NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

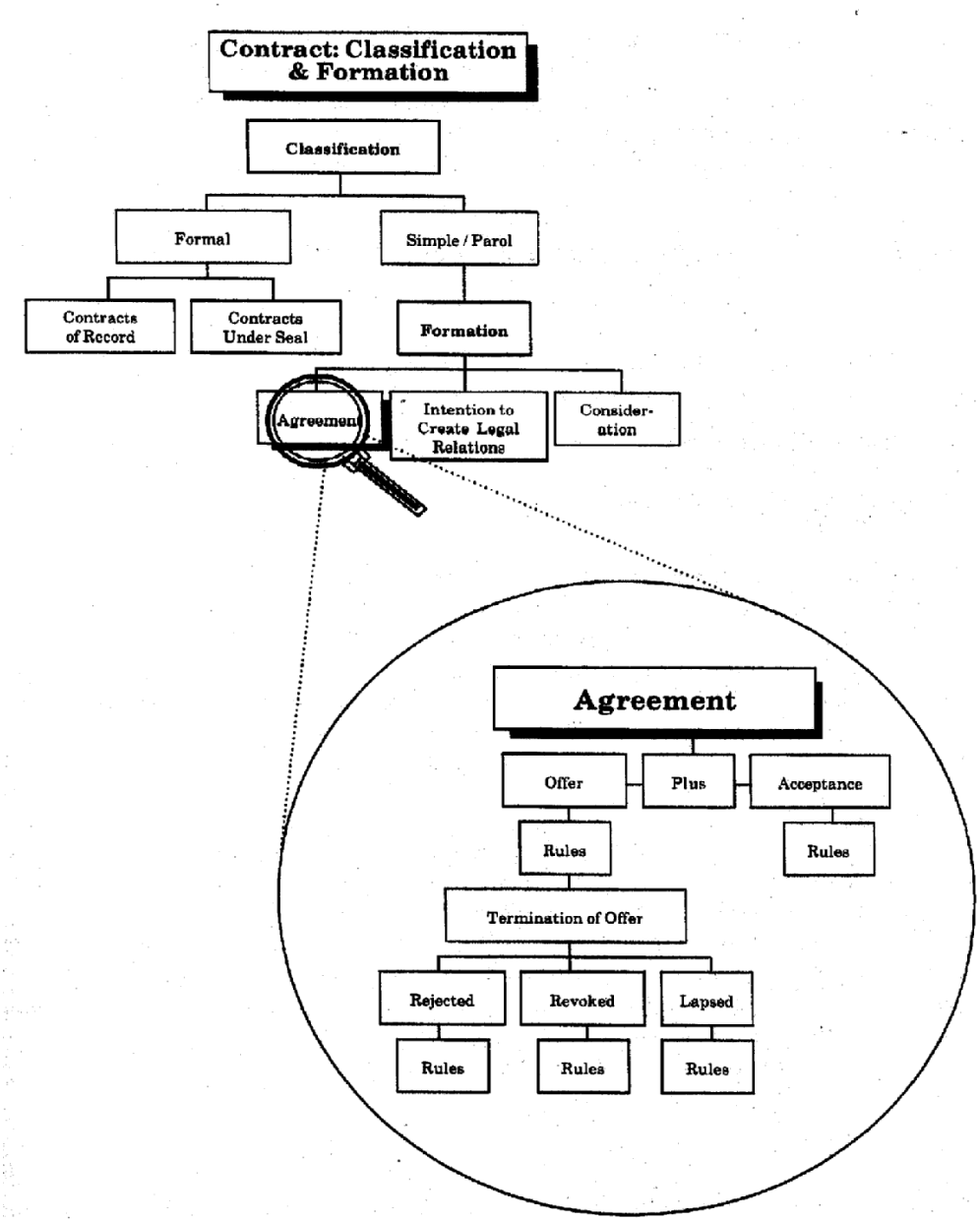
COURSE TITLE:INTRODUCTION TO LAW

Promises or undertakings made under seal or by deed are often referred to as covenants, as opposed to terms within a simple contract.

3.3.2 Simple Contract

All those contracts which are not formal are known as simple contracts. They rely for their validity, amongst other things, on the presence of consideration and accordingly their form is generally irrelevant. Most simple contracts are verbal, eg the purchase of lunch at a take-away food bar, but others are required to be in writing or evidenced in writing, eg contracts for the sale of land.

Unless specific reference is made to contracts under seal, the balance of this study book when mentioning contracts, refers to simple contracts only.



3.4 Formation of Simple Contracts

There are three basic elements of the formation of a simple contract:

(a) Agreement: offer and acceptance
(b) Intention to create legal relations.
(c) Consideration.

All three elements must be present if a party is to argue that the promises made by the other form part of a contract and are therefore enforceable. While some texts include other elements as essential such as the capacity of the parties to contract; absence of fraud etc we have included these issues in the discourse. For present purposes let us assume that the parties are of full age and they were not misled etc when

entering the contract and so the focus is on the three basic elements identified above.

3.5 Agreement

In attempting to discover if an agreement has been reached between the parties the courts have traditionally looked for an offer from one party and an acceptance of the offer by the other party. The person making the offer is called the **offeror** and the person receiving the offer is the **offeree**. If the offer is clear, (eg 'you can buy my car for N200,000.00') and the acceptance corresponds with the offer (eg 'I accept your offer') then you have an agreement. In this case you have an express agreement. However, agreement may be **implied** from the conduct of the parties.

In *Clarke Dunraven [1897]* AC 59 at P. 63:

One of a number of yachts in a regatta fouled and sank another. The participants had agreed with the club organizing the regatta to obey the club rules. One of these provided that participants should pay all damages caused by fouling. The question arose as to whether there was any contract between the participants themselves, or whether each had contracted with the club only. The House of Lords affirmed the view taken by the Court of Appeal, holding that, in the words of Lord Herschell: 'The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient ... where those rules indicate a liability on the part of the one to the other, create a contractual obligation to discharge that liability'.

So while the participants did not communicate directly with each other, and there was no offer and acceptance in the usual way, the court found a contract based on their agreement to participate.

3.5.1 Offer

There are a number of basic principles or rules regulating the legal effect of offers.

(a) The single most important test of an offer is that it must show, on the part of the offeror, an intention to be legally bound. Put another way, it is a final commitment by the offeror, a point of no return which, if accepted by the other party, will legally bind the offeror. In this context the language of the supposed offeror is closely examined by the courts to determine whether the communication in question is still part of preliminary negotiations or in fact the final commitment.

Most of the rules that are discussed below are really examples or extensions of this basic requirement.

(b) An offer must be **sufficiently definite** so as to be capable of acceptance. If the so-called offer is too vague or leaves out too many basic terms then it is unlikely that it is an offer at all. Certainly, it is hard to argue that there is a final commitment in that case. If, for example, a person selling her car said that she would like to get 'around N100,000.00' for it then that expression is not likely to be sufficiently definite for the offeree to respond with an acceptance. Obviously, what 'around' means to one person could well be different to another. Similarly, if a possible sale was discussed without any mention of price at all that could hardly be classified as an offer.

It's not that the offer must contain all the terms that might ultimately end up as part of the contract but there must be enough to indicate agreement. There must be enough for the offeree to make up her or his mind as to how they wish to respond and to accept the offer should they wish to.

(c) An offer is often distinguished from an **invitation to treat**. As the term suggests, an invitation to treat is an invitation to enter into negotiations. Examples of invitations to treat are advertisements that list items for sale, catalogues, the display of goods and the calling of tenders for a contract. In these cases, the seller is regarded as advertising their goods to the public who in turn come and make the **offer** to buy. The mere advertising of the goods does not ordinarily show an intention to be bound on the part of the seller.

The distinction between invitations to treat and offers is based on sound commercial practice. If the advertisement contained offers to customers then the customer could come to the seller and purport to accept that offer and claim a binding contract. This would work injustice because the merchant may well in good faith have sold all the particular items advertised. So invitations to treat are simply a means of attracting customers to look at the goods and hopefully (from the seller's point of view) to make an offer to purchase.

Perhaps the most illustrative case on invitations to treat is the *Pharmaceutical Society of Great Britain v Boots Cash Chemists* [1953] 1 QB 401.

The question was whether a contract between a seller and a customer was concluded when the customer took down an article from a shelf in a

self-service store and put it in his basket or whether the customer made an offer when he took his selection to the cashier, which was accepted when the cashier indicated the total price. The Court of Appeal preferred the latter view. On the former view, the display of goods on the shelves would amount to an offer, with the consequences that a customer who had taken an article from a shelf and put it into his basket would not subsequently be able, without the proprietor's consent, to replace it should he find something he liked better. This was contrary to common sense, and the view which would have produced this result was rejected.

Note the different point in time when the contract would be formed if it were held that the display were an offer and the legal effect of this.

(d) Another way to identify an offer is to compare it with what courts have described as a 'mere puff'. A **puff** is a representation about the subject matter of the contract such as a service to be provided, or an item to be sold, which usually exaggerates the features of the service or item and often in circumstances that cannot be proven. An example might be a statement that 'this car is a little beauty'. Such a statement will not form part of the offer because there is no intention on the part of the maker to be bound. In fact, the words are too vague to become part of a contract.

(e) An offer must be distinguished from a **mere answer to a request for information.** Again, such a response will not usually show an intention to be legally bound. These are often made during communications between prospective parties to a contract. An example in point is *Harvey v Facey* [1893] AC 552:

The plaintiff telegraphed to the defendants 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price'. The defendant telegraphed in reply 'Lowest price for Bumper Hall Pen £900'. The plaintiff's then telegraph 'we agree to buy Bumper Hall Pen £900 asked by you. Please send us your title-deeds'. The court held that no contract existed as the defendant's response was only an answer to a request for information rather than an offer.

(f) An offer can be revoked at any time before acceptance unless an **option** has been granted. An option is a separate contract whereby the would-be seller gives the prospective purchaser an option to buy the property at a stipulated price, provided the option is exercised within a given time period. It may or may not be followed by a contract to sell the property depending on whether the 'purchaser' decides to exercise the option. To be enforceable the purchaser must give some consideration for the

option. As mentioned above 'consideration' is money or money's worth. So if the offeree was to say to the offeror 'I will pay you $10 to keep your offer open (to me) for one month' then a valid option will come into effect – assuming of course that the offeror agrees. The important point is that the offeree must **pay** something for the right to have the offer remain open. If not, then the offeror can revoke the offer at **anytime** even where she or he has said they will keep the offer open for certain period. A case demonstrating this area of law is *Goldsborough Mort & Co Ltd v Quinn*. When reading this case do not concern yourself at this stage with the meaning of the term 'specific performance.

(g) An offer can be made to one person, a class of persons or the world at large. It is unusual to have an example of the latter because normally a communication to the world at large is an invitation to treat. Again it depends on whether there was an intention to be bound.

SELF ASSESSMENT EXERCISE 1

1. What is the difference between an invitation to treat and an offer to the World at large?
2. What is a Counter offer?

A famous case where an advertisement was an offer to the world at large is *Carlill v Carbolic Smoke Ball Company (1893).*

Read this case carefully because it does illustrate the importance of the central principle that a communication is an offer so long as there is an intention to be bound. That intention can be found in circumstance where at first glance there might have appeared to be an invitation to treat. When reading the case note the grounds upon which the court found that the advertisement was an offer.

(i) It may be relevant to determine to whom the offer is made as only an offeree may accept the offer. For example if an offer is made to a class of persons, only a member of that class (who is aware of the offer) may accept the offer.

(ii) An offer will only be effective when it is communicated to the offeree, when it is brought to the notice of the person to whom it is made.

3.5.2 Possible Responses to the Offer

Once a legally effective offer has been made, a number of things may happen to it. If it is validity accepted, this will result in an agreement. Thus, the first element of a legally binding contract is established.

The other possible outcome, however, is that the offer may be terminated, and thus not be available for acceptance.

3.5.3 Termination of Offer

An offer can be terminated in one of three main ways:

- Revocation;
- Rejection; and
- Lapse.

3.5.4 Revocation of Offer by Offeror

(a) The fundamental rule is that the offer can be revoked at any time before acceptance. As we have seen, an exception to this rule is when a valid option is granted. In such circumstances, the seller is bound to keep the offer open in favour of the would-be purchaser until the end of the period stipulated in the option. Any attempt to revoke the offer in the interim would be a breach of the terms of the option.

Another exception to the rule is where the offer is made for the doing of an act, then the offeror cannot revoke the offer after the offeree has partly performed the act.

(b) Revocation is not effective until it is communicated to the offeree. See *Byrne & Co. v Leon Van Tienhoven & Co. (1880) 5 CPD 344.* Thus, it is not sufficient that the revocation be merely posted, it must reach the offeree. A different rule applies to the **acceptance** of an offer, as will be discussed below.

(c) It is not necessary that the revocation be communicated by the offeror only – as long as the offeree learns of it from some reasonably reliable source.

Dickinson v Dodds (1876) 2 Ch D 463:

On 10 June Dodds made an offer to D to sell him a dwelling-house for £800: 'This offer to be left over until Friday, 9 o'clock am, 12 June' On 11 June Dodds contracted to sell the house to A. D heard of this from

one Berry on the same afternoon. He nevertheless handed Dodds an acceptance of the offer at a few minutes before 9 a.m. on 12 June. Dodds said 'You are too late. I have sold my property'. Dodds, by entering before 9am on 12 June. Dodds sell to A, showed an unequivocal intention to revoke his offer to sell to D. This revocation was communicated by B to D before D had accepted. There was therefore no contract between D and Dodds. Notice of the revocation was good, although it was communicated by a third party, B, and not by Dodds himself.

(d) Revocation can take any effective form. It can be in writing, verbal or as demonstrated in *Dickinson v Dodds*, communicated by a third person.

3.5.5 Rejection of Offer by Offeree

(a) The rejection can be express
(b) It can also be implied. This leads to the rule that a **counter offer** terminates the original offer.

In the case of *Hyde v Wrench* [1840] 49 ER 132.

Wrench wrote to Hyde on the 6th June offering to sell his farm for £1000. On the 8th June. Hyde replied by offering £850, which was rejected by Wrench on 27th June. On 29 June Hyde wrote again to Wrench stating he was prepared to pay the £1000. The Court held that no contract had arisen as Hyde's counter offer of £950 had rejected Wrench's offer of £1000 and he could not revive the offer by writing on the 27th June purporting to accept it.

Compare this with the case of *Stevenson, Jacques & Co v McLean* (1880) 5 QBD 346 where the response from the offeree was characterized as a request for information, not a counter offer. The facts of *Stevenson v McLean* were:

The parties had been corresponding regarding the sale of certain iron. Finally on Saturday the defendant wrote to the plaintiff offering to sell at 40s net cash per ton, the offer being left open until the following Monday. At 9.42am on the Monday the plaintiff telegraphed the defendant enquiring 'whether you would accept 40s for delivery over two months if not, longest limit you would give'. Receiving no reply, the plaintiff at 1.34pm on the same day telegraphed an acceptance of the offer to sell at 40s net cash per ton. At 1.46pm on the same day the plaintiff received a telegram from the defendant, sent at 1.25pm, advising that the iron in question had been sold elsewhere. The court had to decide whether the plaintiff's telegram sent at 9.42am was a

counter offer, in which case the plaintiff was not free to accept the original offer by his 1.34pm, telegram, or whether it was simply a request for information. The court, considering, amongst other matters, the unsettled state of the iron market at the time the telegram was sent, found that the telegram in question should have been regarded by the defendant not as a counter-offer but as a mere enquiry. As such it did nor reject the defendant's original offer, and the plaintiff's subsequent acceptance at 1.34pm was legally effective.

3.5.6 Lapse

(a) Death

Death of either party may result in the offer lapsing. Factors relevant to determining this issue are which party dies, the time at which the other party knew of the death and whether the offer was personal to the party who died. (An example of an offer being personal to one of the parties would be an offer to an artist to pay a sum of money if he/she were to paint the offerer's portrait.)

(b) Death of Offeror

After Acceptance - contract already formed (if all three elements present).

Before Acceptance - whether the offer lapses depends on the knowledge of the offeree at the time of purported acceptance and the nature of the contract.

- if the offeree is aware of the death - no contract.

- if the offeree is not aware of the death - if the offer is personal to the offeror-no contract.

- if the offer is not personal to the offeror – there may still be a valid acceptance.

(c) Death of the Offeree

As a general rule this cause the offer to lapse because only the person to whom the offer is made can accept the offer. There is authority however for an exception in the case of an option if the offer is not personal to the offeree. In such a case if the afferee dies during the option period the offer may be accepted by the executors of the estate within the time stipulated.

(d) Time

The offer may lapse if it is not accepted within the prescribed time or, if no time is prescribed, then a reasonable time. What is a reasonable time depends upon the circumstance; it will be quite short if the goods are perishables but much longer if the offer relates to land.

3.5.7 Condition

If an offer is made subject to a condition and the condition is not fulfilled then the offer lapses. An example of this is when there is an offer to purchase land subject to the buyer obtaining finance. If the finance is not obtained then the offeror cannot be held to his offer.

SELF ASSESSMENT EXERCISE 2

1. How may an offer be terminated
2. What is an option?

3.6 Acceptance of Offer

(a) Only persons to whom the offer is made can accept it. This might be one person, a class of persons or the world at large.

(b) The acceptance must be complete and **unqualified** acceptance of the terms of the offer, otherwise the acceptance (so called) will not be an acceptance in the eyes of the law but a **counter offer** which destroys the original offer. However, as previously discussed, a counter-offer should be distinguished from a **mere request for information** or a mere spelling out of terms which would otherwise have been implied into the offer.

(c) Acceptance must conform with the requirements of the offeror. This has an impact on the mode by which an offer can be accepted.

(d) If the mode is prescribed by the offeror as the sole mode then that mode must be followed by the offeree; otherwise it is not a valid acceptance. So that if the offer stipulates that an acceptance must be by hand delivered letter then that requirement must be followed, otherwise there is no valid acceptance.

(e) If a mode is prescribed by the offeror and it is not stated to be sole mode, then that mode or an equally expeditious mode would be appropriate.

(f) If the mode is not prescribed then the law will require a reasonable mode of acceptance. What is reasonable will depend upon the circumstances of the case and in particular the means by which the offer is communicated in the first place. The mode of acceptance should normally be as quick as (or quicker than) the mode of the offer, unless the offeror expressly or impliedly indicates that some other method is acceptable. If, for example, the offer is made over the telephone, then it is unlikely to be reasonable for the offeree to accept by letter.

(g) There are two points in time at which acceptance might be effective at law:

(i) On Postage

The postal rule states that the acceptance occurs (and the contract formed) at the moment a letter is posted. This will only apply where it is reasonable to use the post as a mode of communication for the acceptance. (See discussion above). This rule can be seen to be unfair on the offeror as that person does not know the precise time of acceptance (or that acceptance has occurred at all). In the circumstance, it is open for the offeror to exclude the use of the post by the offeree when accepting. In the circumstance, the offeror could require the offeree, for example, to telephone their acceptance.

(ii) On Communication

Where the negotiations are conducted by instantaneous means, e.g. where the parties use the telephone, telex or are in each other's presence, the contract forms when the acceptance reaches the offeror.

Where the post has been used, however, and the postal rule is excluded, i.e. actual communication is required (see discussion above), the contract will only form when the acceptance is communicated.

(h) The rule regarding acceptance by post is an exception to the normal rule that a contract only arises when the acceptance is communicated to the offeror. With the postal rule a contract forms the moment the letter is posted whether or not it ever reaches the offeror.

(i) The acceptance must be in response to the offer. The offeree must:

- Know of the offer; and