|  |  |
| --- | --- |
| **Logotipo  Descrição gerada automaticamente** | **1 – Offer vs. Invitation to Treat**  The latest computers are displayed in a shop window at a very attractive price. A customer comes into the shop and declares that he would like to buy one of the computers at the advertised price.  Another customer has seen the computers advertised in promotional material that gives all the relevant information, including the price. He contacts the salesperson and tells him that he would like to buy one of the computers. The salesperson no longer wants to sell the computer at the advertised price.  English Law: Emphasis of **legal certainty** and **economic efficiency**.  3 conditions to form a contract in English Law:   1. An **agreement** (offer and acceptance) – How do we know if we have an agreement? Objective test: A reasonable person would be able to understand that a proposal (offer) was made? The objective intention is the one considered. Counterpropositions may also exist, so the words and conduct of the parties counts. 2. **Intention to create legal relations**; - It is because, intention to create legal relations consists of readiness of a party to accept the legal sequences of having entered into an agreement. 3. **Consideration** -   Offer  An offer is a statement by one party of their willingness to enter into a contract on the terms that they have put forward. It must be **sufficiently precise** and **definite** to be capable being turned into a contract by acceptance.  The judges do not care about the intentions of the offeror, since they will analyze how the **intention** appears to the other party (objective intention).  The offer will be effective only on communication of the offer to the offeree. When it comes to letter, it is considered when the letter is received by the offeree.  Mere invitation to treat  Is an invitation to the other party to enter negotiations; an invitation to make an offer. The *invitee* can decide to make an offer itself, leaving it to the original *invitor* to either reject or accept it.  Advertisements (4), (5) and displays of goods in shops (1), (2), (3) will usually be considered as ***mere invitations to treat***.  Decisions  Display of goods in show windows: |
| **Logotipo  Descrição gerada automaticamente** | (1) Gibson vs. Manchester City Council – Corporation letter for a house selling - Conclusion: **Mere invitation to treat**.  (2) Fisher vs. Bell – Knife displayed in show window - Conclusion: **Mere invitation to treat**.  (3) Pharmaceutical Society of Great Britain vs. Boots Cash Chemists – Display of goods in the self-service shop – Conclusion: **Mere invitation to treat**.  Advertisements:  (4) Partridge vs. Crittenden – Advertisement of wild bird – Conclusion: **Mere invitation to treat** (limited stocks argument (from Grainger & Son v. Gough): otherwise, the advertiser might find himself contractually obliged to sell more goods than he in fact owned)  (5) Carlill v. Carbolic Smoke Ball Co – Advertisement of reward for persons who contract cold after using the ball – Conclusion: Constituted an **offer** (*objective test*: would the ordinary person construe the 1000 pounds deposited in the bank as evidence of good faith on the part of the company?)  If an offer is accepted, this will result in a binding contract, provided the other essential elements of a contract are satisfied; if an invitation to treat is ‘accepted’, it *will not* create a contract.    **2 - The Revocation of an Offer**  Case scenario 1: On March, 19, 2019, João offered to sell his car to Caterina for 4000 euros and told her that she will need to give him a definite answer by April 16, 2019. On April 10, 2019, Mario offered to buy João’s car for 4500 euros, and João accepted. Unaware of this, Caterina informed João on April 15, 2019 that she would like to buy his car for 4000 euros. João replied that he no longer wished to sell her the car.  Case scenario 2: Sofia tells Duarte: ‘you can have my green and black bicycle for 100 euros’. Duarte replies: ‘I would be interested in buying it, but I am not prepared |
| **Logotipo  Descrição gerada automaticamente** | to spend more than 80 euros’. Sofia rejects his offer. The next day, Duarte tells Sofia that he will buy her bicycle for 100 euros. Sofia replies that she no longer wishes to sell him the car. Duarte wishes to sue Sofia for breach of contract.  Revocation of an offer means that the offeror is no longer bound by his offer.  Ratio: Demonstration of **freedom of contract** and it would be unfair if the oferror was bound to wait for an **indefinite period of time** before the offer was accepted;  **Exception**: when consideration is given in return for the offer to remain open (e.g. the offeree pays money ‘= Sinal’ to the offeror in order to keep the offer open)  Allowing revocation favours the offeror in the sense that s/he can sell the goods at a higher price to someone else; on the other hand, the offeree relying on the offer may have taken action as a result before formally accepting the offer (e.g. negotiating a loan from a bank).  General Rule: An offer may be withdrawn at **any time** before it is accepted, even if a fixed period for acceptance is stipulated.  Conditions:   1. For a valid revocation the offeror should communicate his decision to revoke to the offeree **before** the offeree accepts the offer; 2. For revocation by post to be effective, it must be received by the offeree before they post their letter of acceptance; 3. An offer can be withdrawn using the **same channel** as the one used before. 4. Revocation of an offer does not need to come exclusively from the offeror (**third party can also revoke**);   Decisions  Routledge vs. Grant – 6 weeks period to accept an offer and revocation on the meantime. Conclusion: **Offer validly withdrawn** and acceptance was ineffective.  Mountford vs. Scott – Selling of a house and 1 pound paid to exercise the purchase within 6 months, on the meantime, seller withdrawn the offer. Conclusion: 1 pound was **given as consideration** and the **offer could not be withdrawn during six-month period**.  Byrne & Co. vs. Van Tienhoven & Co – Offer and withdrawn sent by letter, offeree received withdrawn only after accepting the offer. Conclusion: A **contract was formed** when the offeree accepted the offer and revocation was not valid. The **postal rule**: **postal revocation takes effect** not when posted, but **on receipt by the offeree**.  Dickinson vs. Dodds – Offer revoked by a third party. Conclusion: **Valid revocation by third party**. |
| **Logotipo  Descrição gerada automaticamente** | **3 – Acceptance**  An agreement is not complete until the offer has been validly accepted.   1. Only then a contract can be formed; 2. The rights and obligations under the contract begin from the time of acceptance; 3. In sale of goods contracts, the risk in the goods generally passes at this point.   Acceptance is an unequivocal expression of consent to the proposal contained in the offer; constitutes an **unconditional** assent to **all** the terms of the offer → **‘Mirror image’ rule:** the offer must be mirrored by an acceptance;  Legal effect: immediately binding both parties into a contract.  If the offeree adds one or several new term(s), then it constitutes a counter-offer and, therefore, it terminates the original offer (1).  In commercial contracts, the situation is sometimes less straight-forward.  **Communication of acceptance**  **General Rule**: Usually, is does not matter how the acceptance is made, as long as it is effectively communicated to the offeror, but if the offer specifies the method of acceptance, then it will normally have to be complied with.  **Exception**: When the method of acceptance is merely proposed in the offer, an equally expeditious method would suffice; the precise method does not have to be followed, so long as the communication by the alternative method results in the acceptance being delivery at the same time.  English Law distinguishes between *instantaneous* and *non-instantaneous* communication.  **→ Instantaneous communication**: Acceptance takes effect when and where the acceptance reaches the offeror (e.g. face-to-face, telephone, etc) (2). *Ratio*: the offeree will generally know when his acceptance was not communicated to the other party and can try again.  **→ Non-instantaneous communication**: **Postal rule** (3): acceptance takes effect when a letter is posted and **not** when it is received by the offeror (it is an **exception** to the general rule that acceptance of an offer takes place when communicated to the offeror). *Ratio*: the “meeting of the minds” necessary to form a contract occurs at the exact moment where acceptance is sent via post by the person accepting it; is was easier to prove that one posted a letter than it was to prove that it was received by the other party. The Postal rule favors the offeree by putting the risk of late or lost acceptance on the offeror → to avoid the risk, the offeror can expressly require actual receipts as a condition before being legally bound by his/her offer.  An offer made by post is not effective until received by the offeree, but acceptance is effective as soon as it is posted.   * Limits the possibility of revocation by the offeror: revocation is only allowed before acceptance and must reach the offeree before it becomes effective (which means, before the offeree post the letter of acceptance).   Important legal consequences deriving from the determination of the date and place in which the contract was formed:   * Capacity of the parties * Transfer of ownership and risks |
| **Logotipo  Descrição gerada automaticamente** | * Applicable law in international contracts * Possibility for the offeror to revoke their offer   **Silence**  General rule: silence is not sufficient acceptance (4); the offeree must communicate his acceptance to the offeror for a contract to be concluded. *Ratio*: protect the offeree.  Other types of communication  In certain situations, performance of an act is sufficient acceptance;  In unilateral contracts, the offeror *impliedly waives the need to communicate acceptance*. E.g. ‘reward’ to find a dog – the performance of finding the dog is suffice (*decision Carlill v. Carbolic Smoke Ball Co*)  **Battle of Forms**: Two business negotiating the terms of a contract and each party sees to impose its own terms upon the other.  Standard terms have been defined in the UNIDROIT Principles of International Commercial Contracts as ‘provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party’.  No valid contract formed, but the parties have agreed on the main points and started to perform:   * ‘First shot rule’: the first terms which have been offered by the offeror prevail (unless they were explicitly rejected in the acceptance) (Dutch law). * ‘Last shot rule’ (5): considers each new reference to general conditions as a counter-offer, if this offer is accepted by performance of the obligation (e.g. delivery of the goods), the offeree is presumed to have accepted the general conditions referred to in the latest offer (English Law). * ‘Knock-out rule’: the terms for which the forms do not match will cancel each other out and will be dropped from the contract (French Law) – they will be replaced by alternative solutions   Decisions  (1) Hyde v. Wrench – Selling of a farm, first buyer refuses, then makes a counter-offer then accept the second price offered. Seller gives up and buyer sues him for breach of contract. Conclusion: A counter-offer destroys the original offer  (2) Entores case – Offer and acceptance by Telex. When did acceptance take place? When it was received or when it was sent? Conclusion: Acceptance took place when the message by Telex was received (postal rule does not apply for instantaneous communications)  (3) Adam v. Lindsell – Offer and acceptance (with delay) by letter. Conclusion: A valid contract had been formed when the acceptance was sent.  (4) Felthouse v. Bindley – Selling of a horse, silence as acceptance. Conclusion: Silence is not sufficient acceptance. The offeree must communicate his acceptance for a contract to be concluded.  (5) Butler Machine Tool Case – Battle of forms in a selling machine. Conclusion: |
| **Logotipo  Descrição gerada automaticamente** | The buyer’s order was a counter-offer, not an acceptance, so the contract was formed with the latest terms and conditions agreed.  3 – Formation of a Contract  3 Conditions for a contract to exist:   1. **Agreement** (an offer and an acceptance); 2. **Intention to create legal relations**; 3. **Consideration**   2. Parties not only need to agree on the same thing (‘meeting of the minds’) but also on the fact that **what they agree upon is binding in law** → each party can go to court to enforce the agreement if necessary.  Not every arrangement that is made includes an intention that if one party fails to keep to the agreement, the other party should be able to sue for breach of the agreement. For many promises, it might be *morally* wrong not to keep them, but it will not have legal consequences.  The test to decide whether there is an intention to create legal relations is an **objective test**.  Lord Denning M.R. explained: the court look at the situation in which the parties were placed and asks itself: would reasonable people regard the agreements as intended to be binding?  The case law developed **two rebuttable presumptions** to determine whether or not an intention to create legal relations exists that would make an agreement enforceable:   1. In the case of social or domestic arrangements, it is **presumed that there is no intention to create a legal relationship enforceable in law** (1), (2) (unless the contrary can be proven (3)). 2. In the case of commercial or business arrangements, it is **presumed that there is an intention to create a legal relationship** and that the agreement is **legally enforceable** (unless the contrary can be proven).   A social or family arrangement is an agreement between neighbors, friends or relatives (parties rely solely on family ties of mutual trust and affection).  Contracts of a commercial nature are presumed to be made with an intention to create legal relations although this **presumption can be rebutted**; e.g. express words used in the commercial agreement such as ‘binding in honor only’, or ‘gentlemen’s agreement’.  Decisions  (1) Balfour v. Balfour: Husband promised to send money to wife but stopped paying after a while. Conclusion: As the parties defined amicable terms at the date of the agreement, they did not intend to create a legally binding obligation.  (2) Jones vs. Padavatton: Mother claimed possession of the house where daughter was living in while taking bar exams. Conclusion: No binding contract (and mother succeeded in gaining possession of the house purchased)  (3) Merrit v. Meritt: Husband left but promised to transfer the house to wife’s name once she paid off the mortgage but refused to do so when the moment came by. |
| **Logotipo  Descrição gerada automaticamente** | Wife sued husband for breach of contract. Conclusion: Agreement was not in amicable terms (separated or about to separate), so as a rule, the court impute to them an intention to create legal relations.  **5 – Consideration**  **Agreements need to be supported by consideration**; consideration is necessary for a promise to become binding.  The promise must give consideration in exchange of the promisor’s promise → ‘something’ which is of value in return for a promise. Consideration must be in *money* or *money’s worth*.  Consideration description in the case of *Currie v. Misa* *(1875)* in terms of benefit and detriment as:  ‘a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility give, suffered or undertaken by the other’.  Example: A and B enter into a contract whereby B purchases A’s bicycle for 90 euros. In this sense:   1. A is gaining the benefit for 90 euros, but have the detriment of giving the bicycle away; 2. B is gaining the bicycle but giving up 90 euros.   **Professor Pollock** (‘Principles of Contract Law’) defined it as ‘*An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable*’.  5 elements in Pollock’s definition:   1. Consideration can be an act (i.e. doing something of value); 2. Consideration could be forbearance (i.e. not doing something of value) 3. A promise to act or a promise to forbear is consideration; 4. Consideration is given in exchange of the promisee’s promise; 5. Consideration has to be of value.   English judges will not enforce a promise which has not been paid in some way (1).  **Policy reasons**: requirement which stems from the idea that, in English Law, the contract is defined as an exchange, a bargain.  Each party to the agreement must give, do or promise something of value in return for a promise. Based upon commercial needs – consideration provides the test that a bargain was concluded.  Unique feature of common law systems. |
| **Logotipo  Descrição gerada automaticamente** | Originally, contracts were only recognized if they were contained in a deed. By the 17th century, in agreements other than for land, the courts would demand evidence of the ‘proof’ that a bargain in fact existed.  Allowing all agreements to be legally binding was seen as too broad;  The English courts therefore also developed a device to keep the expansion of binding contracts under control.  The giving of consideration by both sides became the traditional method of ensuring that other types of agreement were contractual → proof that the bargain existed.  As a result, the rules of English Law seek to differentiate between:   * Agreements where there is **something to be gained by both parties;** * Agreements which are **purely gratuitous;**   In the first scenario, in order to become binding the promise needs to be **supported by consideration**;  In the second scenario, for the promise to become binding, it needs to be **written in a deed**.  **Past consideration** (2) → given before the promise is made: It is generally not considered as sufficient consideration to support a contract; Consideration and promise **must be part of the same transaction**, otherwise it is unenforceable.  **Exception** (3),(4): certain circumstances of past consideration can give rise to an implication to pay some money or confer benefit on the promise:   1. The act must have been carried out at the promisor’s request; 2. The parties must have understood that the act would be rewarded in some way; 3. The payment must have been capable of legal enforcement had it been promised beforehand.   **Future consideration** (executory consideration) → exchange of promises to carry out acts or pass property at a later stage. If one party breaks their promise, they are in **breach of contract**.  The adequacy of consideration  In English Law, consideration does not have to be adequate but it must be sufficient (5).   * It does not have to be fair or equal in value to the promisor’s promise; * Idea that if one of the parties has made a bad bargain, they will have to stick with it, the court will not come to their rescue; * Freedom of contract entails that adequacy will be decided by the parties themselves.   Consideration must be sufficient → mains valid, of value in the eyes of the law. And does not have to be money (although it still must be sufficient) (6),(7).  **Consideration and the performance of existing duties**  **General Rule**: Where the promisee merely fulfils an existing legal duty to the promisor, and nothing more, they do not provide consideration (8),(9), |
| **Logotipo  Descrição gerada automaticamente** | (10) → i. the promisee merely does something by which they are already legally bound (e.g. legal duty or contractual duty)  **Exceptions** where performance of existing duty constitutes valid consideration:   1. Where the promisee **exceeds** their duty (11); 2. There the promisor promising to pay extra is said to **receive an extra benefit** from the promisee’s agreement to compete what they were already bound to do under the existing arrangement (12).    1. Wherever a promisor promises additional payment for completing a task that the promisee is already bound to do under an existing contract, if the promisor gains an extra benefit in return, then the promise will be enforced. (Stilk v. Myrick was being refined rather than overruled) → Exception developed on the basis of consideration of fairness; Criticized by certain scholars for making the rules too vague and uncertain.   Decisions  (1) Roscola v. Thomas – Selling of a horse, promise of the seller that the horse was free from vice and in fact was not; breach of promise. Conclusion: The promise was not part of the bargain, no consideration had been given in exchange for the promise. Lord Denman: “it may be taken as a general rule […] that the promise must be coextensive with the consideration… a consideration past and executed will support no other promise than such as would be implied by law”.  (2) Re McArdle – Son’s wife paid for substantial repairs and an agreement was made to reimburse her, but the parties failed their promise. Conclusion: **Her consideration was in the past**, before their promise, therefore the **agreement was unenforceable**.  (3) Lapleigh v. Brathwait (1615) – Agreement for King’s pardon after accusation of murder in exchange of money (payment failed). Conclusion: The **promise was legally enforceable**, as the service had been requested by the promisor and it was clear that both parties would have contemplated a payment.  (4) Pao On v. Lau You Long (1980) – Two agreements, one for purchase of shares and other for indemnification for share pricing; in exchange, claimants promised to resell more than 60% of the shares within a year. Conclusion: An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor’s request, the parties must have understood that the act was to be remunerated further by a |
| **Logotipo  Descrição gerada automaticamente** | payment of the conferment of some other benefit and payment, or the conferment of a benefit must have been legally enforceable had it been promised in advance.  (5) Thomas vs. Thomas (1852) – Mr Thomas expressed the wish that his wife be allowed to remain in the house, but never wrote it; Executors tried to dispossess the wife, even thought she agreed to pay 1 pound/year to stay in the house. Conclusion: Even though it was not economically adequate, she provided consideration and the **contract was enforceable**.  (6) Chappell & Co Ltd vs. Nestlé Co Ltd (1960) – Nestlé had offered a record for 1s 6d plus three chocolate bar wrappers, to promote their chocolate. Conclusion: Chocolate wrappers were held to be sufficient consideration.  (7) Bainbridge vs. Firmstone (1838) – A father lent his son a sum of money and told him that repayment was not necessary if he stopped complaining about how the father would distribute his property is his will among the children. Conclusion: the promise not to complain was not considered sufficient consideration.  (8) Collins vs. Godefroy (1831) – Defendant promised to pay money to police officer to attend a trial, the police officer attended, but was not called to give evidence. The defendant refused to pay. Conclusion: The agreement was not supported by consideration. The police officer was under a public duty to attend court anyway.  (9) Ward vs. Byham (1956) – A father of an illegitimate child promised money for the mother to keep the child “well looked after and happy”. Conclusion: By looking after the child, the mother would doing nothing more than she was already bound by law to do. However, there is no obligation in law to keep a child happy, **the promise to do so was seen as good consideration and therefore enforceable**.  (10) Stilk vs. Myrick (1809) – Agreement between plaintiff (crew member) and defendant (captain) on board after two crew members deserted. Conclusion: Not entitled to the extra money as he did not provided any consideration (they were merely fulfilling what they had agreed to do under their original contract) – \*read together with Willams vs. Roffey  (11) Hartley vs. Ponsonby (1857) – Captain promises extra money to crew members in a dangerous voyage for them to continue the voyage, but then refused to pay. Conclusion: The crew members had exceeded their contractual duty, since many crewmen had deserted during the voyage; they could have refused to continue the voyage. Consequently, by agreeing to do the work, they had supplied fresh consideration.  (12) Williams vs. Roffey Bros & Nicholls Contractors Ltd (1989) – Claimants under-quoted a carpenter service and ran into financial difficulties. Defendant promised extra money for them to work on time, but only paid partly. Conclusion: It was supported by consideration as the defendants received an extra benefit from the agreement; there was clearly a commercial advantage to both sides. The extra benefit comes from the |
| **Logotipo  Descrição gerada automaticamente** | moment the carpenters would not be able to deliver the goods on time, so the constructor would have to pay the penalty anyway. So, for this reason, the contracts are benefitted to create a new deal paying extra money. \*read together with Stilk v. Myrick  **6 – Electronic Contracts**  Does the postal rule apply to email?  General rule = acceptance must be communicated to the offeror  Exception in relation to non-instantaneous modes of communication (i.e. postal acceptances) for which the postal rule applies → acceptance takes effect when the letter is posted; exception justified by considerations of commercial convenience.  English courts have **refused to extend the postal rule to faster modes of communication**, such as telex.  Debate amongst scholars as to whether emails are instantaneous or non-instantaneous modes of communication:   * One side states that Emails are not instantaneous because they usually pass through various servers, routers and internet service providers before reaching their destination. * Another side states that emails are virtually instantaneous (‘any delay in the electronic relaying of an email message is now infinitesimal’ – Simon Hill)   The majority of commentators believe **that the postal rule should not apply to emails**. As a virtually instantaneous mode of communication, the **general rule applies** (to be effective, an emailed acceptance must be received by the offeror). Ratio = the sender of an email is more likely that the recipient to be aware that it has not arrived (e.g. receiving a message telling them that there is a problem)  At which point can the offeror be said to have ‘received’ an email?   1. **When the email is read by the offeror**   Evidentiary problems: unless an acknowledgment is sent, it is difficult to prove when a particular email was read; would give the offeror the power to nullify the acceptance by *deciding not to read it*, or *to delay its taking effect by putting off reading it*.   1. **When the email arrives on the server which manages the offeror’s email (preferred position among authors)**   Much more likely to be adopted by English judges. Provides greatest clarity and is easier to prove. It is open to the offeror to stipulate that an *acceptance is not effective until it is read or acknowledged by him*.  Art. 24 of CISG: an offer, declaration of acceptance or any other indication of intention ‘reaches’ the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business, or mailing address, to his habitual residence’.  Solution adopted in the US: US Restatement (Second) of Contracts – ‘A written revocation, rejection, or acceptance is received when the |
| **Logotipo  Descrição gerada automaticamente** | writing comes into the possession of the person addressed, or of some person authorizes by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him’.  UN Model Law on Electronic Commerce: ‘Unless otherwise agreed […] the time of receipt of a data message is determined as follows: […] receipt occurs at the time when the data message enters the designated information system’.  As a default rule, the majority of authors states that would apply even if the email, after having arrived on the email server, cannot be accessed because it is blocked by the offeror’s firewall or automatically deleted as ‘junk-mail’; because it is within the offeror’s ‘sphere of control’. Would apply even if the email is rejected by the offeror’s email server because the offeror’s email inbox is full or because of a problem with the server.   1. **When the email ought reasonably to have come to the offeror’s attention**   Used in some cases concerning Telex (1);  Disadvantages:  Creates uncertainty;  Lack of significance of business hours → common to check emails in the evenings and at weekends.  Contracting through websites  2 ways in which a contract can be made:   * **Contracts involving digital products** (e.g. software, music or videos)   The customer goes on the retailer’s website and downloads the product in return for payment → website as a *‘digital vending machine’*.  Once the buyer’s order has been placed, performance of the contract by the retailer is likely to begin immediately (e.g. product downloaded onto buyer’s computer).  The presence of the website is a standing offer, which the customer accepts by making the relevant payment   * **Contracts where the retailer’s performance does not immediately follow the placing of the customer’s order but comes at a later time.**   Similar to a self-service shop but not identical since the delivery of the goods does not take place when the customer goes to the online ‘checkout’ but at a later time → website as a *digital shop window* - - - Pharmaceutical Society of Great Britain v. Boots Cash Chemists (1953) and Fisher v. Bell (1961)  Scholars of argue that the display of goods or services on a website would constitute an **invitation to treat** and the **offer** would be **made by the customers** when they place their order. |
| **Logotipo  Descrição gerada automaticamente** | UN Convention on the Use of Electronic Communications in International Contracts, Article 11:  *A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an* ***invitation to make offers****, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.*  Treating the display of goods or services on a website as an invitation to treat means that the website provider will not be bound to deal with every customer who seeks to place an order; may choose to decline an order if the supply of stock is limited, or if the customer is in a country where it is illegal to sell the goods in question.  At which moment does the online retailer become bound?   1. By taking the customer’s payment, the retailer will be considered to have accepted the customer’s offer by conduct. 2. When the website displays a message after payment has been accepted saying that the customer’s order has been processed. 3. When the customer receives the automated email confirming that the order has been received (2) (legal requirement under the Electronic Commerce Regulation 2002)   An online retailer can take control of the process of contract formation: e.g. *make clear to the viewers of its website that the presentation of goods and services on the website is an invitation to treat* or *give details as to the status of any email it sends to the customers after receipt of an order*. E.g. terms and conditions of Amazon.co.uk: acceptance will be complete at the time we send the Dispatch Confirmation E-mail to you.  Decisions  (1) The Pamela (1995) – Telex arrived shortly after midnight, outside of business hours. Conclusion: If telex had been sent in ordinary business hours it would have taken effect on arrival, but the arbitrators in the case had been entitled to find that on the facts the notice of withdrawal had not been received until it was to be expected that it would be read (i.e. at the start of business the following Monday)  (2) Cheww King Keong and Others v. Digilandmall.com Pte Ltd (2004) – Plaintiff bought a laser printer for the wrong price and defendant refused to honor the contract. Conclusion: Confirmation email had all the characteristics of an unequivocal acceptance.  **7 – The Content of a Contract**  There is **no general duty of good faith** at the negotiating stage. No special rule of pre-contractual liability exists in English law when no contract results. *Ratio*: promoting pragmatism, predictability, and certainty. |
| **Logotipo  Descrição gerada automaticamente** | There is **no general duty of disclosure** (1) in English law. Generally, no liability arises if a party does not disclose information to the other during pre-contractual negotiations. Based on the idea that the relationship between the parties during pre-contractual negotiations is at *arm’s length*.  Not having a **duty of disclosure** is **different** from making a **false statement** (there may be legal consequences if one party can make a false statement during pre-contractual negotiations).  Any statement made at the time of contracting or before the contract is formed is called a ‘**representation’**.  English law draws an importance between terms and representations   * Any statement made by either party to the contract which was **not intended to form part of the contract** is a **representation**. It does not form part of the contract so even if the statement is false, it cannot amount to breach of contract. * Any statement by which the parties to the contract **intended to be bound** is an **express term**. Express terms forms part of the contract and can be relied upon by the parties.   3 Types of representation that will normally not give rise to any liability and have no legal significance:   * **Trade puffs**: are mere boasts or unsubstantiated claims. Commonly made by advertisers of products or services; e.g. ‘probably the best in the world’. **Exception**: factually based statement (2) may not constitute ‘mere puff’. * **Mere opinions**: statements of opinion which are *honestly* made do not normally give rise to liability. An erroneous opinion stated by one party and relied upon by the other does not give rise to liability, even if it induced the other party to enter into the contract (3).   **Exception**: i) statements made by a party with specialist expertise in the field are normally actionable (4) (or statement made by a party in a better position to know the truth – the law will imply that the statements have a reasonable basis - actionable if untrue)  ii) Statements opinion can be actionable if they were known to be untrue by the party expressing it → constitute **misrepresentation** (see below).   * Mere representations   **Misrepresentation** is where a representation has been falsely made so as to induce a party to enter into a contract (vitiate the party’s free will); is a false statement of a material fact which induces the other party to enter into a contract, so it can have contractual significance even though it does not form part of the contract.  In order to be actionable, the statement must fulfil 2 criteria: 1) constitute a **false statement of material fact** – it is not always necessary for the statement to be made in writing or orally, it can also be made by conduct (6); |
| **Logotipo  Descrição gerada automaticamente** | 2) have acted to **induce the other party** to enter the contract – the statement alleged to be a representation must have been made before or at the time of the contract because it must have induced the representee to enter the contract (7).  (\*) Statements merely expressing a future intention normally constitute speculation rather than misrepresentation, unless the statement falsely represented a state of mind which did not in fact exist at the time it was made (5).    **Legal Consequences** of a contract having been formed on the basis of a misrepresentation: the contract is **voidable**.  Not void because the party who is the ‘victim’ of misrepresentation might chose to continue with the contract if that is in their interest.  In addition, the adversely impacted may be able to seek damages depending on the situation.  **3 types of misrepresentation**:   * **Fraudulent misrepresentation** (traditionally the only actionable type of misrepresentation): false statement of material fact made by one party knowing it was false to induce the other party to enter into the contract.   Remedy: rescission of the contract + damages   * **Negligent misrepresentation**: false statement of material fact by one party who did not attempt to verify its veracity, in violation of the principle of reasonable care. |
| **Logotipo  Descrição gerada automaticamente** | Remedy: rescission of the contract or damages/   * **Innocent misrepresentation**: false statement of material fact by one party who was unaware at the time of contract was formed that the statement was untrue (honest belief in its truth) (8)   Remedy: nor normally actionable. In certain cases, rescission of the contract is possible but no damages.  Evolution of the law: **Misrepresentation Act 1967, section 2(1)**:  Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true. → the burden of proof is on the representor.    Source: C. Turner, ‘Unlocking Contract Law’, Routdlege, 4th ed. (2014)  **Mistake**  Narrow conception of mistake in English law:  ‘A **mistake** as to the facts made by one party only is **legally relevant**, even *if the other party knows of it*. Mere silence as regards a material fact which the one party is not bound to disclose to the other is not a ground of invalidity, for the principle that in relation to sale is referred to as caveat emptor (‘let the buyer beware’) is still the starting point of the English law of contract.  3 types of mistake:   * **Common mistake**: both parties have made exactly the **same** **mistake** (i.e. the mistake is ‘common’ to both of them). |
| **Logotipo  Descrição gerada automaticamente** | Legal consequences: the contract may be void *if the mistake concerns the subject-matter of the contract* (9).   * **Mutual mistake**: both parties are mistaken but they are not making the same mistake.   Legal consequences: not actionable unless the promises made by the two parties so contradict one another as to render any performance of the agreement impossible and it is impossible to make sense of the agreement (10).   * **Unilateral mistake**: only one party is mistaken.   Legal consequences: actionable only if it relates to terms of the contract or the identity of the other party. E.g. Smith v. Hughes: the court considered that there was only a mistake as to the quality of the goods (‘new’ oats rather than ‘old’ oats) which did not constitute the terms of the contract.  Decisions  (1) Smith v. Hughes (1871) – Selling of oats for horse. Buyer refused to pay because he thought it was old oats and not green oats. Conclusion: The contract was binding. Mr Smith was under no duty to inform Mr. Hughes of his mistake about the kind of oat.  (2) Carlil v. Carbolic Smoke Ball Co (1893) – Mrs. Carlill read the advertisement, bought the smoke ball, used as instructed and contracted influenza, but the company refused to pay arguing that was a mere advertising. Conclusion: It was not a mere puff because of the passage ‘1000 l. is deposited with the Alliance Ban, shewing our sincerity in the matter’. It proved the sincerity of the promise.  (3) Bisset v. Wilkinson (1927) – Land sold in New Zealand. Buyers intended to use for sheep farming and the seller told that, in his opinion, the land had capacity for 2,000 sheeps. It was not the case. Conclusion: It was nothing more than an honest opinion as the seller had no experience and therefore it is not actionable.  (4) Esso Petroleum Co Ltd v. Mardon (1976) – Site to build a petrol station, Esso stimated 200,000 gallongs a year. Mr Mardon entered into a tenancy agreement with Esso. Despite of the defendant’s best efforts, sales only reached 78,000 gallons and defendant lost money and couldn’t pay the loan took from Esso. Esso sued him por repossession. Conclusion: Esso had special knowledge or skill. They made a representation and Mr Mardon entered into a tenancy on the faith of it. It was a ‘fatal error’. For their misrepresentation, they are liable in damages.  (5) Edgington v. Fitzmaurice (1885) – Prospectus stated the money of the bonds would be used to alter company’s building, buy horses, etc but in fact it would be used to pay serious debts. Mr Edgington bought bonds and the company later became insolvent. The statement made by the directors is qualified as misrepresentation? Conclusion: The statement was a fraudulent misrepresentation (a false statement of material fact that influenced Mr. Edgington to buy it). |
| **Logotipo  Descrição gerada automaticamente** | (6) Spice Girls Ltd vs. Aprilia World Service BV – Contract for a commercial with Spice Girls before the announcement that one member left the group. Aprilia refused to pay the advance royalties. Conclusion: Spice Girls were liable of misrepresentation by conduct. The participation of all 5 Spice Girls in the commercial photoshoot amounted to a representation that there had been no declared intention of any member to leave the band. The representation was false since all the other members were aware of Gerri’s intention to leave the band.  (7) Roscola vs. Thomas (1842) – The selling of the horse free from vice that was untrue. Conclusion: The promise that the horse was sound was not part of the contract, it had been made after the contract had been formed.  (8) Derry vs. Peek (1889) – Shareholder lost money due to a false statement and the company fell into liquidation. Conclusion: The shareholder’s action failed because it was not proved that the director lacked honest belief in what they had said. ‘the law is that where a man makes a statement to be acted on by other which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false (…) he is liable’.  (9) Leaf vs. International Galleries (1950) – Buyer purchased an oil painting representing that it was painted by John Constable. When he tried to sell it five years later, he discovered it was not in fact a Constable and claimed rescission of the contract. Conclusion: The Court rejected him claim, because both parties believed the picture to be a Constable. Such a mistake does not avoid the contract because there was no mistake about the subject-matter of the sale.  (10) Raffles vs. Wichelhaus (1864) – Contract for the sale of cotton. The seller was under the impression that he was selling one of the cargo and the buyer was under the impression that he was buying the other cargo. Conclusion: Contract was declared void for mistake. It was impossible to find a common intention between the parties.  **8 – Express and Implied Terms**  The terms of a contract  A contract consists of the terms agreed upon by the parties.  2 distinct typed of terms:   * Express terms: Under the principle of contractual freedom, parties have a wide freedom to choose the content of their contract.   Determination of the Price   * Under Section 8 of the Sale of Goods Act 1979, a contract can be valid even if the price is not determined or not determinable. The price will be a ‘reasonable price’ determined by the judge based on the circumstances of the particular case.   Section 8 – Ascertainment of price   1. The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties. 2. Where the price is not determined as mentioned in sub-section (1) above the buyer must pay a reasonable price. |
| **Logotipo  Descrição gerada automaticamente** | 1. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.   Rule extended to other type of contracts (e.g. Supply of Goods and Services Act 1982, Section 15)  Section 15 – Implied term about consideration   1. Where, under a [relevant contract for the supply of a service], the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge. 2. What is reasonable charge is a question of fact.   **Unilateral determination of the price** in contracts considered as a manifestation of the principle of freedom of contract in English Law: ‘with regard to price, it is perfectly good contract to say that the price is to be settled by the buyers’ (Lord Dunedin in May & Burcher ltd v. The King HL 1920 [1924])   * Implicit terms   Terms can be implied:   1. **By statute**   Implied terms applying only where the goods are sold in the course of business → cannot be implied in a contract involving a private sale.  Implied condition that the goods are satisfactory quality (s. 14(2) Sale of Goods Act 1979).  Implied condition that the goods are fit for purpose → here the buyer expressly or by implication makes known to seller any particular purpose for which the goods are required, there is an implied term that the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied (except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the sill or judgment of the seller) (s, 14(3) – Fitness for particular purpose – Sale of Goods Act 1979).  Where there is a sale of sample, there is an implied term that the bulk will correspond with the sample in quality (s. 15 – Sale by Sample – Sale of Goods Act 1979).  Where the supplier of a service is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill (s. 13 – Standard of Service – Supply of Goods and Services Act 1982).   1. **As a result of custom or trade usage**: Terms may be implied on the basis of an established custom or usage of the relevant trade unless such a term would be consistent with an express term of the contract.   Old maxim that ‘customs hardens into right’ (1).   1. **By the court**   English case-law has developed 2 tests in relations to implied terms: |
| **Logotipo  Descrição gerada automaticamente** | 1. **The ‘officious bystander’ test**:   MacKinnon LJ in Shirlaw vs. Southern foundries Ltd (1939): ‘Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that is goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common “Oh, of course!”.   1. **The ‘business efficacy’ test**:   The courts will imply a term into a contract that is necessary and obvious to give it business sense (2).  English law will also imply terms in certain common types of contractual relationships (e.g. employer/employee, landlord/tenant (3))  In the case of *Yam Seng PTE Ltd. vs. International Trade Corp (2013)*, the courts recognized a **limited form of good faith** as an implied contract term (4).  In case of doubt about the meaning of contractual terms, English law seeks to find the *common intention of the parties*. If a common intention cannot be found, English law looks for the *reasonable meaning to be given to the terms*, based on the perspective of the reasonable person in the position of the contracting parties (leaves some room for introducing **elements of fairness** into the contract)  Objective interpretation – gives priority to the objective declaration over the party’s subjective intention.   * English judges have sometimes referred to the perspective of the reasonable commercial person in relation to commercial contracts; e.g. Lord Hoffmann in the case of Lord Napier and Ettrick vs. R.F. Kershaw Ldt (1999):   ‘Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favor a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them.  Decisions  (1) Hutton vs. Warren (1836) – Mr Hutton was the tenant farmer of a land owned by Mr. Warren. Upon expiry of the farming tenancy, Mr. Hutton claimed that it was the custom that the landlord would pay a reasonable allowance for seed and labour. Mr Warren refused to pay, arguing that the original leased contained no such provision. Conclusion: Mr. Hurron was entitled to recover a fair and reasonable price for the seed and labour; the custom was imported in the lease as an implied term. |
| **Logotipo  Descrição gerada automaticamente** | (2) The Moorcock case (1886) – Owners of ship contracted defendants to unload and load cargo from the ship. The ship god damaged during the service and claimant sued for the cost of damage to the ship. Defendants claimed that there was no express term that the riverbed was suitable for mooring the ship. Conclusion: The court implied a term that the riverbed was suitable for mooring the ship and awarded damages for breach of contract.  (3) Liverpool City Council vs. Irwin (1977) – Tenants refused to pay the rend because the common parts were constantly vandalized and argued that landlord had a duty to keep the common parts of the building in a decent state. Conclusion: Landlord had an obligation to take reasonable care to keep the common parts of the block in reasonable repair and usability – a test of necessity.  (4) Under English law, a duty of good faith is implied by law as an incident of certain categories of contract, for example, contracts of employment and contracts between partners or others whose relationship is characterized as a fiduciary one (…) recognize a requirement of good faith as a duty implied by law (…) following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.  **9 – Promissory Estoppel**  Contracting parties are generally considered to contract at arm’s length (especially in commercial transactions).  English contract law does not recognize a general principle of good faith. 5 main justifications:   1. Good faith requires the parties to take into account the **legitimate interests** of one another → in contradiction with the individualistic and liberal approach of English contract law which is based on adversarial self-interested dealing. 2. Good faith is **too vague** → *threatens legal certainty* 3. Good faith may require an inquiry into the **subjective state of minds** of the parties to understand why a party acted in a certain way → goes against the objective approach of English law. 4. Good faith restricts the autonomy of the contracting party → **inconsistent with the principle of freedom of contract**. 5. Good faith has a **lesser role to play in commercial contracts**, which are the most litigated before the UK courts.   Despite the lack of a general principle of good faith, English law uses a number of doctrines which have a similar function. E.g. the doctrine of promissory estoppel.  The doctrine of promissory estoppel has been developed as an attempt to ensure justice and fairness.  In English law, a promise made without consideration is generally not enforceable. However, **promissory estoppel is an exception to this principle**: in certain circumstances, the court will be prepared to enforce a promise made without consideration on the basis that *it would be unconscionable for the promisor to renege on his/her promise*.  The doctrine of promissory estoppel is an equitable doctrine (1), (2). It applies where the following criteria are met: |
| **Logotipo  Descrição gerada automaticamente** | * The promisor makes a *clear and unambiguous promise* to the promisee which was intended to create legal relations; * The promisee must have acted *in reliance of that promise* (i.e. suffered a detriment or changed his/her position as a result of the promise); * The promisor must have *known* that the promisee was going to act on the promise; * It would be *inequitable* for the promisor to come back on his/her promise; * The promisor and the promisee are in an *existing contractual or other legal relationship*.   Promissory estoppel is based on a *promise not to enforce some pre-existing right* → the promisor will be estopped from relying on their legal right. E.g. where a creditor informs a debtor that a debt is forgiven, but subsequently asks for repayment or where a landlord tells his tenant that he is not required to pay the rent for a period of time – until the war is over.  In English law, promissory estoppel **can only be used as a ‘shield not a sword’** (3) – can be used only as a defense but does not give rise to a cause of action.  \*The situation if different in American Law where promissory estoppel can be used as a basis of a cause of action.  Decisions  (1) Hughes vs. Metropolitan Railway (1877) – The landlord gave his tenant 6 months to repair the property, the tenant indicated to the landlord that he was not proceeding with repairing the premises while the negotiations were taking place. After a while, the negotiations broke down, and six months after the original notice the landlord tried to evict the tenant. Conclusion: The landlord has led the tenant to believe that, while the negotiations for the sale were in progress, the tenant was not obliged to repair the premises. It was held that six-month period was to run from the date that the negotiations broke down.  (2) Central London Property Trusts Ltd vs. High Trees House Ltd (1947) – Agreement after WWII to reduce the rent by half, without expressly agreeing how long this would last for. After the war, promisor bought an action against the promisee to restore payment to full rent. Conclusion: The promisor was able to restore payment of full rent from the time the flats became fully occupied but did not succeed on trying to recover the full rate rent during war period.  (3) Combe vs. Combe (1951) – During a divorce, the husband promised to pay the wife 100 pounds per annum as permanent maintenance. The wife gave no consideration in exchange for the promise. The husband did not honor his promise and wife sued him relying on the principal of promissory estoppel. Conclusion: Wife could not enforce the husband’s promise as she had not given consideration. **The doctrine of promissory estoppel could only be used as a shield but not as a sword**, it could only be used as a defense. The principle of promissory estoppel does not create new causes of action and consideration is always essential for the formation of contract. |
| **Logotipo  Descrição gerada automaticamente** | Original common law rule (1): parties were bound to perform their obligations under the contract regardless of the effect of any intervening events that might make it more difficult or even impossible to perform the contract → strict rule meaning that a party could not be discharged from contractual obligations.  From the 19th century on, exceptions started to be created by the courts because the strict rule leaded to injustice. A doctrine started to emerge whereby parties who were bound by contractual promises could be relieved of the obligation to perform in circumstances where they were prevented from keeping their promises because of an unforeseeable intervening event (origin of the doctrine of frustration) (2).  The doctrine of frustration applies where:   * Because of some **external event**, * The f**undamental purpose of the contract becomes ‘frustrated’** or made impossible to perform, * So that any attempt at performance would amount to something **quite different from what was contemplated by the parties** at the time the contract was formed.   Decisions  (1) Paraldine v. Jane (1647) – Tenant of a land stopped paying the rent when it was invaded by the enemy of the king and he was expelled from the land. Conclusion: The defendant still had a contractual duty to pay the rent due under the lease, which he was not discharged of by any intervening event. The contract did not provide expressly for the possibility to account of intervening events preventing performance.  (2) Tayler v. Caldwell (1863) – Rental contract of the Surrey Gardens and Music Hall, but in between the place was destroyed by an accidental fire. The claimant sued the defendant for damages in relation to the money he had spent on advertising the concerts and other general preparations. Conclusion: The commercial purpose of the contract had ceased to exist, performance was impossible and both parties were therefore excused from further performance of their obligations under the contract.  **5 – Consideration**  Harmer vs. Sidaway (1891) – An uncle promises his nephew $5,000 if the nephew would refrain from ‘drinking liquor, using tobacco, swearing and playing cards or billard for moneu until he should become 21 years of age’. The nephew complied, but the executor refused to make the payment after  the uncle’s death. Conclusion: The promise was enforceable because the nephew had provided consideration by restricting his freedom of action. |
| **Uma imagem contendo Padrão do plano de fundo  Descrição gerada automaticamente** | **6 – Electronic Contracts**  At which point can the offeror be said to have ‘received’ an email?  Solution adopted in the US Restatement (Second) of Contracts – ‘A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorizes by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him’.  **9 – Promissory Estoppel**  In American Law, promissory estoppel can be used as a basis of a cause of action. |
| **Ícone  Descrição gerada automaticamente com confiança média** | **1 – Offer vs. Invitation to Treat**  French Law: Fundamental role of the law, seen as the **expression of the general will**. Limited role played by the French judge (recently increased, e.g. in relation to the notion of frustration)  Definition of a Contract in Art. 1101 of French Civil Code:  *A contract is an agreement by which two or more persons express their willingness to create, modify, transfer, or extinguish obligations.*  Formation of a Contract under Art. 1113 of French Civil Code:  *A contract is formed by the meeting of* ***an offer and an acceptance*** *expressing the parties’ willingness to be bound.* ***Such willingness may be expressed in words or clearly implied from the relevant party’s unequivocal conduct****.*  Characteristics of an offer under Art. 1114 of French Civil Code:  *An offer, whether it is made to a specific person or to the world at large, contains all the essential elements of the proposed contract and indicates the will of the offeror to be bound in case of acceptance. Failing this, it is only an invitation to enter into negotiations.*  Characteristics of an acceptance under Art. 1118 of French Civil Code:  *Acceptance indicates the offeree’s willingness to be bound by the terms of the offer* […]  3 conditions for a valid contract in French Law (Art. 1128):   1. The consent of the parties 2. Their capacity to contract 3. Consent which is lawful and certain   **Advertisements** are normally considered as **offers** in French Law. |
| **Ícone  Descrição gerada automaticamente com confiança média** | **Display of goods in shop windows** and on supermarket shelves usually constitute **offers**, provided the price is displayed.  Offer  François Terré/Philippe Simler/Yves Lequette, Droit civil: An expression of willingness only constitutes an offer if it is sufficiently precise. In order for the simple acceptance of an offer to be adequate to form a contract, the offer must clearly specify the conditions of the potential contract by setting out, at the very least.  Decisions  Advertisements:  Maltzkorn c. Braquet – Advertisement in newspaper proposing the sale of a piece of land for a stated price – Conclusion: Constituted an **offer** (binds the offeror vis-à-vis the first person who accepts it in the same way as an offer made to a specific person).  Display of goods in show windows:  Exploding lemonade bottle – A customer injured after lemonade exploded before it had been paid for – Conclusion: Constituted an **offer** and was accepted when the bottle was placed in the purchaser’s basket (customer could claim damages in contract)  Policy reasons:  The rule **protects** **customers** against a seller who advertises at a low price to lure people into his shop and then makes up excuse for not selling to them.  Limited stock argument does not convince French judges as *they assume that an offer will automatically lapse when the stock is finished*.  **Exceptions**: proposals of an intuitu personae character (the identity of the contracting party is a decisive factor). In this case, constitutes **invitations to treat**. E.g. advertisements to rend our a building or fill a job opening.  **2 - The Revocation of an Offer**  The importance of the principle of good faith  Principle of Good Faith under Art. 1104 of French Civil Code:  *Contracts must be negotiated, formed, and performed in* ***good faith****. This provision is a matter of public policy.*  Art. 1112 of French Civil Code:  *Parties are free to enter into, proceed with, and withdraw from pre-contractual negotiations. These negotiations must meet the requirements of good faith.* |
| **Ícone  Descrição gerada automaticamente com confiança média** | Art. 1116 of French Civil Code:  *[The offer] may not be revoked before* ***the expiry of any period fixed by the offeror*** *or, if no such time limit has been fixed, before the end of a* ***reasonable period of time****. Where an offer is revoked in breach of this restriction,* ***no contract shall be concluded****.*  *The offeror who thus withdraws an offer incurs extra-contractual liability under the conditions set out by the general law, but shall have no obligation to compensate the loss of profits which were expected from the contract.*  Revocation is considered to be **abusive** (1) as it frustrates the legitimate expectations of the offeree.  Decisions  (1) Chastan c. Isler: Offeror sold his chalet before the offeree visit (parties accorded for the visit) and accept it. Conclusion: Offeror agreed on the visit, so it was implied that his offer would not be revoked before then.  **3 - Acceptance**  *Acceptance under Art. 1118 of French Civil Code:*  *Acceptance is the manifestation of the will of the offeree to be bound on the terms of the offer.*  *As long as the acceptance has not reached the offeror, it may be withdrawn freely provided that the withdrawal reaches the offeror before the acceptance.*  *An acceptance which does not conform to the offer has no effect, apart from constituting a new offer.*  3 elements   1. Acceptance indicates the offeree’s willingness to be bound by the terms of the offer. 2. Acceptance may be freely retracted at any stage, so long as it **has not been received by the offeror**. 3. Acceptance must be unconditional. If it does not correspond to the offer, it constitutes a counter-offer.   Acceptance can be communicated in various ways (e.g. written, oral or by some unequivocal action).  Timing of the contract - Question   1. At the moment in which the offeree’s willingness to accept the offer appears? E.g when the offeree writes the letter of acceptance? 2. At the moment in which the offeree’s willingness to accept the offer manifest itself? E.g when the letter is posted. 3. At the moment in which the acceptance is received by the offeror; e.g the letter arrives in the mailbox of the offeror. |
| **Ícone  Descrição gerada automaticamente com confiança média** | 1. At the moment in which the offeror becomes aware of the acceptance. E.g they read the letter.   **Timing of the contract – Answer**  The French Cour de cassation originally considered that this was a question of facts that should be left to the appreciation of the trial courts  Then contradictory decisions emerged amongst the various chambers of the Cour de Cassasion. Solution?  Art. 1121 of the French Civil Code:  *A contract is concluded as soon as the* ***acceptance reaches the offeror****. It is deemed to be concluded at the place where the acceptance has arrived*. (**reception theory**)  **Silence**  Silence under Art. 1120 of French Civil Code:  *Silence* ***does not count as acceptance*** *except where so provided by legislation, usage, business dealings or other particular circumstances*.  **Exceptions** (1):   1. If the parties have agreed otherwise 2. Previous business relationship between the parties, or business customs 3. Where the offer is made in the exclusive interest of the offeree 4. Silence circonstancié (circumstantial silence): when silence is accompanied by a whole range of surrounding circumstances.   **Battle of Forms**  Battle of Forms under Art. 1119 of French Civil Code:  *General conditions put forward by one party have no effect on the other party unless they have been brought to the latter’s attention and that party has accepted them.*  *In case of inconsistency between general conditions relied on by each of the parties, incompatible clauses have no effect.*  *In case of inconsistency between general conditions and special conditions, the latter prevail over the former.*  Meaning:   * Where both parties to a contract have attempted to impose differing sets of conditions, those conditions which conflict are without effect: the conflicting provisions will be **replaced** by the statutory provisions provided in the French Civil and Commercial codes as well as related case-law (**knock-out rule**)   **The contract will only be upheld if the parties have agreed on the core obligations (e.g. price and object)**  Decisions  (1) Amusement Park Case: Parties agreed an option to buy an amusement park on the proposed price and seller would then reply. Buyer exercised the option but did not hear anything from the seller. Conclusion: Cour de Cassation found that silence amounted to acceptance in these circumstances. |
| **Ícone  Descrição gerada automaticamente com confiança média** | **4 – Formation of a Contract**  3 conditions for a contract to be valid under Art. 1128 of French Civil Code:   1. ***Agreement between the parties with the free and informed consent of the parties*** 2. ***The parties’ capacity to contract*** 3. ***A certain and determined object.***   The intention to create legal relations is not expressly included as a condition for the validity of a contract, however, it is included as part of one of the general principles underlying French Contract Law.  French contract law analyses a contract as a ‘meeting of intentions’.  Like in English Law, in French Law, social or family arrangements *do not normally give rise to legal obligations*. Similarly, acts of kindness or courtesy do not normally give rise to liability in contract.  Contracts of a commercial nature are assumed to be made with an *intention to create legal relations*, although can be rebutted by evidence to the contrary and the standard of proof is ‘balance of probabilities’.  Certain arrangements are stated to be binding in honor only.  **Theory of the ‘autonomy of the will’ and the principle of binding force of contracts**  Art. 1103 of French Civil Code:  *Contracts which are lawfully made have the force of law for those who have made them.*  Based on the fact that the binding force of the contract has for only source the will of the parties. The law does not create this binding force, **it protects only the expression of will**.  Each party has to perform the obligation s/he took upon him/herself; if it fails to do so, the court can intervene at the request of the other party. Contract elevated to the same level of bindingness as a statute.  No one is forced to enter into a contract, but if one does, they will be bound by it the same way as if the rules had been made by the legislator.  **Freedom of contract**  Freedom of Contract under Art. 1102 of French Civil Code:  *Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation.*  *Ratio*: Idea that each individual should be allowed the autonomy to make the choices they desire. It entails that a person is allowed to conclude a contract on whatever terms they deems fit, whenever they desire and with whomever they want.  Freedom of contract is a longstanding and uncontroversial principle in French law. However, it knows a number of **limitations** in French law whereby the French legislator and courts intervene (e.g. to protect the interests of the weaker party, such as employment contracts, residential lease, consumer credit and consumer sale). It ensures the **principle of good faith** is respected. |
| **Ícone  Descrição gerada automaticamente com confiança média** | **5 – Consideration**  4 conditions in order for a contract to be valid in French law in force from 1804 to 2016:   1. Free and informed consent of the parties; 2. The parties’ capacity to contract; 3. A certain and determined object; 4. A lawful cause.   **3 conditions** in order for a **contract to be valid** in French law since the 2016 reform:   1. Free and informed consent of the parties; 2. The parties’ capacity to contract; 3. A certain and determined object.   The object refers to the subject-matter of the contract: a contract’s must not breach public order and must be based on a present or future obligation.  The French Civil Code used to require the contract to have a cause. This requirement was abolished with the 2016 reform of the civil code (seen as having become redundant).  Reform in the Civil Code became necessary for various reasons:   * Judicial re-interpretation had become too extensive: growing body of case law interpreting the Code meaning that the 1804 Code had ceased to be an accurate statement of the law of contract applied; * French contract law perceived to be less attractive than some common law regimes as applicable law in international commercial contracts → modernization intended to make it more competitive in a globalizing word.   **Different meaning of cause**:   1. A contract must **not** be contrary to **morality** (odre public). 2. Cause means the **reason** for entering into a contract (the ‘why’ of the contract). E.g. in sale, the reason for the promise of the seller is the obligation of the buyer to pay the price and vice-versa.  |  |  | | --- | --- | | Cause | Consideration | | * Cause does not necessarily describe a bargain (e.g. a gratuitous contract has a good cause – ‘pleasure of doing some good’) * A promise based on **the past consideration** has a good cause. * Cause has to do with **motive**. | * Consideration refers to the idea of a **contract as a bargain**; * Past consideration is normally not good consideration; * Consideration is **not concerned with motive** |   **6 – Electronic Contract**  An electronic contract, like any other contract, must respect the conditions of validity under Article 1128 of the French Civil Code: |
| **Ícone  Descrição gerada automaticamente com confiança média** | * Consent of the parties; * Parties’ capacity to contract; * Certain and determined object.   French Law is very protective of the consumers.  **Advertisements of goods and services online** are considered as **offers**, but they must contain all the essential elements of the contract.  Acceptance takes place when the online offeree clicks on the button for the validation of the order.   * Online offerors are required to put in place a **‘double-click’** process to avoid mistakes:   + The first click should allow the offeree to verify their order (details and price)   + The second click should allow the offeree to confirm their order. * The offeror must then send an electronic acknowledgement of receipt. * The online offeree has the right to change theirmind and **revoke their acceptance** (‘droit de rétractation’) without any justification for **14 days** from the reception of the goods (or the acceptation of the service).   **7 – The Content of a Contract**  Duty to disclose information during pre-contractual negotiations  Cicero’s test cases:   * The famine at Rhodes; and * The selling of a defective house  |  |  |  | | --- | --- | --- | | Cicero | Saint Thomas d’Aquin | Pothier | | The buyer must not ignore anything of what is known to the seller | The seller of oats in the case of the famine at Rhodes does not have a moral obligation to inform the Rhodians | Distinguishes law from morality  Law cannot require the seller to inform the buyers of all the external factors of the object of the contract  However, from an ethical point of view, the profit should be considered as unjust |   Cicero: “good faith requires any defect known to the seller to be notified to the purchaser […] no decent person engaged in buying and selling can ever resort to invention or concealment for his own profit […] then our gran-merchant and the seller of the unsanitary house acted wrongly when they concealed the facts.”  Art. 1104 of the French Civil Code:  *Contracts must be negotiated, form and performed in good faith. This provision is a matter of public policy.* |
| **Ícone  Descrição gerada automaticamente com confiança média** | **The importance of the Principle of Good Faith**  The scope of the principle of good faith was expanded in the 2016 reform. It extended the principle to the pre-contractual negotiations and formation stages.  Art. 1112 of the French Civil Code:  *Parties are free to enter into, proceed with, and withdraw from pre-contractual negotiations. These negotiations must meet the requirements of good faith.*  French Law is **very protective of weaker parties**:  Article L. 111-1 of the French Consumer Law Code (Code de la consommation) : imposes a general duty of information on the professional seller in relation to ‘the essential characteristics of the good or service’.  Art. 1112-1 of the French Civil Code:  *The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.*  *However, this duty to inform does not apply to an assessment of the value of the act or*  *performance.*  *Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the quality of the parties.*  *A person who claims that information was due to him has the burden of proving that the*  *other party had the duty to provide it, and the other party has the burden of proving that he has provided it.*  *The parties may neither limit nor exclude this duty.*  *In addition to imposing liability on the party who had the duty to inform, his failure to*  *fulfil the duty may lead to annulment of the contract under the conditions provided by*  *articles 1130 and following*  **The factors which vitiate the party’s free will (‘les vices du consent’)**  Art. 1130 of French Civil Code:  *Mistake, fraud and duress vitiate consent where they are of such a nature that, without them, one of the parties would not have contracted or would have contracted on substantially different terms.*  **Fraud**  Art. 1137 of the French Civil Code:  ***Fraud*** *(‘le dol’) is an act of a party in obtaining the consent by scheming or lie.*  *The intentional concealment by one party of information, when he knows its decisive character for the other party, is also fraud.* |
| **Ícone  Descrição gerada automaticamente com confiança média** | The intentional element is important to characterize the ‘dol’:  French Law distinguishes ‘dol’ and mistake ‘erreur’.  Ignorance or negligence cannot constitute a ‘dol’. However, mere silence can constitute a ‘dol’ (different from the situation in English Law in relation to misrepresentation).  Legal consequences of fraud:   * The contract may be annulled; * The victim of fraud can also claim for damages under the general heading of tort law liability.   **Mistake** (‘l’erreur’)  Art. 1132 of the French Civil Code:  *Mistake of law or of fact, as long as it is not inexcusable, is a ground of nullity of the contract where it bears on the essential qualities of the act of performance owed or of the other contracting party* (1).  Art. 1133 of the French Civil Code:  *The essential qualities of the act of performance are those which have been expressly or impliedly agreed and which the parties took into consideration on contracting.*  Mistake as to the value of the subject-matter of the contract: a wrong economic assessment is not necessarily a ground of nullity.  Art. 1136 of French Civil Code:  *A mistake as to value is not a ground of nullity where, in the absence of a mistake about the essential qualities of the act of performance, a contracting party makes only an inaccurate valuation of it.*  French Law distinguishes between 2 main types of mistakes:   * ‘**Erreur sur la substance**’: concerns mistakes on the essential qualities of the contract   + Ground for **annulling** a contract;   + French judges apply a **subjective test**. * ‘**Erreur sur la personne**’: relates to mistakes about the other party to the contract   + Does not in principle constitute a defect of consent, except in intuitu personae contracts (where the person with whom the contract was concluded is essential)   Decisions  (1) The Poussin case (Cass. Civ., 22 févr. 1978): Seller sold an old painting thinking it had been made by the Ecole des frères Carrache. Later, he discovered that the painting had probably been painted by Nicholas Poussin and was exposed as such in the Musée du Louvre. Conclusion: The sole probability of it being a Poussin was judged to be enough for the contract to |
| **Ícone  Descrição gerada automaticamente com confiança média** | be avoided (…) the seller made an error concerning the substantial quality of the subject-matter of the contract and determining factor of their consent, which they would not have given if they had known the reality (…) declared the sale of 21 February 1968 null and void on the basis of Art. 1110 of the Civil Code.  **8 – Express and Implied Terms**  Determination of the price  Art. 1163 of the French Civil Code:  *An obligation has its subject-matter a present or future act of performance.*  *The latter must be possible and determined or capable of being determined.*  *An act of performance is capable of being determined where it can be deduced from the contract or by reference to usage or the previous dealings of the parties, without the need for further agreement.*  The French Civil Code requires that the content of a contract be determined or determinable.   * The **price** must therefore be **determined** or **determinable** * Specifically mentioned in relation to contracts for the sale of goods under Art. 1591 of the French Civil Code.   Implied terms  Art. 1194 (1) of the French Civil Code:  *Contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which are given to them by equity, usage or legislation.*  **10 – The Effects of a Contract**  Roman law: Res inter alios acta aliis neque nocere neque prodesse potest (“a thing done between other does not harm of benefit others”)  Idea that a contract cannot affect a person who is not a party to the contract; Linked to the **principle of freedom of contract** since third parties have not expressed any intention to be bound.  Art. 1199 of the French Civil Code:  *A contract creates obligations only as between the parties.*  *Third parties may neither claim performance of the contract nor be constrained to perform it […]*  *Third parties must respect the legal situation created by the contract.*  Art. 11999 lays down the **principle of relativity of contracts** (‘principe de l’effet relative des contrats’)  However, French law also recognizes that certain contracts can be for the benefit of a third parties:  Art. 1205 of the French Civil Code:  *A person may make a stipulation for another person.* |
| **Ícone  Descrição gerada automaticamente com confiança média** | *One of the parties to a contract (the ‘stipulator’) may require a promise from the other party (the ‘promisor’) to accomplish an act of performance for the benefit of a third party (the ‘beneficiary’). The third party may be a future person but must be exactly identified or must be able to be determined at the time of the performance of the promise.*  In addition, French law also extended the notion of third parties beneficiary of a contract (1) in certain cases of *harms* suffered by third parties.  Decisions  Contaminated blood case (1954) – Hospital patient has received blood contaminated with Syphilis. The blood-transfusion service had only contracted with the hospital in which the patient was treated and not with the patient herself. Conclusion: Patient was considered third-party beneficiary of the contract between the hospital and the supplier of the blood.  **11 – Discharge of a Contract**  Art. 1217 of the French Civil Code:  *A party towards whom an undertaking has not been performed or has been performed imperfectly, may:*   * ***Refuse to perform or suspend performance*** *of his own obligations;* * ***Seek enforced performance*** *in king of the undertaking;* * *Requires a* ***reduction in price****;* * *Provoke the* ***termination*** *of the contract;* * *Claim* ***reparation*** *of the consequences of non-performance.*   Art. 1218 of the French Civil Code:  *In contractual maters, there is force majeure where an event beyond the control of the party, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures,* ***prevents performance of his obligation****.*  *If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is* ***permanent****,* ***the contract is terminated*** *by operation of law and the* ***parties are discharged from their obligations*** *under the conditions provided by articles 1351 and 1351-1.* |
| **Ícone  Descrição gerada automaticamente com confiança baixa** | **1 – Offer vs. Invitation to Treat**  Portuguese Law: Two important principles: **i. Freedom of contract** – idea that within the limits set by the law, parties may freely shape the contents of their contract; **ii. Good faith** – parties must comply with the requirements of good faith when entering into a contract and when performing such contract.  General rule: Freedom of form (exceptions under the law)  Offer |
| **Ícone  Descrição gerada automaticamente com confiança baixa** | Art. 232 CC: *The contract shall not be concluded until the parties have agreed on all the clauses on which either party has judged the agreement necessary.*  Offer must be **clear**, **precise**, **firm** and **unequivocal**.  The offeree should be able to just say ‘yes’, otherwise it is a mere invitation to treat.  It may also be made to one or more specific persons or to the public (Art. 230/3): The revocation of an offer addressed to the public, shall be effective, provided that it is made in the same form of the offer or in an equivalent form.  **Advertisements** are normally considered as **offers**.  Provided that all the elements for an offer including the price are present; Presumption that the offer is valid until the stock of goods, or the supplier’s capacity to supply the service is exhausted.  **Display of goods in windows** and self-service stores are considered to be **offers**.  Provided that all the elements for an offer including the price are present (if it gives the possibility to discuss the price, it would constitute an invitation to treat); they remain offers as long as there is stock.  **Acceptance** takes place when the **offeree pays the price** for the good.  **2 - The Revocation of an Offer**  Art. 230 CC: *Unless otherwise stated, an offer is* ***irrevocable*** *after it has been received by the offeree or is known to them. (2) If, however, at the same time as or before the offer is made, the offeree receives the revocation of the offer or otherwise becomes aware of it, the offer is invalid. (3) The revocation of an offer addressed to the public, shall be effective, provided that it is made in the same form of the offer or in an equivalent form.*  General rule: **Irrevocability** of an offer once it has been received by or is known to the offeree. **Exceptions**:   1. If the parties decide otherwise 2. If the offer is made to the public, in which case it can be revoked through the same channel as the offer   **3 – Acceptance**  Acceptance defined as ‘the positive reaction to a particular offer’; affirmative answer which matches the terms of the offer.  **Modifications** to the terms of the offer, it they are precise enough, constitute a **counter-offer**.  Art. 233 CC: ***Acceptance with additions, limitations or other modifications*** *implies* ***rejection of the offer****; but if the modification is sufficiently precise, it is equivalent to a new offer, provided that no other meaning is apparent from the declaration.* |
| **Ícone  Descrição gerada automaticamente com confiança baixa** | *An offer may be accepted by* ***express consent****, and in certain circumstances, can take place* ***by conduct****.*  Art. 234 CC: *When the offer, the very nature or circumstances of the business, or customs make a declaration of acceptance unnecessary, the contract is concluded as soon as the conduct of the other party shows an intention to accept the proposal.*  **Timing of the contract**  Distinction between effectiveness of the declaration of intention and moment when the contract is concluded.  Effectiveness of the declaration of intention (Mixed approach): i. Theory of reception, ii. Theory of knowledge (can be effective of presumed)  Art. 224 CC: 1. *The declaration of intention that has a specific addressee becomes effective as soon as it reaches them or is known to them; the others, as soon as the will of the person making the declaration is expressed in the appropriate form.*  *2. A declaration of intention that has not been received in due time through the fault of the recipient alone is also considered effective.*  *3. The declaration of intention received by the addressee under conditions which, through no fault of his own, cannot be known is ineffective.*  **Battle of Forms**  Art. 232 CC: *The contract shall not be concluded until the parties have agreed on all the clauses on which either party has judged the agreement necessary.*  **Silence**  Art. 218 CC: *Silence is valid as a declaration of intent, when this value is attributed to it by law, customs or convention.*  Declarations of intention can be express or tacit (implied) under Art. 217 CC → Implied declarations requires certain behavior (different from silence)  **5 – Consideration and Cause**  It was considered that an express reference to the concept of cause as a requirement for a contract to be valid would be unnecessary. However, a contract must not be contrary to **morality** (art. 280 and 281° CC).  Art. 280° CC:  *1. Any legal transaction whose object is illegal or indeterminable, contrary to the law or indeterminable is void.*  *2. Any transaction contrary to public order, or offensive to good customs, is void.*  Art. 281° CC:  *If the purpose of the legal transaction is illegal, contrary to public policy, or offensive to good manners, the transaction is null and void so long as such purpose is common to both parties.* |
| **Ícone  Descrição gerada automaticamente com confiança baixa** | **6 – Electronic Contracts**  Portuguese law is very protective of the offeree, and even more so when it is a consumer.  Decree-Law n°24/2014, Article 1 requires **detailed pre-contractual information** to be included in the contract:   * Terms must be *easily readable and accessible* (display, font, size, etc) * Terms must be *easily understandable* (accessible terminology used).   **Advertisements of goods and services online** are considered as **offers** made to the public (and not invitation to treat)  Detailed information required in Article 4 of the Decree-Law n° 24/2014 means that they are *sufficiently clear, precise, firm, and unequivocal* to constitute an offer.  Art. 232° CC: *The contract shall not be concluded until the parties have agreed on all the clauses on which either party has judged the agreement necessary.*  Decree-Law n°7 2004, Art. 32:  *The online offer of products or services constitutes an offer when it contains all the elements necessary for the contract to be concluded with the simple acceptance by the offeree, otherwise it constitutes a mere invitation to treat.*  *The mere acknowledgement of receipt of the order has no significance in determining when the contract is concluded.*  When is the contract formed?  Under Art. 32 of the Decree-Law n°7 2004:   * When the acceptance is sent by the offeree * The acknowledgment of receipt of the order has no significance in determining when the contract is concluded.   Art. 29:  *1 – As soon as the service provider receives an order by electronic means only, they must also acknowledge receipt by electronic means, unless otherwise agreed with the party who is not a consumer.*  *2 – The acknowledgment of receipt or the order is waived in cases where the product or service is immediately provided on-line.*  *3 – Acknowledgment of receipt must contain the fundamental identification of the contract to which it relates*  *4 – The service provider meets their obligation to acknowledge receipt if they send the communication to the electronic address indicated or used by the recipient of the service.*  *5 – The order becomes final with the confirmation of the recipient, given following the acknowledgement of receipt, reiterating the order issued.* |
| **Ícone  Descrição gerada automaticamente com confiança baixa** | When is the contract formed?  Under Art. 29 of the Decree-Law n°7 2004:   * Electronic acknowledgement of receipt of an order is mandatory; * However, scholars do not consider that such acknowledgement is required for acceptance; * Rather, it constitutes a post-contractual obligation.   Art. 227° CC:  *1. Whoever negotiates with another for the conclusion of a contract must, both in the preliminary negotiations and in the formation of the contract, proceed according to the rules of good faith, failing which he will be liable for the damage he has culpably caused to the other party.*  *2. Liability is prescribed under the conditions set out in Article 498.*  Portuguese Law recognizes the **principle of good faith** in pre-contractual negotiations leading to the conclusion of the party → prescribes that the violation of such principle triggers an **obligation to compensate** the damage caused to the other party (pre-contractual liability established in Art. 227 of the Portuguese Civil Code/Ideas inspired by the German doctrine and by the work of Jhering).  In Portuguese contract law, the obligation of good faith in the performance of the contracts has many facets:   * **Duty to cooperate** placed upon the parties to facilitate the execution of the contract * **Duty of transparency** and contractual honesty * **Duty of loyalty**   Art. 229° CC:  *1. If the offeror receives the acceptance late but has no reason to consider that it was not sent in due time, they must* ***immediately inform the acceptor that the contract has not been concluded****, failing which he will be* ***liable for the damage*** *suffered.*  *2. The offeror may, however, consider a late reply to be effective, provided that it has been dispatched in good time; in any other case, the formation of the contract depends on a new offer and acceptance.*  Pre-contractual liability can also be found in other legislative texts aside from the Civil Code, including:   * The Law on the Protection of the Consumer (“Lei de Defesa do Consumidor”): Art. 9. Refers “loyalty and good faith” in the framework of pre-contractual negotiation and during the formation of the consumer contracts * The Securities Code (“Código dos Valores Mobiliários”): art. 304-A/2 |
| **Ícone  Descrição gerada automaticamente com confiança baixa** | * The Labour Code (“Código do Trabalho”), Art. 102 * The Law of Insurance Contract “Lei do Contrato do Seguro”: Art. 23(1)   The principle of good Faith plays a very important role in Portuguese Law.  The duty to negotiate in good faith covers the **entire process of contract formation**.  Importance of the **duty of information** (duty of loyalty): need to strike a right balance between the interest of the buyer in knowing every relevant information about the product and the interest of the seller in not disclosing all information.  The **duty of good faith** also covers the entire **performance of the contract**. Art. 762° CC:  *1. The promisor fulfils their obligation when performing the service to which they are bound to perform.*  *2. In performing the obligation, as well as in exercising the corresponding right, the parties must proceed in good faith.*  Duty of information is affirmed in several legislative texts, including:   * The Law on the Protection of the Consumer (“Lei de Defesa do Consumidor”): Art. 8°/1: the duty to inform the consumer in an objective and adequate manner which covers the characteristics, composition and process of the goods sold or services supplied, as well as the warrantees, deadlines, after-sale support, etc. * The Securities Code (“Código dos Valores Mobiliários”): art. 7°/1: the information should be complete, true, actual, evident, objective and licit. * The Securities Code (“Código dos Valores Mobiliários”), art. 304-A°/2.   **Mistake**  Mistake in Portuguese Contract Law is covered by Articles 247 to 252 of the Portuguese Civil Code  Art. 247° CC: Error on the declaration of intention which does not correspond to the will of the author of the declaration → contract void, provided that the offeror knew, or should have known, the essential nature, for the offeree, of the element on which the error occurred.  Art. 248° CC: Effects on the acceptation of the mistake  Art. 249° CC: Typos in the writing and in the calculation → contract not void but right of rectification  Art. 250° CC: Situation where the declaration is made through a third party.  Art. 251° CC:  *Any error in the determination of the will, where it relates to the person of the declarant or to the subject-matter of the contract, renders that contract void in accordance with Article 247.* |
| **Ícone  Descrição gerada automaticamente com confiança baixa** | Art. 252° CC:  *1. The error which concerns the motives determining the will but does not concern the person of the declarant or the subject-matter of the contract, shall only be grounds for annulment if the parties have recognized, by agreement, the essential nature of the motive.*  *2. If, however, it falls within the circumstances which form the basis of the contract, the provisions on termination or modification of the contract due to a change in the circumstances in force at the time the business was concluded shall apply to the mistake of the declarant.*  **Fraud** (‘dolo’) in Portuguese Contract Law is covered by Articles 253-254 CC.  Art. 253: definition of ‘dolo’ – induces the other party into mistake. Has to concern the essential characteristics of a contract.  Art. 254: legal consequences of the dol: contract is **void**.  **8 – Express and Implied Terms**  Determination of the price:  Under Article 883 of the Portuguese Civil Code, a contract which do not contain a determined price can nonetheless **be valid** and the price will be determined on the basis of objective elements.  Art. 883°:  *1. If the price is not fixed by a public body, and the parties do not determine it or agree on the manner in which it is to be determined, the contract price shall be that which the seller normally charges at the time of conclusion of the contract or, failing that, that of the market or stock exchange at the time of the contract and at the place where the buyer is to perform it; if those rules are insufficient, the price shall be determined by the court on the basis of consideration of fairness.*  *2. When the parties have referred to the fair price, the provisions of the preceding paragraph shall apply.*  **No statutory disposition on implied terms** in the Portuguese Civil Code, but concept of ‘ancillary behavioral duties’ attached to contractual obligations developed by the case law which has a similar function.  10 – The Effects of a Contract  Effects on Third Parties  Art. 443° CC:  *1. By contract, one of the parties may assume before another, who has a legal interest in the promise, the obligation to perform in favor of a third party, alien to the business; the party who assumes the obligation is said to be the promisor and the party to whom the promise is made is said to be the promisee.* |
| **Ícone  Descrição gerada automaticamente com confiança baixa** | *2. By contract in favor of a third party, the parties still have the possibility to write off debts or assign credits, as well as to constitute, modify, transmit or extinguish right in rem.*  A third party may require performance of a contractual obligation if the parties to the contract have agreed to it;  **No acceptance from the beneficiary is needed** for the contract to produce effects; e.g. a life insurance (art. 444°/1). However, the third party need to **adhere** to the promise (art. 447°/1) in order to acquire the right to request performance. But the third party may **renounce that right** (art. 447°/1).  **11 – Discharge of a Contract**  Portuguese Law does **not** contain specific statutory provisions defining or regulating force majeure in the context of commercial contract.  In practice, force majeure clauses are common in contracts subjects to Portuguese Law.  Valid under Portuguese law in accordance with the principle of party autonomy stated in Article 405 of the Civil Code.  Article 405° CC:  *1. Within the limits of the law, the parties are free to determine the content of contracts, to conclude contracts other than those provided for in this code or to include in such contracts such clauses as they deem appropriate.*  *2. The parties may also bring together in the same contract rules of two or more businesses, totally or partially regulated by law.*  Since there is no specific statutory provisions in Portuguese law, there is no statutory definition of force majeure.  Contracts which are subject to Portuguese law usually include a general definition of force majeure, and sometimes also give specific examples to clarify which events amount to force majeure.  Force majeure is usually defined as an event which is:   * **Extraordinary** * **Unpredictable** * **Unavoidable** * And **not-faulty** * And which has a **relevant impact on the performance** of the contractual obligation. |
| **Forma  Descrição gerada automaticamente com confiança média** | **1 – Offer vs. Invitation to Treat**  European Union: Harmonization in contract law – Principles of European Contract Law (PECL) – set of general rules  Offer |
| **Forma  Descrição gerada automaticamente com confiança média** | Art. 2:201 - Definition of an offer:   1. *A proposal amount to an offer it:* 2. *It is* ***intended to result in a contract*** *if the other party accepts it, and* 3. *It contains* ***sufficiently definite terms*** *to form a contract* 4. *An offer may be made to* ***one or more specific persons or to the public*** 5. *A proposal to supply goods or services at stated prices made by a professional supplier in a* ***public advertisement*** *or a catalogue, or* ***by a display of goods****,* ***is presumed to be an offer to sell*** *or supply* ***at that price until the stock of goods****, or the supplier’s capacity to supply the service is exhausted.*   **Proposals to the public** are generally treated as **offers** if they show an intention to be legally bound. In other words, proposals which are sufficiently definite, and which can be accepted by anybody without respect of person are considered **offers**. However, proposals such as advertisement of a house for rent or advertisement of a job-opening are presumed to be **invitations** to make offers.  **2 - The Revocation of an Offer**  **General Rule**: An offer can be revoked **before** the offeree has dispatched its acceptance.  Revocation of an offer under Art. 2:202 of PECLs:   1. *An offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance.* 2. *An offer made to the public can be revoked by the same means as were used to make the offer.* 3. *However, a revocation of an offer is ineffective if:* 4. *The offer indicates that it is irrevocable; or* 5. *It states a fixed time for its acceptance; or* 6. *It was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.*   Case for the last exception:  In an advertisement A promises a ‘reward’ of 1,000 pounds in addition to damages to purchasers of its ‘high pressure’ cooker, which will be on the market the following day, if the cooker explodes. A month later it revokes the promise in another advertisement. Customers who before the offer was revoked have bought a cooker which eventually explodes can claim the ‘reward’.  **3 – Acceptance**  **Acceptance and Silence**  **Acceptance** and **Silence** under Art. 2:204 PECL:  *1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.*  *2. Silence or inactivity does not in itself amount to acceptance.* |
| **Forma  Descrição gerada automaticamente com confiança média** | Inertia selling is prohibited by the EU Directive on Consumer rights to ensure that no contract is formed when there is no positive response from the offeree. Art. 27 of the Directive provides that:  The consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services (…). In such cases, *the absence of a response from the consumer following such as unsolicited supply or provision shall not constitute consent*.  **Timing of the Contract**  Timing of the Contract under Art. 2:205 PECL (**Reception Theory**):  *1. If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror.*  *2. In case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror.*  *3. If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by performing an act without notice to the offeror, the contract is concluded when performance of the act begins.*  **Battle of Forms**  Battle of Forms - under Art. 2:209 PECL:  *1. If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.*  *2. However, no contract is formed if one party:*  *(a) has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1), or*  *(b) without delay, informs the other party that it does not intend to be bound by such contract.*  *3. ‘general conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.’*  The rule of Art. 2:209 addresses the question of which terms govern when the general conditions are in real conflict.   1. *There may be a contract even though the general conditions exchanged by the parties are in conflict*. 2. **Exception** of the general rule on *modified acceptance* (Art. 2:208) which provides that *acceptance which is different to the offer will be effective only if the differences are not material*. |
| **Forma  Descrição gerada automaticamente com confiança média** | The general conditions form part of the contract only to the extent that they are common in substance. The conflicting conditions ‘know out’ each other. Idea that as neither party wishes to accept the general conditions of the other party, **neither set of conditions should prevail over the other**.  **4 – Formation of a Contract**  Conditions for the Conclusion of a Contract under Art. 2:101 PECL:   1. A contract is concluded if:    1. *The parties intend to be legally bound, and*    2. *They reach a sufficient agreement without any further requirement;* 2. A contract need not be concluded or evidenced in writing nor it is subject to any other requirement as to form. The contract may be proved by any means, including witnesses.   Intention: The intention of a party to be bound by a contract is to be determined from the party’s statement or conduct as they were reasonably understood by the other party.  **5 – Cause and Consideration**  A contract is concluded it, under Art. 2:201 (1) PECL:   1. *The parties intend to be legally bound, and* 2. *They reach a sufficient agreement without any further requirement.*   The PECLs implicitly **reject both concepts of cause and consideration** in considering that they do not form part of the conditions for a contract to validly exist.  **7 – The Content of a Contract**  Duty to disclose information during pre-contractual negotiations  No general duty of information imposed by the PECLs.  **Freedom of Contract**  Art. 1:102(1): **Freedom of contract**  *1. Parties are free to enter into a contract and to determine its content, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.*  **Good Faith**  Art. 1:201: **Good faith and fair dealing**  *1. Each party must act in accordance with good faith and fair dealing.*  *2. The parties may not exclude or limit this duty.* |
| **Forma  Descrição gerada automaticamente com confiança média** | **Mistake**  Art. 4:103: **Fundamental Mistake as to Facts of Law**  *1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:*  *a. (i) The mistake was caused by information given by the other party; or*  *(ii) The other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or*  *(iii) The other party made the same mistake, and*  *b. The other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so on fundamentally different terms.*  *2. However a party may not void the contract if:*  *a. In the circumstances its mistake was inexcusable, or*  *b. The risk of the mistake was assumed, or in the circumstances should be born, by it.*  **Fraud**  Art. 4:107: **Fraud**  *1. A party may avoid a contract, when it has been led to conclude by the other party’s fraudulent representation, whether by words of conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed.*  *2. A party’s representation or non-disclosure is fraudulent if it was intended to deceive.*  *3. In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all circumstances, including:*  *a. Whether the party had special expertise;*  *b. The cost to it of acquiring the relevant information;*  *c. Whether the other party could reasonably acquire the information for itself; and*  *d. The apparent importance of the information to the other party.*  **Determination of the Price**  Art. 6:104: **Determination of Price**  *Where the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price.*  **Interpretation of a contract**  Art. 5:101: **General rules of interpretation**  *1. A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.* |
| **Forma  Descrição gerada automaticamente com confiança média** | *2. If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party’s intention, the contract is to be interpreted in the way intended by the first party.*  *3. In an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.*  Under Article 5 of Directive 93/13 on unfair terms in consumer contracts, where there is doubt about the meaning of a term, the interpretation most favorable to the consumer is generally to prevail.  **10 - The Effects of a Contract**  Art. 6:110 Stipulation in Favor of a Third Party  *1. A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.*  *2. If the third party renounces the right to performance the right is treated as never having accrued to it.*  *3. The promisee may by notice to the promisor deprive the third party of the right to performance unless:*  *a. The third party has received notice from the promisee that the right has been made irrevocable, or*  *b. The promisor or the promisee has received notice from the third party that the latter accepts the right.* |
| **CISG** | CISG  What is it? Multilateral treaty establishing a uniform framework for international commerce developed by the United Nations Commission on International Trade Law (UNCITRAL).  What is it about? Provides substantive rules that regulate duties and obligations of professionals – buyer and seller – established in different jurisdictions in relation to contracts on international sale of goods.  Characteristics   * Text unanimously approved in 1980 and opened for ratification. * Came into force on 1 January 1988; * Ratified by 94 countries (very successful instrument of international trade law), including most of the Member States of the EU, a large part of Latin America, the US, Japan and China → account for over 80% of all international trade.   Article 17 |
| **CISG** | * Portugal ratified the CISG in 2020, and it will enter into force in Portugal in 1 October 2021.   Objectives  Contribute to the removal of legal barriers in international trade through uniform rules.   * Enhance legal certainty; * Simplify international transactions for the purchase and sale of goods, speeding up the process of negotiating and concluding international contracts.   Where is it applied?  To trigger the Convention is must be shown that the transaction involves:   1. A contract 2. Of sales 3. Of goods 4. Between parties    1. Who are located in different convention states; or    2. Where the rules of private international law governing the contract lead to a Convention state.   Elements  Articles 14 to 17: Offer  Articles 18 to 22: Acceptance  Articles 23 to 24: Time at which a contract is formed  Article 14  1. A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.  2. A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.  Article 15  (1) An offer becomes effective when it reaches the offeree.  (2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.  Article 16  1. Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.  2. However, an offer cannot be revoked:  a. if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or  b. if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer. |
| **CISG** | An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.  Article 18  1. A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.  2. An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.  3. However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph  Article 24  For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other  means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.  Article 19  1. A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.  2. However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.  3. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the  settlement of disputes are considered to alter the terms of the offer materially.  Article 23  A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention. |