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Letters of Intent, Contract Formation & Limitation Periods

Chartered Institute of Arbitrators (London)
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Letters of Intent, Contract Formation & Limitation Periods

Has a Contract been entered into?

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Has a Contract been entered into?

A Letter of Intent often doesn't constitute a Contract

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A Letter of Intent often doesn't constitute a Contract

Why are Letters of Intent issued?

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A Letter of Intent often doesn't constitute a Contract

- When it includes a "cap"
- When it states that a matter has still to be agreed
- When it states that its terms are different to the future Contract

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What is the significance that the Letter of Intent does not constitute a Contract?

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What is the significance that the Letter of Intent does not constitute a Contract?

- No Completion date
- No provisions for Liquidated Damages
- No provisions for Extensions of Time
- No commitment to complete Works
- Entitlement to Quantum Meruit

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The Offer

An offer can be said to be 'a proposition put by one party to another with an intimation that he will be bound by it.'

Thus a contractor's tender is an offer, which can be accepted or rejected by the client.

But an offer must be distinguished from an invitation to treat, which is just an invitation for the other party to make an offer.

Pharm. Soc of G.B. v Boots (1952) (2QB 795)
Partridge v Crittenden (1968) (2 All ER 421)

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But consider:-
Blackpool & Fylde Aero Club Limited v Blackpool Borough Council (1990) ETLS (C of A).

Tenders were invited for concessions at an airport. The invitation to tender stated that there was no undertaking that any tender would be accepted and that no tender submitted after the deadline would be considered.

The plaintiffs tender was submitted before the deadline. Due to a mistake their tender was not considered. The defendants had warranted that they would consider all tenders submitted before the deadline. It was the fact that tenders received after the deadline would not be considered which gave rise to a contractual obligation to consider those submitted before.

Thus, where a local authority goes out to open tender and puts an advert in the press, they are merely inviting offers.

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But see:
Marston Construction Co. v Kigass (1989)

where the Court held there was an implied request (offer) to pay a reasonable sum for work leading to the contractor's tender.

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However there are two exceptions, where the Courts view an advertisement as an offer.

- a) Offer of a reward.
- b) Offer to the world at large.

Car Courtney & Fairbairn Limited v Tolaini Bros. (1975) 1 ALL ER 716 (COFA).

Following discussion on various issues C wrote to T and said that he hoped he would be suitably reimbursed if he helped set up an arrangement. T replied in the affirmative. When T defaulted C sued for breach of contract. Held. The letter did not give rise to an enforceable contract because:

- a) The price was a matter fundamental to the contract, which had not been agreed as it amounted to no more than an agreement to negotiate fair and reasonable contract sums.
- b) A contract to negotiate even where supported by consideration was not a contract known to law as it was too uncertain. Carill v Carbolic Smokeball Co (1892)

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Does an Offer Once made Last Forever

No, it can be terminated by:

- a) **Revocation, that is withdrawn, anytime before acceptance Byrne v Van Tienhoven (1880)**

General rule - revocation must be communicated although it does not have to be by the offeror himself - Dickinson v Dodds (1876)

This would apply where a contractor withdraws his tender before acceptance, which he is perfectly entitled to do. Even if it was stated as open for acceptance for a specific period.

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b) Rejection or Counter offer

Follows the rule that acceptance must exactly fit the offer. A party cannot accept an offer by putting conditions on it. Once rejected in this way the offer is dead.
Hyde v Wrench (1840)

N.B. A request for information about the terms of the offer will not necessarily amount to a counter offer - Stevenson v McLean (1880)

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c) Lapse of time where either stated or reasonable. i.e., where tenders/offers are held open for a specific period.

d) Where the offer is based on occurrence of some event, and that does not occur.

e) Death - Generally, offer dies with offeror or where death occurs before acceptance.

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Acceptance

The court, when considering what constitutes an acceptance have taken various matters into account.

a) Continuing Negotiations

It is not always clear when negotiations have been completed and a firm offer has been unequivocally accepted. Many contracts, and in particular construction ones, suffer from this problem. Basically the Parties will negotiate over the terms of the eventual contract and the negotiations will take the form of a series of counter offers (see before). Only at the end of this process may there be a contract.

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b) Acceptance may be by conduct

One party may perform his part of the contract without even formerly accepting the offer. *Brogden v Metropolitan Railway Co.* (1877). This is particularly common in the construction industry. For instance where a contractor carries out work or an employer permits a Contractor to carry out work which has previously been the subject matter of an offer of terms. It is important to remember that acceptance can occur even though no written contract is signed and even if a party unwittingly conducts himself in a binding way. It must be noted however that silence alone (without some conduct) will not amount to acceptance. *Felthouse v Bindley* (1862)

But it may do when accompanied by an action. *Robert v Hayward*.

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c) Acceptance must exactly fit the offer

It can be especially difficult to identify the actual offer and acceptance where both parties have printed forms stating the terms on which they have based their offer/acceptance.

The situation where these conflict is commonly known as the 'Battle of the Forms' and the simple rule is that the 'Last Shot Prevails'. There are many illustrations of this, one being *Sauter Automation Ltd v V.H.C. Goodman* (1986).

Here, the main contractor, Goodman, undertook to do work for the P.S.A. at Windsor Castle. The main contract being in the form of GOWorks/1. Goodman employed a domestic sub-contractor, Sauter, to do some of the work. The P.S.A. subsequently determined Goodman's contract, but wanted to use Sauter's equipment already supplied. Sauter claimed they owned the equipment because there was a retention of title clause in their standard conditions of sale which has been included with the quotation to Goodman. But in Goodman's acceptance they stated that it was on 'terms and conditions in accordance with the main contract'. Sauter argued that the acceptance had been to its own conditions, including the retention of title.

Held: -Goodman had made a counter offer which killed Sauter's offer, Sauter then accepted Goodman's offer by proceeding to execute the works in accordance with the Goodman offer (also acceptance by conduct).

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See also :

Chichester Joinery v John Mowlem (1987);
Chichester Joinery Limited v John Mowlem & Company Plc - 4ZBLR (1987)

Mowlem sent a purchase order which included their own terms and conditions. Chichester replied by sending back an acknowledgement of purchase order as required.

Held: Mowlems had accepted the 'Last Shot' which was the Chichester Acknowledgement of order. Therefore the contract, which had indeed come into existence was subject to Chichester's terms.

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Acceptance must be communicated

Generally, an Acceptance must be communicated to an offeror by the offeree before it is effective. This is because the very essence of a contract is an agreement.

This is except:

- a) Where communication is by an authorised Agent.
- b) By the conduct of the offeror, where for example it is reasonable to assume that the offeror should have received the acceptance.
- c) Conduct of the offeree - as before described.
- d) Acceptance by Post. Postal Rule - acceptance effective as soon as its posted *Adams v Lindsell* (1818) N.B. This does not generally apply to communication i.e. - telephone, telex.
- e) Silence - not acceptance as before described.

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Offer and Acceptance – Generally

There are two situations which seem to conflict both with each other and with the general rules as previously stated.

Firstly, despite there being an offer and an acceptance and thus an agreement, the courts will not consider a contract to be valid where its meaning is either uncertain or incomplete. In *Scammell v Ousten* (1941) it was held "In order to constitute a valid contract, the parties must so express themselves so that their meaning can be determined with a reasonable degree of certainty".

However this does not mean that all the terms of the contract have to be sorted out at the very beginning, this can be retrospectively, providing there is sufficient certainty as to the minimum essential terms, see *Trollope & Colls v Atomic Power Contr. Ltd.*(1962). But note - certainty is the key to avoiding disputes.

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Economic Duress

Where one party has apparently accepted an offer, then it may be that he has a defence in economic duress where his "agreement" was obtained illegitimately.

See *Atlas Express v Kafco* (1989).

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Intention to Create Legal Relations

This is essential element in order to create a legally binding contract.

The distinction between this and the intention to enter into a social arrangement is often clear, with the latter not being enforceable at law.

In most commercial and construction situations such an element is easy to establish.

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Consideration

An agreement made with the intention of being legally bound will be unenforceable where the parties have not provided consideration.

Consideration can be defined by three para-phrases which have emanated in the courts.

- 'Consideration is some benefit owing to one party or some detriment suffered by the other'
- 'It is something of value in the eyes of the Law.'
- 'It must be sufficient (as the court recognises) but need not be adequate'.

Normally consideration is easy to identify, for instance money, work or goods. In some situations it is not but there are many well known rules and cases by way of illustration. This is important as consideration will invariably be an essential term of the contract as well as an essential element. A promise by either/both parties can be and often is consideration i.e. promise to pay goods and a promise to supply them.

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Various principles have been identified as necessary to establish good consideration;

- Consideration must move from the promiser but does not have to go to the promisee. Tweddle v Atkinson (1861) (also privity)
- Generally, past consideration (that is consideration given or promised previously) is not sufficient consideration to cement a legally enforceable contractual bond. Re McArdle Goldshede v Swan

But if past consideration satisfies 3 criteria the Courts will recognise it as good consideration.

- Where the act was done at the request of the promiser.
- The parties knew that payment would be made.
- Payment must have been legally recoverable.

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- c) The consideration must contribute to the bargain, but as long as the Court can recognise it as something of value then even a trivial act will suffice. *Chappell v Nestle* (1960)
- d) Even a forbearance to sue the other party, providing the claim would have been valid or at the least doubtful, is good consideration, as it is recognised as something of value. *Alliance Bank v Broom* (1864). Under the same principles a compromise of a dispute also (generally) takes on contractual form.
- e) It is a matter of Public Policy that someone should not be able to enforce payment (i.e. consideration) for doing something he already has a duty to do. Only when this is exceeded does it constitute consideration which contributes to the bargain. It then can be seen as of extra value. Thus:
 - i) Performance of an existing duty imposed by the general law is not sufficient consideration.
 - ii) Performance of an existing duty imposed by a contract with the promisee is not sufficient consideration.
 - iii) Performance of an existing duty imposed by contract but not made with the promiser but made with a 3rd party will suffice as consideration.

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Lester Williams v Roffey Bros. and Nicolls (Contractors Limited) (1989) CICC 552, COEA.

C were subcontractors engaged to undertake joinery work. It became apparent that C would not complete their work on time. D promised C additional monies, over and above the subcontract sum, to get the work done. D defaulted on payment. C stopped work before completion. Replacement subcontractors were engaged. C claimed *inter alia*, the additional money promised. D appealed against the decision in C's favour at first instance on two grounds.

1. The additional money was due only on full completion.
2. The promise to pay the additional money was not enforceable as there was no consideration for it.

The Court held that, as D had promised to pay C the additional money to complete and thus avoid a penalty under the main contract, both parties had gained from the agreement. Thus it was enforceable. Also important in this decision, the court found there was no economic duress or fraud.

But, see case of *Williams v Roffey Bros* (1990) where an agreement for additional payment for a subcontractor to comply with his original completion obligations was an enforceable contract because both parties had gained some (additional) advantage from the arrangement.

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Limitation

Limitation periods impose time limits within which a party must bring a claim, or give notice of a claim to the other party.

Limitation periods are set out (mainly) in the Limitation Act 1980 ("LA 1980"). There are different limitation periods for different causes of action. For example, the limitation period is 6 years for a contract claim, but 12 years if the contract was by deed.

It is essential at the start of any claim to decide whether or not the limitation period has expired. If it has, the claim will be "statute-barred" and the claimant may be prevented from bringing the claim.

If a claim is issued out of time, the defendant can defend on the basis of limitation and the claimant then has the task of proving that the claim was started in time.

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When does time run from?
Time runs from different dates depending upon the cause of action.

For example, in a negligence claim, time will usually run for 6 years from the date the negligent act or omission occurred. In a contract claim the limitation period will run from the date when the contract was breached.

In respect of negligence claims, it is possible to bring a claim outside the 6 year limitation period if the damage complained of was not discovered until after the expiry of the 6 year limitation period ("latent damage"). Here, a claimant has 3 years from either the date of knowledge of the loss or the date when he ought reasonably to have known of his loss. What constitutes "ought reasonably to have known" depends on the circumstances of the case. There is also a 15 year long-stop date from the date of the defendant's negligent act or omission.

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In cases of fraud, concealment or mistake, time does not start to run until after its discovery or when such fraud etc could reasonably have been discovered by the claimant.

The start of proceedings ie, when the Court stamps the Claim Form, will stop time running. This is useful when parties are in settlement discussions and the expiry of the limitation period is near. Often the claimant will commence proceedings which are then adjourned whilst the discussions continue; this protects the claimant's right to sue.

A contractual term which imposes a shorter limitation period than the LA 1980 may be subject to the "reasonableness test" under the Unfair Contract Terms Act 1977 ("UCTA"). For example, where parties are contracting on one of the parties' written standard terms, the imposition of a nine-month limitation period for an action for breach of contract, will be subject to the reasonable test. However, while UCTA protects consumers, in relation to commercial entities, the courts are less willing to intervene with contractual limitations of liability agreed between the parties and because commercial companies of equal bargaining strength should be bound by a shortened limitation period.

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