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# Default Rules for Contract Formation By Promise and the Need for Revision of the Mailbox Rule

BY BETH A. EISLER\*

## I. THE RULES

The existing default rules<sup>1</sup> for contract formation by promise generally conform, as they should, with the reasonable and probable expectations of the contracting parties.<sup>2</sup> There is, however,

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<sup>1</sup> A default rule fills a gap in a contract. It is an implied term that gives parties the rights and duties that they would have bargained for if they had thought to bargain. See, e.g., Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (a discussion of default theory); see also Bard, *Self-Interest and Cooperation in Long-Term Contracts*, 19 J. LEGAL STUD. 583 (1990); Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535 (1990); Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

This Article uses the term "default rule" to denote a rule that fills a gap, not in contract performance, but in contract formation. Generally, parties do not negotiate in advance with respect to the particulars concerning the formation of an enforceable contract. Parties enter negotiations with their own perceptions of contract formation and expect the default rules of contract formation to comport with those perceptions. See *infra* note 2.

<sup>2</sup> Justice Cardozo eloquently discussed gap filling in existing contracts, and stated that "[i]ntention not otherwise revealed may be presumed to hold in contemplation of the reasonable and the probable." *Jacob & Youngs v. Kent*, 129 N.E. 889, 891 (N.Y. 1921). What is reasonable and probable depends on the circumstances as well as the experience of the decisionmaker. This Article makes assertions concerning the expectations of the contracting parties. This Article assumes that the hunches upon which it is based are correct. Cf. A. KRONMAN & R. POSNER, *THE ECONOMICS OF CONTRACT LAW* 50-51 (1979) ("Perhaps, then, the real reason for the law's generally not enforcing gratuitous promises is not a belief, which would be economically unsound, that there is a difference in kind between the gratuitous and the bargained-for promise, but an empirical hunch that gratuitous promises tend both to involve small stakes and to be made in family settings where there

one exception: the rule that governs when an acceptance is effective to create a contract. The dispatch or mailbox rule<sup>3</sup> departs from the parties' expectations and from a more logical rule which would be in keeping with modern communications technology. The mailbox rule also fails to parallel existing formation default rules. For example, unless otherwise stated, an offer, which is a manifestation of willingness to enter into a bargain,<sup>4</sup> has the legal effect of creating a power of acceptance in the offeree only when the offeree actually receives the offer.<sup>5</sup> If the offeror decides to withdraw or revoke the offer, the revocation generally has legal effect only when the offeree receives the revocation.<sup>6</sup> In the absence of negotiation, the individuals most likely would presume that the offeree must receive the communication of the offeror's revocation before that revocation could affect the contract formation. Furthermore, if the parties had discussed revocation, their agreement with respect to revocation probably would have mirrored the existing default rule. An alternative default rule would deprive the offeree of a dependable basis for deciding whether to accept the offer. After

are economically superior alternatives to legal enforcement.'"); J. WHITE & R. SUMMERS, LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-24, at 610 (3d ed. 1988) ("While we have no empirical basis for concluding the typical offeror is a chiseler as opposed to a legitimately aggrieved debtor, we are inclined to that view.').

<sup>3</sup> See *infra* note 23 and accompanying text.

<sup>4</sup> See, e.g., Day v. Amax, Inc., 701 F.2d 1258, 1263 (8th Cir. 1983) (offer must be a manifestation of willingness to enter into a bargain so as to justify the conclusion by the offeree that his assent will conclude the bargain); 1 A. CORBIN, CORBIN ON CONTRACTS § 94 (1963 & Supp. 1990); 1 F. FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.10 (2d ed. 1990); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 23 (3d ed. 1957); RESTATEMENT (SECOND) OF CONTRACTS § 38(2) (1981).

<sup>5</sup> Caldwell v. Cline, 156 S.E. 55 (W. Va. 1930) (offer to exchange land effective on receipt, rather than on mailing); see also Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 182-83 (1917).

Receipt here means that 1) the party or an authorized agent has come into possession of the information or 2) the information has been put in some place which the party has expressly or impliedly authorized as the place for deposit of the information. Cf. United Leasing, Inc. v. Commonwealth Land Title Agency, Inc., 656 P.2d 1246 (Ariz. Ct. App. 1982) (letter left with agent need not have been read by principal to be effective); see RESTATEMENT (SECOND) OF CONTRACTS § 68 (1981); UNIFORM COMMERCIAL CODE § 1-201(26), (27) (1990) [hereinafter U.C.C.].

<sup>6</sup> See, e.g., Brauer v. Shaw, 46 N.E. 617 (Mass. 1897) (revocation must be received to be effective); Dickinson v. Dodds, 2 Ch. D. 463 (C.A. 1876) (revocation must be received to be effective); Corbin, *supra* note 5, at 185; RESTATEMENT (SECOND) OF CONTRACTS § 42 (1981). If, however, the offeror has made a general or public offer, the offeree need not have actual knowledge of the revocation. See Shuey v. United States, 92 U.S. 73 (1875) (revocation of offer of reward for the apprehension of Lincoln assassination conspirators need not actually have been received); Corbin, *supra* note 5, at 184; RESTATEMENT (SECOND) OF CONTRACTS § 46 (1981).

the offeror had manifested an intent to revoke, but before the offeree received notice of the revocation, the offeree may have expended or continued to expend resources to determine whether to accept or may have accepted the offer. At a minimum, the offeror and offeree would want the offeree to be able to rely on the offeror's original manifestation until the offeree received notice of the offeror's contrary intention.<sup>7</sup>

After receiving the offer, the offeree usually determines whether to accept or reject the offer. A rejection or a manifestation of intent not to accept the offer<sup>8</sup> terminates the offeree's power of acceptance<sup>9</sup> only when the offeror has received the rejection.<sup>10</sup> The same rule applies to a counter-offer by the offeree.<sup>11</sup> In the absence of negotiation, the individuals most likely would presume that the offeror must have received the offeree's manifestation of intent not to accept before the rejection or counter-offer would have the legal effect of terminating the offeree's power of acceptance. Had the parties discussed rejection and counter-offer by the offeree, their agreement probably would have mirrored the existing default rule. Until the offeror receives a manifestation, that manifestation cannot affect the offeror. In that regard, the offeror could not

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<sup>7</sup> On the other hand, it has been proposed that the offeror may reserve the power to revoke the offer without notifying the offeree of the revocation. RESTATEMENT (SECOND) OF CONTRACTS § 42 comment b (1981). In that circumstance, the reservation of the power by the offeror would have been known to the offeree. The reservation, therefore, would have created an expectation in the offeree, who would adjust his actions accordingly.

<sup>8</sup> See, e.g., *Trautwein v. Leavey*, 472 P.2d 776, 780 (Wyo. 1970) (rejection manifests an intent not to accept an offer); 1 A. CORBIN, *supra* note 4, § 94, at 389-90; 1 F. FARNSWORTH, *supra* note 4, § 3.20, at 257; 1 S. WILLISTON, *supra* note 4, § 51, at 164; RESTATEMENT (SECOND) OF CONTRACTS § 38(2) (1981).

<sup>9</sup> See, e.g., *Nabob Oil Co. v. Bay State Oil & Gas Co.*, 255 P.2d 513 (Okla. 1953) (letter of rejection terminated the offeree's power of acceptance); 1 A. CORBIN, *supra* note 4, § 94, at 389; 1 S. WILLISTON, *supra* note 4, § 51, at 164-65; RESTATEMENT (SECOND) OF CONTRACTS § 38(1) (1981).

<sup>10</sup> See, e.g., *James v. Darby*, 100 F. 224 (8th Cir. 1900) (letter of rejection could be recalled until received, at which point the rejection terminated the offeree's power of acceptance); 1 A. CORBIN, *supra* note 4, § 94, at 389; 1 S. WILLISTON, *supra* note 4, § 51, at 167-68; RESTATEMENT (SECOND) OF CONTRACTS § 38(1) (1981).

<sup>11</sup> "A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer." RESTATEMENT (SECOND) OF CONTRACTS § 39(1). The counter-offer terminates the offeree's power of acceptance. See, e.g., *Thurmond v. Wieser*, 699 S.W.2d 680, 682 (Tex. App. 1985) (prospective purchaser of land rejected an offer when he made a counter-offer); 1 A. CORBIN, *supra* note 4, § 90, at 382-84; 1 S. WILLISTON, *supra* note 4, § 51, at 164-65; RESTATEMENT (SECOND) OF CONTRACTS § 39(2) (1981). The counter-offer is effective only when received by the offeror. 1 S. WILLISTON, *supra* note 4, § 52, at 166; RESTATEMENT (SECOND) OF CONTRACTS § 40 (1981).

rely on the rejection until receipt. Likewise, the offeror could not understand that the offeree's counter-offer terminates the offeree's power of acceptance until the offeror has actually received the communication.<sup>12</sup>

If, however, the offeree has determined to accept the offer, the offeree must manifest assent to the terms of the offer.<sup>13</sup> Initially,

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<sup>12</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 40 comment a (1981).

Of course, the parties can agree that the offeree need not communicate the rejection or counter-offer to the offeror in order to terminate the offeree's power of acceptance. In that circumstance, the offeror would continue to assume that the offeree is still deciding how to proceed. At some point, the offer would lapse. Before lapse, if the offeror wanted to know the status of the offer with respect to the offeree, the offeror would have to communicate with the offeree. Usually, though, an offeror who has not heard from an offeree will assume that the offeree has not yet decided whether to exercise the power of acceptance. Additionally, the parties can agree that a rejection or a counter-offer does not manifest an intent not to accept. In that circumstance, the offeror could not rely on the rejection or counter-offer as a termination of the offeree's power of acceptance.

<sup>13</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 50 comment c (1981).

The manifestation of assent must be in the manner invited or required by the offeror. See, e.g., *Cillessen v. Kona Co.*, 387 P.2d 867 (N.M. 1964) (all terms for acceptance of an option contract must be strictly followed); 1 A. CORBIN, *supra* note 4, § 70, at 288-91; 1 S. WILLISTON, *supra* note 4, §§ 65, 78A; RESTATEMENT (SECOND) OF CONTRACTS § 50(1) (1981). Usually, the offeror is indifferent with respect to the method of the offeree's acceptance and the offeree may manifest assent either by promising to perform or by performing that which was requested by the offeror. See, e.g., *Gleeson v. Frahm*, 320 N.W.2d 95, 97 (Neb. 1982) (when offer did not specify mode of acceptance, a promise contained in a letter manifested acceptance); 1 A. CORBIN, *supra* note 4, § 77; 1 S. WILLISTON, *supra* note 4, § 78A; RESTATEMENT (SECOND) OF CONTRACTS §§ 32, 50 comment a (1981); see also U.C.C. § 2-206(1)(b) (1990). The manifestation, if by promise, may be made by words, oral or written, or by conduct. See RESTATEMENT (SECOND) OF CONTRACTS § 50 comment c (1981). Moreover, the conduct may be an act of performance. See, e.g., *Signist v. Century 21 Corp.*, 519 P.2d 362 (Colo. Ct. App. 1973) (substantial performance amounted to acceptance); 1 A. CORBIN, *supra* note 4, § 63; 1 S. WILLISTON, *supra* note 4, § 78A; RESTATEMENT (SECOND) OF CONTRACTS §§ 32, 50 comment c (1981).

Generally, the offeree's silence or inaction will not manifest assent to the offer. See, e.g., *Karlin v. Avis*, 457 F.2d 57, 62 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972) (silence not acceptance); 1 A. CORBIN, *supra* note 4, § 72, at 304; 1 S. WILLISTON, *supra* note 4, § 91, at 319-20; RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981). Rarely, the offeree may be deemed to have accepted the offeror's offer by doing or saying nothing. RESTATEMENT (SECOND) OF CONTRACTS § 69(1) (1981). For example, if the parties, through their course of dealing, have agreed that the offeree's silence or inaction constituted a manifestation of assent to the terms of previous offers, then the offeree's later silence or inaction also may be deemed to be an acceptance of a similar offer. See, e.g., *Hobbs v. Massasoit Whip Co.*, 33 N.E. 495 (Mass. 1893) (retention of animal skins was acceptance when that had become the practice of the parties); RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(c) (1981).

In the absence of negotiation, the individuals most likely would presume that the offeree must manifest assent in the manner required by the offeror, and, if no manner is specified, the offeree could manifest assent either by promising to perform or by performing that which was bargained for by the offeror. Additionally, had the parties discussed the

an acceptance by promise requires that the offeree complete every act essential to the making of the promise.<sup>14</sup> In addition to the manifestation of assent, the offeree must notify or communicate to the offeror the fact that the offeree has manifested assent by promise.<sup>15</sup> In the absence of negotiation, the individuals most likely would presume that the offeror actually must receive notification of the offeree's manifestation of assent by promise before either party would be bound to the contract. If the parties had discussed the offeree's acceptance by promise, their agreement would probably have mirrored their individual expectations that the offeror must actually receive the offeree's promise. That, however, is not the existing default rule.<sup>16</sup>

Although parties might presume or agree that receipt of the notification of the manifestation by promise is required, absent an express agreement to that effect, most Anglo-American courts have decided that the offeror need not receive the notice in order to create a contract.<sup>17</sup> Rather, the offeree need only exercise reasonable diligence to notify the offeror of the offeree's acceptance.<sup>18</sup>

What constitutes reasonable diligence may differ according to the circumstances. If the parties are in the presence of each other, courts expect that the offeror will actually receive the notice of the promise.<sup>19</sup> Courts have not had to determine what constitutes rea-

offeree's manifestation of assent, their agreement probably would have mirrored the existing default rule. See *supra* note 2 and accompanying text.

<sup>14</sup> See 1 A. CORBIN, *supra* note 4, §§ 63, 70; 1 S. WILLISTON, *supra* note 4, § 65; RESTATEMENT (SECOND) OF CONTRACTS § 50(3) (1981).

<sup>15</sup> See, e.g., *Lloyd & Elliott v. Parke*, 157 A. 272 (Conn. 1931) (acceptance became effective when means were set in motion to convey acceptance to offeror); 1 A. CORBIN, *supra* note 4, § 67, at 275; 1 S. WILLISTON, *supra* note 4, § 70; RESTATEMENT (SECOND) OF CONTRACTS § 56 (1981).

<sup>16</sup> "There is no universal doctrine of the common law that acceptance of an offer must be communicated." *Lennox v. Murphy*, 50 N.E. 644, 645-46 (Mass. 1898) (Holmes, J.).

<sup>17</sup> See, e.g., *United Leasing*, 656 P.2d at 1250 (counter-offer was accepted when reasonable diligence was used to communicate the acceptance); *Lloyd & Elliott*, 157 A. at 272 (acceptance effective when means set in motion to convey acceptance to offeror); 1 A. CORBIN, *supra* note 4, § 67; 1 S. WILLISTON, *supra* note 4, §§ 70-72; RESTATEMENT (SECOND) OF CONTRACTS § 56 comments a and b (1981).

<sup>18</sup> See, e.g., *Kendel v. Pontious*, 261 So. 2d 167, 169-70 (Fla. 1972) (offeree must make a reasonable effort to communicate to offeror notice of acceptance); 1 A. CORBIN, *supra* note 4, § 67, at 109; 1 S. WILLISTON, *supra* note 4, § 70, at 230; RESTATEMENT (SECOND) OF CONTRACTS § 56 comment b (1981).

<sup>19</sup> See *Entores Ltd. v. Miles Far East Corp.*, 2 Q.B. 327 (C.A. 1955) (whereas acceptance by mail is effective upon dispatch, acceptance by instantaneous communication is effective upon receipt by offeror); 1 A. CORBIN, *supra* note 4, § 79 (compares acceptance

sonable diligence when the parties are in the presence of each other because in such a situation the offeror immediately learns of the manifestation. In a decision of the Queen's Bench, Justice Denning posited that, in the instantaneous situation, reasonable diligence should not be adequate because it is no burden for the offeree to ascertain whether his acceptance actually has been received.<sup>20</sup> In those instances, he wrote, actual notification should be required. For example, assume the offeror and the offeree were discussing their bargain at the Ohio State-Michigan football game. At the precise moment when the offeree said "I promise," assume that the public address system blared out the score (with the Wolverines suitably ensconced in the lead). Assume that the offeror did not hear the offeree's words. Justice Denning would argue that no contract had been formed because the offeree should have been aware that the offeror actually had not received notice of the offeree's manifestation of assent by promise.<sup>21</sup>

If, as is the usual circumstance, the parties are at a distance, the offeree's manifestation of assent by promise is effective as soon as the offeree puts notice of acceptance out of his possession and into the invited or reasonable channel of communication.<sup>22</sup> The current default rule governing acceptance by promise when the

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by telephone to acceptance in the presence of the offeror); 1 S. WILLISTON, *supra* note 4, § 82A, at 271 ("[T]he time or place of the formation of the contract is not when or where the offeree speaks, but when or where the offeror hears, or ought to hear the acceptance."); RESTATEMENT (SECOND) OF CONTRACTS § 64 (1981) ("Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptance where the parties are in the presence of each other.")

<sup>20</sup> *Entores*, 2 Q.B. at 332.

<sup>21</sup> *Id.* at 332; *see also* 1 A. CORBIN, *supra* note 4, § 79; 1 S. WILLISTON, *supra* note 4, § 82A; RESTATEMENT (SECOND) OF CONTRACTS § 64 comment b (1981).

<sup>22</sup> *See, e.g.*, *Morrison v. Thoelke*, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963) (acceptance is effective upon being placed in the channel of communication and not upon receipt); *Adams v. Lindsell*, 106 Eng. Rep. 250 (K.B. 1818) (established rule); 1 A. CORBIN, *supra* note 4, §§ 78-81, 88; 1 F. FARNSWORTH, *supra* note 4, § 3.22; 1 S. WILLISTON, *supra* note 4, §§ 81-89; RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (1981).

There are, however, many qualifications to this rule. For example, if the offeree does not send the notice through the invited or reasonable means of transmission, or the offeree fails to use reasonable diligence, the notice is effective upon dispatch only if the notice is received by the offeror within the time in which a properly dispatched acceptance would have arrived. RESTATEMENT (SECOND) OF CONTRACTS §§ 66, 67 (1981). Moreover, if the offeror receives knowledge that the offeree manifested assent to the offer, even though the offeree never sent a communication to the offeror, the acceptance is probably effective when received. *See Southern Nat'l Bank v. Tri Fin. Corp.*, 317 F. Supp. 1173, 1179 n.1 (S.D. Tex. 1970), *modified*, 458 F. 2d 688 (1972) (offeree need not personally notify offeror of acceptance if offeror learns promptly from some source); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 56 comment b, at 142 (1981).

parties are not in the presence of each other is labeled the "dispatch rule" or "mailbox rule."<sup>23</sup> The dispatch rule states that as soon as the acceptance is released from the offeree's possession and placed into the channel of communication, the acceptance is effective.<sup>24</sup> Under the existing default dispatch rule, the offeror need not actually receive the notice sent by the offeree.<sup>25</sup>

The English and American courts differ with respect to the appropriate default rule<sup>26</sup> when the parties are at a distance and the offeree decides to notify the offeror by telephone, teletype, or other substantially instantaneous methods of communication.<sup>27</sup> In England, the courts have held that when the offeree accepts by teletype, the parties must use the same communication rules as if the parties were in the presence of each other.<sup>28</sup> The English courts hold acceptance by teletype effective only when received by the offeror.<sup>29</sup> American courts, in contrast, have held that an acceptance by telephone or teletype is effective when dispatched by the offeree with no necessity of receipt.<sup>30</sup>

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<sup>23</sup> *Worms v. Burgess*, 620 P.2d 455, 457-58 (Okla. Ct. App. 1980) (acceptance, though never received, was deemed adequate because it had been sent according to the "dispatch rule").

<sup>24</sup> Some commentators argue that the contract is created immediately, that is, when the offeree manifests assent to the terms of the bargain. The notice requirement, therefore, constitutes a condition subsequent, which discharges the offeror if the offeree does not exercise diligence to notify the offeror. *See, e.g.*, F. FARNSWORTH, *supra* note 4, § 3.14; *see supra* notes 13-15 and accompanying text.

<sup>25</sup> *United Leasing*, 656 P.2d at 1250; F. FARNSWORTH, *supra* note 4, § 3.22; RESTATEMENT (SECOND) OF CONTRACTS § 63(a) (1981).

<sup>26</sup> All cases in which the offeree notified the offeror by telephone or teletype address issues concerning place of contracting for jurisdiction purposes. *See, e.g.*, *Ledbetter Erection Corp. v. Workers' Compensation Appeals Bd.*, 156 Cal. App. 3d 1097, 203 Cal. Rptr. 396, 400 (1984); *Linn v. Employers Reinsurance Corp.*, 139 A.2d 638 (Pa. 1958); *Entores*, 2 Q.B. 327.

<sup>27</sup> No cases that discuss notification by facsimile machine [hereinafter fax] or electronic data interchange [hereinafter EDI] were found.

Fax is a process of sending a document's data from one point to another so that the receiver's machine provides what appears to be a photocopy of the document. The transmission is accomplished through telephone lines and is usually virtually instantaneous.

EDI is a method by which parties communicate electronically between computers in standardized formats. Recently, EDI has been expanded by businesses to enable the purchase and sale of goods. In addition, parties are beginning to negotiate contracts through EDI. *Model Electronic Data Interchange Trading Partner Agreement and Commentary*, 45 BUS. LAWYER 1717 (1990) [hereinafter *Agreement*].

<sup>28</sup> *Entores*, 2 Q.B. at 330.

<sup>29</sup> *Id.* at 329 (the place of contracting was where the teletyped acceptance was received).

<sup>30</sup> *See, e.g.*, *Ledbetter*, 203 Cal. Rptr. at 400 (contract by telephone formed where offeree uttered acceptance); *Linn*, 139 A.2d at 640 (acceptance by telephone creates a



The existing default dispatch rule does not conform with the reasonable and probable expectations of the parties in that contracting parties expect that their communications will have legal effect only when received by the other party<sup>31</sup> Moreover, the parties expect that the first communication received will have legal priority.<sup>32</sup> These private expectations usually serve the parties well.<sup>33</sup> However, when a dispute arises<sup>34</sup> and the parties seek legal advice, they learn that the existing legal default rules do not mirror their expectations of what the law will provide.

## II. THE PROPOSAL

This Article proposes that the existing common law default rule governing contracts formed by promise when the parties are at a distance be changed so that acceptance is effective not on dispatch by the offeree but only upon actual receipt by the offeror. Additionally, the default rule governing instantaneous and substantially instantaneous communication should mirror the English rule, which states that an acceptance is effective when received by the offeror. Receipt here means that 1) the offeror or an authorized agent has come into possession of the information or 2) the information has been put in some place which the offeror has expressly or impliedly authorized as the place for deposit of the information.<sup>35</sup>

The existing default rule governing acceptance by promise when the parties are at a distance seems rarely to enter into the process of contract formation. First, contract formation by promise gen-

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contract at the place where the offeree speaks).

It should be noted that no American court has followed the Restatement default rule, which treats acceptance by telephone as a situation in which the parties are in the presence of each other. RESTATEMENT (SECOND) OF CONTRACTS § 64 (1981).

<sup>31</sup> Support for this proposition comes from discussions with individuals unschooled in the law. Lay people usually try to make certain that their communications actually are received so as to bind the other party. Moreover, we often hear an offeree say that he called the offeror or faxed his acceptance, instead of mailing it, in order to create a contract as quickly as possible. See also *infra* note 78.

<sup>32</sup> *Id.*

<sup>33</sup> Professor Macaulay found that, as a general matter, contracting parties may be unaware of the law affecting their transaction. Moreover, even if they know the law, business people especially have little use for the law. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58-59 (1963); see also Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1304-1308 (1990); Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465.

<sup>34</sup> See *infra* notes 101-51 and accompanying text.

<sup>35</sup> See *supra* note 5 and accompanying text.

erally runs smoothly<sup>36</sup> Second, until the parties seek legal advice, their presumptions or expectations of the existing law will govern their disposition of any formation dispute that may arise.<sup>37</sup> Why, then, change the default rule?<sup>38</sup> First, the rule is just plain wrong. It is not supported by logic.<sup>39</sup> The rule gives an unbargained-for advantage to the offeree<sup>40</sup> and is out of sync with modern methods of communication.<sup>41</sup> The rule mirrors neither other existing rules of contract formation<sup>42</sup> nor the reasonable and probable expectations of the parties.<sup>43</sup> Nor does the rule mirror existing statutory rules of contract formation<sup>44</sup> or proposed models of contract formation.<sup>45</sup> The existing rule is also economically inefficient.<sup>46</sup> The rule also does not facilitate the production of evidence.<sup>47</sup> Finally, the party less capable of ensuring against a loss now bears the burden of communication.<sup>48</sup>

Many courts and commentators have attacked the dispatch rule.<sup>49</sup> Others have supported it.<sup>50</sup> All, however, have admitted that

<sup>36</sup> A search of Westlaw's Alfed and Allstates databases revealed only 57 cases that discussed the "mailbox rule" in the last several decades. (The query was "Mailbox/1 rule"). A search of Lexis's Genfed (Courts) and States (Omni) files revealed only 58 such cases. (The query was the same). Both searches were conducted on October 29, 1990.

<sup>37</sup> This second reason is based on a hunch. Probably there are two reasons why there is little litigation concerning communication of acceptances by promise. First, acceptances rarely get lost and parties rarely change their minds. Second, the parties may settle their disputes according to their expectations.

<sup>38</sup> In addition to the many significant arguments in favor of the change, there is another, less weighty, benefit: myriad first-year law students would appreciate some added sense of consistency in the law they study.

<sup>39</sup> See *infra* notes 51-54 and 72 and accompanying text.

<sup>40</sup> See *infra* notes 58-60 and accompanying text.

<sup>41</sup> See *infra* notes 62-64 and accompanying text.

<sup>42</sup> See *supra* notes 5-12 and accompanying text.

<sup>43</sup> See *supra* notes 31-33 and accompanying text.

<sup>44</sup> See *infra* note 79 and accompanying text.

<sup>45</sup> See *infra* notes 80-85 and accompanying text.

<sup>46</sup> See *infra* notes 86-87 and accompanying text.

<sup>47</sup> See *infra* notes 88-95 and accompanying text.

<sup>48</sup> See *infra* notes 96-99 and accompanying text.

<sup>49</sup> See, e.g., *Rhode Island Tool Co. v. United States*, 128 F. Supp. 417 (Ct. Cl. 1955) (bidder allowed to withdraw mistaken bid by telephone before arrival of mailed acceptance); *Dick v. United States*, 82 F. Supp. 326 (Ct. Cl. 1949) (ability to remove postal matter from the mail after posting should negate the mailbox rule); 2 C.C. LANGDELL, *SUMMARY OF THE LAW OF CONTRACTS* § 14 (1880); 1 S. WILLISTON, *supra* note 4, § 81, at 226; Evans, *The Anglo-American Mailing Rule: Some Problems of Offer and Acceptance in Contracts by Correspondence*, 15 INT'L & COMP. L.Q. 553 (1966); Macneil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. PA. L. REV. 947 (1964); Samek, *A Reassessment of the Present Rule Relating to Postal Acceptance*, 35 AUSTR. L.J. 38 (1961); see also

the original rationale for the dispatch rule no longer exists.<sup>51</sup> The rule sometimes was justified on an agency theory: the courts determined that the post office or other dispatch office acted as the agent of the offeror.<sup>52</sup> Additionally, the offeree could not get back the letter of acceptance once it was sent.<sup>53</sup> The latter rationale no longer exists because the offeree now has the ability to retrieve the letter from the post office.<sup>54</sup>

The drafters of the Restatement (Second) of Contracts favor the dispatch rule because the rule affords the offeree a dependable basis for deciding whether to accept.<sup>55</sup> The drafters argue that if the offeree has not received notice that his power to accept has been terminated, the offeree should be assured that a contract has been created as soon as the offeree dispatches the notice of his acceptance.<sup>56</sup> The Restatement rule makes the offer irrevocable upon dispatch of the acceptance.<sup>57</sup> That irrevocability binds the offeror even when the offeror is unaware of the acceptance.

The offeree should not receive this unexpected and unbar-gained-for protection. If the offeree wants the protection of an irrevocable offer, the offeree should be required to obtain an

McCulloch v. Eagle Ins. Co., 1 Pick 278 (Mass. 1822) (decided before court saw decision in Adams v. Lindsell; acceptance of offer of insurance effective on receipt).

<sup>50</sup> Morrison v. Thaelke, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963); Reserve Ins. Co. v. Duckett, 238 A.2d 536 (Md. 1968) (acceptance effective when placed in post box); Worms v. Burgess, 620 P.2d 455 (Okla. Ct. App. 1980); Adams v. Lindsell, 106 Eng. Rep. 250 (K.B. 1818); Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779, 795 (1939).

<sup>51</sup> See 1 A. CORBIN, *supra* note 4, § 78, at 335; S. WILLISTON, *supra* note 4, § 81, at 266-67; see also commentators cited *supra* note 49.

<sup>52</sup> Cf. Samek, *supra* note 49, at 39 ("Today it would seem to be recognized that the post office is not an agent of the parties at all, but a public institution.").

<sup>53</sup> See, e.g., *Rhode Island Tool*, 128 F Supp. at 417 (discusses the rationale long cited for the mailbox rule that a letter, once mailed, could not be retrieved and that, therefore, mailing an acceptance was a definitive manifestation of assent); see also RESTATEMENT (SECOND) OF CONTRACTS § 63 comment a (1981).

<sup>54</sup> See *Dick*, 82 F Supp. 326 (citing postal regulations permitting retrieval of mail by sender); *Rhode Island Tool*, 128 F Supp. 417. (citing postal regulations that permit withdrawal by sender of letter deposited in the mails); *Morello v. Growers Grape Prods. Ass'n.*, 186 P.2d 463 (Cal. Dist. Ct. App. 1947) (citing state codification of dispatch rule).

<sup>55</sup> RESTATEMENT (SECOND) OF CONTRACTS § 63 comment a (1981); see also *Worms*, 620 P.2d at 457.

<sup>56</sup> *Id.*

<sup>57</sup> Civil law countries also make an offer irrevocable upon dispatch of an acceptance. The acceptance, however, is not effective until received by the offeror. See, e.g., 2 R. SCHLESINGER, *FORMATION OF CONTRACTS—A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 1446-1463 (French), 1464-1473 (Austrian, German, Swiss) (1968); Eorsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 317-319 (1979).

option from the offeror.<sup>58</sup> Additionally, the offeree can always protect the intent to create a bargain by instantaneously communicating the acceptance to the offeror. The offeree can telephone or use a facsimile machine to communicate with the offeror or transmit the acceptance via electronic data interchange.<sup>59</sup> A substantially instantaneous communication would create a contract when received by the offeror, nearly at the same moment as when dispatched by the offeree.<sup>60</sup>

Detractors may argue that instantaneous communication is extraordinary and expensive. The mere prevalence of high technology equipment capable of instantaneous or near instantaneous communication belies that notion. American and international telecommunication companies are every day expanding their capabilities. As early as 1983, MCI Telecommunications introduced a system called MCI Mail, which linked people in the United States with people in 80 foreign countries by electronic mail, fax, telex, and courier delivery.<sup>61</sup> In less than five years, fax machines have changed the pace of document delivery worldwide. When South African Nelson Mandela negotiated his release from twenty-seven years in prison, he communicated with the Pretoria government through a fax machine.<sup>62</sup> Climbers on a 1988 expedition to the summit of Mount Everest (some 29,000 feet) sent back progress reports via a fax machine attached to a cellular telephone.<sup>63</sup> In November, 1990, during Operation Desert Shield, American soldiers stationed in

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<sup>58</sup> Strictly, an option may be used to refer to any power to make a choice. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 25 comment a (1981). This Article uses "option" and "option contract" interchangeably to mean only an enforceable promise that limits the offeror's power to revoke the offer. The option contract must meet the requirements of a contract in that the offeror's promise of irrevocability must be supported by a validation device. The validation device may be consideration, but also may consist merely of a signed writing. *Cf. N.Y. GEN. OBLIG. L. § 5-1109* (McKinney 1989); *U.C.C. § 2-205* (1990) ("firm offer" defined). Additionally, the offeree's reliance on the offeror's promise of irrevocability may make the offer irrevocable. *See RESTATEMENT (SECOND) OF CONTRACTS § 90* (1981); *see also Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958) (reasonable reliance before acceptance made the offer irrevocable); RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981).

<sup>59</sup> *See supra* note 27 for a description of fax and EDI.

<sup>60</sup> Nothing is certain but phones and faxes. With apologies to Benjamin Franklin, who on November 13, 1789, wrote to Jean Baptiste Le Roy: "In this world, nothing can be said to be certain, except death and taxes."

<sup>61</sup> PR Newswire, Sept. 25, 1990 (available on Nexis).

<sup>62</sup> Chicago Tribune, Aug. 12, 1990, § 10 (Magazine), at 36.

<sup>63</sup> *Id.*

Saudi Arabia used fax machines to vote for candidates in their home towns across the United States.<sup>64</sup>

The growing demand for fax machines has brought the price of the equipment into an affordable range. Fax machines sell at a purchase price of approximately \$400. A similar machine would have cost more than \$1,200 just five years ago. If the sender owns the machine, transmission of a document costs merely the price of the long-distance toll charge.<sup>65</sup>

English jurists have justified the dispatch rule by labeling it as a rule of convenience.<sup>66</sup> As was pointed out in *Adams v Lindsell*,<sup>67</sup> the courts determined that, on the grounds of expediency, offerors impliedly dispense with actual notification of acceptance when the parties are at a distance. Unless this were so, argued the courts, "no contract could ever be completed by the post."<sup>68</sup> If the offeree's acceptance were not effective until received by the offeror, the offeror would have to notify the offeree that the offeror had received the offeree's notification of acceptance.<sup>69</sup> In order for the offeror to be certain that the offeree had received the offeror's notice, the offeree would have to notify the offeror that the offeree had received the offeror's notification that the offeror had received the offeree's acceptance.<sup>70</sup> In order for the parties not to go on in this way *ad infinitum*, the English courts determined that when the parties are at a distance, the balance of convenience dictates that the contract is complete when the acceptance is put into the channel of communication, placing the burden of doubt on the offeror.<sup>71</sup>

It is submitted that the current dispatch rule is no more convenient than the proposed default rule. Under the proposed rule, the advantage is merely shifted from the offeree to the offeror, but that shift is logical and reasonable. Because substantially instantaneous methods of communication are now so inexpensive and common,<sup>72</sup> the burden should be placed on the offeree if he

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<sup>64</sup> Los Angeles Times, Nov. 6, 1990, at A4, col. 1.

<sup>65</sup> Conversation with a salesperson from Sharp Electronics, Oct. 24, 1990.

<sup>66</sup> *Entores Ltd. v. Miles Far East Corp.*, 2 Q.B. 327 (C.A. 1955) citing *In re Imperial Land Co.*, L.R. 7 Ch. 587, 594 (1872); *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 216 (1879); *Dunlop v. Higgins*, 9 Eng. Rep. 805, 808 (1848) (contract accepted by posting letter declaring acceptance); *Adams*, 106 Eng. Rep. 250.

<sup>67</sup> 106 Eng. Rep. 250 (K.B. 1818).

<sup>68</sup> *Id.* at 251.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See *supra* notes 61-65 and accompanying text.

refuses to take advantage of these modes of communication. If an offeree refuses to use telephone, fax, EDI or other substantially instantaneous methods of communication, the offeree's convenience should not be protected. A contract should be formed when the offeror receives the acceptance, not when the offeree dispatches the acceptance.

The proposed default rule is justified because the requirement of receipt of communication is both reasonable and probable.<sup>73</sup> Is it not reasonable for the parties to expect that the default rule that governs acceptance would be the same as the default rules that govern offer, revocation, and rejection? An offeree must receive the offeror's offer.<sup>74</sup> An offeree must receive the offeror's revocation.<sup>75</sup> An offeror must receive the offeree's rejection.<sup>76</sup> Moreover, is it not reasonable for the parties to expect that the default rule governing acceptance would be the same as the default rule that governs acceptance by silence? An offeree's silence or inaction is not a manifestation of assent.<sup>77</sup> It is manifestly unreasonable to presume that an offeror expects that the offeree may create a contract without the offeror actually receiving notice of the offeree's manifestation of assent to the terms of the offer.<sup>78</sup>

Additionally, the proposed receipt default rule mirrors the existing common law rule with respect to acceptance of an option. When an offeree accepts an offer under an option contract, courts find that a contract is not created until the offeror receives the acceptance.<sup>79</sup>

Moreover, the proposal comports with the default rule adopted by the Model Electronic Data Interchange Trading Partner Agreement proposed by the Electronic Messaging Services Task Force of the Section of Business Law of the American Bar Association.<sup>80</sup> Section 2.1 of the Model Agreement provides that no documents

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<sup>73</sup> See *supra* note 2.

<sup>74</sup> See *supra* note 5 and accompanying text.

<sup>75</sup> See *supra* note 6 and accompanying text.

<sup>76</sup> See *supra* note 10 and accompanying text.

<sup>77</sup> See *supra* note 13.

<sup>78</sup> One businessman, with no legal background, likened the unreceived acceptance to the proverbial "tree in the forest." In essence, he asked, "If an acceptance is put into the channels of communication but no one receives it, does it make a contract?"

<sup>79</sup> *E.g.*, *River City Dev. Corp. v. Slemmer*, 781 S.W.2d 525 (Ky. App. 1989) (receipt of acceptance required in option); *Romain v. A. Howard Wholesale Co.*, 506 N.E.2d 1124 (Ind. Ct. App. 1987) (same); RESTATEMENT (SECOND) OF CONTRACTS § 63(b) (1981).

<sup>80</sup> *Agreement*, *supra* note 27, § 2.1, at 1732.

create legal obligations until properly received.<sup>81</sup> That section essentially abolishes the existing default dispatch rule and adopts the proposed receipt rule.

An important additional rationale for the proposed change is that it would remove a significant variation between the law of the United States and the laws of most European nations. As Justice Denning wrote:

In a matter of this kind, however, it is very important that the countries of the world should have the same rule. I find that most of the European countries have substantially the same rule as that I have stated. Indeed, they apply it to contracts by post as well as instantaneous communications. But in the United States of America it appears as if instantaneous communications are treated in the same way as postal communications. In view of this divergence, I think that we must consider the matter on principle: and so considered, I have come to the view I have stated, and I am glad to see that Professor Winfield in this country ., and Professor Williston in the United States of America ., take the same view<sup>82</sup>

The proposal also parallels the default rule adopted in the United Nations Convention on Contracts for the International Sale of Goods.<sup>83</sup> According to article 18 of that document, an acceptance of an offer is effective when the manifestation of assent reaches the offeror.<sup>84</sup> In addition, a contract is created when the

<sup>81</sup> *Id.*

<sup>82</sup> *Entores*, 2 Q.B. 327. In a world so closely linked by communications technology and trade agreements, a uniform rule would seem an imperative.

<sup>83</sup> United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF 97/18 Annex I (1980) [hereinafter U.N.C.I.S.G.].

<sup>84</sup> U.N.C.I.S.G., *supra* note 83, art. 18(2). The Convention adopted the civil law rule rather than the common law rule. For a discussion of the complexities of developing a uniform contract law for use among common law countries and civil law countries, see Eorsi, *supra* note 57, at 315-16. See also Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984, 1995-1996 (1984).

The proposed default rule carries with it, then, the additional benefit of allowing American companies to apply the same default rule in domestic contracts as they would apply, under the U.N.C.I.S.G., in international contracts. The proposed rule would simplify contracting between American companies and those in countries applying the civil law. It also would remove an incentive for forum shopping by litigating parties.

The proposed rule differs from the U.N.C.I.S.G. and the civil law rule in one notable way: the U.N.C.I.S.G. and the civil law provide that an acceptance, once dispatched, makes the offer irrevocable. The importance of this difference in rules becomes minimal when one considers that instantaneous communication is now the norm. The difference would have

acceptance is effective, that is, when the acceptance is received by the offeror.<sup>85</sup>

Economists agree that efficient contracting encompasses communication between the parties.<sup>86</sup> If offeror and offeree can communicate openly, they can negotiate their own default rules. That communication, however, is efficient only when both negotiating parties are aware of their basic rights and duties. When both the offeror and the offeree expect that the offeror must actually receive the offeree's acceptance before the parties are bound by a contract, no negotiation on that issue will occur. Adoption of the proposed default rule will permit parties to form contracts efficiently since they generally will not need to expend resources to negotiate a change from their expectations.<sup>87</sup>

Detractors may argue that the evidentiary aspects of this proposal would be a detriment to proving contract formation by promise. Many times a substantive rule is based on the parties' abilities to provide evidence of the existence of substantive facts.<sup>88</sup> Arguably, dispatch is peculiarly within the knowledge of the offeree and dispatch should be the rule. Receipt is peculiarly within the knowledge of the offeror. As between the offeree, who knows whether the acceptance was sent, and the offeror, who knows whether the acceptance was received, who should prevail? If the proposal were adopted, the offeror would prevail and the offeree would have the burden of determining whether the offeror received the acceptance. Such a burden would be slight and much less than the burden put on the offeror under the existing default dispatch rule. If the parties used the telephone, the risk of transmission failure would be small because both parties would know or have reason to know of any failure.<sup>89</sup> The risk of transmission problems

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little relevance outside a situation in which an offeree sent his acceptance and an offeror attempted to revoke the offer before receiving the acceptance. If communication of the acceptance were instantaneous, the question of whether the offer could be revoked would be moot. See *infra* notes 96 and 116-19.

<sup>85</sup> U.N.C.I.S.G., *supra* note 83, art. 23.

<sup>86</sup> See, e.g., R. COASE, *THE FIRM THE MARKET AND THE LAW* (1988).

<sup>87</sup> Of course, if they wanted, the parties would be able to negotiate a change from the proposed default rule. See generally A. KRONMAN & R. POSNER, *supra* note 2, at 1-7.

<sup>88</sup> For example, courts adopt the presumption that if goods are damaged in transit, it is the last carrier who caused the damage. It is assumed that the last carrier will notify the former carrier if the goods were damaged when received. If that last carrier, who would have knowledge of the condition of the goods, did not notify the former carrier, it is presumed that the last carrier caused the damage.

<sup>89</sup> See, e.g., *Entores*, 2 Q.B. 327; RESTATEMENT (SECOND) OF CONTRACTS § 64 comment b (1981); see also *supra* notes 24-27 and accompanying text.



with a fax, likewise, is minimal. Many fax machines signal the sender (here the offeree) when the message (here the acceptance) has arrived at the receiver's machine.<sup>90</sup> With respect to EDI, the Electronic Messaging Service Task Force of the Section of Business Law of the American Bar Association included in the EDI Model Agreement a provision that requires the receiver to verify receipt of any document by promptly transmitting an acknowledgment to the sender.<sup>91</sup>

Another positive evidentiary aspect of this proposal is that the proposal limits the legal effect of a false allegation of dispatch of an acceptance, or of a false allegation of the time when the acceptance was dispatched. Many businesses have their own postage meters that postmark letters sent. It is possible for the postage meter postmark to be incorrectly dated.<sup>92</sup> An incorrect meter date would allow an offeree to claim that a letter of acceptance was dispatched, thus creating a contract, earlier than it actually was dispatched. If the contract were not created until the offeror received the letter of acceptance, a fraudulent claim by the offeree that a letter had been sent earlier than it actually had been would have little legal effect. Additionally, if an acceptance were telephoned, faxed, or sent by other substantially instantaneous communication, misstating the time at which the communication was dispatched would be difficult. Detractors will argue that under the proposed default rule the ability to misstate the time of communication merely is shifted to the offeror, who could allege that the acceptance was received at a different time than it was. Under the proposed rule, a check on the offeror exists. First, many electronic messages, either fax or EDI, are automatically imprinted with the time and date of receipt.<sup>93</sup> Second, the receiver could be required

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<sup>90</sup> Most fax machines offer this feature. For those who own machines that do not, a simple request for a return fax would suffice for verification of receipt.

<sup>91</sup> *Agreement, supra* note 27, § 2.2, at 1734. Failure to receive a verification would put the original sender on notice that the communication may not have been received. Failure to send a verification would be a breach of the agreement by the receiver who failed to send a verification. Electronic Messaging Services Task Force, *The Commercial Use of Electronic Data Interchange—A Report and Model Trading Partner Agreement*, 45 Bus. LAW. 1645, 1667-1671 (1990) [hereinafter *Report*].

<sup>92</sup> In *Aminoff & Co. v. Varsity Corp.*, No. 89-CV-70002-DT (E.D. Mich. 1989), the court discussed the issue of an incorrect postage meter postmark in order to determine whether a contract had been formed. In that case, the post office had recancelled the letter, thus proving that the postmark was false. See also Nielson, *Post-dated Postmarks, Or, How To Mail A Letter Yesterday*, 46 A.B.A. J. 949 (1960).

<sup>93</sup> See *supra* note 65 and accompanying text.

to send a verification of receipt.<sup>94</sup> The offeree would know when the acceptance was dispatched, and a presumption that the acceptance was received within the amount of time usual for the given medium would exist. In that circumstance, an offeror could not claim that the acceptance was not timely received.<sup>95</sup>

The proposal is fair to both parties. Under the existing default dispatch rule, the offeree receives an unbargained-for advantage because the offeror is unable to revoke an offer once the acceptance has been put out of the possession of the offeree and into the proper channel of communication.<sup>96</sup> The offeree has the advantage because he is aware of the contract before the offeror. Some would argue that the offeree has a basis for performance and can begin performing under the contract.<sup>97</sup> The contrary argument is that the offeror has no basis for understanding that a contract has been formed. Who then should benefit? If the offeree wants such a basis for understanding that the contract has been created, the offeree should either communicate with the offeror as quickly as possible using a substantially instantaneous method of communication<sup>98</sup> or negotiate for an option that is irrevocable and is not affected by the offeree's rejection or the offeror's revocation.<sup>99</sup>

The real issue is who should bear the burden of communication. The offeree should bear the burden unless the parties otherwise agree because the offeree has the opportunity to ensure that the acceptance is instantaneously communicated to the offeror. The offeror can only ensure against a loss by insisting on a certain medium of communication. Usually, an offeror does not state such requirements in the offer, probably because he expects that the offeree would bear the risk with respect to failure of communication.

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<sup>94</sup> See *supra* note 90 and accompanying text.

<sup>95</sup> It is possible, though not probable, that the acceptance will fail in its communication through the substantially instantaneous method.

<sup>96</sup> In this regard, the proposal differs from the civil law and from the United Nations Convention, both of which make an offer irrevocable once the acceptance has been dispatched. See U.N.C.I.S.G., *supra* note 83, art. 16(1); see also Eorsi, *supra* note 57, at 316.

<sup>97</sup> See Samek, *supra* note 49, at 41-42.

<sup>98</sup> See *supra* notes 61-65 and accompanying text.

<sup>99</sup> See *supra* note 58 and accompanying text.

Some would argue that the advantage to the offeree is no different than the advantage given to the offeree under RESTATEMENT (SECOND) OF CONTRACTS §§ 45, 89 (1981). They are correct. Nevertheless, those rules also give an unbargained-for advantage to the offeree. That advantage should not be given.

Some have argued that the default rules concerning communication are too broad, that one rule cannot adequately be applied to all circumstances.<sup>100</sup> The remainder of this Article analyzes the existing common law default rules, the existing statutory rules and the proposed change. This analysis proves that a single default rule, a rule of receipt, can and should govern contract formation by promise.

### III. THE APPLICATION OF THE PROPOSAL

#### Example One: Offer — Acceptance — Revocation

*On May 1, Offeror, at a distance from Offeree, mailed Offeree a letter offering to employ Offeree for the next six months at \$100 per week. On May 5, Offeree received the offer. On May 7, Offeree mailed Offeror a letter of acceptance. On May 10, Offeror received Offeree's acceptance. On May 11, Offeror mailed to Offeree a letter of revocation withdrawing the offer. On May 15, Offeree received Offeror's revocation.*

According to the existing default dispatch rule, a contract was formed on May 7 when Offeree sent the letter of acceptance to Offeror.<sup>101</sup> Had the transaction involved the sale of goods, it would have been governed by the Uniform Commercial Code.<sup>102</sup> The Code, however, does not explicitly provide for a time when an acceptance becomes effective. In that circumstance, the common law default dispatch rule most likely would have applied,<sup>103</sup> and the acceptance would have been effective on May 7.

If this were an international transaction for the sale of goods, the United Nations Convention would apply.<sup>104</sup> According to the Convention, Offeree's acceptance would have been effective on May 10 when Offeror received the acceptance.<sup>105</sup> If this were a transaction using EDI, under the Model Agreement the acceptance likewise would have been effective upon receipt.<sup>106</sup>

If the proposed default receipt rule were adopted, it would apply to transactions under the Code as well as to all other trans-

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<sup>100</sup> Macneil, *supra* note 49, at 950.

<sup>101</sup> See *supra* note 22 and accompanying text.

<sup>102</sup> U.C.C. §§ 2-102, 2-105 (1990).

<sup>103</sup> U.C.C. § 1-103 (1990) (unless otherwise displaced, provisions of the Code are supplemented by the common law).

<sup>104</sup> See U.N.C.I.S.G., *supra* note 83, art. 1.

<sup>105</sup> *Id.* at art. 18(2).

<sup>106</sup> Agreement, *supra* note 26, § 2.1, at 1732.

actions not covered by the Code.<sup>107</sup> May 10 would be the effective date of acceptance under the proposed default rule. The letter of revocation received by Offeree was too late to have any legal effect under any existing default rule because the contract was formed either on May 7 upon dispatch or on May 10 upon receipt.<sup>108</sup>

In Example One, the various rules yield the same result: the revocation is ineffective. The acceptance would be effective upon dispatch only under the existing common law rule. The acceptance would be effective upon receipt using the United Nations Convention, the Model EDI Trading Partner Agreement and the proposed default receipt rule. A slight variation of Example One creates a more difficult and more uncertain analysis.

Example Two: Offer — Acceptance Sent — Revocation Received — Acceptance Received

*On May 1, Offeror sent the offer. On May 5, Offeree received the offer. On May 7, Offeree mailed the acceptance. On May 8, Offeror faxed Offeree a revocation of the offer, which was received by Offeree within moments of dispatch. On May 10, Offeror received Offeree's acceptance.*

According to the existing default dispatch rule, a contract was formed on May 7 when Offeree mailed the letter of acceptance to Offeror.<sup>109</sup> The dispatch of the acceptance essentially makes the offer irrevocable<sup>110</sup> so that the revocation has no legal effect even though it was received by Offeree before Offeror received the acceptance. A contract, likewise, would have been created if the Uniform Commercial Code applied.<sup>111</sup>

Curiously, the result, but not the analysis, would be similar under the United Nations Convention.<sup>112</sup> As previously discussed,<sup>113</sup> under the Convention a contract is created when an acceptance becomes effective,<sup>114</sup> and an acceptance becomes effective when received by Offeror.<sup>115</sup> Initially, it would seem, then, that the contract was formed on May 10, but the revocation received on

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<sup>107</sup> See *supra* note 103 and accompanying text.

<sup>108</sup> A revocation is effective upon receipt. See *supra* note 6 and accompanying text.

<sup>109</sup> See *supra* note 22 and accompanying text, *But see* Rhode Island Tool Co. v. U.S., 128 F Supp. 417 (Ct. Cl. 1955).

<sup>110</sup> See *supra* note 57 and accompanying text.

<sup>111</sup> See *supra* notes 102-03 and accompanying text.

<sup>112</sup> See U.N.C.I.S.G., *supra* note 83 and accompanying text.

<sup>113</sup> See *supra* notes 84-85 and accompanying text.

<sup>114</sup> U.N.C.I.S.G., *supra* note 83, art. 23.

<sup>115</sup> *Id.* at art. 18(2).

May 8 would terminate Offeree's power of acceptance before the contract was created. A closer reading of the Convention reveals that although the contract was not created until May 10, the offer may be revoked only if the revocation reached the Offeree before he dispatched the acceptance.<sup>116</sup> Dispatch of the acceptance makes the offer irrevocable so that, in Example Two, the contract was formed on May 10 and the revocation was ineffective. This civil law default rule approximates the common law mailbox or default dispatch rule for probably the same reason, which is that Offeree has relied on the offer by dispatching an acceptance and that reliance should be protected.

Offeree's reliance was not reasonable. Offeror, unaware that Offeree dispatched an acceptance, should have been able to revoke effectively the offer unless the parties agreed to its irrevocability or a default rule properly made the offer irrevocable. The civil law and the Convention default rules, by making an offer irrevocable upon dispatch of the acceptance, do not mirror the expectations of the parties.<sup>117</sup> If Offeree had wanted the protection of irrevocability, Offeree should have bargained for it or created the contract before he received the revocation.<sup>118</sup> In Example Two, Offeror used a substantially instantaneous medium of communication instead of the mail because the Offeror most likely presumed that time was of the essence. Offeree could have done the same.

The proposed default receipt rule would best reflect the reasonable expectations of the parties: a contract would not have been created because the acceptance was received by Offeror after Offeree received the revocation. The principle is similar to the rule in the law of security interests: first in time, first in right.<sup>119</sup>

With regard to EDI, no issues of continued irrevocability would have arisen. Simply, under the Model Agreement no document has legal effect until received by the other party.<sup>120</sup> The result under the Model Agreement would be the same as under the proposed default receipt rule: no contract was created. The burden on Offeror engendered by the existing common law and civil law default rules is alleviated by the Model Agreement and the proposed de-

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<sup>116</sup> *Id.* at art. 16(1).

<sup>117</sup> See *supra* notes 13-16 and accompanying text.

<sup>118</sup> See *supra* notes 58-60 and accompanying text.

<sup>119</sup> See, e.g., U.C.C. § 9-312(5) (1990).

<sup>120</sup> *Agreement, supra* note 26, § 2.1, at 1732.

fault rule. Acceptance as well as revocation will be governed by time of receipt, not dispatch.<sup>121</sup>

Those unhappy with the result under the proposed rule might argue that, in relying upon the new technologies, the rule places a Herculean burden on small business operators and individual consumers. However, it is reasonable to expect that these people will understand that time is of the essence in contract formation.<sup>122</sup> Whether the contract is for a multi-billion dollar takeover of an airline, a ten thousand dollar purchase of hamburger meat, or a hiring of a minimum-wage employee, an offeree would reasonably expect that his acceptance will have effect only if received by the offeror before the offeror revokes the offer. Moreover, there is no technology advantage: any offer can be immediately accepted by simply using a telephone.<sup>123</sup>

Example Three: Offer — Manifestation — Revocation — Notification

*On May 1, Offeror sent Offeree the offer. On May 5, Offeree received the offer. On May 5, Offeree called four different friends telling them about the offer and saying, "I accept that offer. I want to work for Offeror." Moreover, on May 5, Offeree wrote, but did not mail, a letter of acceptance to Offeror. On May 6, Offeror faxed Offeree revocation of the offer, which was received by Offeree within moments of dispatch. On May 7, Offeree mailed Offeror the letter of acceptance. On May 10, Offeror received Offeree's acceptance.*

In Example Three, Offeree manifested acceptance, but did not communicate that acceptance to Offeror until after Offeree received

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<sup>121</sup> See Report, *supra* note 91, at 1678.

<sup>122</sup> On the matter of new technology and changes in society, Chief Judge Jones wrote:

We are living in a time of change. The theories of yesterday, proved by practice today, give way to the improvements of tomorrow.

To apply an outmoded formula is not only unjust, it runs counter to the whole stream of human experience. It is like insisting on an oxcart as the official means of transportation in the age of the automobile. The cart served a useful purpose in its day, but is now a museum piece.

*Rhode Island Tool Co.*, 128 F. Supp. at 420.

<sup>123</sup> There are more than 120 million telephone lines in this country. Indeed, if nothing else suffices, there are two million telephone booths in the United States alone. Chicago Tribune, *supra* note 62, § 10, at 38.

Detractors might argue that this oral communication would raise a Statute of Frauds problem. However, the agreement is formed at the moment of assent; the Statute of Frauds serves only to make the existing agreement enforceable. See RESTATEMENT (SECOND) OF CONTRACTS § 137 (1981). Moreover, an offeree could fax the acceptance. Indeed, many courts have found that a signed fax document satisfies the writing requirement of the Statute of Frauds. See Report, *supra* note 91, at 1684.

Offeror's revocation. According to the existing common law dispatch default rule, Offeree's attempted notification would have no legal effect in that Offeree must have completed every act essential to the making of the promise.<sup>124</sup> It is essential that, in addition to his manifestation, Offeree must exercise reasonable diligence to notify Offeror of that manifestation.<sup>125</sup> Because Offeree failed to attempt to notify Offeror, Offeree did not complete his acceptance before the revocation became effective.<sup>126</sup> The result would be the same under the Uniform Commercial Code.<sup>127</sup> According to the United Nations Convention,<sup>128</sup> the EDI Model Agreement,<sup>129</sup> and the proposed default receipt rule, an acceptance is not effective until received; therefore, Offeree's receipt of the revocation terminated his power of acceptance.

Professor Farnsworth proposed that the proper interpretation of the communication or notice requirement of the existing common law default rule was that notification merely was a condition subsequent to the contract that was formed upon an offeree's manifestation of assent to the terms of the offer.<sup>130</sup> If Professor Farnsworth's explanation were correct, in Example Three a contract would have been created at the moment of Offeree's manifestation of assent on May 5. According to Professor Farnsworth, Offeror's duty under the contract would have been discharged had Offeror not received the notice within a reasonable time.<sup>131</sup> In Example Three, however, Offeror received the notice and was bound to perform. Essentially, Professor Farnsworth's analysis would make Offeror's offer irrevocable as soon as Offeree manifested assent. That irrevocability was unbargained-for and created a windfall for the offeree.<sup>132</sup> As in Example Two, Offeree should

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<sup>124</sup> See *supra* note 14 and accompanying text.

<sup>125</sup> See *supra* notes 17-18 and accompanying text; see also *Painter v. Brainard-Cedar Realty Co.*, 163 N.E. 57 (Ohio Ct. App. 1928) (notice by phone after signing effective to create contract).

<sup>126</sup> See, e.g., *Lyon v. Adgraphics, Inc.*, 540 A.2d 398 (Conn. App. 1988) (signature without communication of acceptance was ineffective to create a contract for sale of business); *Sokol v. Hill*, 310 S.W.2d 19 (Mo. 1958) (same for sale of realty); *Wilkie v. Banse*, 88 N.W.2d 181 (Neb. 1958) (same); *Toro v. Geyer*, 117 N.E.2d 620 (Ohio Ct. App. 1951) (same for sale of business).

<sup>127</sup> See *supra* notes 102-03 and accompanying text.

<sup>128</sup> See *supra* notes 83-85 and accompanying text.

<sup>129</sup> See *supra* notes 80-81 and accompanying text.

<sup>130</sup> F. FARNSWORTH, *supra* note 4, § 3.14, at 231-234.

<sup>131</sup> *Id.* In that situation, the preferable analysis leads to the conclusion that the offer lapsed before acceptance.

<sup>132</sup> See *supra* notes 57-58 and accompanying text.

have protected his acceptance by using a substantially instantaneous medium of communication. If that had occurred, Offeree's acceptance would have reached Offeror within moments of dispatch and Offeror's revocation would have had no legal effect. Because Offeree did not act reasonably, Offeree should not receive the benefit of irrevocability<sup>133</sup>

Example Four: Offer — Manifestation of Acceptance — Rejection — Notification

*On May 1, Offeror mailed Offeree the offer. On May 5, Offeree received the offer. On May 7, Offeree mailed Offeror the acceptance. On May 8, Offeree faxed Offeror a rejection, which was received by Offeror within moments of dispatch. On May 10, Offeror received Offeree's letter of acceptance.*

According to the existing default dispatch rule, a contract was formed on May 7 when Offeree mailed the letter of acceptance.<sup>134</sup> However, the rejection, received by the Offeror before receipt of the acceptance, may have some legal effect, if Offeror changed his position in reliance on the rejection.<sup>135</sup> The result would be the same under the Uniform Commercial Code.<sup>136</sup>

The proposed default rule avoids this ambiguity. Neither party would risk acting in reliance upon an incorrect belief about the existence of a contract. Offeree would know that he did not have a bargain and would not be bound by an acceptance that might still be sitting in a mailbox outside his office building. Offeror, meanwhile, would not risk receiving a faxed rejection only to learn days later after perhaps forming a contract with another that he was bound by the mailed acceptance. Example Four illustrates one of the primary benefits of the proposed rule.

The result would be the same under the United Nations Convention,<sup>137</sup> the EDI Model Agreement,<sup>138</sup> and the proposed default receipt rule: the receipt of the rejection prior to the receipt of the acceptance would terminate Offeree's power of acceptance. The

<sup>133</sup> In the vernacular, "If you snooze, you lose!"

<sup>134</sup> *E.g.*, *Morrison v. Thelke*, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963) (contract complete when acceptance deposited in mail); *see also supra* notes 16-18 and accompanying text.

<sup>135</sup> *See, e.g.*, F. FARNSWORTH, *supra* note 4, § 3.22, at 275; RESTATEMENT (SECOND) OF CONTRACTS § 63 comment c (1981).

<sup>136</sup> *See supra* notes 102-03 and accompanying text.

<sup>137</sup> U.N.C.I.S.G., *supra* note 83, arts. 17 (power of acceptance is terminated when offeror receives rejection), 18(2) (acceptance effective when received), 22 (acceptance may be withdrawn if withdrawal is received by offeror before or at the same time as acceptance).

<sup>138</sup> *Agreement, supra* note 26, § 2.1, at 1732.



uncertainty under the existing common law dispatch rule would be effectively avoided.<sup>139</sup>

Example Five: Offer — Acceptance — Acceptance Lost

*On May 1 Offeror mailed Offeree the same offer On May 5, Offeree received the offer On May 7, Offeree mailed the letter of acceptance to Offeror Offeror never received the letter of acceptance and, on May 20, Offeror hired another employee.*

According to the existing default dispatch rule, a contract was formed on May 7 when Offeree mailed the letter of acceptance.<sup>140</sup> It does not matter that Offeror never received the letter Why is Offeree and not Offeror protected in this circumstance? As between the two innocent parties, Offeror bears the burden of communication failure. According to current analysis, if Offeror had wanted to ensure receipt of the acceptance, Offeror could have required receipt of the acceptance as a contingency of the offer<sup>141</sup> Offeror's failure to expressly require receipt of Offeree's acceptance places the burden of communication on Offeror. The presumption is that by mailing an offer to Offeree, Offeror is impliedly authorizing Offeree to send an acceptance by mail.<sup>142</sup> That authorization puts the onus of communication on Offeror In reality, Offeror has made no such authorization. Offeror understandably expects to receive a notice of acceptance from Offeree if Offeree determines to accept.

It is submitted that as between the two innocent parties, Offeror, who never received the acceptance, and Offeree, who expected that Offeror received the acceptance, Offeree should bear the burden of communication. How can Offeree ensure communication? Offeree can telephone or fax Offeror In response, one

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<sup>139</sup> In a similar circumstance, parties will sometimes reach an oral contract. One party will write a confirming memorandum (in order to comply with the Statute of Frauds) and later try to retract the memorandum. Many courts wrongly use the dispatch default rule in this situation to hold that a contract was made upon dispatch of the memorandum. In fact, the contract was made at the time of the oral negotiation; the confirmation merely made the contract enforceable by complying with the Statute of Frauds. Moreover, the retraction of the signed memorandum has no legal effect because the Statute of Frauds is satisfied as soon as the writing is signed. See *Joiner v. Elrod*, 716 S.W.2d 606 (Tex. 1986) (contract created when memo mailed); RESTATEMENT (SECOND) OF CONTRACTS § 137 (1981); see also *American Bronze Corp. v. Streamway Products*, 456 N.E.2d 1295 (Ohio App. 1982) (compliance with Statute of Frauds serves only to make enforceable an already existing contract).

<sup>140</sup> See *supra* notes 16-18 and accompanying text.

<sup>141</sup> The offeror, as we all know, is the "master of the offer." F FARNSWORTH, *supra* note 4, § 3.12, at 221; RESTATEMENT (SECOND) OF CONTRACTS § 30 comment a (1981).

<sup>142</sup> See, e.g., *Chanoff v. Fiafa*, 271 A.2d 285 (Pa. 1970) (use of the mails was impliedly authorized).

might argue that Offeror could have insisted on Offeree's sending a communication of acceptance by a substantially instantaneous method of communication. However, if Offeror is unaware of the existing default dispatch rule, he would not think to include that stipulation in the offer. The preceding analysis would be the same under the Uniform Commercial Code.<sup>143</sup>

The drafters of the Restatement (Second) of Contracts acknowledge that the existing default dispatch rule is less convenient in situations such as Example Five in which the acceptance is never received or is not received within a reasonable time by an offeror.<sup>144</sup> The Restatement commentary provides that, in this circumstance, the language of the offer "is often properly interpreted as making the offeror's duty of performance conditional upon receipt of the acceptance."<sup>145</sup> This gloss points out that the courts seem to be backed into a corner because of the dispatch default rule and would be better served without the rule. Because most offerors expect receipt of the acceptance, this artificial interpretation of the offer would be unnecessary under the proposed default receipt rule.

If the transaction had involved an international sale of goods under the United Nations Convention, Offeree's acceptance would have been effective only when received by Offeror.<sup>146</sup> Since the acceptance would not have been effective, a contract would not have been formed.<sup>147</sup> Under the Model EDI Agreement, the acceptance, likewise, would have had no legal effect.<sup>148</sup>

If the proposed default receipt rule were adopted, it would apply to all transactions. The acceptance, having never been received by Offeror, would have no legal effect, and no contract would be created. This result seems fairer in light of the good faith and innocent actions of the two parties. If Offeree wanted to ensure that a contract were formed, Offeree should have used a better means of communication. Professor Llewellyn argued that the dispatch rule is justified because, if an offeror does not hear from an offeree, the offeror would call the offeree to determine whether the offeree has accepted or rejected the offer.<sup>149</sup> Professor Llewel-

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<sup>143</sup> See *supra* notes 102-03 and accompanying text.

<sup>144</sup> RESTATEMENT (SECOND) OF CONTRACTS § 63 comment b (1981).

<sup>145</sup> *Id.*

<sup>146</sup> U.N.C.I.S.G., *supra* note 83, art. 18(2).

<sup>147</sup> U.N.C.I.S.G., *supra* note 83, art. 23.

<sup>148</sup> *Agreement*, *supra* note 26, § 2.1, at 1732.

<sup>149</sup> Llewellyn, *supra* note 50, at 795 n.23.

lyn's argument carries weight only in a circumstance in which an offeror still intends to contract with the original offeree. When an offeror has found a better bargain, an offeror will merely assume that the offeree has not accepted, and the offeror will contract with another. That is exactly what happened in Example Five. As a matter of human nature, there would be no reason to expect an offeror to seek out an offeree to ascertain the offeree's intentions if the offeror does not care about the offeree's intentions. In addition, a reasonable offeror could conclude that the offeree has not accepted if the offeror has not heard from the offeree within the time set by the offeror or a reasonable amount of time.<sup>150</sup> In that circumstance, the offeror would logically understand the offer to have lapsed and the offeror would be justified in entering into a bargain with another party. If the offeror had assumed that the offeree had determined not to accept, unless he truly wanted to restate the offer, the offeror would not want to communicate with the offeree merely to find out that the offeree had determined not to accept. Nobody wants to be rejected more than once.

On the other hand, is there some protection for the innocent Offeree in Example Five? Offeree did not act reasonably when he used the mail or some other medium of communication that is not substantially instantaneous or certain. Offeree could argue that the Offeror misled Offeree into using the mails. Nevertheless, the law has evolved so that an offeree need not use the same mode of communication as that used in the offer.<sup>151</sup> In that regard, Offeree should not be allowed to claim that Offeror authorized Offeree to use an inefficient method of communication.

Again, the outcome under the United Nations Convention,<sup>152</sup> the Model EDI Agreement<sup>153</sup> and the proposed default rule would be the same: no effective acceptance and, therefore, no contract. The acceptance would be effective under the existing common law dispatch rule.

#### CONCLUSION

The original rationale for establishing a default dispatch rule was to allocate the burden of distance. In a world in which a

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<sup>150</sup> The offer will have lapsed. See RESTATEMENT (SECOND) OF CONTRACTS § 41 (1981). As to when the time for acceptance begins to run, see *Caldwell v. Cline*, 156 S.E. 55 (W Va. 1930) (time begins to run upon receipt of offer by offeree).

<sup>151</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 30(2), 65 (1981).

<sup>152</sup> See U.N.C.I.S.G., *supra* note 83 and accompanying text.

<sup>153</sup> See *Agreement*, *supra* note 26 and accompanying text.

message could take days or weeks, either the offeror or the offeree had to face some period of uncertainty concerning the proposed bargain. Presumably, the burden was placed on the offeror because, as “master of the offer,”<sup>154</sup> the offeror expressly could change the default rule and make the acceptance effective only when received. That right to change the default rule could be exercised only if the offeror knew of its existence. Most offerors, however, had no reason to know of the rule.

As we enter the twenty-first century, modern methods of communication have alleviated the need for the previous allocation of the burden of communication. Mail and telegram are the exception. Telephone, fax, and EDI are now the common and reasonable means of communication. If the offer and acceptance can be transmitted in an instant, the situation becomes more like a face-to-face bargaining. When the parties bargain in the presence of each other, no reason exists to excuse the offeree for not ensuring that the offeror has received the acceptance. Unless otherwise agreed, therefore, the acceptance in all circumstances should be effective upon receipt.

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<sup>154</sup> F. FARNSWORTH, *supra* note 4, § 3.12, at 221; RESTATEMENT (SECOND) OF CONTRACTS § 30 comment a (1981).

