

INTRODUCTION TO CONTRACT LAW (I)

Comparative study between Common and Civil Law

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INTRODUCTION TO CONTRACT LAW:

• Comparative study between Common and Civil Law

• History:

- **Société de Législation Comparée** (1869) - founded by Laboulaye - França
- **1st Congress of Société de Législation Comparée** – 1900 - (Raymond Saleilles): he has stated that "the comparative science aims to extract of a group of legal institutions a common base or, at least, some points of contact which enable a fundamental unity between them".
- **International Academy of Comparative Law** (1924)
- **Rome (1928) – UNIDROIT** – Institut International pour l'Unification du Droit Privé - today it belongs to United Nations Organization – its aim: **unification of private law**.



COMPARATIVE STUDY BETWEEN COMMON AND CIVIL LAW:

• What is this thing such as "comparative study"?

- "The scholarly study of the similarities and differences between the legal systems of different jurisdictions, such as between civil-law and common-law countries". (GARNER, B. A. *Black's Law Dictionary*. 7th ed., West Group, 1999, p. 858)
- "Legal differences between the laws of different nations or peoples, are not necessarily attributable to historical accident or contingent circumstances. Legal unification, therefore, is a much more promising project if it development which, moreover, share historical experiences and political philosophy" (ZIMMERMANN, R.; REIMANN, M. *The Oxford Handbook of Comparative Law*. Oxford University Press, 2006. p. 541)

• Is it a method or a science?



COMPARATIVE STUDY BETWEEN COMMON AND CIVIL LAW:

- It is a science (RODOLFO SACCO) – there are a variety of methods that can be used to compare, such as structuralism, functionalism, among others.
- Comparative as a legal science:
 - - compare and measure the differences between legal models
 - - know deeply the models to be compared
 - - take into account the cultural, economic, political and social aspects of the models to be compared
- Objective: unification of the law
- Ex. European Union after the 2nd World War

DEFINITIONS ON CONTRACT:

- A contract is a **legal mechanism** that outlines the specific responsibilities and obligations pursuant to a **relationship** between two or more parties. (Elad Gafni)
- **VARIOUS KINDS:** Contracts can **range** from marriage contracts to unspoken agreements between patrons and store owners. (Stephanie Boydell)
- A contract **represents** the **agreement** that is made between two or more parties. (Daniel Albahary)
- **CONTRACTUAL PARTIES:** The parties to a contract may be public or private entities (**person-person; person-corporation; corporation-corporation**) but a good contract will set out who is bound. (Jonathan Laski)
- Because of the doctrine of **privity** of contract, the contract and its terms are binding only on those parties, both in terms of its **specific performance** and **liability** accruing from a **breach** of its terms... (Johanna McNulty)
- **FORM/PROOF:** a contract can be articulated **orally** or in **writing**, but the latter is preferred as it can serve as a more tangible **proof** of an agreement during **litigation**. (Ivana Sud)

DEFINITIONS ON CONTRACT:

- **DEFECTS:** Each party who agrees to take part in the contract must be fully intellectually **capable** of entering into a contract and **comprehending** the terms of the agreement. As well, each party must enter into the contract of their own **freewill** and not under any **duress** of any kind. (Suzie Kotzer)
- It must be entered into **voluntarily**, without **coercion**, by someone who has reached the age of majority and is **mentally capable** of understanding what they are agreeing to. If the terms of a contract are not honoured, **lawyers make money**. (Meghan Murtha)
- **BINDING EFFECT OF CONTRACTS:** As contracts are legally binding, either party that **breaches** it is subject to **legal ramifications**. (Nicholas Saint-Martin)

CONTRACT FORMATION:

• OFFER

- a proposition put forward by an **offeror to an offeree**, indicating a willingness to enter into an agreement on certain terms, *coupled with an intimation that s/he is willing to be bound by that proposition* (IAN KERR, Ottawa University)
- can be made to a **single person (bilateral)** or to **several people (multi-lateral)** or to the **"world at large" (unilateral)**
- generally, a proposition becomes an offer **only when it is communicated** (whether verbally, in writing or by conduct) to the offeree



CONTRACT FORMATION:

• Invitation to Treat

- a proposition indicating a general commercial intent
- lacks the requisite intention to enter into legal relations
- (i.e., a desire to enter into contractual negotiations and *perhaps* a contract *if* a suitable agreement can be reached)
- **The distinction between offer // invitation is important in the following way:**
 - when an offer is made, it can be accepted. Once accepted (assuming an exchange of consideration has occurred), a contract comes into being
 - it is NOT possible to "accept" an invitation
 - the distinction between offer // invitation is often difficult to apply in actual cases



CONTRACT FORMATION:

- generally, **a mere quotation of one's lowest price is not an offer**, because it is said to lack an intention to be bound to that price. According to the courts, the matter must be determined via an examination of the intention of the author of the statement (in light of the circumstances of the case and the language used)
- generally, **the display of goods (including price tags) is thought to be an invitation to treat**. According to the decision in *Boots Cash Chemists*, there is no such thing as an offer-for-sale in a retail self-service store rather there is only an offer-to-purchase.
- most **ads are invitations to treat** - in order for an ad to be an offer, it must express a clear intention to enter into legal relations .



CONTRACT FORMATION:

- **reward offers are a special instance of a unilateral offer** made via advertisements: - they often cause certain problems when it comes to the communication requirement; - they push-the-limits of the notion of a unilateral offer.
- **Actions and fixed bids:** generally, a call for the best bid, whether in an open or closed forum is an invitation to treat • courts have held that referential bids will not be capable of acceptance in cases where the caller has indicated that it will take the highest/lowest offer.



CONTRACT FORMATION:

- **ACCEPTANCE**
- Acceptance means the signification by the **offeree of his/her willingness to enter into a contract** with offeror on the terms, as offered
- **ACCEPTANCE X COUNTER-OFFER** – battle of forms
- – determine whether acceptance substantially mirrors offer. If not, determine whether offeree provided notice and whether offeror objected.
- – **first shot rule** ...sometimes works with “supremacy clause”
- – **last shot rule** ...sometimes works when performance has occurred without objection



CONTRACT FORMATION:

- **COMMUNICATION REQUIREMENTS:**
- **GENERAL RULE (RECEIPT RULE):** the communication of acceptance is said to be complete when (and where) it is received by the offeror.
- • this rule applies to all communication deemed to be **instantaneous** [not involving significant delays or 3rd parties]
- • paradigms for instantaneous communication tend to include **face-to-face interaction**, telephone, etc...
- **THE POSTAL ACCEPTANCE RULE (DISPATCH RULE):** for **non-instantaneous communications**, the communication of acceptance is said to be complete when (and where) it is dispatched by the offeree
- • paradigms for non-instantaneous communication tend to include the post, telegrams, over-night couriers.
- **NEW MEDIA?**



CONTRACT FORMATION:

- **no universal rule - econtract**
- when offer and acceptance involve **shrinkwrap/clickwrap/browsewrap**, the issue usually boils down to whether the offeree **has reasonable notice of the terms and conditions**, not whether s/he actually read/understood them
- offerees who have been provided with reasonable notice and an opportunity to return the goods or deny the services are usually held to contract if they have acted in a manner that supports **"acceptance by conduct"**
- **REFUSAL**: offers that are refused by the offeree cannot later be accepted; the refusal of an offer results in its termination.
- **REVOKATION**: is an act of the offeror (or agent) and, in order to be effective, it must be communicated to the offeree.
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CONTRACT FORMATION:

- **LAPSE OF TIME**: often, acceptance will be impossible because of the lapse of some reasonable period of time since the offer was put forth.
- Courts will determine the **reasonable period of time** by investigating the nature and character and the normal or **usual course of business negotiations** leading to the sale, as well as the **circumstances** of the offer including the conduct of the parties in the course of negotiations.
- **DEATH**: of the offeror will sometimes **make acceptance impossible**, such is not the case where performance of an offeror's obligations do not require the existence of the offeror.
- **IMPLIED CONDITIONS**: some offers have express or implied conditions, the failure of which will be said to terminate the offer.
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