivocal or contains a condition.

So the second key requirement for a proper acceptance of a bilateral contract offer is that the acceptance must be unequivocal and unconditional. This generally means that:

- (1) the acceptance must show that the offeree presently agrees to the offer; AND
- (2) the acceptance must not depend on a change or addition to the offer, which would mean that the acceptance was subject to a condition.

These two related elements are discussed in the following Sections.

(1) A Proper Acceptance Must Show the Offeree's Present Agreement

In order to make a proper acceptance, the offeree must indicate that she agrees to the offer now. Some responses by offerees show that they do not presently agree to the offer. For example, it is obvious that an offeree is not ready to make a contract based on an offer if she responds by saying, "I might agree to accept your offer next week," or "Yes, your offer seems to be acceptable," or even "I agree in principle."

For the same reason, offerees do not generally make contracts with responses which are "agreements to agree" about important (material) terms. Such responses are not proper acceptances because they show that the offeree has not yet made a final agreement to the offer, since there are still some material terms which the parties need to agree about in the future. As discussed earlier in Section 2.3b of this Chapter, offers which propose such agreements to agree about important terms are usually not definite enough to be valid offers. Such statements cannot generally create proper acceptances either. However, it is possible that an "agreement to agree" might create some added duty to negotiate in good faith about a final agreement.

(2) A Proper Acceptance Must Not Depend on Any Change or Addition to the Offer

A valid offer gives the offeree the power to create a contract just by properly accepting the terms of that offer. But in order to make such a proper acceptance, the offeree's response cannot depend on any changes or additions to the offer. That would basically mean that the acceptance was subject to a condition, and that it would be an acceptance only if the condition occurred.

As explained earlier, a condition is an if-then relationship of two events: if X happens, then Y will happen; but if X does not happen, then Y will not happen. An offeree makes a conditional acceptance whenever the acceptance depends on something which might or might not happen, such as the offeror's

agreement to a change or addition. That is, the offeree says to the offeror: "If X happens, then I accept your offer." The problem is that if X does not happen, then the offeree does not accept the offer. So even though the offeree's response may look like an acceptance, it is really only a possible acceptance. Such conditional acceptances are not proper acceptances and do not create contracts.

So if the offeree's response to an offer depends on additional or different terms, that response is generally not a proper acceptance--and it may be a counter-offer! The key question is whether the offeree's response actually agrees to the offer but requests changes, or whether the response says there is no agreement unless the offeror agrees to the changes the offeree wants. The following chart compares examples of offeree responses which properly accept the offeror's offer (the left column) with examples of offeree responses which do not properly accept the whole offer, but are in fact counter-offers (the right column).

Illustration: <u>Acceptance of Offer vs. Counter-Offer</u>			
	<u>ACCEPTANCE</u>	<u>COUNTER-OFFER</u>	
1. Offeree's response	"We accept your offer, but we would like to add the following terms..."	"This letter is an acceptance <u>only if</u> you agree to the following additional terms."	
	--or--	--or--	
	"I do not really like your offer, but I agree."	"I accept your offer <u>if</u> you change it like this..."	
2. Nature of such responses	Unconditional response.	Conditional response.	
3. Role in formation of a contract	Proper acceptance.	Counter-offer.	
4. Effect	Offeree immediately creates a bilateral CONTRACT.	NO CONTRACT yet, but original offeror can create a contract if she accepts the counter-offer.	

However, some authorities appear to say that not all statements requiring future events in an offeree's response prevent that response from being a proper acceptance. According to such authorities, it is possible for an offeree to make a proper acceptance which shows her agreement even though the response appears to require some future formal event which is not directly related to performance of the contract. It appears that some authorities do not consider such acceptances to really be conditional.

The most common way for this to happen is where an offeree appears to agree to the offer, but wants to put the agreement in some different written form later. For example, an offeree may say to the offeror, "I accept subject to our preparation of a document which records this agreement." In such cases, the future event (the "preparation of a document") does not relate to further negotiation of the terms of the offer. It would appear that the offeree does agree to the terms of the offeror's offer. As a result, some authorities say there is a contract, even though it appears that the offeree's agreement depends on some future event.

But if the offeree refers to writing some document that might change the important terms the parties have already discussed, or if the offeree wants to put the terms discussed in a document that must be approved by someone else (such as a lawyer), there may not be a valid acceptance--because there may not be a present agreement. Of course, whether the offeree presently agrees can be a difficult question, which the court in each case must decide based not only on what the offeree says, but also on all the surrounding circumstances.

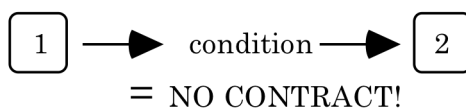
Some authorities appear to apply this rule even where the offeree agrees to the offer subject to the preparation of a document including "whatever other related terms are reasonably necessary," or some similar statement. This kind of response by an offeree can apparently be a proper acceptance if it indicates an intent to be presently bound by the terms the offeror has already proposed. Of course, the "reasonably necessary" terms will generally be standard terms which are commonly found in similar contracts, and which are related to the existing terms, such as the place of delivery in a sale of goods contract. They would seem to be the kind of terms that a court could supply where the parties did not state them, as discussed in Section 2.3b above, and as will be further explained in Chapter 8 ("Interpretation of Contracts"), Section 8.3j. They cannot be terms that would change the existing terms, or that only the parties could determine, such as the identity of goods to be sold.

Illustration: What Happens When an Offeree's Response Describes a Future Event: Two Possibilities (A and B)

Possibility A. When the offeree says that she **agrees only if a particular event happens first**, generally there is no contract. This is because that future event is actually a condition which prevents the offeree's response from being a proper acceptance.

FUTURE EVENT
MUST HAPPEN (such as
more negotiation of terms)

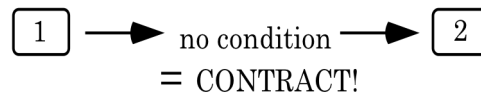
FINAL AGREEMENT
TO THE OFFER



Possibility B. When the offeree says that she **agrees to the offer, but requires that a particular formal event happen later**, some authorities appear to say there generally is a contract. This is because the future event is not considered to be a condition that must occur in order for the contract to be formed.

**FINAL AGREEMENT
TO THE OFFER**

**FUTURE EVENT TO
HAPPEN** (such as putting
the agreement in some
different written form)



CASE STUDY 81

PRELIMINARY FACTS The White Star Company sent a letter offering \$1,000,000 to the owner of land opposite the University of Phnom Penh. The owner decided to accept the offer, but she wanted a formal written contract.

POSSIBLE FINAL FACTS:

QUESTION OF LAW

DECISION

The owner gave White Star a letter which said:

Is that a proper acceptance?

Result

1. "I agree subject to a document acceptable to our lawyers."

Probably not a proper acceptance, because the offeree and her lawyers may still want to negotiate terms of the offer.

Probably NO contract. This is like "A" in the Illustration above.

2. "I agree subject to contract."

Probably not a proper acceptance unless the circumstances show that the offeree has already agreed to the terms of the offer.

Probably NO contract. This is usually like "A" in the Illustration above.

3. "I agree subject to White Star's preparation of a document which reflects this agreement and whatever other related terms are reasonably necessary."

Probably a proper acceptance, according to some authorities. The offeree has expressed final agreement to both the terms of the offer and any related terms which are reasonable and necessary.

Probably a CONTRACT, according to some authorities. This is usually like "B" in the Illustration above.

4. "I agree subject to writing this agreement."

Probably a proper acceptance, according to some authorities.

Probably a CONTRACT, according to some authorities. This is usually like "B" in the Illustration above.

One potential problem with the above rules is the use by offerees of phrases like "subject to." Technically, if the offeree's "agreement" is "subject to" any future event which is not certain to occur--even an apparently minor event such as the creation of a document stating what the parties have already "agreed"--that is still a condition. And the offeree is saying she does not agree unless that condition is fulfilled. The parties can be fairly confident the law will imply reasonable terms where the parties have omitted them. But how can they be sure that one or both parties will actually create some document in the future? So arguably such an offeree response is still conditional, and there is not really a final agreement yet.

It would appear that courts applying the above rules would have to interpret language such as "subject to" as not creating a condition, or as not creating a "serious" condition that should prevent an agreement. It is not clear what would happen if the parties actually failed to create the later writing. And if the court would enforce the agreement anyway, it is not clear what remedy the offeree would have where her demand for a writing was not followed. Nor is it clear why the offeror should be required to do something--such as write an agreement--which she never agreed to do.

Of course, if the offeree says the agreement is "subject to" some future event and the offeror then agrees, there is no problem. In that situation, the parties have a contract obligation to make the future event happen.

***** ADDITIONAL REFERENCE:** Chapter 8 ("Interpretation of Contracts"), Section 8.3j contains further discussion of contract terms courts may supply where the parties did not state them.

2.10c Third Requirement: The Offeree's Acceptance Must Generally Be Identical to the Offer

An offeree generally does not make a proper acceptance of an offer if she tries to accept that offer with new or different terms in her acceptance--if her acceptance is not identical to the offer. Such offeree responses generally do not create contracts. In fact, such offeree responses generally terminate the offeror's offer, because they are not acceptances, but counter-offers. This was already discussed in Section 2.10b above, and in Section 2.5b on counter-offers.

This Section first discusses the general requirement that acceptances of bilateral contract offers must be identical to the offer. Then it explains a very important exception that some jurisdictions make for sale of goods contracts.

(1) A Proper Acceptance Must Generally Be Identical to--a "Mirror Image" of--the Offer

In order to form a contract with an offeror, the offeree's acceptance must generally be identical to the terms in the offeror's offer--like a reflection in a mirror. So this important rule is often called the "mirror image rule."

It generally applies to all kinds of contracts except, in some jurisdictions, contracts for the sale of goods. The basic reason for the mirror image rule has been explained before: the offeree is not really agreeing to an offer if her response to that offer shows that she does not agree to the offer's terms, or that she will agree only to something else.

CASE STUDY 82

FACTS After several interviews, Cambodioil, Inc. offered Mey Muntty the job of manager of its Kompong Som operations. Cambodioil offered Muntty a salary of \$1,000 per month, health and life insurance, and two weeks annual vacation time.

Muntty knew that was a good offer, but he decided to try to negotiate for an even better one. So the next day he told Cambodioil that he accepted their offer at \$1,200 per month and three weeks annual vacation time. That night, Muntty invited all of his relatives and friends to celebrate his good luck at a big dinner, which he arranged and paid for at the fine restaurant on Koh Pohs Island.

But Muntty was upset when he found out two days later that Cambodioil had hired someone else to be the manager in Kompong Som! Now Muntty asks that the court order Cambodioil to either hire him or pay him compensation for the damage he suffered as a result of Cambodioil's failure to hire him.

QUESTION OF LAW Did Muntty's response create a contract with Cambodioil?

DECISION No. Muntty did not make a proper acceptance of Cambodioil's offer because his response was not identical to the offer.

In general, an offeree can create a contract with the offeror only if her response to the offer is identical to the offer--a mirror image. If the offeree tries to accept that offer with new or different terms, the offeree has generally only made a counter-offer, not a contract.

In this case, Muntty tried to accept Cambodioil's offer of a job in Kompong Som and change important parts of that offer at the same time. When an offeree does that, the offeree has not accepted the offer. Instead, the offeree has created and then tried to accept her own offer! Here, Muntty did not accept the \$1,000 monthly salary that Cambodioil offered him. In fact, he tried to accept his own offer of \$1,200 per month. And Muntty did not accept the two weeks of vacation time that Cambodioil offered him--he tried to accept his own offer of three weeks of vacation time. Responses like Muntty's are not proper acceptances, because they are not identical to the offers they claim to accept. So they do not create contracts. No acceptance = no contract. Cambodioil has no obligation to Muntty.

The result of this general rule is that if any part of the offer is not accepted, there is no contract. And it generally does not matter how small or unimportant a term seems to be: the offeree must accept all the terms if she wants to immediately create a contract with the offeror.

CASE STUDY 83

FACTS On the last day of October, the leader of the New Khemara Party decides she would like to organize a huge party in the Luxury Hotel in Phnom Penh in order to celebrate Cambodia's Independence Day, and also introduce to the public the 40 candidates running on the party's ticket in the upcoming Parliamentary elections. The leader describes her plan to the candidates, and tells them that each candidate can bring 20 of his or her most important friends and supporters.

The party leader approaches the hotel manager and makes an offer. Specifically, the leader says that she wants the use of the hotel ballroom, entertainment, and the excellent meal that the hotel serves for such big events. The leader says she also wants the following: 80 tables seating 10 persons each, 20 cases of Green Label whiskey, 1,000 cartons of Downhill brand cigarettes, and one big cake shaped like the Independence Monument with a Cambodian flag on top. The party leader offers to pay the hotel \$40 per person for all this.

The manager of the Luxury Hotel tells the party leader that he will check. Two days later, the manager sends the party leader a note saying, "I accept your offer. The meal and the cake will be exactly as you ordered, and delicious as usual. However, I will prepare 100 tables for 8 persons, and we will serve White Label and Harsh 6 brand cigarettes. Thank you for your business!"

The party leader is annoyed. She immediately contacts a local restaurant, which agrees to provide everything exactly as the leader wants, and the leader holds the event there instead. The event is a big success. And although the manager of the Luxury Hotel and all of his staff vote for the candidates of a different party in the election, many of the New Khemara candidates win. But the hotel sues the New Khemara party and its leader for breach of contract.

QUESTION OF LAW Did the Luxury Hotel manager's attempted acceptance of the party leader's offer create a contract?

DECISION No. The hotel manager did not accept what the party leader had offered, so no contract was formed between the hotel and the party.

An offeree's response must generally be identical to--a mirror image of--the offer in order to create a contract. So the offeree cannot choose which terms she likes and insist on adding or changing others!

In this case, the leader of the New Khemara Party made an offer to the Luxury Hotel. But the hotel manager (the offeree) only accepted some of the terms in the party leader's (offeror's) offer. Specifically, although the offer asked for 80 tables for 10 persons each, the hotel manager's response said the hotel would provide 100 tables of eight; instead of Green Label whiskey the manager said he would provide White Label; and instead of Downhill cigarettes, the manager said he would provide Harsh 6 brand cigarettes. So the response was not identical to the offer. And the party leader did not agree to the different terms with which the hotel manager tried to accept her offer. So the party leader did not accept the hotel manager's counter-offer. There was no proper acceptance in this case, and no contract.

(2) Some Jurisdictions Say a Proper Acceptance of an Offer for the Sale of Goods May Not Need to Be a Mirror Image If It Is a Definite Expression of Acceptance

In offers which are mostly for the sale of goods, it is not always necessary for the offeree to accept exactly what the offeror offered in order to create a contract. This is an important exception to the general mirror image rule.

Specifically, some jurisdictions basically say that an offeree can properly accept an offer for the sale of goods if her acceptance is a definite expression of acceptance--even if it includes new or different terms! This exception may be contained in special commercial laws that govern sale of goods transactions.

A "definite expression of acceptance" would appear to basically mean that the offeree's response shows that she really, presently agrees to the offer, with no doubts or conditions. Basically, it would seem to mean about the same thing as the "unequivocal and unconditional" requirement discussed in Section 2.10b above. It is possible to make such a response while still changing terms in the offer. For example, an offeree might say: "I definitely accept your offer at 500 riels"--even though the offer was actually for 400 riels.

Of course, even though this kind of exception means a mirror image is not always needed to create a sale of goods contract, proper acceptances must still be fundamentally similar to the offer. If an offeree's response is not, then it is not really a "definite expression of acceptance." This is because there must be some limit to how different a response can be and still be considered an "acceptance." A response that is too different from an offer cannot be a proper acceptance, no matter how "definite" it claims to be. For example, an acceptance to buy cashews is probably not an acceptance of an offer to sell beans! This limit will vary in every situation. And since different jurisdictions have different laws, it is important to check the specific law that applies to each transaction to see if this exception applies, or if it applies in a different way from what is described below.

One example of a commercial law that contains this sale of goods exception is the Uniform Commercial Code ("UCC") in the United States. This text will use the UCC as an example to show how such an exception works in some jurisdictions. Of course, this type of exception may differ in other jurisdictions.

In any event, under the UCC, there are basically two important questions to ask in order to understand how the exception works:

- (1) Is a sale of goods contract formed even though the offeree's response contains new or different terms?
- AND (2) If a sale of goods contract is formed in this special way, then what happens to the new or different terms in the acceptance?

These key questions are discussed in more detail below.

(a) Is a Sale Of Goods Contract Formed Even Though the Offeree's Response Contains New or Different Terms?

Under the UCC, in order for an offeree's response to a sale of goods offer to be a proper acceptance, it must be a definite expression of acceptance, even if it contains terms that differ from the offer.

The following chart compares the requirements for acceptance of sale of goods offers under the UCC to the general mirror image rule discussed earlier.

Illustration: Mirror Image Rule vs. UCC Sale of Goods Exception		
	Requirement for the offeree's response to be a <u>Proper Acceptance</u>	Is there a contract when the response <u>adds to or changes terms of the offer</u>?
1. Offers generally for all kinds of contracts <u>except</u> sale of goods contracts in some jurisdictions.	<u>General Rule:</u> The offeree's response must be IDENTICAL to the offer (a mirror image).	NO CONTRACT!
2. Offers for the sale of goods under the UCC.	<u>Exception:</u> the offeree's response need only be a DEFINITE EXPRESSION OF ACCEPTANCE -- <u>even</u> if the response includes new or different terms. So a mirror image is not required.	a. If the offeree's response satisfies this requirement: CONTRACT! (status of new or different terms discussed below) b. If the response does <u>not</u> satisfy this requirement: NO CONTRACT! (because the offeree's response is probably just a counter-offer)

Consider how this sale of goods exception applies in the following Case Study.

***	<i>CASE STUDY 84</i>	(applying UCC)
FACTS After much negotiation, a purchasing agent gave a letter to a sales officer of the Pokambor Supply Company with an order for "50 Enginola portable telephones, at \$1,000 each, delivery 30 days, 90 days credit." Pokambor accepted the order at the stated price in a note to the purchasing agent which also said "60 days delivery, 60 days credit." The purchasing agent did not like those terms and decided to buy the telephones from some other seller. But Pokambor insisted that even though it had changed some terms of the purchasing agent's offer, Pokambor had properly expressed its acceptance, and the agent was legally required to buy the telephones. QUESTION OF LAW Did Pokambor's acceptance create a contract with the purchasing agent? DECISION Yes. Pokambor's response was a proper acceptance because it was a definite expression of acceptance of an offer for a sale of goods contract, even though some of its terms differed from those in the offer. In jurisdictions with laws like the UCC, an acceptance of an offer for a sale of goods contract is proper if it is a definite expression of acceptance, even if it includes new or different terms. In this case, Pokambor sent a response to the purchasing agent's offer to buy mobile phones which accepted the offer but included different credit and delivery terms. This response actually created an enforceable contract. In this case, involving the sale of goods, Pokambor's response was a definite expression of acceptance--even though it changed the delivery term (from 30 days to 60) and the credit term (from 90 days to 60) in the purchasing agent's offer. Proper acceptance = contract. However, the new terms can only become part of the contract in very limited circumstances. That will be explained below.		

This sale of goods exception allows an offeree to accept an offer--and create a contract--and include a new or different term at the same time! Because of this exception, such a response by the offeree can create a contract.

The exception can also be dangerous for offerees who are not careful, or not familiar with these rules. Such offerees may end up creating contracts where they did not think they were! And the terms in that contract are likely to be the offeror's terms. As explained in the next Section, the new or different terms such offerees include will only become part of the contract in very limited circumstances.

(b) If a Sale of Goods Contract Is Formed in this Special Way, Then What Happens to the New or Different Terms the Offeree Put in Her Acceptance?

In jurisdictions with laws like the UCC, a new or different term that an offeree includes in her acceptance of an offer for a sale of goods contract only becomes part of the contract in very limited circumstances. Whether the offeree's new term becomes part of the contract depends on several things. They are not easy to understand. They include whether the offeree's acceptance makes a "material change" in the offer, and whether both parties are "merchants." The exact rules for what happens to the new or different term are explained below. But first the text will explain what commercial laws generally mean by "material change" and "merchant."

***** DEFINITION:** A **material change** is a new or different term which gives one party significantly greater benefits, rights, or advantages (and the other party less) than she had before.

So if the offeree's acceptance includes a new or different term which will give her significantly more benefits, rights, or advantages (and the offeror less) than the offeror offered, then that acceptance makes a material change in the offer. But if the offeree's response includes a new or different term which does not significantly increase or decrease the benefits, rights, or advantages in the offer, then that acceptance does not make a material change. What will be a "material change" will differ in every contract, based on all the circumstances. But common examples include changes in the contract terms as to the price, quantity or quality of goods.

***** DEFINITION:** A **merchant**, for this purpose, is basically a person who normally deals in goods of the kind involved in the transaction being analyzed.

Now this Section will examine the rules for whether the offeree's new or different terms become part of a sale of goods contract. It should be--and is--more difficult for a term that makes a material change to become part of a contract than for a term that makes a non-material change. So contract laws like the UCC have two separate formulas to determine whether such changes become part of the contract.



(1) Non-Material Changes**Basic Formula for Incorporation of Offeree Terms Which Make NON-MATERIAL Changes to the Offer for the Sale of Goods (UCC)**

If the offeree makes a **definite expression of acceptance** of a sale of goods offer, and the acceptance contains a new or different term which does not make a material change in the offer, then:

THE CONTRACT CONSISTS OF:

(A) THE ORIGINAL TERMS IN THE OFFER;

PLUS (B) ONLY IF the following three elements are present, then the contract includes **THAT NEW OR DIFFERENT TERM**. The three elements that must exist are:

(1) both parties are **merchants**;

(2) the offer **does not expressly limit acceptance to its terms**;

AND (3) the offeror **makes no objection** within a reasonable time to the new or different term in the offeree's response.

That is, a term that does not make a material change will become part of the contract only if the parties are both merchants, the offer does not expressly prohibit the change, and the offeror does not reject the change within a reasonable time. So in this special situation, even the offeror's silence can allow the new or different term to become a part of the contract.

But if even one party is not a merchant, or if the offer prohibits the change, or if the offeror objects within a reasonable time, then the new or different term does not become part of the contract! So it is really not so easy for the new non-material term to become part of the contract.

(2) Material Changes**Basic Formula for Incorporation of Offeree Terms Which Make MATERIAL Changes to the Offer for the Sale of Goods (UCC)**

If an offeree makes a **definite expression of acceptance** of a sale of goods offer, and the acceptance contains a new or different term which makes a material change in the offer, then:

THE CONTRACT CONSISTS OF:

(A) THE ORIGINAL TERMS IN THE OFFER;

PLUS (B) ONLY IF the offeror **agrees** to the new or different term, then the contract will include **THAT NEW OR DIFFERENT TERM**.

So if the offeror does not actually agree to a new or different term making a material change, then that term does not become part of the contract. Terms which make important changes do not become part of the contract just because the offeror is silent or does not object! So it is even harder for terms that make material changes to become part of the contract. Offerors must agree to them.

Compare the following two Case Studies. Case Study 85 illustrates the application of the rule for terms which make immaterial changes to the offer. Case Study 86 illustrates the operation of the rule when the offeree makes a material change.

*** CASE STUDY 85 (applying UCC)
FACTS Bo's Photo Shops, Inc. sent an order to buy 20 "HI-TK" video cameras to the Filmex Corporation in Singapore for a special price of \$6,000, with Filmex to cause delivery to occur within 90 days by the Carryall Co., a reputable delivery service. Both Bo and Filmex normally bought and sold this kind of goods in their businesses. Filmex decided to accept Bo's order. It immediately sent one of its standard, pre-printed order acknowledgment (acceptance) forms to Bo.
In the appropriate spaces on the acknowledgment form, Filmex had written the name, number, and price of the video cameras Bo ordered, and a date for delivery within 90 days of Bo's order. But Filmex had <u>not</u> written the name "Carryall Co." for delivery, because Filmex always used the Rapid Transit Company (another reputable delivery service) for all its deliveries, and Filmex's pre-printed order acknowledgment form already said that. Bo received and read the acknowledgment from Filmex, but did not say anything.
About eight weeks later, however, Bo decided that his shops should buy a different video camera from a different supplier. So Bo sent a letter to Filmex to cancel his order. But Filmex refused to cancel the order, and delivered the 20 video cameras to Bo using Rapid Transit. Filmex then demanded that Bo pay for the 20 video cameras according to his obligation under their contract. Bo responded by saying that Filmex had never properly accepted his offer because Filmex had changed the term for delivery--and then actually used the wrong delivery service--without his approval. Filmex sued Bo for breach of contract.
QUESTION OF LAW Did Filmex's acceptance create a contract with Bo's Photo Shops which allowed Filmex to use Rapid Transit to deliver the video cameras?
DECISION Yes. In this case: (1) Filmex's response created a contract because it was a definite expression of acceptance; and (2) that contract allowed Filmex to use Rapid Transit to deliver the video cameras, because

the change Filmex made was immaterial, and all the legal requirements for the change to become part of the contract are met.

(1) The Contract -- Acceptances need not always be identical to offers ("mirror images") in order to create a contract. In some jurisdictions, in offers for the sale of goods, it is only necessary for an offeree to make a definite expression of acceptance in order to create a contract with the offeror. In fact, in such cases, a contract exists even if the offeree's acceptance tries to add or change the terms in the offer!

In this case, Bo made a written offer to Filmex which described the identity, quantity, price, and delivery arrangements for a purchase of video cameras--an offer for the sale of goods. Filmex sent a definite expression of acceptance, even though it changed one of the terms in the offer. As a result, Bo and Filmex immediately had a contract together.

(2) The Different Term -- But to determine whether this kind of contract consists of just the original terms in the offer, or also the new or different term(s) in the offeree's acceptance, it is necessary to decide whether the new or different term(s) made a material change or a non-material change. In this case, the only term that Filmex tried to change in its acceptance was the delivery service term in Bo's offer. In offers for the sale of goods, such terms are normally not material (important) unless either a party or the special circumstances of the case indicate that they are.

Here, neither Bo nor the circumstances of the case indicated that delivery by Carryall was a material term of the offer. Most reputable delivery services are comparable, and according to Bo's offer, Filmex had full responsibility for delivery. If Bo really had a special reason for Filmex to use only Carryall to deliver the video cameras, then Bo should have said that. He did not. So Filmex's use of Rapid Transit instead of Carryall would probably not significantly decrease the benefits, rights, or advantages that Bo had anticipated when he made his offer. Filmex's acceptance had made a change in Bo's offer which was not material.

Under the sale of goods exception for acceptances, a non-material change in the offeree's acceptance will become part of the contract if both parties are merchants, and the offer does not limit acceptance to its terms, and the offeror does not object within a reasonable time. Here, both Bo and Filmex were merchants who regularly dealt in this kind of goods, the offer had no such limits, and Bo was silent for eight weeks after Filmex's acceptance said it would use Rapid Transit to deliver the cameras. So Filmex's delivery service term (to use Rapid Transit) became part of the contract.

In this case, Filmex had the right to use Rapid Transit to deliver the video cameras to Bo. And Bo has the obligation to pay for them.

CASE STUDY 86**(applying UCC)**

FACTS The Thambon Import-Export Co. offered in writing to sell a huge Model AX-900 generator to the Yum Noodle Factory for \$86,000, with delivery in 60 days, and payment half on delivery, half within the 90 days following delivery. The chairman of the board of Yum Noodle wrote a letter saying, "We at Yum are pleased to accept your offer of the generator. It will be necessary for you to install it behind our processing plant, because we do not have the trained people or the proper equipment to do that." Thambon scheduled a date for the delivery of the generator with the factory manager, but said nothing about the installation.

Thambon delivered the generator, and Yum paid \$43,000. A week later, Yum's chairman called Thambon to find out when they would install the generator. When Thambon told the chairman of Yum that Thambon had never promised to install the generator, the chairman refused to pay the second \$43,000 until they did. So Thambon sued Yum for payment.

QUESTION OF LAW Did Yum's acceptance impose on Thambon the contract obligation to install the generator for Yum?

DECISION No. In this case: (1) Yum's response did create a contract with Thambon because it was a definite expression of acceptance; but (2) the installation term Yum stated did not become part of the contract, because it was a material change and Thambon did not agree.

(1) **The Contract** -- First, although there is normally no contract unless the offeree's acceptance perfectly matches the offeror's offer, some commercial laws make an exception for the sale of goods. According to this sale of goods exception, an offeree may properly accept an offer and state additional terms at the same time. When such an offeree makes a definite expression of acceptance, she immediately creates a contract with the offeror.

Here, Thambon's offer to Yum was for the sale of goods (a generator for \$86,000), and Yum clearly agreed to Thambon's offer. And though Yum's chairman said in his acceptance that he also wanted Thambon to install the generator, a term which was not in the offer, the chairman did not specify that his acceptance of Thambon's offer "depended on" that installation (or any words to that effect). Yum's words were not conditional. So the two parties had a contract together for the purchase and sale of the generator for \$86,000.

(2) **The Additional Term** -- But additional or different terms in an offeree's response to a sale of goods offer do not always become part of the contract. In fact, it depends on whether the new or different term would make a material change or not. If the additional term would make a material change in the offer, then that term will become part of the contract only if the offeror actually agrees to it.

Here, the additional term that Yum included was for the installation of the generator. In addition to selling and delivering the generator, Yum wanted Thambon to send trained people and special equipment to install the generator at Yum's factory. In fact, Yum was asking Thambon to provide that service, the expertise and labor, and whatever other materials were needed for the installation at no extra cost to Yum! This additional term would significantly increase the benefits, rights, and advantages of Yum, and significantly decrease those of Thambon under the contract. So it made a material change.

Additional terms that make such material changes become part of the contract only if the offeror actually agrees. But here the offeror Thambon did not agree! Thambon said and did nothing except to deliver the generator as required by the contract. So installation never became part of the contract. Thambon is not obligated to install the generator, and Yum must pay what it still owes for the generator.

***** WHY IS THIS IMPORTANT?** Why do some jurisdictions allow offerees to create sale of goods contracts even though their acceptances are not identical to all of the terms in the original offer?

Some jurisdictions believe that this exception recognizes how people and businesses actually make sales contracts. When people buy and sell goods, they often make contracts which are based on offers and acceptances that are not "mirror images!" In fact, people have rarely done their business or made their sales contracts in such a precise way. Parties have often relied more on trade usage, industry practices, course of dealing, and their relationships in order to make their sales contracts. So they have not needed--or wanted--to always have acceptances that were the perfect mirror image of their offers. The strict general rule, which used to apply to all offers and acceptances, said there was no contract in such situations because of the new or different term in the acceptance. But the strictness of that rule was a burden on sales activity. It interfered with the normal way that people negotiate and make sales agreements. And it also gave bad offerees a way to deny real contract obligations by saying that they had never properly accepted an offer!

So some special laws now provide an exception for sale of goods offers. Under the exception, there is a contract if the offeree has made a definite expression of acceptance of a sale of goods offer. And it does not matter that the offeree's acceptance did not perfectly match the offer, or included a different or additional term. In fact, in limited circumstances, that different or additional term might even become part of the contract!

The exception also solves the problem of the "battle of the forms." Many buyers and sellers (especially big businesses and governments) use pre-printed forms in their sales activities, such as purchase order forms, order confirmation forms, and acknowledgments. Like Filmex in Case Study 85, these parties often use such forms to make their offers and acceptances.

Of course, when a buyer and a seller each use their own pre-printed forms, their forms will often differ in some ways! But even if the pre-printed forms differ, there often is a real agreement between the parties. The strict general rule would not recognize that agreement. But the sale of goods exception does recognize such agreements. So the sale of goods exception does not let such real sales agreements "die" in the "battle of the forms!"

This exception also promotes commerce. In a world of fast and extensive commercial activity, the sale of goods exception lets parties create sales contracts without extraordinary attention to every detail of every term. The result is generally more sale of goods contracts and more trade.

Of course, there are some potential problems with the rule discussed in this Section. One is that it may be difficult for courts and parties to decide just how "fundamentally similar" an offeree's response must be in order to be an acceptance. Another potential problem is that it may sometimes be unfair to an offeree who responds with different terms, thinking she has made a counter-offer, but finds that she has actually made a contract on the offeror's terms! Of course, such offerees should not make responses that could be interpreted as "definite expressions of acceptance" unless they are prepared to follow the offeror's terms. Finally, it could be argued that offerors should never be required to object to changes from the offeree--even non-material ones--since that would mean they are not "masters of their offers." Of course, it is difficult to create rules that have no potential problems. On the whole, sale of goods exceptions like this appear to have worked fairly well in practice.

2.10d Fourth Requirement: The Acceptance Must Occur in a Proper Manner, Including Meeting Any Special Requirements of the Offeror

In order to be proper, acceptance must occur in a proper manner. In particular, offerors may require or request that offerees accept in a certain manner. Offerees generally cannot ignore these offeror statements and still make a proper acceptance.

For example, an offer may say the offeree must accept the offer in writing by a certain date in order to make a contract based on that offer. In that case, the offeree must accept the offer in writing by that date, or lose the power of acceptance.

Offerors sometimes describe a specific manner for an offeree to accept the offer if the offeree wants to create a contract. In this Section and Section 2.10e, this text will use the word "manner" to mean the entire way an offeree conveys an acceptance to the offeror, including the way the acceptance is transmitted (such as by fax, messenger, or telephone), the physical nature of the acceptance (such as whether it is oral or in writing), and the timing of the acceptance (such as whether it occurs by a certain date).

Basically, if the offeror does require only one manner of acceptance, the offeree must accept in that manner, or the acceptance is not proper. But if the offeror does not insist on just one manner--whether because the offer merely suggests a manner, or because it says nothing about manner of acceptance--then the offeree must use a manner that is reasonable under the circumstances. Of course, these basic rules are similar to those about how long an offer lasts, as discussed in Section 2.6a with regard to lapse.

The following Sections discuss how offerees can make proper acceptances of these different kinds of offers.

(1) If the Offeror Expressly Insisted on Only One Manner of Acceptance, the Offeree Must Comply in Order to Make a Proper Acceptance

Sometimes the offeror expressly insists on just one specific manner of acceptance, such as a writing or a face-to-face communication. In that situation, that specific manner of acceptance is the only way for the offeree to make a proper acceptance of that offer.

CASE STUDY 87

FACTS Malin mailed an offer to Bunthet which stated: "If you wish to accept, you must fax your acceptance before the end of this week to my agent Choo Choo in Taiwan. No other manner of acceptance is possible."

Bunthet quickly decided to accept. But he could not find Choo Choo's fax number. So he faxed his acceptance to Malin and mailed a copy of the fax to Choo Choo. But Malin was out of the country on business and did not know that Bunthet had sent him the fax. The following Tuesday, Choo Choo called Malin to say that he had just received by regular mail a copy of the acceptance that Bunthet had faxed to Malin. Malin told Choo Choo to ignore it.

QUESTION OF LAW Did Bunthet's attempted acceptance create a contract with Malin?

DECISION No. Bunthet did not make a proper acceptance because he failed to accept in the proper manner.

In order to make a proper acceptance where offerors expressly insist on one manner of acceptance, offerees must accept in that manner. In this case, Malin clearly limited the manner of acceptance of his offer to Bunthet to one way: a fax to Choo Choo. He said, "No other manner of acceptance is possible." Bunthet failed to comply with that requirement. It does not matter that Bunthet sent the fax to Malin as fast as he would have sent the fax to Choo Choo, or that Bunthet actually succeeded in informing Choo Choo by mail, because neither of those ways was what Malin had required

for acceptance of his offer. So the acceptance was not proper. No proper acceptance = no contract.

As Case Study 87 shows, what the offer says about the manner of acceptance is important. But it may not always be easy to determine when an offeror is "expressly insisting" on only manner of acceptance. In many jurisdictions, an offeree must comply with the precise manner the offer specifies if the offer uses expressions like those which are underlined in the sentences below:

- "If you want to accept, you must respond only by mail."
 - "Acceptance absolutely not valid unless received before the first of next month."
 - "Your signature on this form is the essential and exclusive means of acceptance."
- OR**
- "No contract until offer accepted in person."

In such cases, the offeree has no other way to make a proper acceptance of the offer, unless the offeror changes her requirement. Of course, in practice, offers rarely insist on just one special manner of acceptance.

(2) If the Offeror Did Not Expressly Insist on Only One Manner of Acceptance, the Offeree Must Use a Manner That Is Reasonable under the Circumstances

If the offer did not clearly require just one manner of acceptance, then the offeree has some freedom in choosing how to accept the offer. In that case, the offeree can use any manner of acceptance that is reasonable under the circumstances.

What is "reasonable under the circumstances" may not always be clear, and legal authorities do not always seem to agree about it. Therefore, this Section will attempt to present some of the general ideas in this difficult area. Generally there are two possible ways for offerees to make "reasonable" acceptances where offers do not strictly require one manner of acceptance.

(1) Offer Suggests a Manner of Acceptance -- If the offer suggests (but does not expressly insist on) a particular manner of acceptance, then it is reasonable for the offeree to accept diligently either by that manner, or any other manner which is generally similar to or better than the manner that the offer suggested.

"Similar or better" usually means an acceptance made in a manner that is generally as fast, reliable and otherwise satisfactory as what the offer suggests. For example, if the offer asked for (but did not demand) an acceptance by mail, the offeree may properly accept the offer by sending her acceptance either by mail (the suggested manner), or by a reliable

delivery service, telegram or fax, which are usually better because they are faster, more reliable, or both.

Sometimes the offeror's suggestions may look very strong, such as when the offeror says, "accept this way," or "you should accept this way." But in many jurisdictions, these are still only considered "suggestions" unless the offeror clearly says that the manner specified is the only permissible way, using words like "only" or "essential," as discussed above.

Sometimes an offeree can even make a valid acceptance when she does not diligently use a manner which is generally "similar to or better than" the way the offeror suggested. However, if the offeree chooses to try to accept in such a manner, that manner must actually succeed at making the acceptance at least as well--as quickly, reliably and otherwise satisfactorily--as the manner suggested by the offer. Otherwise, the acceptance will generally not be effective. So if the offeree in the example above sent the acceptance by a manner that was generally even slower than the mail (such as a cyclo from Phnom Penh to Battambang), the acceptance would probably not be effective if that manner actually turned out to be slower. And some manners of acceptance are not as reliable or otherwise satisfactory as the manner the offeror suggested no matter what actually happens. For example, an offeror who requests a written acceptance will probably not be satisfied with an oral acceptance, no matter how fast it arrives.

Consider the possibilities in Case Study 88.

*** CASE STUDY 88			
<u>POTENTIAL FACTS AND RESULTS</u>			
<u>IF:</u>	<u>AND THEN</u>	<u>QUESTION OF LAW</u>	<u>DECISION</u>
Mr. Fer wrote to Mr. Free:		Was that a proper acceptance?	Result
1. "I should receive your acceptance by mail."	Mr. Free sends a telegram, which arrives more quickly than the mail would.	YES.	= CONTRACT.
2. "Send a messenger with an answer to this offer by noon today."	Mr. Free comes himself before noon and accepts.	YES.	= CONTRACT.
3. "Acceptance on reverse side of this form."	Mr. Free sends a separate letter of acceptance with the form.	YES.	= CONTRACT.

<u>IF:</u>	<u>AND THEN</u>	<u>QUESTION OF LAW</u>	<u>DECISION</u>
Mr. Fer wrote to Mr. Free:		Was that a proper acceptance?	Result
4. "Call me immediately if you want to accept."	Mr. Free faxes an acceptance, but the fax does not arrive at Fer's fax machine until three days later.	NO. Mr. Free tried to use a different manner which was <u>not</u> similar to the manner Fer suggested, and which turned out to be worse (slower).	= NO CONTRACT.
5. "Written acceptance no later than midnight Monday."	Mr. Free calls Fer on Monday before midnight and accepts.	NO. Mr. Free chose a manner that was different from what Fer had suggested--and probably not as reliable or satisfactory.	= NO CONTRACT.

(2) Offer Does Not Suggest Any Manner of Acceptance -- Sometimes the offer neither insists on nor suggests a specific manner of acceptance. Of course, this is very common. In this situation, the offeree must generally accept in a manner that is reasonable based on:

- (a) the subject matter of the offer;
- (b) the manner in which the offeror made the offer; AND
- (c) any other relevant circumstances.

These rules are briefly discussed below.

In this situation, the manner of acceptance must be reasonable based on the subject matter of the offer. Sometimes some of the other rules explained in this text may affect what is a reasonable manner of acceptance in this situation. For example, it would seem that acceptance of an offer for the sale of land might need to be written to be reasonable, since most jurisdictions require contracts for the sale of land to be written in order to be enforceable. However, as with some of the offer termination rules discussed in Section 2.6, the real problem here might seem to be a different formation requirement--formality--rather than real agreement. In addition, an offer for a currency exchange contract would probably require an immediate acceptance. This is because offers for this kind of subject matter usually expire quickly, because the rates of exchange of currencies generally change so quickly. This has already been explained as part of the rules about lapse which were discussed

in Section 2.6a. Of course, a manner of acceptance is probably not reasonable if it results in the offeree trying to accept an offer that is no longer valid.

The manner in which the offeror made the offer is also an important part of the analysis of whether an acceptance is reasonable. Generally, the offeree should make her acceptance in the same manner that the offeror made the offer, or one that is generally similar or better. For example, if the offeror made the offer in a mailed letter, the offeree should normally mail a written acceptance back to the offeror, or use a manner that is generally similar or better (like a reliable delivery service) if she wants to be sure her acceptance is proper. The offeree may be able to accept in a different manner that is not generally similar or better. But such an acceptance will generally be proper only if it turns out to be basically as fast, reliable and otherwise satisfactory as the manner in which the offer was made.

Finally, if a party asks a court to resolve a dispute about whether there was an effective acceptance, the court will look at any other relevant circumstances to help it determine what was reasonable. For example, if an offer was sent by fax, an acceptance sent by regular mail might still be reasonable if the mail service between the offeree and offeror was relatively quick and reliable, and no other factors indicated that the offeror needed a particularly quick response. Or if an offeree had technical difficulties in responding in the same way the offer was made--such as if the offeree's fax machine or e-mail system broke down--that could also be a factor in a court's decision as to whether an acceptance was reasonable. Of course, such difficulties would not help an attempted acceptance be considered reasonable where the offer had lapsed.

***** ADDITIONAL REFERENCE:** Chapter 6 ("Formality") contains further discussion of formality requirements many jurisdictions have for certain types of contracts.

2.10e An Acceptance May Be Effective at the Time of Dispatch or the Time of Receipt

Different jurisdictions have different rules about when an acceptance is effective--when it forms a contract. And even within one jurisdiction, there may be different rules about this subject in different situations. So as with the sale of goods exception for acceptances, it is essential to look at the particular contract law which applies to the parties and the transaction in question. These rules can be important because, as discussed above, the timing of an acceptance can affect whether the acceptance is proper or not, and whether a contract can be formed.

(1) Very Generally, in Many Common Law Jurisdictions, Acceptances Are Effective on Dispatch If They Are Sent Diligently and in a Reasonable Manner

Common law and civil law jurisdictions may have different rules about when acceptances are effective. In at least some civil law jurisdictions, the general rule is that acceptances are effective when they are received by the offeror ("effective on receipt"), unless the offeror specified otherwise in the offer. Other civil law jurisdictions appear to say, at least sometimes, that acceptances are generally effective when sent by the offeree ("effective on dispatch"). These civil law rules are further discussed in Section 2.12 of this Chapter.

Very generally, in many common law jurisdictions, if an acceptance is sent diligently and in a reasonable manner, it is effective on dispatch. If those requirements are not met, the acceptance is effective on receipt, provided it actually arrives in a way that is as fast, reliable, and otherwise satisfactory as an acceptance sent diligently and in a reasonable manner. This is often called the "mailbox rule," since it can mean that an offeree's acceptance is effective at the moment it enters the mailbox (or mail system). As with the rules regarding what is a reasonable manner of acceptance, there does not seem to be complete agreement among legal authorities about when each rule applies. So this Section will merely try to present general ideas in this area.

One way to think about the general rules about when acceptances are effective in common law jurisdictions is to consider two things:

- (1) what the offer itself said about acceptance,
- AND** (2) what the offeree actually did to accept it.

The following illustration presents these two factors and their effect on when an acceptance is effective.



Illustration: When an Acceptance Is Effective (Many Common Law Jurisdictions)

What the offer SAID about <u>acceptance</u> :	What the offeree DID to <u>accept the offer</u> :	WHEN that acceptance is effective:
1. The offer stated a <u>specific time</u> when an acceptance would be effective.	The offeree makes a proper acceptance as the offeror requested.	EFFECTIVE AT THE SPECIFIC TIME the offer stated.
2. The offer required or suggested <u>one specific manner</u> of acceptance.	a. The offeree diligently: (1) accepts in <u>that manner</u>; <u>or</u> (2) (if the offer allows) accepts in a manner that is generally similar or better. b. The offeree (1) undiligently uses the manner described, or (if allowed) one that is generally similar or better; <u>or</u> (2) uses a manner which is not generally similar or better--provided that the acceptance actually arrives in a way that is as fast, reliable, and otherwise satisfactory as if sent diligently in the manner described.	EFFECTIVE ON DISPATCH The offeree's acceptance is effective when <u>sent</u>. EFFECTIVE ON RECEIPT The offeree's acceptance is effective when the offeror <u>receives</u> it.
3. The offer did not describe <u>any</u> manner for acceptance.	a. The offeree diligently uses a manner that is reasonable under the circumstances, generally the same manner the offeror used, or one that is generally similar or better. b. The offeree accepts in a manner that is not reasonable, which generally means (1) in a manner that is not the same, generally similar or better, <u>or</u> (2) undiligently by a manner that is the same, or generally similar or better--provided that the acceptance actually arrives in a way that is as fast, reliable and otherwise satisfactory as if sent diligently by a reasonable manner.	EFFECTIVE ON DISPATCH EFFECTIVE ON RECEIPT
4. The offer is held open by an <u>option</u> contract.	The offeree makes a proper acceptance of the offer which the option held open.	EFFECTIVE ON RECEIPT unless the option says otherwise.

***** WHY IS THIS IMPORTANT?** Why do many common law jurisdictions apply the "effective on dispatch" rule explained above?

The effective on dispatch rule described above may be somewhat confusing, but it is an important part of the contract law of many jurisdictions.

One justification for the rule is the idea that an offeree really makes her acceptance at the point when that offeree voluntarily puts the acceptance outside of her own control in a reasonable manner, such as in the mail. Common law jurisdictions generally use this rule to stop the offeror from revoking--or the offer from terminating in some other way--once the offeree has reason to believe she has accepted. This protects the offeree, who might send the acceptance, rely on the contract in some substantial way (such as by not accepting other offers), then find the offer terminated later--after she thought acceptance occurred!

Of course, it is debatable whether the offeror should be bound by an acceptance she never received, simply because the offeree sent it in a reasonable and diligent manner. Some legal authorities say it is better to put the risk of a lost acceptance on the offeror in this situation. This is because the offeree is less likely to realize the acceptance is lost, but more likely to rely on a lost acceptance than the offeror is, because most offerors will not rely on a contract until they have actually received an acceptance. In fact, offerors are more likely to inquire if they never receive replies to their offers--and the common law idea is that it is better to put the risk of a lost acceptance on people who are less vulnerable to the risk! In addition, even though a contract is formed, it appears that courts may sometimes "discharge"--end--the duties of offerors to perform if those offerors never receive acceptances. Discharge of duties will be discussed more fully in Chapter 9 ("Performance and Discharge of Duties").

CASE STUDY 89**(Common Law)**

FACTS Khin Khun told an insurance agent that he wanted to buy a \$100,000 fire insurance policy for his house. The Big Risk Insurance Company replied that it would insure Khun's house effective at the moment Khun accepted its offer. On January 2, the insurance agent wrote by regular mail to Khun to tell him about the terms--making Big Risk's offer to Khun--but Khun was away from home.

Khun did not see the letter until January 20. On January 21, Khun sent the agent his agreement to the insurance (properly addressed and by regular mail) along with a check to pay the insurance premium. Unfortunately, Khun's house burned down on January 23. The insurance agent received the letter and check on January 27.

On January 28, the agent wrote to Khun. The agent said that the Big Risk company refused to recognize any insurance contract because Khun's house had burned down on January 23--and the subject matter of the offer had been destroyed, thus terminating the offer before Khun made a proper acceptance. Khun sued the insurance company for the \$100,000 proceeds of the insurance policy.

QUESTION OF LAW Did Khun's insurance contract start when he mailed the acceptance to Big Risk?

DECISION Yes. The acceptance by Khun, transmitted diligently by regular mail, was effective on dispatch and created a contract at that time.

In many common law jurisdictions, acceptances are effective on dispatch as long as they are sent diligently and in a reasonable manner. In this case, Big Risk did not describe any specific manner for Khun to accept its offer for a fire insurance policy--an offer which it sent by regular mail. Since the offer did not describe any particular manner for acceptance, Khun diligently accepted by a manner that was reasonable under the circumstances: regular mail, the same manner the offer used. Diligent acceptance by a reasonable manner = acceptance effective on dispatch.

In Case Study 89, suppose Khun accepted by an unreasonable manner--such as if he gave his acceptance to his 4-year-old child to hand deliver to Big Risk all the way across Phnom Penh. Or suppose that Khun was not diligent--such as if he put a completely wrong address on the envelope. In those situations, the acceptance would not have been effective until it was received. And it would only have been effective at all if received within the time it would have generally taken a reasonable acceptance to arrive. So if Khun had tried to accept in such an unreasonable or undiligent manner, the acceptance would probably not have been effective at the time Khun's house burned down--and there would probably have been no contract.

(2) The "Race" between Acceptances and Revocations

Offerees can accept offers, and offerors can revoke offers. In some cases, there is an acceptance by the offeree and a revocation by the offeror in the same transaction. As discussed in Section 2.4a of this Chapter, an offeror's revocation is effective only when the offeree receives the revocation. And as illustrated above, under different contract law rules an offeree's acceptance may be effective on dispatch by the offeree, or it may be effective on receipt by the offeror, depending on the situation.

Because of these rules, it is sometimes possible for an offeree's acceptance to run a "race" against the offeror's revocation! The chart below illustrates the possibility.



Illustration: Acceptances v. Revocations

IF the offeror sends
a revocation of her
offer...

BUT BEFORE the offeree
receives that revocation,

either The offeree sends a proper acceptance
which is EFFECTIVE ON DISPATCH

or The offeror receives a proper
acceptance that is EFFECTIVE ON
RECEIPT

THEN

THERE IS A CONTRACT!

The offeree's acceptance "beat" the offeror's
revocation, even though the offeror may
have actually sent the revocation first. So
the revocation has no effect.

(3) **The "Race" between Acceptances and Rejections**

Offerees can make both acceptances and rejections. In some cases, there is an acceptance and a rejection by the offeree in the same transaction. This might occur if the offeree decides to respond to an offer in one way, but later changes her mind. As discussed in Section 2.5a of this Chapter, an offeree's rejection is effective only when the offeror receives the rejection. And as explained above, under different contract law rules an offeree's acceptance may be effective on dispatch by the offeree, or it may be effective on receipt by the offeror, depending on the situation.

Because of these rules, it is sometimes possible for an offeree's acceptance to run a "race" against her own rejection! This is a difficult situation. In most situations (though not always), the "effective on receipt" rules appear to apply. That is, whichever communication the offeror receives first--the rejection or the acceptance--is usually effective. If the acceptance is received first, there is always a contract, and the rejection has no effect. If the rejection is received first, there is usually no enforceable contract (and the offer terminates) unless--at least in common law jurisdictions--certain requirements are met. The chart below explains these rules more specifically.



Illustration: Acceptances v. Rejections

If both an **acceptance** and a **rejection** are **sent** before either one is received by the offeror
AND....

The **ACCEPTANCE** arrives first...**THEN**

THERE IS A CONTRACT! The offeree's acceptance "beat" her own rejection, even though the offeree may have sent the rejection first! So the rejection has no effect.

BUT IF...

The **REJECTION** arrives first...**THEN**

- (1) If the acceptance is normally **effective on receipt**, then **THERE IS NO CONTRACT!** (and the offer terminates)
- (2) If the acceptance is normally **effective on dispatch**, then there are **two possibilities (in common law jurisdictions)**:
 - (a) **Some common law courts: THERE IS A CONTRACT** but the offeree generally cannot enforce it if the offeror detrimentally relied on the rejection; **OR**
 - (b) **Other common law courts: (1) if the acceptance was sent first, there is a CONTRACT** but the offeree generally cannot enforce it if the offeror detrimentally relied on the rejection; **BUT (2) if the rejection was sent first, there is NO CONTRACT.**

The special common law rules above try to protect the offeror where she detrimentally relies on a rejection by the offeree before receiving the acceptance. For example, an offeror might make a binding contract with a different party, or spend money or time trying to make another contract, in reliance on a rejection from the offeree. These rules basically say that the offeree will not be able to enforce any resulting contract in that situation--even where the acceptance would normally have been effective on dispatch, before the rejection was received and before it was effective!

2.11 If It Is Not Clear Whether an Offeror Wants Only an Act or Only a Promise from the Offeree, Courts Generally Give the Offeree the Choice of Accepting by Performing the Act Requested or Promising to Do So

Sometimes it is really not clear whether an offer is requesting an act or a promise from the offeree--whether it is an offer for what common law jurisdictions would call a unilateral contract or a bilateral contract. This is a difficult but very important problem, because the offeree must know how to properly accept the offer.

If it is not clear whether an offeror wants an act or a promise from the offeree, common law courts will generally give the offeree the choice of accepting by performing the act or promising to do so. One effect of this rule is that such unclear offers actually give the offeree the opportunity to create a bilateral contract if she wishes. That can be a valuable option because of the added security of mutual promises that bilateral contracts often give.

In addition, some jurisdictions appear to say that even where the offeree decides to perform--and not make a promise--in response to the unclear offer, the start of performance actually forms a bilateral contract with the offeror! This provides even more protection for the offeree, though it also obligates the offeree to finish performance, which would not normally happen where the offeree accepts by performing the act requested.

Consider the following Case Study.

CASE STUDY 90

FACTS Saray is a computer instructor. Saray's friend Im says to him: "Computer lessons for me, for ten weeks, three hours per week, \$10 per week, starting at your house, Monday, 2:00 p.m." Saray says, "I accept your offer."

Im takes computer lessons from Saray for three weeks and learns a great deal. But at the end of the three weeks, Im has still not paid Saray any money for the lessons. So Saray says to Im: "Please pay me."

But Im says he has no contract obligation to pay Saray because there is no contract. Im claims his offer requested that Saray actually teach him about computers for the full ten weeks--not that Saray merely promise to do so. As a result, Im says, there is no contract yet--and he has no contract obligation to Saray.

QUESTION OF LAW Did Saray's statement that he accepted Im's offer create a contract?

DECISION Yes. Saray's promise that he would teach Im as described in Im's offer was a proper acceptance, and a contract was formed, because it was not clear whether Im's offer was requesting performance or a promise.

Common law courts generally say that, where it is not clear whether an offer requests that the offeree perform an act or make a promise, the offeree can choose either way to accept the offer. In this case, Saray's promise to teach Im about computers was a proper acceptance because Im's offer was not clear about whether it sought an act or a promise. Im said he wanted the computer lessons. But it was not really clear whether he wanted Saray to just give him the lessons (an act), or to promise to do so. Most courts say that in this situation, the offeree can accept by performance or a promise. So in this case, Saray had the opportunity to make a proper acceptance (and form

a contract with Im) simply by promising to do what was described in Im's offer. That is exactly what Saray did. So a contract was formed immediately which required Saray to teach and Im to pay for a full ten week computer course. Proper acceptance = contract.

And some courts would say that even if Saray had chosen to accept merely by performing, the start of his performance would have actually formed a bilateral contract. Of course, that would have obligated both parties to perform.

One last point to remember is that these rules can provide protection for both parties, including offerors like Im in Case Study 90. This is because the contract Saray formed when he promised to teach Im about computers also bound Saray to fully perform the contract. So if it had been Saray (instead of Im) who claimed there was no contract, or refused to perform, then Im would have been able to enforce the contract against Saray.

***** WHY IS THIS IMPORTANT?** Why do courts apply these rules saying that offerees can accept offers that are not clear about whether they seek an act or a promise either by performing the act or making the promise?

Many jurisdictions want parties to have the opportunity to form bilateral contracts provided that would not violate the clear intentions of the offeror. Legal authorities believe that most contracts in the world today are bilateral, especially in business and government activity. One reason for this is that most offerors and offerees (except in certain special situations like public offers) want a commitment right away that the other party will in fact perform, and unilateral contracts do not provide such commitments. But bilateral contracts do.

Courts also generally prefer bilateral contracts when an offer is unclear about whether it seeks an act or a promise. In fact, as noted above, some courts say that an offeree who merely starts to perform in response to an unclear offer forms a bilateral contract. These courts say that starting performance in such an unclear situation can actually be an implied promise that the offeree will complete performance. It also appears that such courts will do whatever they can to protect the offeree in such unclear situations. For example, in Case Study 90, if Saray had merely started to teach Im about computers without making an express promise, some courts would still view that as an acceptance (implied promise) forming a bilateral contract. Of course, where it is very clear the offeror wants only a promise and not an act (like the tour director Sochua in Case Study 73), then the offeree will have more trouble showing an implied promise merely by starting performance. So it is usually safer for offerees to make a promise if they are not sure whether an offer seeks an act or a promise.

The main reason for courts' preference for giving parties the opportunity to form bilateral contracts is that the rules for bilateral contracts provide

immediate rights and protections for both parties. This is different from unilateral contracts. In the unilateral contract situation, the offeree generally has less protection until she has completed the specific act the offeror requested. And the unilateral contract offeror also has no commitment that the offeree will perform. In many cases, the offeror also wants the immediate commitment of the offeree to perform--and only bilateral contracts provide that.

Finally, some special commercial laws also prefer to give parties the opportunity to create bilateral contracts, particularly with respect to the sale of goods. For example, the Uniform Commercial Code in the United States says that if any offer for the sale of goods does not clearly specify that it requires only an act or only a promise for acceptance, then the offeree can accept the offer either by doing the act that the offeror ultimately wanted, or by promising to do that act.

Of course, parties do not always wish to make bilateral contracts. For example, most reward offerors and offerees probably do not wish to be bound by bilateral contract rules. In such cases, the offeror probably wants many people to try to perform the act she has requested--but not to make binding contracts with all of them, which could cause many disputes, especially if many persons claimed to have performed. And most offerees in such situations would not want to be committed to performing the act requested, where the act may be difficult and many other offerees may be trying to perform it at the same time. So courts will apply unilateral contract rules in cases where it is clear that is what the offeror wants.

2.12 Real Agreement in the Cambodian Legal Tradition and the Civil Law Tradition

The approaches of the Cambodian legal tradition and the civil law tradition to real agreement appear generally compatible with the approach discussed in this Chapter. The approaches of these traditions to real agreement are discussed below.

***** CAMBODIAN LAW PERSPECTIVE:** The current Contract Law of Cambodia (Decree #38D (1988)) contains several provisions relevant to the discussion of real agreement in this Chapter. These provisions are briefly explained below.

Article 1 defines a contract as a "freewill agreement" between two or more persons to create or affect obligations relevant to those persons. Article 3 states that a contract is valid only if, among other things, it "arises out of a real and free agreement" and "has a subject matter that is certain." This requirement of certainty seems similar to the requirements discussed in this Chapter that valid offers be definite and reasonably clear, and that proper acceptances be unequivocal and unconditional. Article 6 states that a contract

will be deemed "voidable" if it does not result from a "real and free agreement," and Article 7 says that agreements resulting from mistake, duress or fraud are not real agreements.

These Decree provisions seem consistent with the ideas in this Chapter. However, the Decree does not appear to discuss "offer" or "acceptance" specifically.

***** CIVIL LAW PERSPECTIVE:** The approach of the civil law tradition to real agreement seems generally compatible with that discussed in this Chapter. However, some civil law jurisdictions have different ideas about several of the important principles discussed in this Chapter.

First, many civil law jurisdictions appears to have a different view about when an offeror can revoke an offer. Specifically, many civil law jurisdictions appear to say that an offeror cannot revoke her offer whenever she wants before the offeree accepts. Such jurisdictions say that the offeror cannot revoke the offer for a reasonable time, as long as no expiration time is specified in the offer itself. For example, this appears to be the law in France and Germany. As the reader will recall, the common law rule discussed earlier in this Chapter is that the offeror generally can revoke her offer any time before acceptance, though there are certain exceptions.

Second, civil law jurisdictions do not appear to have a doctrine comparable to promissory estoppel. However, there may actually be less need for promissory estoppel in civil law jurisdictions. Since civil law jurisdictions do not require consideration in order for a contract to be enforceable, there is less need to find a doctrine to help courts enforce agreements where there is no consideration. In addition, as explained above, many civil law jurisdictions say an offer cannot generally be revoked for a reasonable time. In such jurisdictions, there may be less need for promissory estoppel to prevent the injustice that may occur where offerors try to revoke after offerees have justifiably relied on offers.

Third, many civil law jurisdictions appear to define bilateral and unilateral contracts differently from the way they are defined in common law jurisdictions. For example, in civil law jurisdictions like France, it appears that a bilateral contract is one with obligations on both sides, whereas a unilateral contract is one with obligations on only one side, such as an agreement to make a gift. Of course, this different idea about bilateral and unilateral contracts would affect to some degree the way that valid offers and proper acceptances could be made in such jurisdictions.

Fourth, some civil law jurisdictions appear to have different views about when an acceptance is effective. As described above, many common law jurisdictions say that acceptances are sometimes "effective on dispatch," but sometimes "effective on receipt." By contrast, some civil law jurisdictions say that acceptances are generally effective when they are received by the offeror.

For example, this appears to be the case in Germany. However, other civil law jurisdictions appear to say (at least sometimes) that acceptances are generally "effective on dispatch." For example, in France, there appear to be two different ideas about when acceptances are effective: some say the "effective on dispatch" rule ("*théorie de l'émission*") should generally apply, and others say the "effective on receipt" rule ("*théorie de la réception*") should generally apply. It appears that the "*théorie de l'émission*" may now be the prevailing rule in France. In any case, these different ideas show the importance of checking the specific law that applies to the transaction in question.

2.13 Questions for Review

CHAPTER 2 -- QUESTIONS FOR REVIEW

1. What is an offer?
2. What are three basic requirements of a valid offer?
3. When is an offer valid even though it is not seriously intended?
4. What terms must a valid sale of goods offer generally contain?
5. What is "chicken?" How does that relate to the rules in this text about the definiteness and clarity of offers?
6. When does an offer not have to be so definite? Give examples.
7. Who can accept an offer? Who cannot?
8. Name two things that may look like offers, but are not offers.
9. In general, are advertisements offers? Why?
10. How does bid solicitation work? Why is it important?
11. What are the three general ways offers can terminate?
12. When can an offeror revoke an offer, in general?
13. To whom must a revocation be communicated?
14. When is a mailed revocation effective?
15. What are the reasons for the above rule about when mailed revocations are effective?
16. What are the two ways in which an offeror can revoke? Explain each.

17. How can public offers be revoked?
18. Name four circumstances when an offeror may not be able to revoke in common law jurisdictions, even if there is no acceptance yet.
19. What do common law courts generally say about revocation where there has been part performance in response a unilateral contract offer?
20. What is a rejection? When is it effective?
21. What is the effect of a counter-offer?
22. What is the difference between a counter-offer and a rejection?
23. Compare the legal effects when offerees make inquiries, "grumbling acceptances," and acceptances.
24. What are five common ways that specific events outside the direct control of the offeror or offeree can terminate an offer?
25. How do courts determine what is a "reasonable time" for an offer to last when the offeror does not specify when it expires?
26. How can death or incompetence terminate an offer?
27. What is an acceptance?
28. What are two important general limits on how acceptances can occur?
29. In general, who can accept an offer?
30. What are two special situations where an offer can be accepted even though the offeror does not really want the accepting party to do so?
31. In general, how must offerees accept offers for unilateral contracts?
32. What is the most fundamental requirement the offeree must meet in order to properly accept an offer for a bilateral contract?
33. What are the four basic elements into which this text divides the fundamental requirement described in the previous question?
34. How can conduct communicate acceptance of an offer for a bilateral contract?
35. In general, is silence a proper acceptance of an offer for a bilateral contract?

36. What are four special situations where silence can be a proper acceptance of an offer for a bilateral contract?
37. What is required for an unequivocal and unconditional acceptance of an offer for a bilateral contract?
38. What is the "mirror image" rule?
39. How can an acceptance form a sale of goods contract even though the acceptance contains new or different terms?
40. If a contract is formed as described in Question 39, how do some courts determine whether the new or different terms become part of the contract?
41. Give examples of material and non-material changes to a sale of goods contract.
42. When is an offeree absolutely limited to just one manner of acceptance if she wants to make a bilateral contract?
43. How must an offeree accept an offer for a bilateral contract if the offeror does not insist on just one manner of acceptance?
44. When is an acceptance effective?
45. Explain how acceptances may "win races" against revocations and rejections.
46. How do many courts say an offeree may properly make an acceptance where the offer is not clear about whether it seeks an act or a promise?
47. Is the approach of the Cambodian legal tradition to real agreement basically compatible with the approach discussed in this Chapter?
48. Is the approach of the civil law tradition to real agreement basically compatible with the approach discussed in this Chapter? What are some important differences?