

Acceptance by Conduct

Entry #:	00.20.5
Word Count:	7499 words
Reading Time:	37 minutes
Last Updated:	September 05, 2025

"In space, no one can hear you think."

Table of Contents

Contents

1	Acceptance by Conduct	2
1.1	Introduction: Defining the Silent Agreement	2
1.2	Historical Evolution: From Roman Law to Modern Codification	3
1.3	Legal Foundations and Theoretical Underpinnings	4
1.4	Establishing Acceptance by Conduct: Key Elements and Tests	5
1.5	Common Contexts and Practical Applications	6
1.6	The Perennial Problem: Silence as Acceptance?	8
1.7	Comparative Perspectives: Global Variations	9
1.8	Controversies, Challenges, and Legal Disputes	10
1.9	Evidentiary Considerations and Burden of Proof	11
1.10	Acceptance by Conduct in Specific Contract Types	12
1.11	Modern Challenges: Technology and the Future	13
1.12	Conclusion: Enduring Relevance and Balancing Act	14

1 Acceptance by Conduct

1.1 Introduction: Defining the Silent Agreement

Contract law, the invisible architecture underpinning commerce and countless daily interactions, traditionally conjures images of handshakes sealing deals or signatures adorning formal documents. Yet, a vast and vital dimension of binding agreements operates in a realm of unspoken action, where assent is conveyed not through declarations but through deeds. This is the domain of “Acceptance by Conduct,” a fundamental doctrine asserting that a party’s actions, rather than explicit words, can signal their agreement to the terms of an offer, thereby forging a legally enforceable contract. This silent agreement, inferred from observable behavior under the objective theory of contracts, stands as a crucial counterpart to express acceptance, ensuring the law of contract remains responsive to the practical realities of human interaction and commercial necessity.

1.1 Core Concept and Legal Definition

At its heart, acceptance by conduct embodies the principle that a contract can be formed when an offeree, instead of verbally or in writing stating “I accept,” performs an act that objectively demonstrates their assent to the offeror’s proposal. The legal system, guided by the objective theory of contracts, prioritizes the outward manifestation of a party’s intentions over their undisclosed, subjective state of mind. It asks not what the offeree secretly intended, but what a reasonable person in the position of the offeror would conclude from the offeree’s actions. This focus on external conduct prevents parties from escaping obligations based on hidden reservations and provides essential certainty in transactions. The classic illustration involves a reward offer: if a municipality posts a notice promising \$500 for information leading to the capture of a fugitive, and a citizen provides that information without uttering a word of acceptance, their act of providing the crucial information constitutes acceptance by conduct. The contract for the reward is complete upon performance. This stands in clear contrast to express acceptance, where the offeree directly communicates assent using language, whether spoken (“Yes, I’ll take it”), written (signing a contract), or increasingly, digital (clicking “I Agree”). Acceptance by conduct fills the gap, recognizing agreement where actions speak louder than words, provided those actions unequivocally signal “yes.”

1.2 Foundational Legal Principles

Acceptance by conduct fits seamlessly within the bedrock framework of contract formation: offer and acceptance. An offer is a promise contingent upon a requested act or return promise. Acceptance is the offeree’s manifestation of assent to the terms of that offer. Conduct becomes the vehicle for that assent when the nature of the offer or the circumstances invite performance as the response. The doctrine facilitates a “meeting of the minds” – that essential concord of intention required for a contract – through observable action rather than mutual declaration. Crucially, this meeting of the minds is judged objectively: did the offeree act in a way that would lead a reasonable person to believe they intended to accept? Furthermore, the doctrine incorporates a vital safeguard: reasonable reliance. The offeror must reasonably interpret the offeree’s conduct as acceptance. It is not enough for the offeree to privately decide to accept; their conduct must communicate that decision outwardly in a manner the offeror can, and reasonably does, rely upon. For instance, imagine a

general contractor emails a subcontractor offering to hire them for electrical work on a project at a specified rate, requesting they begin work the following Monday. If the subcontractor's crew arrives on site Monday morning and starts installing wiring, the contractor can reasonably rely on this conduct as acceptance of the offer, forming the contract. The subcontractor cannot later claim they were merely "preparing" or hadn't formally accepted; their unambiguous actions spoke for them.

1.3 Significance in Modern Commerce

The practical importance of acceptance by conduct in contemporary life and commerce cannot be overstated. Its prevalence is woven into the fabric of everyday transactions, often

1.2 Historical Evolution: From Roman Law to Modern Codification

The profound significance of acceptance by conduct in facilitating the seamless flow of modern commerce, as underscored in Section 1, is not a recent innovation but the culmination of a rich and complex historical journey. The legal recognition that actions can speak louder than words, forging binding obligations without explicit declarations, stretches back millennia, evolving through diverse legal traditions and responding to the shifting demands of trade and society. Tracing this evolution reveals the deep roots and persistent adaptability of the doctrine.

Ancient and Medieval Precursors

The conceptual seeds of acceptance by conduct were sown in antiquity. Roman jurists, masters of legal categorization, acknowledged the concept of *conventio tacita* – a tacit agreement inferred from the circumstances and conduct of the parties, distinct from formal *stipulatio*. While express contracts dominated Roman law, situations arose where obligations were recognized based on parties' behavior. For instance, a tenant continuing to occupy land after the lease term implied tacit renewal under certain conditions, and merchants' customary practices often implied terms based on conduct. This nascent idea found fertile ground in the medieval period with the rise of the *Lex Mercatoria* (Law Merchant). Governed by merchant courts operating at bustling trade hubs like the Champagne Fairs, this transnational body of customs prioritized speed, fairness, and practicality over rigid formalism. Merchants routinely concluded deals through unambiguous actions: a buyer taking delivery of goods at the dock, a shipmaster loading cargo as requested, or a handshake followed by immediate performance. These acts were universally understood within the mercantile community as binding assent, establishing a powerful precedent that conduct alone could create enforceable obligations, driven by the relentless pace of commerce and the need for reliable expectations among traders.

Development in Common Law

English common law, initially cautious, gradually embraced the principles honed in merchant practice. Early cases exhibited skepticism towards inferring contracts solely from conduct, favoring the certainty of express words. However, the transformative power of the Industrial Revolution and burgeoning commercial activity necessitated a more pragmatic approach. The landmark 1877 case of *Brogden v Metropolitan Railway Co.* proved pivotal. Here, a coal supplier (Brogden) received a draft agreement from the railway company, added terms, wrote "approved" on it, and returned it. The railway merely filed it away. No formal signing occurred.

Yet, for years both parties acted *as if* the contract existed – the supplier delivered coal, the railway accepted and paid for it. The House of Lords held that this consistent course of conduct unequivocally demonstrated mutual assent, forming a binding contract despite the lack of formal execution. Lord Blackburn’s reasoning emphasized the objective manifestation of intent through performance. This case became the cornerstone for the common law doctrine, firmly establishing that conduct consistent only with acceptance of an offer creates a contract. American courts, facing similar pressures during their own industrial boom, readily adopted and refined these principles, solidifying the “objective standard” – focusing on what the conduct would signify to a reasonable observer, not the offeree’s secret intentions.

Codification in Civil Law and International Instruments

While common law developed the doctrine through judicial precedent, civil law systems often addressed it explicitly within comprehensive codes. The German Civil Code (Bürgerliches Gesetzbuch - BGB), enacted in 1900, contains a clear provision (§ 151) stating that acceptance becomes effective without declaration to the offeror if such a declaration is not customary or expected based on the offer, and the offeror waives it. This directly codifies acceptance by performance. Similarly, the French Civil Code, though less explicit in its original 1804 form, has long

1.3 Legal Foundations and Theoretical Underpinnings

Building upon the historical codification detailed in Section 2, which demonstrated how diverse legal systems ultimately embraced the binding nature of conduct, we now delve into the robust theoretical frameworks and foundational legal principles that justify and explain *why* acceptance by conduct is recognized and enforced. These underpinnings transform the doctrine from a mere historical artifact or practical convenience into a coherent and essential pillar of modern contract law, grounded in fundamental concepts of fairness, predictability, and societal need.

3.1 The Paramountcy of the Objective Theory of Contract

The cornerstone supporting the entire edifice of acceptance by conduct is the objective theory of contracts. This theory fundamentally shifts the legal inquiry away from the elusive realm of a party’s subjective, undisclosed intentions and firmly anchors it in the observable world of outward manifestations. As famously articulated by Justice Oliver Wendell Holmes Jr., the law of contracts is not concerned with what a party secretly intended, but with what they *said* or *did*, interpreted as a reasonable person in the position of the other party would understand it. Acceptance by conduct is the purest expression of this objective paradigm. When an offeree performs an act that a reasonable offeror would interpret as unequivocal assent to the offer’s terms, a contract is formed – irrespective of whether the offeree harbored private doubts or reservations. This approach serves critical societal functions. It protects the reasonable reliance of the offeror who, observing conduct consistent with acceptance, justifiably believes a deal has been struck and may act accordingly (e.g., turning away other potential buyers or commencing dependent activities). It also promotes commercial certainty and efficiency; parties can transact based on observable actions without resorting to costly investigations into hidden states of mind. Consider the classic reward scenario: the citizen who finds and returns a lost dog, aware of the posted reward, objectively accepts by performing the requested act. The law enforces

the reward not because it probes the citizen's inner thoughts, but because their conduct objectively manifests acceptance, fulfilling the offeror's reasonable expectation.

3.2 The Offeror's Perspective: Crafting an Invitation to Performance

Acceptance by conduct is not imposed unilaterally; its validity often hinges on the nature of the offer itself. From the offeror's perspective, the offer can function as an explicit or implicit invitation for the offeree to accept *by performing the requested act* rather than by making a return promise. This is most evident in the case of unilateral contracts, where the offer is expressly structured to be accepted only by complete performance (e.g., "I will pay \$100 to anyone who climbs that flagpole"). However, the principle extends to bilateral contexts. The offeror controls the terms, and by framing the offer in a particular way, they can signal that conduct is the invited mode of acceptance. For instance, an offer stating "Ship the goods immediately to our warehouse at the quoted price" clearly invites acceptance by the act of shipping, not by a preliminary promise to ship. Article 2 of the Uniform Commercial Code (UCC), governing sales of goods, explicitly recognizes this dynamic in § 2-206(1)(b): "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods." This provision highlights the offeror's role in setting the stage; the form of the offer itself dictates whether performance is an acceptable, or even the preferred, method of signifying assent. The offeror, by structuring the proposal to invite performance, implicitly waives the need for a formal declaration of acceptance before the act occurs.

3.3 The Offeree's Perspective: Manifesting Assent Through Action

For the offeree, acceptance by conduct represents a mode of agreement where actions supersede words. The core requirement is that the conduct must constitute a "clear and unequivocal manifestation of assent

1.4 Establishing Acceptance by Conduct: Key Elements and Tests

Having explored the theoretical bedrock of acceptance by conduct in Section 3, particularly the offeree's crucial role in manifesting assent through unambiguous action, we now turn to the practical arena: how courts actually determine whether specific conduct crosses the threshold to constitute legally binding acceptance. This adjudication is not arbitrary; it relies on well-established, albeit context-sensitive, criteria designed to objectively discern genuine agreement from mere preparatory steps or ambiguous behavior. Establishing acceptance by conduct hinges on satisfying four key interrelated elements, each acting as a safeguard against imposing unintended contractual obligations.

Foremost among these elements is the requirement for unequivocal and unambiguous conduct. The actions taken by the offeree must clearly and unmistakably signal, to a reasonable observer in the position of the offeror, an intent to accept the *specific* terms of the offer. Vague gestures, preliminary preparations, or actions open to multiple interpretations generally fall short. For instance, a subcontractor receiving an offer to install plumbing on a job site unequivocally accepts by arriving with a crew and tools and immediately commencing work on the designated pipes. Conversely, merely ordering specialized materials for the potential job, while suggestive, is often deemed ambiguous preparatory conduct, not acceptance itself; the materials might be for another project, or the offeree might still be negotiating. A classic illustration of

ambiguity arose in the case of *Embry v. Hargadine, McKittrick Dry Goods Co.* (1907), where an employee inquired about renewing his employment contract and claimed the employer responded, “Go ahead, you’re all right. Get your men out.” The court found this statement too ambiguous to constitute an offer that could be accepted by the employee’s continued work; it lacked the definite terms required. Silence, absent specific exceptional circumstances discussed later, is almost never considered unequivocal conduct for acceptance precisely because it manifests nothing. The conduct must objectively declare “yes” to the deal as proposed.

This leads directly to the second critical test: the conduct must be consistent only with acceptance of the offer. Courts often phrase this as the “only consistent with” test. Could the offeree’s actions reasonably be interpreted as something *other* than acceptance? If the conduct is equally consistent with another plausible explanation – such as preparation, an independent act, or performance under a different agreement – it typically fails to constitute acceptance. Context is paramount here. Prior dealings between the parties, established industry customs, and the nature of the offer itself heavily influence this assessment. For example, in *Brogden v. Metropolitan Railway Co.* (1877), discussed earlier, the supplier’s consistent delivery of coal over years, following the exchange of the draft agreement marked “approved,” was conduct that could *only* reasonably be interpreted as acceptance of the ongoing supply arrangement. There was no other sensible explanation for the railway accepting deliveries and paying invoices based on that draft’s terms. Conversely, if a potential buyer, after receiving a quote for goods, merely rearranged warehouse space potentially for those goods, this conduct could equally be preparation for a future decision or for other inventory and thus would likely not pass the “only consistent with” test. The court seeks conduct that locks in the offeree’s commitment in a way that excludes other reasonable inferences.

The third indispensable element is notice to the offeror. Acceptance, whether by word or deed, must generally be communicated to be effective. Consequently, the offeree’s conduct constituting acceptance, or the commencement of that conduct, must be known or reasonably knowable to the offeror. Actual notice occurs when the offeror observes the conduct or receives direct information about it (e.g., receiving a shipment notification or seeing work begin on their property). Constructive notice suffices when the conduct occurs in a manner or location where the offeror should reasonably become aware of it, or if the nature of the performance inherently implies notification. For instance, shipping goods in response to an offer to buy inherently places them into the stream of commerce, providing constructive notice that acceptance has likely occurred. The timing of when notice is received often determines when acceptance becomes legally effective. Under the common law “mailbox rule,” acceptance by performance generally becomes effective upon dispatch of the performance (like mailing the goods) if that is the invited or reasonable mode

1.5 Common Contexts and Practical Applications

The indispensable requirement of notice to the offeror, concluding Section 4, underscores that acceptance by conduct, while silent, is never invisible; the manifestation of assent must be reasonably perceptible. This principle finds its most vivid expression and widest application across the bustling landscape of modern commerce. Far from an abstract legal doctrine, acceptance by conduct operates as the silent engine driving countless daily transactions, its practical applications diverse yet governed by consistent underlying princi-

ples. Examining these common contexts reveals the doctrine's pervasive role in facilitating efficiency and certainty.

Within the realm of the Sale of Goods and Shipment, acceptance by conduct is not merely common but often the default mechanism. The Uniform Commercial Code (UCC), specifically § 2-206(1)(b), explicitly codifies this reality. It establishes that an offer to buy goods for prompt or current shipment invites acceptance either by a prompt promise to ship or by the actual shipment itself. This statutory recognition reflects the practical exigencies of trade. Consider a wholesale distributor receiving a purchase order from a retailer for 100 units of a specific product, requesting “immediate shipment.” The distributor, by loading the goods onto a carrier directed to the retailer’s warehouse, unequivocally accepts the offer through conduct – the act of shipping. The shipment notice, often generated automatically, serves as the required notice of this acceptance-by-performance. This dynamic becomes significantly more complex, however, in the infamous “Battle of the Forms,” governed by UCC § 2-207. When Buyer sends a purchase order with its standard terms, and Seller responds by shipping the goods accompanied by an acknowledgment form containing *different* standard terms, has a contract formed, and if so, on whose terms? The Seller’s act of shipping constitutes acceptance by conduct, forming a contract *at the moment of shipment*. However, § 2-207 then dictates that the additional or different terms in the Seller’s acknowledgment may or may not become part of the contract, depending on materiality and prior notice, illustrating how conduct forms the core agreement while potentially leaving subsidiary terms contested. Similarly, under the United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 18(3) explicitly recognizes that acceptance can occur “by performing an act, such as one relating to the dispatch of the goods or payment of the price,” provided the offer or practices established between the parties permit it. An exporter shipping goods in response to an international buyer’s order effectively binds the parties under the CISG framework through conduct, streamlining cross-border transactions.

The Provision of Services similarly relies heavily on conduct to signal agreement, particularly where commencing work is the natural and expected response. A general contractor emails a proposed scope of work and price to a plumber, concluding with “Please begin on site Monday.” The plumber’s arrival Monday morning with tools and crew, and the immediate commencement of installing pipes, constitutes unequivocal acceptance by conduct. This scenario highlights the practical necessity: demanding a formal signed agreement before any work begins would paralyze project timelines. Conversely, merely ordering specialized parts or scheduling preliminary meetings typically represents ambiguous preparation, not binding acceptance. A critical nuance arises in continuing performance scenarios. Imagine an architect emails revised fee terms mid-project to a client. The client, without verbal acknowledgment, continues making payments based on the new fee schedule and accepts subsequent project deliverables. This continued performance under the revised terms strongly implies acceptance by conduct of the modification, reflecting the principle of “course of performance” under UCC § 2-208 (by analogy in service contexts). Furthermore, acceptance by conduct is the quintessential mode for unilateral offers involving services. A municipality’s offer of a reward for information leading to an arrest is accepted *only* by the act of providing the qualifying information; no prior promise is required or effective. The performance itself completes the acceptance and forms the contract.

**The explosive growth of E-Commerce and Digital Contracts has propelled acceptance by conduct into the digital realm, creating novel forms of manifestation

1.6 The Perennial Problem: Silence as Acceptance?

The digital landscape, where clicks, downloads, and passive use constitute pervasive forms of conduct signaling assent, underscores the fundamental principle that acceptance requires some observable manifestation of will. This principle leads inexorably to one of contract law's most persistent and thorny questions: can the utter *absence* of action – pure silence or inaction – ever amount to acceptance? Section 6 confronts this perennial problem, exploring the general rule, its carefully circumscribed exceptions, and the ongoing policy debates surrounding the potential imposition of obligations through passivity.

The bedrock principle, firmly entrenched in common law and echoed in civil codes, is that silence or inaction, in and of itself, does not constitute acceptance. This rule, articulated forcefully in cases like *Felthouse v. Bindley* (1862), serves as a vital shield against the imposition of unwanted contractual burdens. The rationale is compellingly twofold. First, silence lacks the unequivocal manifestation of assent required by the objective theory of contracts. It communicates nothing positive; a reasonable person cannot reliably discern from silence alone whether the offeree intends to agree, disagrees, is indifferent, or simply hasn't yet decided. Second, allowing silence to bind parties creates a dangerous avenue for abuse. Unscrupulous offerors could bombard individuals or businesses with unsolicited offers ("If we don't hear from you by Friday, we'll ship the encyclopedia set and bill you \$999") or draft agreements containing clauses deeming silence as assent upon renewal. Upholding such tactics would place an unreasonable burden on recipients to actively reject every unsolicited proposal they receive, effectively forcing them into contracts they never sought. The rule protects individual autonomy and prevents commercial coercion, ensuring parties are not held liable for obligations they never affirmatively undertook. As Judge Learned Hand succinctly observed, silence is "usually evidence only of itself."

Despite the strength of the general rule, Anglo-American law recognizes several established, though narrowly construed, exceptions where silence may be deemed acceptance. These exceptions arise only in specific circumstances where policy considerations strongly favor finding a contract or where the silence itself carries a specific meaning derived from context. The most significant exception stems from **prior course of dealing**. If the parties have an established history where silence in response to a particular type of offer consistently signaled assent, courts may infer that the same pattern applies to a new, similar offer. For example, if a longstanding supplier has repeatedly sent invoices stating "Shipment will proceed unless we hear otherwise within 48 hours," and the buyer has consistently remained silent and accepted delivery, a court may hold that silence constitutes acceptance for a subsequent identical offer. The prior pattern imbues the silence with a specific meaning it otherwise lacks. A second exception arises when the **offeree solicits the offer with the expressed or clearly implied intent that silence will signify acceptance**. This often occurs in ongoing business relationships. A classic hypothetical involves a publisher sending a notice to a subscriber: "Your journal subscription is expiring. Unless we receive notice to cancel by X date, we will renew it for another year at the current rate and bill you." If the subscriber solicited the initial subscription and the renewal

clause was clearly presented, their silence may bind them to the renewal. The key is the offeree initiated the context where silence was designated as the affirmative signal. A third exception involves the **offeree receiving and retaining a benefit offered with known terms, while having a reasonable opportunity to reject it**. This is often grounded more in quasi-contract (unjust enrichment) than true contract formation, but courts sometimes frame it as acceptance by silence. If a publisher sends an unsolicited textbook to a professor with a note stating “Examine for 30 days; if you keep it beyond then, you owe \$150,” and the professor uses the book actively in their course well beyond the 30 days without objection, their conduct (retaining and using the benefit) coupled with silence may be deemed acceptance. However, merely receiving an unsolicited good and doing nothing (the classic ”

1.7 Comparative Perspectives: Global Variations

The European Union’s robust stance against inertia selling, concluding Section 6, exemplifies a broader truth: while the core concept that conduct can manifest assent enjoys near-universal recognition, the *application* of acceptance by conduct doctrine reveals fascinating variations across legal systems. These differences stem from diverse historical traditions, codification philosophies, and cultural attitudes towards contractual formality and consumer protection. Examining these global perspectives illuminates both the doctrine’s fundamental importance to commerce and the nuanced ways jurisdictions balance certainty, fairness, and efficiency.

Within Common Law Systems (United States, United Kingdom, Canada, Australia), the doctrine flourishes through the incremental development of case law, heavily reliant on precedent and the objective theory of contract. The foundational principle, solidified in landmark cases like *Brogden v Metropolitan Railway Co.* (1877), remains paramount: conduct manifesting unequivocal assent to the offer’s terms binds the parties. Courts rigorously apply the “reasonable person” standard, asking what the offeree’s actions would signify to a reasonable observer in the offeror’s position. The treatment of silence generally adheres strictly to the rule that silence is not acceptance, with exceptions recognized only where prior dealings create a clear pattern, the offeree solicits the offer intending silence as assent, or benefits are knowingly retained. Judicial reasoning often emphasizes commercial reality and the protection of reasonable reliance. For instance, the Australian High Court in *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) found acceptance by conduct where a builder proceeded with work knowing the principal had not signed the formal contract but had received plans and specifications, reasoning that the principal’s conduct in allowing the work to continue manifested assent. Similarly, US courts interpreting the UCC frequently emphasize shipment as acceptance under § 2-206(1)(b), showcasing the system’s pragmatic adaptation to trade needs. However, the common law’s flexibility can lead to subtle differences; English courts might exhibit marginally greater caution in inferring acceptance from ambiguous conduct than some US state courts, reflecting nuances in judicial philosophy.

Civil Law Systems (France, Germany, Japan), grounded in comprehensive codes, often provide more explicit statutory frameworks for tacit acceptance. The German Civil Code (BGB) offers perhaps the clearest articulation. § 151 explicitly states that acceptance does not require declaration to the offeror if such a

declaration is not customary or expected based on the offer, and the offeror waives it. This provision directly codifies acceptance by performance, placing significant weight on the offeror's implicit invitation and trade customs. French law, under Article 1120 of the Civil Code (as reformed in 2016), recognizes that acceptance "may result from conduct which sufficiently indicates it" ("*peut résulter d'un comportement qui l'implique suffisamment*"). French jurisprudence often intertwines this with the pervasive principle of good faith (*bonne foi*), scrutinizing whether the conduct fairly reflects assent in the specific context and whether the offeror acted in reliance. Japanese law, under its Civil Code (Article 526), similarly recognizes tacit acceptance (*mokuteki jaku dōsa* - purposeful action), requiring conduct demonstrating an intention to accept. Japanese courts, influenced by both German doctrine and local commercial practices, pay close attention to the parties' prior relationship and the specific industry context when evaluating whether conduct is unequivocal. While the statutory recognition provides clarity, civil law systems often maintain a formalistic undercurrent, potentially demanding slightly more unambiguous conduct than might suffice under a common law "reasonable interpretation" analysis in a similar context.

**The CISG and UNIDROIT

1.8 Controversies, Challenges, and Legal Disputes

The comparative analysis in Section 7 reveals a remarkable global convergence on the core validity of acceptance by conduct, facilitated by instruments like the CISG and UNIDROIT Principles. Yet, this widespread recognition does not eliminate friction; the doctrine's inherent reliance on interpreting actions rather than words generates persistent areas of legal uncertainty, fertile ground for disputes, and ongoing scholarly debate. These controversies underscore the delicate balance the law attempts to strike between commercial efficiency, contractual certainty, and fairness to vulnerable parties.

Foremost among these battlegrounds is the infamous "**Battle of the Forms**". As touched upon in Section 5, this conflict erupts when both parties, typically in commercial sales transactions, attempt to form a contract through conduct (like shipping or accepting goods) while simultaneously exchanging standard forms containing conflicting boilerplate terms. The fundamental problem lies in the mechanics of acceptance by conduct: Seller ships goods in response to Buyer's purchase order, thereby accepting the offer *by conduct* and forming a contract at that moment. However, Seller's shipment is often accompanied by an acknowledgment form stating "These terms govern; any different terms in Buyer's form are rejected." Buyer's form, meanwhile, likely contains its own standard terms, perhaps mandating its own forum selection clause or warranty disclaimers. Which set of terms controls the contract formed by the shipment? Traditional common law applied the rigid "last shot" doctrine: the last form sent before performance (usually Seller's acknowledgment) constituted a counter-offer, accepted by Buyer's subsequent conduct (using the goods), thereby imposing Seller's terms. This was widely seen as arbitrary and unfair, often binding a party to terms they never saw until after performance began. The UCC § 2-207 revolutionized this landscape with its "knock-out rule" for contracts formed by performance. It acknowledges that the conduct forms the contract on the *terms on which the writings agree*, while conflicting terms "knock each other out" and are replaced by UCC gap-fillers or evidence of prior agreement. This pragmatic approach aims for commercial fairness but in-

roduces significant complexity. Disputes rage over whether a term is truly “material” (and thus excluded under § 2-207(2)(b)), whether a party sufficiently “objected” to conflicting terms, and how to handle terms that don’t directly conflict but supplement. A stark illustration arose in *Transaero, Inc. v. M/V Sky Universe* (1997), where conflicting forum selection clauses in exchanged forms were both knocked out, forcing the court to apply default rules – a result leaving both parties potentially dissatisfied and highlighting the doctrine’s inherent messiness despite its intentions. CISG Article 19 offers a different, often stricter, approach, potentially requiring greater harmony in the terms to avoid counter-offer status, adding another layer for international disputes.

Beyond conflicting forms, the core challenge of **Ambiguity in Conduct** remains a prolific source of litigation. As established in Section 4, conduct must be unequivocal and consistent only with acceptance. Yet, the line between preparatory acts and actual acceptance, or between conduct signaling assent and conduct indicating something else entirely, is frequently blurred and hotly contested. Courts constantly grapple with questions like: Did the subcontractor *start work* (acceptance) or merely *order materials* (preparation)? Did the buyer’s partial payment signal acceptance of disputed modification terms or simply a good-faith effort to keep the project moving? Context is king, but its interpretation is subjective. The case of **Poel v. Brunswick-Balk*

1.9 Evidentiary Considerations and Burden of Proof

The persistent controversies and challenges surrounding the interpretation of ambiguous conduct, such as the partial performance at issue in *Poel v. Brunswick-Balke-Collender Co.*, underscore a fundamental reality of acceptance by conduct litigation: establishing that such a contract exists often hinges not merely on legal theory, but on the complex, sometimes arduous, task of *proving* it in court. While the objective manifestation of assent through action is the doctrinal cornerstone, translating observable behavior into legally cognizable acceptance frequently involves navigating a labyrinth of evidentiary hurdles. Section 9 delves into the practical battlefield where claims of acceptance by conduct are won or lost – the realm of burden of proof, admissible evidence, and the persistent challenges of demonstrating that actions spoke louder than words in forming a binding agreement.

The initial and paramount principle governing any dispute over contract formation is the burden of proof. The party asserting the existence of a contract – typically the plaintiff claiming a breach – bears the burden of proving all essential elements of its formation, including valid acceptance. When acceptance is alleged to have occurred through conduct rather than express words, this burden specifically requires the plaintiff to demonstrate that the defendant’s actions unequivocally manifested assent to the offer’s terms. This foundational rule, rooted in the Restatement (Second) of Contracts § 19 and reinforced by countless judicial decisions, places a significant onus on the claimant. They must construct a persuasive narrative from the available evidence showing conduct that was intentional, responsive to the specific offer, and objectively indicative of agreement. Failure to meet this burden, even if the conduct seems suggestive, results in no enforceable contract being found. For example, in *Braman Chemical Enterprises, Inc. v. Barnes*, a supplier claimed a contract was formed when a farmer accepted delivery of chemicals. However, the court found the

supplier failed to prove the farmer *requested* the specific shipment (the offer) or that his conduct in receiving it was inconsistent with anything other than acceptance, particularly given evidence of prior unsolicited deliveries. The burden wasn't met, and the claim failed.

To discharge this burden, parties rely on a diverse arsenal of evidence types, each presenting unique advantages and limitations. Documentary evidence often forms the bedrock of such cases. Invoices referencing the specific offer, shipping manifests detailing goods dispatched in response to an order, purchase orders acted upon, work logs showing commencement or continuation of services after receipt of terms, payment records based on quoted prices, and electronically stored communications (emails, texts) surrounding the conduct are all crucial. These contemporaneous business records provide objective timestamps and details often critical to establishing the sequence of events and the context of the conduct. Witness testimony, both from parties involved and disinterested third parties, plays a vital role in bringing the documentary trail to life. Testimony can describe the observed conduct itself (e.g., “the crew arrived Monday and began installing the HVAC system as per the emailed scope”), establish the offeror’s awareness of the conduct (actual notice), or elucidate industry customs that imbue certain actions with specific meanings. In the digital age, electronic records have become indispensable. Server logs meticulously recording user actions (e.g., IP address, timestamp, and specific button clicked for “Place Order” or “Download”), clickstream data showing navigation through terms before a decisive action, audit trails of system configurations governing automated acceptance, and metadata embedded in digital documents all provide granular, often irrefutable, evidence of digital conduct. This digital footprint was pivotal, for instance, in litigation surrounding online terms of service, where courts scrutinized user activity logs to determine if conduct (like continued use after a notice of updated terms) constituted acceptance. Furthermore, evidence of the parties’ prior course of dealing and relevant trade usage is frequently paramount. Demonstrating

1.10 Acceptance by Conduct in Specific Contract Types

The intricate evidentiary challenges explored in Section 9, particularly the critical role of context like prior dealings and trade usage in interpreting conduct, underscore that acceptance by conduct never operates in a vacuum. Its application and interpretation are profoundly shaped by the specific *type* of contract at issue. While the core principles of unequivocal manifestation, consistency with acceptance, and notice remain universal, their application reveals distinct nuances across major contractual categories. Section 10 examines these critical variations, demonstrating how the silent agreement manifests uniquely within unilateral promises, bilateral bargains, pre-existing options, and evolving contractual modifications.

10.1 Unilateral Contracts: Performance as the Sole Key

In unilateral contracts, acceptance by conduct is not merely possible; it is the *exclusive* and defining mechanism. The offeror promises something in exchange for the offeree’s performance of a specified act, explicitly rejecting a return promise as acceptance. Consequently, the offeree accepts solely by performing the requested act. Classic examples abound in reward offers. The promise of \$10,000 for information leading to an arrest is accepted only by the act of providing that information, as famously established in cases like *Carlill v. Carbolic Smoke Ball Co.* (1893), where using the smoke ball as directed constituted acceptance

of the reward offer for avoiding influenza. The very nature of the offer – “Do X and I will pay Y” – invites and is satisfied only by conduct. A critical nuance, however, concerns commencement of performance. While the contract is only formed upon *full* performance, commencing performance often creates a subsidiary obligation. Under the modern view, articulated in the Restatement (Second) of Contracts § 45 and widely adopted, beginning performance of the requested act creates an option contract. The offeror is then estopped from revoking the offer for a reasonable time, allowing the offeree to complete performance and earn the reward. For instance, starting the search for a lost dog in response to a posted reward prevents the offeror from calling off the search just as the offeree nears success. The commencement of performance, while not yet acceptance, manifests a reliance that the law protects, binding the offeror to keep the offer open for completion.

10.2 Bilateral Contracts: Conduct as the Invited Response

Bilateral contracts, involving mutual promises, more commonly feature acceptance by express words. However, conduct remains a vital mode of acceptance where the offer expressly or impliedly invites performance as the appropriate response. The key distinction lies in whether the offer requests a *promise* or the *act* itself. An offer stating “I will pay you \$5,000 to paint my house; please begin next Monday” clearly invites acceptance by the act of starting to paint, not by a preliminary “I promise to paint.” The painter’s arrival on Monday with brushes and ladders and commencement of scraping constitutes unequivocal acceptance by conduct, forming the binding bilateral contract. Contrast this with an offer stating “Will you paint my house for \$5,000? Please let me know by Friday.” Here, acceptance requires a communicated promise (“Yes, I will paint it”), though performance fulfills that promise later. Ambiguity often arises in distinguishing preparatory acts from acceptance. Ordering paint or scheduling the job is typically mere preparation, insufficient to bind the offeree. However, arriving on site and starting substantial work is almost always acceptance. The context is paramount. In *White v. Corlies & Tift* (1871), a carpenter received plans and specifications for custom millwork with instructions to start immediately. His immediate commencement of constructing the unique pieces was held to constitute acceptance by conduct of the bilateral contract, despite no express promise; the offer clearly invited performance as the mode of assent.

1.11 Modern Challenges: Technology and the Future

The nuanced distinctions between contract types, concluding Section 10, underscore that acceptance by conduct is fundamentally context-dependent. This inherent adaptability has proven crucial as the doctrine confronts its most transformative challenge yet: the relentless pace of digitalization and the emergence of technologies that reshape how parties interact and manifest assent. The silent agreement now operates within an increasingly automated, data-driven, and algorithmically mediated landscape, testing traditional legal frameworks and prompting urgent questions about consent, attribution, and fairness in the digital age.

11.1 Algorithmic and Automated Acceptance

The rise of artificial intelligence and autonomous systems introduces profound questions about agency and intent. Can actions performed by algorithms, without direct human intervention at the moment of execution, constitute legally binding acceptance? The foundational principle of the objective theory suggests the an-

swer is often yes, provided the conduct manifests assent attributable to a principal. High-frequency trading algorithms executing buy/sell orders in milliseconds based on predefined parameters clearly accept offers on behalf of their human or institutional operators. Similarly, IoT devices programmed to automatically reorder supplies when inventory dips low accept vendor offers by conduct – the transmission of the order data. The critical legal inquiry shifts from the machine’s “intent” (a nonsensical concept) to whether the conduct falls within the scope of authority delegated by the principal and whether it objectively indicates assent to the offer’s terms. Smart contracts on blockchain platforms like Ethereum represent a frontier, where code automatically executes predefined actions (e.g., releasing payment upon verified delivery confirmation) based on external data feeds (oracles). Here, acceptance and performance become inseparable automated events governed by the code itself. While efficient, this raises thorny issues: Who is liable if a bug causes unintended acceptance? How are unforeseen circumstances handled when the contract “executes” without human review? Recent proposals, such as those within the EU’s evolving AI regulatory framework, grapple with attributing legal effects to algorithmic actions, emphasizing the need for clear human oversight and audit trails to ensure the conduct truly reflects the principal’s will.

11.2 Ubiquity of Digital “Conduct”

Beyond automation, the sheer pervasiveness of digital interactions creates a vast, often ambiguous, field of potential “conduct” from which assent might be inferred. Passive data collection presents a significant challenge. Does merely browsing a website equipped with pervasive tracking cookies, continuing to use an app after a notification of updated terms pops up (without actively clicking “agree”), or allowing location services to run in the background constitute conduct signifying acceptance of privacy policies or terms of service? Companies often argue that continued use implies acceptance, as seen in cases involving Meta (Facebook), where user interactions were cited as acceptance of data usage policies. However, courts and regulators increasingly scrutinize this logic, recognizing the vast gulf between active, informed consent and passive, often unnoticed, digital existence. The line between meaningful conduct and ambient data generation blurs significantly. Consider fitness trackers silently transmitting health data to cloud servers governed by lengthy terms, or smart TVs monitoring viewing habits. Does the act of wearing the device or watching television, absent explicit affirmative action, truly manifest assent to complex legal terms governing data exploitation? The Facebook emotional contagion study controversy highlighted this tension, where user news feeds were manipulated without explicit consent, relying on terms of service arguably accepted by mere platform usage. This ubiquity demands a reevaluation of what constitutes sufficiently clear and unequivocal conduct in the digital realm, moving away from blanket “acceptance by use” towards more granular and affirmative manifestations.

****11.3 Evolving Standards for Online and**

1.12 Conclusion: Enduring Relevance and Balancing Act

The relentless evolution of digital interfaces, particularly the regulatory scrutiny of “dark patterns” that subtly manipulate user behavior and the global patchwork of standards governing app-based consent, underscores a fundamental truth illuminated throughout this exploration: acceptance by conduct remains not merely a

historical artifact or niche doctrine, but an indispensable, dynamic pillar of contract law facing unprecedented yet familiar challenges. As we conclude, it is essential to synthesize the doctrine's enduring principles, its irreplaceable role in lubricating the gears of commerce, the persistent tensions it navigates, and its secure place within the legal architecture of agreement.

Recalling the essential principles crystallizes the doctrine's core. At its foundation lies the objective theory of contracts – the law looks outward, not inward. A contract springs to life not from secret intentions, but from unequivocal actions manifesting assent to a specific offer, interpreted as a reasonable person in the offeror's position would understand them. The citizen finding a lost dog aware of a posted reward poster accepts not by declaration, but by the act of returning it; the subcontractor accepts the emailed scope and price by arriving on site and commencing work. This conduct must be consistent *only* with acceptance, not equally explainable by mere preparation or independent motives. Furthermore, this manifestation requires notice, actual or constructive, reaching the offeror to cement the bargain. Crucially, this framework stands distinct from the perilous territory of silence, which, barring narrow exceptions rooted in prior dealings or solicitation with intent, remains a shield against imposed obligations, protecting parties from the tyranny of unsolicited proposals and inertia selling tactics outlawed in jurisdictions like the EU.

The critical role of acceptance by conduct in facilitating commerce is undeniable and multifaceted. It is the silent engine driving efficiency and speed in countless transactions, from the medieval merchant loading cargo at the docks governed by *Lex Mercatoria* customs to the modern wholesaler shipping goods in response to an electronic purchase order under UCC § 2-206(1)(b). By recognizing that actions can bind, the doctrine dispenses with the impracticality and delay of requiring formal declarations for every interaction. It enables the fluid initiation of services – the plumber starts work, the architect delivers revised plans – keeping projects moving without bureaucratic paralysis. Its explicit codification in instruments like the CISG (Article 18(3)) streamlines international trade by validating performance itself as acceptance across borders. This adaptability is its strength, allowing the doctrine to seamlessly incorporate new forms of digital conduct – the click, the download, the automated shipment trigger – ensuring contract law remains relevant in an increasingly automated and high-velocity commercial ecosystem. Without this mechanism, the friction in daily transactions would be immense, stifling economic activity.

Yet, this very utility generates enduring tensions that the law perpetually strives to balance. The quest for **certainty** clashes with the need for **flexibility**. The “Battle of the Forms” under UCC § 2-207 exemplifies this perfectly: while the “knockout rule” aims for flexible fairness by discarding conflicting boilerplate terms after performance-based contract formation, it inherently introduces uncertainty about the final governing terms, a trade-off courts constantly navigate. Similarly, the core requirement for “unequivocal conduct” demands contextual interpretation, leaving room for dispute – was ordering materials preparation or acceptance? Did partial payment signal assent to new terms? **Protecting vulnerable parties** also perpetually challenges the **enforcement of bargains**. The potential for overreaching, especially in digital contexts where terms are buried and “acceptance by use” is claimed for passive data collection, fuels legitimate consumer protection concerns, as seen in the backlash against Meta's data practices and the Cambridge Analytica scandal. Regulators grapple with defining when digital conduct truly manifests informed consent versus mere inertia, pushing back against overly broad claims of acceptance implied by mere continued existence on a

platform. The tension between enabling efficient business models and safeguarding individual autonomy remains acute.

**Despite these challenges, the doctrine