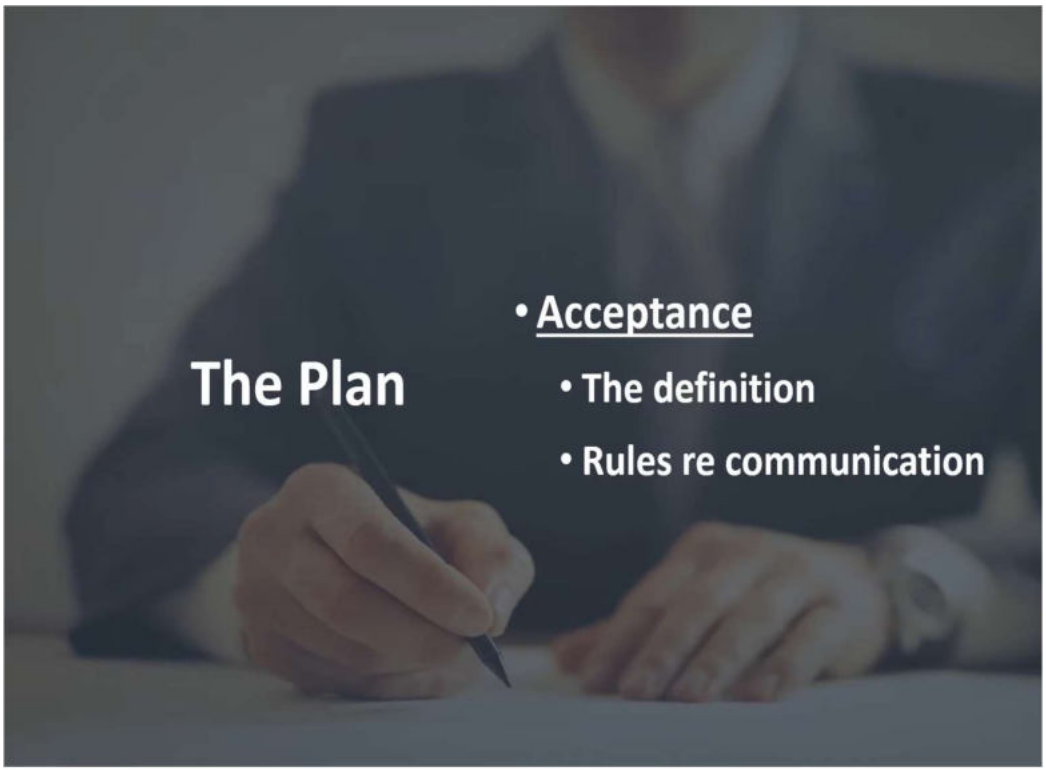
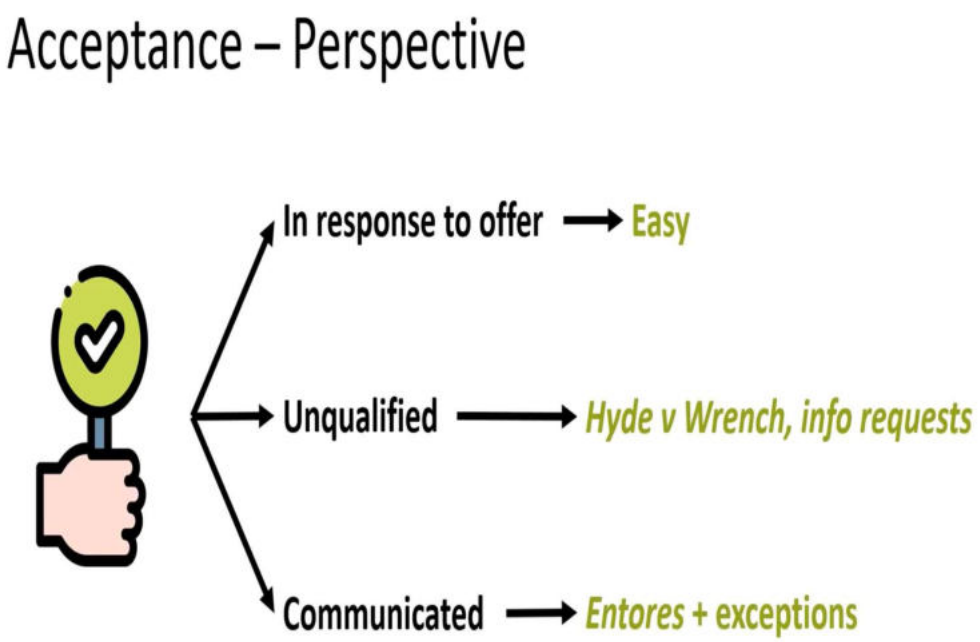
Week 3: Contract Law
Acceptance





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Acceptance

Acceptance – What is it?

- Acceptance (in the eyes of contract law) is:

  "An unequivocal expression of intention and assent to the terms of an offer, which is communicated to the offeror"

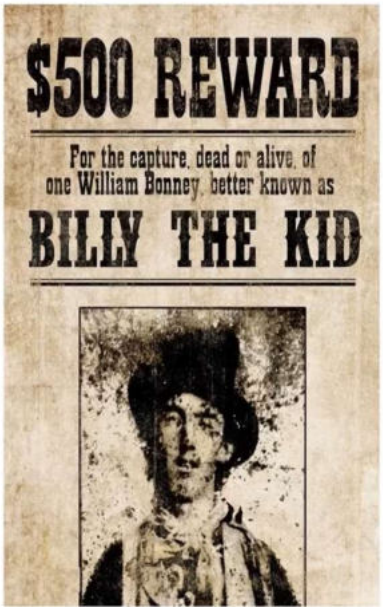
Must be in response to an offer

Must be unqualified

Must be communicated

Acceptance – *"in response to an offer"*

- The offeree must have knowledge of the offer and make acceptance in response to it.
- Links to the principle of consideration (dealt with later)
- Does motive for accepting matter?
  - No – ***Williams v Carwardine (1833)***



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Acceptance – *"unqualified"*

- This is sometimes called the Mirror Image Rule
- Key case – ***Hyde v Wrench (1840)***
  - Wrench offered to sell a farm for £1,000
  - Hyde replied offering £950 ← **Counter-offer**
  - Wrench refused
  - Hyde then tried to accept original offer of £1,000

Acceptance – *"unqualified"*

- What about a mere request for more information?
  - This would not be a counter-offer
  - Original offer would still stand (and be open for acceptance)
  - ***Stevenson, Jacques and Co. v McLean (1880)***

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Acceptance – *"communicated"*

- General rule – acceptance must be communicated
  - ***Entores v Miles Far East Corporation* (1955)**
  - Shout across a river… and an aircraft flies over… no contract

Acceptance – *"communicated"*

- Know the general rule
- But there are a few other things to consider…
  - Can silence amount to acceptance?
  - Can third parties communicate acceptance?
  - Can you communicate acceptance via post?
  - Can you communicate by instantaneous means?
  - Can you stipulate a method of communicating acceptance?

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Week 3: Contract Law
Acceptance

Acceptance – "communicated"

- Can silence amount to acceptance?
  - In bilateral contracts, generally no – ***Felthouse v Bindley* (1862)**
  - In unilateral contracts, generally yes – ***Carlill v Carbolic Smoke Ball* (1893)**

Acceptance – "communicated"

- Can third parties communicate acceptance?
  - Yes. If they are authorised by the offeree.
  - ***Powell v Lee* (1908)**

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• Can you stipulate a method of communicating acceptance?
  • Yes.
  • Particularly clear words are needed – ***Manchester Diocesan Council v Commercial and General Investments (1970)***
  • Unless mandatory, another mode which is no less advantageous is fine – ***Tinn v Hoffman (1873)***

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does not reply and B then accepts the offer as originally made within the time limit fixed by A in his offer, there will be a valid contract of sale with A, B's enquiry amounting to a mere request for further information and not, therefore, terminating/rejecting A's offer (*Stevenson v McLean* (1880) 5 QBD 346).

Nor will the court find a counter-offer where the "new" term would be implied, in any case, into the offer. So, if in response to an offer to sell goods, the prospective purchaser stated in his reply that the goods must be suitable for the purpose for which he was purchasing them, such a term would be implied into the contract for sale by s. 14 Sale of Goods Act 1979.

A counter-offer must be similarly contrasted with an acceptance, coupled with a request for information, which brings a contract into existence.

2.6.3 LAPSE OF TIME

Where an offer is stated to be open, for a specific length of time, it will automatically terminate, once that time limit expires. In the absence of any express time limit, an offer is normally open for a reasonable time. What constitutes "reasonable" will depend largely on what is usual and to be expected, in respect of the subject matter of the proposed contract. Thus, in *Ramsgate Victoria Hotel Co v Montefiore* (1866) LR 1 EX 109, the defendant was held entitled to refuse to buy the claimants' shares, five months after making his original offer, as his offer had not been accepted within a reasonable time and had, therefore, lapsed.

2.6.4 DEATH

While the death of the offeree terminates the contract in all cases, some writers consider that the offeror's death only terminates the offer, where the offeree knows of the death, or where the potential contract has some kind of a personal element (such as an employment contract, writing a book or singing at a concert).

2.6.5 FAILURE OF A TERMINATING CONDITION

An offer may be made subject to an express or implied condition precedent. Examples include that the offer must be accepted within a stated time; that the goods forming the subject of the sale are in substantially the same condition as at the date of the offer; or that an applicant for life insurance is in the same state of health as he was when he made his application. If any of those conditions are not satisfied, the offer will not be capable of acceptance.

2.7 ACCEPTANCE

An acceptance is a final and unqualified assent to the terms of an offer, whether by express words or by action. Without it, there can be no contract. Frequently, progress towards agreement involves long and arduous bargaining by the parties; in these circumstances, the courts will need to look carefully at all of the dealings between the parties, in order to decide whether there has, in fact, been an agreement, and upon which terms.

In addition to being a firm and unqualified acceptance of all the terms of the offer, the fact of acceptance must normally be communicated to the offeror before there is a concluded contract.

2.7.1 ACCEPTANCE BY CONDUCT

In the case of a bilateral offer, acceptance normally takes the form of spoken or written words; in the case of *unilateral* offers (i.e. the offer of a promise in return for the performance of some

act by the offeree), the offeree's performance of that act is the acceptance of the offer. So, in *Carlill v Carbolic Smoke Ball Co Ltd.* [1893] 1 QB 256, Mrs Carlill accepted the offer by inhaling the company's smoke balls, in accordance with the company's instructions. Here, in contrast to the usual rule, acceptance was complete, without the need to communicate the fact of acceptance to the company.

It may be that both offer and acceptance have been made by conduct, making it difficult to ascertain the terms of the agreement or, indeed, whether there was, in fact, an agreement at all. In such cases, the courts may apply the standard of reasonableness (e.g. by implying a term that a reasonable price is to be paid for goods sent by A to B and used by B); alternatively, it might look at previous dealings between the parties. Even a draft agreement can form the basis for the existence and terms of an agreement between two parties – where the parties act as though there is a contract between them. In general, the courts will treat the dealings of businessmen as effective "so that the law may not incur the reproach of being the destroyer of bargains" (Lord Tomlin, *Hillas & Co Ltd v Arcos Ltd* [1932] UKHL 2).

In the case of *Brogden v Metropolitan Railways* (1877) 2 App Cas 666, the House of Lords confirmed that acceptance can be implied by conduct. A railway company drew up terms of a draft agreement for Brogden to supply coal to the railway company. Before signing it and returning it to the railway company, Brogden inserted the name of an arbitrator who would decide upon differences which might arise. The railway company's manager simply put the signed agreement into a drawer and Brogden supplied the coal, on the terms specified in the agreement. After a year and a half, a dispute arose between the parties. Brogden argued that there was no contract, because the railway company had never accepted his offer, as contained in the signed agreement. The House of Lords decided that the railway company had placed orders on the basis of the agreement, with Lord Blackburn stating that:

> "...[I]f the parties have, by their conduct, said, that they act upon the draft which has been approved of by Mr Brogden, and which if not quite approved of by the railway company, has been exceedingly near it, if they indicate by their conduct that they accept it, the contract is binding..."

2.7.2 COMMUNICATION OF ACCEPTANCE

2.7.2.1 Silence

There must be some act on the part of the offeree to indicate his acceptance. Silence on the part of the offeree (i.e. his mere failure to reject the offeror's offer) does not normally amount to acceptance; see *Felthouse v Bindley* (1863) 142 ER 1037, where an uncle and his nephew were negotiating about the sale of a horse. There was a misunderstanding about its price, and the uncle wrote to his nephew stating: "... [i]f I hear no more about him, I consider the horse mine at £30-15". His nephew did not reply, but told the auctioneer that the horse had been sold. The auctioneer, however, then proceeded to sell the horse by mistake. The uncle, subsequently, sued the auctioneer, in conversion. It was held that, whilst the nephew intended that his uncle acquire the horse, he neither communicated this intention to his uncle, nor obligated himself, so no contract existed to transfer ownership of the horse to the uncle.

The common law rule mitigates the effects of inertia selling (i.e. unsolicited goods sent to consumers) and is now reinforced by the Consumer Protection (Distance Selling) Regulations 2000, whereby unsolicited goods are treated as unconditional gifts. There are exceptions to the silence rule, which may give rise to acceptance by silence. One of these is based on a previous course of dealing; see for example *Ammons v Wilson* 176 Miss 645 (1936). The other is where the prior consent of the offeree is implied, such as in the circumstances that arose in *Carlill v Carbolic Smoke Ball Co* [1893] EWCA Civ 1.

2.7.2.2 Postal Rule

The so-called "postal rule" has been firmly established since *Adams v Lindsell* (1818) 1 B & Ald 681. In *Adams v Lindsell,* the defendant posted an offer to sell wool to the claimant, and asked for any reply to be by post. The letter containing the offer was misdirected and arrived later than expected. The claimant replied immediately by post, as requested, stating that he wished to accept the offer, only to be informed by the defendant that the wool had already been sold to another party. It was held that acceptance was valid from the moment of posting, not merely from when the letter was received by the defendant. The rationale for this decision has since been explained by Mellish LJ, in *Re Imperial Land Co of Marseilles (Harris's Case)* (1872) LR 7 Ch App 587, p. 594, who ascribed it to the extraordinary and unwelcome consequences which would follow, if it were held that an offer might be revoked at any time, until the letter accepting it had actually been received. Its foundation in business efficacy was restated by Thesiger LJ in *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) 4 ExD 216, 223. In these cases, too, it seems logical to say that the place, as well as the time, of acceptance should be when the acceptance is put into the hands of the Post Office.

The general rule as to acceptance is that no contract comes into existence unless and until the offeree's acceptance is communicated to the offeror. Therefore, if the offeree decides to accept an offer and writes a letter of acceptance, which he then forgets to post, there will be no effective acceptance of the offer. The offeror must actually hear the words of acceptance in order to conclude the contract.

So, an offer sent by telex (or fax) to the offeree's agent in Amsterdam, who then sent an acceptance by telex, was deemed to have been accepted only when the telex message was printed out on the offeror's terminal in London (*Entores Ltd v Miles Far Eastern Corporation* [1955] 2 All ER 493). This is significant for determining whether English law governs the contract, so that legal proceedings can be commenced in England for breach of contract (as was the case in *Entores*), or whether the English court has jurisdiction to hear a case, or to order service of notice of a writ, outside the jurisdiction. By deciding that the deal was made in London, when the telex message was printed in that office, the Court of Appeal illustrated how the law adapts to the march of technological innovation: on this occasion, the introduction of the telex machine.

However, the general rule will not apply, or will be modified, in the following cases:

- Where the offeror expressly or impliedly *waives* the requirement that acceptance be communicated, e.g. in the case of many unilateral offers (such as *Carlill*, above); it is also possible that inaction on the part of the offeree to a bilateral contract may justifiably entitle the offeror to infer that his offer has been accepted.
- Where the offeror is estopped from denying that the acceptance was communicated, such as where the acceptance was, in fact, faxed during office hours by the offeree, but was simply not read by anyone there after it had been received on the offeror's machine.
- Where the acceptance is communicated to the offeror's agent, who has authority to receive that acceptance on behalf of his principal.
- Where the "postal rule" applies, in which case, the acceptance will be effective *before* it is, in fact, received by the offeror, viz. the time when the offeree *posts* the telegram/letter of acceptance, even if it is subsequently lost in the post (provided it was properly posted, e.g. not wrongly addressed).

  This is more a rule of convenience, reflecting the fact that, while letters often get delayed or lost, if an offeror indicates that he is willing to negotiate by post, he is indicating his willingness to bear the risks involved. It is also easier to keep accurate

records of the date and time at which a letter was posted than the moment when it was delivered, or the time when the offeror actually became aware of its existence. Hence, in the interests of certainty as to the time when the contract was formed, the time of acceptance should be the time of posting, especially as the offeror can always safeguard himself by stipulating in the offer that the acceptance must actually be communicated to him, in which case the postal rule will *not* apply.

By contrast, where defendants had granted claimants a six-month option to purchase property, to be exercised "by notice in writing", and the letter giving notice of the exercise of the option was lost in the post, it was held that the notice of acceptance needed to be actually received by the seller. The parties, here, clearly did not intend that the posting of a letter should constitute the exercise of the option (*Holwell Securities Ltd v Hughes* [1974] 1 WLR 155).

It should be noted that while a letter of acceptance is effective upon posting, a letter of revocation is only effective once it has reached the offeree.

Acceptances sent by electronic means will probably be treated in the same way as telephone or telex acceptance. The seller's acceptance will, thus, only be effective when actually received by the customer, even if the latter is based in a different country and jurisdiction from those of the seller. To avoid such difficulties, e-traders should confirm customer orders by e-mail and request e-mail confirmation by customers, thus ensuring that the contract is concluded at the seller's place of business.

2.7.3 VAGUE AND INCOMPLETE AGREEMENTS

Vague agreements and inchoate (or incomplete) agreements arise where the parties have not expressed themselves with sufficient clarity on the matter of an essential term. In such cases the contract is unenforceable, because the lack of precision regarding terms in the contract allows either party to avoid its obligations should it so choose. The question is whether the court can perfect the contract by referring to either trade practice or course of dealing between the parties. Sometimes this may not be possible. If the court is unable to ascertain the true construction of the contract based on these sources, it will generally be reluctant to complete the contract for the parties. In such cases, the contract, being inchoate, will not be enforceable. In *Scammell and Nephew Ltd v Ouston* [1941] AC 251; [1941] 1 All ER 1, the parties had agreed to the supply of a truck on "hire purchase terms". The absence of ancillary evidence of the details of the hire purchase agreement meant that it was too vague to be enforceable. As Viscount Maugham remarked (at 255):

> "... [i]n order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty... [Otherwise] *consensus ad idem* would be a matter of mere conjecture. The legal question is whether any vagueness can be ascertained and any gaps filled *by the court* without further agreement between the parties. The scope of the court's jurisdiction in this exercise is difficult to pin down. Indeed, Macneil describes the attempt to find 'coherent principles' in the uncertainty cases as 'a fool's errand'..."