Comparative Private Law

Formation of Contracts
Herman Bruserud

- Cand. jur. 2002 (UiO), Ph.D 2010 (UiO) on thesis on contract law
- Associate lawyer in the law firm Haavind AS August 2002 – May 2004
- Research fellow at UiO May 2004 – September 2008
- Senior adviser in the Legislation Department in The Ministry of Justice October 2011 – August 2012
- Associate professor at IfP (UiO) – August 2012
Case Based – Different Legal “Systems”

- Norwegian Law
- German Law
- Italian Law
- English Law
- CISG
- UNIDROIT
- PECL
- CESL
Timeline – Written Amendment

- Contract between Constructor and Sub-Contractor – installation of infrastructure
- The Sub-Contractor requires an amendment to the contract
- A written amendment to the contract is made – the price is increased
- Constructor finds another party – shorter time + not much higher price than the original price

Is the amendment binding, or has the constructor some possibility to avoid enforcement?
Constructor wants to participate in a tender

Sub-Contractor sends offer to the Constructor – can not be revoked before a specific date

Sub-Contractor revokes his offer before the specific date

Contractor is awarded the contract and wants to accept the Sub-Contractor’s offer

Can the Sub-Contractor revoke its offer before the fixed term has elapsed?
Timeline – Modified Acceptance

Seller and Buyer agrees on a purchase of certain goods on the phone

Seller send confirmation of the terms, specifying that the goods are to be shipped on a ship at the Seller’s discretion

Buyer sends an acceptance, but requests that the ship is of a certain nationality – no reply from Seller

Time of agreed shipment: Seller has shortage of goods, and decides to consider the contract as not concluded

Has the contract come into existence in spite of the non-confirming acceptance?
Timeline – Battle of the Forms

Seller and Buyer agree on a purchase of a certain volume of certain goods on the phone – nothing said about modalities of the delivery

Seller transmits confirmation on pre-printed general conditions

Buyer confirms on its pre-printed general conditions

Contradicting

Agreed time of delivery: Seller has not the whole volume of goods available – increased demand

Buyer claims reimbursement of damages
Seller claims principally no binding contract, secondary limitation of liability

Has there been concluded a contract, and if it has on what terms?
Timeline – Break-off of Negotiations

Car Producer and Component Producer starts negotiating for joint production of a new car-structure

Detailed negotiations over several months – two teams of experts involved – MoUs to be presented to legal departments and transformed into contract to be signed by management

Shortly before work on first MoU starts: Car Producer is approached by another Component Producer – parallel negotiations (without informing the first Component Producer)

Before last MoU is finalized: Agreement on exclusive negotiations with the last Component Producer – breaks off negotiations with first Component Producer

Is the Car Producer entitled to (without liability) break off negotiations with the first Component Producer?
Formation of Contracts – Norwegian law

• Basis: Act on Formation of Contracts and judicial practice

• Starting point – corresponding offer and acceptance ("mirror image"), not conforming acceptance amounts to a rejection + a counter-offer
  – Not conforming acceptance might – in exceptional cases – have the same effect as a conforming acceptance

• No form requirements
Formation of Contracts – Norwegian law

• An offer is binding on the offeror from the moment the offeree has obtained knowledge of it
• Time limit to accept offer
• No specific rule on “battle of forms”
• Contract conclusion beyond the strict offer / acceptance-model – “main terms”-test
• Duty of loyalty and duty of good faith during negotiations (and beyond)
Formation of Contracts – German Law

• Bürgerliche Gesetzbuch (BGB) §§ 145 ff.
• Starting point – corresponding offer and acceptance (“mirror image”), not corresponding would amount to a rejection + a counter-offer
  – Exception: “inessential” term
• No formal requirements
Formation of Contracts – German Law

• An offer is binding on the offeror from the moment the offeree has obtained knowledge of it – effect may be excluded in the “offer”

• “Open lack of agreement” (“offener Eingungsmangel”)
  – Doubts on the existence of agreement – no agreement
  – Doubts on the existence of agreement excluded – “knock out theory” – governing law
Formation of Contracts – German Law

• No conclusion of contract if agreement has not been reached on all points that have been the object of negotiations
• Duty of loyalty and duty of good faith during negotiations
Formation of Contracts – Italian Law

• Basis: Codice Civile
• Requirements for a contract to be considered binding:
  – Agreement
    • Exchange of corresponding offer and acceptance – an offer is revocable until it has been accepted
    • The acceptance must confirm the offer ((strict) mirror image), not corresponding would amount to a rejection + a counter-offer
Formation of Contracts – Italian Law

– Causa
  • Social-economic function (not violate mandatory rules or public policy)

– Object
  • Must be possible, legal, determined or determinable

– Form
  • Written form requirements mainly applies to contracts relating to real estate
Formation of Contracts – Italian Law

• No specific rule on “battle of forms”, but performance may be deemed as an acceptance (“last shot”-rule)
• Certain duties of loyalty during negotiations
Formation of Contracts – English Law

• Basis: Judicial practice
• Starting point – corresponding offer and acceptance (“mirror image”) + consideration
• Consideration
  – A contract must oblige both parties – reciprocal benefits and detriments
  – A benefit or detriment may be merely practical
Formation of Contracts – English Law

- Consideration (cont.)
  - Remedy of promissory estoppel – clear and unequivocal promise, inequitable to go back on the promise, the promisee must have relied in the promise
  - Does also apply to irrevocability of an offer
Formation of Contracts – English Law

• An offer may be revoked until it has been accepted
• Starting point – corresponding offer and acceptance (“mirror image”) – not corresponding would amount to a rejection + a counter-offer
Formation of Contracts – English Law

• Rather strict application of the “mirror image”-rule to situations of “battle of the forms”
• No general duty of loyalty during negotiations – fraudulent misrepresentations
Formation of Contracts – CISG

- Formation of contracts – CISG part II
  - The Scandinavian Countries opted out of CISG part II, but are now in the process of opting in
- Between a civil law tradition and a common law tradition
- Starting point – corresponding offer and acceptance ("mirror image") – not corresponding would amount to a rejection + a counter-offer
Formation of Contracts – CISG

- Starting point – corresponding offer and acceptance ("mirror image") – not corresponding would amount to a rejection + a counter-offer (cont.)
  - Immaterial modifications – the offeror must object
  - Non-exhaustive list of terms which are considered material
    - Also applies to amendments to existing contracts
Formation of Contracts – CISG

• An offer may be revoked until accepted
  – Exceptions
    • Indicates that it is irrevocable
    • The offeror has reasonably acted on reliance that the offer was irrevocable
Formation of Contracts – CISG

• No specific regulation for “battle of the forms”
• No rules on pre-contractual liability – governing law?
  – What about lex mercatoria?
  – The question was on the table during the negotiation of CISG
Formation of Contracts – UNIDROIT

- Very similar to CISG on formation of contracts
- Differences
  - No list of “material terms”
  - Specific rule on “battle of the forms” – “knock out theory”
    - Agreed terms and any general conditions that might be common in substance
  - Rule on good faith during negotiations
Formation of Contracts – PECL

• Very similar to UNIDROIT on formation of contracts
Formation of Contracts – CESL

• Starting point – corresponding offer and acceptance ("mirror image") – not corresponding would amount to a rejection + a counter-offer
  – Immaterial modifications – the offeror must object
  • Non-exhaustive list of terms which are considered material
Formation of Contracts – CESL

• An offer may be revoked until accepted
  – Exceptions
    • Indicates that it is irrevocable
    • The offer states a fixed time period for its acceptance
    • The offeror has reasonably acted on reliance that the offer was irrevocable
Formation of Contracts – CESL

• Conflicting standard contract terms
  • Does not exclude the conclusion of a contract
    – Unless a party in advance has indicated an intention not to be bound by a contract to that extent, or informs the other party of such an intent without undue delay
  • Terms as far as they are common in content
Formation of Contracts – CESL

• General duty to act in accordance with good faith and fair dealing
Timeline – Written Amendment

Contract between Constructor and Sub-Contractor – installation of infrastructure

The Sub-Contractor requires an amendment to the contract

A written amendment to the contract is made – the price is increased

Constructor finds another party – shorter time + not much higher price than the original price

Is the amendment binding, or has the constructor some possibility to avoid enforcement?
Written Amendment

• Norwegian law
• German law
• Italian law
• English law
• CISG
• UNIDROIT
• PECL
• CESL
Constructor wants to participate in a tender

Sub-Contractor sends offer to the Constructor – can not be revoked before a specific date

Sub-Contractor revokes his offer before the specific date

Contractor is awarded the contract and wants to accept the Sub-Contractor’s offer

Can the Sub-Contractor revoke its offer before the fixed term has elapsed?
Irrevocable Offer

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL
Timeline – Modified Acceptance

- Seller and Buyer agrees on a purchase of certain goods on the phone
- Seller send confirmation of the terms, specifying that the goods are to be shipped on a ship at the Seller’s discretion
- Buyer sends an acceptance, but requests that the ship is of a certain nationality – no reply from Seller

Time of agreed shipment: Seller has shortage of goods, and decides to consider the contract as not concluded

Has the contract come into existence in spite of the non-confirming acceptance?
Modified Acceptance

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL
Timeline – Battle of the Forms

Seller and Buyer agrees on a purchase of a certain volume of certain goods on the phone – nothing said about modalities of the delivery

Seller transmits confirmation on pre-printed general conditions

Buyer confirms on its pre-printed general conditions

Contradicting

Agreed time of delivery: Seller has not the whole volume of goods available – increased demand

Buyer claims reimbursement of damages
Seller claims principally no binding contract, secondary limitation of liability

Has there been concluded a contract, and if it has on what terms?
Battle of the Forms

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL
**Timeline – Break-off of Negotiations**

- **Car Producer and Component Producer**: starts negotiating for joint production of a new car-structure.
- **Detailed negotiations over several months** – two teams of experts involved – MoUs to be presented to legal departments and transformed into contract to be signed by management.
- **Shortly before work on first MoU starts**:
  - Car Producer is approached by another Component Producer – parallel negotiations (without informing the first Component Producer).

**Before last MoU is finalized**: Agreement on exclusive negotiations with the last Component Producer – breaks off negotiations with first Component producer.

---

Is the Car Producer entitled to (without liability) break off negotiations with the first Component Producer?
Break-off of Negotiations

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL