AGREEMENT

- An agreement is:

  A meeting of two or more minds in regard to the terms of a contract.

- The process of agreement usually involves two steps:

  1) **Offer:** A promise or commitment to perform or refrain from performing some specified future act made by the *offeror*; and

  2) **Acceptance:** A voluntary act by the *offeree* -- either in the form of words or of conduct -- which indicates agreement to the terms of the offer.

  - The acceptance must be *unequivocal* and must be *communicated* to the offeror.

  - The acceptance must be made *by the offeree* -- a third party generally cannot substitute for the offeree and effectively accept the offer.
REQUIREMENTS OF AN OFFER

Three elements are required for an offer to be effective:

(1) Serious, objective intent, on the part of the Offeror, to perform or refrain as offered;

(2) The terms of the offer must be reasonably certain or definite; and

(3) The offer must be communicated to the offeree.

What common statements related to business transactions are not offers? Here are some examples:

Expressions of opinion;

Preliminary negotiations;

Auctions and other invitations to bid, negotiate, and/or contract including most forms of advertisement; and

Agreements to Agree to one or more material contract terms or conditions at some later day.
TERMINATION OF THE OFFER - PART I

The communication of an effective offer gives the offeree the power to transform the offer into a binding legal agreement, or contract, subject to the following acts of the parties:

- **Revocation:** The withdrawal of an offer by the offeror, communicated to the offeree prior to the offeree’s acceptance.

- Unless an offer is **irrevocable**, the offeror may revoke any offer not yet accepted at any time without liability. Examples of offers generally deemed to be irrevocable include:
  - “**Firm offers**” for the sale of goods made by a merchant and subject to the provisions of the Uniform Commercial Code; and
  - **Option contracts**, under which the offeror cannot revoke his or her offer for a stipulated time period during which the offeree has the sole right of acceptance.

(Note: The offeree must give the offeror **valuable consideration** in order to make the option contract irrevocable.)
Rejection: The terms of the offer may be rejected by the offeree, in which case the offer terminates.

Any subsequent attempt by the offeree to “accept” will be construed as a new offer, which the original offeror may accept.

Rejection is ordinarily accomplished by words or by conduct evidencing intent not to accept.

To be effective, the rejection must be received by the offeror prior to any contrary writing or conduct evidencing acceptance by the offeree.

Counteroffer: A rejection by the offeree of the original offer, coupled with a new offer made by the original offeree to the original offeror.

“Mirror Image” Rule: Prior to the adoption of the Uniform Commercial Code, an offeree’s acceptance was required to match the offeror’s offer exactly. If the offeree’s acceptance materially changed, added to, or deleted any terms in the original offer, the offeree’s acts were deemed to constitute a counteroffer, not an acceptance.
TERMINATION OF THE OFFER - PART III

- An offer may also terminate by operation of law if any of the following occur:

- **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.

- **Illegality:** A statute or court action that makes a previously valid offer illegal will automatically terminate the offer.
COMMUNICATING ACCEPTANCE

- When the offeror and offeree cannot or chose not to deal face to face, acceptance is effective when communicated by the offeree to the offeror by an authorized means.

- The “Mailbox Rule”: An acceptance becomes effective upon being placed in the mailbox by the offeree.

- Note that, whereas a revocation becomes effective upon its receipt by the offeree, an acceptance becomes effective upon its dispatch by the offeree to the offeror.

- In addition to any modes of acceptance expressly stated in the offer, common law recognizes the following impliedly authorized methods:

  1. Any means that is as fast or faster than the method identified as acceptable by the offeror; and

  2. U.S. Mail is always impliedly acceptable when the parties are bargaining at a distance.

  Note: An acceptance communicated by means not expressly or impliedly authorized is not effective until it is received by the offeror.
**ACCEPTANCE BY SILENCE**

- **Acceptance by Silence:** Generally speaking, 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 or she 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 or her 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(s) has/ have been performed.
ELEMENTS OF CONSIDERATION

Consideration, which must be given in order to make a contract legally binding, is *legally sufficient and bargained-for value*, given by the promisor in return for the promisee performing or refraining from performing some act which results in a detriment to the promisee and/or a benefit to the promisor.

Legally Sufficient Value may be established by:

1. **promising** to do something that the promisor has no prior legal duty to do (e.g., promising to pay money for the promisor’s goods);

2. **performing** an action that the promisor is not otherwise obligated to undertake; or

3. **refraining** from exercising a legal right, which the promisor is otherwise entitled to exercise.

In a bargained-for exchange, the consideration given by the promisor *must induce the promisee* to incur a legal detriment and/or provide a legal benefit to the promisor, either or both of which are *sufficient to induce the promisor* to make the promise.
INSUFFICIENT CONSIDERATION

- **Pre-Existing Legal Duty:** Under most circumstances, a promise to do (or refrain from doing) what one already has a legal duty to do (or refrain from doing) does not constitute legally sufficient consideration.

- A commonly recognized exception to the foregoing rule is the so-called “unforeseen difficulties” doctrine, which permits an existing contract to be modified to account for unforeseen difficulties that arise during the course of performance.

- **Past Consideration:** Promises made in return for acts or events that have already taken place are unenforceable for lack of sufficient consideration.

- **Illusory Promises:** If the terms of a contract call for performance in such uncertain terms that the promisor has not definitely promised to do (or refrain from doing) anything, the promise is unenforceable for lack of sufficient consideration.
RESCISSION AND NOVATION

- The unmaking of an existing contract and making of a new contract between the same parties (e.g., to account for unforeseen difficulties) are known, respectively, as *rescission* and *novation*.

- **Rescission:** Canceling an existing contract, and returning the parties to their pre-contract states.

- **Novation:** Replacing an existing contract with a new, superseding contract between the same parties.
ACCORD AND SATISFACTION

- **Accord and Satisfaction:** An agreement between an obligor (debtor) and obligee (creditor), by which the obligor agrees to pay the obligee some amount owed under the contract (generally less than the amount in dispute) in exchange for a discharge of all obligations owed by the obligor to the obligee.

- For accord and satisfaction to occur, the amount of the obligor’s debt to the obligee must be **in dispute**, or **unliquidated**.

- **Liquidated/Undisputed Debt:** A debt whose amount has been ascertained, fixed, agreed on, settled, or exactly determined.

- **Unliquidated/Disputed Debt:** A debt whose amount is in dispute by reasonable persons.
RELEASES AND COVENANTS NOT TO SUE

- **Release:** An agreement whereby one party forfeits its rights to pursue a legal claim against another party.

- Releases are generally binding if they are:

  1. given in **good faith**,
  2. stated in **writing**, and
  3. accompanied by **consideration**.

- **Covenant Not to Sue:** An agreement to substitute a contractual obligation for some other type of legal action based on a valid claim.
Promissory Estoppel: When a promisor makes a clear and definite promise on which the promisee justifiably relies, the promisor is bound by the promise, even if it was insufficient to form the basis of a valid, legally binding contract.

For the doctrine of promissory estoppel to be applied, the following elements must be established:

1. the promise was clear and definite;
2. the promisee justifiably relied on the promise;
3. the promisee’s reliance was substantial and of a definite character; and
4. enforcing the promise will serve the best interests of justice.