

UiO Department of Private Law University of Oslo

Comparative Private Law, October 9th 2013

#### **Formation of Contracts**



# Case Based – Different Legal "Systems"

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

#### **Timeline – Written Amendment**

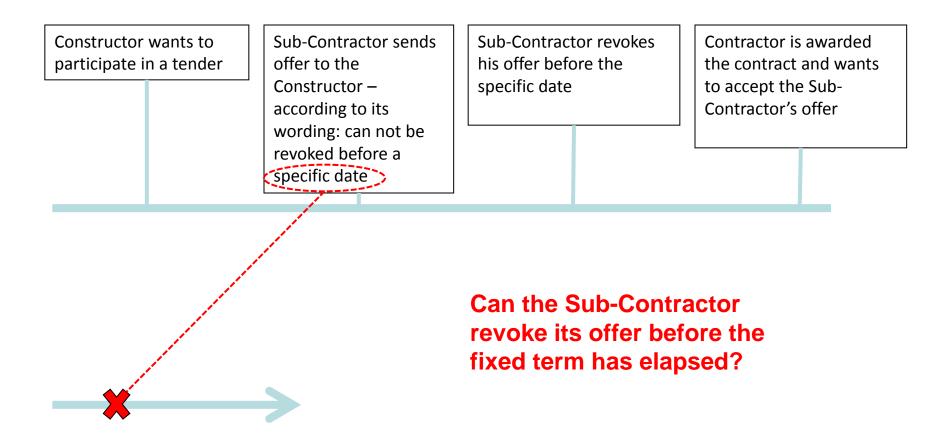
Contract between Constructor and Sub-Contractor – installation of infrastructure The Sub-Contractor requires an amendment to the contract because of miscalculation

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.
Wants to revoke the amendment

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

#### Timeline – Irrevocable Offer



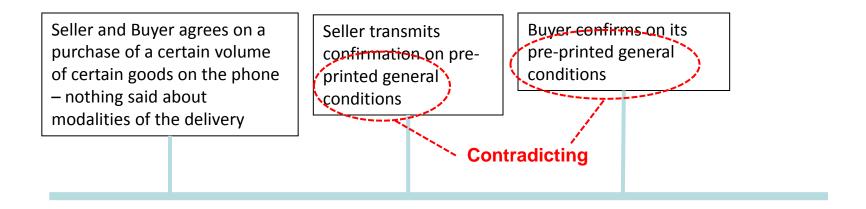
# **Timeline – Modified Acceptance**

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



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

Buyer claims reimbursement of damages.
Seller claims principally no

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 carstructure 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 (without liability) to 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

- Basis: Case law
- 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

- 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

- 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

- Rather strict application of the "mirror image"rule to situations of "battle of the forms"
- No general duty of loyalty during negotiations
  - but fraudulent misrepresentations

- 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

- 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

- An offer may be revoked until accepted
  - Exceptions
    - Indicates that it is irrevocable, or
    - The offeror has reasonably acted on reliance that the offer was irrevocable

- 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

Very similar to UNIDROIT on formation of contracts

- 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

- 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

- 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

 General duty to act in accordance with good faith and fair dealing

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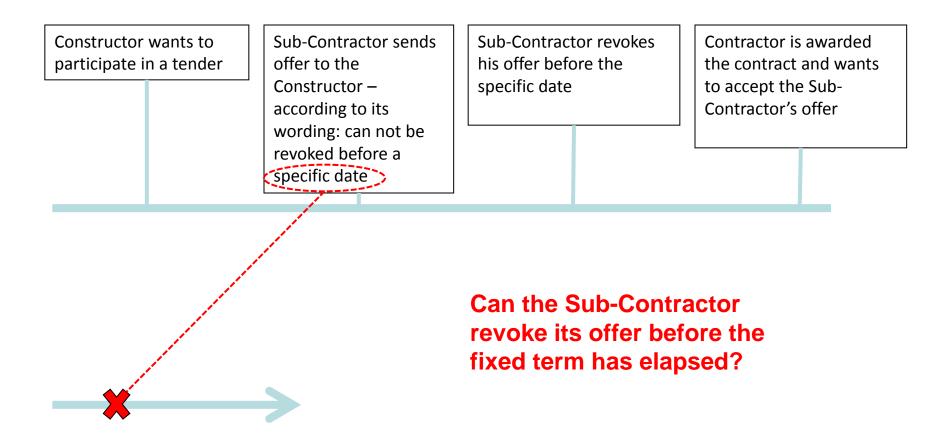
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## **Written Amendment**

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#### Timeline – Irrevocable Offer



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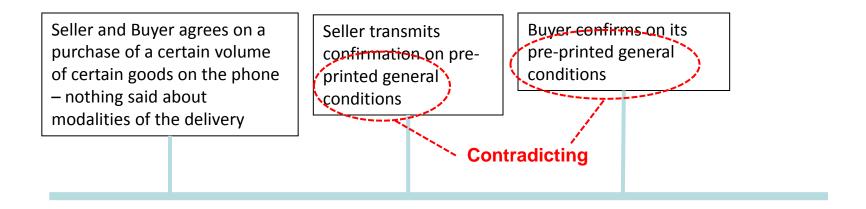
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