

AGREEMENT

- **Agreement:** Mutual assent to a contract's essential terms, voluntarily manifested through *offer* and *acceptance*.

- **Offer:** An offeror's promise or commitment to perform or refrain from performing some specified act presently or in the future.
 - The offeror must seriously **intend** to perform or refrain as offered.
 - The offer's terms must be **reasonably certain**.
 - The offeror (or his agent) must **communicate** the offer to the offeree (or her agent).

- **Acceptance:** An offeree's statement or act indicating her assent to the offer's terms.
 - The acceptance must be **unequivocal** and the offeree generally must **communicate** it to the offeror.
 - A third party (other than the offeree's agent) cannot accept an offer made solely to someone else.

INTENT TO OFFER

- A variety of common statements generally are not offers, including:
 - expressions of **opinion**;
 - statements of **intent**;
 - preliminary **negotiations**;
 - **auctions** and other **invitations** to bid, negotiate, or contract, including most forms of **advertisement**; and
 - **agreements to agree** to one or more material contract terms or conditions at some later date.

DEFINITENESS

- Generally, an offer must express the following terms, or they must be reasonably inferred from it:
 - (1) the offeror's and offeree's **identities**;
 - (2) the **object or subject matter** of the offer (*e.g.*, quantity of goods, work to be performed, specific identity of unique goods, etc.);
 - (3) the **consideration** due; and
 - (4) the **time** of payment, delivery, or performance.
- An otherwise indefinite offer may invite an offeree to express her acceptance in such a way that the acceptance will make the resulting agreement definite.
- A court may supply or clarify a missing or indefinite term if the parties have clearly manifested their intent to agree.
 - However, if the parties clearly *failed to agree* (as distinct from having *not agreed*) on a particular term, a court generally will not supply a reasonable term in its stead.

REVOKING AN OFFER

- **Revocation:** An offeror may withdraw his offer by **communicating** the revocation to the offeree at any time **before** the offeree accepts.

- Unless an offer is *irrevocable*, the offeror may revoke an unaccepted offer **without liability**.

- Examples of **irrevocable offers**:
 - offers on which the offeree has **justifiably relied** to her detriment (a.k.a. *promissory estoppel*);

 - **firm offers** for the sale or purchase of goods made by a merchant and subject to the provisions of the Uniform Commercial Code (“UCC”); and

 - **option contracts**, under which the offeror, in exchange for valuable consideration from the offeree, cannot revoke her offer for a stipulated time period during which the offeree has the sole right of acceptance.

 - The offeree must give the offeror consideration *for the option* to make the option binding and the offer irrevocable.

REJECTION AND COUNTEROFFER

- **Rejection:** The offeree may reject the offer, in which case the offer terminates when the offeror receives notice of the rejection.
 - Any subsequent attempt by the offeree to accept will be construed as a new offer, which the original offeror is free to accept or reject.
 - Rejection is ordinarily accomplished by **words or conduct** evidencing the offeree's intent not to accept.
 - To be effective, the offeror must **receive** the rejection **prior** to any contrary writing or conduct evidencing acceptance by the offeree.
- **Counteroffer:** The offeree's rejection of the original offer, coupled with the original offeree's new offer to the original offeror.
 - **“Mirror Image” Rule:** An offeree's acceptance must match the offeror's offer exactly. If the offeree's acceptance non-trivially changes, adds to, or deletes any terms in the original offer, it is treated as a counteroffer, rather than an acceptance.

TERMINATION BY LAW

- **Lapse of Time:** An offer terminates automatically when the time period specified in the offer expires.
 - If no time period is stated in the terms of the offer, then the offer will terminate after a *reasonable* period of time has expired.
- **Destruction of Subject Matter:** An offer terminates automatically if the subject matter of the contract (*i.e.*, goods, property) is destroyed prior to acceptance.
- **Death or Incompetence:** An offeree's power to accept is terminated when the offeree or the offeror dies or is deprived of legal capacity to enter into the contract, **unless** the offer is irrevocable, in which case only the offeree's death or incompetence will terminate the offer.
- **Supervening Illegality:** A statute or court action that makes a previously valid offer illegal will automatically terminate the offer.

ACCEPTANCE BY SILENCE

- **Acceptance by Silence:** Generally, silence (or inaction) cannot constitute acceptance – even when the offeror indicates that silence or inaction will be taken as acceptance. There are exceptions:
 - **Acts Consistent with Acceptance:** If the offeree, despite having an opportunity to reject, takes the benefit of offered goods or services, he is implied to have accepted the goods or services and agreed to compensate the offeror according to the terms of the offer.
 - **Prior Dealings:** If the offeror and offeree have prior dealings, pursuant to certain standard terms and conditions, the offeree has the **duty** to reject or risk being bound by his silence.
 - **Unilateral Contract:** Because a unilateral contract requires acceptance by some action on the part of the offeree, acceptance is usually evidenced by the action; and, therefore, notification is unnecessary – **unless** the offeror has specifically requested notification or has no means to determine whether the requested act has been performed.

COMMUNICATING ACCEPTANCE

- **The “Mailbox Rule”:** Unlike a rejection or counteroffer, which takes effect when the offeror receives it, an acceptance generally takes effect when the offeree properly **dispatches** it to the offeror
 - by any means the offer expressly authorizes; or
 - by any means that is **as fast as or faster** than the slowest method the offer expressly authorizes or by **U.S. Mail**, unless the offer’s terms expressly prohibit the offeree from accepting using a particular means.
- **Exceptions:** Unless the offer expressly states otherwise, an acceptance cannot take effect until the offeror receives it if
 - (1) the offeror **conditioned** his offer **on receiving** the offeree’s acceptance;
 - (2) the offeree **improperly dispatched** her acceptance;
 - (3) the offeree communicated her acceptance using an **unauthorized** (but not expressly prohibited) **means**; or
 - (4) the offeree dispatched her acceptance **after** dispatching a **rejection** or **counteroffer** (but the offeror received the acceptance first).

E-CONTRACT FORMATION

- A contract formed electronically must meet the same requirements (except as to form) as a traditional contract.
- An online offer to form a contract should **clearly** and **conspicuously** state:
 - (1) whether the offer is to **sell, lease, or license**,
 - (2) how the offeree may **accept**,
 - (3) how and how much the offeree may **pay**, including applicable taxes and shipping costs,
 - (4) the offeror's **return and refund** policy (if applicable),
 - (5) any **liability disclaimers or limitations**,
 - (6) the offeree's **remedies** (and limits thereon), and
 - (7) how the offeror will handle **information** it gathers, or the offeree provides, before and after acceptance.
- **Pre-Dispute Planning:** The offeror may also want to include provisions addressing **governing law, choice of forum, and alternative dispute resolution**.

ONLINE ACCEPTANCES

- **Click-On Agreement:** An agreement that arises when a buyer/lessee/licensee completing a transaction online indicates her assent to be bound by the terms of an offer by clicking on a button or checking a box that says, *e.g.*, “I accept” or “I agree.” The terms of the agreement may appear on the screen or on a related Web page or site.

- **Browse-Wrap Agreement:** Terms and conditions of use presented to an Internet user at the time she is using or downloading a product, to which she need not actively assent before she can use or download the product.

- Courts are less receptive to browse-wrap agreements than to click-on agreements because browse-wrap agreements do not require that the offeree manifest assent to its terms.

SHRINK-WRAP AGREEMENTS

- **Shrink-Wrap Agreement:** An agreement whose terms are expressed inside the box containing the goods, such that an offeree cannot make herself fully aware of the terms of her purchase until after she has purchased/leased the goods and opened the box.

- Typically, shrink-wrap agreements indicate that the offeree must return the goods if she does not consent to be bound by the contract/license terms inside the box.

- Courts are generally receptive to shrink-wrap terms
 - (1) if the offeror presents the terms **before the offeree has accepted**,

 - (2) particularly where the **exterior of the box** or some **other information** provided to the offeree before she completes acceptance **clearly indicates** that the purchase/lease/license is **subject to additional terms** contained in the box or to be delivered with the goods, and

 - (3) the offeror gives the offeree **adequate time to review** the terms, **inspect** the goods, **and decide** whether to keep them and be bound.

ELECTRONIC SIGNATURES

- In many instances, a contract is unenforceable unless there is some writing, signed by the party against whom enforcement is sought, evidencing the contract. But, what does “signed” mean when a contract is formed electronically?
- **E-Signature:** An electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.
- **Digitized Signature:** A graphical image of a handwritten signature, created by using a digital pen and pad and specialized software.
- **Signature Dynamic:** An encrypted *biometric token* that allows a recipient to compare a signature created with a stylus and an electronic digitizer pad to a stored exemplar.
- **Digital Signature:** An *asymmetric cryptosystem* that creates a digital signature using two different “keys” – one of which is private to the signer, and the other of which may be used by a recipient, with the aid of a third party *cybernotary*, to verify the source of the digital signature.

PARTNERING AGREEMENTS

- **Partnering Agreement:** An agreement between a seller and a buyer who frequently do business with each other on the terms and conditions that will apply to all subsequently formed electronic contracts.
- The partnering agreement can also establish special **access** and **identification codes** to reduce the risk of fraud or other unauthorized activity.

UETA AND E-SIGN

- **Uniform Electronic Transactions Act (UETA):** Model state law – enacted by 47 states and D.C. – recognizing the validity of electronic contracts, records, signatures, and notarization.
 - UETA only applies if all parties to a transaction have explicitly or impliedly **agreed to** conduct the transaction **using electronic means**.
 - UETA provides statutory rules governing *attribution*, the effects of procedural and substantive **errors** in an electronic record, and the **effective time** for sending and receiving electronic records relating to a transaction.
 - UETA recognizes encrypted digital signatures, names (intended as signatures) at the end of e-mail messages, and clicks on a Web page intended to identify the person making the click.
- **Electronic Signatures in Global and National Commerce Act (E-SIGN):** Federal statute recognizing the validity of electronic contracts, records, and signatures.
 - By its terms, E-SIGN yields to UETA if the state whose law governs a contract has enacted UETA.