A. Introduction

Contracts form the basis of numerous aspects of our daily lives, both in private matters and in relation to our work. Not only may we have rented, leased, or even purchased the house we live in, we will probably have purchased the clothes we wear, and almost certainly the food we consume; similarly, our work relationship will usually be based on an employment contract; whenever we use public transport, watch a movie, go to a concert, see a doctor, or hire a tax adviser, we rely on service contracts. These are only a few examples of all the different contracts that govern our lives. As a consequence, the coming into existence of these contracts is a vital question when considering any kind of legal (trans)action.

Despite the advance in globalisation and the internationalisation of trade, as well as the appearance of international treaties like the United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980; hereinafter 'CISG')[12] and projects to harmonise contract law[13], such as the Principles of European Contract Law[14] (of 2002, commonly abbreviated as 'PECL'), domestic laws are still of relevance in several respects.[15] This is not only true for matters that are not regulated

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12 1489 UNTS 58. On the status of the Convention, including a list of signatory states, see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-10&chapter=10&clang=_en.

13 For the purposes of this dissertation, contract law is understood as those rules which govern a contract. The differentiation of whether this subject is a stand-alone category of private law, as in English law, or rather seen as a sub-category of a law of obligations, as in German and Japanese law, will thus not be discussed here. See on this briefly Martin Schmidt-Kessel and Shane McNamee, *Methodological Issues in Selected Branches: European Contract Law*, in: Karl Riesenhuber (ed), *European Legal Methodology* (Intersentia 2017) 405, 408–409.

14 Ole Lando (ed), *Principles of European Contract Law (Kluwer Law International)* Parts 1–2 (rev edn, 2000), Part 3 (2003).

15 Something along this line is suggested by Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* [Introduction to Comparative Law] (3rd edn, Mohr 1996) V (preface). See also Thomas Kadner Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (Eleanor Grant tr, Palgrave Macmillan 2009) 3, who states that provisions of national law 'play an important role […], particularly in purely domestic scenarios', but that these are 'not the only rules' applicable to contracts, in particular to transnational ones. The author goes on to note that national law and international treaties 'coexist '. One given example

on a transnational scale, such as the form of contracts, but is due to the fact that contracting parties seem to tend to choose national laws to govern their relationship.[16] In this respect, it also ought to be borne in mind that modern contract laws foresee a range of norms that are sometimes prescriptive (mandatory), but more often dispositive (optional) in nature, so that the latter act as default rules to the contractual provisions made by the parties.[17] In this way, domestic laws support the self-determination of the parties. For all of these reasons, knowledge of the national rules is crucial when considering the issues surrounding the conclusion of a contract. This is true not only for one's own domestic law, but also for foreign laws that may govern the formation process.[18]

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is the CISG, which contains stipulations on the formation of contracts (arts 14–24). These provisions will be discussed in detail in Section E.I. and II. below. A detailed introduction to and discussion of the Convention can be found in, eg, Larry A DiMatteo (ed), *International Sales Law: a Global Challenge* (CUP 2014).

16 The question of choice of law is one of private international law and will not be considered in this dissertation. Interested readers are referred to the following materials: Lawrence Collins (gen ed) and others, *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) Vol 2, 1797–1817; Gisela Rühl, *Rechtswahl* [English title: Choice of Law by the Parties], in: Jürgen Basedow and Klaus J Hopt and Reinhard Zimmermann (eds), *Handwörterbuch des europäischen Privatrechts* [English title: The Max Planck Encyclopedia of European Private Law] (Mohr Siebeck 2009) Vol II 1270–1274 (the German version of the Encyclopedia is available online at http://hwb-eup2009.mpipriv.de/index.php/Handw%C3%B6rterbuch_des_Europ%C3%A4ischen_Privatrechts); Yūko Nishitani, *§ 26 Internationales Privat- und Zivilverfahrensrecht* [Chapter 26 Private International and International Procedural Law], in: Harald Baum and Moriz Bälz (eds), *Handbuch Japanisches Handels- und Wirtschaftsrecht* [Handbook Japanese Commercial- and Business Law] (Heymann 2011) 1211, 1235–1237 paras 64–66.

17 Compare Hein Kötz, *Europäisches Vertragsrecht* [European Contract Law] (Mohr Siebeck 2015) 10, who puts the largely dispositive nature of contractual rules down to the principle of freedom of contract. A similar argument is advanced by Schmidt-Kessel and McNamee (fn 13) 415, who even rank the declarations by and the consensus of the parties first before dispositive and mandatory contract law rules. According to these authors, the function of the mandatory rules is the 'set[ting of] certain limits', see Schmidt-Kessel and McNamee, ibid 416.

18 This may be due to the regulation in the conflict of law rules. Again, this topic will not be considered in this dissertation, as its breadth would demand a consideration on its own. Readers are therefore referred to works on private international law, in particular: Collins (fn 16); Rühl (fn 16), and Jürgen Basedow, *Internationales Privatrecht* [English title: Private International Law], in: Basedow and Hopt and Zimmermann (fn 16) Vol I 902–906; Nishitani (fn 16).

I. Motivation, Subject, and Objectives of the Analysis

When considering the conclusion of a binding contract from a legal perspective, there are numerous aspects that need to be borne in mind. In this dissertation, the requirements foreseen for the formation of a contract in Japanese law will be contrasted with those found in English and German law. This constitutes an endeavour to indicate the variations within the legal formation of contracts in relation to English, German, and Japanese law, which, although sometimes deceptively small, and while certainly interesting from a comparative law perspective, may have great importance for contracting in practice. Coming with a little practical experience herself, the author is aware that some aspects of importance in applied (contract) law can be easily overlooked when confronted with purely theoretical treaties on a particular subject. In this sense, some legal academics have commented that the purpose of contracts lies in economic benefits.[19] As a consequence, it has been argued that contracts will necessarily appear to be the same in their final form, with little or no local differences.[20] While this may be true, it cannot be denied that the basic requirements for contracts vary across different legal regimes.[21]

By looking at these three legal orders, a rough understanding may be gained of the situation in three different legal families: the civilian system, represented by Germany; the common law system, represented by England; and that of a hybrid or mixed system that has been influenced by both of these systems, represented by Japan. While this selection cannot give a definite picture of the situation in each of the three legal families, it suffices to give an inkling of the general differences that exist in contract-

19 Compare Hein Kötz and Axel Flessner, *European Contract Law Vol 1 Formation, Validity, and Content of Contracts; Contract and Third Parties* (Clarendon Press 1997) 6.

20 Indeed, a functional comparative analysis will often lead to the result that what appear to be differences in legal stipulations are resolved when viewed in terms of their function, see Colm P McGrath and Helmut Koziol, *Is Style of Reasoning a Fundamental Difference Between the Common Law and the Civil Law?* (2014) 78 RabelsZ 709, 710, who refer to the comparative approach created by Konrad Zweigert and Hein Kötz in their work '*An Introduction to Comparative Law*' (Tony Weir tr, 3rd edn 1998).

21 This is true even for the notion of a contract. See on this Arthur T von Mehren, *Chapter 1: Introduction*, in: René David and others (eds), *International Encyclopedia of Comparative Law* (Mohr Siebeck/Nijhoff 2008) Vol VII/1 3, 5–6.

ing across the world.[22] As will be seen, these differences begin with both of the required declarations of intention, ie, the offer and the acceptance; however, they do not end there. Although the fundamental principle of consensual contracts is present in all three of the jurisdictions considered in this dissertation, a range of other requirements exists. Aptly termed '*indicia* of seriousness',[23] the legal orders considered in this dissertation prescribe that something beyond a mere consensual and usually mutual arrangement must exist before deeming an agreement to be an enforceable contract. This may be a factual question concerning the willingness to be legally bound, a particular form, or that something be handed over at contracting as a token of one's earnestness.[24] It is these further requirements that bring out the differences between the legal systems best, especially with regard to formalities. This is the case even within Europe, as the juxtaposition of the legal frameworks in England and Germany in Section B. will show. Notable differences are equally visible in comparison with Japanese law (on which see Section C. below), as will become clear from the comparison of the three legal orders in Section D.

To this author's best knowledge, no one piece of academic work has focused on a comparison of the contract formation rules in this constellation, ie, of these three legal systems, while also considering the context of its background and operating framework.[25] Even when looking at each

22 Indeed, it has been argued that a comparison between two systems of the same legal family gives a wider scope to the analysis: compare, eg, Guido Alpa, *Conceptions and Definitions of Contract: Some Thoughts on the Differences in English and German Law* (2019) 2 Zeitschrift für Internationales Wirtschaftsrecht (IWRZ) 51, 52. While this may have merit, the aim of this dissertation is to highlight the similarities and differences between European and Asian countries.

23 The expression was coined by Konrad Zweigert and Hein Kötz in their joint work cited in fn 15 above. For a brief discussion of the term, see Hein Kötz, *Seriositätsindizien* [Indicia of Seriousness; in English version 'Tests of Earnestness'], in: Basedow and Hopt and Zimmermann (fn 16) Vol II 1397–1400; for a deeper analysis, see Zweigert and Kötz (fn 15) 382 et seq; or Kötz, '*Europäisches Vertragsrecht*' (fn 17) 68 et seq.

24 Kötz, '*Seriositätsindizien*' (fn 23) 1398.

25 Of course, comparative analyses exist, such as the classical work by Rudolf B Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana 1968); or the more recent work by Jessica Schmidt, *Der Vertragsschluss: ein Vergleich zwischen dem deutschen, französischen, englischen Recht und dem CESL* [The Formation of Contracts: A Comparison of German, French, English Law and the CESL] (Mohr Siebeck 2013). There are also works in which contract law from across the world is considered, in which, however, no in-depth comparison is made. See, eg, David and others (fn 21) Vols VII/1 and 2.

legal system individually, the fact that the basic rules have changed little in the past century, while the practical circumstances have, makes a fresh evaluation worthwhile. The comparative approach adopted in this analysis allows for the variations to be brought into focus more clearly. At the same time, the juxtaposition brings to light issues that are not usually discussed — or at least not at length — in one or the other legal system, although these might be practically relevant.

This dissertation cannot and in fact does not aspire to become a handbook for practitioners in transnational contract law. Instead, the aim is to present a work that goes beyond a mere theoretical exposition and to include facets which are often treated too superficially, if at all, in present literature. This is especially true for form requirements and the mark verifying a person's intention in a written document: the signature or seal impression. The aim is to raise awareness of these matters by discussing them in the context of their operating framework, including the legal thinking prevalent in each system, as explained in the following section.

In order to avoid confusion, it should be noted at the outset that any reference to 'English law' in this dissertation means the law as applicable in England and, generally, Wales.[26] The fact that England forms part of the United Kingdom[27] (hereinafter 'UK') notwithstanding, the law in Scotland and Northern Ireland differ from that of England.[28] Focus will be on the latter, as this is what is sometimes referred to as the 'mother of all common laws'.[29] More on English law and its sources will be said in Section B. Before proceeding with the analysis, a further delimitation of the topic will be made in Section II. This is followed by a note on the method of the analysis in Section III.

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26 Authors have noted that the legal system of Wales is the same as that of England, see, eg, Collins (fn 16) Vol 1, 31 para 1-067. See further the geographical definition of England as including Wales, ibid 32 para 1-073. cf the legal definition of England and Wales in sch 1 Interpretation Act 1978 and ss 1 and 20 Local Government Act 1972. cf also David H Griffith and Joel Harrison, *United Kingdom*, in: Dennis Campbell (ed), *E-commerce and the Law of Digital Signatures* (Oceana Publishing 2005) 637, 639, who note that the law in Wales may deviate in some situations.

27 For a geographical definition, see Collins (fn 16) Vol 1, 33 paras 1-075 (United Kingdom), 1-074 (Great Britain), and 32 para 1-073 (England).

28 Compare Penny Darbyshire, *Darbyshire on the English Legal System* (11th edn, Sweet & Maxwell 2014) 9 para 1-008; Griffith and Harrison (fn 26) 639.

29 Darbyshire (fn 28) 11 para 1-013.

II. Defining and Delimiting the Topic

The formation of a contract can be a complex process which can hardly be set out adequately in a doctoral dissertation, even if only one legal system were analysed. As this dissertation will investigate three jurisdictions,[30] aspects must be selected in order to allow for deeper discussion. It may be said generally that the exposition will analyse contracts in three constellations: between businessmen (B2B contracts), between businessmen and consumers (B2C contracts), and between consumers only (C2C contracts). The latter seems to be of growing importance recently, due to the rise of a number of internet platforms that allow private individuals to contract directly with each other, whether this be for the purposes of selling, swapping, lending (eg, tools) or renting something (eg, a car or a house), or even just to give someone a helping hand.[31] This phenomenon has been labelled the 'share economy'.[32]

While relevant aspects of specific fields such as consumer, labour, or land law will be touched upon during the subsequent discussion, details must be left to works dedicated wholly to the subject in question. In contrast, agreements or arrangements arising in relation to family affairs, such as marriage and divorce contracts, adoptions, etc will not be discussed and will be equally left to specialists in the area of family law. Similarly, the area of law surrounding quasi-contracts will not be covered in this dissertation, as these kinds of obligations are not contracts in the strict

30 The scope is in fact even larger, as applicable rules on the formation of contract found in European and international law will also be considered. More on this subsequently.

31 Next to global companies such as eBay, Uber, and Airbnb, a plethora of regional platforms exist, eg, www.any-times.com (Japan, for skills), www.libraryofthings.co.uk (UK, for tools and skills), www.nebenan.de (Germany, for goods and skills).

32 See generally, eg, Jenny Kassan and Janelle Orsi, *The Legal Landscape of the Sharing Economy* (2012) 27 No 1 Journal of Environmental Law & Litigation 1, 3–13; Devyani Prabhat, *"BorrowMyDoggy.Com": Rethinking Peer-to-peer Exchange for Genuine Sharing* (2018) 45 No 1 Journal of Law and Society 84, 87, 90. Perhaps due to the rising success of these platforms, commercialisation has slowly crept in, so that the parties may not be private persons only, but involve merchants or entrepreneurs. On the problems of this phenomenon, see, eg, Prabhat, ibid 87–90; on the legal challenges, see Kassan and Orsi, ibid 13 et seq.

sense due to the fact that they arise from law rather than from the parties' agreement.[33]

In terms of the formation process, it may be stated at the outset that the legal frameworks in Europe and in other parts of the world are cast in a similar fashion. Thus, for there to be an agreement that is deemed legally binding, a contract must arise from declarations of intention that are flawless (ie, the person must possess the required mental and legal capacity to act, the declaration must be free from errors or undue influence, etc), the declarations must also be mutual and correspond in terms of their content. A range of these issues will not be covered. This includes the matter of a person's mental and legal capacity, as well as mistake, duress, and fraud. The reason is that the interest of this author lies in the contract itself and its formation process. And while it may be true that the above-named issues have a bearing on this process, they are subjects eliciting diverse discussions in all three jurisdictions examined in this dissertation, making them worthy of individual examination, and would thus surpass the limits set for this dissertation.[34] For the same reasons, aspects like the interpretation of a contract's terms and control of its content through public morals or standard term regulation will be largely omitted and only referred to, as required, to illustrate a point. Similarly, other aspects such as promissory estoppel, *culpa in contrahendo*, and good faith will only be mentioned where directly relevant to the discussion in this dissertation, ie, the formation of a contract.

Apart from the three individual jurisdictions named above, regulation from selected other sources will be considered, namely, pertinent supra- and international law from the European Union (hereinafter simply 'EU law')[35] and the CISG. Moreover, transnational efforts in relation to the

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33 See *Halsbury's Laws of England* (4th edn, LexisNexis 1974) Vol 9 paras 201, 212, 634. cf Atiyah, *An Introduction to the Law of Contract* (5th edn, Clarendon Press 1995) 45–46, who states that this is now treated as a separate branch of law from contract, namely, under the law of restitution.

34 Beside general comparative works such as Kötz, '*Europäisches Vertragsrecht*' (fn 17), see more specifically: Ernst A Kramer and Thomas Probst, *Defects in the Contracting Process*, in: David and others (fn 21) Vol VII/2 3 et seq; Michael H Whincup, *Contract Law and Practice: The English System, with Scottish, Commonwealth, and Continental Comparisons* (5th edn, Kluwer Law International 2006) 107–123, 287–335; Raymond Youngs, *English, French & German Comparative Law* (3rd edn, Routledge 2014) 580–584, 608–630.

35 The importance of EU law has been noted by many; see, eg, Stefan Grundmann, *Series Preface*, in: Riesenhuber (fn 13) v–vii. cf Christian Twigg-Flesner, *Lessons for Consumer Law Reform from the UK's Consumer Rights Act 2015* (Lecture, Ryūkoku

harmonisation of contract law, in particular the PECL, the Draft Common Frame of Reference for European Contract Law[36] (commonly abbreviated as 'DCFR'), and the Common European Sales Law[37] (commonly abbreviated as 'CESL') will be considered briefly in Section E.II.[38] The UNIDROIT Principles of International Commercial Contracts (commonly abbreviated as 'PICC') will not be examined, as its content — in particular in relation to the formation of contracts — is an almost identical wording to the provisions of the CISG.[39]

III. A Note on the Method

The dissertation follows a particular order in its exposition. First, the legal framework is set out in a theoretical manner to provide for a solid basis. Having said this, reiterations at length of discussions on technical or semantical points will be avoided wherever possible to maintain a certain level of easy readability. Instead, an overview of the key points of any

University, Kyōto, Japan, 8 November 2015), who notes that EU law does not regulate the formation of contracts.

36 Christian von Bar and Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (full edn, Sellier European Law Publishers 2009) 6 Vols. The text is available online at http://storme.be/european-private-law_en.pdf. Page numbers refer to the online version.

37 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM (2011) 635 final. The Proposal contains the CESL in Annex I to the regulation. Hereinafter, references to the regulation will be as 'art [no] CESL Reg', while references to the actual CESL will simply be 'art [no] CESL'. Note that this project has been abandoned, see Jan M Smits, *Contract Law: A Comparative Introduction* (2nd edn, Edward Elgar Publishing 2017) 31.

38 An excellent overview over these and other European projects is given by Nils Jansen and Reinhard Zimmermann, *General Introduction: European Contract Laws*, in: ibid, *Commentaries on European Contract Laws* (OUP 2018) 1–13.

39 See, International Institute for the Unification of Private Law (UNIDROIT), UNIDROIT Principles of International Commercial Contracts (2016) xxix (introduction to the 1994 edition), where it is stated that some rules have 'been taken over more or less literally from the world wide accepted United Nations Convention on Contracts for the International Sale of Goods', and that *inter alia* arts 1.9 (now 1.10, Notice) and 2.2 (now 2.1.2, Definition of offer) 'follow the solutions found in that Convention'.

discussions will be given and reference material for further in-depth investigation offered to those interested in the topic.

In relation to this first aim, the theory will be set out in its context, so that contract law can be seen as 'a law in action'.[40] The setting will be composed of the historical development on the one hand, to aid in uncovering the rationale behind a particular rule and improve understanding of the way in which the norms came to be.[41] On the other hand, simultaneously acting as a second step, points that are relevant to legal practice will be highlighted. Moreover, in order to foster greater comprehension of the legal practices in question, significant aspects of the legal mentality cultivated in the three legal systems will be set out.[42]

Put in technical terms, this dissertation therefore combines a functional comparison with an analysis of the legal origin and its current practice. The author aims to balance the level of theory and information with readability in order to keep the end product digestible. Stemming from this objective, the legal theory and practice of English, German, and Japanese contract law will be set out with its context (history, legal mentality) for each jurisdiction separately, before a direct comparison is made on specific points of interest.

The following exposition is written as seen through the eyes of the English legal system, as this jurisdiction forms the foundation of the author's legal education.[43] This perspective has also affected the choice of vocabulary and particular stylistic elements (on which see Section 2. below).

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40 Compare Stefan Grundmann and Jan Thiessen, *Vorwort* [Preface], in: ibid (eds), *Recht und Sozialtheorie im Rechtsvergleich* / Law in the Context of Disciplines: *Interdisziplinaeres Denken in Rechtswissenschaft und -praxis* / Interdisciplinary Approaches in Legal Academia and Practice (Mohr Siebeck 2015) V, stating this to be the approach of a functional legal comparison.

41 In the words of Youngs (fn 34) xvi: '[A] proper understanding of a legal system can be obtained only by looking into the past.' This approach gains importance if one considers what Schmidt-Kessel and McNamee (fn 13) have pointed out at 423, namely, that '*the basis for enactment of a certain norm often is* not actually a conscious political decision of the legislature, but rather *simply tradition*' (emphasis added).

42 As was said by one German legal academic, law cannot be understood without regard to the understanding of a particular circle of persons as it is a 'spiritual reality' ('*geistliche Wirklichkeit*'). Compare Ernst-Wolfgang Böckenförde, *Der Rechtsbegriff in seiner geschichtlichen Entwicklung: Aufriß eines Problems* [The Concept of Law seen in its Historical Development: Outline of the Matter] (1968) 12 Archiv für Begriffsgeschichte 145, 146.

43 To quote the very fitting words of Youngs (fn 34) xvii once again: 'I have to admit that I have seen the other legal systems through English eyes.'

Perhaps more importantly, it has prompted the exposition to be weighted: the section on English law has been written concisely on purpose; rather, more focus is given to the section on German law, and, even more to the one on Japanese law.