

契約法 (Contracts)

第一部分 契約的訂立 (Reaching an Agreement)

壹、重要詞彙與觀念釋義

1. Mutual Assent 相互意思表示一致

- (1) To form a contract, the parties must reach ***mutual assent*** which means both parties must intend to contract, and they must agree on at least the ***main terms*** for their deal.

欲訂立契約，當事人間需相互意思表示一致，亦即雙方均有締約的意思，且對契約主要內容有合意。

- (2) Main terms / Essential terms: Under the traditional ***common law***, the ***main terms*** / ***essential terms*** are referred to an ***identification of parties***, a ***description of the subject matter***, the ***time for performance***, and the ***price***.

在傳統普通法下，契約主要內容／必要內容乃指當事人的確認、標的物的描述、契約履行時間及價額。

2. Offer 要約

- (1) ***Restatement*** defines an ***offer*** to be “the manifestation of willingness to enter into a ***bargain***, so made as to justify another person in understanding that his ***assent*** to that bargain is invited and will

conclude [the bargain].”¹

法律重編將要約定義為：「對成立交易的意願的明白表示，並因此使他方了解他方的同意是被邀請的，且其同意將會使交易成立。」

- (2) **Offeror**: person or corporation who extends an offer to someone else to make a contract.

為要約人：即向他人發出訂立契約要約者。

- (3) **Offeree**: a *person* or *entity* to whom an offer to enter into a contract is made by another (the offeror).

受要約人（要約相對人）：指要約人締約之要約所發出對象之個人或法人。

- (4) **Counter-offer** 新（反）要約

“A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the *original offer* and proposing a substituted bargain differing from that proposed by the original offer. An offeree’s power of *acceptance* is *terminated* by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.”²

新（反）要約：新要約乃指由受要約人對原要約人就原要約內同一事務所為之要約，並對原要約內容提出不同的替代建議。受要約人對原要約承諾的權力，因其為新要約而終止，除非原要約人或新要約中有相反表示。

- (5) **Duration of an offer** 要約有效期間

The life of an offer ends by: ① *expiration* or *revocation* governed by terms of the offer; ② operation of law (i.e. *death*, *insanity* or *legal incapability* of the offeror, *destruction of the subject matter*); and ③ *termination* by act of the parties.

¹ Restatement (Second) of Contracts § 24.

² Restatement (Second) of Contracts § 39.

要約因下列情事而消滅：①依要約內容已到期或撤回；②依法應消滅（如要約人死亡、心神喪失、法律上喪失行為能力或標的物毀損滅失）及③因當事人行爲而終止。

- (6) Offers which have been re-enforced by an *option contract* are not revocable. An option contract refers to the offeror's acceptance of *consideration* in exchange for his promise to keep the offer open for a designed period irrevocable.³ The option arrangement takes the form of a distinct separate contract with its own formation and distinct.⁴

若要約已經選擇權契約加強其效力，於選擇權期間即不得撤回。選擇權契約乃指要約人收受一定對價，承諾要約於一定期間繼續有效且不得撤回。此選擇權的安排係透過分別的契約爲之，其成立與原要約無關。

3. Acceptance 承諾

- (1) *Acceptance* of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.⁵

對要約的承諾指受要約人對要約內容以要約要求的方式明示同意之謂。

- (2) Formation in a unilateral mode 單務模式成立契約

If an *act* or *forbearance* is requested by the offeror as the acceptance for a *unilateral contract*, the act or forbearance must be given with the intent of accepting the offer.⁶ Acceptance by *performance* requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.⁷

³ BARRON'S LAW DICTIONARY 352 (Steven H. Gifis ed. 1996).

⁴ *Palo & Country Village, Inc. v. BBTC Co.*, 521 P.2d 1097 (1974).

⁵ Restatement (Second) of Contracts § 50.

⁶ Restatement (First) of Contracts § 55.

⁷ Restatement (Second) of Contracts § 50.

若要約人要求以一定之作爲或不作爲爲單務契約成立的承諾方法者，該作爲或不作爲需有對要約爲承諾之意思。以履行行爲作爲承諾者，要約中需要求以部分或全部的履行作爲承諾的前提。

(3) Formation in the bilateral mode 雙務模式成立契約

A *bilateral contract* is one in which there are mutual promises between two parties to the contract; each party being both a *promisor* and a *promisee*.⁸ Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.⁹

雙務契約乃指當事人雙方相互允諾爲一定行爲的契約，雙方當事人互爲允諾者及被允諾者。以允諾爲一定行爲作爲承諾者，受要約人需完成一切必要的承諾行爲〔如要約中要求僅能以一定媒介（channel）作爲傳遞承諾意思表示者，使用其他媒介即非完成承諾〕。

(4) Silence as acceptance 單純沉默構成承諾

Common law does not impose upon an offeree a risk that her silence in the face of an offer may be treated as an acceptance.

Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

- ① Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of *compensation*.
- ② Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
- ③ Where because of *previous dealings* or otherwise, it is reasonable that the offeree should *notify* the offeror if he does not intend to

⁸ Restatement (First) of Contracts § 12.

⁹ Restatement (Second) of Contracts § 50.

accept.¹⁰

普通法原則上不承認單純沉默可作為承諾，但有下列情形者例外：

- ① 當受要約人接受要約人所提供之服務受有利益，然其有合理的機會拒絕，並知悉要約人期待因服務而受補償者。
- ② 當要約人給予受要約人理由相信其沉默或不作為構成同意，而受要約人繼續保持沉默或不作為者。
- ③ 因先前之交易，使受要約人負擔對要約人通知其不欲承諾義務乃屬合理者。

貳、延伸閱讀

*Nebraska Seed Co. v. Harsh*¹¹

MORRISSEY, C. J.

Plaintiff, a **corporation**, engaged in buying and selling seed in the city of Omaha, Neb., brought this action against the **defendant**, a farmer residing at Lowell, Kearney county, Neb. The petition alleges:

“That on the 26th day of April, 1912, the plaintiff purchased of and from the defendant 1,800 bushels of millet seed at the agreed price of \$2.25 per hundredweight, F. O. B. Lowell, Neb., which said purchase and contract was evidenced by writing and correspondence passing between the respective parties of which the following is a copy:

‘Lowell, Nebraska, 4-24-1912.

Neb. Seed Co., Omaha, Neb.—Gentlemen: I have about 1,800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want \$2.25 per cwt. for this seed f. o. b. Lowell.

¹⁰ Restatement (Second) of Contracts § 69.

¹¹ 98 Neb. 89, 152 N.W. 310 (1915).

Yours truly,

H. F. Harsh.'

Said letter was received by the plaintiff at its place of business in Omaha, Neb., on the 26th day of April, 1912, and immediately thereafter the plaintiff telegraphed to the defendant at Lowell, Neb., a copy of which is as follows:

'4-26-12.

H. F. Harsh, Lowell, Nebr. Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load.

The Nebraska Seed Co.'

On the same day, to wit, April 26, 1912, the plaintiff, in answer to the letter of the said *311 defendant, wrote to him a letter and deposited the same in the United States mail, directed to the said defendant at Lowell, Neb., which said letter was duly stamped, and which the plaintiff charges that the defendant in due course of mail received. That a copy of said letter is as follows:

'4-26-12.

Mr. H. F. Harsh, Lowell, Neb. — Dear Sir: We received your letter and sample of millet seed this morning and at once wired you as follows: "Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred, wire how soon can load." We confirm this message have booked purchase of you 1,800 bushels of millet seed to be fully equal to sample you sent us at \$2.25 per cwt. your track. Please be so kind as to load this seed at once and ship to us at Omaha. We thank you in advance for prompt attention. When anything further in the line of millet to offer, let us have samples.

Yours truly, The Nebraska Seed Co.'"

It alleges that defendant refused to deliver the seed, after due

demand and tender of the purchase price, and prays judgment in the sum of \$900. Defendant filed a *demurrer*, which was overruled. He saved an exception to the ruling and answered, denying that the petition stated a cause of action; that the correspondence set out constituted a contract, etc. There was a trial to a *jury* with *verdict* and *judgment* for plaintiff, and defendant appeals.

In our opinion the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff. After describing the seed, the writer says, "I want \$2.25 per cwt. for this seed f. o. b. Lowell." He does not say, "I offer to sell to you." The language used is general, and such as may be used in an advertisement, or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted, by any or all of the persons addressed.

"If a proposal is nothing more than an *invitation* to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases." 9 Cyc. 278e.

The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. It did not fix a time for delivery, and this seems to have been regarded as one of the essentials by plaintiff, for in his telegram he requests defendant to "wire how soon can load."

"The mere statement of the price at which property is held cannot be understood as an offer to sell." *Knight v. Cooley*, 34 Iowa, 218.

The letter of acceptance is not in the terms of the offer. Defendant stated that he had 1,800 bushels or thereabouts. He did not fix a definite

and certain amount. It might be 1,800 bushels; it might be more; it might be less; but plaintiff undertook to make an acceptance for 1,800 bushels — no more, no less. Defendant might not have this amount, and therefore be unable to deliver, or he might have a greater amount, and, after filling plaintiff's order, have a quantity of seed left for which he might find no market. We may assume that when he wrote the letter he did not contemplate the sale of more seed than he had, and that he fixed the price on the whole lot whether it was more or less than 1,800 bushels.

We do not think the correspondence made a complete contract. To so hold where a party sends out letters to a number of dealers would subject him to a suit by each one receiving a letter, or invitations to bid, even though his supply of seed were exhausted. In *Lyman v. Robinson*, 14 Allen (Mass.) 242, 254, the Supreme Court of Massachusetts has sounded the warning:

“Care should always be taken not to construe as an agreement letters which the parties intended only as a *preliminary negotiation*.”

Holding, as we do, that there was no binding contract between the parties, it is unnecessary to discuss the other questions presented.

The judgment of the district court is reversed.

【解說】

法律名詞

1. Corporation 公司

An association of **shareholders** (股東) created under law and regarded as an artificial person by courts having a **legal entity** (法人) entirely separate and distinct from the individuals who compose it, with the capacity of continuous existence of succession, and having capacity as such legal entity, of taking holding and **conveying property** (convey property 財產

移轉), *suing and being sued* (起訴與被訴), and exercising such other powers as may be conferred on it by law, just as a *natural person* (自然人).¹²

2. Defendant 被告

In *civil proceedings* (民事程序), the *party* (當事人) responding to the *complaint* (起訴狀).¹³

3. Demurrer 防訴抗辯

In *pleading* (答辯), a formal objection attacking the legal sufficiency of opponent's pleadings. It is an assertion, made without disputing the facts, that pleading does not state a *cause of action* (訴因), and demurring party is entitled to judgment.¹⁴

4. Invitation (to deal) 要約引誘

5. Judgment 裁判

The determination of court of competent *jurisdiction* (管轄) upon matters submitted to it.¹⁵

6. Jury 陪審團

A group of people *summoned* (summon 傳喚) and *sworn* (swear 宣示) to decide on the facts in issue at a *trial* (審判).¹⁶

7. Preliminary Negotiation 前期磋商 (締約前磋商)

A manifestation of willingness to enter into a bargain is not an offer if the

¹² BARRON'S LAW DICTIONARY 109.

¹³ *Id.* at 132.

¹⁴ Cornell Univ. Law School Legal Information Center, Demurrer, <http://www.law.cornell.edu/search/wexnolo/demurrer> (last visited Jan. 11, 2013).

¹⁵ *Id.* at 271 .

¹⁶ *Id.* at 276.

person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.¹⁷

8. Verdict 陪審團或法官就事實的判斷

The finding or answer of a jury or of a judge where there is no jury given to the court concerning a matter submitted to their judgment. A verdict differs from a judgment in that a verdict is not a judicial determination, but rather a finding of fact which the trial court may accept or reject and utilize in formulating its judgment.¹⁸

本案摘要

本案被告Harsh寄信予本案原告Nebraska Seed Co.稱其有大約1,800蒲式耳（bushel，約等於37.6升）的種子欲出售，其售價為每英擔（cwt）2.25美元，並寄附種子樣本。Nebraska Seed Co.回覆：「已收到樣本與信函，對您的要約承諾。」其後原告再向被告發信確認：已訂購台端所寄樣本相同之種子共1,800蒲式耳，價金為每英擔2.25美元，請求將該標的裝載並運送。」然事後被告未交付種子，原告乃以被告違約為由提起訴訟。法院則認為被告既與原告之信函，未明示標的種子之確切數量，且其信中亦未表示其欲一次出售恰等於1,800蒲式耳之種子，故未包含契約必要之點，故被告之信函僅屬要約引誘，而原告與被告間之信件往來，尚不足認為成立契約，僅屬「締約前之磋商」。

¹⁷ Restatement (Second) of Contracts § 26.

¹⁸ BARRON'S LAW DICTIONARY 541.

參、例題演習

1. () An offeree refers to _____.
 - (a) a person who makes an offer
 - (b) official who judges sporting contests
 - (c) a person who may accept an offer
 - (d) an arbitrator
2. () An offeror refers to _____.
 - (a) a person who makes an offer
 - (b) a person who may accept an offer
 - (c) a person who solicits business through advertisement
 - (d) a broker
3. () What is an “acceptance”?
 - (a) An exception to a general rule of contract law.
 - (b) A counteroffer that changes the terms made by the offeror.
 - (c) Surrender to the term of the offeror.
 - (d) A manifestation of assent by the offeree to be bound to the terms of the offeror.
4. () What is an “option contract”?
 - (a) A contract that is not binding because performance is optional.
 - (b) A binding agreement in which the owner agrees to sell property to a prospective purchaser, at a specified price, within a stated period time.
 - (c) An offer that can be revived after being rejected by the offeree.
 - (d) An investment instrument that gives trade hedgers and investors a more flexible alternative to futures as a means of trading on the Exchange.

5. () It must, to constitute a contract, appear that the two minds were at one at the same moment of time, and that the existence of the same mind between the two parties is essential in point of law to the making of an agreement. This idea is often referred to as the requirement that there be a _____.
- (a) consideration
 - (b) preliminary negotiation
 - (c) mutual assent
 - (d) warranty

【解答】

- 1.(c) Offeree指「受要約人」或「要約相對人」，即有資格接受要約之人。
- 2.(a) Offeror指為要約之人。
- 3.(d) Acceptance指「承諾」，亦即受要約人明示同意要約內容並有使自己被該內容拘束的意思。(b)中的counteroffer（新要約）則是受要約人不同意要約內容，向要約人提出內容修改時發生。
- 4.(b) Option contract在契約法上指「選擇權契約」即要約人收受一定對價，承諾要約於一定期間繼續有效且不得撤回，與(d)所指衍生性金融商品中之選擇權投資標的不同。
- 5.(c) 欲成立契約，雙方當事人意思表示需達一致，此即mutual assent。
(a)之consideration指「約因」或「對價」，一般解釋為：“The inducement to a contract, something of value given in return for a performance or a promise of performance by another, for the purpose of forming a contract.” 其在英美契約法上雖亦係契約成立要件，但與題意表述不符。(d)之warranty最常用於「瑕疵擔保」，即：“A promise, either express or implied, that a product will have certain properties, qualities, or characteristics.”