

# Lecture 3 – Acceptance

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# Key Features for a Binding Contract



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## 1. Offer

- Expression of willingness to contract on certain terms

## 2. Acceptance

- Needs to correspond to the offer

## 3. Consideration

- An act or promise given in exchange for the offer

## 4. Intention to Be Bound

- Objective intention to create legal relations





ID: 102 – 165 – 963

(questions 1 – 4)

# Question 1



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**Which one of the following statements is correct?**

89



The courts will not look at what is reasonable to clarify vague terms.

5 (5.62%)

The courts will usually look to see if there is any way to make an apparently vague or incomplete contract more certain.

37 (41.57%) ✓

The courts will not try and find a way to make an agreement more certain.

2 (2.25%)

The courts take the terms exactly as they are stated and will not imply anything into a contract.

45 (50.56%)

**Correct responses** 37 (41.57%)

**Correct answer**

The courts will usually look to see if there is any way to make an apparently vague or incomplete contract more certain.

**Correct answer explanation**

Destiny 1 Ltd v Lloyds TSB Bank Plc [2011] EWCA Civ 831: if any REASONABLE observer of the promisor's conduct would have supposed that the promisor was making a particular promise, (...) then the promisor (and the promisee) will be bound.

# Question 2



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## What is an invitation to treat?

100



The stage of a transaction at which an offer is made.

6 (6%)

The stage of a transaction where one party invites the other to make an offer.

88 (88%) ✓

A contract where each party assumes an obligation.

2 (2%)

A contract where only one party assumes an obligation.

4 (4%)

Correct responses

88 (88%)

Correct answer

The stage of a transaction where one party invites the other to make an offer.

Correct answer explanation

An invitation to treat is a statement made during the negotiations between the parties.

# Question 3



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**Which one of the following cases illustrates an offer to the public at large?**

96



Carlill v Carbolic Smoke Ball Co (1893).

75 (78.13%) ✓

Thornton v Shoe Lane Parking Ltd (1971).

0 (0%)

Gibson v Manchester City Council (1979).

3 (3.13%)

Fisher v Bell (1960).

18 (18.75%)

**Correct responses** 75 (78.13%)

**Correct answer**

Carlill v Carbolic Smoke Ball Co (1893).

**Correct answer explanation**

In Carlill, an advert was published on a local newspaper, and the items (carbolic smoke balls) were sold to the public. Thornton v Shoe Lane Parking Ltd (1971): a clause cannot be incorporated after a contract has been concluded; Gibson v Manchester City Council (1979): an offer cannot be accepted if there is no agreement on essential terms of the contract; Fisher v Bell (1960): displaying goods in a shop window is not (in most cases) a valid offer.

# Question 4



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**In which one of the following circumstances will an original offer NOT be terminated?**

100



When a counter offer is made.

5 (5%)

When the offeree rejects the offer.

6 (6%)

When the offer is effectively revoked or withdrawn.

17 (17%)

When information is requested about the offer.

72 (72%)



**Correct responses**

72 (72%)

**Correct answer**

When information is requested about the offer.

**Correct answer explanation**

Asking for information does not have the automatic effect of removing an offer. However, the offeror may decide to revoke it after your request of information.

# 01

Key Concept –  
Acceptance (in various  
scenarios)

# 02

Battle of the Forms



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# 1. Acceptance



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“A final and unqualified expression of assent to all the terms of an offer”.

—Definition of “acceptance”

# NO Acceptance Possible



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*Harvela Investments Ltd v Royal Trust Co. of Canada Ltd*  
[1986] A.C. 207 (HL)



In a tender for D1's shares, P's offer was CUSD 2,175,000 and D2's CUSD 2,100,000 or CUSD 101,000 in excess of any other offer.



Is "referential bid" (D2's tender) a form of valid offer?



**No.** D1 has invited the parties to participate in a fixed auction sale. Referential bids are not a valid form of acceptance in these circumstances.



# NO Acceptance?



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*Kennedy v Thomassen* [1929] 1 Ch. 426



The executors of a will wanted to replace an annual annuity with a one-off payment. The agreement was signed by the widow, but the written assent was not communicated to the executors until after the widow's death.



Is the acceptance timely and effective, if the document was not sent to the offeror?



**No.** Acceptance needs to be communicated to the offerors to be effective.



# YES Acceptance



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*Immingham Storage Co. Ltd v Clear Plc* [2011] EWCA Civ 89



IS provided fuel storage facilities for C. IS sent C a quotation for a 12-month contract and the standard terms. C signed a copy of the quotation. IS sent C the contract, which was never signed.



Was the contract accepted by C?



**Yes.** Quotations and general terms were accepted, and parties behaved as if a contract existed, up until C breached the contract and failed to pay.



# YES Acceptance



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## *Premier Paper Group Ltd v Buchanan McPherson Ltd* [2018] EWCA Civ 15



PPG sold paper to BM. Because a batch was of poor quality, a manager from PPG issued a credit note for the benefit of BM. PPG contended that the manager had no authority to issue the note.



Was the credit note accepted by BM?



**Yes.** Before being challenged, the parties reached a general agreement on the terms. In that instance, it was unnecessary to identify the precise mechanics of offer and acceptance.



# NO Acceptance



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## *Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541



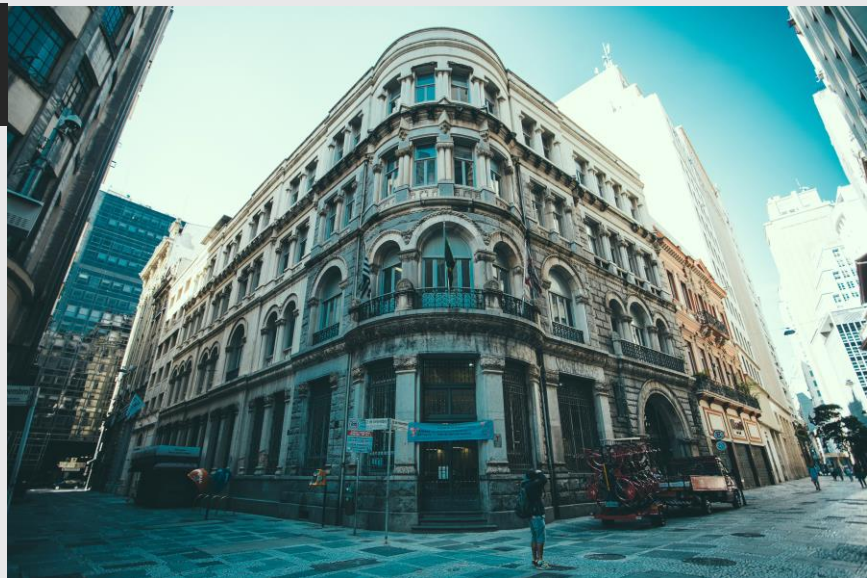
JP borrowed money from MC. When JP fell into arrears, JP's assets were sold. £140k was available for distribution. The parties negotiated how to allocate the money, "subject to contract". After a while, MC started distributing money.



Was MC entitled to distribute money on the basis of a binding agmt with JP?



**No.** The phrase "subject to contract" means that no binding agmt has been reached between the parties.





# NO Acceptance



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## *LNT Aviation Ltd v Airbus Helicopters UK Ltd* [2022] EWHC 309 (Comm)



Airbus issued an Alert Service Bulleting (ASB) for some helicopters they manufactured, including those owned by LNT. There was extensive correspondence between the parties. When the repair proved much more expensive than planned, Airbus refused to carry out the repair.



Was the contract accepted by LNT?



**No.** Neither party had made a formal offer on specified terms, or any final and unqualified expression of assent to such an offer.





# 1a. Acceptance through Silence



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# NO Acceptance?



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*Felthouse v Bindley* (1862) 11 C.B. (NS) 869



Uncle told to nephew: *"If I don't hear from you, I consider the horse mine for £30.15"*. Nephew asked the auctioneer to withdraw the horse from the auction. The horse was sold.



Has the uncle's offer been accepted?



**No.** The nephew failed to communicate acceptance to the uncle.



# NO Acceptance?



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*Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA [1985] 1 W.L.R. 925*



Parties were in a dispute, which had to be referred to arbitration. Each appointed one arbitrator, but no agreement on the 3<sup>rd</sup> arbitrator. After 5 years, AMT wrote to VRDN saying: “*Either you appoint an arbitrator or we will*”.



Is VRDN’s silence sufficient to infer that they abandoned arbitration and accepted AMT’s offer to appoint a 3<sup>rd</sup> arbitrator?



**No.** In the absence of special circumstances, silence and inactivity are not sufficient to infer the existence of a binding agreement.



# NO Acceptance?



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*In re Selectmove Ltd* [1995] 1 W.L.R. 474 (CA)



A company owed the revenue sums. The company's director reached an agmt with the tax collector to pay in instalments. The tax collector agreed, and said he would contact the director if his superior said this was not acceptable.



Has a contract (to pay taxes by instalments) become binding for the acceptor's silence?



**No**, but in principle it could have been possible.







“Where the offeree himself indicates that an offer is to be taken as accepted if he does not indicate to the contrary by an ascertainable time, he is undertaking to speak if he does not want an agreement to be concluded. I see no reason in principle why that should not be an exceptional circumstance such that the offer can be accepted by silence”.

—*In re Selectmove Ltd*  
[1995] 1 W.L.R. 474, 478

# Acceptance by Conduct



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*Brogden v Metropolitan Railway Co. (1877) 2 App. Cas. 666*



B signed a contract and sent it to MR Co., which never signed it. B supplied coal as per the contract. When disagreements arose, B denied that there was any contract with MR Co.



Has MR Co. accepted a contract, when they never signed and sent it back to B?



**Yes.** The objective conduct of the parties established the existence of the contract.



- Absent exceptional circumstances, silence and inactivity are not a form of acceptance;
- Lack of written assent is not always proof that there is no contract;
- Conduct is a form of acceptance, especially where it is in the contemplation of both parties or it's the only way to accept a contract (e.g. unilateral contracts);
- Can silence be a form of conduct?!?



## “Acceptance by Silence”



## 1b. Acceptance through Post



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# Acceptance through Post



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*Adams v Lindsell* (1818) 1 B & Ald 681

Step	Date	Event	Contract
1	2 Sept 1817	L offered to sell wool to A, and asked for an answer "in the course of post".	
2	5 Sept 1817	L's letter was received by A.	
3	5 Sept 1817	A accepted the offer and posted the reply.	x
4	8 Sept 1817	L sold the wool to a TP.	
5	9 Sept 1817	A's letter of acceptance delivered.	

# NO Acceptance



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*Holwell Securities Ltd v Hughes* [1974] 1 W.L.R. 155



H granted HS a six month's option to purchase land, to be exercised by "notice in writing". HS sent acceptance by post shortly before the deadline expired.



Had the option been properly exercised?



**No.** The relevant Act and the offeror's request suggested that acceptance by post was not a valid way of exercising the notice.



# Acceptance through Post



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*Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1970] 1 W.L.R. 241

Step	Date	Event	Contract
1	1964	2 schools offered for sale by tender. Winning bidder should be notified by post.	
2	26 Aug 1964	CGI posted a tender.	
3	15 Sept 1964	MDC's surveyor wrote to CGI saying that their offer has been accepted.	x
4	18 Nov 1964	Minister's approval of the sale.	
5	7 Jan 1965	MDC sent a formal letter of acceptance by post, CGI withdrew from the tender.	



“Where an offeror prescribes a particular mode of acceptance, but does not stipulate that only acceptance in that mode shall be binding, acceptance may be communicated in any other mode not less advantageous to the offeror”.

—*Manchester Diocesan Council for Education v Commercial & General Investments Ltd* [1970] 1 W.L.R. 241, 246B

# Revocation



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- In response to an expropriation notice, a party first accepted the offer by post, and then revoked the acceptance by telegram;
- HELD: According to the expedition theory, the offeree was bound by his letter of acceptance;
- A subsequent telegram advising of withdrawal is ineffective.
- Letter to engage a servant sent on 5 Sept., but received on 6 Sept;
- Letter to revoke the “contract” sent on 6 Sept;
- Letters received on the same day;
- HELD: revocation is effective, no completed contract.



*A to Z Bazaars Pty Ltd v Minister of Agriculture*  
[1975] (3) SA 468

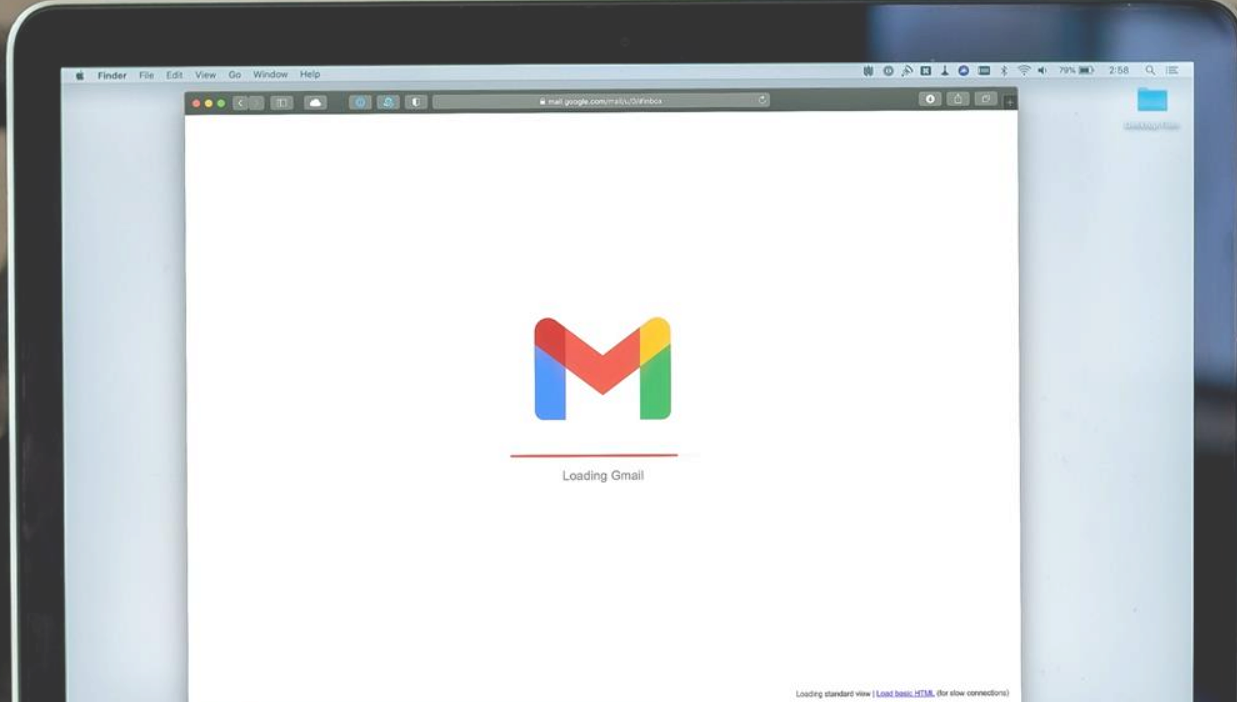


*Countess of Dunmore & Co. v Alexander*  
(1830) 9 S. 190

# "Acceptance through Post"



- Acceptance upon posting the letter;
- ONLY if within the contemplation of the parties and communications to correct addresses;
- The rule applies even if the letter of acceptance goes missing for no fault of the offeror's;
- Does not apply to the revocation of an offer or any other aspect of contract formation, including revocation of acceptance.



# 1c. Instantaneous Communications



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# NO Acceptance?



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*Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327



E entered into a contract with MFE for the purchase of copper cathodes. MFE was a NY corporation, with agents in Amsterdam. The Dutch agent accepted the contract by telex.



Where and when was the contract accepted?



The place where the contract is made is the place where the offeror receives – during office hours – the notification of the acceptance by the offeree.





# Key Features for Instantaneous Communications



- 1. Both O and A know that the communication was disrupted**
  - A needs to re-send acceptance;
  - Acceptance is effective once received (2<sup>nd</sup> time).
- 2. A is unaware that the communication was disrupted**
  - O is estopped from denying the existence of a contract if it's their fault;
  - No contract if the message was not received for no-one's fault, or if A sent it to the wrong address.



- Key authorities: *Thomas v BPE Solicitors* [2010] EWHC 306 (Ch) [82]-[90] and *The Eastern Navigator* [2005] EWHC 3020 (Comm);
- Emails follow the general rule (communication to the recipient);
- Emails sent during office hours are received instantaneously;
- What “office hours” are is a matter for the Court to be established.



## “Acceptance by email”

- Acceptance must be communicated to the offeror (bilateral contracts) by the acceptor or any other qualified persons;
- Performance is a form of acceptance (especially but not only for unilateral contracts);
- Counter-offers are NOT a form of acceptance;
- Special rules apply in case of “acceptance” by silence;
- Special rules apply for communications via post, phone or email.



## “Acceptance”



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(questions 5 – 8)

# Question 5



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**Which of the following statements regarding acceptance is TRUE?**

76



Silence does not constitute valid acceptance

61 (80.26%) ✓

An offeree can accept an offer of which they were not aware.

3 (3.95%)

Generally, there is no need for an offeree to communicate their acceptance to the offeror.

5 (6.58%)

Generally, acceptance needs not precisely match the terms of the offer.

7 (9.21%)

**Correct responses** 61 (80.26%)

**Correct answer**

Silence does not constitute valid acceptance

**Correct answer explanation**

Silence does not constitute valid acceptance, although a number of academics have argued that, in certain situations, silence could amount to valid acceptance.

# Question 6



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**Which one of the following statements is incorrect in relation to the rules of acceptance?**

80



Unilateral contracts are usually accepted by communication.

39 (48.75%) ✓

Unilateral contracts are usually accepted by conduct.

23 (28.75%)

Acceptance of an offer means unconditional agreement to all the terms of that offer.

13 (16.25%)

Generally, remaining silent will not amount to acceptance.

5 (6.25%)

**Correct responses** 39 (48.75%)

**Correct answer**

Unilateral contracts are usually accepted by communication.

**Correct answer explanation**

Unilateral contracts are only and usually accepted when FULL performance occurs.

# Question 7



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## What does the postal rule state?

86



That acceptance occurs as soon as the letter is posted.

71 (82.56%) ✓

That acceptance occurs when the letter is received by the offeror.

7 (8.14%)

That acceptance occurs when the letter is read by the offeror.

6 (6.98%)

That acceptance does not occur if the letter is lost in the post.

2 (2.33%)

Correct responses 71 (82.56%)

### Correct answer

That acceptance occurs as soon as the letter is posted.

### Correct answer explanation

The postal rule states that acceptance occurs as soon as the letter is posted, irrespective of whether or when the addressee receives the letter.

# Question 8



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**Which of the following is NOT an exception to the rule that acceptance must be communicated to the offeror?**

68



Where parties communicate face to face.

13 (19.12%) ✓

The postal rule.

6 (8.82%)

When an offer may state or imply that acceptance needs not be communicated.

23 (33.82%)

Performance of a unilateral contract.

26 (38.24%)

**Correct responses**

13 (19.12%)

**Correct answer**

Where parties communicate face to face.

**Correct answer explanation**

In face-to-face communications, acceptance needs to be communicated to the offeror.



A black and white photograph of chess pieces on a white surface. In the foreground, several light-colored (white) pawns are visible, slightly out of focus. Behind them, a row of dark-colored (black) pieces, including pawns, knights, and rooks, is also slightly out of focus. The background is a plain, light-colored surface.

## 2. Battle of the Forms



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# Counter-Offer



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*Hyde v Wrench* (1840) 3 Beav 334



W offered his farm to H for £1,000. H accepted, but only offered £950. W declined the reduced price. H then accepted the original offer.



Is W bound to sell the farm for £1,000?



**No.** Any counter-offer results in the rejection of the original offer.



# Mere Inquiry



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*Stevenson, Jacques & Co. v McLean* (1880) 5 QBD 346

Step	Date	Event	Contract
1	27 Sept (Sat)	ML offered to sell iron at 40s. Offer valid until Monday.	
2	29 Sept (Mon) at 9:42 am	SJ asked as to the time of the delivery.	
3	29 Sept (Mon) at 1:25 pm	ML sold the iron and sent a telegram to SJ to revoke the offer.	
4	29 Sept (Mon) at 1:34 pm	SJ accepted the offer (before receiving the revocation from ML).	x

# Battle of the Forms (1)



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*Butler Machine Tool Co. Ltd v Ex-Cell-O Corp (England) Ltd*  
[1979] 1 W.L.R. 401



BM wanted to sell a machine for £75k with T&Cs including a price variation clause. ECO replied with an order with their own T&Cs. The order had a tear-off slip of acknowledgment on those terms. BM signed that slip.



Could BM rely on the price variation clause?



**No.** BM has signed the order made by ECO. That order was equivalent to a counter-offer. The order was made on ECO T&Cs.





“In some cases the battle is won by the man who fires the last shot. [...] In some cases the battle is won by the man who gets the blow in first”.

—*Butler Machine Tool Co. Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401, Denning LJ

# Battle of the Forms (2)



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## *Hamad M Aldrees & Partners v Rotex Europe Ltd* [2019] EWHC 574 (TCC)



HMA bought 4 machines to extract silica sand from RE. The machines were not fit for purpose, and HMA started proceedings against RE. RE wanted to rely on an exclusion clause. The T&Cs were not attached to the quote approved by HMA, but on earlier quotes.



Could RE rely on the exclusion clause?



**No.** A reasonable business person would conclude that those T&Cs were not attached to the final contract because RE's approach to incorporating these clauses had been inconsistent.

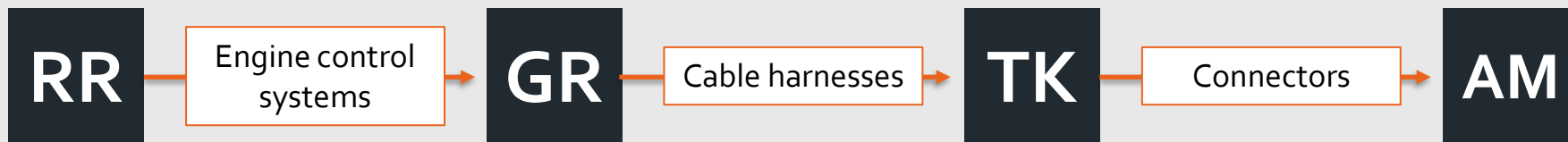




# Battle of the Forms (3)



*Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209

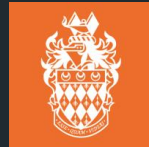


The relationship lasted for 20 years. Mostly, this was controlled by Goodrich. AM also had a long term contract with Goodrich. However, TK sent purchase orders to AM with their own T&Cs. AM replied with their own T&Cs. At 1<sup>st</sup> instance, the court held that the overall relationship suggested that the contract was on TK's T&Cs (Denning's approach in *Excel*).



**Judgment Reversed.** The lower court should have applied the traditional offer-and-acceptance analysis ("last shot" approach). If they followed that approach, they would have concluded that the contract was entered into pursuant to AM's T&Cs.





“It is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms”.

—*Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, Phill LJ

- A reply inconsistent with an offer is a counter-offer, unless it does not materially alter the offer and the offeror doesn't object (Uniform Law of Sales);
- The "last shot" approach is *generally* followed to determine on which terms a contract has been entered by the parties;
- If the "last shot" approach is inconclusive, parties may have failed to conclude a contract.



## "Battle of the Forms"

# Summary

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1. **Acceptance**: general rules and special principles applicable when acceptance occurs by silence, conduct, through post or instantaneous means of communication.
2. **Battle of the Forms**: when acceptance is a counter-offer (or mere inquiry), and what happens if it is not clear on which terms a contract has been entered into by the parties.