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Formation of Contracts: The Law in Norway

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Formation of Contracts: The Law in Norway

*Daniel A. Nye**

Table of Contents**

I. Preliminary Materials 189
A-1. General Introduction 189
B-1. Introduction to the Norwegian Report 190
I. Comment on the Norwegian Legal System . 190
II. The Promise Principle 193
III. The Concept of *Fordring* 197
II. Report on Norway 198
A. Offer 198
A-1. Offer of Invitation to Deal 198
I. Distinction Recognized 198
II. Clear Proposals 199
III. Unclear Proposals 199
IV. Special Rules for Particular Situations 201
A-2. Sales at Auction 202
I. General Rules 202
II. Request for Bids and Tenders 202
A-3. Definiteness of Terms 203
I. Scope 203
II. Two Situations Distinguished 203
III. Offer Not Referring to a Gap-Filling Device 203
IV. Offer Referring to a Gap-Filling Device 204
V. Section 32 of Norwegian Contract Code 205
A-4. Offers Calling for a Promise and Offers Calling for an Act 206
A-5. Offer for One Entire Contract or for Several Contracts 206

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** This Table of Contents is modelled after that used in the Schlesinger Report.

A-6. Parties to Contract: Complete or Partial Identity of Offeror and Offeree 206
A-7. Offers to the Public 207
A-8. Communication of the Offer 208
I. Communication of Offer Necessary 208
II. Identical Cross-Offers 210
A-9. When Offer Becomes Effective 210
I. Offers Made to Public at Large 210
II. Oral Offers Made to Ascertained Persons ... 210
III. Offers Made Inter Absentes to Ascertained Persons 210
IV. Pertinent Provisions in the Offer 213
A-10. Revocable and Irrevocable Offers 213
I. Preliminary Observations 213
II. Revocation of Offers 214
A-11. Is Communication of Revocation Necessary? 216
I. Revocation: Distinction between Offers to Specified Persons and to the General Public 216
II. Importance of the Problem 216
III. Revocation of Offers Made to Specified Persons 216
IV. Revocation of "Offers" Made to the Public . 218
A-12. When Does Revocation Become Effective? 218
I. General Rules 218
II. Time of Withdrawal of Revocation 219
A-13. Termination of Offer by Death or Insanity 220
B. Acceptance 221
B-1. Who May Accept an Offer—Assignability of Offers 221
I. General Observations 221
II. Assignability by Assent 222
III. Nonassignability by Agreement 222
B-2. Qualified or Unqualified Acceptance? 222
I. General Rule 222
II. Valid Acceptance Despite Seeming Variance 223
III. Additions That do Not Make the Acceptance Ineffective 224
B-3. Rejection and Return Offers 226
I. Legal Nature of Rejection 226
II. The Legal Effect of Rejection 228
III. Time When Rejection Becomes Effective ... 228
B-4. Acceptance or Acknowledgement of Receipt of Offer 228
B-5. Acceptance by Silence 229

I. General Rule 229
II. Exceptions to the General Rule 230
B-6. Acceptance by Performance 234
I. Preliminary Observations 234
II. Performance as Acceptance 235
B-7. Is Communication of Acceptance Necessary? 237
I. General Principle 237
II. Exceptions 237
B-8. Means of Declaring and Communicating Acceptance 238
I. The Nature of the Problem 238
II. Clear Stipulation in the Offer 238
III. Unclear Stipulation in the Offer 238
IV. No Stipulation in the Offer 238
V. Legal Requirements of Form 239
VI. Consequence of Improperly Communicated Acceptance 239
B-9. When Acceptance Becomes Effective 239
I. Statement of the Basic Rule 239
II. What Constitutes Reception? 240
III. Revocation of Acceptance 241
B-10. Time Limit for Acceptance 242
I. Express Time Limit for Acceptance 242
II. Implied Time Limit for Acceptance 243
B-11. Late Acceptance 244
C. Other Problems Concerning Conclusion of Contracts 245
C-1. Manifestation of Assent without Identifiable Sequence of Offer and Acceptance 245
C-2. Agreements Contemplating a Writing or Other Formality 245
I. Scope of this Article 245
II. Types of Form Agreements 246
III. Constitutive Formality 246
IV. Non-Constitutive Formality 246
V. Formality not Clearly Constitutive or Non-Constitutive 246
VI. Waiver 247
D. Summary 247

I. Preliminary Materials

A-1. General Introduction

This Article examines the Norwegian law of contract formation and is modelled on a study conducted under the auspices of the General Principles of Law Project of the Cornell Law School concerning the law of contract formation as it exists in various nations. The re-

sults of the study are contained in a report edited by Rudolf B. Schlesinger (the Report).[1] This Article follows the Schlesinger scheme as closely as possible, and seeks to explore the same areas and ask the same questions as that scheme, so that a reader might more easily compare Norwegian law to the legal systems examined in the Report. The challenge to undertake this task is expressly raised by the Schlesinger Report itself.

The Report does not purport to cover all systems of contract law; Schlesinger acknowledges this in his introduction.[2] The Report questions the significance of its results with regard to legal systems not covered. The Report contends that almost every legal system in the world is more or less closely related to one of the systems covered in the Report, but, Schlesinger emphasizes, this hypothesis must be tested by "re-check[ing the Report's conclusions] against the law of a particular country."[3] He notes that the Italian, Polish, and Australian-Canadian-New Zealand "Annotations" contained in the Report are the product of such re-checking, and sends forth the challenge that inspired this Article:

> Such re-checking should be particularly interesting with respect to the Scandinavian systems, which present original solutions on some of the controversial problems in this area (and which, but for budgetary limitations, would have been covered in the course of the present Study).[4]

B-1. Introduction to the Norwegian Report

I. Comment on the Norwegian Legal System with Particular Reference to the Law of Contracts

The basic principle of Norwegian contract law is that citizens can regulate their own economic affairs through contract. Norwegian contract law has abandoned all requirements of formality and parties may today make a contract in any way that they find mutually agreeable. Parties may avail themselves of the Norwegian courts to enforce

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[1] R.B. SCHLESINGER, FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (1968) [hereinafter SCHLESINGER]. The Schlesinger study has two main components. The first, the General Report, is actually the *raison d'être* of the study. It summarizes the findings and draws a number of conclusions as to the general areas of agreement found among the various systems studied. The second portion is composed of a series of so-called *National Reports*. Here, major topics of contract formation are discussed in turn. Each nation or group of nations participating in the study describes in turn its own law with regard to each topic. The various topics are grouped under one of three headings: (a) offer, (b) acceptance, and (c) other problems concerning conclusion of contracts.

[2] *Id.* at 29. The following reports or annotations appear: American Report, Communist Legal Systems Annotation, English Report, Australian-Canadian-New Zealand Annotation, French Report, German-Swiss Report (with Austrian Annotations), Indian Report, Italian Report, Polish Annotation, and South African Report.

[3] *Id.* at 30.

[4] *Id.* at 30 n.36.

the rights and duties arising from a valid contract. The basic principles of contract law have long been recognized in Norway. A fundamental rule has been codified since 1687: "Enhver er pligtigt at efterkomme hvis hand med Mund, Haand og Segl lovet og indgaaet haver." (Each [person] is duty-bound to abide by [that] which he by mouth, hand, and seal has entered into and promised.)[5] The bulk of Norwegian contract law had its genesis in case law and custom. Eventually the most important rules were compiled and codified by the Norwegian Contract Code, *Avtaleloven.*[6] Although most of its provisions are in conformity with previous case law and custom, some of its sections represent what were wholly new trends of legal thought at the time of its adoption in 1918.[7] The Code is not an attempt to exhaustively regulate the questions that arise regarding treatment of the areas it covers. In modern Norway many important rules have developed in case law and legal scholarship that now supplement the Code. The rules in the Code were originally intended to be part of the Commercial Code and therefore reflect turn-of-the-century commercial conditions. Norwegian law recogizes that much has changed since those days, and numerous statutes now provide mandatory regulation of certain types of contracts.

Some of the types of contracts for which specific statutes may set mandatory requirements are: (1) purchase contracts;[8] (2) labor contracts;[9] (3) transportation contracts;[10] (4) rental agreements;[11] and

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[5] The Norwegian's Law of King Christian the Fifth of 15 April 1687, Section 5-1-1.

[6] The official title of the Code is *Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer*, (Law on Formation of Contracts, on Agency, and on Invalid Declarations of Will)[hereinafter *Avtl.*]. The Norwegian Contract Code was formulated in cooperation with Denmark and Sweden. When Finland and Iceland codified their laws regarding contracts, they conformed their efforts to the Norwegian-Danish-Swedish model. The Nordic codes are not identical in every detail, but are essentially equivalent. Although modified by subsequent case law and legal scholarship in each nation, efforts are made to keep the systems on parallel iracks. For example, *Nordiske Dommer*, a case reporter series of Scandinavian appellate decisions, is extensively relied upon and referred to by judges and practitioners throughout Scandinavia. Thus, though one cannot speak of a pan-Scandinavian law of contracts, the law of Norway's neighbors is probably equivalent to the rules explored here. In fact, with regard to modern case law, one system may well be found to rely directly on the precedent of a neighbor.

The Norwegian Contract Code is dated 31 May 1918 no. 4. The date of a law is an important research aid. The Norwegian Code is organized by date, not subject matter. A statute or set of statutes is indexed by the date of its final approval by the Norwegian parliament, Storting. Subsequent amendments appear on the face of the statute, but its chronological order does not change. A new official edition of the statutes, *Norges Lover* (Norwegian Laws), is issued every two years. The statutes appear in their original order, as amended, and with extensive reference, by footnote, to related statutes and statutory language.

[7] *See, e.g., Avtl., supra* note 6, § 33, regarding validity.

[8] Lov om kjöb av 24 mai 1907 no. 2 (Sales Code), Lov om kjöp pa avbetaling av 21 juli 1916 no. 9 (Credit Sales Code).

[9] Lov om arbeidervern av 7 desember 1956 no. 2 (Workers Protection Law), Lov om offentlige tjenestemàend av 15 februar 1918 no. 1 (Law of Public Servants), Sjömannsloven av 30 mai 1975 no. 18 (Law of Seamen).

[10] Lov om sjöfarten av 20 juli 1893 no. 1 (Maritime Code), Lov om luftfart av 16

(5) insurance contracts.[12]

Further, the Price, Profit, and Competition Law[13] has had a dramatic impact on consumer contracts. Under section 18 of this statute, courts have broad discretion to invalidate contracts for unreasonable prices or conditions. These statutes evidence the extent of governmental regulation in this area, and suggest that in many cases the express provisions of the parties, or the declaration rules, are superseded by mandatory law.

Norway has thus rather freely blended elements of a civil law system with those of a common law system. Norway had a Contracts Code as of 1918. As one would expect in a civil law system, the Storting, Norway's Parliament, has subsequently amended the Code, and supplemented it with other laws as well. Yet the codification is far from exhaustive, and Norwegian courts, like their common law counterparts, have contributed much by way of case law to the total picture. Legal scholarship also appears to have had a marked impact.

This state of affairs should surprise no one. Consider geography: Norway sits like a wedge astride the North Sea with the German civil code to the Southeast, and English common law to the Southwest. Norway's geographical position is reflected in her history. The nation's 400-year union with Denmark saw a period of extensive domination of Norwegian commerce and trade by the Hanseatic League.[14] In more recent times, Norway has leaned more to the West, and drawn heavily upon the English and American systems. This influence has been felt even more keenly since World War II. The Norwegian legal system has always taken many impulses from France as well.

As the main body of this Article suggests, this diversity of origin seems to be reflected as well in the substance of the law. Thus, although Norway holds fast to the promise principle of the Continent, Norwegian courts cushion some of its impact where it seems reasonable to do so. The mélange is not composed only of foreign elements, however. As the Schlesinger Report suggests, and this Article details, Norwegian law presents a number of original solutions to certain contractual issues.

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desember 1960 no. 1 (Air Transport Code), Lov om befordring av personer og gods pa jernbanene av 23 februar 1973 no. 10 (Railroad Code), Lov om vegfraktavtaler av 20 desember 1974 no. 68 (Law of Highway Freight Contracts).

[11] Lov om husteie av 16 juni 1939 no. 6 (House Rental Code—Extensive regulation).

[12] Lov om forsikringsavtaler av 6 juni 1930 no. 20 (Insurance Contract Code).

[13] Lov om kontroll og regulering av priser, utbytte, og konkurranseforheld av 26 juni 1953 no. 4.

[14] The German influence seems particularly strong. The German-Swiss Report (Austrian Annotations) appearing in the Schlesinger Report was very helpful in understanding Norwegian law at several points. This reliance is noted where appropriate in the body of the paper.

II. The "Promise Principle," löfte prinsippet in Norwegian Contract Law

Norwegian contract law has as its most basic premise what Norwegians term *löfte prinsippet*, the "promise principle."[15] Norway has a long history of applying the promise principle throughout the body of its law.[16] The earliest codification of *löfte prinsippet* occurred in 1687.[17]

The principle is perhaps best understood when viewed against the contrasting principle that forms the basis of Anglo-American contract law, as well as the law in many other systems. Norwegians call this the "contract principle." For convenience, this Article will use this terminology, though admittedly it is far from satisfactory.

Knoph and Arnholm both cite the Romans as the source of the "contract principle."[18] The Romans were of the opinion that no one could singlehandedly impose an obligation on himself. They viewed the contract as the thing that created legal rights and duties.[19] Many states endorse this view even today, not least among them states in the Anglo-American system. Thus, in England and the United States a promise becomes irrevocable (in Scandinavian terms, "binds the promisor") only if the promisee has himself promised or given the promisor consideration.[20]

The promise principle says that no contract is needed. In essence, "a promise is a promise," or perhaps "what you promise, you deliver." Norwegians and others who apply the principle state simply, " A promise is 'binding'." Arnholm states the rule as follows: "Selve löftet er nok, så sant det bare efter sitt innhold tar sikte på å binde promitenten."[21] (The making of the promise is itself sufficient [to make the promise *binding*] just so long as its contents contemplate a binding obligation upon the promisor.)[22] A more to-the-point definition is: "(Man er) normalt bundet av sine ensidige tilsagn." (One is normally *bound* by one's unilateral promises.)[23]

The above definitions necessitate a comment on the Norwegian term *bindende löfte* (binding promise). This is the concept to which the language emphasized above refers. The Norwegian verb *å binde* is a cognate of the English "to bind." Nevertheless, a direct transla-

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[15] C.J. ARNHOLM, PRIVAT RETT II, AVTALER 50 (1964) [hereinafter ARNHOLM PII].

[16] R. KNOPH, OVERSIKT OVER NORGES RETT 347 (9th ed. 1987)[hereinafter KNOPH].

[17] *See supra* note 5 and accompanying text.

[18] *See* KNOPH, *supra* note 16, at 327; *see also* ARNHOLM PII, *supra* note 15, at 47.

[19] KNOPH, *supra* note 16, at 347.

[20] *Id.*

[21] *Promittenten* is the Norwegian term for promisor; *promissaren* is the word used to refer to the promisee. *See* E. GULBRANSEN, JURIDISK LEKSIKON 166 (4th ed. 1977) [hereinafter GULBRANSEN].

[22] ARNHOLM PII, *supra* note 15, at 47 (emphasis added).

[23] KNOPH, *supra* note 16, at 347 (emphasis added).

tion into English in the contexts of the above definitions does not adequately convey the legal sense of the word as used in Norwegian.

In Anglo-American terminology, one speaks of revocable and irrevocable offers. One could also, presumably, speak of revocable and irrevocable acceptances as well, though it appears that this distinction is seldom necessary.[24] In many instances, "irrevocable" can be equated with "*bindende.*" However, *bindende löfter* can vary greatly in their effect in Norway. At times a *bindende löfte* will be "irrevocable" in that only under exceptional circumstances will Norwegian courts permit the promisor to call back his promise.[25] Then again, the promisor may have freedom to recall his otherwise "binding" promise, and the English term "revocable" is more appropriate. On still other occasions, the legal status of the promise will fall somewhere between "irrevocable" and "revocable" as these words are used in England and in the United States.[26] Our terminology simply does not provide us with precise terms, capable of connoting the various degrees of "binding" effect that a promise can have under Norwegian law.[27]

The quoted definitions must therefore be read as stating the basic rule of Norwegian law, that all promises bind the promisor, recognizing that the strength of these bonds may vary depending upon the circumstances. Therefore, a binding promise in the Norwegian sense may, but need not, equate with the Anglo-American concept of irrevocability. This Article employs the terms "revocable" and "irrevocable" in their Anglo-American sense, where such usage accurately reflects the substantive rule of Norwegian law. Where this is not appropriate, this Article uses the term "binding" and attempts by apt words to describe the exact meaning within the context.

Norwegian law is in accord with that of its Scandinavian neighbors in enforcing what Anglo-American law might call "a naked promise."[28] Article 1 in each of the Danish, Finnish, and Swedish

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[24] The mailbox rule, strictly applied, makes revocable acceptances a short-lived species.

[25] Indeed, the Schlesinger Report uses the term "irrevocable offer" to refer to the analogous, though not identical, concept of "binding offer" in German law. *See* 1 SCHLESINGER 272, translating § 145 German Civil Code (BÜRGERLICHES GESETZBUCH [BGB]). In Norway, as this Article details, an offer first becomes impossible of revocation only upon receipt by the offeree of actual notice of the offer. In Germany, an offeror may not revoke his offer once the offeree has received the offer (though the offeror may not yet be aware he has received it). Thus the term "irrevocable offer" is even less appropriate when applied to the Norwegian *bindende tilbud.* This is because of the longer period an offer may be "in limbo" at Norwegian law.

[26] The discussions *infra* at notes 133-50, 375-84 and accompanying text provide specific examples of the various amounts of "irrevocability" *bindende löfter* can have.

[27] This inadequacy of Anglo-American terminology is no doubt due to the basic difference in approach between the Norwegian "promise principle" of contracts and the "contract principle" that lies at the heart of the Anglo-American law of contracts.

[28] ARNHOLM PII, *supra* note 15, at 50.

Contract Codes[29] expressly states that *tilbud og svar på tilbud* (offers and answers to offers) are binding upon one who dispatches these promises.[30] Although the Norwegian Contract Code does not include this provision, commentators agree that this omission is due to recognition of the promise principle's importance, which requires no codification.[31] Iceland follows Norway's suit and does not codify the "obvious."[32]

The promise principle is not confined to Scandinavia, and in fact probably comes to the North as part of the Germanic heritage of these states. Austria, Germany, and Switzerland all possess somewhat similar versions of the legal principle.[33] France applies the promise principle to commercial transactions but applies its counterpart, the "contract principle," to private transactions.[34]

The promise principle is subject to certain reservations. The promise principle does not attach to declarations that a party does not intend should have legal consequences.[35] The principle does, however, apply in the situation most important in the context of this Article — where the promisor makes his promise conditional upon the timely receipt of some form of acceptance.[36]

Where parties contemplate a relationship involving mutuality of obligation, the promise of the first party to do an act is made conditional upon the other party's promise to supply the *quid pro quo*.[37] The inclusion of this condition converts a *löfte* (promise) to a *tilbud* (offer).[38] The promisor becomes bound to *perform* his promise only upon receipt of the acceptance he demands.[39] To this extent, the

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[29] See *supra* note 5 for a discussion of the formulation of the Scandinavian Contract Codes. The Norwegian, Swedish, and Danish Codes stem from a cooperative effort among these states. The Finnish and Icelandic Codes came later but are patterned on the Norwegian-Swedish-Danish model.

[30] KNOPH, *supra* note 16, at 347. The various provisions of each Code, as applied by the respective national judiciaries, define further what "binding" means with regard to a specific promise. Sweden and Finland, for example, do *not* apply the promise principle to sales of real property. Contracts, in a specific form, are required. *See* ARNHOLM PII, *supra* note 15, at 49.

[31] ARNHOLM PII, *supra* note 15, at 50; *see also* KNOPH, *supra* note 16, at 347.

[32] ARNHOLM PII, *supra* note 15, at 50.

[33] *See* ALLGEMEINES BÜRGERLICHES GESETZBUCH FÜR DIE GESAMMTEN DEUTSCHEN ERBLÄNDER DER OESTERREICHISCHEN MONARCHIE [ABGB] § 862 (Austrian Civil Code), *translated at* 1 SCHLESINGER, *supra* note 1, at 269; BGB, *supra* note 25, § 145 (German Civil Code), *translated at* 1 SCHLESINGER, *supra* note 1, at 272; SCHWEIZERISCHES OBLIGATIONENRECHT [OR] Article 3 (Swiss Law of Obligations), *translated at* 1 SCHLESINGER, *supra* note 1, at 275; see also 1 A. CORBIN, CORBIN ON CONTRACTS § 46 n.56 (1950)[hereinafter CORBIN] for a brief comparison of the Anglo-American and Swiss and German systems with regard to the irrevocability of offers.

[34] *See* ARNHOLM PII, *supra* note 15, at 49.

[35] See *supra* note 22 and accompanying text for Arnholm's definition.

[36] ARNHOLM PII, *supra* note 15, at 47.

[37] *Id.*

[38] *Id.* at 62.

[39] See *infra* notes 365-78 and accompanying text for a complete exposition of this rule.

effect of a *tilbud* under the "promise principle" is not too different from that of a revocable offer applying the contract principle.[40]

The impact of the promise principle is felt not with regard to the duty of the offeror to *perform* his promise, but rather on the duty of the offeror to enter into the contract. Norwegian law, and that of other systems applying the promise principle, add to the offer the promise that the offeror will enter into a contract if the offeree accepts the offer. Norwegian law makes *this* promise irrevocable once the offeree finds out about it.[41] Normally, this occurs well before the underlying promise of the offeror to perform becomes irrevocable on his receipt of the acceptance.

Under Norwegian law, a promisor *may* reserve for himself a power to revoke the promise implied at law to enter into a contract. The offeror must do this explicitly, however, in the original promise—with the result that the offeror's declaration will no longer be viewed as a true promise.[42]

Having pinpointed the theoretical differences between these two principles, the two may now be compared. This Article details the promise principle as Norwegian courts apply it. In practice, Norwegian courts achieve results not far different from those of Anglo-American courts applying the contract principle; the differences are certainly less than the theoretical underpinnings might suggest. This similarity of result is due to the modifications both approaches have necessarily undertaken to achieve reasonable results. If, under the contract principle, one allows the parties to make an offer irrevocable by express provision (option contracts), while under the promise principle the law allows one to expressly make promises *sine obligo* (*uten forbindtlighet*), the whole question becomes upon whom one imposes the task of making the reservation.[43]

It would be inconsistent with the purposes of the Schlesinger Report to attempt here to debate the relative merits of each system. Several critical observations, however, shed light on the reasoning behind the promise principle. Arnholm notes that neither principle can be called impractical in the face of so many years of effective functioning.[44] Still, Arnholm argues, in certain instances the promise principle seems the better rule. As an example he uses the case where the system provides for option contracts or, alternatively, promises *sine obligo*, and a party neglects to make the appropriate reservation. The question becomes whether the offeror should lose his right of revocation as soon as the offeree finds out about the offer or

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[40] *See, e.g.*, 1 CORBIN, *supra* note 33, § 38.

[41] See *infra* notes 122-24 and accompanying text for a complete exposition of this rule.

[42] See *Avtl.*, *supra* note 6, for a codification of this rule.

[43] ARNHOLM PII, *supra* note 15, at 49.

[44] *Id.* at 48.

not until the offeree has managed to send off an acceptance.[45]

Arnholm feels that in this situation it is more "natural" to apply the promise principle and make the offer irrevocable as soon as the offeree finds out about the offer.[46] In partial support of this position, Arnholm cites the infrequency with which Norwegians avail themselves of opportunity to make their promises *uten forbindtlighet* (*sine obligo*). By doing so, they would avoid the binding effect that Norwegian law presumes promises possess, but they would also reduce their chances of concluding the contract.[47] A number of states converted from the contract principle to the promise principle in the eighteenth century, but no state has done the reverse. This also speaks in favor of the promise principle.[48]

Arnholm suggests that certain allowances may be made in the promise principle for contracts made between closely associated parties.[49] He points out that the contract principle is most naturally suited to societal conditions in which parties meet to negotiate the terms of their agreement, and that a requirement of formalities is very often involved. In today's society, Arnholm asserts, contracts are concluded between strangers over an expanse of distance and time. Therefore, although the promise principle is probably the best rule in such circumstances, Arnholm suggests that the rules ought to bend where parties are in fact on close terms with one another. Although Arnholm does not explicitly say so, this is probably a reference to certain provisions in the Norwegian Contract Code that afford Norwegian courts a considerable measure of flexibility in applying the rules that follow from the promise principle.[50]

III. The Concept of Fordring *in the Law of Contracts and Obligations in Norway*

As will be seen elsewhere in this Article, the concept of a *fordring*

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[45] Arnholm notes that the same question arises where a system does not allow such reservation. He cites no examples in support of his statement. *See* ARNHOLM PII, *supra* note 15, at 49.

[46] ARNHOLM PII, *supra* note 15, at 43. Arnholm does not spell out exactly why he feels this result is more "natural." Perhaps he means because one avoids the difficult questions of reliance with which Anglo-American courts must grapple. Perhaps, too, "natural" can be equated with "familiar."

[47] ARNHOLM PII, *supra* note 15, at 49. Arnholm evidently believes that were revocable promises such a good idea, Norwegians would make use of the right *Avtl* § 9 affords them. They could then make all their promises "non-binding." One suspects Arnholm is describing a custom of trade rather than a conscious choice between alternatives.

[48] *Id.* Arnholm unfortunately gives no clue as to which states he is referring.

[49] *Id.*

[50] *See, e.g.*, *Avtl.*, *supra* note 6, §§ 4.2, 6.2, 9, 32, 33. *Avtl.* § 39 is particularly important because it opens the door to considerable flexibility by courts in dealing with difficult cases between closely associated parties. See *infra* notes 119-29 and accompanying text for a discussion of the effects of this rule. Even more important since 1983 is *Avtl.* § 36, which gives the courts even broader discretion. *See infra* notes 130-37 and accompanying text.

figures prominently in Norwegian law.[51] It is necessary, therefore, to pause at the outset and define this concept.

En fordring is defined as "a legally enforceable right of payment or delivery of a performance in money, goods or other things of value. . . . A *fordring* can be created by contract or by the breach of a legal duty . . . ."[52] Because Norway applies the promise principle, the offeree, by virtue of the offer, acquires a right to create a contract. Most often the offer will contain a promise to perform or not perform a certain act at a later time. When this is the case, the right acquired by the offeree is in the nature of *en fordring*.[53]

As this Article will detail, the offeree acquires this right at a point in time prior to his acceptance. This means that the body of law concerning *fordringer* — essentially the law of contract enforcement — is brought into play at that time. The discussion in this Article will make apparent that in many cases this leads to results quite different from those achieved under the contract principle as it operates in Anglo-American law.

II. Report on Norway

A. Offer

A-1. Offer or Invitation to Deal

I. Distinction Recognized

The Report found that the distinction between an offer and an invitation to deal was recognized by all the legal systems it considered. The differentiation appears in Norwegian contract law as well, and is codified by the Norwegian Contract Code.[54] The distinction is crucial in Norwegian law, as once an offer has become effective it is binding on the offeror. Norwegians refer to this as the promise principle (*löfte prinsippet*).[55]

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[51] *See infra* notes 186-201 and accompanying text.

[52] GULBRANSEN, *supra* note 21, at 73.

[53] *See* P. AUGDAHL, DEN NORDSKE OBILGASJONSRETTS ALMINDELIGE DEL (The General Law of Obligations in Norway) 1, 5 (5th ed. 1978)[hereinafter AUGDAHL]. The citation to AUGDAHL is significant. In Norway, scholars have divided the law of contracts into two sections: *Avtalerett* (roughly, the law of contract formation); and *Obligasjonsrett* (the law of contract enforcement, also including a number of commercial law topics). As its title indicates, Schlesinger's Report limits the scope of its inquiry to contract formation. To answer the questions the Report poses for Norwegian contract formation, it is necessary to go also to the law of Norwegian contract enforcement. As this Article details, the operation of the promise principle causes offers to become irrevocable (and thus create an enforceable right in the offeree) at a point earlier in the give-and-take process of contract negotiations than where the contract principle is involved. In this sense, Schlesinger's chosen title, *Formation of Contracts*, is less universal than it should be.

[54] *Avtl.*, *supra* note 6, § 9.

[55] All of Scandinavia (Germany as well) follows this so-called promise principle. It provides that one is normally bound by one's unilateral promises. Denmark, Finland, and Sweden each made explicit provision for this in the first section of their respective contract codes. Norway did not do so, as this rule of law was considered so settled that codification

Norwegian law recognizes that the distinction between offer and invitation to deal often depends on circumstance and interpretation. Nevertheless, the law seems to reflect a clear feeling that if a person who makes a proposal wants to avoid being bound by it, that person must give the proposal a form that leaves no doubt that it is not meant to bind its giver, but only to invite offers. This rule perhaps has as its source the promise principle.

II. Clear Proposals

Norwegian law provides that a person may make it clear, by appropriate language, whether he or she intends to make an offer (*tilbud*) or an invitation to deal (*oppfordring til å gjöre et tilbud*). Courts normally give effect to such a clear intention. Section 9.1 of the Contract Code specifically provides that the use of the words *uten forbindtlighet* (without prejudice), *uten obligo* (without obligation), or their equivalent, in a proposal that would otherwise be viewed as an offer, will instead be viewed as an invitation to deal.[56] Such an invitation to deal, however, may ripen into an acceptance if offers are received in response to it.[57]

III. Unclear Proposals

Where a person has not used such words as to make clear his intention, Norwegian contract law recognized that drawing the line between offers and invitations to deal may on occasion be difficult. Specific rules of law exist to guide certain factual situations such as those involving pricelists or advertisements. In other situations, Norwegian courts identify a number of factors whose presence or absence will be taken into consideration in deciding what to call a given proposal.

A. Use of Vague or Uncertain Terms

Where a proposal is couched in uncertain terms, Norwegian courts occasionally find no offer at all.[58] Courts, however, do define

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was unnecessary. Nevertheless, the principle clearly forms the basis of *Avtl* §§ 5, 7 and 39. Iceland has followed Norway's lead in this regard. *See* KNOPH, *supra* note 16, at 344-46.

[56] It appears, however, that Norwegians seldom avail themselves of this language. Carl Jacob Arnholm suggests that this is perhaps because parties feel that though they may avoid being bound by using such language, they also reduce the likelihood of their creating a contract. C.J. ARNHOLM, LAEREBOK: AVTALERETT 43 (3d ed. 1976) [hereinafter ARNHOLM].

[57] See *infra* the discussion of implied acceptance at notes 263-93 and accompanying text. *Avtl.* § 9.2 provides that if an offer is received in response to an invitation to deal as per § 9.1, and the recipient ought to be aware of this, he is to let the offeror know, without unnecessary delay, if he is going to accept the offer. Otherwise, *Avtl.* § 9.3 provides that the offer will be viewed as accepted.

[58] *Rettstidene* (Norway's Supreme Court case reporter series)[hereinafter *Rt.*] 1924 at 929. When A was in financial trouble and B, his stepfather, wrote to creditor C and requested a statement of A's debt, saying, "then we'll see what we can do," C sent B the

the missing elements if it is at all possible to do so.[59]

B. *Words of Reservation*

Words of reservation are clearly authorized with regard to limiting an offer to a mere invitation to deal.[60] Norwegian law also recognizes that a proposer may make it clear by explicit language that his proposal is an offer but may be recalled at any time.[61]

Norwegian law distinguishes from both of the above, however, proposals containing a qualifier such as "upon the condition of no change in the market price." Such proposals are viewed as offers with a special condition (*löfter med saerlige betingelser*), but the offeror is still bound by the terms of the offer.[62]

C. *A Proposal Addressed to Several People but to be Accepted by only One*

A proposal addressed to several people but to be accepted by only one person may be so vague that a Norwegian court will not view it as a binding offer at all, but rather as a "feeler" and an invitation to deal.[63] Where the recipient of the proposal has little factual material on which to build his case, courts go quite far in allowing the person making the proposal to withdraw it. They also allow the use of a "strawman" to accept an offer to void it to others.[64]

D. *Reliance*

In Norwegian law, like German law, one should not overemphasize the reliance principle as a factor in determining what to call a proposal. Norwegian law recognizes the 'culpa in contrahendo' concept (*negativ kontrakts interesse*). It has been suggested that even a non-binding invitation to enter contractual negotiations may contain an implied promise to refund to the other party the expenses incurred in preparing a detailed offer. One should remember that under section 9 of the Contract Code an invitation to deal may ripen into an acceptance.[65]

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statement and indicated that he had given A a due date both imminent and inflexible. B answered, "Sorry, this cannot be arranged as quickly as tomorrow, but you can be sure that it will be taken care of right away." Held: neither statement was an offer.

[59] ARNHOLM, *supra* note 56, at 46-47.

[60] *See Avtl., supra* note 6, § 9; *see supra* notes 56-57 and accompanying text.

[61] ARNHOLM, *supra* note 56, at 42.

[62] *Id.* at 46.

[63] *Id.* at 51-52.

[64] *Id.* at 52. The law is settled, however, with regard to stocks and bonds offered on the stock market; these may not be conditionally called back.

[65] *See supra* note 57 and accompanying text.

E. Prior Dealings

One may infer from prior dealings whether a proposal should be construed as an offer.[66]

F. Price Quotes

A mere inquiry into the price of specific merchandise is not generally an offer. A more difficult question is whether a price quotation in response to an inquiry should be viewed as an offer. The language of section 9 suggests that, at least in certain cases, a mere price quote should be viewed as an offer. An example might be an "invitation to deal" within the meaning of section 9, requesting offers in the form of a price.

IV. Special Rules for Particular Situations

A. Advertisements and Pricelists

Courts are not likely to view either advertisements or pricelists as offers in Norway, even if prices and conditions are given as carefully and completely as they would be in a regular letter of offer.[67] Nevertheless, courts may well construe an advertisement to be an invitation to deal, based on the language of section 9. Similarly, no bar exists to a seller's explicitly declaring an advertisement to be an offer — for example, by using language like "first come, first serve" or "as long as supplies last".[68] Pricelists are generally not offers even if sent out with cover letters. Pricelists may, however, constitute offers in the course of an ongoing business relationship.[69]

B. Articles in Shop Windows

A price tag attached to an object is probably a binding offer. Norwegian law considers this a borderline situation.[70]

C. Self-Service Systems

Norwegian law concerning self-service systems is unsettled. The trend seems to be towards viewing an object on display with a price tag as an offer, and allowing customers to make that offer binding by picking up the item.[71] A contract is certainly concluded when the

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[66] ARNHOLM, *supra* note 56, at 46. His comments here would likely benefit from supplementation by ARNHOLM PII, *supra* note 15.

[67] ARNHOLM, *supra* note 56, at 46.

[68] But Norwegian law probably views an advertised promise of reward to be a binding offer. *Avtl.* § 14 provides that a statement of agency made public through advertising is also binding.

[69] ARNHOLM, *supra* note 56, at 46.

[70] *Id.* at 46.

[71] KNOPH, *supra* note 16, at 345-47; *see also* ARNHOLM, *supra* note 56, at 56, 100; *Rt.* 1978 at 702.

customer pays for the item.

D. Automatic Vending Machines

Norwegian law appears settled that placing items in automatic vending machines amounts to making binding offers capable of becoming contracts on acceptance by the customers putting the money in the machine.[72]

E. Sending of Goods to a Person Who Never Ordered Them

Little pertinent authority exists on this point. Arnholm does mention such situations at several points,[73] but does not state clearly whether such mailings should be construed as offers.

A-2. Sales at Auction

I. General Rules

Norwegian law recognizes sales by auction. The Norwegian Code contains no specific provisions as to the conclusion of a contract at an auction sale.

The question of whether a mere announcement of an auction sale constitutes an offer is not discussed in the Norwegian system. Such an announcement might constitute an invitation to deal with the consequences provided by section 9 of the Contract Code.[74] There is no discussion in the Norwegian Code of an auctioneer's ability to turn his or her proposal into an offer through the use of appropriate words. The presumption in Norwegian law, therefore, is definitely that one who puts things up for auction makes no offer by so doing.[75] The bids received at an auction, on the other hand, are viewed as binding offers.[76] The auctioneer is not bound, however, until he or she can be said to have finally accepted a bid.[77]

II. Request for Bids and Tenders

Norwegian law does not consider requests for bids and tenders (*lisitasjoner*) to be offers.[78]

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[72] ARNHOLM, *supra* note 56, at 56; *see also* KNOPH, *supra* note 16, at 304. Knoph makes the same reservation in note 71, *supra*.

[73] *See, e.g.*, ARNHOLM, *supra* note 56, at 180-81.

[74] *See supra* notes 56-57 and accompanying text.

[75] ARNHOLM, *supra* note 56, at 57.

[76] *Id.* Arnholm notes that auctions require the setting of contractual conditions through special means, because the bidders only mention a price, and so that the auction can proceed with bid and overbid. *Id.*

[77] The discretion of the auctioneer is clearly suggested by Lov. 14 aug. No. 3 om offentlige auktioner og licitationer § 11.2 (Public Auctions and Bids Code). This law also contains a number of other procedural rules regarding sale at auction. *See also* Lov. 18 des 1959 No. 11, Kapitel 4 and 11 (Bidding Fees Code).

[78] ARNHOLM, *supra* note 56, at 57; *see also* Lov. 14 aug. No. 3, Lov. 18 des. 1959.

A-3. Definitions of Terms

I. Scope

Section A-1 presented the state of Norwegian law on the significance of the definiteness of a proposal in determining whether a proposal is intended as an offer or as an invitation to deal. This section looks at Norwegian law where a genuine offer, intended to be binding, is made in indefinite terms.

II. Two Situations Distinguished

Norwegian law provides that, in order for a proposal to lead to a valid contract, the proposal must contain an adequate statement of its terms. Rules of law determine whether there has been an adequate statement of these terms.

The Report distinguishes two types of situations—first, proposals where there is a clear gap concerning a vital element; and second, proposals where there is no gap but some standard or mechanism is to be employed in determining one of the elements. In the second instance, questions arise concerning whether the standard or mechanism provides the requisite definiteness. The Norwegian rules may also be approached in this manner.

III. Offer Not Referring to a Gap-Filling Device

Norwegian law clearly allows courts to fill gaps in contractual language, including the language of offers. The discretion of Norwegian courts is very broad in this regard, and is very different from Anglo-American law on this point.[79]

Norwegian law contains declaratory rules capable of gap-filling for specific types of contracts. These various statutes specifically provide that the rules contained therein must be followed where a contract is silent regarding certain provisions.[80] Case law extends this notion to instances where a contract provides for a situation but the contract's meaning is unclear.[81] The rules also extend to situations where it is unclear whether a contract makes provision for the circumstances or not.[82]

Norwegian law also allows courts, where appropriate:

1) To read into contractual language certain well-defined terms used in transactions of the same kind, regardless of whether a subjec-

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[79] *See* ARNHOLM, *supra* note 56, at 37; *see also* K. HUSER, AVTALETOLKNING 488 (1983)[hereinafter HUSER]. HUSER is a lengthy treatise on all aspects of contract interpretation in Norway. On interpretation of offers, see, e.g., *Rt.* 1921 at 259.

[80] *See, e.g.*, Lov. om kjöp av 24 mai 1907 No. 2, § 1; Lov. om kommission, handelsagentur og handelsreisende av 30 juni 1916 No. 1 § 1 (Maritime Code); Lov. om Sjöfarten av 20 juli 1893 No. 1 § 72 (Commission Sales Code).

[81] *Rt.* 1960 at 1055; *Rt.* 1924 at 68.

[82] *Rt.* 1929 at 1081; *Rt.* 1947 at 705.

tive approach would reach the same result.[83]

2) To fill the gap according to a very general standard of reasonableness where clear rules do not exist. Norwegians view the price paid as an important factor to be considered in interpretation.[84]

3) To fill the gap according to the circumstances of each case. Recent court decisions hold that courts may go very far in this regard.[85] Courts are not completely free to act, however. A judge must employ what support is to be found in legislative considerations of a subject previously recognized as relevant to contract law. He or she may also be required to consider analogous rules governing related contractual conditions.[86] One recent case, however, allowed the judge to evaluate a case only on its particular facts, without setting up any definitive rules, in seeking the most reasonable solution.[87]

Norwegian law recognizes the validity of contracts that leave it to one of the parties to fill the gap in a fair and equitable manner. Courts may intervene where unreasonableness appears likely, and the discretion of Norwegian courts is very broad, by English or American standards, in this regard.[88]

IV. Offer Referring to Gap-Filling Device

The Report distinguishes several situations:

A. References to a Standard

No pertinent authority is available on this point. Nevertheless, it seems likely, based on the broad discretion afforded the parties, that Norwegian courts would allow such incorporation by reference. Norwegian policy clearly upholds agreements wherever possible. Even the lack of a definite price will seldom be fatal, because often

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[83] *See* HUSER, *supra* note 79, at 532-39; *see also Avtl.*, *supra* note 6, § 1, which provides that courts are to apply the rules of the Contract Code, unless the acts of the parties, usage of the trade or custom provide other rules. A literal translation is found *infra* at note 140.

[84] ARNHOLM, *supra* note 56, at 35; *see also* KNOPH, *supra* note 16, at 445. *See, e.g.*, Lov. 24 mai 1907 No. 2 om Kjöb § 5.

[85] *Rt.* 1972 at 449; *Rt.* 1968 at 783.

[86] KNOPH, *supra* note 16, at 460-61.

[87] *Rt.* 1973 at 887. ARNHOLM, *supra* note 56, at 34-36, suggests the broad parameters of this discretion. A judge may consider the language—read dialect—of parties, a very significant factor in highly regionalized Norwegian society. Judges may also consider: negotiations prior to the agreement; prior agreements between the parties; and the subsequent behavior of the parties.

[88] ARNHOLM, *supra* note 56, at 47-48, cites numerous examples of this from case law. The Price Code, (Lov. 26 juni 1953 No. 4 om kontrol og regulering av priser, utbytte og konkurranse folhold, 40-41) contains rules on this subject; *see also* Falkanger, *En Sammenligning mellom engelske og norske prinsipper for fortolkning av kontrakter*, 9 ARKIV FOR SJÖRETT 537, 561-62, 565 (1969).

one possesses some means of determining price.[89]

B. Determination by a Party

Norwegian courts are willing to go quite far here, but a determination by a party must not be unreasonable.[90] Parties may give such discretion to themselves. In the absence of agreement, rules of law may give the discretion to one of the parties.[91]

C. Reference to a Future Agreement

Norwegian courts will evidently also go quite far in this direction.[92] The trend is to hold the contract valid on its terms and direct the parties to negotiate a reasonable agreement on the unsettled issues.

V. Section 32 of Norwegian Contract Code

Section 32 of the Norwegian Contract Code figures prominently in a number of cases involving contract interpretation. It provides:

> One who has dispatched a declaration of will, which due to faulty penmanship or other similar error on his side, has been given a different intent than intended, is not bound by the contents of its declaration, if the person to whom the declaration is dispatched, realized or ought to have realized, that an error had occurred.
>
> If a declaration of will is distorted through faulty telegraphy, the person who has dispatched it will not be bound by the declaration in the form it has when it is received.
>
> The same is true, if an oral declaration, sent by messenger, is received in a distorted form.
>
> If the distortion is due to fault on the side of the declarant, he is bound to compensate the recipient for losses caused by the error.
>
> If the declarant becomes aware of the distortion, and he wishes to rely upon it, he must give the other party notice of this without undue delay. If he does not give such notice, the declaration will be valid as received, if the other party did not know or ought not to have known of the distortion.[93]

Section 32 falls outside the specified focus of the Report in that the statute applies where mechanical difficulties have obscured what was the once clearly stated intent of the parties. The Report, however, concerns itself with cases where the intent of the parties was unclear *ab initio*. Because these two areas may well overlap, the importance of section 32 cannot be overlooked.

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[89] ARNHOLM, *supra* note 56, at 47.

[90] The Norwegian term is *ubillig*, the literal translation of which implies commercial reasonableness: "not-inexpensive" or "un-economic."

[91] *See, e.g.*, Kjöpsloven (Sales Code) § 5, regarding *price*; § 13 regarding time of performance; *see also* ARNHOLM, *supra* note 56, at 47-48.

[92] ARNHOLM, *supra* note 56, at 64.

[93] *Avtl.*, *supra* note 6, § 32.

A-4. Offers Calling for a Promise and Offers Calling for an Act

Norwegian law recognizes the distinction between offers calling for a promise and offers calling for an act. There is no special name for a contract that results from an offer calling for a promise. A contract resulting from an act in response to an offer does have a special tag—*realkontrakt*. The essential difference between contracts resulting from acceptance of one or the other type of offer relates to the act of acceptance.[94]

A-5. Offer for One Entire Contract or for Several Contracts

No pertinent authority is available on this point. Perhaps, like German law, the Norwegian system is not concerned with this problem. Norwegian courts likely do as their German counterparts and treat the question of whether an offer is meant to propose an entire contract or a series of separate contracts as a matter of interpretation.

Norwegian law does recognize the concept of *rammeavtale* (literally, "frame contract"). Here, the individual parties set down common provisions for a series of contracts that they expect to enter into in a certain period.[95] Norwegian courts have also shown themselves willing to find an offer definite enough to form the basis of a contract where the offeree retains considerable latitude as to quantity or time of delivery. Perhaps because Norwegian courts possess such broad interpretive discretion, they are always able to decide this issue based on the facts of an individual case.

A-6. Parties to Contract: Complete or Partial Identity of Offeror and Offeree

Little pertinent authority is available concerning complete identity of offeror and offeree. Arnholm says only that *in older theory* one viewed it as a logical impossibility that a person could enter into a contract with himself. Unfortunately, he goes on to distinguish self-contracting by an agent, and never returns to state the current Norwegian law in this regard.[96]

Norwegian law distinguishes two situations: 1) Self-dealing, (*Selvkontrakering*), where the agent, (*fullmektigen*), representing his principal, (*fullmaktsgiveren*), contracts with himself as an individual; and 2) dual agency, (*kombinasjon*), where the agent of two or more principals effects a contract between them.[97] This distinction appears to be largely linguistic, and the law in this area is unsettled,

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[94] *See infra* notes 312-39 and accompanying text.
[95] KNOPH, *supra* note 16, at 330.
[96] ARNHOLM, *supra* note 56, at 141.
[97] *Id.*

with both self-dealing and dual agency addressed on a case-by-case basis.

Arnholm says that it is clear that an agent cannot be given total freedom in either circumstance, but neither can one absolutely forbid such transactions. Arnholm suggests that Norwegian courts solve problems here by examining the power of the individual agent in light of the circumstances surrounding the contract in dispute. He names several relevant factors to be considered: Whether all parties consented; whether the agreements were specialized or mere formalities; and whether bankruptcy is contemplated.[98]

A-7. Offers to the Public

Norwegian law recognizes that an offer can be directed to the public at large.[99] Norwegian law provides that an offer to the public that does not involve a reward may be treated as a real offer provided that it meets the other requirements of an offer.[100] The difference here is that the offer in this case can be accepted by persons not named in the text of the offer. Norwegian law recognizes that great difficulties can arise in deciding where to draw the line in such instances. The difference here is that the offer in this case can be accepted by persons not named in the text of the offer. Norwegian law recognizes that great difficulties can arise in deciding where to draw the line in such instances. Arnholm suggests that as soon as such an offer is made public, it should become binding.[101] In regard to making sure that no one accepts the offer in the future, he suggests that one might use by analogy the rule of section 14 of the Contract Code. That rule provides that where one advertises a statement of agency, a binding offer by law, one may legally recall that statement from future operation by the publication of a retraction.[102]

In Norway, one who promises a reward to anyone for performing a certain act is viewed as bound.[103] It is not clear, however, when one is bound—upon publication, upon receipt by some person capable of accepting the offer, or upon actual acceptance. Arnholm suggests that it is probably binding on publication.[104]

In some circumstances, Norwegian law will hold an offeror bound immediately. It is unclear whether a similar rule would be, by analogy, followed in cases where an act is performed without knowledge of the promise to give a reward for such act. Arnholm seems to

98 ARNHOLM, *supra* note 56, at 142.

99 *Id.* at 46.

100 *See supra* notes 54-73, 80-93 and accompanying text.

101 ARNHOLM, *supra* note 56, at 44.

102 *Id.* at 48-49, 160.

103 *Id.* at 46.

104 *Id.* at 44, 46.

favor binding the offeror on publication.[105]

Section 14 could probably be applied analogously to revocation of offers of rewards.[106]

A-8. Communication of the Offer

I. Communication of Offer Necessary

To be effective as an offer, a proposal must be intended to be communicated, and must in fact be communicated to the offeree.[107]

A. Phases of Communication, Inter Absentes: Dispatch, Receipt, Actual Notice

A proposal that has not yet been dispatched (*avgitt*) — for example, one left on the desk of its author is not yet an effective offer.[108] Actual dispatch also does not normally make an offer binding.[109] In Norwegian law, the general rule is that an offer is not effective until it has "come to the knowledge" of the addressee (*kommet til adressatens kunnskap*).[110] Mere receipt of the offer by the offeree will not usually suffice to make an offer binding on the offeror.[111]

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105 *See supra* note 101 and accompanying text.

106 *See supra* notes 100-02 and accompanying text.

107 ARNHOLM, *supra* note 56, at 44. But a stock offering is binding once it is placed on the list of offerings. Money placed in a church collection box or a blind beggar's hat cannot be taken back just because the offeree was not yet aware of his good fortune. Also, it may be Norwegian law does not hold this to be true regarding offers to the general public.

108 *Id.* at 44. Arnholm states, as well, that even if an employee of the offeror finds a signed letter offering her a raise in the offeror's out-basket, the letter will not be viewed as a binding offer. *Id.*

109 *Id.* at 80. Note, however, that a different rule applies to what Norwegians call a "reklamasjon." *Reklamasjon* is defined as follows, "A declaration of one of the parties that he has an objection to the object of the contract, its delivery, or other conditions regarding the performance of the other party" (this author's translation). GULBRANSEN, *supra* note 21, at 175. A *reklamasjon* secures the right of its author when it is responsibly dispatched. (*forsvarlig avsendt*). *Avtl.*, *supra* note 6, § 40. *Compare* Kjöpsl. § 61, (Sales Code), Koml. § 3 (Commissions Code), *with* og FAL § 33.1 (Insurance Contracts Code). Norwegian courts appear to have been somewhat troubled by the mildness of this standard. *See* ARNHOLM, *supra* note 56, at 82. A different standard has been imposed in at least one instance. Where a buyer has purchased something "on approval" and is required by Kjöpsl. § 61 to notify the seller that he does not wish to keep the item, his notice must be *received* by the buyer to be effective.

110 ARNHOLM, *supra* note 56, at 48. This rule is codified, in effect, by *Avtl.*, *supra* note 6, § 7, regarding revocation of an offer. A revocation is effective, *Avtl.* § 7 provides, if it is *received* by the other party before or at the same time the offer comes to the offeree's knowledge.

111 The problem of the point in time at which the offer becomes effective is discussed *infra* at notes 119-24. Note, however, that this rule does not apply to what Norwegians call a "påbud," defined as follows: "A legal act that is binding upon its addressee *from the very instant it is received*, that is, when it is placed in a position where the addressee has or ought to have familiarized himself with it, e.g., when a notice of termination of employment is put in his postbox." GULBRANSEN, *supra* note 21, at 169 (translation and emphasis by this author). Note also that Norwegian law has recognized certain exceptions to the "actual knowledge" rule with regard to proposals in the form of promises (*löfter*) and offers (*tilbud*).

B. Regular and Irregular Communication

When the would-be offeror willingly dispatches the message, it may reach the addressee either in the intended manner of communication or some different way. When the message arrives in its intended form, it becomes an effective offer.

When the message arrives in a different manner, legal consequences may follow in at least one area of the law. Section 2.1 of the Contract Code requires that where the offeror has set a deadline for an acceptance, he or she must have received that acceptance before the deadline has passed. Section 2.2 provides further:

> If the offer is made by letter, the day of the deadline is figured from the day the letter is dated. If the offer is made by telegram, the time of the deadline is figured from the instant it, the telegram, is turned in at the telegraph station of the place of dispatch.[112]

Deadlines are thus apparently bound to the manner of communication originally chosen by the offeror.

Norwegian law does not otherwise seem to have been much concerned with communication of an offer, although section 33 of the Contract Code may well set out the basic rule for solving disputes in this area. It provides:

> Even if a declaration of will otherwise would be viewed as valid, it will not bind the one who has given it, if because of circumstances which existed at the time the other party gained knowledge of the declaration, and to which it may be assumed he was aware (*må antas*),[113] it would run counter to good faith or conscionability (*redelighet*) should he, the other party, seek to bring the declaration into force.[114]

Where the addressee may be assumed to know at the time of receipt that the communication of his offer has been irregular, section 33 seems to provide clear authority for Norwegian courts to loose the offeror from his bonds. Furthermore, even where the addressee gains such knowledge after receipt of the offer, courts may intervene. Section 39 here expands upon section 33. Section 39 provides that if special reasons demand it, (*saerlige grunde tilsiger det*) courts may take into consideration the fact that the addressee has knowledge or ought to have acquired knowledge[115] of the circumstances, after receipt of the offer but before he has changed his position in reliance upon it.[116]

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[112] *Avtl., supra* note 6, § 2.2.

[113] The use of *må antas* is significant. It clearly suggests a standard of proof higher than that of *burde ha skjönt*, "ought to have realized". The *må antas* formulation does fall short of requiring any *exact* proof. *See* ARNHOLM, *supra* note 56, at 254.

[114] *Avtl., supra* note 6, § 33.

[115] Note that *Avtl.* § 39 uses the lesser standard here. *See supra* note 113.

[116] *See infra* note 127 and accompanying text for a complete translation and more extensive discussion.

II. Identical Cross-Offers

Arnholm seems to view the identical cross-offer situation essentially as a variant on the more common situation of ongoing negotiations where it can be difficult to identify one party as offeror and the other as offeree.[117] In practice, he continues, business people will usually skirt the dilemma. One party or the other will affirm the agreement. But, Arnholm maintains, the two offers are in and of themselves actually sufficient to constitute a valid contract.[118] No other pertinent authority is available at present to confirm Arnholm's assertion. Nevertheless, the preeminence of the Arnholm text does make it likely that Arnholm correctly states Norwegian law in this regard.

A-9. When Offer Becomes Effective

I. Offers Made to the Public at Large

Norwegian law appears to be similar to German law in that it requires that a distinction be drawn between promises made to the public and individual offers communicated to ascertainable persons.[119] Norwegian law apparently agrees with German law that such offers are effective upon publication.[120]

II. Oral Offers Made to Ascertained Persons

Offers made *inter praesentes*, that is by word of mouth, including through use of the telephone, present few problems. Here, as in the Report, suffice it to say that such offers are recognized in Norway.[121]

III. Offers Made Inter Absentes to Ascertained Persons: Pertinent Rules of Law

A. Power of Acceptance

By implication, section 7 of the Contract Code makes clear in its rule regarding revocation that an offer is not binding until it has "come to the knowledge" of its addressee.[122] Some exceptions to

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117 ARNHOLM, *supra* note 56, at 57.

118 *Id.*

119 1 SCHLESINGER, *supra* note 1, at 729.

120 The Norwegian term *utlovelse*, used to describe such offers, is clearly a "Norwegianization" of the German *Auslobung*. *See supra* notes 101-02 and accompanying text.

121 *See* ARNHOLM, *supra* note 56, at 44, 48. In Norwegian shipping circles, there is an ongoing debate as to whether shipping contracts entered into by Telex should be considered *inter praesentes* or *inter absentes* agreements. Complicating the issue are significant differences between Norwegian and Anglo-American law regarding agents and personal contracts. The problems presented here are discussed in some detail in P. GRAM, FRAKTAVTALER 36-41 (4th ed. 1977) (Freight Agreements).

122 *See supra* notes 110-11 and accompanying text for a brief discussion of the language of the statute. Note that Norwegian law does not require the offeree to have detailed

this rule, however, have been recognized.[123] Some offers set a specific deadline for acceptance. Where such a deadline is not set out, Contract Code section 3 provides guidelines for determining a reasonable time for acceptance. In either case, if the offer does not reach the offeree before this time has elapsed, the offeror will apparently no longer be held to his offer.[124]

B. Revocation

The general rule of Norwegian law is codified by section 7 of the Contract Code:

> If an offer . . . is recalled, this recall is effective if it reaches the other party before or at the same time the offer . . . comes to his knowledge.[125]

This statute requires no more than that the revocation reach (*kommet frem*) the addressee in time.[126]

On occasion, Norwegian law will afford an offeror a further right of revocation. It is here that section 39 serves its intended purpose. The statute provides:

> When under this law the power of a proposal [*viljeserklaering*] to bind is contingent upon the fact that the other party did not know or ought not to have known or is otherwise deemed to be in good faith, this goes to the point in time when the proposal came to his knowledge. Nevertheless, where special reasons so demand, the fact may be taken into consideration that he has or ought to have acquired knowledge of the circumstances after this point in time, but before he has changed his position in reliance on it.[127]

Section 39 concerns an addressee seeking a stronger position than he otherwise would have, based on his good faith. It may well be reasonable in such cases to take into account knowledge later acquired by him. Nevertheless, this need not mean that the same rule should apply where the offeror wishes to recall his offer.

Still, the law presupposes that a similar rule is to be applied to revocations, and this is the reason behind the careful language of

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information regarding the contents of the offer. Rather, it requires only that he understand that he has received a certain promise. ARNHOLM, *supra* note 56, at 49.

123 *See supra* note 107.

124 ARNHOLM, *supra* note 56, at 60.

125 *Avtl.*, *supra* note 6, § 7 (translation by author).

126 Norwegian law is evidently quite close to Swiss law in this regard, but at variance with German law where the time of actual knowledge is immaterial.

127 *Avtl.*, *supra* note 6, § 39. Norwegian law allowed an expanded right of revocation, corresponding to that of § 39 even before the incorporation of this statute into the Code. If the revocation occurred *re integra*—before anything had happened—the addressee had to accept this.

Such a rule, of course, significantly narrows the difference between a system employing the promise-principle (like Norway) and one employing the contract principle (like the United States). This is particularly so in light of the effect of option contracts upon revocability in systems based on the contract principle. For a further discussion, see KNOPH, *supra* note 16, at 343-46; see also ARNHOLM, *supra* note 56, at 41-45.

section 7 of the Contract Code.[128]

That statute provides only that a revocation is effective if it reaches the addressee before or at the same time as the offer comes to his knowledge; it does not preclude the possibility that occasionally a revocation may reach still further forward in time. Arnholm advises caution in this area. He points out that section 39 on its face only authorizes revocation before the addressee has changed his position in response to the offer, and suggests that one would have to speak of a rather short period of time. Furthermore, a showing of some special excuse for his change of heart perhaps should be required of the offeror. Arnholm expresses serious doubts that section 39 could ever be applied to investment contracts involving price speculation. He also asserts that higher demands will generally be required in the field of commercial activities than in the private sector. Nevertheless, he concludes, section 39 gives courts access to a purely subjective brand of decision-making in this area.[129]

The ability of Norwegian courts to intervene in contracts to resolve issues such as this has recently been further expanded. In 1983, the former text of section 36 of the Contract Code was entirely replaced.[130] Before 1983, section 36 governed liquidated damages and permitted their modification.[131] New section 36, on the other hand, gives courts broad discretion to set aside or reform *any* provision of a contract, if enforcing the contract according to its terms would be unreasonable or violative of good business practices.[132]

The explicit authority to alter contracts that section 36 now gives courts is broader than any such grant Norwegian courts had previously exercised.[133] The *travaux préparatoires* of section 36 directs

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[128] ARNHOLM, *supra* note 56, at 50. *See supra* note 125 and accompanying text.

[129] The following cases are on point: *Rt.* 1916 at 1154 (pre-Code); *Rt.* 1926 at 597; *Rt.* 1964 at 1260; and *Rt.* 1966 at 292.

[130] Denmark and Sweden had previously amended the corresponding sections of their contract codes in a similar fashion. K. HUSER, AVTALESENSUR (Modification of Contracts) 19 (1984)[hereinafter HUSER II].

[131] Previously, the section gave courts the authority under certain specified circumstances to reduce stipulated amounts of penalties or liquidated damages that proved to be economically unreasonable.

[132] Section 36 now provides:

> An agreement may be entirely or partially set aside or altered to the extent it would seem to be unreasonable or violative of good commercial practices to enforce it (according to its terms). The same is true for unilaterally binding dispositions.
>
> In this decision, taken into account shall not be only the contents of the contract, the positions of the parties, and conditions prevailing at the time the agreement was entered into, but also conditions that have arisen subsequently and to the other circumstances in general.
>
> The rules in the first and second subparagraphs shall apply correspondingly whenever it would seem to be unreasonable to employ customs of a trade, or other contractual custom or usage.

Avtl., supra note 6, § 36 (translation by author).

[133] *See* HUSER II, *supra* note 130, at 12.

Norwegian courts to be conservative in their exercise of this broad statutory discretion and to continue to take their departure point in pre-existing statutes and case law.[134] One commentator opines that courts are likely to adhere to this directive, at least for now.[135] Another commentator forecasts significant changes in contract law as a result of section 36, however, and urges attorneys to make aggressive use of it.[136]

Section 36 clearly gives courts additional flexibility to deal with such problems as delayed revocations, as well as other problems of contract formation.[137] It is too soon to say what concrete effects will follow from the flexibility that section 36 allows. No instances in which section 36 has been applied to resolve the problems raised by a late revocation could be found; however, case law and commentary surrounding section 36 should be examined carefully in the future when examining any issue of Norwegian contract law.

C. Reliance Damages

Norwegian law would seem to be in agreement with German law[138] that the offeree can claim no reliance damages if the offer did not come to his attention before the deadline for acceptance. Where the offeree has found out about an offer through an unauthorized person he will also be entitled to no reliance damages.[139]

IV. Pertinent Provisions in the Offer

Norwegian law permits the offeror to make specific provisions in the offer that will make the offer effective at a time later or earlier than the times provided in sections 7 and 39. These rules are derived from the Contract Code: section 1 makes it clear that all the rules contained therein are to serve a declaratory function only.[140]

A-10. Revocable and Irrevocable Offers

I. Preliminary Observations

The Report views the problem of revocation as occurring only after the offer has become effective. In Norway, it appears that section 39, along with its forerunner, the *re integra* rule, allows a narrowly circumscribed right of revocation of a binding offer, within the meaning of "revocation" as used by the Report. Yet this right seems

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[134] KNOPH, *supra* note 16, at 512.

[135] *Id.*

[136] HUSER II, *supra* note 130, at 62.

[137] KNOPH, *supra* note 16, at 355.

[138] *See* 1 SCHLESINGER, *supra* note 1, at 733.

[139] ARNHOLM, *supra* note 56, at 48, 230.

[140] *Avtl.*, *supra* note 6, § 1 reads: "The rules in this chapter shall govern, unless other rules are provided for by the acts of the parties, or usages of trade or other custom."

limited.[141] Although falling outside the scope of the definition of the Report, a far more important right of revocation is found in section 7 of the Contract Code.[142]

Further, it is tempting to speak of sections 7 and 39 in one breath when discussing revocation in Norway, the latter provision being treated almost like a postscript to the former.[143] This state of affairs must be kept in mind when discussing revocable and irrevocable offers.

Finally, it should be mentioned that in Norway, as elsewhere, an offer may generally be freely withdrawn prior to its coming to the knowledge of the offeree. Where an offeree is hard-of-hearing, the offeror may withdraw his oral offer if the offeree does not understand him. An offeror is also permitted to void his written offers by stopping them in transit.[144]

II. Revocation of Offers

A. Offers Expressly Made Revocable

Norwegian contract law provides that offers normally are revocable right up to the time that they come to the knowledge of the offeree. Once again, actual notice is required.[145] After that, they are normally irrevocable. These rules, however, are only declaratory, and yield to the clear intent of the parties.[146] Thus, where the offeror inserts a clause plainly reserving the right to revoke the offer at any time up to its acceptance, the courts will give effect to such a provision. The significance of such a reservation may not always be clear, but courts may interpret it to mean the so-called offer is not an offer at all but only an invitation to deal, thereby bringing it within the ambit of section 9.[147]

B. Offers Expressly Stated to be Irrevocable

Importantly, Contract Code section 1 limits the rules of the Code to only a declaratory effect. Thus, if the offeror provides that the offer must be accepted by a certain time, Norwegian courts hold the offer to be irrevocable from its effective date until that final deadline.[148]

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[141] *See supra* notes 125-29 and accompanying text.

[142] *See supra* note 125 and accompanying text.

[143] *See, e.g.*, ARNHOLM, *supra* note 56, at 49-53.

[144] *Id.* at 48. *But see supra* note 107.

[145] *See supra* notes 125-26 and accompanying text.

[146] *See supra* note 140 and accompanying text.

[147] *See supra* notes 56-57 and accompanying text.

[148] *See* ARNHOLM, *supra* note 56, at 58-60. Note that Norwegian case law appears to have provided some rather specific guidelines for interpreting language frequently used in setting out such guidelines. It would appear that these rules allow courts to pinpoint things precisely.

C. *Silence as to Revocability*

Absent explicit provision to the contrary, an offeror is bound by his offer. Therefore, silence as to revocability will generally mean that offers are irrevocable once effective. An offeror may then as a rule only escape his obligation when the offer expires,[149] or is rejected.[150] Where the offer is silent as to the deadline for acceptance, section 3 of the Contract Code sets forth a number of declaratory rules. An oral offer has to be accepted immediately (*straks*).[151] Written offers will bind the offeror for as long a time as he would expect it to take for an offer and an acceptance to reach its addressee, plus a reasonable amount of time for the offeree to think things over.[152] If the offer was made by telegram, the acceptance will be required to be by telegram or some speedy equivalent. This shortens the statutorily-imposed deadline.[153] The rule is intended to be extremely flexible regarding the time afforded the offeree for reflection.[154] The deadline may well be rather short for routine business agreements, but longer for other less run-of-the-mill affairs.[155]

D. *Options*

Options are available in Norwegian law, although it appears that no codification contains any special rules regarding them. Perhaps unsurprisingly, a dearth of authority exists on the subject. Offers, even those whose only content is a promise to keep another offer open, are irrevocable once they come to the knowledge of the offeree. The Norwegian term is *forkontrakter*, literally, "pre-contracts". A *forkontrakt* arises from the acceptance of an offer to bind oneself to further development of a legal relationship. *Forkontrakter* appear to have once had a special relevance to the sale of real property in Norway. Because of the introduction of recording statutes, however, their use is now waning.[156] Apparently, a simple offer with an extended deadline for acceptance accomplishes in Norway what option contracts do in the United States.[157]

Finally, note should be made of the Norwegian term *opsjons kontrakter*, which should not be confused with the term "option contracts." *Opsjons kontrakter* are contracts intended to secure for one

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149 *See Avtl., supra* note 6, § 2.

150 *See id.*, §§ 5, 6.

151 *See id.*, § 3.4.

152 *See id.*, §§ 3.1, 3.2.

153 *See id.*, § 3.3.

154 *See, e.g., Rt.* 1912 at 1051, where the Supreme Court found a period of over a month for reflection not too long. The case involved a proposal sent to a close relative offering a settlement and requesting as answer "as soon as possibly so things won't be too delayed since they'll soon go to the Supreme Court."

155 ARNHOLM, *supra* note 56, at 59.

156 *Id.* at 77-78.

157 *See* note 148 and accompanying text. Note that Norway requires no consideration.

party the right to enter into the contracts he desires. An example from Norwegian case law: A agrees with B to temporarily assume operation of B's iron mines, with a right reserved in A to assume complete control if mining proves to be commercially practicable.[158]

A-11. Is Communication of Revocation Necessary?

I. Revocation: Distinction Between Offers to Specified Persons and to the General Public

As in the Report, it is appropriate to distinguish between offers made to a specific person and offers made to the public at large.

II. Importance of the Problem

Because it can only rarely arise, the question of whether revocation must be communicated seems to be of rather minimal importance in Norwegian law. Generally, offers are irrevocable once the offeree has received actual notice of them. Before that time, an offer may be freely withdrawn as long as the offeror complies with Contracts Code section 7.[159] Once an offer has become irrevocable, however, an offeror can do little more on his own. Where special circumstances are present, Norwegian law does grant discretion to the court to decide whether an offeror may escape his obligation.[160] Although the offeror may petition the courts for such relief, once the offeree has actual notice of the offer the offeror has no legal right to effect a unilateral revocation.

III. Revocation of Offers Made to Specified Persons

It follows from the above that the discussion under this heading must be limited to the rare case in Norway of a true offer[161] that is not irrevocable, for example where the offeror explicitly provides that the offer is revocable until acceptance.

A. Declared Revocation

No clear authority is available on the issue of declared revocation, perhaps due to the largely academic nature of the question. Nevertheless, a solution may lie in an analogy to the withdrawal of offers under section 7.[162] The situations are in fact almost identical. The offeror here has merely made express provision that his offer will remain revocable past the time section 7 would otherwise have made it irrevocable. Section 7 requires communication of the of-

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158 *See Rt.* 1924 at 913.
159 *See supra* notes 125-28 and accompanying text.
160 *See supra* notes 127-28 and accompanying text.
161 Compare "invitation to deal," discussed *supra* notes 54-73 and accompanying text.
162 *See supra* notes 125-26, 128, 159 and accompanying text.

feror's intent to no longer be bound by his offer.[163] It seems clear, absent contrary provisions in the offer itself,[164] that courts will hold the offeror to the same standard, where he or she provided that revocation may come later than the section 7 cutoff.

This solution may at first appear superficial. An examination of the Norwegian concept underlying the analogy, however, demonstrates its accuracy. This concept is *påbud*,[165] unilateral declarations binding on the addressee upon receipt. The Norwegian Contract Code recognizes two situations that involve a *påbud*. First, where an offeree receives an offer he gains the right to accept it. He may exercise this right by notifying the offeree of his acceptance. This notice is considered to be a *påbud*; it binds its addressee on receipt.[166] Second, a *påbud* is involved where the offeror seeks to withdraw an offer, as per section 7. Here, too, the power is with the declarer to bind the addressee upon receipt of notification. A revocation of an offer made expressly revocable will be considered a *påbud*. The intent is to effect a change in the status of the offeree without the offeree having any further say in the matter. Although the exact time that *påbud* takes effect may vary,[167] receipt by the addressee is a minimum requirement. Communication of a revocation, as defined by the Report, is necessary in Norwegian law.

B. Undeclared Revocations

Norwegian law appears to provide no definitive rules regarding undeclared revocations. What guidelines have been set up tend to apply rather generally to all types of legal aids heretofore discussed—*löfter/tilbud* (promise/offer); *påbud* (order);[168] *reklamasjon* (objection).[169]

1. Unauthorized Revocation

Although arguably unauthorized revocation may not truly be called an undeclared revocation, the subject is discussed here for the sake of convenience. Norwegian courts will generally give effect to a legal act only if the communication was authorized.[170] Arnholm es-

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[163] As discussed *infra* at notes 178-82, whether a withdrawal is effective depends upon when the offeree receives it.

[164] Of course, if he wishes to do so, it is clear that the offeror can explicitly provide that he need not communicate his revocation. Possibly, however, courts would consider this a mere invitation to deal. *See supra* notes 54-73 and accompanying text.

[165] For the legal definition of *påbud*, *see supra* note 111.

[166] This rule is found in *Avtl.*, *supra* note 6, § 2: "Where he who has made an offer to enter into a contract has requested a reply within a given time, the reply accepting the offer must have been received by him (kommet frem) before the deadline has passed."

[167] *See infra* notes 178-82 and accompanying text.

[168] *See supra* note 111.

[169] *See supra* note 109.

[170] Arnholm provides the following example: If A gets word of the contents of a letter

pouses this view, and notes that many close cases arise.[171]

2. Unclear Revocation (Revocation by Conduct)

Arnholm is particularly troubled by the situation of a *påbud*. If the recipient is to be held bound by a *påbud* upon receipt of any kind of inkling as to its contents, the recipient incurs a considerable risk. In the case of a revocation, a *påbud* operates to deny the offeree the right to accept. This right may be of considerable commercial value. It does not therefore seem reasonable for the law to foist upon the offeree, where a revocation may or may not be intended, the burden of deciding this issue individually. Arnholm suggests that in such a case the offeree has a right to ignore an unclear revocation. Nevertheless, the safest course would probably be for the offeror to object via *reklamasjon*.[172]

IV. Revocation of "Offers" Made to the Public

Arnholm states that revocation of offers made to the public is best done by publication. In doing so he draws an analogy to the situation covered by Contract Code section 14 regarding the recall of a power of agency.[173]

A-12. When Does Revocation Become Effective?

I. General Rules

The practical significance of when a revocation becomes effective in Norwegian law is rather limited.[174] One will rarely encounter genuine offers in Norway that are nevertheless revocable. Normally, once an offeree has actual notice of an offer, the offer will be irrevocable either for the period of time provided for in the offer, or absent this, for a reasonable period of time as determined by Contract Code section 3.[175] Where the offeror provides that the offer shall have no binding force, courts will tend to find only an invitation to deal.[176] Nevertheless, it is clearly possible for the offeror to create a true offer that remains revocable.[177]

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through a third party C, communication is too remote (to be enforceable), even if C in fact has related the contents of the letter quite correctly. It is always risky for A to rely upon this sort of message, as he has the simple means at his disposal of letting B know what has happened and finding out if everything is as it should be. ARNHOLM, *supra* note 56, at 230.

171 *Id.*

172 *Id.* at 26.

173 *See supra* note 102 and accompanying text.

174 *See supra* note 159 and accompanying text.

175 *See supra* notes 122-24 and accompanying text.

176 *See supra* note 60 and accompanying text.

177 *See supra* notes 145-47 and accompanying text.

II. Time of Withdrawal or Revocation

A. Irrevocable Offers

Norwegian law is quite clear: Contract Code section 7[178] provides that an offer is revoked on receipt of a notice of withdrawal, provided that notice reaches the offeree before or at the same time as he receives actual notice of the offer.

B. Revocable Offers

No clear statement of the Norwegian law regarding time of revocation of revocable offers can be formulated, perhaps because of the academic nature of the question. Interestingly, however, a solution may emerge from the Norwegian concept of *påbud*. As noted above, Norwegian courts would consider a declaration intended to revoke a revocable offer to be a *påbud*.

Arnholm discusses the concept of *påbud* at some length.[179] He points out that *påbud* are not something that can be thrown around to anyone, anytime. If a *påbud* is to bind someone, it must be based on some sort of preexisting authority, a *påbudsgrunn*. The above discussion cited acceptances and withdrawals of offers as examples of *påbud*. The offer is the *påbudsgrunn* of an acceptance. The offer is also the *påbudsgrunn* of a withdrawal. Arnholm suggests that the reason that the law provides that these *påbud* are binding upon receipt is because a reasonable interpretation of the *påbudsgrunn* indicates that this is the just result.[180]

If one required that an acceptance come to the actual notice of the offeror to be effective, it would be too easy for him or her to evade an acceptance of an offer he or she had come to regret. Applying this same concept to the withdrawal of an offer, an offeree might experience a slight disappointment by rejoicing over an offer, not realizing a withdrawal is already in his or her mailbox. The offeree, however, often suffers no real loss from this event. In any event, offerors should be aware that they cannot expect to act instantaneously on offers; they need only do a little checking first. They may then act with confidence.

Arnholm contends that situations other than those involving a *påbud* should be analyzed on the basis of the *påbudsgrunn*, in search of a rule that is reasonable. He feels that receipt should be sufficient where an ongoing relationship is to be terminated, for example, a notice of termination of employment. Nevertheless, a higher standard is sometimes appropriate[181]—perhaps receipt at a place and in

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178 *See supra* note 125 and accompanying text.

179 *See* ARNHOLM, *supra* note 56, at 80-83.

180 *Id.*

181 Arnholm cites the example of a bank in charge of administering A's securities,

a manner that the addressee ought to know of at the decisive point in time.

It seems highly likely that Norwegian courts view an effort by an offeror to revoke an offer expressly made revocable to be a *påbud*. It is clear, however, that such an action does not fit completely into the already formulated rules of Norwegian contract law. Thus, it seems probable that courts will do as Arnholm suggests, that is, evaluate the authority behind the *påbud* and seek a just solution. The analogy to the offer-withdrawal situation is readily apparent. The argument is even stronger there that the offeree, who has received an offer expressly revocable, must be on notice to not act without first checking his or her mailbox. Norwegian courts would likely hold receipt of the revocation to be sufficient to cancel the offer.

Finally, it is significant that an acceptance is also considered to be a *påbud* in Norway. Section 2 of the Contract Code[182] provides that an acceptance, as *påbud*, is binding upon receipt. Thus, where an offeror has reserved a right to revoke an offer at any time prior to acceptance, he is well-advised to check his own mailbox before attempting to impose a duty on the offeree of checking his.

A-13. Termination of Offer by Death or Insanity

Courts determine the ability of the offeror to contract by looking at conditions as they were at the time of dispatch of the offer. The fact that the offeror later becomes incompetent to contract usually is of no consequence. Arnholm notes, however, that the line-drawing that is done here is actually more flexible in practice.[183]

In case of the death of the offeror, an analogy is made to Contract Code section 21. This section governs the effects of the death of the principal in any agency relationship. Section 21 provides that even on the death of the principal, the power of agency will continue to reside in the agent, unless special circumstances indicate that it should be terminated.[184] It may fairly be inferred from this language that a contract involving a personal element would fall within the ambit of the special circumstance that would terminate the power of the agent. The same rule should no doubt apply to contracts not involving an agent.

In the case of subsequent insanity of the offeror, section 31 provides some guidance. An offeror will not be held bound if another can be said to have exploited the offeror's lack of mental wherewithal. This rule also applies where a third party accomplished such

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where A orders the bank to sell a certain block at one—the bank should be afforded a reasonable time to acquaint itself with the order. *Id.* at 81.

[182] *See supra* note 166 and accompanying text.

[183] *See* ARNHOLM, *supra* note 56, at 189.

[184] *Avtl.*, *supra* note 6, § 21.

exploitation and the offeree knew or should have known of this state of affairs.[185] This rule goes more to the question of the validity of the total agreement, and does not really contradict the general rule that offers are binding if the offeror was competent at the time of dispatch.

B. Acceptance

B-1. Who May Accept an Offer—Assignability of Offers

1. General Observations

The assignability of offers is a consequence of the promise principle.[186] The extent to which they bind the offeror varies.[187] By virtue of the offer, the offeree acquires a legally enforceable right, a *fordring*, that allows him to create a contract by accepting the offer.[188] The scope of this right varies. Once the offeree has knowledge of the offer, the right is absolute.[189] Before that time, the right remains subject to the condition that a revocation not reach the offeree before the offeree knows of the offer.[190] The effect of the right does not vary. From this principle flow a number of legal consequences, the central one being the free assignability of a *fordring*.

Early in Norwegian history the legal right embodied in a *fordring* was generally not assignable.[191] This was due in part to the barbaric means of enforcement that the law afforded a creditor.[192] The law authorized one owed an outstanding obligation to make the debtor his bondman. Moreover, it allowed the creditor to "Hugge av ham hvor han vil, oventil eller nedentil," (cut off him as he [the creditor] will, up high or down low) if the debtor declined to perform any required tasks.[193] Under these circumstances, the debtor no doubt cared very much who became his creditor.[194]

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185 *Id.* § 31.

186 *See supra* notes 15-23 and accompanying text.

187 *See supra* notes 142-58 and accompanying text. As far as revocable offers are concerned, the problem of assignability has little significance because such offers will most often be treated as mere invitations to deal, *oppfordring til a gjöre tilbud*. *See supra* notes 54-73 and accompanying text. See *supra* notes 51-53 for definition and discussion of *fordring*.

188 *See supra* notes 141-58 and accompanying text.

189 *See id.* This right follows from the promise principle and is akin to that of an offeree in Anglo-American law once he has concluded an option contract or where the offer is made under seal, 1 CORBIN, *supra* note 33, § 48, or is made irrevocable by statute. *Id.* § 46.

190 *See supra* notes 141-58 and accompanying text. This right also follows from the promise principle and is somewhat akin to the right arising from an offer made under seal at Anglo-American law. 1 CORBIN, *supra* note 33, § 48.

191 AUGDAHL, *supra* note 53, at 311. Norwegian law consistent with the promise principle recognizes an enforceable right on the part of the offeree, even in the absence of an executory contract involving mutuality of obligation. Where the offeree does not yet have actual notice, his right will be conditional but vested nevertheless. *Id.* at 311.

192 *Id.* at 308.

193 *Id.* at 309.

194 *Gulatingloven*, Chapter 15. *Gulatingloven* was the Code that governed the *Gulating*

Today, however, all *fordringer* are presumed to be assignable. Statutory exceptions modify this rule where the identity of the creditor is crucial to the contract.[195] In many such situations the assent of the party owing the duty is required.[196] Norwegian law also regulates assignment by offerees in certain specific factual settings where the identity of the parties seems unimportant.[197]

II. Assignability by Assent

In many situations where the personal nature of the contract or a statutory provision prohibits assignment without assent, the parties may effect an assignment through express agreement.[198] In some circumstances, parties must seek permission of the courts or some governmental agency.[199]

III. Nonassignability by Agreement

An offeror may expressly provide in the offer that the offer is not assignable, and courts will enforce these provisions.[200] The law is unsettled with regard to the effect of such a provision, however, on a subsequent purchaser in good faith.[201]

B-2. Qualified or Unqualified Acceptance?

I. General Rule

For an acceptance to create a contract, it must unconditionally comply with the offer.[202] Norwegian law views faulty acceptance as rejection and counteroffer.[203] Norwegian law requires complete compliance with both: (1) the terms of the contract to be con-

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(legal district) in Norway in the Middle Ages. Such districts existed each with a Code. *Gulating* was the area of West Norway, south of Trondhjem and east of the Hardanger plateau. The Code was already in existence in the days of Harald Harfagre (Harald the Fair-Haired), and was the basis for the earliest legal formulations in Iceland. *Gulatingloven* is still in existence. *See* GULBRANSEN, *supra* note 53, at 89.

195 AUGDAHL, *supra* note 53, at 309.

196 AUGDAHL states that this is the case with regard to labor contracts (exception for the sale of one's workplace—no assent of the employees required), and rental contracts. *Id.*

197 *See, e.g., Lov*, 14 August 1918 § 12 (bars assignment of future wages and other forms of compensation); *Lov* 13 Juni 1969 (bars assignment of wrongful death or personal injury claims).

198 *See* AUGDAHL, *supra* note 53, at 309-11.

199 *See, e.g., Lov om valutaregulering* av 14 Juli 1950 (Law of Foreign Exchanges), *reviewed by* AUGDAHL, *supra* note 53, at 311.

200 AUGDAHL, *supra* note 53, at 312.

201 *Id.*

202 ARNHOLM, *supra* note 56, at 65.

203 *Lov* 1918 31 mai om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer, (No. 4) §§ 4.1, 6.1 (hereinafter Avtl.); *cf.* ARNHOLM, *supra* note 56, at 65; *Rt.* 1956 at 224 (held no contract was formed where offeree added conditions to his acceptance that did not accord with the offer, and offeror rejected them).

cluded,[204] and (2) any wording or specific form of acceptance requested by the offeror.[205] The Norwegian Contract Code codifies this rule: "If the response to an offer purports to be an acceptance, but does not accord with the offer, it is viewed as a rejection . . . ."[206]

II. Valid Acceptance Despite Seeming Variance

Norwegian law is in accord with Schlesinger's General Report that seeming variances between offer and acceptance will not prevent the conclusion of the contract.[207]

A. Differences in Wording

Unless the offeror specifies otherwise, there is no general requirement that the wording of the acceptance mirror that of the offer. The law requires only that the acceptance accord with (*stemme med*) the offer.[208]

In exceptional circumstances, an offeror may properly reject an acceptance because its form is improper.[209] There is no rule that an acceptance improper in form is invalid. If the offeror voices no objection to the acceptance, the offeree is bound by its terms.[210] The difference in wording may, however, vary the meaning between that of the offer and the acceptance. Under certain circumstances, even an acceptance with a variance may conclude a contract.[211]

B. Inclusion of Terms Implied in Fact

The offeree is generally permitted in his acceptance to include terms that a court could conclude were factually implied in the original offer. The inclusion of such terms will not be a bar to the formation of the contract.[212] Where the offeree errs and includes terms not factually implied, his acceptance may yet create a contract under Norwegian law.[213]

C. Inclusion of Terms Implied at Law

Norwegian law generally also permits an offeree to include terms in the acceptance that a court considers implied at law by the offer. The inclusion of these terms also does not stand in the way of

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204 ARNHOLM, *supra* note 56, at 65.

205 *Id.* at 66; *see also infra* notes 340-64.

206 *Avtl., supra* note 6, § 6.1.

207 *See* 1 SCHLESINGER, supra note 1, at 125.

208 ARNHOLM, *supra* note 56, at 64; *cf. Avtl., supra* note 6, § 6.1.

209 ARNHOLM, *supra* note 56, at 66. Arnholm illustrates this point with the example of negotiations seeking to come up with an amicable compromise or settlement.

210 *Id.* at 66. This seems to follow from *Avtl.* § 6.2.

211 *See infra* notes 280-83 and accompanying text.

212 ARNHOLM, *supra* note 56, at 65.

213 *See infra* notes 280-83 and accompanying text.

the contract.[214] Some limits, however, are appropriate in this area. An offeree must stop short of including the entire Contracts Code in the acceptance. The offeror should be able to insist on a concise acceptance, thus guarding against becoming encumbered with conditions he or she is not bound to accept. Where the offeror receives a verbose acceptance just prior to the deadline set in the offer, the offeree must be given sufficient time to submit a new and satisfactory declaration of acceptance.[215]

Where an offeree errs and includes terms not implied at law in the original offer, Norwegian law again provides that the acceptance may effect a contract.[216]

Some dispute exists as to whether Norwegians actually distinguish terms implied at law from those implied in fact.[217] The result is apparently the same with the inclusion of either type. Any further distinction arises from the Norwegian law of contract interpretation, a topic beyond the scope of this Article.

III. Additions That Do Not Make the Acceptance Ineffective: The Borderline Between Unqualified and Qualified Acceptance

As discussed above, Norwegian law recognizes an acceptance as unconditional if the offeree accepts without any qualifications.[218] This is true even where the offeree makes certain additions to the acceptance, so long as they are not understood to qualify the offeree's assent. Norwegian courts tend to analyze each case on its own merits in drawing the line here,[219] within the following parameters: (1) an unconditional acceptance does not lose its validity simply because the offeree grumbles about the bargain,[220] (2) an acceptance is generally effective even though the offeree adds to it some requests or wishes,[221] (3) an acceptance is valid where the offeree adds to it a proposal that, if the offeror accepts it, will constitute a separate contract. The actions of the offeree must not, however, be such as to lead the offeror to believe the original offer was rejected.[222]

Difficult questions of construction arise in Scandinavian law where the offeree sends the offeror a telegraphic acceptance with the

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214 ARNHOLM, *supra* note 56, at 65.

215 *Id.* at 66.

216 *See infra* notes 280-83 and accompanying text.

217 *Compare* KNOPH, *supra* note 16, at 305-06, 437-67, *with* ARNHOLM PII, *supra* note 15, at 38-40.

218 *Avtl.*, *supra* note 6, § 6.1.

219 *See* ARNHOLM PII, *supra* note 15, at 72-73.

220 *See, e.g.*, *Rt.* 1951 at 376 (contract upheld when protest against price increase accompanied an acceptance in a supply contract situation).

221 ARNHOLM, *supra* note 56, at 69; *see also Rt.* 1928 at 716. Arnholm notes that Danish law differs somewhat from Norwegian law in this regard and cites to H. USSING, AFTALER PAA FORMUERETTENS OMRAADE (3d ed. 1950) (Danish treatise on the law of contracts) [hereinafter USSING].

222 *See id.*

words "I accept, details by letter." (*Aksepert; naermere pr. brev.*)[223] If the letter arrives before the deadline for acceptance, it will appear from the letter whether the acceptance is unconditional and the dilemma is skirted. If the letter is delayed, however, the offeror is left to wonder whether the acceptance is unconditional or conditional. The offeree should not be allowed, on his or her own volition, to impose such uncertainty on the offeror. Scandinavian courts and commentators have proposed possible solutions. The first is to view the telegram as an unconditional acceptance that the offeror cannot reject. The offeree would thus be barred from including any variance of the terms of the offer in the letter.[224] The second is to ignore the preliminary telegraphic acceptance altogether.[225] Arnholm suggests a third possibility, that of selecting the solution according to the type of contract involved. He contrasts a contract involving the sale of marketable stocks and bonds from a contract for the sale of real property. The highly volatile nature of stocks and bonds would make it unreasonable to allow the offeree to refer the offeror to a subsequent letter for details. With a land sale contract, however, one could reasonably be expected to wait for the letter as necessary amplification of a terse initial agreement.[226]

Arnholm also distinguishes a telegraphic acceptance reading "I accept, letter follows." (*Aksepterer. Brev følger.*) This message refers only to the confirmation commonly exchanged in business where contracts are entered into by wire. No indication of any further conditions appears. It would be unreasonable to interpret this acceptance as conditional, thereby depriving the offeree of the right to conclude the contract. The two telegraphic responses, on their faces, have little to distinguish them.[227]

Another problem area pertaining to the unconditionality of an acceptance is that of vague or ambiguous language.[228] Arnholm suggests the offeror has a right to demand that the offeree clarify his

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[223] ARNHOLM PII, *supra* note 15, at 75. This problem is discussed at some length here.

[224] The offeree would still be allowed to include in his letter, among other things, the amplifications of terms and changes in wording that courts normally recognize as permissible.

[225] ARNHOLM PII, *supra* note 15, at 75; *see also* T. ALMEN & R. EKLUND, LAGEN OM AVTAL OCH ANDRA RÄTTSHANDLINGAR PA FORMOGENHETSRÄTTENS OMRADE 8, 30 (Nordstrom ed. 1963) (Treatise on Swedish Law of Contracts) [hereinafter ALMEN & EKLUND].

[226] *See* USSING, *supra* note 221, at 67, 107; *contra* ALMEN & EKLUND, *supra* note 225, at 30.

[227] ARNHOLM PII, *supra* note 15, at 75. The formalism of this approach seems odd in light of the case by case determination by Norwegian courts of whether an acceptance is unconditional. Arnholm cites no cases in support of his suggested distinction, perhaps because he addresses a theoretical rather than a practical problem. *Id.* German courts evidently treat telegrams stating "I accept, letter follows" the same. German courts look at the course of previous negotiations and the commercial usage existing in a particular branch of trade in construing all such declarations. *See* 2 SCHLESINGER, *supra* note 1, at 980.

[228] *See* ARNHOLM PII, *supra* note 15, at 75. Arnholm also cites no cases applying this distinction in his updated text. *See* ARNHOLM, *supra* note 56, at 66.

or her intent, allowing the offeree a reasonable time to do so. This reasonable time is required at least in those cases where the offeree's actions are not exceptionally deserving of rebuke (*utpreget klanderverdig*), even if the clarification arrives after the expiration of the original deadline for acceptance.[229] Arnholm concludes that the offeree must, however, clarify matters upon becoming aware of the situation.[230]

B-3. Rejection and Return Offers

I. Legal Nature of Rejection: Counter Offer and Return Offer Distinguished

A. General Rule as to Rejection

Norwegian law permits an offeree to terminate the right of acceptance by rejecting the offer. Article 5 of the Norwegian Contract Code codifies the rule: "Blir tilbudet avslaat, ophörer det at vaere bindende for tilbyderen . . . ." (If the offer is rejected, it ceases to be binding on the offeror.)[231]

Rejection is not possible in those circumstances where freedom of contract is restricted by law,[232] specifically those involving the *kontraheringsplikt* (duty to contract). This duty is applicable, for example, to state monopolies functioning as public utilities in Norway.[233] Apart from these exceptional cases, the offeree has broad power to reject the offer. This power to reject may in fact rise to the level of a duty. Where an offeree originally solicits an offer and then does not wish to enter into a contract, Norwegian law requires notice to the offeror in certain circumstances.[234]

In Norway, a rejection stands as a declaration of intention that the offeree must communicate to the offeror, and as such amounts to a unilateral act.[235] Norwegians call this type of action by a party a *påbud*.[236] Special rules govern such declarations.[237] Norwegian law requires that a rejection be a definitive expression of unwillingness to accept, communicated within the time of the offer's validity.[238] If the rejection is to have its desired effect, that is, termination of the

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229 *See* ARNHOLM PII, *supra* note 15, at 75. See *infra* notes 394-417 and accompanying text regarding time limits for acceptance.

230 ARNHOLM PII, *supra* note 15, at 76. Arnholm cites no case in support of the solution he offers to this problem.

231 *Avtl., supra* note 6, § 5. The use of "bindende" is troubling to translate here. That the offer ceases to be binding might suggest a revocable offer, not a terminated offer.

232 *See* ARNHOLM, *supra* note 56, at 77.

233 *Id.* at 76-80.

234 *Avtl., supra* note 6, § 9.2.

235 ARNHOLM, *supra* note 56, at 80.

236 *Id.* at 80-83. See *supra* note 111 for a definition of *påbud*; see *supra* notes 165-72 and accompanying text for a discussion of *påbud*.

237 ARNHOLM, *supra* note 56, at 80-83.

238 *Id.* at 78.

offer, it must fulfill the requirements of a valid legal act (*disposisjon*).[239] For *påbud*, the burden is on the offeree to make his or her intent clear[240] if the rejection is to be a bar to later acceptance.[241] What constitutes a rejection is a question of interpretation and construction in each case.[242]

B. Counter Offers—Return Offers

Rejection may also take the form of a counter-offer, if the offeree's declaration of acceptance contains qualifications or alterations inconsistent with the terms of the offer.[243] The offeree may open up negotiations and make suggestions without necessarily rejecting the offer, intending to fall back on that offer while attempting to secure better terms. Where the offeree expresses a desire to negotiate on the condition that the right to accept the original offer is retained, courts do not deny the offeree that option.[244] The same rule applies even without express provision where the offeree's actions do not suggest rejection to the offeror.[245]

The following case indicates how far a Norwegian court may go in this regard. Three guarantors, who already had promised to answer for the part of a man's debt to a bank, were asked to execute a new document because the man's debt had exceeded the amount of the previous guaranty. The guarantors submitted a signed document for an amount less than that suggested by the bank. The bank told the debtor that this document was "worthless" and asked him to procure a document "in a form that was usable (*anvendelig*)." The bank retained the signed document, however, and it was eventually entered onto the bank's guaranty ledger. The bank did not tell the guarantors personally of its dissatisfaction and it did not appear that the guarantors ever tried to get the document back. Based on these facts, the Norwegian Supreme Court majority (6 to 1) found that the bank could collect on the guaranty.[246]

Norwegian law also allows the offeree to make wholly independent return offers without rejecting the original offer.[247]

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[239] *Id.* at 79.

[240] *Id.* at 26.

[241] *Id.* at 79. Arnholm notes that this can of course cause uncertainty for the offeror. But the situation is not any worse and perhaps is better than that of the offeree who relies upon an offer later proven to be flawed. Usually, the deadline for acceptance will run before the offeree manages to dispatch an acceptance subsequent to the faulty rejection.

[242] *See supra* notes 202-06 and accompanying text.

[243] *Avtl., supra* note 6, § 6.2. See *supra* notes 202-30 and accompanying text for a discussion of the distinction between unconditional and conditional acceptances.

[244] ARNHOLM PII, *supra* note 15, at 79.

[245] *See, e.g., Rt.* 1928 at 716.

[246] *See Rt.* 1925 at 814.

[247] *But see supra* note 222 and accompanying text.

II. The Legal Effect of Rejection

The Norwegian Contract Code makes clear that rejection terminates the power to accept, even if the period of time fixed for acceptance has not elapsed.[248] Current Norwegian law allows the offeror to keep the offer open even following a rejection by making a new offer with the same terms.[249] The offeror/purchaser need not renew an offer in a land sale contract where such party is to assume a mortgage and is initially rejected by the mortgagor.[250]

III. Time When Rejection Becomes Effective

A rejection is a *påbud* in that it is a declaration of intention that the law requires be addressed and communicated to another person.[251] Generally, *påbud* are effective as soon as they reach their intended address, no matter when the addressee takes actual notice of them. Article 5 is silent on when a rejection is effective. None of the special factors that Arnholm concludes may cause a variance in the time when a *påbud* takes effect apply.[252] One can safely conclude, therefore, that the *påbud* rule is applicable to rejections as well as acceptances.[253]

B-4. Acceptance or Acknowledgement of Receipt of Offer

The problem of whether an offeree's response constitutes an acceptance or merely an acknowledgement of receipt of an offer arises at two different points in time: (1) in the course of the parties' dealings, or (2) if the parties overlook the issue, in a subsequent suit to establish the rights of the parties.

An acceptance is a *påbud*.[254] An addressee who receives any *påbud* and has a reasonable doubt as to its validity or scope should have a right to reject it rather than risk reliance on a subjective inter-

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[248] *See Avtl.*, *supra* note 6, § 5, ARNHOLM PII, *supra* note 15, at 78. The statute is actually somewhat sloppily worded, saying "If the offer is rejected, it ceases to be *binding* on the offeror, even if the time limit for acceptance has not yet expired" (emphasis added). Again, the use of the term *bindende* (binding) is troubling in that it might lead one to believe that a rejection does not terminate the offer, but merely makes it revocable until the time for acceptance has run. Fortunately, the clarity of the second clause cleans up the uncertainty of the first. Time remaining on the acceptance clock is simply irrelevant once the offeree rejects the offer.

[249] ARNHOLM, *supra* note 56, at 70.

[250] *Id.* at 70.

[251] *See supra* notes 165-67 and accompanying text.

[252] *See* ARNHOLM, *supra* note 56, at 80-83.

[253] See *infra* notes 365-88 and accompanying text for discussion of when acceptances are effective. See also ARNHOLM PII, *supra* note 15, at 93. Where one buys an item on trial, *Kjöpsl* § 10 requires notice to the seller if one does not wish to keep the item. Arnholm says that this notification amounts to a rejection of an offer and as such must be received by the offeror to achieve its desired effect. *Id.*

[254] ARNHOLM PII, *supra* note 15, at 12. *See supra* notes 165-67.

pretation of the offeree's intent.[255] In rejecting the *påbud*, however, the addressee/offeror also incurs a duty to respond (*reklamasjonsplikt*). Without response and perhaps clarification from the addressor/offeree, the offeror should be set free, even if the original *påbud* is subsequently found to be proper.[256] Thus, an offeror who receives what may or may not be an acceptance should seek clarification from the offeree at once.

At trial, the issue is probably one of interpretation. Norwegian law treats the determination of whether the offeree's response is an acceptance or merely acknowledgement of receipt as an issue of fact within the trial court's discretion. The trial court judge uses an objective approach,[257] looking to the language of the communication, any prior negotiations or agreements between the parties, the customs of the trade if appropriate, and the parties' subsequent behavior. The judge seeks a reasonable result. Where doubt exists, the communication will be interpreted against its author.[258]

The problem posed in this section is analogous to the problem of whether an acceptance by telegram containing the words "details by letter" or "letter follows" should be regarded as conditional or unconditional.[259] There, as here, courts lack a clear-cut answer and seek through detailed analysis of the facts of each case to arrive at a just result.[260]

In view of the above, parties should avail themselves of every opportunity to clarify ambiguous communications so as to avoid the uncertainty of submitting the matter to the courts.

B-5. Acceptance by Silence

I. General Rule

Where the offeree does nothing in response to an offer received, Norwegian law is clear that the silence does not amount to an acceptance of the offer.[261] With silence the offeror ceases to be bound by the offer once the deadline for acceptance has passed.[262] Norwegian law recognizes a number of circumstances, however, where silence may be deemed an acceptance.[263]

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255 *Id.* at 26.

256 *Id.*

257 *Id.* at 35-47.

258 *Id.* at 40-42.

259 *Id.* at 66.

260 *Id.*

261 ARNHOLM, *supra* note 56, at 70.

262 *Id.* at 70.

263 *Id.*

II. Exceptions to the General Rule

A. Contracts for the Sole Benefit of Offeree

In Norway, promises are binding upon the promisor and a gift is a promise.[264] An acceptance and the giving of consideration is not required.[265] Thus, no issue arises regarding acceptance by silence.[266]

B. Duty to Speak Arising from Law

The Norwegian Contract Code imposes a *reklamasjonsplikt* (duty to speak)[267] in a number of circumstances.[268] A *reklamasjon* is a special kind of *påbud*,[269] and is a unilateral jural act by which an addressor seeks to *preserve* a right possessed with regard to the addressee.[270] The *reklamasjonsplikt* may fall upon either an offeror or an offeree depending upon the statute and circumstances. The impact of a *reklamasjonsplikt* is best seen in terms of the various statutes that impose the duty.

Silence may commit an offeror to a contract where he has made an *oppfordring til å gjöre tilbud* (invitation to deal).[271] This invitation amounts to a promise whose binding effect has been neutralized by the offeror's reservation.[272] The invitor acquires the special duty to respond to the offers generated.[273] If the invitor receives an offer within a reasonable time and is or should be aware that it is in response to his or her *oppfordring*, the invitor must communicate rejection without unreasonable delay.[274] Otherwise, article 9 of the Contract Code provides that silence is deemed to be an

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264 *Id.* at 13.

265 *Id.* at 14.

266 Arnholm points out that one should in fact scrupulously avoid all behavior that might be construed as an acceptance of a gift. The acceptance is unnecessary. It will not "bind" the promisor—he is already bound. It will bind the promisee, however, and this means that he can no longer refuse the gift. This can be costly where the gift object damages someone's property. ARNHOLM, *supra* note 56, at 76.

267 *Avtl.*, § 9. As the Schlesinger Report indicates, the use of the term "duty to speak" is in accord with general usage although the term may not be entirely accurate. What is actually meant is not a duty on the part of the offeree, but a loss of a power or immunity—if the offeree does not speak, he will lose his power to reject the offer and his immunity from a contract action. *See* 1 SCHLESINGER, *supra* note 1, at 132. The Norwegian term is *reklamasjonsplikt*. See *supra* note 109 for a definition and discussion of this term.

268 ARNHOLM, *supra* note 56, at 71.

269 *Id.* at 15.

270 *Id.* See *supra* notes 165-67 and accompanying text for definition and discussion of *påbud*.

271 ARNHOLM, *supra* note 56, at 57. See *supra* notes 54-73 and accompanying text for a discussion of invitations to deal.

272 ARNHOLM, *supra* note 56, at 57.

273 *Avtl.*, *supra* note 6, § 9. *See* ARNHOLM, *supra* note 56, at 7. Arnholm suggests that Norwegian courts may also view such *oppfordringer* to contain a promise to reimburse the other party for expenses incurred in drawing up a detailed offer. *Id.*

274 *Avtl.*, *supra* note 6, § 9. *See* ARNHOLM, *supra* note 56, at 7.

acceptance.[275]

Silence may also operate as an acceptance on an original offeror who receives a late or noncomplying acceptance.[276] Normally, this sort of reply prevents the formation of a contract.[277] Under Norwegian law, however, that acceptance has some legal effect. Articles 4.1 and 6.1 of the Norwegian Contract Code provide that it is to be viewed as a new offer.[278] In certain situations, Norwegian law provides that the silence of the original offeror will be viewed as an acceptance of this "new offer."[279]

Norwegian law provides that where the offeror knows or ought to know that the offeree thinks he or she is properly accepting the offer, the offeror must without unnecessary delay, notify the offeree that he or she finds the acceptance wanting.[280] If the original offeror remains silent, a contract will be effected on the terms stated in the acceptance.[281] This rule is applicable even where the offeree miscalculates the deadline for acceptance or employs a method of dispatch resulting in a late arrival.[282] Courts have applied the rule where the offeree is aware that the acceptance is at variance with the offer, but where under the conditions the offeree was justified in thinking that the acceptance would be well-received.[283]

Nothing bars an offeree from waiving the right to *reklamasjon*, impliedly or expressly.[284]

Additional statutes that render silence the equivalent of acceptance by imposing a *reklamasjonsplikt* include sections 5, 82, and 90.2 of the Code, which regulate brokers, agents and travelling salesmen;[285] and section 60 of the Sales Code.[286] The operation of these

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275 *Avtl., supra* note 6, § 9.

276 *Id.* at 67.

277 *Id.*

278 *Id. See supra* notes 202-06 and accompanying text; *see infra* notes 418-23 and accompanying text.

279 ARNHOLM, *supra* note 56, at 67.

280 *Avtl., supra* note 6, §§ 4.2, 6.2. *See* ARNHOLM, *supra* note 56, at 67.

281 *Avtl., supra* note 6, §§ 4.2, 6.2.

282 ARNHOLM, *supra* note 56, at 67.

283 *Rt.* 1938 at 259. Arnholm notes that this decision is also consistent with the policies underlying the Norwegian Contract Code. ARNHOLM, *supra* note 56, at 67.

284 ARNHOLM, *supra* note 56, at 67.

285 *See* Lov av 30 juni 1916 No. 1 om kommission, handelsagentur og handelsreisende. Section 5 provides that a broker must give notice without unnecessary delay if he does not wish to accept a consignment from someone with whom he has a trade agreement. Sections 82 and 90.2 together deal with the situation where a buyer who is dealing via an agent or travelling salesperson receives a notice from the principal that the principal considers a contract to exist, or an order to have been placed. The statutes require that the buyer notify the principal if he wants to claim that there is no binding contract or valid order. Otherwise, his silence will bind him.

286 *See* Lov av 24 mai 1907 No. 2 om kjöb. Section 60 provides that where an item is sold "on approval" the buyer is bound by the contract where after delivery he retains possession without notifying the seller of his wish within a reasonable period or within the period specified in the contract. *Cf. Rt.* 1930 at 799.

statutes is similar to the Contract Code.

Article 32 of the Contract Code imposes a *reklamasjonsplikt* where a communication has been garbled through the fault of the addressor, or through faulty telegraphy or human error.[287] Here, too, silence in the face of a duty to speak may be deemed an acceptance.[288] Article 40 provides that one who delivers notice to expedition by mail or other responsible means has fulfilled his or her duty.[289] Apparent "silence" due to the loss of or delay in notification will not be deemed an acceptance.[290]

C. *Duty to Speak Arising from Prior Agreement of the Parties*

Norwegian law permits parties to agree that a contract may be concluded in the future by the silence of the offeree following an offer.[291]

D. *Duty to Speak Arising from Prior Dealing or Negotiations*

1. *Following Established Patterns of Conduct*

Norwegian law construes the offeree's silence as an acceptance where the offeror and offeree have had prior contacts independent of the present transaction.[292] Such construction must be reasonable in light of the prior dealings of the parties.[293]

2. *Reducing Mutual Claims to Certainty*

A problem arises where the offeror proposes not an independent deal similar to a previous one, but only a reduction to certainty of mutual claims resulting from previous dealings.[294] Norwegian law does not except this situation from the general rule and allow silence to operate as an acceptance.[295] It can be assumed, therefore, that the general rule applies and silence is *not* acceptance.

E. *Duty to Speak in Current Negotiations*

In the course of or at the end of negotiations conducted among persons with no similar previous dealings, Norwegian law may yet impose on the offeree a duty to speak.

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287 *Avtl.*, *supra* note 6, § 32. *See supra* text accompanying note 43; *see* ARNHOLM, *supra* note 56, at 72.

288 *Avtl.*, *supra* note 6, § 32. ARNHOLM, *supra* note 56, at 72.

289 *Avtl.*, *supra* note 6, § 40.

290 *Id.*

291 *See* ARNHOLM, *supra* note 56, at 71.

292 *Id.*

293 *Id.*

294 *See* 1 SCHLESINGER, *supra* note 1, at 133-34.

295 *See* ARNHOLM, *supra* note 56, at 70-75.

1. *Offer Solicited by the Offeree*

Article 9 of the Norwegian Contract Code regulates the offer solicited by the offeree.

2. *Final Offer Made by a Party After Some Negotiations*

Articles 4.2 and 6.2 of the Norwegian Contract Code apply to final offers made after negotiations.

3. *Letters of Confirmation*[296]

Norwegian law recognizes a contract where one party receives notification from another indicating a belief that: (1) a contract has been concluded; and (2) it contains certain terms.[297] The addressee's silence in the face of such notification may be deemed acceptance.[298] The rule applies where litigants dispute the existence of a contract or admit its existence but disagree on its terms.[299] There is a clear policy behind this rule. Letters of confirmation are an effort at clarity, a commodity so valuable that Norwegian laws place the minor burden of *reklamasjon* on the addressee.[300]

Norwegian law also permits a letter of confirmation[301] to include clauses that do not directly follow from the parties' previous agreement.[302] Such clauses serve most often to supplement a contract that is incomplete in its terms, although they may also undertake a change that the drafter of the letter of confirmation reasonably believes is in the interest of both parties.[303] In both cases, where appropriate, silence by the addressee may be acceptance.[304]

The rule is not without qualification, however. The addressee need not respond where the other party claims that which is manifestly unreasonable.[305] The rule does not protect the addressor who indiscriminately sends *stadfestelser* to a number of persons in the hope

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296 It is important to distinguish the letters discussed here from those contemplated by *Avtl.*, *supra* note 6, § 8. Section 8 provides: "Even if an offeror has declared that he will consider the silence of the other party to be an acceptance, or it otherwise appears from the circumstances that he is not expecting an explicit answer, the other party has a duty upon request to reveal whether he wishes to accept the offer. If he does not do so, the offeror is free (of his offer)." *Id.*

297 ARNHOLM, *supra* note 56, at 68, 72.

298 *See Rt.* 1902 at 247. ARNHOLM, *supra* note 56, at 72. Arnholm cites a number of cases in support of this rule. *Id.* at 73-75.

299 ARNHOLM, *supra* note 56, at 72.

300 *Id.*

301 The Norwegian term is *stadfestelser*. See ARNHOLM, *supra* note 56, at 72.

302 *Id. Cf. Rt.* 1930 at 799 (attempt to include "on approval" clause by buyer found to be "significant change"—could not therefore rely on silence by seller).

303 ARNHOLM, *supra* note 56, at 72.

304 Arnholm notes that the rule also governs the issue raised by *Avtl.* § 32, *see supra* text accompanying note 93.

305 ARNHOLM, *supra* note 56, at 72.

that someone is so careless as to not protest.[306] Courts must administer the rule with considerable elasticity.[307] Merchants should comply strictly, but private parties dealing with one another on terms of distinct trust should not feel similarly compelled.[308]

F. Invoice and Other Documents Relating to Performance

Where one party sends the other an invoice or other document relating to performance but also containing additional terms or terms in variance with the original contract, questions of acceptance arise. Silence may be deemed an acceptance of those terms at Norwegian law under the rule concerning prior dealings.

G. Offer Stating that Silence Will Be Deemed Acceptance

Norwegian law recognizes that the offeror cannot by unilateral declaration force the offeree to speak or enter the contract.[309]

H. Oral Offers

No specific rule on oral offers appears in Norwegian law. Where a person receives an oral offer, however, it is not unreasonable to require objection if that person does not wish to conclude the contract.[310] Most often one may interpret the actions of the offeree and determine whether there has been an acceptance. As Arnholm puts it, *taushet kan vaere talende* (silence can be telling).[311]

B-6. Acceptance by Performance

I. Preliminary Remarks

A. The Problem Raised by the Schlesinger Report

The Schlesinger Report distinguishes between two categories of offers: (1) Offers in which the offeror seeks to obtain a promise, that is, an obligation of the offeree in exchange for his or her own promise, and (2) offers where the offeror does not seek a promise, but rather an act or result on which his or her promise is conditional; for example, A tells B: "Perform such an act, or achieve such a result, and I will pay you a certain sum of money."[312] In Norway, a contract consisting of a promise and an act is called a *realkontrakt*.[313] An ac-

306 *Id.*
307 *Id.*
308 *See Rt.* 1916 at 945; ARNHOLM, *supra* note 56, at 72.
309 ARNHOLM, *supra* note 56, at 70.
310 *Id.*
311 *Id.*
312 *See supra* notes 94-95 and accompanying text.
313 GULBRANSEN, *supra* note 21, at 173. Norwegians do not have a common designation for bilateral contracts. Norwegians speak of *gjensidig bebyrdende* (mutually obligating contracts) but this term is meant to distinguish single-obligation contracts, e.g., *gave kontracter* (gift contracts).

ceptance by performance is referred to as an *oppfylleleshandling*, or a *real akt*.[314] The discussion in this section examines the manner in which such offers can be accepted.

B. General Rule

In Norway, almost all offers, including those calling for an act, are viewed as susceptible of acceptance by *any* expression of assent on the part of the offeree.[315] The discussions of this rule by commentators reviewed in the preparation of this Article imply that the rule flows from the promise principle,[316] which forms the core of Norwegian contract law. No authority can be found, however, that explicitly traces this connection.[317]

In Norway, the promise contained in an offer is binding and irrevocable as soon as the offeree has actual knowledge of the offer.[318] This is so whether the offer contemplates a response in the form of a promise or an act.[319] In either case, the promise is irrevocable until such time as the offeree either rejects the offer or the deadline for acceptance passes.[320]

Norwegian law does distinguish between bilateral and unilateral contracts.[321] The distinction is significant, however, mainly with respect to the *effects* of the two types of contracts;[322] the distinctions have little effect on the *creation* of the obligations arising from such contracts.[323] This is because, pursuant to the promise principle, these obligations have their source in the irrevocability of the promises with the individual party or parties.[324] The Norwegian legal system is unhampered by the intricacies of the doctrine of consideration that loom so large in the Anglo-American concept of unilateral contract.[325]

II. Performance as Acceptance

In Norway, an offeror may explicitly demand a formal acceptance.[326] Such a demand will be enforced by the courts, both where

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[314] *See* ARNHOLM, *supra* note 56, at 63-64.

[315] KNOPH, *supra* note 16, at 348.

[316] See *supra* notes 15-50 and accompanying text for a discussion of this principle.

[317] *See, e.g.*, ARNHOLM PII, *supra* note 15, at 62-64, 85-86, 223-25; KNOPH, *supra* note 16, at 343-49; AUGDAHL, *supra* note 53, at 5.

[318] *See supra* notes 110-11, 145 and accompanying text.

[319] *See* ARNHOLM PII, *supra* note 15, at 63.

[320] *See supra* notes 144-45 and accompanying text.

[321] *See supra* note 313.

[322] AUGDAHL, *supra* note 53, at 5.

[323] *See* ARNHOLM PII, *supra* note 15, at 62-63.

[324] *See supra* notes 15-50 and accompanying text.

[325] See 1 SCHLESINGER, *supra* note 1, at 141-42 for a general discussion of the civil law-common law split in this area. See also 1 CORBIN, *supra* note 33, at 63, where an analogy is drawn to "firm offers" that is helpful in understanding this problem.

[326] ARNHOLM PII, *supra* note 15, at 63; *see Avtl.*, *supra* note 6, § 1.

the law normally does not require an acceptance, for example, where a gift is intended, and where the law allows acceptance by performance.[327] The offeror may waive formal acceptance or may be content with an acceptance by performance.[328] Occasionally, the offeror says this expressly. More often courts construe offers to that effect.[329]

The law appears settled that an acceptance by performance is sufficient to render the promise of the offeror irrevocable.[330] The extent, however, to which the offeree's performance constitutes a declaration of acceptance, binding the offeree to the promise implicit in his or her performance, is an unsettled question.[331] Arnholm's opinion is that one should not so construe a performance.[332] He notes some basis in practice for the distinction where parties trade at a distance and acceptance is by performance, and where the offeror is contractually obligated by his or her promise once performance is had. Where the offeree sends an acceptance, however, the offeror is contractually obligated by his promise when the acceptance arrives.[333] Arnholm further states that courts also grant the offeree a longer period of time to perform, for example, to send the goods, than they grant the offeree to dispatch an acceptance.[334]

Finally, the provisions of article 8 of the Contract Code must be considered.[335] This provision covers the situation involving an offeror's demand of "express" acceptance as well as that requiring no acceptance.[336] Under this rule, the offeror is allowed to formally ask whether the offeree intends to accept the offer.[337] If the offeree replies in the negative, or does not answer, the offeror is set free from the offer.[338] The offeror can take advantage of this rule to prevent being bound to a contract by the performance of the offeree.[339]

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327 ARNHOLM PII, *supra* note 15, at 63. Generally, acceptance by performance is always allowed.

328 *Id.* at 63.

329 *Id.*

330 *Id.*

331 *Id.* The issue would arise in practice where the offeree had partially performed but did not now wish to complete performance.

332 *Id.* Arnholm unfortunately does not provide any details as to who feels otherwise about this issue.

333 *Id.* Terminology is problematic. The offer becomes *irrevocable* once the offeree has actual knowledge. However, the offeror is *legally obligated* by this irrevocable promise only when acceptance is complete (i.e. upon performance or receipt).

334 *Id.* This rule appears to be problematic and is subject to some exceptions.

335 *See Avtl., supra* note 6, § 8, *translated supra* at note 296.

336 ARNHOLM PII, *supra* note 15, at 63-64.

337 *Id.*

338 *Id.*

339 *Id.*

B-7. Is Communication of Acceptance Necessary?

I. General Principle

Norwegian law requires that, within the deadline set for acceptance, the acceptance must have been received by the offeror.[340] The offeror need not have yet received actual knowledge of the acceptance.[341] On the other hand, actual knowledge normally suffices if the formal declaration of acceptance is not received within the time limit.[342]

II. Exceptions

A. Acceptance by Silence

Where Norwegian law requires no expression of assent at all, the requirement of communication cannot, of course, come into play.[343] Technically, this is probably not an exception to the rule requiring *communication*.

B. Acceptance by Performance

Unless specifically requested, acceptance by performance need not be communicated to the offeror.[344]

C. Trade Practices or Other Usages

Trade practices or other usages may have decisive influence on the necessity of communication of acceptance.[345] Arnholm cites the example of newspaper ad placement, where no acceptance is expected other than that the ad be printed.[346]

D. Waiver

The Norwegian Contract Code is declaratory only.[347] The offeror has power to demand a specific form of acceptance, including power to be content with less than the law requires. Thus, the offeror may waive communication of acceptance where the law would otherwise require it.[348]

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340 *Avtl., supra* note 6, § 2.1. *See* ARNHOLM PII, *supra* note 15, at 69.

341 ARNHOLM PII, *supra* note 15, at 69. Such a rule would obviously make it too easy for the offeror to avoid learning of the acceptance.

342 *Id.* This particular rule is subject to certain exceptions. *See id.* at 289.

343 *See supra* notes 264-311 and accompanying text.

344 *See supra* notes 326-30 and accompanying text. This constitutes an exception of great significance in business practice. *See* KNOPH, *supra* note 16, at 348-49.

345 *See* ARNHOLM PII, *supra* note 15, at 63.

346 *Id.*

347 *See Avtl., supra* note 6, § 1.

348 ARNHOLM PII, *supra* note 15, at 69.

B-8. Means of Declaring and Communicating Acceptance

I. The Nature of the Problem

The means chosen by the offeree for communicating acceptance may be improper for one or both of the reasons that such means is (1) not timely or (2) not in compliance with requirements of form.[349]

II. Clear Stipulation in the Offer

If the offeror specifies a particular means of communicating the acceptance, Norwegian law generally requires the offeree to comply with this request or risk rejection of this acceptance.[350] The impact of articles 4.2 and 6.2 of the Contract Code, however, may impose a duty to speak upon the offeror in certain circumstances.[351]

III. Unclear Stipulation in the Offer

Where the offeror suggests a particular means of communication without making it clear that no other means will suffice for acceptance, a question of interpretation arises. Is the offeror interested in speed, or certainty, or both?

Norwegian law directs the offeree to look to the means of dispatch the offeror used for the offer, and follow this lead.[352] Article 3 of the Contract Code is the source of this rule.[353] Although the main force of the rule is directed at deadlines for acceptance, its last two clauses deal with the means of acceptance.[354] The next-to-last-clause provides that where an offer is made by telegram the acceptance should be telegraphic unless it will arrive equally quickly in some other way.[355] The last clause provides that oral offers that do not set a deadline must be accepted right away (*straks*), on the spot.[356] Here, again, the provisions of articles 4.2 and 6.2 of the Contract Code may "save" an acceptance under certain circumstances.[357]

IV. No Stipulation in the Offer

The same rules apply here as above. Courts look first to the means the offeror employed to convey the offer.[358] Beyond that,

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[349] This division meshes with that used in the Schlesinger Report. *See* 1 SCHLESINGER, *supra* note 1, at 151.

[350] *Avtl.*, *supra* note 6, § 1; *see* ARNHOLM PII, *supra* note 15, at 69, 76.

[351] *See Avtl.*, *supra* note 6, §§ 4.2, 6.2.

[352] *See* ARNHOLM PII, *supra* note 15, at 68, 74-75.

[353] *See Avtl.*, *supra* note 6, § 3; ARNHOLM PII, *supra* note 15, at 68.

[354] *See Avtl.*, *supra* note 6, § 3; ARNHOLM PII, *supra* note 15, at 67-69. This section of the Code is discussed in more detail *infra* at notes 407-11 and accompanying text.

[355] *Avtl.*, *supra* note 6, § 3.

[356] *Id.*; *see* ARNHOLM PII, *supra* note 15, at 68, 75.

[357] *See Avtl.*, *supra* note 6, §§ 4.2, 6.2.

[358] *See id.* § 3; ARNHOLM PII, *supra* note 15, at 68, 75.

courts seek to achieve reasonableness, and consider commercial usage, practice in prior dealings between the parties, and any special circumstances such as a fluctuating market.[359]

V. Legal Requirements of Form

In making certain types of contracts, Norwegian law mandates adherence to specified form.[360] Where the law allows only one form, the parties must comply or face certain consequences.[361]

VI. Consequence of Improperly Communicated Acceptance

An improperly communicated acceptance may prevent the conclusion of a contract.[362] As noted below, the rule is the same regardless of the type of impropriety involved. Where the offeree on receiving the acceptance promptly indicates approval, a contract results under two theories: (1) The improperly communicated acceptance is regarded as a counter offer, and the original offeror may then accept this offer;[363] or (2) the silence of the offeror alone may be binding if the offeror knows or ought to know that the offeree thinks the acceptance is properly communicated.[364]

B-9. When Acceptance Becomes Effective

I. Statement of the Basic Rule

Some explanation is necessary at the outset regarding the Norwegian concept of acceptance in light of the focus of this subsection. Norwegians view acceptance as having two components. The most important is the unilateral declaration by the offeree that the offer is accepted.[365] This declaration is a *påbud*,[366] and as such operates to impose a legal duty upon the offeror by establishing the contractual relationship.[367] "[The offeror's] offer is locked firmly into a contract [by the acceptance]."[368] The *påbud* power of the acceptance shuts down preliminary negotiation and simultaneously starts up the contractual relationship. It is therefore the focus of the discussion that follows.

The second component that Norwegians view as being present

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359 *See* ARNHOLM PII, *supra* note 15, at 68.

360 Examples appear *infra* at notes 434-42 and accompanying text.

361 ARNHOLM PII, *supra* note 15, at 26. Arnholm notes, however, that it is uncertain exactly what those "consequences" are. *Id.*

362 *See Avtl.*, *supra* note 6, §§ 1, 2, 6.

363 *See id.*, §§ 4.1 (late acceptance), 6.1 (other impropriety in the acceptance).

364 *See id. See supra* notes 271-90 and accompanying text.

365 ARNHOLM PII, *supra* note 15, at 85.

366 *Id.* at 91. See *supra* notes 165-67 and accompanying text for a definition and discussion of the concept of "*påbud*."

367 ARNHOLM PII, *supra* note 15, at 85.

368 *Id.*

in an acceptance is a promise (*löfte*).[369] The promise is that of the offeree to undertake the performance contemplated by the offer.[370] Different rules govern these two distinct elements of an acceptance.

The rule governing when the promise contained in an acceptance becomes "effective" (that is irrevocable) is the same principle that applies to offers and to all promises in Norway.[371] The rule governing acceptance as *påbud* is the following: a *påbud* imposes a legal duty on its addressee on receipt,[372] with some reservations.[373] The "reception" theory adopted by the Norwegian legal system, as well as by other Scandanavian, German, Swiss, and Austrian systems,[374] is perhaps a necessary outgrowth of the "promise principle." The theory of "reception" is in distinct contrast with the Anglo-American theory of "expedition," the so-called mailbox rule.[375] For this reason, significant differences result under the two theories, in terms of who bears the risk of loss and/or lateness at a given point in time.[376] It should be recalled, however, that the "reception" rule is not mandatory under Norwegian law; all rules of the Contract Code are merely declaratory.[377] The offeror is the master of the offer and may validly stipulate that the acceptance is deemed to be made, for example, when the offeree dispatches the acceptance.[378]

II. What Constitutes Reception?

The general guideline regarding what constitutes "reception" is that the offeree must have submitted the acceptance to the workings of such external forces as would allow the offeree, based on the normal course of events, to expect that the offeror could directly gain knowledge of the acceptance, so that it becomes the offeror's responsibility to see that he or she does so.[379] In essence, the "reception"

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[369] *Id.*

[370] *Id.*

[371] *Id.* See *supra* notes 122-24 and accompanying text for the rule on when offers become irrevocable. See also *supra* notes 15-50 and accompanying text regarding the "promise principle."

[372] *See Avtl., supra* note 6, § 2.1; *see also* ARNHOLM PII, *supra* note 15, at 69, 81; KNOPH, *supra* note 16, at 348.

[373] The same rule applies without reservation to the *påbud* that exists in the recall of a promise. See *supra* notes 125-29 and accompanying text regarding revocation of offers. *See* ARNHOLM PII, *supra* note 15, at 91.

[374] *See* 2 SCHLESINGER, *supra* note 1, at 1464-65.

[375] *Id.*

[376] The full ramification of this distinction would be too far-reaching to be dealt with adequately here. *Compare* 2 SCHLESINGER, *supra* note 1, at 1464-65 (discussion of the reception theory) *with* CORBIN, *supra* note 33, at 78, 80, 81.

[377] *Avtl., supra* note 6, § 1. *See* ARNHOLM PII, *supra* note 15, at 69.

[378] ARNHOLM PII, *supra* note 15, at 69.

[379] "Akseptanten maa ha bragt akcepten under slike ydre forhold, at han efter livets amindelige regel kan regne paa at tilbyderen umiddelbart blir bekjendt med den, saaledes at det beror paa denne selv, om dette skal bli tilfældet eller ikke. *Utkast* til lov om avtaler og andre retshandlinger paa formuerettens områder." (Draft of the Contract Code), at 25, reprinted in ARNHOLM PII, *supra* note 15, at 70. Specific statutes govern certain types of

theory requires the written declaration of acceptance to reach the sphere controlled by the offeror.[380]

Contracts made by word of mouth, including telephone communication, rarely present problems. Reception generally equals actual knowledge,[381] with perhaps one exception. The offeror cannot avoid contract by holding his ears.[382] Moreover, an unsuspecting offeree vocalizing acceptance need not bear the burden with an offeror who is stone deaf or suffering from delusions.[383] If the offeree knows of the communication problem, however, the offeree must overcome the disability or barrier. If the offeree observes the offeror to be dead-drunk, the offeree should leave a note somewhere where the imbiber will find it, or repeat the message when the person is sober again.[384]

Written acceptances raise more difficult problems. Arnholm believes that the mailing destination of the acceptance should be the return address indicated by the offeror,[385] or the offeror's office address if no return address appears, and the offeror's private address for non-commercial dealings.[386] There are a number of other fact patterns that prove troublesome in this area, far too numerous to recount here. A partial listing of topics suggests the scope of the problem: post office boxes, rural deliveries, registered letters, permanent and temporary changes of address, postage due letters, ad nauseum. One concludes that courts will apply the above standard and decide these cases *ad hoc*.[387] Arnholm notes that courts also require parties to show good faith and exercise common sense.[388]

III. Revocation of Acceptance

Article 7 of the Norwegian Contract Code provides that an acceptance may be revoked by the offeror's receipt of a message to this effect either before or at the same time he or she acquires actual knowledge of the acceptance.[389] The reasoning behind this statute is that the promise component of an acceptance does not become irrevocable until the original offeror has actual knowledge of that

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contracts with regard to when receipt occurs. *See, e.g., Lov av 6. juni 1930 No. 20 om Forsikringavtaler* (Insurance Contracts Code), § 33.3. Receipt may be had on behalf of an offeree by those whom the offeree authorizes. ARNHOLM PII, *supra* note 15, at 72.

380 The statement of the rule in Germany, Austria, and Switzerland aids understanding here. *See* 2 SCHLESINGER, *supra* note 1, at 1467.

381 ARNHOLM PII, *supra* note 15, at 69.

382 *Id.*

383 *Id.*

384 *Id.*

385 *Id.* at 70.

386 *Id.*

387 *See generally id.* at 70-71.

388 *See* ARNHOLM PII, *supra* note 15, at 71.

389 *See Avtl., supra* note 6, § 7, translated and discussed *supra* at text accompanying note 125. The same statute governs both revocation of offers and acceptances.

promise.[390] The offeree may therefore revoke this acceptance and prevent final conclusion of the contract.[391] Once both parties are irrevocably bound by their promises, a contract exists.[392]

In certain circumstances, the promise of the offeree contained in the acceptance may become irrevocable at a time earlier than receipt. This occurs, for example, in the sale of lottery tickets or the underwriting of insurance. One who has sold a lottery ticket cannot legally revoke his or her acceptance, after the ticket has been declared a winner, nor can an insurance company recall its acceptance if a claim on the policy has already arisen.[393]

B-10. Time Limit for Acceptance

The Norwegian Contract Code closely regulates the time limit for acceptance of contracts.[394]

I. Express Time Limit for Acceptance

Norwegian law allows the offeror to effectively specify a time limit for acceptance.[395] Norwegian law will give effect to an express time limit even if it contains an ambiguous term.[396] Norwegian case law provides guidance for determining the meaning of certain frequently-used terms.[397]

Where the offeror specifies a deadline for acceptance, this date is assumed to refer to the time of receipt of the acceptance.[398] Where an offeror states the offer shall be open for a specified period, but does not state when the period starts, article 2.2 of the Contract Code provides supplementary rules.[399] If the offer is by letter, the period runs from the date appearing on the letter.[400] If the letter is undated, its postmark is determinative.[401] If the date is in error, the

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390 *See* ARNHOLM PII, *supra* note 15, at 85.

391 *Avtl., supra* note 6, § 7; *see* ARNHOLM PII, *supra* note 15, at 57. In spite of this rule, the main purpose of the acceptance remains that of binding the offeror to his promise in a contract. This will have already occurred on *receipt*.

392 See *supra* notes 15-50 and accompanying text for discussion of the promise principle.

393 *See* ARNHOLM PII, *supra* note 15, at 85.

394 *See, e.g., Avtl., supra* note 6, §§ 2, 3, 4, 32.

395 *Id.* § 1; *see* ARNHOLM PII, *supra* note 15, at 67.

396 ARNHOLM PII, *supra* note 15, at 67.

397 *See id.* at 67-68. Arnholm discusses the probable effect to be given such terms as "innen en bestemt dag" (by a certain day); "til en dag" (until a certain day); and "omgående svar" (answer by return mail). He also discusses special rules applicable in commercial dealings. *Id.*

398 *See id.* at 69. This follows from the "reception" theory discussed *supra* at notes 379-88 and accompanying text.

399 *See Avtl., supra* note 6, § 2.2; *see also* ARNHOLM PII, *supra* note 15, at 68.

400 *Avtl., supra* note 6, § 2.2.

401 ARNHOLM PII, *supra* note 15, at 68.

provisions of article 32 of the Code come into play.[402] If the offer is by telegram, the period runs from the instant the offeror delivers the telegram at the station for dispatch.[403] If transmission is delayed, the rule of article 4.2 applies, and, as discussed previously, the contract may yet be concluded even where the offeree is at fault.[404]

Norwegian courts attempt to interpret open-ended time limits as calling for a reasonable time for response, where possible.[405] Article 8 of the Code is also useful to the offeror in such a case. Using this provision, the offeror may effectively cutoff the offer by requesting that the offeree respond.[406]

II. Implied Time Limit for Acceptance

Norway applies a "reasonableness" standard as an implied time limit for acceptance. Article 3 of the Contract Code provides a number of rules to guide a court in the determination of what constitutes reasonableness.[407] A written offer "binds" the offeror— that is, the offeree may accept the offer—for the period of time the offeror would expect to be required for the offer and acceptance to reach their respective addresses.[408] The law adds to this a reasonable period of "thinking it over" time for the offeree.[409] Lawmakers specifically chose an elastic formulation of this rule.[410] Deadlines are relatively short for everyday transactions among merchants, but longer for intricate dealings that are broad in scope and future impact.[411]

A 1912 case demonstrated that, in certain circumstances, a reasonable period may be very long indeed. The suit arose among family members. One side offered a settlement and requested a response "as quickly as possible . . . because this case will soon be heard in the Supreme Court." The Norwegian Supreme Court found that a one-month delay in responding to the offer was reasonable, because this was still well in advance of the date set for hearing the case.[412]

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[402] *Id. See Avtl., supra* note 6, § 32, translated and discussed *supra* at text accompanying note 93.

[403] *Avtl., supra* note 6, § 2.2. Because Norway applies the "reception" theory, it seems odd that the law here starts the clock running upon *dispatch*. This is contrary to the rule in other states applying the "reception" theory. *Cf.* 1 SCHLESINGER, *supra* note 1, at 166. Arnholm provides no clue as to the reason for this anomaly.

[404] *See supra* notes 263-90 and accompanying text.

[405] *See* ARNHOLM PII, *supra* note 15, at 63.

[406] *Avtl., supra* note 6, § 8. This statute is discussed *supra* at notes 327-31 and accompanying text.

[407] *See Avtl., supra* note 6, § 3; ARNHOLM PII, *supra* note 15, at 68.

[408] *Avtl., supra* note 6, § 3.

[409] *Id.*

[410] *See* ARNHOLM PII, *supra* note 15, at 68.

[411] *Id.*

[412] *See Rt.* 1912 at 7051.

Concerning the time consumed in sending the offer and acceptance, Norwegian courts decide by looking at the circumstances as the offeror perceived them at the time of the dispatch.[413] The courts do not lengthen the period for acceptance where the sender discovers too late a disruption in communication that delays conveyance.[414] Where the offer is sent by telegraph, courts allow the offeree the time required by a return wire.[415] A telegraphic offer also shortens the time allowed the offeree to mull over his response—the offeree should know enough to hurry.[416]

Article 3 requires that oral offers, including those by telephone, must be accepted *straks* (more or less immediately).[417]

B-11. Late Acceptance

If an acceptance arrives too late, Norwegian law creates no contract.[418] A late acceptance is deemed to be a new offer, which its recipient may choose to accept and thereby bring about the contract.[419] The rule is only declaratory, however.[420] The author of the acceptance may have expressly provided that no new offer may arise if the reply arrives late.[421] Alternatively, the facts may dictate that the original offeree did not intend to become a party to a contract if such contract was not concluded immediately on the arrival of the acceptance.[422]

Under limited circumstances, the late acceptance may create a contract where the original offeror takes no action and allows the offer arising out of the belated acceptance to lapse. Article 4.2 of the Contract Code imposes a duty on the recipient of a late acceptance to notify the other party if he or she knows or ought to know that the offeree assumes all is in order.[423]

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413 ARNHOLM PII, *supra* note 15, at 68.

414 *Id.*

415 *Id.*

416 Arnholm notes further that although courts will view the time for acceptance as having three components—two communications periods and one period for thinking things over—courts still set only *one* deadline. If the offer arrives before expected, the offeree may get more thinking time. If the offeree thinks too long he or she may still beat the clock by returning a reply by means faster than the offeror expects. Conversely, if the offer is delayed, even through fault of the offeror, the offeree's time will be shortened. If the delay is significant, the offer may be expired before reaching the offeree. ARNHOLM PII, *supra* note 15, at 68-69.

417 *Avtl., supra* note 6, § 3.

418 *See Avtl., supra* note 6, § 4.1; ARNHOLM PII, *supra* note 15, at 76.

419 *Avtl., supra* note 6, § 4.1; *see* ARNHOLM PII, *supra* note 15, at 76.

420 *Avtl., supra* note 6, § 1; *see* ARNHOLM PII, *supra* note 15, at 76.

421 ARNHOLM PII, *supra* note 15, at 76.

422 *Id.* Arnholm cites the example of a contract for the sale of seasonal goods, a setting where an inordinate degree of speculation is involved. *Id.*

423 *See Avtl., supra* note 6, § 4.2; *cf. id.* § 6.2.

C. Other Problems Concerning Conclusion of Contracts

C-1. Manifestation of Assent without Identifiable Sequence of Offer and Acceptance

Norwegian law recognizes the line drawn between mere negotiations and a binding contract.[424] The considerable litigation in this area[425] has revealed some general guidelines: (1) a court will not find a contract where conscious dissent between the parties on one or more terms is apparent;[426] (2) a contract may exist even though agreement is lacking on certain specifics, and the parties are aware of the need for clarification.[427] The law may fill in what is lacking, or the court may direct the parties to negotiate their way forward within the bounds of reasonableness.[428]

Between merchants, courts more often give effect to incomplete contracts than between private parties, friends, or relatives.[429] Courts enforce stricter demands where the contract involves large, important dealings.[430] This is particularly true where parties deal in real property, though incomplete contracts are not unknown here.[431]

In general, a tendency of the courts, akin to that in French law, is to find the parties bound at contract once negotiations open.[432] This is in keeping with the duty of good faith between parties that Norwegians consider to be an essential, although unwritten, requirement of their contract law.[433]

C-2. Agreements Contemplating a Writing or Other Formality

1. Scope of this Report

During negotiations, two parties may agree that, as an additional step on their road to contract, their transaction be reduced to a writing, or that some other formality be observed.[434] Where this agreement is not fulfilled, doubts arise as to whether the contract is concluded. This Article deals with these problems, but is not concerned with situations in which a transaction is required by law to be in writing or to comply with some other formality.[435]

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424 ARNHOLM, *supra* note 56, at 63.

425 *See, e.g.*, cases cited in *id.* at 63-64.

426 *Id.* at 64.

427 *Id.*

428 *Id.*

429 *See id.* at 64-65.

430 *Id.* at 65.

431 *Id.*

432 *Id.*; *cf.* ARNHOLM PII, *supra* note 15, at 74.

433 *See* ARNHOLM, *supra* note 56, at 11-12 for a general discussion of the good faith requirement implicit in Norwegian contract law.

434 The Schlesinger Report does not distinguish writings from other formalities. *See* 1 SCHLESINGER, *supra* note 1, at 177 n.1. There is no need to distinguish these concepts at Norwegian law.

435 Norwegian law does impose some requirements of form in certain types of con-

II. Types of Form Agreements

An agreement to reduce a transaction to writing can be made either in the course of negotiations leading up to the written contract, or in a separate contract contemplating a writing for a future contract between the parties.[436] Such an agreement can also be contained in a contract clause providing that any future agreement to modify or terminate the contract be in writing or another specified form.[437] Norwegian law does not require such an agreement to be in any specific form.[438]

III. Constitutive Formality

Norwegian law permits the parties, by use of appropriate language, to stipulate that the contemplated writing shall be constitutive. This principle prevents contractual formation unless contemplated formality takes place.[439]

IV. Non-Constitutive Formality

Norwegian law also permits the parties to a contract to indicate by use of appropriate language that the suggested writing or formality is not to be constitutive. In this case, the contract will be deemed to exist even though the formality never occurs.[440]

V. Formality not Clearly Constitutive or Non-Constitutive

Many times the parties will not specify whether they intend the formality to be constitutive or non-constitutive. Norwegian law views this as a question of interpretation and applies an objective approach in seeking a reasonable result.[441] Norwegian courts will look carefully at the actions of the parties after the alleged conclusion of the contract. Where one party receives a written communication from the other party that purports to set forth the terms of their contract, he or she incurs a duty (*reklamasjonsplikt*) to let the other party know of any dissatisfaction. If such party does not do so, he or she will be bound to the contract as it is written.[442]

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tracts. *See, e.g.*, § 3 no. 6 and no. 9, and § 109, Lov av 13 august 1915 no. 7 om tvangsfullbyrdelse (writing required for letters of credit, leases, and mortgages—the latter where the mortgagee would sell at public sale). In Norway, certain contracts also must be in writing if one party demands it. *See, e.g.*, § 5 Lov av 16 juni 1939 no. 6 om husleie (rental agreements). Norwegian law has no general writing requirements equivalent to the Anglo-American Statute of Frauds.

436 *See* ARNHOLM PII, *supra* note 15, at 24-25.

437 *See id.* at 34.

438 *See id.*

439 *See Avtl., supra* note 6, § 1; *see also* ARNHOLM PII, *supra* note 15, at 76.

440 *See Avtl., supra* note 6, § 1; *see also* ARNHOLM PII, *supra* note 15, at 77.

441 *See* ARNHOLM PII, *supra* note 15, at 35-36.

442 *Id.* at 76.

VI. Waiver

Waiver of requirements of form may be by express words or conduct. An additional writing is not required.[443]

D. Summary

This Article is an overview of the Norwegian law of contract formation and is intended as a supplement to *Formation of Contracts: A Study of the Common Core of Legal Systems*, edited by Rudolf B. Schlesinger. The Article examines the Norwegian Contract Code, certain Norwegian-language treatises on contract law, and, where available, Norwegian case law. Based on this examination, the Article provides general statements of the law of contract formation in Norway.

The Article follows the outline used by the Schlesinger Report for the disposition of these subjects, and, to the extent possible, answers the same questions, in the same order, as the Schlesinger Report did for the legal systems it studied.

It is not possible within the scope of this Article, nor is it the author's intent, to provide more than a brief summation of Norwegian law on contract formation. The Article does pay particular attention, however, to the "promise principle" in Norwegian law and its effect on the substantive rules of contract formation. The Article also briefly compares the "promise principle" of Norwegian law to the "contract principle" of English and American law.

The Article places substantial reliance on Norwegian treatises on contract law, particularly those of Professor Carl Jacob Arnholm, as the source of many of its conclusions on the state of Norwegian law. This reliance was necessitated by the paucity of Norwegian case law on many of the subjects covered. The reliance is justified, perhaps, by the prominence of these treatises, particularly those of Professor Arnholm, in any discussion in Norway of Norwegian contract law.

This Article should be viewed as an English-language roadmap to the law of contract formation in Norway generally, and to the information contained in the Norwegian-language treatises on contracts specifically. The Article is intended to aid subsequent researchers that dig into the fertile fields of Scandanavian contract law. Unfortunately, very little has been written in English about this area of law. As Professor Schlesinger writes, the Scandanavian legal systems certainly do "present original solutions on some of the controversial problems" of the law of contract formation.[444]

Scandinavian originality, at least as discussed in this Article on Norwegian law, does not appear to undermine the statements of the

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[443] *See id.* at 37.

[444] 1 SCHLESINGER, *supra* note 1, at 30 n.36.

law of contract formation contained in the General Reports section of the Schlesinger Report.[445] On the contrary, a comparison of the statements of Norwegian law found in this Article with the statements of law in the General Reports indicates clearly that, as predicted by the Schlesinger Report, the Norwegian law of contract formation bears out the statements of the law in the General Reports.[446]

[445] *Id.* at 69-190. The General Report section generally found more similarities than differences when it compared and summarized the laws of contract formation for the legal systems the Report studied. *Id.* at 37-43. The differences and similarities, however, for a variety of probable reasons, were a "crazy quilt." *Id.* at 41 n.14a.

[446] *Id.* at 30.