B. Comparative Background

As stated, the basis for the comparison of Japanese contract law will be English and German contract law as representatives of the common law and the civil law tradition respectively (see below). Both of these systems are relevant when analysing Japanese contract law, since Japanese law has been influenced by each of these laws (among others), particularly during the modernisation of the Japanese legal system starting in 1868. This process will be explained in detail in Section C.III.2. below. In what follows, the classification of English and German law will be explored in Section I. The emergence and development of contract law in England will be explored in Section II., followed by a similar discourse of German contract law in Section III.

I. Classification of the Legal Traditions of English and German Law and the Sources of their Contract Laws

In analysing and contrasting the laws of different countries, it is important to bear in mind that differences in legal regulation stem — at least partially — from the tradition underlying the legal system in question. For this reason, the sketching of the comparative background will begin with a classification of the English and the German legal systems (see Section 1. below) and an identification of the sources forming these two legal orders (Section 2.). Another aspect affecting the development of regulations is the historical context. This will be considered separately for each of the countries in Sections II.2. and III.2. below.

1. Classification of the Legal Traditions of English and German Law

The classification of legal systems into groups or families has been attempted by applying various criteria, eg, by concentrating on the legal ideology of a country, or by focusing on the sources or the content of a legal

system.[44] Irrespective of which classification standard is applied, it remains true that the English system, which is usually subsumed under the Anglo-American or Common Law legal tradition, and the German system, which is normally contained in the (Roman-) Germanic (civil) legal family, are treated as distinct traditions.[45] In contrast, Japanese law is generally not contained in lists of the different legal traditions, as it is not so much a source for a legal family, but rather the recipient of several foreign inspirations. The nature and classification of the Japanese legal system as 'mixed' will be analysed in C.I. below.

2. Sources of English and German (Contract) Law

Owing to the differences in their legal traditions, the sources of English and German law vary; or, rather, the weight given to each source differs in the two legal systems.[46] This becomes clear in the exposition of the inter-relationship of the different sources of English and German law. It can be stated at this point that one exception is the co-existence of law and equity in the English legal system (see Section a. below).[47] Conversely, one point in common is that the first source for both English and German contract law, adhering to the principle of freedom of contract, is the

44 For a discussion of these criteria and references to authors adopting different categorisations, see Zweigert and Kötz (fn 15) 62–64, 66. They present a modification of the discussed classification methods, namely, by grouping according to 'legal styles' ('*Rechtsstile*'), see ibid 67–73. They refer to, *inter alia*, common historical roots and legal thought as two aspects for distinguishing between these styles. Similar: Smits (fn 37) 25.

45 This categorisation is adopted by, eg, Zweigert and Kötz (fn 15) 177–178 and 130–131 respectively. Smits (fn 37) gives a brief overview of the features of the civil and common legal systems at 25–26 and 28–29 respectively. Zweigert and Kötz, ibid 64 caution that such classifications are made by academics from the field of private law, so that the groupings are best described as being true for private law only; the results may deviate where other areas, eg, constitutional law, are contrasted. In this author's opinion, the classification of English, German, and Japanese law as belonging to the traditions of the Common, Civil, and a hybrid legal system respectively holds true for contract law and is thus adopted in this dissertation.

46 Compare Smits (fn 37) 16.

47 While it is true that there is no organised system like equity to be found in German law, there is the notion of *Treu und Glauben* (good faith), which seems to underpin German legal reasoning in a similar way to equity. This will be considered cursorily in Section b. below.

agreement between the parties itself.[48] Subsidiarily,[49] the sources of the legal system, ie, of England (see Section a.) or of Germany (see Section b.) come into play. Within these sources, the two systems have — for the time being[50] — two sources in common from the European Union (hereinafter 'EU'):[51] legislation adopted by the European Parliament, the Council of the European Union, and the European Commission (hereinafter 'EU legislation');[52] and decisions made by the Court of Justice of the European Union (CJEU; hereinafter 'EU case law').[53] There is further international law, such as the European Convention on Human Rights[54] (hereinafter 'ECHR'), which is applicable in the two countries. These sources will be

48 Compare generally Smits (fn 37) 16–17; Schmidt-Kessel and McNamee (fn 13) 415, borrowing the former phrasing of the French civil code 'the contract is the law of the parties' (former art 1134 para 1). For English law, see, eg, Ewan McKendrick, *Contract Law: Text, Cases and Materials* (5th edn, OUP 2012) 1 and Roy Goode (founder) and Ewan McKendrick, *Goode on Commercial Law* (5th edn, Penguin Books 2016) 910 para 32.09. For German law see, eg, Manfred Wolf and Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* [General Part of the Civil Code] (Karl Larenz founder, 10th edn, Beck 2012) 97 para 23.

49 Where national laws set out mandatory rules, these obviously have priority over anything the parties have stipulated that is contrary to these norms. Otherwise, national contract law will often be made up of default rules, which only take effect if the parties have not made a stipulation on the matter in question. See generally on this Smits (fn 37) 18. Contrast Schmidt-Kessel and McNamee (fn 13) 426, who question dispositive rules and case law acting as a source of law.

50 Presumably, this statement will cease to be true once the UK has ceased to be a member of the European Union. This scenario will be considered briefly in Section a.iv. below.

51 On the influence of the EU on European laws, see generally Kötz, '*Europäisches Vertragsrecht*' (fn 17) 11–13.

52 For more details on the law-making process in the EU, see https://europa.eu/european-union/about-eu/institutions-bodies_en#law-making. See also Paul Craig and Gráinne de Búrca, *EU Law* (6th edn, OUP 2015) 31–46, 50–57 (EU institutions involved in legislating), 124–146 (EU law-making process).

53 Further information on the court can be found at https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en. The court was formerly known as the European Court of Justice, so that the abbreviation ECJ is also sometimes used in literature, see Catherine Elliott and Frances Quinn, *English Legal System* (15th edn, Pearson 2014) 98. See further Craig and de Búrca (fn 52) 57–66 on the CJEU and the EU's court system.

54 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950, came generally into force in 1953, see www.echr.coe.int/pages/home.aspx?p=basictexts. For a detailed discussion of this Convention and its application in the UK and Germany, see, eg, Youngs (fn 34) 115–363.

borne in mind during the subsequent discussion of the two legal systems, whereby international law will only be considered selectively as explained in Sections a.v. and b.v. below.

a. Sources of English (Contract) Law

In England, legal sources are broadly divided into primary and secondary sources.[55] Within each of these categories, further demarcations are made, whereby an order of preference can be observed.[56] The weight given to these sources will be explored first in Section i., before the sources themselves are addressed briefly in Sections ii.–v.

i. The Inter-relationship of the Sources in English (Contract) Law

While the differentiation between primary and secondary sources already connotes some preference, further distinctions are made within these two categories. Thus, primary sources of the English legal system include (in order of importance): EU legislation, English legislation, EU case law, English case law, the ECHR and the decisions of the European Court of Human Rights, as well as other international law.[57] Of these, the ECHR

55 Deviating classifications have been made, see, eg, Whincup (fn 34) 1 para 0.2, who speaks of 'three main sources or elements' of modern English law.

56 For a brief overview of the classification, see the Quick Reference Guide in OSCOLA 2012 (fn 1) 55 (back cover).

57 Compare Darbyshire (fn 28) 21 para 2-001, who lists the sources in a slightly different order. As will be seen in the subsequent discussion, the arrangement by this author corresponds to the theoretical order of application. For information on the treaties entered into by the UK, see www.gov.uk/guidance/uk-treaties. There are, furthermore, other rules beside treaties, including international custom or general principles (see art 38 para 1(b)–(c) Statute of the International Court of Justice, signed on 26 June 1945 at San Fransico; hereinafter 'ICJ Statute'; published, *inter alia*, in International Court of Justice, *Acts and Documents Concerning the Organization of the Court No 6* (February 2007) 59–87, available online at www.icj-cij.org/en/publications). The International Court of Justice (hereinafter 'ICJ') is the 'judicial organ' of the United Nations (hereinafter 'UN'), see art 1 ICJ Statute. See Darbyshire (fn 28) 47 para 4-044 for further discussion, in particular of international custom.

will not be considered further, as its provisions, while certainly significant, have little bearing on the formation process of contracts.[58]

Secondary sources include (in no particular order): books of authority,[59] custom (and usage), and equity.[60] These sources are all significant — to different degrees — for contracts, in keeping with the statement that English contract law 'is a well-blended mix of common law, equity, and statute'.[61] While this is true, customs[62] and equity[63] play no substantial part in the

58 This is because issues in relation to the ECHR rarely arise at the contracting stage. One counter-example of this is a very recent case over an application for judicial review, in which the ECHR (art 8, Right to respect for private and family life) and the issue of whether an application for accreditation under an incentive scheme was a legally binding contract were considered and dismissed, *Re Doran's Application for Judicial Review v re Decision of the Department for the Economy and the Minister for the Economy in Connection with the Renewable Heat Incentive Scheme (No. 2)* [2017] Northern Ireland QB (NIQB) 24, 2017 WL 00956529 (official transcript) at [18], [28]–[30], [37], [39]–[40] (Deeny J). Those interested in the ECHR are referred to other works, eg, Darbyshire (fn 28) 81–110, or Elliott and Quinn (fn 53) 304–328, and to the website of the Council of Europe on the ECHR, www.coe.int/en/web/human-rights-convention/home.

59 Darbyshire (fn 28) 21 para 2-001; cf Elliott and Quinn (fn 53) 7, who does not mention this category at all. Only a limited number of books written by persons such as Blackstone or Glanvill are considered to be authoritative. For a list of the accepted works, see Darbyshire (fn 28) 46–47.

60 Elliott and Quinn (fn 53) 6.

61 Robert Chambers, *The Importance of Specific Performance*, in: Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook 2005) 431.

62 Custom has been defined as 'a reasonable act iterated, multiplied, and continued by the people from time out of mind' (*Tanistry Case* (1607) Davis 28; 80 ER 516, as cited in *Halsbury's Laws of England* (5th edn, LexisNexis 2012) Vol 32 para 1 fn 1) and 'is such a usage as has obtained the force of law and is in truth a binding law as regards the particular place, persons, and things which it concerns'. See *Halsbury's Laws Vol 32*, ibid. See also the entry for 'custom' in Elizabeth A Martin (ed), *A Dictionary of Law* (5th edn, OUP 2002; hereinafter 'Oxford Dictionary of Law') 132, and the entry for 'usage' in ibid 520.

63 It is both a source of law and a separate jurisdiction in its own right, although it has also been referred to as a separate system of law (Darbyshire (fn 28) 9 para 1-007), or as a branch of law (Harold G Hanbury (Founder) and Jill E Martin, *Modern Equity* (18th edn, Sweet & Maxwell 2009) 3 para 1-001 and 4 para 1-002). Its development was a practical necessity born from the fact that the medieval English legal system was riddled with defects. Some of these shortcomings were alleviated through the work of the Chancery, which — not being fettered by the procedural chains binding the royal courts — could see to it that justice was done where the court proceedings could not. See John Hamilton Baker, *An Introduction to English Legal History* (3rd edn, Butterworth 1990) 117–121. On the historical origins, including the role of the Chancellor, see, eg, Hanbury and

formation of contracts; rather, customs are referred to in relation to the terms of a contract (interpretation),[64] while equity is a recourse for parties in distress.[65] Therefore, these two sources will not be considered further.[66] The following exposition will therefore treat primary sources only, beginning with English legislation and case law (Sections ii. and iii.), followed

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Martin, ibid 5–18. A distinct court with its own jurisdiction gradually evolved, which acted according to conscience and led to *equity* being born as a system of legal rules and principles distinct to the *common law*. See Baker, ibid, and 122–128. See also the entry for 'equity' in Oxford Dictionary of Law (fn 62) 178–179. Although the courts of equity were abolished in the nineteenth century, the substantive rules of equity were maintained and applied in parallel to law in the (common law) courts. See Hanbury and Martin, ibid 15–16 and 22–29; see also Baker, ibid 131–132. Equity still prevails today if the common law is incompatible. See Hanbury and Martin, ibid 22 para 1-020; see further Darbyshire (fn 28) 164 para 8-015.

64 See Goode and McKendrick (fn 48) 13 para 1.21; see further ibid 94 para 3.57.

65 Certain remedies are available — at the court's discretion — in equity only, such as specific performance of a party's obligation, or rectification of the contractual document or deed to reflect the parties' intentions, if certain conditions are fulfilled. On the requirements of the former, see Gunter H Treitel (founder) and Edwin Peel, *The Law of Contract* (15th edn, Sweet & Maxwell 2020) 21-018 et seq. See also Hanbury and Martin (fn 63) 751–792. Specific performance is not usually available in sales of goods, as the application of equity in commerce is deemed generally 'undesirable', see Whincup (fn 34) 296–297 para 10.22; cf PJ Millet, *Equity's Place in the Law of Commerce* (1998) 114 LQR 214, according to whom '[e]quity's place in the law of commerce, long resisted [, ...] can no longer be denied.' On the other remedy, rectification, see Elliott and Quinn (fn 53) 126; Darbyshire (fn 28) 163 para 8-012 speaks of a deed. Note that this remedy is only available if a mistake has been made in the recording of the intended agreement but not as to the content, ie, if it turns out to be a bad bargain, that is not rectifiable. Something similar was held by James Vice Chancellor in *Mackenzie v Coulson* (1869) LR 8 Eq 368 (Ch), 375: 'Courts of Equity *do not rectify contracts*; they may and *do rectify instruments* [… where a] *contract is inaccurately represented in the instrument*' (emphasis added). While the court found that there was a contract in the form of a signed policy, the mistake had been made by the plaintiffs themselves in carelessness so that they could not 'escape the obligation of the contract' (375–376). See on this Treitel/Peel, ibid paras 8-063 et seq. For details on the conditions for rectification, see Hanbury and Martin, ibid 34 para 1-037 (common law remedies must be inadequate), 30 para 1-027 (equitable maxim of 'he who seeks equity must do equity'), and 30–31 para 1-028 (equitable maxim of 'he who comes to equity must come with clean hands'). On the equitable maxims, see also Elliott and Quinn, ibid 125–126.

66 Readers interested in customs are referred to *Halsbury's Laws Vol 32* (fn 62), especially paras 1–6, 50–56; further to Darbyshire (fn 28) 46 para 2-042; and Elliott and Quinn (fn 53) 118–120.

by EU and international law (Sections iv. and v.). It should be borne in mind, however, that the foremost source of an English (-style) contract will be the terms of the agreement itself, unless some mandatory statutory provisions exist.[67]

ii. English Legislation: Statutes and Statutory Instruments

English (contract) law is mostly contained in court decisions.[68] This is true despite the constitutional principle of parliamentary sovereignty, according to which statutory law, ie, law enacted by the English Parliament, is officially the first source of English law.[69] Apart from the historical development of the common law, there are two other reasons for this relationship. First, at least as regards contract law, much is made of the lack of a comprehensive piece of legislation.[70] Instead, one finds a range of specific codifications.[71] These may take the form of primary legislation, ie, statutes enacted by Parliament; or secondary, delegated, legislation,[72] which encompasses statutory instruments, byelaws, and orders.[73] Due to this absence of a general statutory framework, the system must therefore draw on judicial decisions to fill any voids. Secondly, even where legislation exists, it is often not only interpreted by case law,[74] but even supple-

67 Compare the sources listed in fn 48 above.

68 See Smits (fn 37) 24, who refers to case law as the 'dominant source' of contract law. More generally, Elliott and Quinn (fn 53) 7 call it the 'base of our law today'.

69 See Elliott and Quinn (fn 53) 3. On the origin of this principle, see, eg, the succinct exposition in Darbyshire (fn 28) 22. cf John H Baker, *Why the History of English Law has not Been Finished* (2000) 59 No 1 CLJ 62, 67, who notes that law reports are treated 'as the primary source of common-law authority'.

70 Compare, eg, Smits (fn 37) 24. See further Neil Andrews, *Contract Law* (2nd edn, CUP 2015) 5, who points out that legislation on 'the general part of contract law' are few in number.

71 These seem to 'cluster' in certain areas, namely, those of the common law (ie, case law) which are thought in need for reform. Compare Smits (fn 37) 24. For a list of statutes, see, eg, Andrews (fn 70) 5.

72 Darbyshire (fn 28) 25–26 para 2-011 points out the difference between the two forms as being that secondary legislation can be quashed by the courts if these are *ultra vires* (made outside the delegated-legislator's power).

73 Elliott and Quinn (fn 53) 80.

74 See Darbyshire (fn 28) 26. For further details on the interpretation rules used in this process, see ibid 27–36, and Elliott and Quinn (fn 53) 53–76. cf Andrew Burrows, *The Relationship Between Common Law and Statute in the Law of Obligations*

mented by it,[75] underlining the common law focus on judicial decisions further.[76]

The most important pieces of legislation in relation to the formation of contracts are as follows: In relation to trade, there is Part II of the Sale of Goods Act 1979 (hereinafter 'SGA 1979') and the Supply of Goods and Services Act 1982 (hereinafter 'SGSA 1982')[77]. As a consequence of the Consumer Rights Act 2015 (hereinafter 'CRA 2015'), a comprehensive regulation of legal consumer issues, ie, of B2C contractual relationships, that has unified and repealed several individual pieces of consumer legislation, both the SGA and the SGSA are now largely applicable to B2B and C2C transactions only;[78] however, since the CRA is not an all-encompassing piece of legislation, parts of these statutes, in particular the provisions of the SGA 1979 concerning the conclusion of contracts, are still applicable to B2C transactions as well.[79] Concerning formalities, the Law of

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(2012) 128 LQR 232, 235, who calls case law that has developed in relation to statutes 'statute-based common law', as opposed to 'pure common law'.

75 See Burrows (fn 74) 234, who states that statutes are almost never 'entirely self-contained' and that they thus rely on the existence of the meanings and institutions developed and contained in the common law.

76 Interestingly, and perhaps surprisingly, textbooks on contract law usually begin with a list of English cases, followed by a list of English statutes and a table of European and international legislation. See, eg, Treitel/Peel (fn 65) ccliii–cclxix; or Andrews (fn 70) x–lii. Other areas, such as Commercial law, may deviate from this pattern, see, eg, Goode and McKendrick (fn 48) xxxi–cxliii. This practice reflects the reality of case law effectively being the most important source of English contract law, as just discussed. Compare Andrews, ibid 4. An explanation might be that it was the most important source historically, as the law was developed from it, see Youngs (fn 34) 61. See also Burrows (fn 74) 233, who then goes on to argue 'that common law and statute are more fully integrated than has traditionally been thought.' Cf Darbyshire (fn 28) 10 and 37, who states that case law 'is at least as important to us as' and 'can be just as important as' legislated law.

77 Note that the statute is concerned with 'supply' and not 'sale' of goods, see s 1 subss 1 (contract concerning the transfer of property in goods) and 2 (sale of goods contracts are excepted) SGSA 1982.

78 See Department of Business, Innovation and Skills, *Consumer Rights Act 2015: Explanatory Notes* (2015; hereinafter 'CRA 2015 Explanatory Notes') para 24, which shows a table with the English legislation related to consumers that is affected by the CRA 2015, including the SGA 1979 and the SGSA 1982. The Notes are available online at www.legislation.gov.uk/ukpga/2015/15/notes/contents.

79 Another example from the SGA 1979 is the stipulations on the passage of property (s 4 CRA 2015, ss 16–20B SGA 1979). For a summary of the provisions of and changes under the CRA 2015, see, eg, Treitel/Peel (fn 65; 14th edn 2015) paras 23-001–23-002.

Property (Miscellaneous Provisions) Act 1989 (hereinafter 'LPMPA 1989') is of importance in sales of land. Furthermore, the Electronic Commerce (EC Directive) Regulations 2002[80] and Consumer Protection (Distance Selling) Regulations 2000[81] deserve mentioning.

iii. English Case Law

For the two reasons just mentioned, case law is an important source for English contract law.[82] In this respect, it is necessary to bear in mind the hierarchical structure of the courts. The highest instance is principally the Supreme Court (hereinafter 'UKSC'), known as the House of Lords (hereinafter 'HoL') until 2009; however, sometimes it may be the CJEU (on which see Section iv. below), whose decisions are binding on the English courts.[83] Lower English courts in civil matters are, in descending order: the Court of Appeal (hereinafter 'CA'), the High Court (hereinafter 'HC') and the county courts, all of which are bound by decisions of the UKSC or the HoL.[84] And while the CA is bound by its own decisions,[85] the other courts are not.[86] This general binding nature flows from the doctrine of (judicial) precedent, which in turn is governed by the principle

80 SI 2002/2013 (hereinafter 'E-Commerce Regulations').

81 SI 2000/2334 (hereinafter 'Consumer Distance Selling Regulation').

82 Due to this heavy reliance, an overabundance of cases has amassed over time. Only the most important of these, what are known as 'leading cases', will be discussed in this dissertation. For further references, readers are referred to textbooks on contract law such as Treitel/Peel (fn 65).

83 See Elliott and Quinn (fn 53) 15.

84 See Darbyshire (fn 28) 39 para 2-032. For brief descriptions of each instance, see Elliott and Quinn (fn 53) 20–21, who show a flow chart of the hierarchy in civil matters at 23 figure 1.2.

85 The CA bound itself in the case of *Young v Bristol Aeroplane Co, Ltd* [1944] KB 718, although it laid down three exceptions. These regard conflicting opinions in CA cases, or with a HoL decision, as well as an *in curiam* (ie, in error) decision. For further information, see Darbyshire (fn 28) 41 at 2-033.

86 Until 1966, the HoL was bound by its own rulings, when its members resolved in a Practice Statement that they would 'treat[…] former decisions of this House as *normally* binding, [but would] depart from a previous decision when it appear[ed] right to do so', see HoL, *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (Gardiner LC; emphasis added). While the HoL is seemingly 'reluctant' to do so, it has departed from its own decisions in a number of cases, see Elliott and Quinn (fn 53) 16. For information on the HC and the county courts, see Darbyshire (fn 28) 41 para 2-034 and 42 para 2-035 respectively.

of *stare decisis* ('let the decision stand').[87] Decisions made by the Judicial Committee of the Privy Council (hereinafter 'PC'), the final instance of appeal for Commonwealth jurisdictions and whose members are mostly Justices of the UKSC, are persuasive only to other English courts.[88] This structure must be borne in mind when considering (conflicting) decisions made by different courts on a subject.

iv. EU Law: Legislation and Cases

Although EU law was listed in Section i. above as having priority over English law, the situation is not straightforward. This is largely due to the dualistic approach in the UK to both EU and other international law.[89] Accordingly, EU law has been categorised by the courts in the past as not being a source of English law in the traditional sense. In the words of Lord Mance, 'European law is part of United Kingdom law only to the extent that Parliament has legislated that it should be',[90] so that the English Parliament's sovereignty was affirmed.[91] On the other hand, the HoL later accepted that the European Communities Act 1972 (hereinafter 'EC Act 1972')[92] 'constitutes EU law as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning.'[93]

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87 Elliott and Quinn (fn 53) 14, 10. According to this principle, a court has to decide a case that is similar in its facts to an earlier case in line with the *ratio decedendi* ('reason for deciding') of that previous decision, unless the case in question can be sufficiently distinguished on its facts. In contrast, the *obiter dicta* ('things said by the way') do not bind the courts but may nevertheless be persuasive. See on this ibid 14.

88 See Darbyshire (fn 28) 11 para 1-013. One influential case of this court relating to formation of contracts is *Pao On v Lau Yiu Long* [1980] AC 614 (PC). As the main issue relates to consideration, the case will be discussed in Section II.3.v. below.

89 See Craig and de Búrca (fn 52) 296.

90 *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [76] (Mance L).

91 It was called 'the ultimate legislative authority', see *Pham* (fn 90) [80] (Mance L).

92 As amended, particularly by the European Union (Amendment) Act 2008.

93 *R (on the application of Miller) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5 [80] (Neuberger L, Lady Hale, Mance L, Kerr L, Clarke L, Wilson L, Sumption L, Hodge L). The latter statement is in line with the supremacy principle of EU law that the ECJ once stated in Case C-6/64 *Costa v ENEL* [1964] ECR 585, 593. A citation of the pertinent part of the decision as well as a discussion of the case can be found in Craig and de Búrca (fn 52) 267–268. Indeed, the HoL later used a similar phrase in *Reg v Secretary of*

The situation has been complicated further by the UK having applied to and consequently left the EU as a Member State.[94] As a consequence, the influence of EU law will diminish over time, if not cease altogether. While the Government has — at the time of writing — given no concrete plan as to the legal changes ahead, legal academics expect that EU law will not simply cease to be effective at the time that membership in the EU ends; rather, it is being predicted that EU law will be phased out, so that an interim, transitional phase will arise.[95] Indeed, the government has stated in its Repeal Bill White Paper that English legislation would be drafted to transpose all EU law into English law so that no 'holes [would appear] in our statute book'.[96] This measure will allow the government to review, amend, and repeal law as necessary on a step by step basis.[97]

State for Transport, Ex p Factortame Ltd (No 2) [1990] 3 WLR 818 (HoL), [1991] 1 AC 603, 658–659 (Bridge L). For details on this case, see Craig and de Búrca, ibid 297–298. They further discuss the supremacy principle at ibid 266–279 (ECJ's stance), 296–304 (UK's stance).

94 The people of the UK cast their vote in a referendum on 24 June 2016 to leave the EU, whereby almost 52% voted leave and approximately 48% voted remain, see the results published by, eg, the BBC on www.bbc.com/news/politics/eu_referendum/results. Article 50 Treaty of Lisbon [2007] OJ C 306/01 (hereinafter 'Lisbon Treaty') was invoked on 29 March 2017, so that the negotiation process between the UK and the EU should end by April 2019, as art 50 para 3 Lisbon Treaty stipulates a maximum time frame of two years for the negotiations. See also Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (White Paper, Cm 9446; hereinafter 'Repeal Bill White Paper') chapter 1; the Paper is available online at www.gov.uk/government/publications/the-repeal-bill-white-paper. This period has been extended several times. Section 1 European Union (Withdrawal) Act 2018 (hereinafter 'EU Withdrawal Act 2018') merely refers to 'exit day' for the repeal of the EC Act 1972; according to s 20 of that Act, that day is '31 January 2020 at 11.00 p.m.' A transition period is in effect until 31 December 2020. On this, see Tom Edgington, *Brexit: What is the transition period?*, BBC (1 July 2020), https://www.bbc.com/news/uk-politics-50838994.

95 See, eg, Andrew Dickinson, *Back to the Future - The UK's EU Exit and the Conflict of Laws* (2016) Oxford Legal Studies Research Paper No 35 (draft as of 31 May 2016) 2. The paper is available online at https://ssrn.com/abstract=2786888.

96 Repeal Bill White Paper (fn 94) 10 at 1.11–1.13. This is reiterated in Department for Exiting the European Union, *European Union (Withdrawal) Act 2018 Explanatory Notes* (c 16–EN, 2018), *inter alia*, 10–11, 14. The Notes are available at the source indicated in fn 94 and will hereinafter be referred to as 'EU Withdrawal Act Explanatory Notes'.

97 Repeal Bill White Paper (fn 94) 10 at 1.12. The same idea is contained in ss 2–3 European Union (Withdrawal) Act 2018.

It remains unclear at this point to what extent legislation will be modified. Having said this, as one of the Law Lords of the Supreme Court, Lord Reed, has stated: The influence of EU law did not begin and will not end with the UK's membership in the EU.[98] Thus, while some changes in law are imminent, this may not have a great effect due to the current stance in legal practice.[99] On the other hand, authors have noted that the influence of EU law has not been equally strong in all areas of English law to begin with. Thus, by way of example, while it has shaped consumer law, it has not greatly impacted commercial law.[100] For all these reasons, this dissertation proceeds on the basis of the current status quo, ie, without making speculations as to possible future changes.

While EU law is therefore applicable in England, a differentiation has to be made between legislation that is directly applicable and that which is not. By virtue of s 2 subs 1 EC Act 1972, rights and obligations created by EU Treaties and made directly applicable by the same are recognised as such. Similarly, EU regulations are also directly applicable.[101] Conversely, this means that any EU law that is not directly applicable, like a directive,[102] has to be implemented by English legislation.[103] In situations of conflict between English and directly effective EU law, the courts must 'override any rule of national law'.[104] With regard to judgments by the

98 Lord Reed, *Comparative Law in the UK Supreme Court* (Lecture, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany, 10 July 2017).

99 This could be the case for, say, choice of law clauses that are currently uniformly regulated within the EU by virtue of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), see Malcolm Clarke and others, *Commercial Law: Text, Cases, and Materials* (5th edn, OUP 2017) 52.

100 See Clarke and others (fn 99) 52; see also McKendrick (fn 48) 2–3.

101 See s 228 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326 /01 (hereinafter 'TFEU 2012').

102 While initially no direct effect was foreseen (compare art 228 TFEU 2012), directives can now be directly effective under certain circumstances. This was established in case C-9/70 *Grad v Finanzamt Traunstein* [1970] ECR-I 826 and confirmed in case C-41/74 *van Duyn v Home Office* [1974] ECR-I 1338. In summary, a directive can be directly applicable if its provisions are clear, precise, and unconditional. See Darbyshire (fn 28) 66 para 3-029; Elliott and Quinn (fn 53) 106.

103 See Darbyshire (fn 28) 51.

104 *Factortame No 2* (fn 93) 659 (Bridge L).

CJEU, these must be borne in mind by the English courts, so that EU case law is also a source of EU law.[105]

v. International Law

As with EU law, international treaties signed by the UK will not be automatically applicable in England due to the principle of sovereignty of the UK Parliament; the government usually first has to enact legislation transposing the treaty into English law.[106] Having said this, provisions of treaties which the UK has signed have priority over the English common law and will thus prevail over conflicting common law.[107] This will be explored separately for each of the sources discussed below.

It has been stated that most legal instruments aiming at harmonising the law of contracts deal only with international but not domestic transactions.[108] One example of an international treaty ratified by the UK is the UNIDROIT Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, adopted 1 July 1964 (hereinafter 'ULFC'). The Convention was not successful and became the 'forlorn predecessor' of the CISG.[109] It is perhaps a little ironic that while the UK ratified the ULFC, it has not signed the CISG, and seems unlikely

105 Darbyshire (fn 28) 51. This was laid down in s 3 subss 1–2 EC Act 1972.

106 See Section iv. above. See further Darbyshire (fn 28) 6 para 1-001, 47 para 2-044; Elliott and Quinn (fn 53) 131–132.

107 It was held in the case of *Sidhu and Others v British Airways Plc* [1997] AC 430 (HoL), 437–438, 444, 446–447, 453 (Hope L) that where an international convention provided exclusive provisions in a matter, national law providing otherwise was not applicable. The convention in question was the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocol Modifying the said Convention Signed at the Hague on 28 September 1955.

108 Roy Goode, *Reflections on the Harmonisation of Commercial Law* (1991) 19 No 1 Uniform Law Review 54, 63. One reason given is that the latter are usually seen as being better regulated in domestic legislation, see ibid 63, 73.

109 Thus described by Goode (fn 108) 74. In light of the fact that the convention only has two (!) remaining signatory states, namely, the UK and Gambia, this seems an apt description. On the status of the convention, see www.unidroit.org/status-ulfc-1964. On the ULFC's demise, see Ulrich Hubner, *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge* [The UNCITRAL-Draft of a Convention on International Sale Contracts] (1979) 43 RabelsZ 413, 414–415.

to do so in the future.[110] Furthermore, while the English courts could theoretically apply the CISG under English conflict of law provisions, they seem not to have done so.[111] Both of these conventions may therefore be deemed irrelevant as sources of provisions on the formation of contracts in English law, so that the ULFC will not be discussed further; however, seeing as the CISG is relevant in relation to Germany and Japan, its provisions will be discussed in Section E.II. below.

b. Sources of German (Contract) Law

In the German legal system, we find the same kind of sources as in English law: German and European legislation (Sections ii. and iv. respectively), German case decisions (Section iii.), customary law (*Gewohnheitsrecht*), and international law (Section v.). This is because all of these sources are general and contain 'norms, which determine the legal assessment of life circumstances'.[112] Accordingly, charters or articles of incorporation (*autonome Satzungen*) or collective bargaining law (*Tarifrecht*) can also be sources of law, whereas academic text(book)s cannot.[113] Slight differences with England are therefore already visible at this level. Furthermore, as was intimated above, the inter-relationship between the sources is different in the German legal system as compared to that of England. This relationship will be analysed first before each of the sources are examined further.

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110 Speculation on the reasons for this position have been made by, *inter alia*, Goode and McKendrick (fn 48) 972. A succinct account of the political reasons is given by Sally Moss, *Why the United Kingdom has not Ratified the CISG* (2005) 25 Journal of Law and Commerce 483–485: the low political priority was due to the reserved response by the English business community to several enquiries.

111 Goode and McKendrick (fn 48) 973 in fn 11. Or at least, not often: One example is perhaps *Kingspan Environmental Ltd and Others v Borealis AS, Borealis UK Ltd* [2012] EWHC 1147 (Comm), WL 1469127 (official transcript), in which Clarke J found the law applicable to the contract in question to be Danish law, which in turn incorporated the CISG. The court thus applied it. See paras 557 (applicability of Danish law), 617 et seq, and 993 et seq (application of the CISG) of the decision. In this way, the 'UK courts may sometimes be obliged to apply' the Convention, see Djakhongir Saidov and Sarah Green, *Software as Goods* (2007) Journal of Business Law (JBL) 161, 163.

112 Definition given by Arthur Kaufmann, *Rechtsbegriff und Rechtsdenken* [The Concept of Law and Legal Thought] (1994) 37 Archiv für Begriffsgeschichte 21, 52: '[…] *Normen, die für die rechtliche Entscheidung von Lebenssachverhalten bestimmend sind* [...]'.

113 Kaufmann (fn 112) 53, 52.

i. The Inter-relationship of the Sources in German (Contract) Law

There seems to be no classification of sources into primary and secondary sources in German law. Having said this, there is of course an order of application, so that the sources of German law are (in order of importance): the ECHR[114] and international law, EU law (legislation), German legislation, and customary law.[115] Furthermore, there are German and EU case decisions and academic literature, the latter of which plays a role in court decisions;[116] however, none of these three are sources of law in the strict sense.[117] Out of these, the ECHR,[118] customary law,[119] and academic

114 It was incorporated into German law by virtue of the *Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten* [Law on the Convention of the Protection of Human Rights and Fundamental Freedoms] of 7 August 1952, Bundesgesetzblatt [German Federal Law Gazette; hereinafter 'BGBl'] 1952 II 685; and came into force on 3 September 1953, see *Bekanntmachung über das Inkrafttreten der Konvention zum Schutze der Menschenrechte und Grundfreiheiten* [Announcement of the Coming into Force of the Convention of the Protection of Human Rights and Fundamental Freedoms] of 15 December 1953, BGBl 1954 II 14. On the relationship between the ECHR and the fundamental rights contained in German law, see *Bundesverfassungsgericht* (German Federal Constitutional Court, hereinafter 'BVerfG') decision of 4 May 2011, 2 BvR 2365/09, BVerfGE 128, 326–409; an English translation is available online at www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/05/rs20110504_2bvr236509en.html. See further BVerfG order of 5 April 2005, 1 BVR 1664/04, paras 14–15; an English translation is available online at www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2005/04/rk20050405_1bvr166404en.html. The BGBl can be accessed at www.bgbl.de.

115 See Wolf and Neuner (fn 48) 44, 59 para 40, 52.

116 It has been termed a 'persuasive authority' due to this fact by Youngs (fn 34) 84.

117 See Wolf and Neuner (fn 48) 25 para 17, 27 para 25.

118 The reason given in relation to English law in Section a. above applies.

119 *Gewohnheitsrecht* (customary law), is 'the law of the whole legal community', ie, rules which can be seen as law, see Peter Krebs and Maximilian Becker, *Entstehung und Abänderbarkeit von Gewohnheitsrecht* [Creation and Modifiability of Customary Law] (2013) JuS 97, 98. It has to be certain and must be applied constantly or at least regularly, ie, be recognised by the community as customary law in order to exist, see ibid 98–99; see also Kaufmann (fn 112) 52. It is not a certain practice but a legal understanding that can become customary law, see Krebs and Becker, ibid 98. See also Kaufmann, ibid 52. For further details on the necessary conditions, ie, of the general recognition of the legal validity (in Latin: *opinio iuris sive necessitatis*) of a custom and the element of time in terms of its observation (Latin: *longa consuetudo*), see Krebs and Becker, ibid 98–101 or Wolf and Neuner (fn 48) 21–22 paras 5–8; Karl Larenz, *Methodenlehre der*

literature will not be considered below.[120] Another concept of influence in German law, which will also not be considered further, is *Treu und Glauben* (good faith). While it is sometimes applied in relation to contract law, *inter alia*, when interpreting contracts, it is not relevant for their formation and thus falls outside the scope of this dissertation.[121]

It should be noted that Germany is a federal republic (art 20 para 1 *Grundgesetz*, Basic Law for the Federal Republic of Germany of 1949, hereinafter 'GG'[122]), comprised of 16 *Bundesländer* (federal states) with legislative, executive, and judicial competences (regulated in arts 70 et seq, 83 et seq, and 92 et seq GG respectively), meaning Germany has institutions for these purposes on both the central and federal level.[123] This feature will be borne in mind in the subsequent discussion, which will begin with German legislation (Section ii.) and case law (iii.), followed by EU and international law (iv. and v. respectively).

Rechtswissenschaft [Methodology of Jurisprudence] (6th edn, Springer 1993) 433. In general, its role today is seemingly negligible (see Wolf and Neuner (fn 48) 22 para 5), namely, of amending existing law (legislation), rather than filling *lacunae*. While it could, in theory, still be used in cases of non-regulation, eg, in relation to new technologies, it has been suggested that the emergence of a customary law would be hindered particularly by the nature of such technological advances (short-lived) due to the requirement of the time element. See on this Krebs and Becker, ibid 98. Due to this minor role and a general absence of a practical application, customary law will not be considered further.

120 Readers interested in German academic literature are directed to the references provided by Youngs (fn 34) 84–85.

121 It has been likened to equity in its effects, see Youngs (fn 34) 82. Indeed, similar ethical notions seem to underpin the two standards, as becomes clear when looking at the wide application of § 242 BGB (*Leistung nach Treu und Glauben*, Performance in good faith) to generally curb 'dishonest use of a right'. See on this Wolf and Neuner (fn 48) 230 para 75 and 232–238.

122 BGBl III, Gliederungsnummer 100-1. An English translation is available at www.gesetze-im-internet.de/englisch_gg/index.html.

123 For further information on the interplay of the central and the federal states, see, eg, Bernd Grzeszick, *Artikel 20 GG*, in: Theodor Maunz and others (eds), *Grundgesetz Kommentar* [Basic Law Commentary] (CH Beck, 2017 issue) at II. *Die Verfassungsentscheidung für die Demokratie* [II. The Constitutional Decision for a Democracy] paras 253 et seq; see also the entry for '*Bundesländer*' in Uwe Andersen and Wichard Woyke (eds), *Handwörterbuch des politischen Systems der Bundesrepublik Deutschland* [Handbook on the Political System of the Federal Republic of Germany] (7th edn, Springer VS 2013), available online at www.bpb.de/nachschlagen/lexika/handwoerterbuch-politisches-system/.

ii. German Legislation: *Gesetze* and *Verordnungen*, German Statutes and Regulations

Before turning to the pieces of legislation that are relevant in German contract law, it is important to make a note of vocabulary. As has been pointed out by some authors, the German term *Gesetz* has a wide meaning, encompassing both primary as well as secondary legislation.[124] In this sense, and despite perhaps not being quite adequate, whenever this broad meaning of legislated norms is to be conveyed, the simple term 'legislation' will be used. Whenever a more specific meaning is intended, several terms will be used, depending on the type of enactment in question. Within the categories of primary and secondary legislation, further distinctions must be made: On the one hand there are *Gesetzbücher*, hereinafter referred to as 'codes of law', which set out a broad area of law; on the other hand, there are pieces of legislation of narrower scope, *Gesetze* in its strict sense, which will be called 'laws'.[125] German secondary legislation includes *(Rechts-) Verordnungen* (regulations), laid down by the government[126] and public authorities, and *öffentlich-rechtliche Satzungen* (bye-laws), laid down by public institutions such as universities.[127]

Note that, due to Germany's dual political structure, legislation may be *Bundesrecht* (federal law) or *Landesrecht* (regional state law). Legislative competences are split, whereby these may be *ausschließlich* (exclusive) or, shared (*konkurrierend*, meaning 'competing', art 70 para 2 GG). Under art 70 para 1 and art 72 para 1 GG, the *Länder* (regional states) are granted residual legislative competence, which means that, unless the *Bund* (central state) has been given authority to legislate and this right is exercised, the *Länder* may do so.[128] In case of conflict, *Bundesrecht* will take precedence

124 See, eg, Youngs (fn 34) 64; cf Wolf and Neuner (fn 48) 21, who also include customs; cf, again, Kaufmann (fn 112) 52, who sees custom as *gesetztes Recht* (set(tled) law) but differentiates it from *Gesetze*. The following systematisation, as well as the English terms have been largely adopted from Youngs (fn 34) 63, 64, 65, 67. For an overview of the development of the notion of *Gesetz* throughout history, see Kaufmann, ibid 22–37.

125 These terms are also used by, eg, Smits (fn 37) 23–24. As already explained in Section A.III.3. above, by using this word, confusion with English legislation (Acts) is avoided.

126 That is, by the Executive, see Wolf and Neuner (fn 48) 21 para 3.

127 Ibid 21 para 4.

128 The *Bund* may authorise the *Länder* in areas of its exclusive competence (art 71 GG). See on this Arnd Uhle, *Artikel 70 GG*, in: Maunz and others (fn 123) at 2–3. This applies to primary, but not to secondary legislation, see ibid at 34.

over *Landesrecht* (art 31 GG). Having said this, federal institutions have to take regional law into consideration, eg, in the area of administrative law.[129] Private law (*bürgerliches Recht*) and commercial law (*Recht der Wirtschaft*, business law) are two of the competences that are shared by *Bund* and *Länder* (art 74 para 1 nos 1 and 11 GG).

Although it is true to say that primary legislation in the form of codes provides for comprehensive and systematic regulation, it is not all-encompassing, so that supplementation is necessary, either through laws or secondary legislation. As a consequence, German private law, in particular the law on contracts, is fragmented.[130] The two most important codes in this area are undoubtedly the *Bürgerliches Gesetzbuch* (German Civil Code, hereinafter 'BGB')[131] and the *Handelsgesetzbuch* (German Commercial Code, hereinafter 'HGB')[132]. Of particular relevance to the discussion in this dissertation are the first three books of the BGB, namely, *Allgemeiner Teil* (General Part), *Recht der Schuldverhältnisse* (Law of Obligations) and *Sachenrecht* (Law of Property),[133] as well as the first and fourth books of the HGB, namely, *Handelsstand* (Commercial Entities) and *Handelsgeschäfte* (Commercial Transactions). It is important to note that while the BGB can be described as the basic legislation in the area of private law, the HGB is a *Sonderprivatgesetz* (special private law) whose rules must be applied prior to those contained in the BGB; conversely, rules from such special frameworks can be applied to general private relationships where the BGB makes no provision and the special rules are not exceptional regulations

129 See Grzeszick (fn 123) at IV. *Die Verfassungsentscheidung für den Bundesstaat* [IV. The Constitutional Decision for a Federal State] paras 154 et seq.

130 Compare Youngs (fn 34) 64–65, who notes that there is piecemeal legislation to be found in Germany as well, not just in the UK.

131 Originally from 1896, the BGB was published in revised form in 2002 BGBl 2002 I 42, 2909; BGBl 2003 I 738) and last amended by Law of 20 July 2017 (BGBl 2017 I 2787), see www.gesetze-im-internet.de/bgb/BJNR001950896.html. An English translation of the BGB can be found at www.gesetze-im-internet.de/englisch_bgb/index.html. Note that this translation is based on the BGB as of 2013, so that subsequent amendments may have altered the text.

132 Originally from 1897, the HGB was last amended by Law of 18 July 2017 (BGBl 2017 I 2745), see www.gesetze-im-internet.de/hgb/index.html. A partial English translation is available online at www.gesetze-im-internet.de/englisch_hgb/index.html. A complete English translation can be found in, eg, Thomas Rittler (trans), HGB — German Commercial Code: *Deutsch-englische Text-Synopse* / German-English Synopsis (3rd revised edn, Plattform-compliance 2015).

133 These English terms are used in the BMJV's translation of the BGB, see fn 131.

but are of general application.[134] Another special area of relevance to this dissertation is that relating to consumers.[135] Other relevant pieces of legislation include the *Zivilprozessordnung* (German Code of Civil Procedure, hereinafter 'ZPO'),[136] and the *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (Introductory Act to the Civil Code, hereinafter 'EGBGB'),[137] the latter of which contains, *inter alia*, commencement provisions for legislation or amendments.

iii. German Case Law: *Rechtsprechung*, German Court Decisions

German court decisions (*Rechtsprechung*) are not a source of law like *Gesetze*; they have even been called an informal source.[138] This may be due to the fact that judges in Germany fulfil the function of applying and interpreting legislation, rather than creating law, as is the case in England.[139] Indeed, *richterliche Rechtsfortbildung* (judge-made law) has been categorised

134 Compare Wolf and Neuner (fn 48) 67 paras 11–13. One example given is § 350 HGB, which foresees a deviation from the general rule for the form of declarations of suretyships (*Bürgschaften*) found in § 766 BGB. This deviation is discussed further in Section III.3.b.ii. below.

135 See Christoph Reymann, *Das Sonderprivatrecht der Handels- und Verbraucherverträge: Einheit, Freiheit und Gleichheit im Privatrecht* [Special Private Laws for Commercial and Consumer Contracts: Union, Freedom, and Equality in Private Law] (Mohr Siebeck 2009) 1. The author analyses the tri-partition of German private contract law on a general level in his book but is critical of this division, see, eg, ibid 3 or 6. Also slightly sceptical: Wolf and Neuner (fn 48) 64 para 4.

136 BGBl 2005 I 3202 and 2006 I 431 and 2007 I 1781. An English translation is available online at www.gesetze-im-internet.de/englisch_zpo/index.html.

137 BGBl 1994 I 2494 and 1997 I 1061. A partial translation (based on the law as amended in November 2015) into English is available online at www.gesetze-im-internet.de/englisch_bgbeg/index.html.

138 Compare Youngs (fn 34) 75, 79. cf Larenz (fn 119) 432–436, discussing different interpretations of the term 'source of law' and the effect of case law, but he is ultimately sceptical of judge-made law being a true source of law in Germany.

139 Compare Krebs and Becker (fn 119) 97, who state that German case law cannot become binding like legislation. Johanna Schmidt-Räntsch, *§ 23. Germany*, in: Riesenhuber (fn 13) 591, 593–594 aptly states that 'the courts must so to speak translate – judgment for judgment – the abstract rules of law into concrete rules'. For a common law perspective, see Whincup (fn 34) 39 para 1.51. On case law in England, see Section a.iii. above.

as a 'continuation of [legal] interpretation'.[140] Having said this, it could be argued that when judges fill *lacunae* of statutory regulation, and especially when they develop a rule further, they do, in this sense, create law.[141] While it goes beyond the scope of this dissertation to go into details, two examples of judge-made law are the doctrine of *culpa in contrahendo* (since 2002 contained in § 311 para 2 BGB) and the protection of third party interests.[142] Furthermore, the decisions of the *Bundesverfassungsgericht* (Federal Constitutional Court, hereinafter 'BVerfG') can — albeit in a limited set of circumstances — have *Gesetzeskraft* (force of law; see § 31 para 2 *Gesetz über das Bundesverfassungsgericht*, Act on the Federal Constitutional Court, hereinafter 'BVerfGG'[143]).

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140 Larenz (fn 119) 366. cf Dirk Olzen, *Einleitung zum Schuldrecht* [Introduction to the Law of Obligations], in: Julius von Staudinger and others, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* [Commentary on the Civil Code with Introductory Act and Ancillary Laws] (rev online edn, Sellier de Gruyter 2015) paras 1, 208, who states that judicial law making and interpretation are both forms of applying law. For a detailed discussion of the judges' role in German law, see Heinrich Honsell, *Einleitung zum Bürgerlichen Gesetzbuch* [Introduction to the Civil Code], in: Staudinger and others, ibid (2018) paras 1, 200–232.

141 Compare and contrast Larenz (fn 119) 366–367, who differentiates between filling *lacunae* as acting within, and developing a legal rule further as going beyond statutory law. Arguably, the former would be a form of interpretation or application of law, whereas the latter might be seen as creating law in some sense. Indeed, Larenz speaks of such further developments as acts 'modifying' statutory law, see ibid 366. He goes on to state that judges ought to do this only when 'very serious cause' is given. For an in-depth discussion, see ibid 370–404 (filling *lacunae*), 413–429 (further development). For a discussion of possible conflicts between the courts filling *lacunae* and statutory law, see Olzen, '*Einleitung*' (fn 140) paras 210–211. Contrast Karl Kroeschell, *Deutsche Rechtsgeschichte Band 3: Seit 1650* [German Legal History Vol 3: From 1650] (4th edn, Böhlau Verlag 2005) 189–191, arguing that positive law cannot be created through judicial decisions, not even in the form of customary law.

142 See on this Olzen, '*Einleitung*' (fn 140) paras 213–214 (*culpa in contrahendo*), 216–221 (third parties). On the importance of the judiciary generally, see Larenz (fn 119) 234 et seq. cf Kroeschell (fn 141) 190, arguing that the notion of *culpa in contrahendo* had been developed by Jhering from Roman law, and that the court decision said to have laid down this concept 'only referred to earlier decisions; and no longer to academic or legislative reasons' ('*berief sich allerdings nur noch auf frührere Entscheidungen, nicht mehr auf wissenschaftliche oder gesetzgeberische Erwägungen*').

143 BGBl 1993 I 1473; English translation available online at www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html.

Moreover, while there is no formal rule in Germany which binds courts to their own or higher court decisions,[144] in practice, a rule of precedence (*Präjudizien*) exists, so that decisions on cases which concern similar facts are deemed to be model rulings.[145] In particular, the highest courts will not readily depart from their own decisions.[146] As a consequence, practitioners will take case law into account when assessing situations, thus effectively making court decisions applicable law (*geltendes Recht*).[147] Given that the courts ought to judge the case in question and not blindly apply another judge's interpretation or rule development, case law is perhaps better termed persuasive authority or at least a plausible indication on the legally desirable result.[148]

Turning to the court structure, the highest instance in civil (and criminal) matters[149] in Germany is the *Bundesgerichtshof* (Federal Court of Justice, hereinafter 'BGH').[150] The lower courts are, in descending order:

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144 Youngs (fn 34) 79. Having said this, decisions of the BVerfG (arts 93–94 GG) are binding on '[a]ll other government institutions', *inter alia*, other German courts, see www.bundesgerichtshof.de/DE/DasGericht/Aufgaben/aufgaben_node.html; see also § 32 para 1 BVerfGG.

145 See Larenz (fn 119) 429. See also www.bundesgerichtshof.de/DE/DasGericht/Aufgaben/aufgaben_node.html on the binding effect, in practice, of decisions by the *Bundesgerichtshof* (Federal Court of Justice). A concise account in English is given by Schmidt-Räntsch (fn 139) 594–595.

146 Larenz (fn 119) 429. Schmidt-Räntsch (fn 139) 595 explains that this is due to the procedure necessary for making such a departure.

147 Compare Schmidt-Räntsch (fn 139) 594; Larenz (fn 119) 430.

148 Compare Larenz (fn 119) 430, 431. Indeed, Schmidt-Räntsch (fn 139) 595 notes that decisions of 'landmark decisions' by the federal supreme courts 'are designed to provide guidance to the courts of first and second instance'. cf § 31 para 2 BVerfGG, according to which decisions made by the BVerfG will have force of law in certain circumstances.

149 Note that under art 95 para 1 GG, four other supreme courts exist in Germany: the *Bundesarbeitsgericht* (Federal Labour Court, hereinafter 'BAG'), the *Bundesfinanzhof* (Federal Finance Court), the *Bundessozialgericht* (Federal Social Court), and the *Bundesverwaltungsgericht* (Federal Administrative Court). There is also the already-mentioned BVerfG. For further information and links to the other courts, see www.bundesgerichtshof.de/DE/DasGericht/StellungGerichtssystem/stellungGerichtssystem_node.html. Another specialised court in Germany is the *Patentgericht* (patent court), dealing with matters relating to patents and other intellectual property such as trademarks. On this court, see www.bundespatentgericht.de/cms/index.php?lang=en; see further Monika Jachmann, *Artikel 96 GG*, in: Maunz and others (fn 123) paras 10–16.

150 See www.bundesgerichtshof.de/EN/Home/home_node.html for further information on this court, its organisation, and tasks.

Oberlandesgerichte (higher regional courts, hereinafter 'OLG'); *Landgerichte* (regional courts, hereinafter 'LG'); *Amtsgerichte* (local courts, hereinafter 'AG').[151]

iv. EU Law: Legislation and Cases

EU law, in the form of primary and secondary legislation, but not legal opinions or recommendations by the European Commission and other EU institutions,[152] is a source of German law that has priority over national law.[153] This was stated by the ECJ in the *Costa* case[154] and is said to flow from art 23 para 1 GG.[155] Having said this, the BVerfG has laid down limits to this supremacy in a range of cases in relation to fundamental rights, constitutional identity, and competence.[156] In general, however, EU primary legislation (treaties) as well as EU regulations are directly applicable and have priority; whereas directives first need to be transposed into German law by German legislation.[157]

For important pieces of EU legislation in relation to contract law, see the enumeration in Section a.iv. above. As with England, the strongest area in which German contract law has been influenced by EU law is in relation to consumers.[158]

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151 See § 12 *Gerichtsverfassungsgesetz* (Court Constitution Act, BGBl 1975 I 1077; hereinafter 'GVG'; English translation available online at www.gesetze-im-internet.de/englisch_gvg/index.html); see further Bundesgerichtshof, *Der Bundesgerichtshof* [The Federal Court of Justice] (brochure, 2014) 7 (hereinafter 'BGH Brochure'), available online at www.bundesgerichtshof.de/SharedDocs/Downloads/EN/BGH/brochure.pdf?__blob=publicationFile. For further information in English on the German court system, see, eg, Youngs (fn 34) 97–114 and the provisions on each court instance contained in §§ 22 et seq GVG.

152 These do not have binding force, see art 288 para 5 TFEU 2012; see also Wolf and Neuner (fn 48) 27 para 26, who notes it can be relevant as soft law.

153 Honsell (fn 140) paras 112.

154 See fn 93 above.

155 See Craig and de Búrca (fn 52) 280.

156 For further discussion of the supremacy issue, see Craig and de Búrca (fn 52) 266–279 (ECJ's stance), 279–290 (Germany's stance). See also Wolf and Neuner (fn 48) 52 para 26.

157 See Wolf and Neuner (fn 48) 52–54, 55–56. See further the discussion in Section a.iv. above.

158 Compare Jan Busche, *Vorbemerkung (Vor § 145)* [Foreword (to S 145)], in: Franz J Säcker and others, *Münchener Kommentar zum BGB* [Munich Commentary on the Civil Code] Vol 1 (7th online edn, CH Beck 2015) paras 1, 4.

v. International Law: The CISG

Apart from the sources just discussed, German law includes another external source beside those from the EU. In particular, there are international treaties, which require what is called a *Zustimmungsgesetz* (Law of Consent), ie, a federal law under which the international law in question is incorporated into German law.[159] One of these is the CISG, which was ratified by Germany and transposed in 1990.[160] The BGH has held it to be a special law on international sales which has priority over the rules of German sales law (*Kaufrecht*).[161] The CISG will thus be applicable automatically in cases of international sales of goods,[162] unless the parties have excluded its application (art 6 CISG). In particular, the Convention will be *a priori* applicable in contractual relations between parties from Germany and Japan, since both countries are Contracting States.[163] Its rules on the formation of contracts will be discussed in Section E.I.2. below.

Furthermore, by virtue of art 25 GG, general rules of international law are treated as part of German law, but at the same time override it. These 'general rules' include the list of sources found in art 38 para 1(b)–(c) ICJ Statute, namely, general principles of law and international customs.[164]

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159 See Wolf and Neuner (fn 48) 59 para 43 with further references. cf Kaufmann (fn 112) 53, who rejects international treaties (*Staatsverträge*) constituting sources of German law.

160 See *Gesetz zu dem Übereinkommen der Vereinten Nationen vom 11 April 1980 über Verträge über den internationalen Warenkauf* [...] [Law on the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (...)] of 5 July 1989, BGBl 1989 II 586, BGBl 1990 II 1699.

161 BGH decision of 25 November 1998, VIII ZR 259/97, NJW 1999, 1259–1261, para 13.

162 The application of the CISG will be discussed in detail in E.II.1. below. Let it be noted at this point that it applies to those transactions in which the two countries involved are Contracting States to the CISG, or where their private international law rules lead to the CISG's application (see art 1 CISG). For further details on the CISG's application, see arts 2–5 CISG, as well as United Nations Commission on International Trade Law (UNCITRAL) Secretariat, *Explanatory Note on the United Nations Convention on Contracts for the International Sale of Goods* (UN Publication, November 2010) 34–36. This document, which will hereinafter be referred to as 'CISG Explanatory Note', is available online at www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf. On the application and excluded issues, see further the contributions in Franco Ferrari and Clayton P Gillette (eds), *International Sales Law Vol 1* (Edward Elgar Publishing, 2017) 113–415.

163 See fns 162 and 15 above.

164 Wolf and Neuner (fn 48) 59 paras 40, 42.

The BVerfG has held that this does not include international treaties, but that these general international rules are complemented by national principles.[165]

II. Contracts in English Law

England traditionally being a nation of commerce,[166] it has had notions of contracts for a long time.[167] Initially, however, these existed as customs, and would only later develop into what we understand as 'law'.[168] Initially, this was a 'law of contracts', ie, a law of a plurality of special contracts, which would turn into one general 'law of contract' in the nineteenth century.[169] Similarly, the denomination of the concept of contract has evolved over time. This concept will be defined first in Section 1., before

165 BVerfG order of 8 May 2007, 2 BvM 1/03, BVerfGE 118, 124–167, para 31. One such principle is good faith, see Wolf and Neuner (fn 48) 59 para 42 with further references.

166 See, eg, McKendrick (fn 48) 2. The origins of this tradition seem to go back to prehistoric times, since Frere notes that some kind of commercial connection already existed between Britain and continental Europe from that time onwards, see Sheppard S Frere, *Britannia: A History of Roman Britain* (3rd edn, Routledge & Kegan Paul 1987) 275; however, it is more probable that it lies in the Bronze Age, where Western Saxons (Wessex) already carried out commerce extensively — not only within, but even beyond the British Islands, see Encyclopaedia Britannica, *United Kingdom* (Online Academic Edition 2019), http://academic.eb.com/EBchecked/topic/615557/United-Kingdom at 'History: Bronze Age'. In contrast, the first British chamber of commerce as a form of trading organisation was only established in the Channel Islands in the eighteenth century, see Encyclopaedia Britannica, *Trade Association* (Online Academic Edition 2015), http://academic.eb.com/EBchecked/topic/601677/trade-association. The commercial aspect continues to be of importance today. Thus, English contract law is directed at facilitating rather than hindering commercial transactions, see Whincup (fn 34) 17 para 1.1. As will be seen below, many legal rules place importance on legal certainty for reasons of commerce even today, see, eg, the explanation for the objective approach or the use of legal presumptions under Sections II.3.a., and II.3.a.ii.bb) respectively.

167 At least commercial contracts existed and gained legal recognition during the time of the writ system, ie, between the eleventh and sixteenth centuries. See on this development briefly H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, OUP 2014) 244, 245, 253–254.

168 Compare the general statement made by Baker, '*English Legal History*' (fn 63) 1–4.

169 See Andrews (fn 70) 3 para 1.01, listing further references.

its historical development as well as the current legal and practical situations are addressed in Sections 2. and 3. respectively.

1. 'Contract' Defined

As English law belongs to the common law tradition, the law of contract is not found in a code nor in one single piece of legislation; instead, one has to look into case law to discover what the principles of English contract law are.[170] This explains the lack of a formal, ie, statutory, definition of a contract as understood in English law; however, 'indicative or illustrative' as opposed to 'definitive or comprehensive' statements on the meaning of contracts can be found in academic writing.[171]

A basic description of a contract has been given by Sir Treitel:

> [It] is an agreement giving rise to obligations which are enforced or recognised by law[, whereby the contractual] obligations […] are based on the agreement of the contracting parties.[172]

Professor Atiyah has not only described a typical common law contract, but has summarised the formation of contracts and the philosophy underlying English contract law at the same time:

> [F]irst, [there is] a bilateral executory agreement. It consists of an exchange of promises; the exchange is deliberately carried through, by *the process of offer and acceptance*, *with the intention of creating a binding deal*. When the offer is accepted, the agreement is consummated, and a contract comes into existence before anything is actually done by the parties. […]. The contract is binding because the parties intend to be bound; it is their will, or intention, which creates the liability. […] T]he law has this *technical requirement known as the doctrine of consideration*, but, except in rare and special cases, mutual promises are consideration for each other […].[173]

170 In the words of Andrews (fn 70) 4 para 1.06: 'English contract law is predominantly a case law subject'.

171 McKendrick (fn 48) 3.

172 Treitel/Peel (fn 65) para 1-001. Compare the simpler definition in *Halsbury's Laws of England Vol 22* (5th edn, LexisNexis 2012) para 220: 'a promise or set of promises which the law will enforce'.

173 Patrick S Atiyah, *Essays on Contract* (repr, Clarendon Press 1990) 12 (emphasis added). cf the elements listed in *Halsbury's Laws 22* (fn 172) para 203, and the

Similarly, in a recent commercial case, the HC stated that a contract was generally subject to the following four requirements, namely, that:

> (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable.[174]

Each of the elements of the formation of a contract found in this summary, except for completeness, will be analysed subsequently. The aspect of certainty will be considered in relation to each constituent of a contract, as it relates to these individual elements of a contract and their validity, thus impacting the existence of the agreement reached. Conversely, (in)completeness of a contract will not be discussed in detail, as this issue often relates to the question of the interpretation of contracts,[175] an aspect that goes beyond the scope of this dissertation due to its extent. Before turning attention to the historical development and the requirements of contracts,

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description in paras 204–205. Note that executory arrangements are those 'made with a view to future performance', Atiyah, ibid 13, 17. Executory agreements have thus not yet been fully performed, whereas they become executed once done, see *Halsbury's Laws*, ibid para 205. This distinction is of importance in some areas of contract, like in sales or land law. Consequently, the Sale of Goods Act 1979 (SGA 1979) differentiates between sales as executed contracts and agreements to sell as executory contracts, see s 2 subss 4 (sale) and 5 (agreement to sell) SGA 1979. For further discussion of this distinction, see Goode and McKendrick (fn 48) 219–222 paras 7.25 et seq. As for land, executed transactions are governed by ss 51–55 Law of Property Act 1925 (hereinafter 'LPA 1925') while executory transactions fall within s 2 LPMPA 1989. This was clarified recently in the case of *Rollerteam Ltd v Riley* [2016] EWCA Civ 1291, [2017] Ch 109 [29] (Henderson L). The case concerned the question whether two declarations of trusts over two pieces of land were effective. The court found that they were, and that they became so upon the two deeds being signed by the party declaring the trust (one of the defendants), see in particular [44]–[45] (Henderson LJ).

174 *Blue v Ashley* [2017] EWHC 1928 (Comm), 2017 WL 03129053 (official transcript) [49] (Leggatt J). The case concerned an alleged oral agreement made in a pub for remuneration (bonus) payment by the defendant to the claimant and whether such an agreement had arisen. It was held that the contract would have been 'inherently absurd', lacking commercial sense, and for several reasons (examined in Section 3.a.iv. below), the court found that the alleged offer was not seriously made, so that no contract could have arisen. See ibid [80] et seq (ibid).

175 See on this, eg, Treitel/Peel (fn 65) paras 2-085 et seq; McKendrick (fn 48) 126–145.

a quick note needs to be made of the different ways in which contracts are classified.

Aside from the differentiation between executory and executed contracts,[176] one key point in English contract law is the distinction between unilateral and bilateral[177] contracts. The difference here lies in whether only one or all of the parties promise something.[178] Sales are common examples of bilateral contracts, whereas a promise of a reward is a typical example of a unilateral contract.[179] In the latter situation, the promisor indicates that they will give something to the other party if something is done or omitted, although the recipient makes no promise in return. Despite this, a contract arises.[180] A more illustrative example of a unilateral agreement is the promise of money in return for the performance of a particular act, eg, going to a specific place.[181] Particularly unilateral contracts must be contrasted with gifts, which, although constituting a mechanism by which one person may transfer property rights to another, are not contracts;[182] they 'can be concealed in the form of' one,

176 See fn 173 above.

177 This category is also known as 'synallagmatic' contracts, meaning a contract 'imposing reciprocal obligations', *Halsbury's Laws Vol 22* (fn 172) para 204.

178 See the entry for 'unilateral contracts' in the Oxford Dictionary of Law (fn 62) 517. See also *Halsbury's Laws 22* (fn 172) para 204. Its concept and the requirements will be discussed in Section 3.a. below. A recent case in which the existence of a unilateral contract was examined is *Blue v Ashley* (fn 174). In the event, the court held that the alleged contract had not arisen.

179 See, eg, Andrews (fn 70) 8 para 1.11.

180 See Treitel/Peel (fn 65) para 2-052, who goes on to note at para 2-053 that acceptance is made at the time of complete performance. See also Andrews (fn 70) 64 para 3.42.

181 Example given by, eg, Treitel/Peel (fn 65) para 2-052. Note that this kind of situation is not a donation on the part of the promisor. It is not gratuitous, since the promisee gives something in return: consideration. See on this John Cartwright, *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (Sweet & Maxwell 2014) 136 in fn 124. This point will be discussed in further detail in Section 3.a.v. below.

182 See *Halsbury's Laws Vol 22* (fn 172) para 208, who states that gifts 'have their legal consequences determined exclusively by other branches of the law'. The distinction is due to the consideration requirement, which will be discussed in Section 3.a.v. below. Atiyah, '*Introduction*' (fn 33) 150–151 states that not gifts themselves but promises of gifts are made difficult by the doctrine of consideration. See on gifts generally Michael Bridge, *Personal Property Law* (4th edn, OUP 2015) 171–175. The gift, or rather, the promise of a gift, is executed by the donor having the necessary intention and effecting the gift through delivery or otherwise, see Bridge, ibid.

however, if nominal consideration is given in return for the promise.[183] Despite not being contracts per se, they do constitute legal transactions when executed.[184]

Another differentiation among contracts may be made according to their subject matter, eg, sale contracts and lease contracts,[185] or their formation (mode), ie, as contracts made under seal and simple contracts,[186] whereby the former are contracts made as deeds (by speciality) and the latter are in any other form.[187] The following section will trace the historical evolution of the notion of contract. Section 3. will then give an overview of the current or modern law of contract in England, which will later serve as part of the comparative background.

2. The Historical Development of the English Law of Contract

The development of English contract law has followed a meandering course rather than a straight line,[188] as this area of law was created through several legal predecessors. This in turn is due to the fact that historically, the origin of the common law lies in court procedures: English substantive law, including the law of contract, was developed from procedural law, namely, from procedural forms called writs, and forms of actions.[189] Furthermore, despite the fact that the maxim that promises should be kept was of great importance during the Middle Ages, the common law did

183 Bridge, '*Property*' (fn 182) 171. On the problems arising with gratuitous promises, see Atiyah, '*Introduction*' (fn 33) 152.

184 See Bridge, '*Property*' (fn 182) 171.

185 *Halsbury's Laws Vol 22* (fn 172) para 219.

186 cf *Halsbury's Laws Vol 9* (fn 33) para 209 and *Halsbury's Laws Vol 22* (fn 172) para 215 (the latter no longer referring to seals, but to deeds only). This differentiation is made in statutory provisions as well, eg, in relation to limitation periods, see ss 5–7 (actions founded on simple contract), 8 (actions on a speciality) Limitation Act 1980.

187 *Halsbury's Laws 22* (fn 172) paras 216, 218. The different formation requirements will be discussed in Section 3.b. below. There is a third class of contracts, 'of record', which will not be considered in this dissertation as it does not relate to private agreements but rather to public records, see on this ibid para 215. Note that von Mehren, '*Introduction*' (fn 21) 7 speaks of unilateral contracts as 'unilateral acts under seal' or 'promise[s] under seal'.

188 See Baker, '*English Legal History*' (fn 63) 360.

189 See ibid 63. This has been succinctly summarised in one sentence by David J Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, repr 2006) 11: 'The medieval Common law was a law of actions and procedure.'

not provide for a uniform (and thus reliable) way of enforcing them.[190] Instead, there were several different actions, whose significance fluctuated over time. Due to this root in procedure, there was initially no legal theory of contracts in English law, a fact that remained true for the seventeenth century.[191] It was only in the eighteenth and nineteenth centuries that a theoretically-founded law of contracts emerged: a notion of agreement that was separated from the procedural forms of action.[192]

It becomes evident from this that an examination of the evolution of the law of contract must therefore begin by looking at procedural actions, in particular at the action of assumpsit. The writ system had inherent deficiencies but was nevertheless of marked importance and, despite its faults, the writ formula continued to exist one way or another throughout the twentieth century.[193] Thus, the development of the law, including the law of contract in the form of simple contracts, 'is essentially a tale of circumventing, of overcoming the special limitations of the medieval forms of action […]'.[194] Writs no longer exist today, but have been replaced by what are known as 'claim forms'.[195] Other remnants of this old system are still perceptible even today, like the sometimes indistinct lines drawn between different areas of law, and in the substantive law that was created from this system.[196]

Four aspects of modern English contract law will be explored in further depth with regard to its historical development: the first two are the action of assumpsit and the doctrine of consideration, both of which developed during Tudor and Stuart times (see Section a. below); the second two are the contractual doctrine of offer and acceptance and the requirement that the parties intend to be legally bound, both of which only emerged after the birth of the Kingdom of Great Britain in the nineteenth century (Section b.). The overview of the historical developments closes by consid-

190 See Morris S Arnold, *Fourteenth-Century Promises* (1976) 35 No 2 CLJ 321.
191 Compare Ibbetson, '*Historical Introduction*' (fn 189) 215.
192 See ibid, also at 153–154.
193 See Baker, '*English Legal History*' (fn 63) 80–81.
194 Samuel J Stoljar, *A History of Contract at Common Law* (Australian National University Press 1975) 3.
195 Hanbury and Martin (fn 63) 6; compare the entry for 'claim form' in Oxford Dictionary of Law (fn 62) 83. More information on the claim form can be found in parts 7 and 16 Civil Procedure Rules 1998, SI 1998/3132 (hereinafter 'CPR 1998').
196 See Baker, '*English Legal History*' (fn 63) 81, 61.

ering legal developments in the area of contract law that occurred after the twentieth century (Section c.).

a. Contracts in the Kingdom of England in Tudor and Stuart Times: The Transition from Medieval to Modern Law Through the Action of Assumpsit and the Emergence of the Doctrine of Consideration (16th~17th Century)

The period between the sixteenth and the eighteenth centuries was the formative time for English contract law. At the beginning of this development phase, English law was in a 'transitional stage between the medieval […] and the modern law'.[197] This development may have been due to the economic and social upheavals that characterised this period (see Section i. below). The change from the medieval to the modern law is reflected in the general structure of law, in which the stiffness of the old procedural system is gradually broken up (Section ii.). The law of contract emerged from this process and would take on its current, modern form in the eighteenth and nineteenth centuries. This was due, in particular, to the emerging action of assumpsit (Section iii.bb)) and was aided further by the doctrine of consideration (Section iii.cc)).

i. Political and Social Background

It has been stated that the transition from Medieval to Modern times had already begun in England in the fourteenth century, at least in relation to the development of its economy and society.[198] In this period, the people became 'a racial and cultural unit', namely, the 'English'.[199] A sense of nationality began to emerge: people no longer felt bound only to their particular locality, which, in turn, led to a change in the social structure: expanding commerce led to an increase in the merchant and manufacturer classes, while the disappearance of the feudal manor farm led to the

197 Ibbetson, '*Historical Introduction*' (fn 189) 96.
198 George M Trevelyan, *Illustrated English Social History 1: Chaucer's England and the Early Tudors* (repr, Penguin Books Ltd 1973) 20.
199 See Trevelyan (fn 198) 16.

appearance of free farmers and other farm labourers (yeomen).[200] Later, in the seventeenth century, the upper strata transformed, not only in terms of the people making up the peerage and gentry, but also in terms of the sources of these nobles' wealth.[201] The transformations continued, despite the political and, occassionally, also economical turbulences in the sixteenth and seventeenth centuries.[202] Not only the towns[203] but even the villages transformed: they became centres of agriculture, craft, and commerce, a change that continued until the nineteenth century.[204] Nevertheless, the majority of the English lived in rural rather than urban areas, with around 800 towns, several provincial cities, and London facilitating inland trade.[205]

This change in size and composition of settlements had other consequences. In the villages and the countryside, the established life patterns changed.[206] Furthermore, the crowds of people in the towns led to congestion of streets, confusion, noise and clamour, as well as poor sanitation.[207] A more positive consequence of the flourishing of the economy and the expanding middle class was an increased consumption of goods: the lower classes strove to emulate the higher classes by acquiring similar merchandise, whereby the demand for more affordable goods led to increased production and fostered inventions.[208] Indeed, 'shopping became an important cultural activity'.[209] This strive for emulation might be explained

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200 See ibid 19, 20, 67, 22–23, 21, 32. For further details on the latter development, see ibid 24–32.

201 On this, see Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'A New Society'.

202 A comprehensive account of the events can be found in ibid at 'Elizabethan Society' et seq.

203 On average, these had a population of 2,000 to 3,000 inhabitants, see Trevelyan (fn 198) 74. cf 'provincial cities', such as Norwich or Bristol, with around 15,000 inhabitants; and London, with 250,000 people at the beginning of the seventeenth century. See on this Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'England in 1603'.

204 Compare Trevelyan (fn 198) 68, 40.

205 See Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'England in 1603'.

206 William R Cornish and Geoffrey de N Clark, *Law and Society in England: 1750/1950* (Sweet & Maxwell 1989) 4.

207 A succinct account of the conditions is given by Matthew White, *The Rise of Cities in the 18th Century* (British Library, 14 October 2009), www.bl.uk/georgian-britain/articles/the-rise-of-cities-in-the-18th-century.

208 See Cornish and Clark (fn 206) 5.

209 Matthew White, *The Rise of Consumerism* (British Library, 14 October 2009), www.bl.uk/georgian-britain/articles/the-rise-of-consumerism.

on the ground that while English society of the seventeenth century was strictly divided into classes, there was no obstacle, albeit money, to the rise or fall from one class to another.[210]

Another positive development during the sixteenth and seventeenth centuries was the rise in literacy: more people were able to read and write; and, by the mid-seventeenth century, this seems to have been true for the majority.[211] Furthermore, perhaps as a corollary to this development came the establishment of 'The King's Posts', a postal service exclusive for the Court but which would later be opened to the public and became known as the 'Royal Mail'.[212]

These changes also affected the political sphere, increasing the sway of the lower house of Parliament, the House of Commons, and allowing the interests of the lower and middle classes to be protected, eg, in the area of labour.[213] On the other hand, the dire situation of the towns necessitated the law to intervene in matters of the general public,[214] while the turmoils under the Glorious Revolution of the later seventeenth century brought about several pieces of political legislation.[215] As for the Royal Mail, the facilitation of sending letters would lead to an important legal development, the 'postal rule', discussed in Section b.iii.bb) below.

ii. The General Structure of Law

The positive developments occurring on the social, economic, and political level were not paralleled in the legal sphere. The stiffness that had previously governed English society initially persisted in the structure of law

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210 For further details on the composition and movement of classes, see Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'England in 1603'.

211 See ibid at 'Elizabethan Society'.

212 See www.bbc.com/timelines/zxnbr82#z39q2hv and www.royalmailgroup.com/en/about-us/our-story/.

213 See Trevelyan (fn 198) 22, 33–34. For examples, see www.parliament.uk/about/living-heritage/transformingsociety/tradeindustry/industrycommunity/keydates/ and further www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/keydates/.

214 The relevant Acts of Parliament are listed at www.parliament.uk/about/living-heritage/transformingsociety/towncountry/towns/keydates/. See also www.parliament.uk/about/living-heritage/transformingsociety/towncountry/towns/overview/georgianimprovement/.

215 On this, see Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'The Revolution Settlement'.

(see below) as well as in the legal procedure itself (Section iii.bb)). As will be seen, a transformation did nevertheless occur.

Although the common law was born in the twelfth century, several factors initially impeded a permeation of a uniform law, of the 'law and custom of the realm'[216] as laid down by the king's courts. In essence, these impediments came down to a multitude of laws, local customs ('folk-right'), and courts existing in parallel in the Kingdom of England during this period.[217] Adding to the insecurity of court decisions was the fact that the notions of precedent and *stare decisis* were only properly developed in the nineteenth century.[218] A reason for this could lie in the fact that the English 'legal culture was largely oral' and that reports of cases in print form only became widespread in the seventeenth century.[219] This fact may also explain why there were no law journals or law books during this period.[220]

This situation was not aided by the inflexible system of the writ, a system of formulas which defined the court procedure to be followed.[221]

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216 Baker, '*English Legal History*' (fn 63) 14, 16.

217 See ibid 3–4, 9, 15–16, who notes the existence of three sets of laws that stood alongside a variety of local customs, as well as the competition for jurisdiction between the local 'administration' (of the shires, hundreds, boroughs, etc) on the one hand and the central 'government' (the king's court) on the other. cf Elliott and Quinn (fn 53) 10, who state that the three laws were 'largely based on local custom'.

218 See Baker, '*English Legal History*' (fn 63) 225–230.

219 Ibbetson, '*Historical Introduction*' (fn 189) 11, 12.

220 See Baker, '*History not Finished*'(fn 69) 69. In fact, two treatises from the twelfth and thirteenth centuries by Glanvill and Bracton on the writs and forms of actions existed; however, the first systematic and comprehensive treatise on contract law only appeared at the turn of the nineteenth century. On the former, see Baker, '*English Legal History*' (fn 63) 200–202. On the latter, see Ibbetson, '*Historical Introduction*' (fn 189) 220, giving a list of the contract law treatises starting with John J Powell, *Essay upon the Law of Contracts and Agreements* (1st edn 1790; P Byrne et al 1796), over Joseph Chitty Jr, *A Practical Treatise on the Law of Contracts not Under Seal; and Upon the Usual Defences to Actions Thereon* (1st edn 1826; 2nd edn, S Sweet 1834) 3, and up to William R Anson, *Principles of the English Law of Contract and of Agency in its Relation to Contract* (1st edn 1879; 3rd edn, Clarendon Press 1884). On the development of legal literature generally, see Baker, ibid 200–221; see further Michael Lobban, *Part Two: Contract*, in: William Cornish and others (eds), *The Oxford History of the Laws of England Vol XII: 1820–1914 Private Law* (OUP 2010) 295, 300 et seq.

221 According to Glenn (fn 167) 215, 242, a 'writ' was essentially an instruction given by the Crown to a sheriff or other royal officer, stating how the officer was to act in a case in order for it to proceed: to summon a party for questioning, to

Moreover, it has been noted that these writs were 'often evaded or defied' and that the 'arm of the law' was 'weak', so that there was no uniformity in legal enforcement,[222] and no guarantee of equal treatment or outcome. Irrespective of its effectiveness, this system gave rise to actions that are important for the development of contract law. Before going into details on these in Section iii.bb), it is worth making a note of the concept of contract during this period.

iii. The Law of Contracts

The law of contract in the English Early Modern period cannot be compared to today's framework. In the first place, the notion and types of contract were very different at that time (see Section aa) below). The same goes for the way in which contract claims were seen (Section bb)). Moreover, the type of agreement affected how the contract was concluded (Section cc)), the process of which often involved some contract form (Section dd)).

aa) Definition and Types of Contract

The notion of contract in this period differed from today's meaning. Initially, the definition from the medieval age persisted. In this respect, 'contract' must be contrasted with 'covenant'. A medieval common law lawyer would have understood 'contract' to mean 'transaction' in terms of transferring property or generating debt, rather than 'exchange of promises'.[223] It was a bargain, a bilateral and reciprocal agreement (*actus contra actum*) requiring the giving and receiving of *quid pro quo* (consideration),[224] exe-

form a jury, etc. It therefore determined — and limited — the actions of both the sheriff and of the judge(s): it conferred jurisdiction to the court, but only within the procedural boundaries of the writ. See on this Baker, '*English Legal History*' (fn 63) 65. For an overview of the different kinds and examples of the formulations used in writs, see the table provided in Baker, ibid 83 and 613 et seq.

222 Trevelyan (fn 198) 44, 40–42.

223 Baker, '*English Legal History*' (fn 63) 360.

224 Ibbetson, '*Historical Introduction*' (fn 189) 140, 135, 141.

cuted rather than executory in nature,[225] but not consensual.[226] Contracts were usually concluded between present parties, face to face, rather than across a distance through some means of communication, with perhaps the exception of messengers.[227]

Instead of 'contract', it was the term 'covenant' that was understood to be 'no more nor less than an agreement between parties' in the fourteenth century.[228] It was seen as a reciprocal (synallagmatic) act of exchange from which mutual obligations arose to do something in future.[229] Initially, however, and even as late as the sixteenth century, the notion of an agreement was unilateral: there was a promise[230] by one side, which was broken, and for which the other party had an action if something (consideration) had been given in return.[231] This notion subsequently changed to a bilateral one, as will be seen below.

As covenants were used to stipulate a specific future conduct, the term initially did not refer to a document, but to an act; this perception would eventually change as sealing became an indispensable requirement to

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225 John H Baker, *New Light on Slade's Case* (1971) 29 No 1 CLJ 51, 60.

226 Baker, '*English Legal History*' (fn 63) 360.

227 Compare Ibbetson, '*Historical Introduction*' (fn 189) 139, who discusses a case in which a servant passed on the promise of the defendant to their master (the claimant): *Milles v Rainton* (from 1600). Interestingly, the court held that an implicit acceptance of the promise was not sufficient; where a promise is not made to a person directly, the promisee must accept expressly for the promise to be effective, see Ibbetson, ibid.

228 Arnold (fn 190) 321, citing Herle J from 1320. This seems to be in line with the understanding (although perhaps emerging at a later time) of a covenant as the promises contained in a deed, see *Halsbury's Laws Vol 22* (fn 172) para 216. Arnold, ibid 322–323 also states that anything ranging from sales of land, business deals, to personal relationships might, among other things, be the object of a covenant.

229 Stoljar (fn 194) 6.

230 It ought to be noted that the meaning of 'promise' was not the same as today. Although it was linked to trust and the existence of an agreement, the notion was much weaker. See on this Warren Swain, *Contract as Promise: The Role of Promising in the Law of Contract. An Historical Account* (2013) 17 No 1 Edinburgh Law Review 1, 10.

231 See AW Brian Simpson, *Innovation in Nineteenth Century Contract Law* (1975) 91 LQR 247, 257. An example is the statement made in *Golding's Case* (1586) 2 Leonard 71, 74 ER 367 (KB) for a lease that '[i]n every action upon the case upon a promise, there are three things considerable, consideration, *promise* and breach of promise' (emphasis added). On the origin of consideration, see Section cc) below.

mean 'agreement under seal'.[232] Covenant did not concern the immediate transfer of rights; this was instead achieved through a grant.[233] An example of the latter would be a consensual transaction (contract) like a sale of goods,[234] or a gratuitous gift of a thing delivered.[235] It was thus said that covenants were executory in nature,[236] whereas contracts (grants) were executed actions. As with the example of a sale, 'contract' thus often denoted an informal agreement, although it could also be used for formal ones.[237]

In conclusion, 'contract' and 'covenant' were both sub-categories of 'agreements', which sometimes overlapped.[238] Conversely, there was as yet no overarching notion of contract, which, as will be seen subsequently, was reflected in the law. It was only later that the term contract evolved into the 'classical' model when the essential elements of the modern doctrine of contract, ie, the doctrine of consideration and that of offer and acceptance, had evolved in the sixteenth and nineteenth century respectively.[239] Nevertheless, it can be stated here that the notion of contract(ual liability) in the seventeenth century already foresaw that an agreement — and thus, a voluntary act of the parties — and some reciprocity in the form of consideration (see Section cc) below) was necessary.[240] Furthermore, the

232 Compare AW Brian Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (repr, Clarendon Press 1996) 16, 19. On the seal becoming a necessary requirement, see Ibbetson, '*Historical Introduction*' (fn 189) 126. For further details on formalities, see Section dd) below.

233 Simpson, '*History*' (fn 232) 19; Stoljar (fn 194) 6.

234 See Simpson, '*History*' (fn 232) 22.

235 See Stoljar (fn 194) 6. Ibbetson, '*Historical Introduction*' (fn 189) 3 notes that gifts were the standard mechanism for transferring property in the Middle Ages. Furthermore, quite unlike today's notion, gifts were not perceived as unilateral acts, but as something reciprocal. This was because the receipt of a gift 'created a tension between the parties' to make a counter-gift, thus in effect creating an 'obligation of reciprocity'. See Ibbetson, ibid 3–4. Something similar is noted by Swain (fn 230) 3–4. This perception of gifts can perhaps be likened to the Japanese notion of *giri*, discussed in Section C.I.2. below.

236 Simpson, '*History*' (fn 232) 19; compare the definition Atiyah gives for 'executory arrangements' as explained in Section 1. above.

237 Simpson, '*History*' (fn 232) 53.

238 Ibid 189.

239 See ibid 5. On the latter, see Section b.iii.bb) below.

240 See Ibbetson, '*Historical Introduction*' (fn 189) 203, 208. In this respect, see the account by, eg, Powell (fn 220) 9 et seq on assent (consent) by the parties to a contract.

principle of sanctity of contract was recognised, so that a contract, once entered into, bound the parties.[241]

bb) The Law of Contracts: Forms of Actions for Contractual Claims

As intimated above, English contract law developed from several actions in court procedures. Three are of interest for this analysis:[242] covenant, debt, and assumpsit. Covenant and debt arose in the twelfth century and continued to develop until they lost importance after the seventeenth century.[243] The third action of assumpsit ('he undertook')[244] emerged in the fourteenth century and went on to become a crucial element in the development of the modern law of contract in the sixteenth and seven-

241 Compare Ibbetson, '*Historical Introduction*' (fn 189) 213, speaking of contractual liability being 'absolute'.

242 There was a fourth action, detinue, which will not be considered further. For reasons of completion, let it be noted that it largely covered cases of what is known as bailment, but that the wide sense of 'detinue' was an action of debt for a chattel. See Simpson, '*History*' (fn 232) 7, 55. It was related closely with debt, see Stoljar (fn 194) 13–15. Furthermore, there seemed to have existed an action of annuity and one of account, although these were supposedly rarely used in practice, see Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 314 in fn 88.

243 On this development, in particular for covenant, see Baker, '*English Legal History*' (fn 63) 361–365; cf Simpson, '*History*' (fn 232) 46–47, who states that covenant underwent a 'revival' in the seventeenth century. One reason given for the demise of the action of covenant was the requirement of a deed, see Swain (fn 230) 9. Another factor was an increased tendency of parties using a formula from the action of debt (bonds) to make contracts, see Baker, ibid 364; but see Simpson, ibid 43, 117, and 44, who suggests that covenant was rarely applied to enforce agreements to begin with, as bonds were preferred, but that covenants were still used in connection with land. On debt, see Simpson, ibid 53–68. One reason for debt to fall into disuse was that several limitations of applicability created lacunae that the action of assumpsit went on to fill. See on this Simpson, ibid 65–68. Another cause might simply be that plaintiffs went from addressing the common law courts to the Chancery, which applied equity and not the common law forms of action. Compare Baker, ibid 372. It ought to be noted, however, that debt was still used for obligations (bonds) until the nineteenth century, see Baker, ibid 368.

244 Baker, '*English Legal History*' (fn 63) 361; Philip Cooke and David W Oughton, *The Common Law of Obligations* (3rd edn, Butterworth 2000) 8; but see Arnold (fn 190) 330, who uses the term 'agree' as a translation of assumpsit.

teenth centuries.[245] In fact, assumpsit largely displaced the other actions on contracts and covenants by the end of the sixteenth century.[246]

While covenant covered actions where an agreement to do something (except to pay a debt) was wrongfully broken, it was only available for 'formal agreements', ie, agreements that were made under seal.[247] Informal agreements, such as 'transactions' like sales of goods, were regarded as 'contracts' and covered by the action of debt, the action for the specific recovery of a sum of money or of a chattel due.[248] Having said this, debt also covered 'formal transactions' where money or a thing was due,[249] and the debt was contained in a bond (see below).[250] This seeming confusion did not pose a problem for medieval English lawyers, because an action of covenant was seen as an action for a wrongful breach of promise, while an action of debt was considered to be related more to property in that it was based on entitlement: the action of debt could only be brought if the claimant had performed their part of the agreement.[251] There was an overlap between covenant and debt in practice only where one party had promised an amount of money or a thing.[252] Having said this, it

245 See Simpson, '*History*' (fn 232) 3. On the origin of assumpsit — the writ of trespass (on the case) — see Baker, '*English Legal History*' (fn 63) 374–375, 71–75. Interestingly enough, the decline of the action of covenant began in the fourteenth century, see Stoljar (fn 194) 5; however, he goes on to note at 7 that 'covenant […] survived the rise of assumpsit', and instead points to the success of the penal bond ('obligation') under debt at 6.

246 See Baker, '*English Legal History*' (fn 63) 361. cf Ibbetson, '*Historical Introduction*' (fn 189) 95 and 126, stating only that assumpsit had displaced the action of debt in relation to informal contracts.

247 Simpson, '*History*' (fn 232) 6. This was not always true. It seems this change came about in the fourteenth century. See on this, eg, Swain (fn 230) 8–9 with further references. The form of contracts will be discussed in Section dd) below.

248 See Simpson, '*History*' (fn 232) 56. Baker, '*English Legal History*' (fn 63) 365 uses the term fungibles and gives the example of barley. It ought to be noted that the objects need not have been specific; where they were specific, ie, identified and attributable to an owner, the action of detinue was appropriate, since this action concerned personal property (chattels), see Baker, ibid, 365. On the differentiation between specific and non-specific objects and debt and detinue, see further Simpson, ibid 57–58.

249 See Simpson, '*History*' (fn 232) 53.

250 See Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 314.

251 See ibid 67–68, where the author states that debt was a 'recupatory' action for something that the creditor owned; see also ibid at 75 and Stoljar (fn 194) 10–11. On the basis of debt being an entitlement, see Swain (fn 230) 8.

252 Baker, '*English Legal History*' (fn 63) 365–366. Note that the promise to pay a sum had to be to the other party of the agreement for an action of debt to

seems that covenant could be for future things, as it encompassed future conduct, whereas debt necessitated that the object be in existence at the time of entering into the agreement.[253] Assumpsit was also available for breaches of (informal) promises,[254] and was aimed at compensating for the breach.[255] The application of these actions underwent a number of changes over time. For reasons of brevity, the focus in what follows will be on the action of assumpsit.[256]

Similar to an action of covenant, the plaintiff in an action of assumpsit complained about a wrongful act ('misfeasance'), which had not been stipulated by the parties,[257] committed by the defendant while executing what he had undertaken to do, leading to the plaintiff suffering physical damage.[258] In this respect, the phrase '*fideliter promisit*' (faithfully promised) was normally used in conjunction with assumpsit. It was a statement of fact that the defendant had undertaken to act,[259] had done so voluntarily,[260] and assumed the risk of the undertaking.[261] The phrase was therefore not used for the connotation of the defendant having promised to do something; the focus was on the breach of that promise. This only changed in the sixteenth century, where the phrase was modified as '*assumpsit et fideliter promisit*' (assumed and faithfully promised).[262] Indeed, it was

arise. Thus, where a party promised another party to pay a sum of money to a third party, this was a covenant, since no money was due to the other party, see Simpson, '*History*' (fn 232) 71.

253 On covenant, see Stoljar (fn 194) 6; on debt, see Baker, '*English Legal History*' (fn 63) 371.

254 Baker, '*English Legal History*' (fn 63) 374; Cooke and Oughton (fn 244) 8.

255 See Simpson, '*History*' (fn 232) 68, 80.

256 Readers interested in the other three actions are referred to Baker, '*English Legal History*' (fn 63) 360–373, and Stoljar (fn 194) 3–15.

257 Cooke and Oughton (fn 244) 8.

258 Baker, '*English Legal History*' (fn 63) 374–375. This may explain why the remedy available under the action of assumpsit was damages for breach of the contract, and not, say, specific performance of the promised action, see Ibbetson, '*Historical Introduction*' (fn 189) 132.

259 Baker 'English Legal History' (fn 63) 375. On the theory of this phrase stemming from the action of *fidei laesio* of the ecclesiastical courts and its meaning, see Ibbetson, '*Historical Introduction*' (fn 189) 136.

260 Cooke and Oughton (fn 244) 8.

261 Arnold (fn 190) 331. The meaning of promise in assumpsit is explored by Ibbetson, '*Historical Introduction*' (fn 189) 136–138.

262 On this, see Ibbetson, '*Historical Introduction*' (fn 189) 130–131. The turning point (or end, compare ibid 138) was a case known simply as *Slade's case* (1595) 4 Coke 91a, 76 ER 1072 (KB). The dispute arose over a sale of crops (not yet harvested), upon the conclusion of which the defendant had 'faithfully promised'

initially not possible to bring cases of non-performance ('nonfeasance') of an undertaking under the action of assumpsit, because an undertaking that had not been performed had a different connotation: in cases of nonfeasance, the undertaking was thought to be a promise, a covenant, thus making that action appropriate.[263] The non-performance of a covenant was therefore a breach of such and not a wrong in trespass,[264] unless the plaintiff suffered some damage.[265] Although an action of assumpsit was first allowed for nonfeasance in a case of deceit in 1422,[266] it was only at the turn of the sixteenth century that nonfeasance was allowed as an action of assumpsit,[267] even where there was in fact no deceit in the non-performance.[268]

By allowing assumpsit to be used for non-performance in the form of *indebitatus assumpsit* (trespass on the case for an obligation assumed), the notion of 'contractual obligation' was established in the sixteenth century:[269]

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to pay, but did not do so after the agreed time had passed, despite the claimant requesting him to do so. The court found a contract but that no promise had been made by the defendant. A succinct account of the legal-political background of the case and the arguments advanced, as well as a transcription of the case from non-published manuscripts can be found in Baker, '*Slade's case transcripts*' (fn 225) 51–67, and John H Baker, *New Light on Slade's Case* (1971) 29 No 2 CLJ 213–236 (hereinafter '*Slade's case* background').

263 See Baker, '*English Legal History*' (fn 63) 380. See also ibid, '*Slade's case background*' (fn 225) 220: 'A failure to perform an obligation was not *ipso facto* fraudulent.'

264 Baker 'English Legal History' (fn 63) 380.

265 See David Ibbetson, *Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count* (1982) 43 No 3 CLJ 142, 145, 153, who states that the damage is the 'ground of liability'.

266 *Shipton v Dogge* (1442) B&M 391, cited by Baker, '*English Legal History*' (fn 63) 383. The case concerned a sale of land, whereby the seller had conveyed the land in question to a third party in order to not have to perform the agreement; the plaintiff claimed deceit and succeeded, because the defendant had made it impossible to perform the covenant due to their own 'deceit'.

267 See Baker, '*English Legal History*' (fn 63) 380, who states that the barrier remained until the end of the fifteenth century, while Cooke and Oughton (fn 244) 9 state the year 1533 as the point at which nonfeasance was included under the action of assumpsit.

268 Baker, '*English Legal History*' (fn 63) 384. See also Ibbetson, '*Historical Introduction*' (fn 189) 129, who gives an outline of the first cases in the fifteenth century, including *Shipton v Dogge* (fn 266), at 127–129.

269 Compare Glenn (fn 167) 222. A succinct explanation of the difference between debt and *indebitatus assumpsit* can be found in Ibbetson, '*Historical Introduction*' (fn 189) 132–133.

someone who received something in exchange for a promise should have to keep that promise.[270] This notion is explored in Section cc) below. The basis of assumpsit shifted at this time from a broken promise to a mutual agreement between the parties, understood as a meeting of the minds.[271] Moreover, the move away from formalities as constitutive requirements for contracts (see Section dd) below) led to consensual contracts being acknowledged.[272]

The action of assumpsit eventually replaced the actions of covenant and debt in the seventeenth century, so that the traditional notion of contract developed into 'agreement'.[273] This unification greatly simplified the enforcement process and marked a change in the definition of a contract: While being understood as a 'transaction' during the Middle Ages,[274] its meaning developed into 'agreement' ('*agreamentum*') or 'undertaking' ('*assumpsit*'; Latin: '*assumptio*') around the turn of the sixteenth and the seventeenth century.[275] 'Contract' thus became 'an agreement between two or more [parties] concerning something to be done […]', the notion of which was, however, strongly connected to sale transactions.[276]

cc) The Formation of Contract and the Further Requirement of Giving Consideration

Apart from the need to overcome the inflexible forms of action found in the writ system as discussed above, the development of English contract

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270 Ibbetson, '*Assumpsit and Debt*' (fn 265) 153. Cf Glenn (fn 167) 217–218, who seems to reject the base of contract on promises in favour of an agreement on an action.

271 Compare Ibbetson, '*Historical Introduction*' (fn 189) 145–146. A contemporary description of assumpsit can be found in Baker, '*Slade's case transcripts*' (fn 262) 55.

272 See Ibbetson, '*Historical Introduction*' (fn 189) 146–147.

273 Baker, '*English Legal History*' (fn 63) 361; see also Ibbetson, '*Historical Introduction*' (fn 189) 147.

274 Compare also the discussion on the 'classical model' of English contracts in Section 1. above.

275 See Baker, '*English Legal History*' (fn 63) 360–361; see also Simpson, '*History*' (fn 232) 3. On agreement, cf Ibbetson, '*Historical Introduction*' (fn 189) 146, stating that it means meeting of the minds. The term assumpsit is sometimes also understood to mean 'to assume', as in *indebitatus assumpsit* (assumed obligation), see Glenn (fn 167) 254.

276 Baker, '*English Legal History*' (fn 63) 361, citing Serjeant Sheppard.

law had to grapple with another theoretical hurdle: the non-bindingness of naked promises. It appears that a mere promise as to some future act was not recognised as being binding in the Middle Ages.[277] Instead, there were three ways in which a person could bind themself to their promise: by swearing an oath; by handing something over to the other person; or by creating personal ties through some customary manner, such as shaking hands or drinking wine together.[278] The second method involved something of real or mere symbolic value, like an amount of money (earnest money) or a stick respectively, being given by the promissor (debtor) to the promisee (creditor) and this had the effect of giving the promisee a right to vengeance if the promise was broken, whereby at least earnest money acted as a formality to 'make [the contract] perfect'.[279] This idea seems to have been carried over into the forms of action, in particular debt and assumpsit.

Where an action of debt was for contract, ie, for informal agreements for which no deed existed as proof, the claimant (creditor) had to show that there was a reason for the debt. This reason was termed as *causa debendi* from the Latin language, or more commonly as *quid pro quo*.[280] Some form of reciprocity was thus required. A contract was created if the debtor was to receive something (a thing or benefit) through the act of the creditor. This situation has to be contrasted with cases of an exchange of promises between the parties, leading to an action of covenant.[281]

A similar principle developed in the action of *indebitatus assumpsit* in the sixteenth century: someone was bound by a promise only if they had received something in return. This principle of consideration echoed the *quid pro quo* found in debt, since consideration was understood to mean the cause, reason, or motive for making a promise at the beginning of the

277 cf Swain (fn 230) 6, who notes that generally, 'some promises *pacta nuda* were certainly binding' (italics as in original), including commercial contracts.

278 See on this Ibbetson, '*Historical Introduction*' (fn 189) 4–6. On oaths, see also Swain (fn 230) 4.

279 For further details on the workings of this mechanism and the analogy to an oath, see ibid 5. On earnest money, see ibid 147.

280 Baker, '*English Legal History*' (fn 63) 366.

281 Ibid 371.

seventeenth century.[282] Its essence was reciprocity, an exchange of some kind (of words or acts) between the parties.[283]

Consequently, assumpsit was only allowed where the defendant had promised something because they had received something (nominal) from the plaintiff, even if this receipt was sometimes fictional;[284] an agreement on its own was no longer sufficient.[285] Thus, the idea of some form of consideration (sometimes called recompense) was applied to contractual promises to make 'naked promise[s]' enforceable by adding something to them.[286] The notion of reciprocity between the parties contained in the doctrine of consideration would later, in the nineteenth century, become an important factor for a contract to be deemed as a 'reciprocal bargain' between the parties.[287] It is interesting to note that the act of giving consideration — and *quid pro quo* before it — was seen as constituting (part-) performance of a contract and as such was evidence of the agreement's existence.[288] The payment of small amounts of money was asserted regularly by claimants in actions of assumpsit initially, but seems to have lessened when the action was recognised readily by the courts.[289]

Beside this application, the courts made use of consideration in a different way: with the rise of the action of assumpsit, the doors to the courts were opened to a wider set of agreements; consideration was then invoked by the courts as a mechanism to limit the ever-increasing number of binding contracts,[290] and, consequently, their enforceability.[291] In other words, it was a way to stem the tide of claims raised in the courts. On the other hand, the formality of giving consideration was seen as a safeguard against hasty decisions by encouraging greater deliberation before entering into an

282 Compare Ibbetson, '*Historical Introduction*' (fn 189) 144, 142, who goes on to note that the notion underlying consideration and debt was the same, namely, reciprocity.
283 See Swain (fn 212) 11.
284 Ibbetson, '*Assumpsit and Debt*' (fn 265) 153–154. See also Cornish and Clark (fn 206) 203.
285 See Swain (fn 212) 11.
286 See Ibbetson, '*Assumpsit and Debt*' (fn 265) 154. Compare also Simpson, '*Innovation*' (fn 231) 258; Baker, '*English Legal History*' (fn 63) 386 uses the Roman term *nudum pactum* ('naked pacts').
287 Cornish and Clark (fn 206) 207.
288 See Ernst Rabel, *The Statute of Frauds and Comparative Legal History* (1947) 63 LQR 174, 181.
289 Compare Ibbetson, '*Historical Introduction*' (fn 189) 147.
290 See Smits (fn 37) 78–79.
291 Kötz, '*Europäisches Vertragsrecht*' (fn 17) 71.

oral contract: It was a mechanism through which the common law sought to protect people from reckless undertakings, something that had been latent in case law in the sixteenth century and was only acknowledged by the courts at the beginning of the nineteenth century. In relation to this, the courts also restated that consideration was not necessary when deeds were involved, as these instruments were thought to exert a sufficient cautionary restraint on the promisor.[292] Consideration was therefore not an issue with formal contracts (on which see below).

Although the idea underlying consideration existed for a long time,[293] it only became a settled requirement by the mid-sixteenth century.[294] This development is perhaps not coincidental, as it was from the same century on that contract theory generally gained importance.[295] Consideration would remain the primary basis of liability with informal contracts in the nineteenth century,[296] and is still seen as a vital requirement for contracts even today. Therefore, the requirements of consideration will be analysed in Section 3.a.v. below. Attention will now be given briefly to contract forms in Tudor and Stuart times.

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292 In the sixteenth century, this was stated in *Sharington v Strotton* (1564) 1 Plowden 298, 75 ER 454 (KB) 469 (Plowden J): 'And because words are oftentimes spoken by men unadvisedly and without great deliberation, the law has provided that a contract by words shall not bind without consideration'. The case will be discussed further in Section 3.a.v. below. On the nineteenth century position, see *Morley v Boothby* (1825) 3 Bingham 107 (Court of Common Pleas), [1825] 130 ER 455, 456 (Best CJ). The case concerned a bill of exchange issued by the defendant to the plaintiff. The promise to pay contained in the document was found invalid for want of consideration. See ibid 456–457 (Best CJ).

293 John Hamilton Baker, *Origins of the "Doctrine" of Consideration, 1535–1585*, in: Morris S Arnold and others (eds), *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne* (University of North Carolina Press 1981) 337. Various theories on the origin of consideration exist. Some legal historians, such as Ibbetson, '*Assumpsit and Debt*' (fn 265) 153, see an equivalent in the *quid pro quo* from the action of debt, others find it in the notion of *causa* from canon law. It has also been said to be a combination of both of these concepts, see Baker, '*Consideration*', ibid 340–341, 352–356; Baker, '*English Legal History*' (fn 63) 386–388.

294 Ibbetson, '*Assumpsit and Debt*' (fn 265) 152. According to Baker, '*Consideration*' (fn 293) 337, it was established before 1585. cf Stoljar (fn 194) 7, stating that it was an essential requirement for simple contracts.

295 Atiyah, '*Introduction*' (fn 33) 2. cf Ibbetson, '*Historical Introduction*' (fn 189) 153, stating the eighteenth and nineteenth centuries to be the period in which English contract theory was established.

296 On this, see Cornish and Clark (fn 206) 222.

dd) Contract Forms

As noted above, contracts of the sixteenth century in England could be 'informal' or 'formal', also known as 'simple contracts' and those 'under seal'.[297] The former could be contracts made orally or in 'simple' writing, whereas the latter had to be made in the form of a special instrument called a deed that bore a seal impression.[298] Of course, form requirements were known before this time. Already in the Middle Ages, both unilateral or gratuitous 'contracts' (arrangements) had to be made 'under seal' in order to be enforceable at law.[299] Beside covenants in the fourteenth century, other kinds of agreement were eventually made the subject of form requirements: During the seventeenth century, the in(famous) Statute of Frauds of 1677 (hereinafter 'SOF 1677') established form requirements for a range of circumstances, including guarantees (suretyships), sale of goods over a value of £10 (approx. €12), certain contracts relating to land, and wills.[300] Accordingly, a guarantee had to be in the form of 'some Memorandum or Note thereof […] in Writing and signed by the [guarantor]' (s 4 SOF 1677). As this requirement remains in force today, its meaning will be discussed in Section 3.b.ii. below. Suffice it to state here that a deed was not necessary.[301]

The stringency of the form requirements varied: sometimes, a form was imperative for the effectiveness of an agreement; sometimes it was optional. As an example of the former situation, a 'sealed instrument (a "speciality")'[302] was a necessary requirement for the action of covenant

297 The latter term is used by *Halsbury's Laws Vol 9* (fn 33) para 209.

298 On the difference, compare ibid paras 210, 212. As deeds are still a form requirement under current law, its requirements will be set out in Section 3.b.iii. below. Anticipating the exposition below, let it be noted at this point that a deed is a written document that fulfils a set of specific requirements and which is thus awarded special legal status.

299 Ibbetson, '*Historical Introduction*' (fn 189) 135.

300 For an overview of the background to the enactment of this Act and a critical assessment, see Rabel (fn 288) 174–187. Ibbetson, '*Historical Introduction*' (fn 189) 203 summarises these as the 'concern (based on experience) that juries might too easily infer contractual agreements from equivocal evidence'. On the application of the SOF 1677, see also Cornish and Clark (fn 206) 203 in fn 33.

301 See on this Rabel (fn 288) 182–183.

302 Simpson, '*History*' (fn 232) 10. The term 'speciality' arose because the rights conferred or obligations imposed under these documents deviated from the common law stipulations, thus creating special law, see ibid 12. There were exceptions to this requirement, namely, with 'petty cases', ie, agreements regard-

by the fourteenth century.[303] While not imperative, a debt agreement was normally contained in a deed and referred to as a bond or an obligation.[304] In essence, it was a declaration by the debtor that they owed a sum of money to the creditor.[305] In contrast, the (non-) existence of a deed was of no consequence with actions of assumpsit: As the issue was not the contract, but the wrongful act, it was irrelevant whether the contract was in the form of a deed or not; the existence of a document would not have proven the wrongful act.[306] The nature of the cases brought under this action was another argument against requiring a deed: these were often daily matters of little consequence like ferry crossings or negligent medical treatment and did not warrant a speciality to be drawn up every time.[307] While written agreements were therefore used in practice, deeds were not mandatory for some claims of action.

b. Contracts in the Kingdom of Great Britain and the United Kingdom in Hanoverian and Georgian Times: The Requirement of the Intention to Create Legal Relations and the Doctrine of Offer and Acceptance (18th~19th Century)

The time between the eighteenth and the twentieth centuries was one of consolidation, both in the social-political (see Section i. below) and

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ing daily matters of little consequence, see ibid 223–224. The use of seals in England will be explored further in Sections 3.b.iv. and D.III.2.b. below.

303 See Stoljar (fn 194) 5–6, who notes that action of covenant was available to formal and informal agreements, ie, whether sealed or not in the thirteenth century; the restriction to sealed agreements only arose during the fourteenth century. See also Ibbetson, '*Historical Introduction*' (fn 189) 126.

304 See Baker, '*English Legal History*' (fn 63) 368; see also Simpson, '*History*' (fn 232) 53. It ought to be noted that the document did not have a mere evidential function; it constituted the debt. Thus, if the document was lost or became invalid, there was no debt at law. See on this Simpson, ibid 95. As a result, pleadings before the court would often focus on the existence of the deed: whether there were reasons for which the deed should not be enforced, like forgery, or duress. See Baker, ibid 369; Simpson, ibid 98–99.

305 Compare the example formula given by Baker, '*English Legal History*' (fn 63) 368: 'Know all men that I, AB, am firmly bound to CD in £n to be paid at…'.

306 See Baker, '*English Legal History*' (fn 63) 374.

307 See ibid 376, citing Cavendish CJ from the case of *Stratton v Swanlond* (1374) B&M 360, 362. The case concerned a surgeon, who had not healed but maimed a patient's hand. For other cases, see ibid 375–376; see further Cooke and Oughton (fn 244) 8; Simpson, '*History*' (fn 232) 223.

the legal sphere (Section ii.). In particular, the foundations for a unified theoretical framework of contract law were first laid and subsequently developed to become a stable structure.[308]

i. Political and Social Background

The United Kingdom of Great Britain arose in 1707 with the unification of England and Scotland. Less than a century later, in 1801, Ireland was added, so that the words 'and Ireland' were appended to its name.[309] It was during this time of unification that the term 'British' began to be used to globally refer to the people living in this kingdom.[310] Unification of the country was not complete, however; Scotland, Ireland, and Wales retained their cultures and people from these parts often could not even speak English, all of which would translate into political turmoils.[311] The uniform demomyn 'British' notwithstanding, English society remained stratified in the eighteenth century. Like in the preceding century, it had a vertical hierarchical structure in which the observance of rank and social norms was of major importance, with the top being made up of a land-owning elite class.[312] In the following century, a change of perception effectively made horizontal connection links more important than vertical ones, with rivalries ensuing between them.[313]

The general upwards trend in industry and commerce of the seventeenth century also continued, making Great Britain a formidable economic power.[314] Furthermore, trade was conducted not only within the

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308 See Ibbetson, '*Historical Introduction*' (fn 189) 153 and 202, where it is noted that a 'skeletal structure' of contract law had already been created in the sixteenth century. See also ibid 220.

309 See Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'Introduction'; Ibid, '*Act of Union*' (Online Academic Edition 2017), http://academic.eb.com/levels/collegiate/article/Act-of-Union/74264.

310 See ibid at 'Introduction'.

311 On this, see ibid at 'The State of Britain in 1714'.

312 For further details, see Cornish and Clark (fn 206) 2–3. On the land-owners, see also Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'British Society by the mid-18th Century'.

313 See Cornish and Clark (fn 206) 2.

314 See Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'The State of Britain in 1714'. One facilitation of trade may have been the unification of Great Britain, as it created 'the largest free-trade area in Europe', see ibid at 'Britain from 1742 to 1754'.

country, but on a large and global scale by the beginning of the nineteenth century.[315] Its prosperity was initially generated predominantly through work in agriculture, which sank to one third at the turn of the nineteenth century, while the work force in industry and commerce increased to 40% at that time.[316] By virtue of the technological advances in agriculture and industry — the latter under the Industrial Revolution — labourers moved from the tertiary to the secondary labour sector, so that a shift in balance may have occurred in the mid-nineteenth century: over 50% were employed in industry, which would increase to almost 70% by the end of the century.[317] On the other hand, the almost one century long 'consumer revolution' between the beginning of the nineteenth and the twentieth centuries and the stark rise in consumption in English society led to a rise in employment in the primary sector: services.[318] These were not only found in retail, whereby a move from street vending to individual shops, grocery chains, and department stores will have accounted for part of the numbers; rather, there was a diversification of services, particularly with regard to insurance and transport by railway.[319]

This change in employment was not paralleled in the distribution of the nation's wealth, which was starkly skewed in favour of the upper class: 5% of the British received over 30% of the profits generated in trade and commerce.[320] Nevertheless, the income of the working class rose from the mid-nineteenth century,[321] which allowed consumption and leisure activities to be enjoyed by an increasing number of people, both in London and

315 See Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 324.

316 Compare Cornish and Clark (fn 206) 4.

317 A succinct account of the Industrial Revolution is given by Matthew White, *The Industrial Revolution* (British Library, 14 October 2009), www.bl.uk/georgian-britain/articles/the-industrial-revolution. The figures of employment were taken from Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'The Industrial Revolution' and Cornish and Clark (fn 206) 4 respectively. cf the figures given in the tables by Geoff Timmins, *Working Life and the First Modern Census* (BBC History, 18 September 2014), www.bbc.co.uk/history/trail/victorian_britain/earning_a_living/working_life_census_05.shtml, also showing a rise of work in services.

318 Compare Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 326, 327.

319 On both of these developments, see ibid 327.

320 See Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'The State of Britain in 1714'. cf the situation in the mid-eighteenth century, in which only 14% of the wealth trickled down to the lower classes, but which made up 40% of the population. See ibid at 'British Society by the mid-18th Century'.

321 Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 326.

other towns, even drawing in people from the countryside.[322] As will be seen shortly, these positive developments in commerce effected the law — and that of contracts.[323]

ii. The General Structure of Law

The union emerging in other areas, eg, in terms of social integration, did not encompass the law, since Scotland — but not Ireland — maintained its own jurisdiction.[324] Thus, the political union did not automatically turn the common law into the one binding 'British' law.[325] On the contrary, there was no central court system but a series of parallel jurisdictions, where different strands of law were heard in separate, independent courts, namely: ecclesiastical courts (canon law) from the eleventh century, the Court of Admiralty (common maritime law, law merchant), the Court of Equity (equity), as well as commercial courts (law merchant).[326] Nevertheless, there was only one legal regime applicable to all strata of society, with local customs acting as a diversifier.[327] A unified court system would only come about some 800 years later, in the nineteenth century.[328] Similarly, although case law accumulated over time, there was initially no notion of precedent, nor of *stare decisis*, so that case law was not a body of fixed

322 See Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'British Society by the mid-18th Century'.

323 The facts explained above were not the only reasons for contract law being developed in the nineteenth century; however, they relate most to the discussion in this dissertation. For details on the other factors, namely, family settlements (of land), commercial negotiable instruments, and investments in stock companies, see Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 323–325, 328.

324 See Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'History: Great Britain, 1815–1914' and 'History: 18th-century Britain, 1714–1815' (Scotland). On Ireland, see Encyclopaedia Britannica, '*Act of Union*' (fn 309).

325 This had already been true in Norman times, on which see Glenn (fn 167) 246–247. On the common law appearing after the Norman conquest, see ibid 252.

326 Ibid 247, 248, 269. For details on the civil courts, see Cornish and Clark (fn 206) 23–33, noting at 26–27 that the Court of Equity was 'an addendum' to the Common law.

327 See Cornish and Clark (fn 206) 3.

328 Glenn (fn 167) 253, 254; and see 270–271 for a summary of this unification process. See also Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 322. The common law courts already began to make inroads into the commercial jurisdiction in the eighteenth century, see Cornish and Clark (fn 206) 198–199.

rules.[329] This constituted 'formal, internal limits on the growth and reach of the common law'.[330] Furthermore, as already noted above, it was only during the nineteenth century that the idea of judicial law-making and *stare decisis* began to emerge.[331] With this congealing coherence also came the idea of a unified common law system.[332] There also seems to have been an interest in the mid-nineteenth century to codify English law; however, this endeavour failed as far as the general law of contracts is concerned. Nevertheless, special legislation, such as for sale of goods and other commercial matters, was enacted.[333]

In terms of the law's focus, the shift from manorialism to employment of farmers and craftsmen might have put labour law issues at the centre; it seems, however, as if this was not the case. Instead, there was more concern for protecting private property, 'the fundament of political thought' since the seventeenth century, enforcing contracts (on which see the subsequent section),[334] and in regards to other issues arising in commerce.[335] One example is the predecessor of the SGA 1979: the Sale of Goods Act 1893.

iii. The Law of Contracts

Already in the seventeenth century, changes were perceptible in English law that brought both the understanding of and the law on contracts closer to today's structure. The approximation was completed in the eighteenth and nineteenth centuries, both in terms of the definition (see Section aa) below), as well as the conclusion process (Section bb)). As will be seen shortly, this was due to the influence of Thomas Hobbes' theory on and definition of social contract on the one hand and works by conti-

329 See Glenn (fn 167) 250–251.
330 See ibid 247.
331 Ibid 258–259. This late development may be due to the fact that juries traditionally decided cases, rather than judges; something which only changed in that period. On this, contrast Ibbetson, '*Historical Introduction*' (fn 189) 220, 233, who uses this fact to support his thesis that the courts began to define contract rules more firmly only in the nineteenth century.
332 See Glenn (fn 167) 259.
333 On this movement, see Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 306–398.
334 See Cornish and Clark (fn 206) 4, 3, 6.
335 For examples, see Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 324–325.

nental-European Natural lawyers, in particular Robert-Joseph Pothier, on the other; however, rather than their theoretical framework, their vocabulary was to become of importance in English contract law.[336] Their ideas were picked up in the English legal textbooks on contract law that were published starting from the end of the eighteenth century.[337] On the other hand, there was a practical need for the courts to see the rules of contract law defined more clearly, as the decline of the use of juries in trials meant that judges could not leave cases to be decided by them any longer and had to deal with contract issues themselves.[338] Therefore, the theorisation of contract law seems to have been worked on by using both a theoretical and a practical approach. Perhaps as a consequence of the concretisation of contract theory, an additional requirement was developed: an intention to create legal relations (see Section cc) below).

aa) Definition of Contract

The shift of the notion of an agreement as bilateral rather than unilateral was made by Thomas Hobbes in the mid-seventeenth century, defining contract 'as the mutual transfer of rights'.[339] This idea echoes in the English legal treaties on contract law of the eighteenth century. By way of example, in the words of Powell from 1796, a contract under the common law was understood as: '[…] an agreement between two or more concerning something to be done, whereby both parties are bound to each other, or one is bound to the other.'[340] A similar but simpler definition describes '[a]n agreement [a]s *aggregatio mentium*, viz when two or more minds are united in a thing done, or to be done.'[341] The notion of agreement seems to have evolved, as Powell speaks of the parties consenting to an obligation

336 See Ibbetson, '*Historical Introduction*' (fn 189) 215, 218, who goes on to note at 219 that 'the terminology and ideas of the Natural lawyers [...] were freely plundered to give expression to the rules of English law' in the nineteenth century.

337 See fn 220 above. On some of the problems faced by the writers in trying to align the 'foreign' natural-law concepts with the English common law of contracts, see Ibbetson, '*Historical Introduction*' (fn 189) 217, 219.

338 See fn 331 above.

339 Ibbetson, '*Historical Introduction*' (fn 189) 215.

340 Powell (fn 220) vi.

341 John Comyns, *A Digest of the Laws of England Vol I* (5th edn, Collins & Hannay 1824) 540 at A 1 (original emphasis).

being created or dissolved, which again seems to be in line with Hobbes' view that contracts are based on the will of the parties; but it is also very close to Pothier's theory, according to which contracts became binding for the parties on the basis of their 'mutual assent'.[342] It is notable that the nineteenth century definition of a contract (not under seal) already sounds quite similar to our modern understanding:

> A [...] mutual assent of two or more persons, competent to contract, founded on a sufficient and legal motive, inducement, or consideration, to perform some legal act, or omit to do any thing, the performance whereof is not enjoined by law.[343]

While this definition contains the essence of the modern legal notion of a contract, there are points which foreshadow changes in the canon. One relates to a missing element, namely, the reference to the mechanism leading to mutual assent: the interplay of offer and acceptance (on which see Section bb) below). Linked to this development is the appearance of what is known as the 'postal rule', a doctrine regulating the coming into effect of a declaration of intention. While the content of this rule will be considered later in Section 3.a.iii.cc), its origin will be outlined briefly below. Finally, the words 'founded upon […] legal motive, inducement or consideration' are connected with another dogmatic change that will be explored in connection with the requirement for an intention to create legal relations.

Further changes in legal practice were also to come, in particular, standard terms and standard form contracts, eg, order forms, came into use, so that the content of contracts were no longer individually negotiated.[344] As a consequence of the arising imbalance between parties, the law increasingly intervened in contracting to protect 'the vulnerable and the exploited' and legislation such as the Unfair Contract Terms Act 1977 came into existence.[345]

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342 Compare and contrast Powell (fn 220) vi, and Ibbetson, '*Historical Introduction*' (fn 189) 216 (on Hobbes) and 220 (on Pothier, whose work seems to have become available in English at the beginning of the nineteenth century).

343 Chitty (fn 220) 8.

344 For further details on this, see Atiyah, '*Introduction*' (fn 33) 15–18. He notes that this standardisation meant that the contract did not represent a true agreement, ie, a bargain. Rather, as the terms were often imposed by one party, the content might, at most, represent that party's intentions.

345 See on this ibid 20–22, 25–26. It ought to be noted that this piece of legislation incorporates a traditional English approach. In contrast, The Unfair Terms in

bb) The Conclusion of Contracts: Emergence of the Doctrine of Offer and Acceptance and the Postal Rule

In the eighteenth century, a contract was concluded through an agreement and the giving of consideration,[346] because, as stated above, the doctrine of offer and acceptance was only developed in the nineteenth century.[347] This rather late emergence can be simply explained by considering two aspects of contracting: what the nature of the agreement was, and the way in which contracts were normally concluded. The first aspect relates to the kind of agreement that was typically concluded. There was a move away from the immediate processes of exchange of, say, goods and money, so that a contract would often consist of promises by one or both of the parties to do something in future (executory contract).[348] Furthermore, the usual way to negotiate and conclude contracts was historically '*têtê-à-têtê*', ie, while in each other's presence (*inter presentes*).[349] With the expansion of the postal service and a rise in the exchange of letters in the nineteenth century, however, the law had to provide answers to two related issues: whether an agreement had been reached in the exchange; and, if so, at what point in time.[350] The former was solved by the mechanism of offer and acceptance, which became an additional requirement to consideration,[351] while the latter was managed by the postal rule.

The idea that a promise on one side, which would later be termed an offer, must be accepted by the other party, developed over time; however, it seems that the time of establishment is around the beginning of the nineteenth century. An agreement was first described in terms of a propos-

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Consumer Contracts Regulations 1999, SI 1999/2083 implemented a EU-Directive (see fn 396 below). See on this Law Commission and Scottish Law Commission, *Unfair Terms in Contracts Summary [of Report]* (Law Commission No 298; Scottish Law Commission No 199; 2005) para 3. For a brief account of the English statute's history, see ibid, *Unfair Terms in Contracts: A Joint Consultation Paper* (Consultation Paper 166, 2002) paras 2.10 et seq. Both documents are available online at www.lawcom.gov.uk/project/unfair-terms-in-contracts/.

346 See Ibbetson, '*Historical Introduction*' (fn 189) 204.

347 See Simpson, '*History*' (fn 232) 5. cf Cornish and Clark (fn 206) 204, noting that the concept of offer and acceptance already appeared in two late eighteenth century cases, discussed subsequently.

348 Compare Cornish and Clark (fn 206) 203.

349 Stoljar (fn 194) 133.

350 See ibid 133–134. See also Simpson, '*Innovation*' (fn 231) 257, 258; Cornish and Clark (fn 206) 203.

351 Simpson, '*Innovation*' (fn 231) 258.

al or an offer on the one side and assent or acceptance on the other in two late eighteenth century cases: *Payne v Cave*[352] and *Cooke v Oxley*[353].[354] The first case concerned a sale by auction, in which the defendant had been the highest bidder but had withdrawn their bid before the hammer came down. The court acknowledged that such a withdrawal was possible, since '[e]very bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to', whereby the assent by the seller is made through their agent, the auctioneer, in 'knocking down the hammer, which was not done here till the defendant had retracted.'[355] In the second case, the defendant had 'proposed' (offered) to sell goods to the plaintiff. The latter wanted time to consider the offer and the defendant said they would sell if notice to purchase was given before a particular time on the same day. The plaintiff alleged to have accepted the proposal on time, but the defendant refused to contract. The court held the promise by the plaintiff to sell to the defendant if they accepted before the appointed time to be one-sided, as it lacked consideration on the defendant's part and was therefore a *nudum pactum*.[356] Despite the vocabulary for the two declarations of intention varying in both cases ('offer' and 'assent', 'proposal' and 'acceptance' respectively), the underlying notion is the same, namely, of these two elements making up the contract.[357] Around the same time, the idea was also first expressed in a treatise on contract law, in which reference was made to Roman law.[358]

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352 (1789) 3 Term Reports 148 (KB); 100 ER 502.
353 (1790) 3 Term Reports 653 (KB); 100 ER 785.
354 Compare Cornish and Clark (fn 206) 204.
355 *Payne v Cave* (fn 352) 503.
356 *Cooke v Oxley* (fn 353) 786.
357 On this point, contrast Cornish and Clark (fn 206) 204 in fn 35 and Simpson, '*Innovation*' (fn 231) 260, the latter of which states that the terms were used in *Payne v Cave* (fn 352) in a descriptive rather than a legal-technical manner.
358 See Simpson, '*Innovation*' (fn 231) 259. The work in question was that of Powell from 1790. The same description is found in the 1796-edition (fn 220) 334, using the terms 'promise' and 'acceptance', although Powell also speaks of 'consent' as an element of a contract, see ibid vii. It is perhaps due to this reliance by Powell on Roman law that Schmidt J (fn 25) 66, 95 has stated that the model is a legal transplant from continental-European law or legal theory. Compare on this also Simpson, ibid 260. Contrast Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 302, 303 who reject the argument that continental-European legal theory ('civilian ideas') were received in England; selected influential authors, such as Pothier, were cited in the nineteenth century works — apparently not used to develop ideas, but rather to explain existing English case law.

The case that seems to have established the doctrine was *Adams v Lindsell*[359], in which both the terms of 'offer' and 'acceptance' are used.[360] The issue was whether a contract of sale of wool had come into existence by way of an exchange of letters, whereby the letter of the seller (offeror, defendant) had been misdirected, so as to reach the prospective buyer (plaintiff) later than anticipated, with the result that the reply (purported acceptance), despite having been sent promptly, reached the seller one day too late, namely, after the wool had been sold to a third party. The court found that the delay had been the defendant's fault, that the plaintiffs had reacted 'in due course of post', as had been requested by the defendants, so that the latter were liable for the plaintiff's loss. In their reasoning, the court used the words 'offer' and 'acceptance' when referring to the declarations of intention of the parties and found — using a fiction — that an offeror making an offer by letter was bound by their offer because they

> must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter.[361]

This fiction of perpetual offers was necessary, as the legal thought of that time was that a promise could only be consideration for another promise if made at the same time as the other promise.[362] This case was thus important in two respects: it applied the offer-and-acceptance model to bilateral contracts, and it established what would later become known as the postal rule: a declaration of intention of acceptance made by post becomes effective once it is sent. Having said this, both the doctrine and the rule only became settled law after application in a number of subsequent cases.[363]

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359 (1818) 1 Barnewall and Alderson 681, 106 ER 250 (KB).

360 See Simpson, '*Innovation*' (fn 231) 260.

361 *Adams v Lindsell* (fn 359) 683.

362 Simpson, '*Innovation*' (fn 231) 261.

363 On the latter, see Stoljar (fn 194) 134; see further Atiyah, '*Introduction*' (fn 33) 71, who states that the rule was only 'confirmed by the [CA] in 1879.' The case of *Adams v Lindsell* (fn 359) was applied and settled in *Dunlop v Higgins* (1848) 1 House of Lords Cases 381, 9 ER 805 (HoL), see McKendrick (fn 48) 106. The facts somewhat resemble those of *Adams*. The case concerned an exchange of letters, through which a contract for the sale of iron was to be concluded; however, as the buyer's (offeree, plaintiff, and appellee) purported acceptance letter reached the seller (offeror, defendant, and appellant) at a later date than would be customary between merchants, the seller refused to transact. The court found that the plaintiff had 'done every thing [they were] bound to do' by

cc) The Further Requirement of an Intention to Create Legal Relations

Beside the doctrine of consideration, another requirement developed in English law to distinguish binding from non-binding agreements: the intention to create legal relations.[364] As the name suggests, it concerns the earnestness of a person to enter into a contract, just like consideration; however, there is a subtle difference. As its name suggests, it concerns the *animus contrahendi* (intention to contract)[365] and 'serves […] to explain in terms of the *consensus* theory of contract the absence of contractual liability for jokes, promises of gifts, domestic and social arrangements, pre-contractual remarks which sensible people do not take seriously', and other situations.[366] It is thus a distinct requirement from consideration.[367]

Similar to the offer-and-acceptance model, the requirement for an intention to create legal relations seems to have been first advanced in English legal literature beginning in 1818,[368] and was only taken up by the courts some 75 years later, albeit indirectly at first. Thus, in the case of *Carlill v Carbolic Smoke Ball Co*[369], the CA decided whether a newspaper advertisement for a product was meant to be a contractual offer, or whether it was a 'mere puff which meant nothing' by looking at the offeror's

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posting their letter of acceptance 'on the correct day' (ie, within the time frame that was usual between merchants for responses) and that 'whether that letter be delivered, or not, is a matter quite immaterial', since they were not liable for any delays of the postal service. The case of *Adams* was cited as authority on the point that an acceptance becomes effective upon being sent. See *Dunlop*, ibid, 805–806, 812–813 (Lord Chancellor).

364 It has been suggested that this requirement arose because consideration did not fulfil the function of making such a distinction, see Simpson, '*Innovation*' (fn 231) 263. See also Cornish and Clark (fn 206) 208, stating that the policy objectives of consideration and the doctrine of an intention to create legal relations were different. According to Schmidt J (fn 25) 66, this requirement was a legal transplant from continental Europe. cf Baker and others, '*Oxford Legal History Vol XII*' (fn 220) 302, 303, generally rejecting such a reception.

365 Translation by this author, with reference to the entry for 'animus' in Oxford Dictionary of Law (fn 62) 26. The term is used by, eg, Simpson, '*Innovation*' (fn 231) 265.

366 Simpson, '*Innovation*' (fn 231) 265. Emphasis added.

367 See Treitel/Peel (fn 65) para 4-001.

368 For a list of the authors and works which successively introduced the notion, see Schmidt J (fn 25) 96–97.

369 [1893] 1 QB 256 (CA). Further details of this case can be found in McKendrick (fn 48) 57–60.

intention (sincerity) and came to the conclusion that it was the former.[370] The term was subsequently used in other contexts, such as in relation to the establishment of a collateral contract, which is used for 'vary[ing] or add[ing] to the terms of the principal contract',[371] or with respect to family relationships.[372] The requirement is analysed in detail in Section 3.a.iv. below.

c. The Subsequent Development of English Contract Law in Windsor Times (20th Century–)

The twentieth century saw many changes in England: politically, socially, and economically. Naturally, this caused English law to be amended. As the changes are too numerous to elaborate in this work, only a sketch of the country's historical development will be given below in Section i. Similarly, only a couple of legal developments of interest will be highlighted in Section ii.

i. Overview of Political and Social Developments

The two World Wars and the period of intermission saw fluctuations in the UK's population and its economy. Both only grew again from the 1980s, whereby the population rose by a total of 4 million people until

370 See *Carlill* (fn 369) 261–262, 263 (Lindley LJ), 266, 268 (Bowen LJ), 273 (Smith LJ). The case will be discussed in further detail in Section 3.a.ii.bb) below. Compare Simpson, '*Innovation*' (fn 231) 265, speaking of the '*animus contrahendi* featur[ing] with reasonable prominence in *Carlill* […]'. Similar: McKendrick (fn 48) 272.

371 *Heilbut, Symons & Co v Buckleton* [1913] AC 30 (HoL), 47 (Moulton L). In the event, '[i]t was held that nothing said by the defendants' manager was intended to have contractual effect', see Treitel/Peel (fn 65) para 4-007. In particular, it was said that the reply of the defendants' manager to a question by the plaintiff was 'a mere statement of fact […] and nothing more', see *Heilbut* (ibid) 48 (Moulton L). According to Simpson, '*Innovation*' (fn 231) 265, the case 'canonises' the requirement of an intention to be legally bound. cf McKendrick (fn 48) 272, according to whom the requirement became settled law after the ruling in *Balfour v Balfour* [1919] 2 KB 571 (CA). The case is discussed in detail in Section 3.a.iv. below.

372 *Balfour v Balfour* (fn 371).

the end of the twentieth century.[373] That period also meant the end of the British empire; it crumbled, with only parts remaining, when several countries, particularly India and Pakistan, became independent during WWII.[374] Political structures also changed in the UK: Scotland and Wales gained devolved political power over their lands in 1997.[375] While the UK was one of the world's 'three superpowers' among the US and Russia after WWII, the continuously struggling economy meant the subsequent loss of that status.[376]

There has been a steady immigration of people from the New Commonwealth countries, including India, Pakistan, and the West Indies since the 1950s.[377] This has diversified the ethnicity and culture of an otherwise ageing British population.[378] In terms of labour, formerly strong sectors like textile production and coal mining declined to only 5% of the workforce in 1961, and manufacture shifted to consumer goods, including automobiles.[379] These transitions created divisions within the country — both geographically and economically; and has thus transformed British society.[380] From the former working class emerged a class of 'middle England' that enjoyed better income and lifestyle; nevertheless, the divide among these people and the affluent grew, creating a new class of the 'new poor'.[381] The continued struggling economy and labour market drove politics and even affected the law (see below).

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373 See Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'Economy' and 'Population Growth'. See also ibid at 'Economy and Society'.

374 See Jeremy Black, *Overview: Britain from 1945 Onwards* (BBC History, 3 March 2011), www.bbc.co.uk/history/british/modern/overview_1945_present_01.shtml. For further details on the fall of the empire, see John Darwin, *Britain, the Commonwealth and the End of Empire* (BCC History, 2011), www.bbc.co.uk/history/british/modern/endofempire_overview_01.shtml.

375 Black (fn 374).

376 On this, see Dennis Kavanagh, *Thatcherism and the End of the Post-War Consensus* (BBC History, 2011), www.bbc.co.uk/history/british/modern/thatcherism_01.shtml.

377 Compare Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'Migration Patterns'.

378 Black (fn 374); compare also Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'Population Growth', and at 'Cultural Life'.

379 Encyclopaedia Britannica, '*United Kingdom*' (fn 166) at 'Economy and Society'.

380 See ibid.

381 Ibid.

ii. Overview of (Contractual) Legal Developments

A range of legal changes were made in relation to the events just described above. An example is the successive amendment of labour law to curb strikes in the 1970s and 1980s due to the struggle between Margaret Thatcher's government and British trade unions.[382] On a more social note, the rise of consumerism was aided by changes to the trading hours of shops, which were now allowed to open for twenty-four hours and on Sundays.[383]

One legal development that is of interest to the subsequent discussion is a change in land law. The transformation began in the nineteenth century with amendments to the statutory law on conveyances, the transfer of land. At that time, sales of land typically progressed in a two-step process: First, what was known as an 'open' contract between the buyer and seller containing basic terms like the object (property) and price, and terms (special conditions) reducing the seller's obligations with respect to the next step.[384] This contract would often be concluded through an exchange of letters; however, the courts would look for an offer and acceptance in order to find that an open contract had been concluded.[385] The second step was the actual conveyance of the land, which involved an often complex investigation of title and was therefore undertaken by professionals.[386] Apart from the conveyance, solicitors were also involved with the sale contract; however, it seems that this was not true before 1820, but that they took on an increasing role only thereafter.[387]

While this legal practice remained almost the same until the beginning of the twentieth century, the common law changed in this period.[388] The transformation of the legal framework was achieved through a series of successive pieces of legislation that would eventually lead to the enactment of the LPA 1925. The overall aim of these legislations was to make the conveyancing process easier, in particular, to lower the labour and risks of title investigation. Therefore, a registration system for titles to land was introduced in the Transfer of Land Act 1862; however, this modernisation

382 For further details, see ibid.
383 Compare Black (fn 374).
384 Stuart Anderson, *Part One: Property*, in: Cornish and others (fn 220) 1, 94, 102, 95, 97.
385 See ibid 97, 109.
386 See ibid 94, 95, 97.
387 See ibid 95, 97. Compare also ibid 107.
388 Compare ibid 108–109.

would not bear substantial fruits for some time, due to resistance from several sides, in particular the professionals involved.[389] Another important legislation in relation to conveyancing of land that was enacted in the twentieth century was the LPMPA 1989. While the content of this statute and of the LPA 1925 will be examined in the subsequent section, it may be noted at this point that the changes affected some of the English form requirements, namely, deeds and the practice of sealing.[390] While the basic contract rules had been settled, new regimes have been created around contracts. Consumer contracts are one important field that has developed since the 1960s,[391] labour law is another.[392]

3. Contracts in Current English Law and Legal Practice

After the gradual yet laborious historical development of the modern concept of contract, the common law viewed a contract as an exchange of promises that it ought to protect if particular requirements were met. These prerequisites are the existence of the declarations of offer and acceptance, both of which are made with the intention of creating a binding legal relationship, whereby the exchange of promises is either in the form of a deed, or supported by consideration.[393] There may be further formalities, which also have to be taken into account at contracting. Each of these requirements will be explored in depth in Sections a. (Basic Principles), b. (Formalities), and c. (Other Requirements), before attention is given to aspects of current legal practice in Section d. below.

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389 For details of this development, see ibid 196–230.

390 See Sections 3.b.iii. and iv. below.

391 Some prior attempts in single cases of consumer protection notwithstanding, the foundation of consumer law lay in the enactment of the Restrictive Trade Practices Act 1956 on the one side and in the establishment of the Molony Committee on Consumer Protection in 1959 on the other, as the committee's report from 1962 would inspire several legislative measures in the following years. For details on the Committee and its influence, see Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 2–4.

392 While this deviation includes aspects of the contract conclusion process, these particularities will not be discussed in this dissertation. Interested readers are referred to, eg, John C Wood (founder) and Ian T Smith and Gareth Thomas, *Smith & Wood's Employment Law* (9th edn, OUP 2008).

393 See Simpson, '*Innovation*' (fn 231) 257. See also the discussion of the definition of contract in Section 1. above.

It should be noted that the common law rules apply to all kinds of contracts; however, many regimes have been regulated separately through statute, like consumer law. Deviations under consumer law will be highlighted during the discussion of the basic rules. Another aspect to keep in mind is that the majority of statutory provisions are dispositive,[394] with most exceptions found in relation to consumers and formalities. In the following, the definition that will be adopted for the term 'consumer' under English law will be that of a natural person acting (almost entirely) for private — as opposed to trade or professional — purposes.[395] A consumer's counterpart in B2C transactions, a trader, will be understood as 'a person acting for purposes relating to that person's trade, business, craft or profession' (s 2 subs 2 Consumer Rights Act 2015, 'CRA 2015'). In this respect, two points require brief comment.

First, regarding the nature of the term 'person', as this notion is different for consumers and traders. For the former, the CJEU (then still known as ECJ) rejected the notion that a legal person can be treated as a consumer in relation to Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts[396].[397] While this Directive allows the EU Member States freedom in transposing the rules, the UK adopted the same definition of a consumer as the one contained in the Directive; the UK therefore chose to limit the term to 'natural persons'.[398] It did so both in this and in other consumer legislation, including the CRA 2015,[399] so that in general, only natural persons count as consumers, whereas 'small

394 This is true, for example, for most implied terms. Compare Treitel/Peel (fn 65) paras 1-003 and 6-067.

395 Compare the definitions found in r 3(1) Consumer Distance Selling Regulation, in s 2 subs 3 CRA 2015, and in r 2(1) E-Commerce Regulations.

396 [1993] OJ L95/29. Note that the Directive was repealed by Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights [2011] OJ L304/64. This did not affect the definition.

397 This was laid down in ECJ Case C-541/99 *Cape v Ideal Service* [2001] ECR I-9049. For an extract of the judgement and commentary, see Jules Stuyck, *Setting the Scene*, in: Hans-Wolfgang Micklitz and Jules Stuyck and Evelyne Terryn (gen eds), *Cases, Materials and Text on Consumer Law* (Hart Publishing 2010) 29–31.

398 Compare the wordings of art 2 para b of the Directive and of r 3(1) The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

399 See fn 395 above. On the CRA 2015 and 'consumer', see also Treitel/Peel (fn 65; 14th edn 2015) para 23-007.

businesses or legally incorporated organisations' do not.[400] In contrast, a trader can be both a natural or a legal person, such as a company.[401]

Secondly, in terms of the nature of the person's activities, the ECJ held in another case from 2004 that a mixed purpose contract, ie, one made for both private and business reasons, does not fall into the scope of consumer protection, unless the business purpose is negligible.[402] An example might be a person buying an article for their home, but which is used for work one day a week.[403] The reason given by the ECJ was that consumer protection is not warranted in such situations, as the business entity 'must be deemed to be on an equal footing with the other part to the contract',[404] in terms of the comprehension of the 'professional risk' involved in contracting.[405] Whether this justification also applies in relation to other EU legislation remains open.[406] In relation to the CRA 2015, it has been stated that a trader could usually rely on the Sale of Goods Act 1979 ('SGA 1979'), so that they would not be without protection.[407]

a. The Current Legal Background

i. Basic Principles: Agreement Through Offer and Acceptance

What Treitel refers to as an 'agreement' is essentially the outcome of an offer being accepted by the other party (see Sections ii. and iii. below

400 See CRA 2015 Explanatory Notes (fn 78) para 36.
401 See ibid para 35.
402 ECJ Case C-464/01 *Gruber v Bay Wa AG* [2005] ECR I-439, paras 39–45. The issue in this case surrounded the application of a jurisdiction rule contained in what was then the Brussels Convention (today Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1, the Brussels I Regulation, as recast in Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters OJ L [2012] 351/1). For an extract of the judgement and commentary, see Stuyck (fn 397) 50–54.
403 Adapted example given in CRA 2015 Explanatory Notes (fn 78) para 36.
404 *Gruber v Bay Wa AG* (fn 402) para 40.
405 Stuyck (fn 397) 53.
406 Ibid.
407 Compare CRA 2015 Explanatory Notes (fn 78) para 36.

respectively).[408] Once this has occurred, consensus is said to have been reached,[409] and the contract comes into existence.[410] This process poses no problems where the contract is concluded with all of the parties being (physically) present; complications may arise where, in contrast, the parties are at a distance.[411]

The analysis in terms of offer and acceptance may likewise be problematic in particular cases. Multilateral contracts provide one example in which several agreements on the same subject are formed in parallel, between one 'offeror' and several 'offerees', such as in a competition.[412] Another difficult case concerns contracts that have arisen from — usually lengthy — negotiations, during which 'offer' and 'acceptance' cannot always be clearly identified.[413] Despite these difficulties and existing criti-

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408 See Treitel/Peel (fn 65) para 2-001. This 'conventional approach' of analysing a contract in terms of offer and acceptance has been criticised for the difficulties it presents with some types of agreements, see McKendrick (fn 48) 46. Although this problem has been acknowledged by the courts and in academic writing, the approach is adhered to for reasons of legal certainty, even if some cases do not fit the model (easily) and thus may lead to the analysis seeming very artificial, see McKendrick, ibid 47–49 and Treitel/Peel, ibid para 2-076.

409 Whincup (fn 34) 47 para 2.1. Another term used is 'consensus ad idem', see *Halsbury's Laws Vol 9* (fn 33) para 206.

410 See, eg, Simpson, '*Innovation*' (fn 231) 257.

411 The term 'distance' is used in this sense by Consumer Distance Selling Regulations, see the definition given for the term 'means of distance communication' in r 3(1) as '[…] any means which, *without the simultaneous physical presence of the supplier and the consumer*, may be used for the conclusion of a contract between those parties' (emphasis added), as well as the explanation contained in the second paragraph of the Explanatory Note.

412 Treitel/Peel (fn 65) para 2-077.

413 An excellent example is the case of *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674, in which a sequence of e-mails between the parties regularly containing the phrase 'agreed', but then going on to suggest some modification of an aspect of the contract being negotiated was held to be an agreement in writing of a contract of guarantee, see [22] (Tomlinson LJ). The case will be discussed further in Section b. below. More complicated situations may exist in business, eg, where a contract has apparently arisen 'partly by reason of written exchanges, partly by oral discussions and partly by performance of the transactions', see *Percy Trentham Ltd v Archital Luxfer Ltd* (1993) WL 963649 (official transcript, CA), in which Steyn LJ found a contract to have arisen by these means. On the general analysis of written contracts in terms of offer and acceptance, see *Halsbury's Laws Vol 9* (fn 33) para 283. Apart from contractual negotiations, see the example of two parties eating at a restaurant without 'agreeing' on who will pay, given by McKendrick (fn 48) 50–51.

cism,[414] the offer-and-acceptance model continues to be used as the basic standard. It seems that where the parties have signed a written contract, the need for identifying offer and acceptance will generally not arise;[415] only where a dispute arises in relation to the terms agreed will this aspect be usually looked into.[416]

An agreement is seen as a binding contract when the parties make the agreement with the intention to create a legal relationship (see Section iv. below), and either give consideration for the promise (Section v.) or fix the agreement in the form of a deed (Section b.iii.). In contrast, other requirements as to form (Sections b.ii., b.iv.–b.v., c.) are more of an exception rather than the general rule, so that oral contracts, especially in commercial situations, are often sufficient.[417] In this way, English law implicitly recognises the freedom of form, albeit not universally. The substance of these requirements will now be examined more closely.

Before doing so, it should be noted that the English courts evaluate these requirements using an objective approach, so that the question is not what the parties themselves, but what a reasonable person in the position of the parties intended.[418] This test is used to provide legal certainty and enhance 'commercial convenience':[419] it is easier to predict how a neutral person in a similar position, rather than one or the other of the parties, would interpret a situation. Therefore, what is of importance is

414 See the judicial discussion outlined and the alternatives suggested by McKendrick (fn 48) 47–49.

415 This can be deduced from the opinion of the court in *Blue v Ashley* (fn 174) [50] (Leggatt J), in which a written agreement and the process of offer and acceptance were given as alternative ways of reaching an agreement.

416 This becomes apparent when examining the case law concerning the formation process, as discussed in the subsequent sections.

417 See, eg, Griffith and Harrison (fn 26) 637.

418 More accurately, the court begins from an objective perspective of a reasonable person in the position of the promisee (wanting the promise to be enforced), but it also examines the perspective of a reasonable person in the position of the promisor (wanting the promise not to be enforced), see McKendrick (fn 48) 27. This can be problematic where the parties' conduct cannot be interpreted externally, see the example mentioned in fn 413 above. This approach is different from German legal theory, which applies a subjective standard (see Section B.III.3.a.i.cc) below).

419 See Treitel/Peel (fn 65) para 1-002, who refers to this as the 'objective principle' but admits a certain subjective qualification where, eg, a party knows the facts to be different from their intention.

not the (internal) intention of a party, but the party's actions.[420] There is another important reason for using this test, however: If the courts were to set out to discern the actual intention of the parties, this might lead them, quite often, to hold 'that the parties were not *ad idem*', ie, that the minds of the parties do not meet, so that there is no agreement. Thus, for practical reasons, the parties' 'actual intentions are happily irrelevant'.[421] A similar statement had been made in an earlier case[422] and has since been restated by the English courts, even recently.[423] This objective standard will resurface in relation to various issues, as will be seen in the subsequent discussion.

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420 This was noted by the CA in the case of *Storer v Manchester City Council* [1974] 1 WLR 1403, 1408 (Denning LMR). The issue was whether a sale of land had been concluded without an exchange of contract documents, since the contract form contained a 'subject to contract' clause (this will be discussed in Section b. below). The court held that a contract had been formed, although the form had only been signed by the buyer (plaintiff) and not by the seller (defendant, a town clerk), since the defendant had already expressed their willingness to contract in a signed letter and the use of the form by the defendant was aimed at dispensing with formalities. See ibid 1407–1408 (Denning LMR), 1409 (Stephenson LJ), 1410 (Lawton LJ).

421 *Summit Invest Incorporated v British Steel Corporation* [1987] 1 Lloyd's Report 230 (CA), 1987 WL 492632 (official transcript; Donaldson MR). The case concerned the interpretation of the words 'or for grates and stoves' contained in a clause varying the allocation of payment of fuel costs (generally borne by the charterers) in a form of the New York Produce Exchange used for time charters of ships. The chartered ship in question was not equipped with either grates, nor stoves, and the point at issue was how the cost of fuel (oil) was to be shared between the owner and the charterers of the ship in question. By adopting the approach of placing themselves 'in the same factual matrix as that in which the parties were', the Court found that the variation clause was intended to make the owners liable for 'all fuel used for crew domestic purposes' (official transcript; Donaldson MR, Lloyd LJ, Nicholls LJ).

422 *Smith v Hughes* (1870-71) LR 6 QB 597, 607 (Blackburn J): 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.' The case concerned a sale of oats by sample and also concerned the issue of mistake, which will not be discussed in this dissertation. The facts and extracts from the case can be found in McKendrick (fn 48) 22–25.

423 See, eg, Steyn LJ in *Percy Ltd v Archital Ltd* (fn 413), or *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 1 WLR 753, 771 (Clarke LJSC).

ii. Offer

The first element found in the basic model of a contract is the declaration of intention termed 'offer'. Its definition (see Section aa) below) and differentiation from other statements (Section bb)), as well as its requirements (Sections cc)–dd)) and its effectiveness (Sections ee)–ff)) will be considered subsequently.

aa) 'Offer' Defined

As with the general concept of a contract, there is no universal, explicit definition of an offer[424] — nor of acceptance — in English law. In a recent case, it was held to be 'an expression, by words or conduct, of a willingness to be bound by specified terms as soon as there is acceptance by the person to whom the offer is made'.[425] In academic writing, the term is normally defined as consisting of a statement which expresses both a willingness to enter into a contract with the other party, and which also sets out what each party will undertake to do (or not do), ie, what the terms of the contract are to be.[426] Having said this, the offer need not state all the terms of the contract, as the English courts have the general power to imply reasonable terms that are missing from the agreement; furthermore,

424 It ought to be noted that legislation may not always refer to an offer using that word; it may also be termed, eg, 'order' (reg 12 E-Commerce Regulations).

425 *Blue v Ashley* (fn 174) [52] (Leggatt J). On the aspect of an intention to be bound 'as soon as [the offer] is accepted by the person to whom it is addressed', see Sergio Cámara Lapuente and Evelyne Terryn, *Consumer Contract Law*, in: Micklitz and Stuyck and Terryn (fn 397) 172; Treitel/Peel (fn 65) para 2-002. See also *Storer v Manchester CC* (fn 420) 1409 (Stephenson LJ), 1410 (Lawton LJ). The principle was restated more recently in, eg, *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 CLC 145 (QB), 175 at [75] (Cooke J). This case concerned the sale of an aircraft, in relation to which the issue arose whether the contract was international within the meaning of s 26 Unfair Contract Terms Act 1977 and whether the claimant had acted as a consumer for the purposes of s 12 of the Act. This would have meant that certain limitations of responsibility of liability would be prohibited. Note that the Act no longer applies to B2C cases by virtue of the CRA 2015, see fn 78 above.

426 See McKendrick (fn 48) 44, 45; Treitel/Peel (fn 65) para 2-002; Atiyah, '*Introduction*' (fn 33) 56.

legislation may also provide for implied terms.[427] At the same time, the agreement must fulfil the requirement of being certain, ie, of not being too vague or incomplete.[428]

The offer can be in the form of an oral statement, or that of written messages like letters, fax, or e-mail.[429] The statement does not necessarily have to be made expressly, but can be implied from the conduct of the party,[430] as long as a reasonable person would interpret that party's behaviour as a willingness to be bound.[431] In contrast, inactivity will usually not count as an offer by way of conduct, unless other circumstances in the case (other actions of the party) point to the objective conclusion that the inactivity was an offer.[432] An offer can be directed at one or several specified persons, or be addressed to the public in general ('the world at large').[433] In case of the latter, the issue may arise whether the statement amounts to an offer or whether it is a mere invitation to treat.

bb) Offers and Invitations to Treat

Not every statement or conduct amounts to an offer. English law generally differs between offers and what are known as 'invitations to treat', statements which do not possess an intention by the party making the statement to be legally bound.[434] Instead, the intention is to bargain,[435] to open negotiations,[436] and, as its name suggests, to have the other side make an offer.[437] The distinction between offers and invitations to treat is often difficult in practice, but is an important one, as an offer will lead

427 On implied terms, see Treitel/Peel (fn 65) paras 6-050 et seq. Examples of statutorily implied terms include ss 10–14 SGA 1979, as well as ss 9–11 and 13–14 CRA 2015.
428 See on this generally McKendrick (fn 48) 125–145. More details on certainty will be given in Section cc) below.
429 Richard Stone, *The Modern Law of Contract* (11th edn, Routledge 2015) 37.
430 Atiyah, '*Introduction*' (fn 33) 56; Treitel/Peel (fn 65) paras 2-004, 2-002.
431 Treitel/Peel (fn 65) para 2-002.
432 Ibid para 2-005.
433 Andrews (fn 70) 39.
434 McKendrick (fn 48) 54; Treitel/Peel (fn 65) para 2-006. There may be other situations in which there is no intention to be legally bound, as discussed in Section iv. below.
435 Whincup (fn 34) 47 para 2.2.
436 Stone (fn 429) 38.
437 See Treitel/Peel (fn 65) para 2-006.

to a contract being formed once it is accepted. In contrast, in the case of invitations to treat, the formation process has not yet begun, so that an extra step is necessary here to begin the process.

A series of legal presumptions[438] exist to distinguish invitations to treat from offers, but it is often ultimately the objective intention of the party, not these rules nor the wording of the statement that identifies it as being the former or the latter.[439] According to one legal presumption, advertisements,[440] and similar materials like catalogues or brochures constitute invitations to treat.[441] Similarly, tenders to bid for the supply of goods

438 Both Treitel and McKendrick use the term 'prima facie rule of law'. See Treitel/Peel (fn 65) para 2-007. McKendrick (fn 48) 54 states the reason for the use of such presumptions to be 'certainty in commercial transactions'.

439 See Treitel/Peel (fn 65) paras 2-006–2-007; also see Whincup (fn 34) 48–49 para 2.4.

440 This certainly includes 'offline' advertisements in newspapers or on television, see Stone (fn 429) 43. It might also apply to 'online' advertisements, see ibid 70–72, who interprets the wording of the E-Commerce Regulations to mean that it is the purchaser, not the seller, who makes an offer on a website. Similar: McKendrick (fn 48) 69, who thinks it likely that online advertisements would be treated like other advertisements, ie, as an invitation to treat. McKendirck cites a Singaporean case (which is only of persuasive authority in England, see Section I.2.a.iii. above), *Chwee Kin Keing v Digilandmall.com Pte Ltd* [2004] SGHC 71 (Singaporean High Court), in which such an analogy is made. The facts and extracts from the case can be found in McKendrick, ibid, 34, 69–70, 112–113. Also see Whincup (fn 34) 48 para 2.2, who gives a similar opinion regarding prices displayed online, and goes on to say at para 2.3 that there is no fixed rule on contracts made online. cf Andrew D Murray, *Entering into Contracts Electronically: The Real W.W.W.*, in: Lilian Edwards and Charlotte Waelde (eds), *Law & the Internet: A Framework for Electronic Commerce* (2nd edn, Hart Publishing 2000) 22, stating that online advertisements are 'clear[ly …] invitation[s] to treat unless [they] clearly indicate[… that] the webvertiser intends to be bound upon acceptance. cf again Michael Furmston and Greg J Tolhurst, *Contract Formation: Law and Practice* (2nd edn, OUP 2016) 158–159 para 6.13, who have a stronger opinion with regards to differentiating between statements on websites, arguing that some cases are more akin to advertisements, while others are better treated akin to vending machines. Online transactions are considered in detail in Section D.IV. below.

441 Atiyah, '*Introduction*' (fn 33) 57. A case example is *Patridge v Crittenden* [1968] 1 WLR 1204 (QB) in which it was held that an advertisement in a magazine simply stating 'Quality British [birds…] 25s each' amounted to an invitation to treat, not to an offer. Interestingly, Ashworth J noted at 1207 that '[i]n no place [...] is there any direct use of the words "Offers for sale." I ought to say I am not for my part deciding that that would have the result of making this judgment any different [...]'. This suggests that even if the words had been used, the result

or the provision of services are generally treated as invitations to treat; however, where the advertisement contains a phrase to the effect that the invitor will be bound by the highest or lowest bid, as the case may be, this declaration is, in effect, treated as an offer.[442] Although this presumption is rebuttable by evidence to the contrary,[443] it operates without taking into consideration the subjective intention of the maker of the statement.[444]

Unlike the foregoing examples, vending machines are not invitations to treat, but generally constitute offers.[445] Seeing as the transaction is executed immediately by the user obtaining the product in question after having paid the appropriate amount, the only considerations against this classification are the possible dysfunction of the machine and the desired item being out of stock. Both the functionality of the machine and the availability of the item in question are therefore presupposed.[446]

An exception to this presumptive rule consists of cases of 'unilateral contracts', eg, when a reward is promised for returning a lost article: the advertisement is then treated as an offer instead.[447] The reason is that bargaining in such situations is not expected; the other party will simply act upon the advertisement, so that the statement maker's intention to be legally bound is assumed.[448] The leading case on this is *Carlill v Carbolic Smoke Ball Co*[449], in which the defendant advertised for its product, a 'smoke ball', which purportedly prevented the user from catching influenza or a cold if used according to the instructions, by promising £100 (approx. €12,000

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would still have been that the advertisement constituted an invitation to treat only.

442 For further details, see Treitel/Peel (fn 65) para 2–013.

443 McKendrick (fn 48) 54.

444 Treitel/Peel (fn 65) para 2-007.

445 See *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (CA), 169 (Lord Denning MR, *obiter*), in which it was held that an automatic ticket machine constitutes an offer if 'the proprietor of the machine holds it out as being ready to receive the money'. Acceptance was made by the user in inserting money, see ibid. The case concerned a claim for damages due to an accident having occurred in a car park operated by the defendants. The CA dismissed the appeal and rejected the defendant's claim that an exemption clause freed them from liability for the damage suffered by the plaintiff because the conditions containing the clause had not been incorporated into the contract.

446 Compare Schmidt J (fn 25) 222.

447 Treitel/Peel (fn 65) para 2-010.

448 See ibid.

449 See fn 369 above.

today)[450] to 'any person' who contracted one of the illnesses the product was said to prevent. The plaintiff claimed the reward for having caught influenza despite having used the product as prescribed. The CA found that the advertisement was not an invitation to negotiate, nor a 'mere puff [… but] an offer which was to be acted upon',[451] since the defendants had deposited a sum of £1,000 (approx. €130,000 today)[452] in a bank account, 'shewing [their] sincerity in the matter'.[453]

Invitations to treat also include the transmission of information,[454] or the display of goods in shelves or shop windows with prices.[455] An example of the former situation is the case of *Harvey v Facey*,[456] in which a telegraph by the defendant in response to an enquiry of sale by the plaintiff, stating the lowest price at which the defendant would be prepared to sell the good in question, was not held to be an offer but a simple statement of information.[457] Consequently, the statement of a price alone does not make an offer, so that it is up to the buyer to make an offer to buy at the

450 The worth of £100 in 1893 would be over £10,000 today, see, eg, www.measuringworth.com/calculators/ppoweruk/.

451 *Carlill* (fn 369) 268 (Bowen LJ). Advertisements that constitute 'mere puffs' or 'sales talk' do not entail legal consequences for being too vague or not containing a serious intention to contract, as the language is filled with superlatives or other promises and because no action on part of the addressees is being demanded, see Whincup (fn 34) 20–21 paras 1.7 –1.9. See also Treitel/Peel (fn 65) para 4-006, who states that 'puffs' may be an opinion only. This suggests that a statement will not be binding if it is not one of fact.

452 The worth of £1000 in 1893 would be approx. £110,000 and more today, see fn 450 above.

453 *Carlill* (fn 369) 268 (Bowen LJ). The words cited are those of the defendants' advertisement, see ibid 257. A similar case was *Lefkowitz v Great Minneapolis Surplus Stores* (1957) 86 North Western Reporter, 2nd Series 689, in which the Supreme Court of Minnesota found a newspaper advertisement for fur coats at a bargain price to constitute an offer by the defendant, as it was 'clear, definite, and explicit, and left nothing open for negotiation.' This had been accepted by the claimant in fulfilling the 'first come first served' condition written in the advertisement. The court held further that the defendant could not change the offer after it had been accepted, while it affirmed a general right of the offeror to alter the offer before acceptance is made.

454 Treitel/Peel (fn 65) para 2-006.

455 Ibid para 2-009. Slightly critical on maintaining this traditional interpretation: Stone (fn 429) 41–42.

456 [1893] AC 552 (Privy Council).

457 For details on the exchange of correspondence, see McKendrick (fn 48) 55.

stated price.[458] With regard to products displayed on shelves in self-service shops, the court in the leading case, *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd*[459], held that the contract between the customer and the shop did not come into being until the customer indicated the goods that they wished to purchase (thus making an offer) and the shop, through one of the shop assistants, accepted this (at the cashier). Under this general construction, the contract will not automatically arise when the customer picks up an item; indeed, the shop assistant has control over the process and may decide to reject the customer's offer.[460] Thus, in a self-service shop, the displaying of goods will normally be an invitation to treat, not an offer;[461] although it ultimately depends on the intention of the party making the advertisement or display.[462]

In cases where the nature of the goods do not allow a subsequent change of mind, like petrol having been filled into a car, the best analysis of the process is suggested to be that the petrol station offers the fuel at a set price, which the customer accepts upon filling his tank.[463] Although one might expect restaurants to follow the same analysis, since the payment is made by the customer after having consumed the food, the cases are arguably analogous to shops. This is because food menus in restaurants are deemed as invitations to treat in academic circles.[464] Accordingly, the customer makes an offer when placing an order, which the waiter — just like the shop assistant — may accept or reject. The situation with food that is taken out rather than being consumed in a restaurant, or with delivery services, would presumably be treated the same, so that the menus ought to be classified as invitations to treat. This would only be consistent, given

458 In effect, the court in *Harvey v Facey* (fn 456) held the purported acceptance by the appellants as an offer, which would have been, but was not, accepted by the respondent in order for a contract to arise, see ibid 555.

459 [1953] 1 QB 401 (CA). The relevant extract of the decision (the opinion of Somervell LJ) is quoted in McKendrick (fn 48) 63–64.

460 See Andrews (fn 70) 41 para 3.04, who also gives a list of the different reasons that the shop assistants may use, such as the person intending to buy tobacco or alcohol being a minor.

461 Another key case is *Fisher v Bell* [1960] 3 WLR 919, [1961] 1 QB 394, in which it was likewise held that the displaying of a flick knife with a price indication in a shop window was not an offer of sale but an invitation to treat under general English contract law, see 394–395, 399 (Parker LCJ).

462 See Treitel/Peel (fn 65) para 2-009.

463 This has been suggested by Whincup (fn 34) 48 para 2.3.

464 Compare McKendrick (fn 48) 50–51.

that a delivery service's menu displayed online or in paper form arguably counts as an advertisement and thus constitutes an invitation to treat.

In relation to sales by auction, s 57 subs 2 SGA 1979 provides that such a sale 'is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner'. Consequently, the offer is made by the bidder and this is accepted by the auctioneer when acting in the customary manner of completing the auction.[465] This means that the auction (lot) itself constitutes an invitation to treat.[466]

Another complex area relates to (public) transport. Operators of railway and bus services have in the past been found to make offers by advertising the operating timetable or simply by running the service.[467] The offeree would accept this proposal through some conduct which showed their willingness to contract, eg, by getting on the bus.[468] It is submitted that, at least in cases where the ticket is purchased prior to boarding the vehicle, the service provider could be said to be making an invitation to treat only, whereas it is the customer who makes the offer when making a booking. This is because the contract in such cases is said to have been concluded when the service provider either accepts the booking, or when the ticket is issued.[469] Indeed, the terms and conditions of some English

465 Treitel/Peel (fn 65) para 2-008.

466 See McKendrick (fn 48) 76. This is the situation of auctions with a reserve price. For a discussion of the situation without reserve price, see ibid 76–80, noting that there is an academic divide on the issue whether the auctioneer makes an offer when advertising the auction without reserve price, or whether the offer is made only when the auction for the object is conducted. While not deciding this point, the CA in *Barry v Heathcote Ball & Co (Commercial Auctions) Ltd* [2000] 1 WLR 1962, 1965–1966 followed the *obiter dictum* in *Warlow v Harrison* (1858) 1 Ellis and Ellis 295, 120 ER 920 that a collateral contract arose between an auctioneer and a bidder to sell to the highest bidder. For further details on the case, see McKendrick, ibid.

467 For trains, see, eg, *Denton v Great Northern Railway Co* (1856) 5 Ellis and Blackburn 860 (QB), 119 ER 701, 703–704 (Campbell LCJ). Cf the view expressed by the other sitting judge, Crompton, at 705, who doubted whether any consideration had been provided by the plaintiff in this case and consequently doubted the existence of a contract. The issue of consideration will be discussed in Section iv. below. An extract of the case can be found in Courtney Stanhope Kenny, *A Selection of Cases Illustrative of the Law of Contract* (CUP 2014) 14–16. For buses, see, eg, Treitel/Peel (fn 65) para 2-012 in fn 61.

468 Treitel/Peel (fn 65) para 2-012.

469 A case example of the latter is *Daly v General Steam Navigation Co (The Dragon)* [1979] 1 Lloyd's Rep 257 (QB). See also the general terms and conditions for carriage of the bus service provider Flixbus at www.flixbus.co.uk/terms-and-conditions-of-carriage, namely, at '3.3.1', where it is stated explicitly that the

train, subway, and bus operators state that a 'binding contract [...] comes into effect between you and the [service provider] when you purchase a Ticket'.[470] The analysis of the timetable as an invitation to treat therefore seems to be closer to practical reality. It would also be in line with the thought that the provision of information discussed above in the form of, eg, catalogues, does not constitute a legally binding act.[471] Moreover, the consideration underlying the QB decision from 1856[472] of needing to protect a person who acts in reliance of the timetable can be assumed to be a lot less pressing today, seeing as the frequency of train (and bus) services is considerably higher now than it was 150 years ago.

Similarly, when hiring a private hire vehicle (private taxi), it is the customer who makes the offer.[473] The situation is not as clear with taxis operating under a public licence (termed cabs[474] or hackney carriages[475]). Applying the general considerations for distinguishing between offers and

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information displayed on the website is 'a non-binding online catalogue which prompts potential passengers to submit offers', so that the offer is made by the customer in booking a journey and is accepted by the company when issuing the ticket or sending an 'acceptance confirmation'. See further Treitel/Peel (fn 65) para 2-012.

470 National Rail, *National Rail Conditions of Travel* (11 March 2018) 3, 4, available online at www.nationalrail.co.uk/times_fares/ticket_types.aspx#National%20Rail%20Conditions. See also https://uk.megabus.com/conditions/conditions-of-carriage-megabus.com at '3. Introduction'. Compare www.nationalexpress.com/en/help/conditions-of-carriage at '2.3 Your ticket', where it merely states that '[y]our ticket is a record of our agreement to carry you […]'. A similar term is found in the general conditions of carriage of EasyBus, see www.easybus.com/en/terms-and-conditions at '2.5 Your Booking Confirmation'. cf Transport for London, *Transport for London Conditions of Carriage – Bus and Underground Services* (2 September 2018) 2, available online at https://tfl.gov.uk/corporate/terms-and-conditions/ticketing-and-travel-conditions-of-carriage?intcmp=3774, which seems to suggest that a contract is made when the passenger 'travel[s] on our services, having bought a ticket [...]'.

471 See also fn 469 above.

472 *Denton* (fn 467) above.

473 This can be deduced from the description of the booking process using the service Gett, see https://gett.com/uk/legal/terms/ at '3.1': 'If you [...] select the order button[, ...] you will be connected with a Driver for Transportation Services and this shall constitute an Order. By selecting the order button, you will enter into a contract for Transportation Services with a Driver [...]'.

474 See, eg, Transport for London, which licences cabs in London, see https://tfl.gov.uk/modes/taxis-and-minicabs/what-to-expect-from-your-journey. No information is provided on the contracting process.

475 See, eg, ss 37 et seq Town Police Clauses Act 1847.

invitations to treat, it would appear that a cab, at least when waiting at a taxi rank, constitutes an offer, which the customer generally accepts upon boarding the vehicle. This has the following reasons: First, publicly licenced cabs are normally obliged to transport a potential customer, unless a 'reasonable excuse', such as the customer being intoxicated, exists.[476] Thus, cab drivers cannot usually reserve themselves the right to decide on whether to contract with the other party, which means one typical characteristic of invitations to treat is missing. Secondly, the rates, that is, the usual price, is fixed by the operator and is usually non-negotiable.[477] Thus, the other typical characteristic of an invitation to treat, negotiability, is missing as well. Taken together, this leads to the result that a cab would normally constitute an offer. While this is the situation for the discussed group of cases, it is ultimately a question of the facts of the case whether a statement is deemed to be an offer, or a mere invitation to treat.[478]

cc) Certainty of Offer, Terms

A statement amounting to an offer must be certain. In this regard, the case of *Carlill* is interesting, since the court dismissed the defendants' argument that the advertisement was too vague to constitute an offer.[479] This is in line with the doctrine that English law will only enforce contracts that are certain, since the court has to be able to determine what the agreement is.[480] This principle has several reasons. First, a proprietary right under

476 This is implicit in s 53 Town Police Clauses Act 1847, which foresees a penalty where a driver refuses to carry a customer without an excuse. The example was given in *Starline and Wessex Taxis Ltd v The Commissioners for Her Majesty's Revenue & Customs* (London Tribunal), 2007 WL 2187088 (official transcript) [4] (Mr Hellier). This seems not to be true for cabs that are not at a taxi rank, at least when ordered online or by telephone; however, it seems that refusals are rare in practice, as this 'could be commercially damaging'. See *Starline*, ibid.

477 This applies to the usual operating area of the cab. In case of a city such as London, this would be within Greater London. See on this and on the normal rates for a London cab https://tfl.gov.uk/modes/taxis-and-minicabs/taxi-fares.

478 Compare Schmidt J (fn 25) 195.

479 *Carlill* (fn 369) 266–268 (Bowen LJ).

480 Atiyah, '*Introduction*' (fn 33) 42–43. The certainty requirement encompasses the aspects of vagueness and of incompleteness of a contract. The former relates to a contract's term being too ambiguous or unclear while the latter means that certain — important — points are not stipulated, see Treitel/Peel (fn 65) 54–69 for details. The second aspect will not be considered further. Suffice it

English law can only arise if the thing in question has been sufficiently identified, as 'a property right is exigible against a thing'.[481] Put another way, a property right does not exist unless attached to something.[482] As a consequence, there has to be certainty as to the subject matter of a transaction.[483]

Secondly, certainty becomes necessary due to the accepted principle that the courts will not make a contract for the parties; but as long as there is 'sufficient evidence' that an agreement exists between the parties, the court will find the contract enforceable.[484] Thus, not all cases of uncertainty will lead to the agreement being unenforceable. As the parties cannot be expected to foresee every possible future development, the courts will enforce contracts which lay down the 'essential terms' ◷ either directly

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to restate that legislation may provide default terms and that the courts have certain powers to imply terms (see fn 427 for further references).

481 Michael Bridge, *Certainty, Intention and Identification in Personal Property Law*, in: Paul S Davies and James Penner (eds), *Equity, Trust, and Commerce* (Hart Publishing 2017) 87.

482 Section 16 SGA 1979 contains a stipulation in this vein, so that property will not pass under a commercial transaction in 'unascertained' goods 'unless and until the goods are ascertained.' The Act gives no definition of the term; however, it is interpreted to mean that the goods are identified, usually by an act of factually 'earmarking' them, see Bridge, '*Certainty*' (fn 481) 93. While this is true, if a sale is for a specified quantity of unascertained goods, this is unproblematic where the source of the goods is an identified bulk (s 20A subs 1(a) SGA 1979), ie, an identified mass of one kind of interchangeable goods contained in a defined space (s 61 subs 1 ibid). Similarly, the transfer of only a portion of property, ie, a share of goods, is possible under the SGA, provided that the share qualifies as 'specified goods' due to being 'specified as a fraction or percentage' (ibid). For a more detailed discussion of this topic, see Bridge, '*Certainty*' (fn 481) 93–96. cf *Everwine Ltd and Ors v The Commissioners of Customs and Excise* [2003] EWCA Civ 953, 2003 WL 21353475 (official transcript), in the case of which the issue of ascertaining goods held in a warehouse under rotation numbers with no physical movement upon being sold to other users of the warehouse is discussed at length by Keene LJ. The court found that goods had been ascertained where the whole or remainder of goods owned by the appellant in a rotation lot had been sold; but that where not all the goods in a lot were exhausted by sales, property had not passed as per s 16 SGA 1979, as it was not possible to tell which out of the goods belonged to the appellant and which belonged to the new owner(s). See [15] et seq of the decision.

483 See Bridge, '*Certainty*' (fn 481) 87. Problems may arise in situations where the thing in question is either not ascertained or not identified at the time of contracting, so that issues of property of a share of things may arise. See fn 482.

484 McKendrick (fn 48) 124–125.

or by providing ways (mechanisms, criteria) of determining a term.[485] In this way, the trend is for the courts to supplement *a priori* incomplete contracts, especially in commercial contexts.[486] The situation is not clearly regulated, however, and the case law is full of conflicting rulings.[487]

In this sense, one related issue is which terms are essential to a contract. This depends on the situation. As the price would be expected to be an indispensable contract term, it may be surprising to discover that the SGA 1979 (s 8 para 2) and the Supply of Goods and Services Act 1982 ('SGSA 1982', s 15 para 1) provide for a default rule where a contract is silent on the subject: a reasonable amount of money must be paid for the goods or services respectively.[488] Other terms like the contract's commencement date may also be essential in this sense.[489] Nevertheless, the court will typically find a contract enforceable, even if it is not entirely certain, as long as it finds that the parties intended to be bound by the agreement.[490]

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485 Atiyah, '*Introduction*' (fn 33) 45; see further Treitel/Peel (fn 65) paras 2-097–2-098.

486 Atiyah, '*Introduction*' (fn 33) 45. He also states that the courts have more references to draw upon when filling the (intentional or unintentional) gaps in contractual terms of commercial agreements, namely, past dealings of the parties, as well as commercial customs or usages, see ibid 45–47. Also see McKendrick (fn 48), who explores the tools available to the court in detail at 136–143: using the mechanisms provided in the contract; referring to default rules contained in statutes, like the SGA 1979; severing vague or uncertain terms if these are severable in order to maintain the remainder of the contract; implying terms, where necessary.

487 McKendrick (fn 48) 143. This is especially true for two of the leading cases in this area: *May and Butcher Ltd v The King* [1934] 2 KB 17n (HoL) takes a restrictive approach, while *Hillas & Co Ltd v Arcos Ltd* (1932) 147 Law Times Reports (LT) 503 (HoL) is more lenient and arguably more in line with contemporary commercial requirements. Both cases are discussed by McKendrick, ibid 126–133.

488 See Treitel/Peel (fn 65) para 2-086.

489 The lack of such a clause in a lease contract was fatal to the contract's existence in *Harvey v Pratt* [1965] 1 WLR 1025 (CA), see 1026–1028 (Lord Denning MR, Davies LJ, Russell LJ). Similarly, it was held in the case of *Blue v Ashley* (fn 174) [97] that a period needed to have been specified in which the target (a certain share price) ought to have been achieved and for how long the target ought to be maintained (Leggatt J), presumably in order to have certainty on when performance could be seen to have been completed.

490 See Treitel/Peel (fn 65) para 2-087. The reason is that English courts will avoid finding a contract ineffective if the parties accepted it as being effective, see McKendrick (fn 48) 125.

dd) Communication of Offers

An offer can only have an effect if it is received, since it must be known to the recipient for that person to be able to act upon it.[491] Thus, the offer must be communicated in some form first, either through an advertisement addressing several people (potentially the whole world) like in the case of *Carlill*, or directly to the intended recipient.[492] In line with this thinking, English law treats two offers with identical terms made by each party to the other ('cross-offers') as not making a contract if the parties do not communicate after having received each other's offer, because the parties did not know of the other party's intention at the time of making their declaration of intention. Consequently, there can be no acceptance.[493]

ee) Coming into Effect of Offers: The Mailbox Rule

Following from the communication requirement, an offer is generally effective upon receipt by the offeree.[494] Thus, a person who acts in a way that corresponds to the offer but who had no knowledge of it is not considered as having acted *upon* the offer, and therefore did not accept the offer. Consequently, it is said that no agreement has arisen between them.[495] Having said this, it has been stated generally that a message containing an offer need not actually be read; receipt, ie, the possibility of having knowledge of the message, is sufficient for its effectiveness.[496] The question

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491 Treitel/Peel (fn 65) para 2-015.

492 Whincup (fn 34) 49 at 2.5. cf the opinion of Cooke J in *Air Transworld Ltd v Bombardier Inc* (fn 425) at [75], who stated that the offer itself and its communication 'may be seen as distinct'. He gives the case of unilateral contracts, in which the fact of the offer being perceived (read if made in paper form) by anyone is irrelevant for the offer having been made.

493 See Treitel/Peel (fn 65) para 2-049.

494 See Stone (fn 429) 63; *Halsbury's Laws Vol 22* (fn 172) para 243. Compare Treitel/Peel (fn 65) para 2-015. See also the *obiter dictum* by Kay LJ in the case of *Henthorn v Fraser* [1892] 2 Ch 27 (CA), 37: 'An offer to sell is nothing until it is actually received.'

495 See Treitel/Peel (fn 65) para 2-049; McKendrick (fn 48) 128. Compare the situation of cross-offers, mentioned in Section dd) above.

496 This can be deduced from the ruling in the case of *Stidolph v American School in London Educational Trust Ltd* (1969) 20 P&CR 802 (CA) in relation to a notice under the Landlord and Tenant Act 1954, which the claimant (tenant) had received but nevertheless claimed partial ignorance of. Edmund Davies LJ

then becomes at which point in time something is deemed as having been received.

While there seems to be no discussion of when exactly something is seen as received with respect to offers, under a general legal presumption, letters are deemed to be received if they are addressed correctly, posted, and not returned.[497] Therefore, letters are deemed to be received when having been inserted into the recipient's mailbox. Furthermore, the Civil Procedure Rules 1998, SI 1998/3132 ('CPR 1998') lay down presumptive points in time at which documents are deemed to be served for the purposes of civil litigation. Accordingly, documents are deemed to be served: on the second day after having been posted when sent by first class post, or where being transmitted by 'other electronic means'; the next day when delivered directly (leaving it at the person's address); on the same day if the document is sent by fax before 4 pm on a business day; on the next business day if it is sent by fax after 4 pm or on a non-business day.[498] For fax communication, it seems that the relevant point in time is the completion of the transmission.[499] The meaning of 'transmission' has been

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stated at 805–806 that the objective of the presumption that letters addressed correctly, posted, and not returned are deemed as having been received by the recipient would be defeated if the recipient were allowed to claim ignorance of the letter's contents. Denning L MR expressed a similar opinion at 805, adding that destroying the unopened letter would not alter its effectiveness. In relation to fax, see *Anson v Trump* [1998] 1 WLR 1404 (CA), 1411 (Otton LJ; quoted subsequently). It can be concluded from this that knowledge of the content of the message is irrelevant where a letter or fax has been actually received. The same should be true for e-mails or statements displayed on websites, though this is not discussed in academic literature. On knowledge being irrelevant, cf Stone (fn 429) 63, who notes that the recipient must be 'aware' of the offer, which might imply 'knowledge' being required; cf also Percy H Winfield, *Some Aspects of Offer and Acceptance* (1939) 55 LQR 499, in particular 503.

497 See, eg, *Stidolph v ASLET Ltd* (fn 496) 805 (Edmund Davies LJ). Despite this presumption, the Royal Mail in the UK offers a special service 'Royal Mail Signed For', whose one highlighted features is 'proof of delivery including a signature from the receiver', see www.royalmail.com/personal/uk-delivery/ signed-for-1st-class and www.royalmail.com/personal/uk-delivery/signed-2nd-class. The meaning of 'posted' will be explored in relation to acceptance in Section iii.cc) below.

498 Rule 6.7 (1) CPR 1998. See also ibid (2), which stipulates that documents served after 5 pm on a business day or on another day will be deemed to have 'been served on the next business day.'

499 This can be deduced from the wording of example 3 (r 10.4, Deemed service of a document other than a claim form) of Ministry of Justice, *Practice Direction 6A – Service within the United Kingdom* (updated 30 January 2017): 'Where the

interpreted in light of r 5 (2B) Rules of the Supreme Court (RSC) Order 65 in the case of *Anson v Trump*[500]. The court held that 'transmission' was

> the process from the moment that the document is dispatched by the sender to a time when the complete document has been received into the recipient's fax equipment. […] The fact that it may remain in the fax memory before being printed or read is to my mind irrelevant.[501]

While these rules relate to actions in court, they hint at least as to what time frame might be deemed reasonable in a general context. With regard to e-mails, the Law Commission has noted that these 'need only be available to be read; [they] need not actually be read in order to be effective.'[502] Accordingly, e-mails ought to be deemed to be received when they have reached the addressee's mail box (provider).[503]

Similarly, offers made online are deemed to be received when they can be accessed. This is laid down in r 11(2)(a) E-Commerce Regulations, whereby the provision generally speaks of an 'order' as an offer (r 12 ibid) being made by electronic means other than by e-mail or 'equivalent individual communications' (see r 11(3) ibid). It can be deduced from r 11(1)(b) that the usual process of the offer will be a customer going through a set process on the website of the seller or service provider, towards the end of which the customer must be able to verify and alter 'input errors'. The 'placing of the order' will then be made by clicking a button that confirms

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document is sent by fax on a Saturday and *the transmission* of that fax *is completed* by 4.30 pm on that day, the day of deemed service is the following Monday (a business day)' (emphasis added). The Practice Direction is available online at www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06a.

500 See fn 496 above.

501 *Anson v Trump* (fn 496).

502 See Law Comission, *Electronic Commerce: Formal Requirements in Commercial Transactions* (advice paper, 2001; hereinafter 'Formal Transactions Advice Paper') at 3.21–3.22.

503 Compare Stone (fn 429) 70. For a short description of the sending process of e-mails, see Murray (fn 440) 18. A distinct issue is when the e-mail can be expected to have been read, so that Stone, ibid, argues that e-mails ought to be deemed to be received once the expected time for checking e-mails has passed. It ought to be noted that he supposes that e-mails are checked only one or two times each day. With the advance of smartphones, which allow access to e-mails outside the home, expecting a higher rate for checking e-mails might be closer to current reality.

that the customer agrees to the terms displayed.[504] Despite the Regulations stating that an order under r 11(1)(a) need not be an offer, the fact that the service provider must acknowledge the order indicates that it is the customer who makes the offer and the service provider who accepts it.[505]

Two related issues stem from the question of *where* and *how long* an offer is legally effective. This relates to the time frame during which an offer can be said to be 'open' and so can be accepted by another party. The first part of this issue is simple: an offer sent via postal mail service is made at the place from which it is sent (posted).[506] Arguably, this will also be true for offers made by other means, including e-mail or online; however, there has been no discussion of this.

ff) Loss of Effect of Offers

The second issue as to how long an offer is effective becomes trickier, since it relates to the question of when an acceptance is effective. The latter aspect will be discussed in the following section (iii.cc)). As the two are not wholly dependent, however, a number of points can be observed here. Before addressing this question, it is worth noting that if an offer that is no longer effective is purportedly accepted, the offeree's act does not constitute acceptance but amounts to a new offer, identical to the original offer.[507] In this case, the contracting process begins anew and the original offeror becomes the party to accept or reject the new offer.

Where an offer states a fixed term for acceptance ('firm offer'),[508] this period will be the time during which it can be accepted. After the lapse of the stipulated period, the offer is said to have expired,[509] or terminated.[510] If no expiration date is given, the offer will no longer be valid after a reasonable period has passed, whereby the determination of 'reasonable'

504 Stone (fn 429) 72. See also Murray (fn 440) 19, who likens the process of clicking the button to 'taking the goods to the cash register in a shop, except that the cashier will usually be a computer instead of a person.'
505 See Stone (fn 429) 72.
506 Treitel/Peel (fn 65) para 2-015.
507 Ibid para 2-062 only refers to a 'withdrawn offer', but it is submitted that the situation should be the same if the offer was no longer 'open' to being accepted, eg, through lapse of the specified acceptance period.
508 Ibid para 3-162.
509 Atiyah, '*Introduction*' (fn 33) 47.
510 McKendrick (fn 48) 136.

depends on the circumstances.[511] This also seems to be true for offers made electronically. Having said this, it would seem that such orders are not open for a long period of time, because the recipient has to acknowledge an electronic order 'without undue delay' (see r 11(1)(a) E-Commerce Regulations). There is, however, no further explanation of this in the Regulations.

In general, the speed of transmission of the offer to the offeree may have an impact on the length of time for which the offer will be effective: where the offeree receives the offer shortly after it was sent out by the offeror, an equally swift reply (acceptance) may be expected.[512] Similarly, in cases where the offeree's conduct by itself is not sufficient to constitute acceptance, eg, because the parties stipulated a different method of acceptance, the offeree's act in response to the offer can nevertheless have the effect of extending the period of time that would normally be reasonable in terms of leaving the offer open to being accepted.[513] Where no actual time-period but some condition is (implicitly) stipulated as the termination of the offer, the offer will expire through the fulfilment of that condition.[514]

Before the offer is accepted by the offeree, an offer can lose its effectiveness if it is revoked by the offeror.[515] This revocation has to be explicit;

511 Atiyah, '*Introduction*' (fn 33) 47–48, who states that with, eg, perishable goods, the period will be short, while it may be longer if the offeror leads the offereee to believe by his conduct that the offer is still valid. See also McKendrick (fn 48) 136. Conversely, the offeree will be given more time to consider offers in transactions involving, say, land, see Whincup (fn 34) 50 para 2.8. If the arrival of the offer is delayed through the offeror's fault, eg, due to indicating an incorrect address leading to a misdirection of the letter, the delay will not invalidate the offer, see Treitel/Peel (fn 65) para 2-015.

512 See, eg, *Quenerduaine v Cole* (1883) 32 Weekly Reporter (WR) 185, in which the offer was sent as a telegram. cf Treitel/Peel (fn 65) 30 para 2-033.

513 Treitel/Peel (fn 65) para 2-066. The methods of acceptance will be discussed in Section iii.bb) below.

514 Ibid para 2-067.

515 Atiyah, '*Introduction*' (fn 33) 49, who states that this is possible even where the offer states a time-period for acceptance, if no consideration has been given by the offeree for the offer. See also McKendrick (fn 48) 135–136 and Treitel/Peel (fn 65) para 3-162, both citing the case of *Dickinson v Dodds* (1876) 2 Chancery Division 463 (CA) as authority. Something similar was said by Lindley J in the case of *Byrne & Co v Van Tienhoven & Co* (1880) 5 Common Pleas Division (CPD) 344 (HC). This promise of leaving the offer open for acceptance for a time can be made revocable if consideration is provided, see Section v.aa) below.

it will not be implied from conduct that is inconsistent with the offer.[516] In the case of unilateral contracts, this means the offeror can only revoke the offer before the offeree begins to act in accordance with it.[517] The revocation only becomes effective upon reaching the offeree, whereby this principle is altered where businesses are concerned, so that the revocation only takes effect from the point in time at which it would normally be read, ie, within normal business hours.[518] It is due to this principle that, where an overlap in time occurs between the notice of revocation and of acceptance reaching their respective recipients, the former must arrive before the declaration of acceptance is sent out in order for the offer to be terminated. This rule was laid down in the case of *Byrne v Van Tienhoven*,[519] in which the revocation of the offer was sent out by the offeror before the offer itself reached the offeree, yet it arrived only after the latter had sent out their acceptance of the offer. The court held the offer to be effective for reasons of 'both legal principles, and practical convenience', so that an offeree can accept an offer without having to worry whether it might have been revoked without their knowledge.[520] Knowledge by the offeree of the revocation is thus essential, meaning that the revocation has to be successfully communicated to, ie, actually reach the offeree, in order to be effective.[521] At the same time, the revocation need not be communicated by the offeror directly: information provided by a third party considered to be a 'reliable source' is sufficient.[522]

516 Treitel/Peel (fn 65) para 2-059.

517 McKendrick (fn 48) 127. This is due to the way in which acceptance takes effect in unilateral contracts, which will be discussed in Section ii.cc) below.

518 See ibid 132. This is true even if the offeree does not read the notice of revocation when it arrives, unless the offeror knew that the offeree was not actually present at the time of the revocation's arrival, Treitel/Peel (fn 65) para 2-061.

519 See fn 515. See also *Henthorn v Fraser* (fn 494) 32 (Herschell L).

520 See the opinion of Lindley J in *Byrne v Van Tienhoven* (fn 515) at 348–349.

521 See Treitel/Peel (fn 65) para 2-059.

522 Ibid para 2-060, who is critical of this rule. Also critical: Whincup (fn 34) 50–51 para 2.10; Atiyah, '*Introduction*' (fn 33) 49. An example of such a reliable source could be the offeree's agent, like in the case of *Dickinson v Dodds* (fn 515). The facts of the case and extracts from the judgment can be found in McKendrick (fn 48) 133–135.

iii. Acceptance

The recipient of an offer has a choice: they can either reject or accept the offer. While a rejection will terminate the offer,[523] acceptance will lead to the formation of a contract. This section will consider the latter choice, this being the second basic element of a contract.

aa) 'Acceptance' Defined

Acceptance has been defined in academic literature as a 'final and unqualified expression of assent to the terms of an offer'.[524] There are two aspects to this definition that need to be considered. First, the statement of acceptance has to show the offeree's willingness to be bound.[525] This requirement is straightforward and relates to the issue that not all statements made by a person will amount to a declaration of intention, ie, here, acceptance. Thus, a mere acknowledgement of the offer or of its receipt is not automatically acceptance as it is neither 'final' nor an 'assent'.[526] In contrast, there may be instances in which the word 'acknowledgment'

523 Treitel/Peel (fn 65) para 2-063. Like other statements of intention, the rejection has to be communicated to the offeror to be effective, see ibid at 2-063. Atiyah, '*Introduction*' (fn 33) 48 notes that the terminated offer can be renewed by the offeror, thus practically reviving it.

524 McKendrick (fn 48) 90; Treitel/Peel (fn 65) para 2-016. See further *Air Transworld Ltd v Bombardier Inc* (fn 425) 176 at [79] (Cooke J). cf *Blue v Ashley* (fn 174) [50] (Leggatt J), where it is stated that acceptance normally means a promise to do something in return for another promise given by the offeror; however, that this is not true in instances of unilateral contracts, in which the required act is simply performed.

525 This has to be contrasted with the offeree's motive in accepting. The motive does not have to be primarily to accept the offer, as long as 'the existence of the offer plays some part, however small, in inducing a person to do the required act'. This will be sufficient to constitute acceptance, see Treitel/Peel (fn 65) para 2-051. An example given there is *Carlill* (fn 369), who is presumed to have been primarily motivated to use the smoke ball to keep from becoming ill.

526 See Treitel/Peel (fn 65) para 2-016.

means acceptance.[527] Similarly, a conditional acceptance is not sufficient ('unqualified').[528]

Secondly, acceptance must relate to the offer. It was already noted above that an offeree must act upon the offer, rather than in accordance with but ignorant of the offer.[529] Therefore, the declaration of acceptance has to identify the offer that is being accepted.[530] Furthermore, the offeree's response must mirror the terms contained in the offer ('the terms proposed by the offeror').[531] Consequently, if the offeree varies the terms of the original offer, this does not constitute acceptance but a rejection of it and will be considered a new offer (a counter-offer).[532] This notwithstanding, it is not necessary to use the exact wording of the offer. Moreover, it is

527 See, eg, the interpretation by Maugham LJ in the case of *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, 405–406, according to which the formation was said to have been effected through an order form on the one hand and an order confirmation on the other. For the facts and dicta of the case, see Section b.iv.aa) below. See also r 11 E-Commerce Regulations, which seems to use the terms 'order' and 'acknowledgement' as meaning 'offer' and 'acceptance'. A similar interpretation is made by Treitel/Peel (fn 65) para 2-016. cf *The UK's E-Commerce Regulations* (Pinsent Masons LLP, guide 2013), available online at www.out-law.com/page-431, where it is stated at 'Placing of the order' that sellers do not need to accept an order when acknowledging it. Similar: Stone (fn 429) 72.

528 Atiyah, '*Introduction*' (fn 33) 50, who draws a distinction between conditional acceptance and conditional contracts, ie, between 'I agree to the offer if…' and '[A] (and [B]) will do [X] if [Y] occurs'. The latter is permitted at common law.

529 See Section ii.dd) above.

530 Treitel/Peel (fn 65) para 2-016.

531 See McKendrick (fn 48) 81. Stone (fn 429) 51 uses the analogy of jigsaw puzzle pieces. Various examples of unmatching declaration of offer and acceptance are given by Treitel/Peel (fn 65) para 2-019, all of which relate to the contract's basic terms, ie, the price or goods, etc.

532 McKendrick (fn 48) 81; Treitel/Peel (fn 65) paras 2-063, 2-019. Problems arise in distinguishing counter-offers from mere enquiries by the offeree, which do not amount to counter-offers, see Whincup (fn 34) 51 para 2.14. The phrasing of the statement can be decisive for this distinction, as shown in the case of *Stevenson, Jaques & Co v McLean* (1880) 5 QB Division 346, where the offeree's telegram in reply to the offer was held to be 'a mere enquiry' (ibid 350, Lush J) and neither counter-offer nor rejection. It stated: 'Please wire *whether you would accept* forty for delivery over two months, or if not, longest limit you would give' (emphasis added). It was held that since the defendant did not communicate their intention to withdraw the offer and that the cited telegram was no rejection, the plaintiffs had accepted the offer and communicated the same before having received the defendant's notice indicating that the offer was no longer valid. See 348–352 of the decision (Lush J).

equally permissible to express terms that, while not included in the offer, would have been implied by law.[533]

bb) Communication and Method of Acceptance

In order for the statement of acceptance to be legally effective, it has to be communicated.[534] Moreover, this communication must normally be directed at the offeror, so that he *can have* knowledge of the declaration of acceptance.[535] There are two instances in which communication may not be necessary: when there is a unilateral contract; or where the acceptance requirement is waived, expressly or impliedly, in the offer.[536] Normally, acceptance will be by conduct in such instances, ie, through a positive act on part of the offeree.[537] Consequently, silence or inactivity is not generally treated as acceptance in English law, because it does not constitute 'positive conduct' and is usually equivocal in terms of its interpretation.[538]

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533 Treitel/Peel (fn 65) para 2-019.

534 Atiyah, '*Introduction*' (fn 33) 51. cf *Air Transworld Ltd v Bombardier Inc* (fn 425) [79], in which Cooke J makes the distinction between a declaration of acceptance and its communication. As with offers, he gives the case of unilateral contracts, in which the carrying out of the required act is sufficient without prior communication.

535 McKendrick (fn 48) 110. See further Treitel/Peel (fn 65) para 2-024. Whether the offeror actually has to have knowledge of the acceptance, eg, by hearing or reading the offeree's statement, will be discussed subsequently.

536 An example of an implied waiver would be a stipulation that acceptance can take the form of acting consistently with the offer (acceptance by conduct), see Treitel/Peel (fn 65) para 2-028. But see Atiyah, '*Introduction*' (fn 33) 51, who is sceptical of contracting parties being able to waive the communication requirement for acceptance.

537 In the case of *Marshall v N M Financial Management Ltd* [1997] 1 WLR 1527 (CA) between an agent (plaintiff) and his former principal (defendant), it was held that a conditional clause for renewal of the commission in an agency contract was a unilateral ('if') contract, since the agent had not promised to fulfil the conditions; however, that such performance would constitute both acceptance of the offered remuneration (commission) and consideration for the promise by the defendants to pay it, see ibid 1533–1534 (Millett LJ). This principle of unilateral contracts being formed through an exchange of a promise and performance has recently been confirmed in *Rollerteam* (fn 173) [45] (Henderson LJ). See generally Treitel/Peel (fn 65) paras 2-028–2-029. Consideration will be discussed in Section v. below.

538 McKendrick (fn 48) 115; Treitel/Peel (fn 65) para 2-044. This rule was laid down in the case of *Felthouse v Bindley* (1862) 11 Common Bench Reports (New

There are only very limited exceptions that always depend on the facts of the case.[539] One relevant circumstance is the relationship of the parties: where there is 'a course of dealing' between them, acceptance can be by silence.[540]

Acceptance can generally be communicated in several different ways: It can be expressed in oral or written form, as well as by electronic means, and it can sometimes even be implied from the offeree's conduct as an 'external manifestation' of acceptance.[541] Thus, the conduct has to indicate the offeree's acceptance and must be made with the intention to accept.[542] English law therefore differentiates between an offeree's silence or inactivity as not constituting acceptance on the one hand, and their acting on the offer (conduct) on the other.

This begs the question whether the offeror must have actual knowledge of the offeree's conduct. The decision in *Carlill* has made it clear for unilateral contracts that this is not the case, because the offeror in such contracts (impliedly) waives the requirement of 'notification of acceptance' by stipulating that a particular conduct is sufficient.[543] Whether an offeror's waiver of communication of acceptance in bilateral contracts is possible, is as yet undecided.[544]

Series) 869, 142 ER 1037 (HC) and although the decision might be criticised on the facts (see, eg, Treitel/Peel, ibid para 2-044 in fn 232), the rule remains valid.

539 See Treitel/Peel (fn 65) para 2-045–2-046, who argues at para 2-047 that an offeror stipulating that silence would be considered as acceptance ought to be bound.

540 For further details, see Treitel/Peel (fn 65) para 2-045.

541 See Stone (fn 429) 59–68. The court's decision in *Brogden v Metropolitan Railway* (1877) 2 App Cas 666 (HoL) made it clear that conduct is a sufficient form of accepting an offer in bilateral contracts. It should be noted, however, that in this case, the conduct in question was the placement of an order with the other party, so that the conduct was in fact communicated to the other party. With unilateral contracts, acceptance will invariably be through conduct, as an offeree's counter-promise to act in accordance with the offeror's promise will not be sufficient, as that 'would not be what the offeror had bargained for', see Treitel/Peel (fn 65) para 2-054. One recent example in which acceptance 'by word or conduct' was generally acknowledged is *Blue v Ashley* (fn 174) [50] (Leggatt J).

542 The offeree does not need to primarily have the intention of accepting; the offer must, however, induce the offeree to act in accordance with the offer to some (minor) extent, see Treitel/Peel (fn 65) paras 2-018, 2-051. As long as the offeree had knowledge of the offer, the courts will presume an intention to accept, unless there is evidence to the contrary, see McKendrick (fn 48) 129.

543 *Carlill* (fn 369) 269–270 (Bowen LJ).

544 See Stone (fn 429) 62; doubtful Atiyah, '*Introduction*' (fn 33) 51.

Parties are free to stipulate a method of acceptance. The agreed method will then be the only effective way to accept, unless the aim underlying the stipulation can be fulfilled by a different method.[545] In this sense, it has been suggested that a deviation from the prescribed method may lead to the declaration of acceptance being deemed as a counter-offer for not mirroring the offer.[546] Irrespective of this, the choice of method has to be reasonable under the circumstances, ie, it must be an appropriate form of response in terms of, eg, the transmission time.[547]

cc) Coming into Effect of Acceptance: The Mailbox and Postal Rules

When and where the declaration of acceptance's effect begins and whether the statement actually has to reach the offeror to be effective depends on: first, the nature of the contract; and second, on the method of acceptance. In terms of the former, unilateral and bilateral contracts must be distinguished. In unilateral contracts, acceptance is usually by conduct,

545 Treitel/Peel (fn 65) paras 2-041–2-042. cf McKendrick (fn 48) 102–103, who seems to suggest that the method is binding only if its mandatory nature is made clear. Furmston and Tolhurst (fn 440) 163–164 para 6.24 suggest that the words specifying the acceptance method need not always be interpreted strictly. Thus, where acceptance is stipulated as to be made 'by return post', this ought to be understood to mean that a 'prompt reply' rather than acceptance by way of letter is being required, see ibid, 164. Nevertheless, they state further that the chosen method must be presumed to be the 'most advantageous', see ibid. The offeror can waive the stipulated method, but only if the offeree is not put at a disadvantage, see McKendrick, ibid, 102. The opposite is also true, so that where the method is for the offeree's benefit, they may waive it unless this would prejudice the offeror, see Treitel/Peel, ibid para 2-043.

546 See Furmston and Tolhurst (fn 440) 164 para 6.25.

547 Compare Treitel/Peel (fn 65) para 2-033, according to whom a slower response method (eg, letter) would not be reasonable if the offer was received by a faster method (eg, e-mail). Similarly, if the offeree is aware of any problems with a particular method, they ought to use a different method, see ibid. Furmston and Tolhurst (fn 440) 164 para 6.24 argue that a choice of method may not simply be about the transmission speed, but about other factors, such as having bad phone connection in the foreseeable future. Furthermore, use of a different method by the offeree means the offeror needs to monitor several communication channels. Another consideration to be made is the business relationship: with solicitations by a new potential partner, traditional communication methods may be more appropriate than electronic methods, whereas it may be acceptable if dealings had been had before. Compare Furmston and Tolhurst, ibid, 165 para 6.26.

but it is only once the required act has been completed that acceptance is considered to have been made.[548] With bilateral contracts, the deciding factor is whether the communication is between physically present parties or whether the communication is through some medium.[549] Interestingly, the differentiation is not simply whether the communication is direct or at a distance, but seems to depend further on the time taken for its transmission.[550] Before going into this differentiation, it ought to be noted that the declaration of acceptance does not always have to reach the offeror directly. Thus, where the offeror has an agent who is authorised to receive a declaration of acceptance on the offeror's behalf, acceptance is effective from the moment the agent receives it; otherwise, the effect will be deferred until the offeror himself receives the declaration.[551]

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548 McKendrick (fn 48) 127; Treitel/Peel (fn 65) para 2-053. Compare the opinion of Bowen LJ in *Carlill* (fn 369) 267, where this issue was contemplated and it was held that acceptance is made once the course of acting has been completed. Due to this, the offeror, although unable to extract himself from his promise through revocation, is not bound to comply with his promise (usually payment) until that point in time, see McKendrick (fn 48) 127. Thus, the delay in the effect of the act of acceptance could be said to mitigate the harshness of the offeror not being able to revoke his offer after the offeree has begun to perform. For a more theoretical analysis of the reasoning behind part-performance being insufficient, see Treitel/Peel (fn 65) paras 2-054. Treitel further advocates that an offeree performing in part should be able to recover something from the offeror, whether this be their expenses or a 'reasonable sum', see ibid para 2-058. Cf also *Air Transworld Ltd v Bombardier Inc*, as noted in fn 534 above. While part-performance therefore does not amount to acceptance, it at least protects the offeree from having the offer withdrawn after having started to act. See on this Stone (fn 429) 74–75.

549 Schedule 1 Consumer Distance Selling Regulation lists the following examples of distance communication: unaddressed and addressed printed matter, letters, press advertisings with order forms, catalogues, telephone with or without human intervention, radio, videophone or videotext, e-mail, fax, and television (teleshopping). This is equivalent to the list found in Annex 1 Council Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts (hereinafter 'EU Distance Selling Directive'), which was transposed through the Consumer Distance Selling Regulation.

550 The meaning of communication in terms of transmission or notification is discussed succintly by Furmston and Tolhurst (fn 440) 169–170 para 6.34: Even if a communication method is instantaneous, ie, without delay in its transmission, this is not equal to instantaneous notification due to the possible absence of the recipient. What matters is the '*actual communication*' (original emphasis).

551 Treitel/Peel (fn 65) para 2-026. This may also be applicable to 'instantaneous communication', see ibid at para 2-035 in note 188.

For communications at a distance, Lord Denning in the case of *Entores Ltd v Miles Far East Corporation*[552] distinguished between acceptance sent through means of 'instantaneous communications' (then: telephone, telex) and those sent through the post. For agreements made via such 'instantaneous communications', Lord Denning held that the declaration of acceptance is effective once and at the place where it reaches the offeror.[553] This rule was confirmed in the case of *Brinkibon Ltd v Stahag-Stahl und Stahlwarenhandelsgesellschaft mbH*[554], which also dealt with the question of the place of contract formation where the relevant communication was via telex. In effect, the ruling in *Entores* extended the application of the general rule for the formation of contracts (the mailbox rule) from those made 'oral[ly and] in writing *inter praesentes*' (emphasis added) to encompass cases where the instantaneity of the communication method (named examples: telephone, radio) compensates for the physical distance.[555] The rule has also been applied to e-mail,[556] in which case receipt is complete once

552 [1955] 2 QB 327 (CA). The case concerned a contract that had been concluded by telex between two parties, one of which was in England while the other was in the US. The issue of interest for the present discussion was whether the contract was made in England (as opposed to New York), ie, whether acceptance was effective from the time that it was sent or from the moment in which it was received. Further facts and excerpts of the judgment can be found in McKendrick (fn 48) 110–112.

553 *Entores* (fn 552) 334 (Lord Denning).

554 [1983] 2 AC 34 (HoL). In this case, the parties were in the UK and Austria and had negotiated a contract via telephone and telex. The issue was whether acceptance, having been made by telex, fell under the postal rule (on which, see below). The court found that it did not. See ibid 41–42 (Lord Wilberforce). In a more recent case, Mann J was of the opinion that the reality of the 'post-Brinkibon world', ie, the possibilities of modern technologies, sometimes made the analysis of the formation of a contract difficult in terms of the traditional offer and acceptance model. Therefore, where the facts of a case allowed, a contract might be found to have been made in several places at once. This would be the case in a transnational telephone conversation, or a video-conference. See *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch), [2004] 2 CLC 720 at [37]–[39], [42] (Mann J). Irrespective of whether this statement forms part of the case's ratio decedendi (doubting: Stone (fn 429) 68), the statement will be persuasive authority at least.

555 See the opinion of Lord Wilberforce in *Brinkibon* (fn 554) 41 at [D]–[F].

556 See *Air Transworld Ltd v Bombardier Inc* (425) 176 at [79] (Cooke J). See also Stone (fn 429) 70. Similarly it is presupposed in Law Commission, '*Electronic Commerce*' (fn 502) 21 para 3.56 that e-mails become effective upon receipt. cf Murray (fn 440) 22–25, arguing that the postal rule ought to apply. It ought to be noted, however, that this view was expressed some twelve years before

the message has been recorded on the recipient's mail server.[557] Similarly, acceptance made online, ie, through a web browser, need to be received in order to be effective.[558] In this case, it has been suggested that the effect of acceptance sets in 'at the time when it would be reasonable for the [offeree] to assume that it will have been read', namely, immediately.[559]

Another principle relating to oral statements of acceptance made to a physically present offeror was applied to 'instantaneous communication' in *Entores*: the offer must have actually been heard or received by the offeror in order to be effective.[560] Thus, if there is some form of disruption in the ('instantaneous') communication, like loud noises or technical problems, the offeree has to make sure that his declaration of acceptance was received by the offeror by repeating the statement if they know or should know that the statement was not received.[561] The situation is different where the offeror's conduct (not asking for the statement to be repeated or re-sent) leads the offeree to reasonably believe that the declaration of acceptance was received, when in fact it was not: here, acceptance is effective.[562] This principle also applies to acceptances sent by fax,[563] and perhaps also to e-mails.[564]

The distinction made in *Entores* between 'face-to-face' conversations and 'instantaneous communications' has been criticised by some authors, on the basis that not all statements will be immediately perceived (read) by the offeree upon its arrival. Accordingly, 'face-to-face' and electronic conversations (telephone and other real-time online communication services[565]) ought to fall into one category. The other category would then consist of postal messages, fax, and e-mail. It has been suggested that while

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the English high courts ruled on the matter. For a thorough analysis of how e-mail ought to be classified, see Furmston and Tolhurst (fn 440) 167–171 paras 6.29–6.35, who decide on it being non-instantaneous.

557 See Law Commission, '*Electronic Commerce*' (fn 502) 21 para 3.56.

558 On this, see Murray (fn 440) 25–25, using the term 'click wrap acceptance'.

559 Stone (fn 429) 72.

560 *Entores* (fn 552) 332–334 (Lord Denning).

561 Ibid 333 (Lord Denning).

562 Ibid. It should be noted that the principle coming into play here is estoppel and was held to prevent the offeror from denying having received the declaration of acceptance due to his own omission. Further explanation of this principle in relation to contracts can be found in McKendrick (fn 48) 236–271.

563 McKendrick (fn 48) 112; Treitel/Peel (fn 65) para 2-035.

564 Whincup (fn 34) 56 para 2.28; Stone (fn 429) 66–68.

565 Although no examples were given, it is submitted that instant messaging or video conferences would fit this description.

the rules regarding the coming into effect of acceptance through 'face-to-face' communication should apply to the first category, the postal rule (discussed subsequently) should apply to the second category, especially in a business context.[566] Indeed, this is a point that was considered and dismissed by the court in *Brinkibon*.[567] Part of Lord Fraser of Tullybelton's reasoning for its dismissal was that it was '[the offeror's] responsibility to arrange for prompt handling of messages within his own office', making it reasonable to assume that a message received was a message delivered to the offeror.[568] The English Law Commission has held a similar view with regard to the question whether e-mail constituted a written notice and gave the opinion that it was, irrespective of whether it was actually read.[569]

Regarding the moment at which the contract is formed, it has been suggested that the business-hour-rule for revocations of offers set out above[570] could be applied to acceptance made via telex by analogy.[571] Another author went on to treat faxes the same way, but not e-mail, because the latter may not be checked as often and the effect should thus be delayed until the 'expected time for checking has passed'.[572] It is submitted that the business-hour-rule should be applicable to all forms of modern 'instantaneous communications' used in business — telex, fax, e-mail, perhaps even mobile text messages. This is because the offeree's concern is always the same: not knowing when the offeror will (have) read the declaration of acceptance. Alternatively, the well-established criteria of 'reasonable time' passing after the sending of the message could be applied.[573] As for contracts made online, ie, on websites, the E-Commerce Regulations provides that 'acknowledgement of receipt' of the order (ie, acceptance) will be deemed to be received once the offeror *can* access it (r 11(2)(a)). Thus, it is argued that since the supplier of the goods or services in question

566 See Stone (fn 429) 66–68.
567 See *Brinkibon* (fn 554), eg, 43[D]–44[A] (Lord Fraser of Tullybelton).
568 *Brinkibon* (fn 554) 43[G] (Lord Fraser of Tullybelton).
569 See Law Commission, '*Electronic Commerce*' (fn 502) at 3.21–3.22. See also the summary provided in *Email, e-signatures and e-commerce* (Reed Smith LLP, 2 February 2002), available online at http://m.reedsmith.com/email-e-signatures-and-e-commerce-02-02-2002/.
570 See fn 518.
571 See McKendrick (fn 48) 114.
572 Stone (fn 429) 70.
573 This is suggested by ibid for telephone answering machines.

will be the offeree, acceptance will occur when the customer's offer is acknowledged, irrespective of whether this happens online or via e-mail.[574]

On the other hand, Lord Denning reiterated the settled law that declarations of acceptance sent through the post will be effective from the time and at the place where they are posted.[575] This postal rule was developed as an exception to the default rule regarding the formation of contracts for reasons of commercial expediency or 'practical convenience' and is applicable to 'non-instantaneous communication at a distance' (letters, telegrams).[576] In contrast, it does not apply to 'instantaneous communication', like telephone, telex, and probably also not to fax and e-mail.[577] As to the exact meaning of 'posting', it was merely stated in *Dunlop v Higgins*[578] that 'if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do? How can he be responsible for that over which he has no control?'[579] It can be deduced from this that putting a letter 'into the post' is sufficient. Arguably, this would encompass sending the letter from within a post office, or by inserting it into a post box. Indeed, the moment of posting is said to occur when the letter is 'in control of the Post Office, or one of its employees authorised to receive letters'.[580]

A declaration of acceptance by post does not actually have to reach the offeror; it is 'deemed to be complete' upon posting, even if its receipt is delayed or completely frustrated (eg, by being lost).[581] It is this aspect

574 See ibid 72.

575 *Entores* (fn 552) at 332 (Lord Denning).

576 *Brinkibon* (fn 554) 41[F]–42[A] (Lord Wilberforce), 43[D] (Lord Fraser of Tullybelton). Treitel refers to this principle as the 'posting rule', see Treitel/Peel (fn 65) para 2-031. See also Atiyah, '*Introduction*' (fn 33) 52.

577 Atiyah, '*Introduction*' (fn 33) 53. Similar: Treitel/Peel (fn 65) para 2-035, though he suggests that acceptance sent by fax, e-mail, or made online (on a website) should be effective even if the received message is (partly) illegible. See also McKendrick (fn 48) 124–126, who would generally distinguish between contracts concluded via e-mail and via the internet (websites) by referring to the Singaporean case of *Kin Keong v Digilandmall.com* (fn 440), but concludes that neither should be governed by the postal rule.

578 See fn 363 above.

579 *Dunlop v Higgins* (fn 363) 812 (Lord Chancellor).

580 Treitel/Peel (fn 65) para 2-031.

581 Atiyah, '*Introduction*' (fn 33) 52. See also Treitel/Peel (fn 65) para 2-036, who has suggested at para 2-037 that where the delay is due to one party's fault, eg, by indicating a wrong or incomplete address, the effect of the declaration of acceptance should arise at the point in time that is 'least favourable' to the responsible party.

that makes this rule, which is only adopted in few other countries,[582] so striking: Even if the letter or telegram is lost so that the offeror cannot have knowledge of the declaration of acceptance, a contract is formed. The justification for this exception is unclear and continues to be discussed in academic literature.[583] It ought to be noted that while a party is usually free in choosing a means of accepting, it has been ruled by English courts that the use of postal mail must have been 'within the contemplation of the parties'.[584] It is possible for the parties to exclude the postal rule.[585] One final matter to note is that acceptance must be made either within the period set in the offer or within a reasonable period; otherwise the offer will have expired and acceptance cannot be effective.[586]

dd) Loss of Effect of Acceptance

One way in which acceptance can lose its effectiveness is through the offeree's own revocation. For this, the offeree must communicate the revocation to the offeror before or simultaneously to the declaration of acceptance reaching the offeror; however, this will not be possible where the postal rule applies, since acceptance would have been made upon posting.[587] At common law, the offeror can therefore not change his mind once the declaration of acceptance is posted. The situation is different where a contract made at distance involves a consumer: r 10 Consumer Distance Selling Regulation gives that party a special cancellation right (r 10(1) ibid), which, if exercised, will lead to the contract being treated

582 McKendrick (fn 48) 119. As will be seen in Section C.IV.1.a.iii.cc) below, Japan is among these.

583 See, eg, Atiyah, '*Introduction*' (fn 33) 52 (sceptical); McKendrick (fn 48) 124 ('English law goes too far in laying down [this] rule'); Treitel/Peel (fn 65) para 2-032 (more neutral). An interesting reason for the initial adoption of the postal rule, the (political) enthusiasm for and innovation of the newly established mail services in the mid-nineteenth century, and the later decline through further innovation in the field of communication (telephone, telex), is suggested by Simon Gardner, *Trashing with Trollope: A deconstruction of the Postal Rule in Contract* (1992) 12 OJLS 170, 178–180, 184.

584 *Henthorn v Fraser* (fn 494) 33 (Lord Herschell), 36 (Kay LJ).

585 McKendrick (fn 48) 122.

586 This expiry of offers was discussed in Section ii.ff) above.

587 See Treitel/Peel (fn 65) para 2-039.

as if it had never been made (r 10(2) ibid).[588] In effect, a consumer can therefore change his mind even after having acceptanced.

iv. The Further Requirement of an Intention to Create a Binding Legal Relationship

As has already been seen in relation to declarations of offer and acceptance, a contractual intention is required of the parties so that statements will amount to an offer or acceptance. More precisely, the requirement is that the parties must have had an intention to create a binding legal relationship when concluding a contract. This essentially means that the parties must have meant to become obliged under the agreement made between them, so that the agreement may be legally enforced.[589] Distinguishing between cases in which this is so and situations in which the parties do not intend to be so bound is important, both inside and outside commercial settings. Indeed, one of the aspects used to decide this issue is the 'social context'. The other two factors are the language of the statement, ie, whether it is clear or vague, and, finally, whether the statement was made in anger or jest, rather than in a serious manner.[590]

The issue of an intention to be bound typically arises where there is no express intention, ie, in cases of implicit manifestations of intention.[591] The assessment of the parties' implied intention is made on an objective

588 The time frame during which the contract can be cancelled depends on whether the 'supplier' of goods or services has provided information regarding the contract to the consumer prior to or on contracting in accordance with r 8: if this has been done, the consumer has seven working days from the time of receipt of the goods or the conclusion of the service contract, or receipt of the information under r 8. Where no information has been provided, the cancellation period is three months and seven working days from the receipt of the goods or conclusion of the service contract. See rr 11 and 12 for sale of goods and services respectively.

589 See *Blue v Ashley* (fn 174) [55] (Leggatt J).

590 Compare *Blue v Ashley* (fn 174) [56] (Leggatt J). In the event, the alleged contract was held not to be legally binding on these grounds, see [80] et seq of the decision.

591 Compare Treitel/Peel (fn 65) para 4-004. Having said this, explicit agreements may equally lead to a dispute. One example might be a stipulation to make an arrangement a 'gentleman's agreement', ie, binding not in the legal sense but in honour only. In the leading case, such a clause had been drafted in a document and both the CA and the HoL found it to be valid, see *Rose and Frank Co v Crompton and Brothers, Ltd* [1923] 2 KB 261 (CA), eg, at 288–289 (Scrutton

basis; however, if one party knows of the other party's intention, this knowledge is taken into account.[592] The court's investigation is aided by the following two presumptions: On the one hand, an intention to create a binding legal relationship will be presumed in a commercial context,[593] or where an agreement is made expressly.[594] This requirement will therefore normally not constitute a problem during the formation of an ordinary business contract and consequently usually does not become an issue in court litigation.[595] Where, on the other hand, particular facts indicate otherwise, such as a family relationship existing between the parties or there being a 'social agreement', the presumption is that there is no intention for a legal relationship to arise between the parties.[596] In these cases, the probability of the issue of contractual intention arising is therefore higher.

Both presumptions are rebuttable, whereby the context of the agreement and the nature of the relationship between the parties are important and constitute differentiating factors.[597] The hurdle that has to be overcome for a rebuttal is generally higher in a commercial context.[598] Where

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LJ); *Rose and Frank Co v Crompton and Brothers, Ltd* [1925] AC 445 (HoL), 454 (Phillimore LJ).

592 See Treitel/Peel (fn 65) para 4-002. See also the point made in Section 3.a. above.

593 McKendrick (fn 48) 295. Sometimes a statute may provide for a different presumption, see, eg, s 179 Trade Union and Labour Relations (Consolidation) Act 1992, which provides that a collective agreement between a trade union and an employer (see s 178 subs 1) will be 'conclusively presumed' not to create legal relations between the parties if the requirements of para 1 are satisfied; otherwise the general commercial presumption applies under para 2.

594 Compare Treitel/Peel (fn 65) para 4-005.

595 McKendrick (fn 48) 309. cf the situation where the terms of an (express) agreement are too vague or uncertain, so that doubt concerning the seriousness of the parties' intention may arise, see ibid 314. This may be the case if the terms confer great discretion to one or both parties regarding their performance, see Treitel/Peel (fn 65) para 4-023. Similarly, if the document in question is a letter of intent (hereinafter 'LOI'), the parties' intentions may not always be clear, but their mere expectation that the LOI will subsequently be replaced by a contract is not by itself conclusive, see Treitel/Peel, ibid para 4-024.

596 See Treitel/Peel (fn 65) paras 4-019–4-022.

597 See *Sadler v Reynolds* [2005] EWHC 309 (QB) [52] (Slade QC), in which both of these aspects are listed together with express statements of intent (on which see further below). Treitel/Peel (fn 65) paras 4-026 gives the unusual examples of the relationships between a Minister and the Methodist Church (no contractual intention) or the Crown and civil servants (contractual intention).

598 McKendrick (fn 48) 295–296, 309, 311. The opinion of Viscount Dilhorne in the case of *Esso Petroleum Ltd v Commissioners of Customs and Excise* [1976] 1 WLR 1 (HoL) 4 [H]–[I] that an intention to create legal relations could be

a commercial element is introduced to family relations, as in a family business, the presumption is more easily rebutted than would normally be the case in a family or social context.[599] Another factor is whether one party relied on the agreement to their detriment, in which case the presumption that there is no legal relationship in a family or social context will normally be rebutted.[600] These factors notwithstanding, it is ultimately the intention of the parties that is relevant for the question whether a presumption is rebutted.[601] Accordingly, the commercial presumption can be rebutted by an express stipulation to this effect between the parties.[602]

The case that laid down the general rule for family relationships that there is no intention to create a binding legal relationship was *Balfour v Balfour*[603]. The court differentiated between the 'domains of a contract' and 'domestic arrangements' and found that the agreements of married couples 'living together in friendly intercourse' or 'in amity' did not belong to the former but were a matter of the latter and therefore outside

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inferred where the thing that was promised to a purchaser was 'something of value' to them but that the World Cup coins involved in the case were of 'little intrinsic value' has been interpreted as evidence of how high the hurdle is.

599 See McKendrick (fn 48) 303, 307. Similarly, a social element may be introduced to *a priori* commercial relations, thus lowering the bar for an intention to create a legal relationship in a social context, see Stone (fn 429) 144–145 and *Sadler v Reynolds* (fn 597) [56] (Slade QC).

600 This factor is not as strong as the one previously mentioned, because even where a detriment is suffered due to reliance being placed on an agreement, this may not be sufficient to rebut the presumption. Compare Treitel/Peel (fn 65) para 4-005. McKendrick (fn 48) 303–304 suggests that the point in time of the 'transaction' may also play a role in this regard, so that, depending on whether a purported contract has already been performed (executed) or not (executory), the position may be different. See on this also Stephen Hedley, *Keeping Contract in its Place: Balfour v Balfour and the Enforceability of Informal Agreements* (1985) 5 OJLS 391, 408: 'If it is the "reasonable man" we are consulting, then the "reasonable man's" opinion [regarding the enforceability of the contract] may change in the course of the transaction.'

601 See McKendrick (fn 48) 304.

602 Whether such a stipulation was made is a matter of construction, so that the words by themselves are not necessarily conclusive, see *Edwards v Skyways Ltd* [1964] 1 WLR 349 (QB), 356 (Megaw J), in which it was held that the words 'ex gratia' did not convey an intention for the promise to not be legally enforceable. Phrases like 'subject to contract' will similarly indicate no intention to be bound, see Treitel/Peel (fn 65) para 4-011 et seq. Where such phrases are contained in commercial contracts, the wording may not be conclusive as to the contractual intention, see Stone (fn 429) 150–151.

603 See fn 371 above.

the law's jurisdiction.[604] If there were to be a contract arising between a married couple — a possibility confirmed by the court — there had to be more than an exchange of promises: the agreement had to either have been made expressly, or circumstances justifying an implied contract had to have existed.[605] On the facts, the court did not find such an intention.[606] Where a couple makes an agreement after or on separation, however, a contract can be concluded between them, since such parties are said to bargain with an intention to create a legal relationship.[607]

Apart from these presumptions, general factors such as whether statements were made in a 'social context', using vague language, or 'in anger or jest' will indicate no intention to be bound.[608] In the case of *Blue v Ashley*[609], in which the intention to be legally bound was a central issue, these and the following circumstances were examined by the court: the place and background ('setting'; in this case: drinking in a pub) and 'nature and tone' of the conversation in the course of which an agreement was allegedly made (casual, 'obviously jocular'); the purpose of the setting (statement maker meeting with people for prospective new business relations, appealing to these people); 'lack of commercial sense' of the alleged offer of remuneration (no reasonable basis, arbitrary amount); '[i]ncongruity with [claimant's] role' (impossible for claimant to realise desired result alone); vagueness of the statement (especially: essential terms such as time for realisation not specified); perception of witnesses to the conversation in question and of the claimant (statement not serious, no agreement made).[610] In this way, it remains a question of the circumstances of a case whether the parties had an intention to be legally bound.

604 *Balfour v Balfour* (fn 371) 574 (Warrington LJ), 579 (Atkin LJ); see also ibid 576–577 (Duke LJ). This rule also normally applies to other cohabiting persons like unmarried couples, and other family relations like those between parents and their children, see McKendrick (fn 48) 301–302; Treitel/Peel (fn 65) paras 4-021–4-022.

605 *Balfour v Balfour* (fn 371) 574 (Warrington LJ), 577 (Duke LJ). Treitel gives the example of a husband being the tenant of his wife, Treitel/Peel (fn 65) para 4-020 at 101.

606 *Balfour v Balfour* (fn 371) 571.

607 *Merritt v Merritt* [1970] 1 WLR 1211 (CA) 1213 [A]–[C] (Lord Denning MR).

608 *Blue v Ashley* (fn 174) [56] (Leggatt J).

609 See fn 174 above.

610 Ibid [81]–[107] (Leggatt J).

v. The Requirement of Consideration

From the viewpoint of other jurisdictions, the requirement that a contract must either be supported by consideration or be made in the form of a deed is one of the most striking aspects of English contract law.[611] For foreign lawyers, it is not so much the deed as the concept of consideration that seems to cause confusion. The first and obvious reason would be that jurisdictions outside the common law do not have such a requirement,[612] and therefore often lack a directly comparable reference. Secondly, the fact that the concept of consideration seems to be founded on rules with no clearly defined criteria makes it less approachable and only exacerbates the problem.[613] The following discussion gives an overview over the doctrine by explaining the most important aspects but must leave an in-depth treatment of finer points to others.[614]

The function of the doctrine of consideration is to enable the courts to differentiate between gratuitous promises and non-gratuitous promises, whereby only the latter will generally be enforceable at law, unless the former is in the form of a deed.[615] The reasoning is that only when there

611 It should be noted that consideration is not a form requirement like a deed, although both can affect the legal enforceability of the contract. Compare Treitel/Peel (fn 65) para 5-002. See further Cartwright (fn 181) 134 para 4-15.

612 Having said this, there may be other requirements fulfilling a similar function, such as the French *causa*. This is true at least for its function to differentiate enforceable from unenforceable promises. For a brief account of how *causa* is applied in this sense in French law, see Whincup (fn 34) 99 para 3.78. See further ibid 100 paras 3.80–3.81 for a comparison with the English concept of consideration.

613 In the words of McKendrick (fn 48) 161, consideration 'is now a very technical doctrine'.

614 See, eg, *Halsbury's Laws Vol 22* (fn 172) paras 308–327; Cartwright (fn 181) 235–288.

615 See McKendrick (fn 48) 147. It seems that no consideration is required with a deed because the document creates a presumption concerning consideration. Compare in this respect s 1 subs 2 (d) SGSA 1982. cf McKendrick, ibid, 261, who merely speaks of a deed 'render[ing] a promise binding'. Similarly, Stoljar (fn 194) 6 points out that a seal on a document did not 'import' consideration even in the Middle Ages. He cites the case of *Sharington v Strotton* (fn 292), in which the court found for the defendant concerning use of land and denied the plaintiff's action of trespass, since the defendant was found to have given consideration for the agreement — in the form of, *inter alia*, brotherly love. In contrast, the plaintiff's argument that where a deed is made, it imported consideration (in the form of the maker's will) was not considered. Stoljar, ibid, interprets this to mean that the argument was rejected by the court. Indeed,

is an exchange of promises, ie, reciprocity, can there be a bargain, an agreement.[616] Put in simpler terms, consideration is 'the "price" for the promise',[617] so that 'both sides to the agreement [are required to] bring something to the bargain'.[618] This requirement is thus founded on the traditional basis of a contract, namely, promises and a bargain; and while this theoretical foundation was later replaced by the offer-and-acceptance model in the nineteenth century, consideration was retained.[619] It should be noted that where no intention to create a legal relationship is found, the question of consideration becomes irrelevant as there can be no contract between parties having no contractual intention.[620]

Similar to the situation with the requirement of there being an intention of creating a binding legal relationship, consideration will not usually be an issue in practice. This is because providing consideration can be easily achieved, and, if in doubt, using the form of a deed will suffice to relieve this insecurity.[621] This is especially true for agreements involving the payment of money in return for goods or services that constitute a monetary benefit for the payor.[622] The issue of a lack of consideration is in fact often brought up before the courts as an argument advanced

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the court did not mention the argument in its reasoning, see *Sharington* at 471. cf the discussion in Section 2.a.iv. above. See also Treitel/Peel (fn 65) paras 3-001 and 3-172, who suggests at para 3-014 that gifts supported by nominal consideration (see below), though practically being gratuitous, are still enforceable while informal gifts, ie, those not supported by any consideration, are not. Contrast Bridge, '*Property*' (fn 182) 171, who states that gifts are not contracts per se since consideration is not generally required; however, where nominal consideration is provided, gifts may look like a contract. They will be legally enforceable if in the form of a deed or if the promise of the gift is accompanied by the 'physical delivery' of the object. Similarly, gratuitous services are not contractually enforceable for lack of consideration, Treitel/Peel, ibid para 3-170.

616 See McKendrick (fn 48) 161–162.

617 Kötz and Flessner (fn 19) 9. Cf Stoljar (fn 194) 6, according to whom consideration relates to the reason or the motive for making a contract.

618 Stone (fn 429) 92.

619 The philosophy underlying English contract law was already discussed in Section 1. above.

620 This is true even if under other circumstances consideration would be found, see *Balfour v Balfour* (fn 371) 578–579 (Atkin LJ).

621 See McKendrick (fn 48) 162. Indeed, it does not seem to be a contemporary issue, as Leggatt J noted in *Blue v Ashley* (fn 174) [58] that '[...] I am not aware of any case in the twenty-first century in which a claim founded on an agreement has failed for want of consideration.'

622 McKendrick (fn 48) 164. The question of what kind of non-monetary benefit will be held to be consideration is explored in Section bb) below.

by a party that wants to be released from the contract. Having said this, when the question of consideration does come up, it is important, as the existence of a contract has often hinged on whether consideration was provided by the parties.[623]

Promises not being supported by consideration or not having been made in the form of a deed are not invariably unenforceable or completely ineffective in English law. In some cases, the principle of estoppel may preclude a party from going back on their promise,[624] and the promise may therefore be given effect indirectly. This is illustrated by the leading case for estoppel, *Central London Property Trust Ltd v High Trees House Ltd*[625], in which it was said that on the basis of the contemporary developments in the case law on applying an estoppel to a promise regarding the future, a full sum initially agreed upon could not be claimed by the promisor if a reduced sum was agreed and also acted upon later and that this later agreement was binding irrespective of consideration having been provided.[626] The full requirements of the principle will not be discussed

623 This argument is not new either, see the argument brought forward by the defendants' attorneys in *Carlill* (fn 369) at 258, which led the court to give attention to the issue — and in this case to find consideration, see ibid at 264–265 (Lindley LJ), 270–272 (Bowen LJ), 274–275 (Smith LJ). An example of a case contemporary with *Carlill* but where an agreement was held not to be supported by consideration and therefore not to be enforceable is *Foakes v Beer* (1884) 9 App Cas 605 (HoL). The agreement in question was a promise by the defendant not to enforce a judgement against the plaintiff for a debt owed if the plaintiff paid the outstanding money in six-month instalments. Although the plaintiff paid the defendant thereafter, this was held not to constitute consideration on the plaintiff's part, since the payment formed part of an 'antecedent obligation', see ibid 611–614 (Selborne LC). See also Section dd) below.

624 McKendrick (fn 48) 161, 236. cf Stone (fn 429) 93, stating this concept to be a 'secondary test of enforceability' that 'does not replace 'consideration'.' There are several different types of estoppel. For an overview, see Hanbury and Martin (fn 63) paras 27-019–27-029. One recent case law example is *Seward v Seward* (2014) WL 3535431 (official transcript; HC) on a promise between parents and son to convey land in exchange for the conveyance of other property to a third party (family member).

625 [1947] 1 KB 130. The case concerned an agreement to vary a lease contract between affiliated companies by reducing the rent of several properties. While no consideration had been provided for the variation agreement, the court held that the plaintiffs were estopped from enforcing the original agreement while the properties in question could not be rented out fully (due to external circumstances), but that the rent originally agreed applied after the properties were fully rented out.

626 *High Trees* (fn 625) 134–135 (Denning J). See also Treitel/Peel (fn 65) para 3-114.

here;[627] however, it should be noted that estoppel does not arise simply from a subsequent change to a contract (variation). Rather, the promisor's representation or conduct has to have an 'effect on the position of the other party'.[628] Thus, it is through this principle — which would later be termed promissory or equitable estoppel[629] — that variations not supported by consideration are now regarded as being effective at common law.[630]

In the following sections, the term consideration will be defined first (in Section aa)) before the following three rules of the doctrine are explained: first, consideration must be sufficient but need not be adequate (Section bb)); secondly, consideration cannot be past (Section ee)); and, thirdly, consideration must move from the promisee (Section ff)). In addition, the issues of nominal and insufficient consideration will be addressed (see Sections cc)–dd)). The requirements for a valid deed will be set out in Section b.iii. below, together with the other form requirements for contracts that exist in English law.

aa) 'Consideration' Defined

Consideration can be defined as 'something of value' that is given in exchange for a promise,[631] whereby this 'something' can be a 'right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other'.[632] More

627 For a succinct account of the concept, see Hanbury and Martin (fn 63) paras 27-021. For further details on the requirements of promissory estoppel, see Stone (fn 429) 120–130.

628 See Treitel/Peel (fn 65) paras 3-077 and 3-114, where another important case in the development of this principle, *Hughes v Metropolitan Ry* (1877) 2 App Cas 439 (HoL), is briefly discussed.

629 See McKendrick (fn 48) 243.

630 Treitel/Peel (fn 65) para 3-077.

631 Ibid para 3-002. Alternative definitions have been suggested by various legal academics, such as 'the price for which the promise is bought' (Frederick Pollock); however, as pointed out at ibid para 3-007, they all have shortcomings.

632 *Currie v Misa* (1875) LR 10 Exchequer 153, 162 (Lush LJ), quoted by McKendrick (fn 48) 163. Although the authority relied on was not *Currie v Misa*, Bowen LJ in *Carlill* (fn 369) 271 found that an 'inconvenience sustained by one party at the request of the other is enough'. Treitel/Peel (fn 65) para 3-005 notes that it is sufficient if there is either a benefit to the promisor, or a detriment to the promisee. In *Denton* (fn 467) 703–704, Campbell LCJ held that a person who, having made their plans according to a schedule issued (a promise) by the train operator, provided good consideration in coming to a train station in

simply put, consideration can be an advantage obtained by one party, or an inconvenience suffered by the other in relation to the promises made or accepted, as the case may be, or both.[633] This is not an exhaustive list. Thus, the provision of information or data is said to constitute valid consideration,[634] as is the transfer of possession or ownership of a chattel.[635] Furthermore, a promise can also be consideration, so that mutual promises, whether implied or express, can be sufficient for forming a contract.[636] Similarly, the performance of a counter-promise will normally be consideration, even if the counter-promise itself is not legally valid (see Section bb) below). By way of example, consideration for a promise that an offer will be kept open for a specified period (firm offer) can be provided by promising to pay a sum of money for this promise, or to undertake to do some other act indicating the offeree's serious intent, or by actually doing such acts.[637]

In relation to unilateral contracts, it has been stated that the act requested by the promisor will constitute both the promisee's acceptance and

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the expectation of taking a particular advertised train; cf Crompton J, in whose opinion at 704–705 such an action did not form part of consideration for a promise, or if it did, only a small part. Indeed it may seem strange to think that train operators could be held liable for compensatory damages to persons who simply come to the train station (as opposed to those who purchase a ticket); however, it must be borne in mind that this case dates back over 150 years, a time when transport and communication systems and thus the setting of the case were very different from today.

633 See *Morley v Boothby* (fn 292) 456 (Best CJ); Stone (fn 429) 96.

634 See Furmston and Tolhurst (fn 440) 154 para 6.08.

635 Compare Treitel/Peel (fn 65) para 3-032.

636 Andrews (fn 70) 115 notes that such an exchange of promises leads to an executory contract (on which see fn 173 above). The caveat is that the performance of the promise in question has to be seen as constituting consideration in order for the promise itself to be good consideration, Treitel/Peel (fn 65) para 3-008. A further caveat is that the promise(s) cannot be defective in the eye of the law, eg, because of illegality or duress, see ibid 3-155–3-159. In some cases, performance of an *a priori* defective promise can sometimes provide consideration, eg, where the party having suffered duress indirectly affirms the contract by suing on it, ibid 3-157. Whether this applies to defects arising from a statutory provision depends on the stipulation in question, ibid 3-158–3-159. Interestingly, the explanation given by Treitel for equating a benefit and a detriment with the expectation in commercial practice that promises are to be kept is 'commercial morality'. This is yet another example of English law taking commercial notions into account.

637 Otherwise, the firm offer will be revocable, see Treitel/Peel (fn 65) para 3-162 and Section ii.ff) above.

provide consideration;[638] but only once it has been wholly performed.[639] Consideration can also be made up of different components, like the payment of a sum of money and another act by the promisee that is of value to the promisor.[640] By way of summary and stated in more basic terms, there therefore has to be something done or given by the promisee in return for the promise received.[641]

The breadth of the definition's scope has led to criticism, since it seems to give the courts very wide discretion, almost as if the judges were able to 'invent consideration', 'as they please'.[642] As will be seen, this description is a bit harsh when bearing in mind the three rules discussed below. Furthermore, the following two points need to be noted in relation to the definition of consideration.

First, the courts have tended to analyse the existence of 'benefit' or 'detriment' in two different ways.[643] One view is that either a benefit or a detriment has to factually arise, so that it is actually perceived by either one of the parties.[644] It must also be 'causally linked to [the] promise'.[645] In contrast, the other view focuses on whether the promisee's act constituted something that they were (not) already legally bound to do: If the promisee was legally bound to act, however much of a benefit or detriment may arise, there will be no consideration; conversely, if the promisee is not legally bound to act, it is irrelevant if their conduct is beneficial

638 See KW Wedderburn, *Contract. Consideration. Retail Price. Copyright* (1959) 17 No 2 CLJ 160, 161. The case on which Lord Wedderburn comments, *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87 (HoL), will be discussed in Section cc) below. See also *Marshall v N M Financial Management Ltd* (fn 537). Compare Cartwright (fn 181) 136 in fn 124, who speaks of the promisee '*earning* the reward' (original emphasis) through their consideration, namely, performance of the required act.

639 Treitel/Peel (fn 65) para 3-160.

640 This view was expressed by Lord Reid in the case of *Chappell v Nestlé* (fn 638) at 108.

641 This simple approach, rather than the 'out of date' language of benefit and detriment, is advocated by John C Smith, *The Law of Contract – Alive or Dead?* (1979) 13 The Law Teacher 73, 77.

642 Treitel/Peel (fn 65) para 3-009.

643 McKendrick (fn 48) 146 sees the disparity in application of these tests as a conflict.

644 See Treitel/Peel (fn 65) para 3-006. According to McKendrick (fn 48) 161, the court's argumentation in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] QB 1 is an example of this test.

645 *Halsbury's Laws Vol 22* (fn 172) para 309.

or detrimental and consideration is found.[646] The latter view is no longer accurate; the courts circumvented the rule by holding that performance of an already existing obligation will suffice if the other party receives a practical benefit from the performance.[647] As a court found recently, this 'will invariably' be so.[648]

Secondly, what is provided as consideration has to be 'something of value in the eye of the law', so that there has to be some sort of economic value to the act or promise, even if this value cannot be specified exactly.[649] This aspect will be discussed in more depth in the following section, as it closely relates to what constitutes sufficient consideration.

bb) Rule 1: Sufficient Consideration, not Adequate

The first requirement for consideration is that, although it must be sufficient, it need not be adequate. The first part of the requirement, ie, sufficiency, relates to the issue whether consideration exists. The second part, adequacy, concerns the question of whether the value of the consideration corresponds to the value of what the offeree obtains under the contract.[650] The reason for this curious rule is based on the requirement for a bargain to be made between the parties in contracting, whereby the law is not concerned whether this is a fair one.[651] For this reason,

646 Treitel/Peel (fn 65) para 3-006. Also see McKendrick (fn 48) 167, according to whom this approach was taken in *Foakes v Beer* (fn 623). An example can be found in the opinion of Selborne LC at 613–614. This case will also be discussed in the following section.

647 This was done by the court in *Williams v Roffey Bros* (fn 644), discussed subsequently.

648 *Blue v Ashley* (fn 174) [59] (Leggatt J).

649 Treitel/Peel (fn 65) paras 3-002, 3-027. See also *Halsbury's Laws Vol 22* (fn 172) para 316, noting that nominal consideration is acceptable. On this, see Section cc) below.

650 Stone (fn 429) 98.

651 Unfairness is therefore not an aspect affecting the formation of a contract, Treitel/Peel (fn 65) para 3-013. It is an aspect to be considered under legal principles other than consideration, like duress or undue influence, see McKendrick (fn 48) 164; and also with illegality, see Treitel/Peel, ibid, para 11-073. Having said this, equity may step in under certain circumstances where a bargain is 'unconscionable', unless the parties have negotiated the (inadequate) consideration while being on an equal footing. Details of the operation of equity in this context can be found in Treitel/Peel, ibid, paras 10-046–10-048.

the courts do not question whether what was given was adequate,[652] as long as what the parties consider being of value is not something 'wholly illusory'.[653] Accordingly, an agreement to transfer the legal title of land or of a business for a mere £1 consideration will in principle be enforceable at law.[654] Such trivial amounts are referred to as nominal consideration (see Section cc) below) and are regarded as being sufficient.[655] Although they might be thought to be an inadequate expression of reciprocity, that is irrelevant. This general rule notwithstanding, adequacy of consideration can be important, in particular if a statutory provision expressly requires it.[656]

In terms of what can be sufficient, the caveat that what is provided has to be valuable in the eye of the law can potentially cause problems in contracting practice if the opinion of the parties and that of the law deviate on what is sufficient, so that a contract might be 'struck down' by the courts for lack of consideration.[657] This does not mean, however, that the courts completely disregard the parties' intentions.[658] On the contrary, it has been stated that

> whilst consideration remains a fundamental requirement before a contract not under seal can be enforced, the policy of the law in its search to do justice between the parties has developed considerably since the early 19th century […]. [T]he courts nowadays should be more ready

652 *Halsbury's Laws Vol 22* (fn 172) para 317. This was stated, for example, by Lord Blackburn in *Foakes v Beer* (fn 623) 616. Stone (fn 429) 98–99 suggests freedom of contract as the reason for the courts not inquiring into the adequacy of consideration.

653 Wedderburn (fn 638) 162. Treitel/Peel (fn 65) para 3-028 interprets this to mean that the promise constituting consideration must be — to the knowledge of both parties — capable of being fulfilled at the time when the promise is made. Furthermore, the performance of this promise should not be left to the promisor's (offeree's) discretion and the promise itself must consist of something that the promisor would not have done or given but for the promise, see Treitel/Peel, ibid paras 3-030 and 3-029 respectively.

654 See McKendrick (fn 48) 165, 162.

655 *Halsbury's Laws Vol 22* (fn 172) paras 316, 314.

656 Treitel/Peel (fn 65) para 3-014 in fn 67 gives the example of 'valuable consideration' in the LPA 1925, which, in accordance with s 205 subs 1(xxi) LPA 1925, 'does not include nominal consideration'. *Halsbury's Laws Vol 22* (fn 172) para 317 notes that the amount of consideration may also 'be evidence of duress or mistake' among other issues.

657 Treitel/Peel (fn 65) para 3-003.

658 See McKendrick (fn 48) 164.

> to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties.[659]

Furthermore, the courts have tended to be more lenient in assessing the value of consideration in cases of a commercial nature.[660]

A claim given up by the promisee is good consideration, because the promisee suffers the loss of the claim and its value.[661] The same is true where the claim is 'doubtful'; but it is debatable whether a 'worthless' claim can suffice.[662] Having said this, where the party giving up the claim does not know that the claim is worthless and acts in good faith, this is sufficient to constitute consideration.[663] Irrespective of the claim being valid or not, there can be no consideration if the promisor does not ex-

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659 *Williams v Roffey Bros* (fn 644) 18 [G]–[H] (Russel LJ). The parties were builders and had entered into a subcontract for carpentry work on a number of properties. The plaintiffs, the subcontractor, agreed orally with the defendants, the main contractor, on extra payments when the plaintiffs ran into financial difficulties due to miscalculations and could not continue working without extra funds. The court found the plaintiff's promise to perform their existing obligation on time to be a commercial benefit and sufficient consideration and thus held the agreement enforceable. See ibid 15–16 (Glidewell LJ).

660 McKendrick (fn 48) 169; Stone (fn 429) 99.

661 See Treitel/Peel (fn 65) para 3-034, who applies this principle to giving up a defence or a remedy at 3-035.

662 See McKendrick (fn 48) 170–171. Cf *Halsbury's Laws Vol 22* (fn 172) para 321, stating that a compromise is good consideration 'even if the claim ultimately turns out to be unfounded'. Cf again Treitel/Peel (fn 65) para 3-036, who states that where a worthless ('invalid') claim is given up, this will not constitute consideration if that was the only consideration provided. Therefore, where the act of giving up such a claim is merely a part of the consideration, there is good consideration. Similarly, it was stated in *Balfour v Balfour* (fn 371) 577 (Duke LJ) that where a claim (right) did not exist, relinquishing it is not consideration. See also Section dd) below.

663 Thus held in *Cook v Wright* (1861) 1 Best and Smith 559 (QB), 121 ER 822, which concerned a suit against the defendant for not honouring two promissory notes, issued to the plaintiffs in order to avoid legal proceedings being initiated against him even though there was in fact no legal basis for the underlying claim and the defendant was aware of this. The court held the factual detriment suffered by the plaintiffs in abstaining from litigation to be good consideration for the promissory notes, since they had believed in good faith that they had a claim against the defendant and acted on that belief. Contrast *Wade v Simeon* (1846) 2 Common Bench Reports 548 (Court of Common Pleas), 135 ER 1061, in which the giving up of a claim was not held to constitute consideration because the party knew they did not actually have a claim.

pressly or at least implicitly request the promisee to give up the claim.[664] In addition to acts of giving something up, promises of taking on obligations can constitute consideration. This is even true for gratuitous gifts of real or personal property, where the recipient of the gift (donee) promises to take over obligations of the donor in relation to the property, like paying mortgage instalments or fulfilling covenants.[665]

cc) Nominal Consideration

A somewhat extreme example of nominal consideration that shows the court's leniency at the same time is the case of *Chappell v Nestlé*, in which a HoL majority held that chocolate bar wrappers can form part of the promisee's consideration.[666] The argument that the wrappers themselves were of no value to the defendant and that they were actually thrown away after their receipt was held to be irrelevant, because, in the words of Lord Somervell of Harrow:

> A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.[667]

It was held further that the value of the request of sending in the chocolate bar wrappers was the increased sale of the defendant's chocolate.[668] Lord Reid's statement to the effect that the number of cases where the wrap-

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664 On this, see Treitel/Peel (fn 65) para 3-042.

665 See ibid. para 3-033.

666 *Chappell v Nestlé* (fn 638) 109 (Lord Reid), 115 (Lord Somervell of Harrow). The case concerned a suit for copyright infringement by the plaintiffs on the ground that the defendants had sold records to which the plaintiff's held the copyright. The defendants had in fact run a campaign under which customers who sent in three Nestlé chocolate wrappers and a sum of money could purchase the record in question. The court held the transactions under the campaign to be 'sales by retail'. In the present case, the other part of the consideration was the sum of money. See also the commentary by Wedderburn (fn 638) 162.

667 *Chappell v Nestlé* (fn 638) 114 (Lord Somervell of Harrow).

668 Ibid 105 and 108 (Lord Reid), 114–115 (Lord Somervell of Harrow). Bowen LJ stated something similar in *Carlill* (fn 369) at 271, namely, that the defendants received an indirect benefit from the use of their products by customers because it increased their sales. This is an important point, since McKendrick (fn 48) 168 identifies the indirect commercial benefit that the promisor receives from the

pers might not have conferred a direct benefit on the defendants being negligible is interesting, as this would seem to correspond to a reasonable calculation merchants would make when initiating such campaigns.[669]

It may be equally surprising that not only trivial things like chocolate wrappers, but also seemingly trivial acts can constitute (nominal) consideration. Examples include the promise of the payment of a sum of money to the promisee if they simply go to a particular place or show a particular document,[670] or return a missing pet.[671] What all these examples have in common is that they are part of unilateral contracts, in which the acts were requested by the promisor. This begs the question whether such seemingly trivial things or acts would be sufficient if the promisor were not to explicitly or implicitly demand them. This issue has been discussed in English academic literature:[672] The argument has been put forward that an offer in unilateral contracts need not include a request by the promisor;[673] all that matters is that there be reliance by the promisee in acting on the promise,[674] and that the offer or promise be serious.[675] In light of the judgment rendered in *Chappell* and the fact that commercial concerns seem to underpin English contract law in general, it is submitted that inconsequential things or acts will not be sufficient in themselves, unless they are of some value or benefit to the promisor.[676]

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requested act as being an objective justification of the promisor's request, which is arguably preferable to a 'subjective whim'.

669 *Chappell v Nestlé* (fn 638) 108 (Lord Reid).

670 See Treitel/Peel (fn 65) para 3-031.

671 Cartwright (fn 181) 136 in fn 124.

672 See on this the debate the following exchange of articles: Arthur L Goodhart, *Unilateral Contracts* (1951) 67 LQR 456–460; John C Smith, *Unilateral Contracts and Consideration* (1953) 69 LQR 99–106; Arthur L Goodhart, *A Short Replication* (1953) 69 LQR 106–110.

673 Smith, '*Unilateral Contracts*' (fn 672) 100; Goodhart, '*Replication*' (fn 672) 107, who goes on to note at 108 that a request is only required in cases where the promise is not express but implied.

674 Goodhart, '*Unilateral Contracts*' (fn 672) 458.

675 Goodhart, '*Replication*' (fn 672) 108.

676 In this respect, see *Shadwell v Shadwell* (1860) 9 Common Bench Reports (New Series) 159, 142 ER 62, 68 (Erle CJ and Keating J) and 69 (Byles J). The plaintiff's uncle promised in writing to pay the plaintiff a sum of money yearly to support his engagement as long as the plaintiff's salary did not amount to a particular sum. The uncle defaulted. Although the judges were not unanimous in their conclusion, the statement of law on this point was that the consideration given (ie, the act of getting married) either had to be a loss suffered by

dd) Insufficient Consideration

While a promise in return for a promise is good consideration, money in return for money is not necessarily sufficient: if a smaller and a larger sum of money are exchanged simultaneously, this is not normally enough; although it is where, for example, the two sums are in distinct currencies or have different values.[677] Another example of what is not sufficient is the parties' motives. These cannot by themselves constitute consideration, though they may form part of it.[678] This is especially true if the motive is 'merely sentimental', since 'natural affection' will not by itself provide consideration.[679] Similarly, a condition that is fulfilled by the promisee can be consideration, although the condition itself cannot.[680]

Apart from the issue of doubtful or worthless claims discussed in Section bb) above, another problematic situation is the fulfilment of a pre-existing obligation as consideration. It is problematic, because English law sometimes finds such an act to be sufficient, while it will not do so at other times. One distinguishing factor is whether the obligation is owed to the promisor or to a third party; however, the law goes further in the former case and has traditionally differentiated between contractual obligations and those imposed by law.[681] While the result is straightforward with duties owed to third parties (a promise to as well as the actual discharge of such a duty can be consideration for the offeror's promise),[682] the situation is more complicated with a duty owed to the offeror. If the act fulfilled by the promisee is an existing contractual obligation towards the promisor, this would traditionally not be sufficient for constituting fresh consideration (see subsequent section).[683] In all of these cases, the promisee can

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the promisee or be a benefit gained by the promisor — at the request of the promissor. It was this last point that divided the court's opinion.

677 Treitel/Peel (fn 65) para 3-014.

678 See *Halsbury's Laws Vol 22* (fn 172) para 310.

679 Treitel/Peel (fn 65) para 3-027.

680 Ibid para 3-011, who explains that the performance must have been explicitly or implicitly requested by the offeror. See also *Halsbury's Laws Vol 22* (fn 172) para 311.

681 See McKendrick (fn 48) 174–175.

682 See *Pao v Lau* (fn 88) 631–632 (Scarman L), discussed below. See further Treitel/Peel (fn 65) paras 3-054–3-055; McKendrick (fn 48) 160–161.

683 This is the traditional view, laid down in the case of *Stilk v Myrick* (1809) 2 Campbell 317 (Assizes), 170 ER 1168. Note that in a second report of the case in (1809) 6 Espinasse's Nisi Prius Reports (Esp) 129, the reason for the judgment is made out to be duress, not consideration. A discussion of these two

ensure that consideration is provided by promising or actually doing more than they are obliged to do.[684] Similarly, where the basis of an obligation is a statutory provision, the mere discharge of such an obligation does not constitute consideration;[685] however, where more is done than is required, this will be consideration.[686]

It is again equity that provides an exception to this common law rule. Where a party is considered to require special protection, the court may examine the adequacy of the consideration provided, and, if inadequate, apply equitable remedies to alleviate the situation.[687]

ee) Rule 2: No Past Consideration

The second requirement for consideration is that it has to be provided in response to the promise. In other words, there has to be a strong connection in time, so that something from before the offeror's promise

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interpretations is given by McKendrick (fn 48) 168–172. It suffices for present purposes that the interpretation of consideration is acceptable (see Treitel/Peel (fn 65) para 3-048) and will therefore be assumed here. This traditional view was adopted by the court in *Foakes v Beer* (fn 623). Accordingly, where an agreement was for the payment of money, a variation of this agreement could not be supported by consideration in the form of a payment of money, because this was not a new act but part of the 'discharge of the original liability', see the opinion of Earl of Selborne (LC) in ibid 613–614. The general rule deduced from this case is that the partial payment of a debt will not provide consideration for the promise of paying the owed sum entirely. See McKendrick, ibid, 203 and 209–220 for criticism and justifications of this rule. Cf *Williams v Roffey Bros* (fn 644), in which it was held that performance of an existing duty could be sufficient consideration where the offeror received a practical benefit from the offeree's additional promise, see 15[G]–16[D] (Glidewell LJ). This decision has thrown doubt on the traditional rule, see McKendrick, ibid, 183–184. See also Treitel/Peel, ibid para 3-051, who suggests tentatively that the *Williams v Roffey Bros*-rule now prevails. But see McKendrick, ibid, 216–217, who states that the relationship between these two cases has not yet been clarified.

684 Stone (fn 429) 112.

685 McKendrick (fn 48) 177. Again, this is the traditional view that has also been challenged but has not yet been revoked. For further details, see ibid 178–183. The reason behind the traditional rule is public policy, see Treitel/Peel (fn 65) para 3-044.

686 See Stone (fn 429) 106–108.

687 Treitel/Peel (fn 65) para 3-016.

('past consideration') is not good consideration.[688] Therefore, the offeree or promisee has to provide fresh consideration: something new has to be given or done, normally very shortly after the offer or promise[689] or the contract is made.[690] A previous act will not suffice.[691] Whether consideration is past or fresh depends not on the intention or stipulation of the parties but on the facts.[692] In essence, the question is whether the two events (promise and consideration) are 'sufficient[ly] connect[ed]' so that they may be regarded as making up a bargain rather than two distinct acts.[693] Where this is not the case and therefore no consideration exists for the two events, the courts may turn to estoppel (see Section aa) above).[694]

Having said this, past consideration can be sufficient under particular circumstances.[695] Accordingly, where something was done or promised at the request of the offeror, with remuneration being intimated for it, and a legal claim for the remuneration exists, the act or promise will constitute consideration for the (implied) promise of payment.[696] There may also be situations in which a statutory provision allows past consideration, like s 27 subs 1(b) Bills of Exchange Act 1882 (hereinafter 'BEA 1882') admitting '[a]n antecedent debt or liability' as 'valuable consideration' for a bill of exchange.

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688 Ibid para 3-017, giving the example of two acts which are a year apart as not being consideration for each other. This general rule was laid down in the case of *Eastwood v Kenyon* (1840) 11 Adolphus and Ellis 438 (QB), 113 ER 482. cf *Halsbury's Laws Vol 22* (fn 172) para 320, noting that the relation is more important than the chronological order, so that something given just before the other party's promise may be sufficient.

689 According to Treitel/Peel (fn 65) para 3-018, the order does not strictly have to be an offer followed by a promise together with consideration, as long as both the offer and the promise can be seen as being 'substantially one transaction'.

690 Stone (fn 429) 102.

691 Treitel/Peel (fn 65) para 3-017 gives the example of a promise of extra remuneration to a retired person based on the (past) employment being unenforceable.

692 McKendrick (fn 48) 226. See also *Halsbury's Laws Vol 22* (fn 172) para 320.

693 See *Halsbury's Laws Vol 22* (fn 172) para 320; McKendrick (fn 48) 223.

694 McKendrick (fn 48) 231.

695 This seems to be especially true in a commercial setting, see Goode and McKendrick (fn 48) 5 at 1.04.

696 Treitel/Peel (fn 65) para 3-019. A modern case law example is *Pao v Lau* (fn 88), in which the plaintiffs' promise not to sell the shares obtained under a contract for the sale of a building for a fixed time, given at the request of the defendants, was consideration for a guarantee by the defendants to buy back the shares at a particular price if the market price was lower than that price (see ibid 628–631 (Scarman L)).

ff) Rule 3: Consideration of the Promisee

The third requirement is that consideration must 'move from the promisee' and means that it has to be provided by the promisee, not by a third party,[697] in order for it to be enforceable.[698] In accordance with the definition of consideration given above, consideration can be either a detriment suffered by the promisee, or a benefit conferred by him.[699] It is noteworthy that while the consideration has to come *from* the promisee, it need not have to be given *to* the promisor: as noted above, something given or promised to a third party constitutes consideration.[700]

b. Form Requirements in English Law

While a legal system may foresee a range of requirements for a valid and enforceable contract, formalities require a specific form or method.[701] This can be contrasted with the general 'outward conduct' that is expected from the parties, namely, that of offer and acceptance having been made.[702] In

697 McKendrick (fn 48) 230. It is sufficient that part of the consideration is provided by the promisee and another by a third party, Treitel/Peel (fn 65) para 3-023. cf *Morley v Boothby* (fn 292) 457 (Best CJ), in which it is stated in relation to a guarantee that it is not necessary for the guarantor (promisor) to provide consideration, but that either the person for whom the guarantee is provided (principal) or the creditor (promisee) do so. For a more extensive discussion on this, see Geraldine Andrews and Richard Millett, *Law of Guarantees* (7th edn, Sweet & Maxwell 2015) 31–34.

698 Treitel/Peel (fn 65) para 3-023. Again, a deviation is found in commercial settings, see Goode and McKendrick (fn 48) 5 at 1.04.

699 Treitel/Peel (fn 65) para 3-025.

700 McKendrick (fn 48) 230.

701 Compare Cartwright (fn 181) 111 para 4-01, who speaks of the procedure that ought to be followed. See in this sense entry number 5 for the term 'form' in the Oxford English Dictionary Online at www.oed.com. cf Treitel/Peel, ibid para 5-001, who limits the scope of form to recording or labelling.

702 According to Cartwright (fn 181) 112 para 4-02, offer and acceptance is the mechanism through which a contract comes into being, but it is not a formality. This is apparently also true of the physical handing over of things, which, despite being a way to effect a transfer of property, is no formality requirement, since no one method is prescribed. Having said this, delivery may in some instances be the way to transfer legal ownership other than by deed, see Clarke and others (fn 99) 80. On the transfer of property by delivery relating to gifts — which are said not to be even unilateral contracts — see Bridge, '*Property*' (fn 182) 171–172. On negotiable instruments, see Clarke and others, ibid 655.

this sense, as was already mentioned above, contracts are sometimes categorised according to the mode of formation as either 'simple' (any form) or 'speciality' (in deed form) contracts.[703] An identical way of classifying contracts but using different labels is to contrast contracts in deed form and all other contracts, termed parol contracts, irrespective of whether they are made orally, in writing,[704] or by conduct.[705] Finally, contracts may be more widely categorised as those made under seal (including deeds) and those 'made under hand only', ie, in writing or evidenced in writing.[706]

There are several instances in English contract law in which a particular form is prescribed for an agreement.[707] It should be borne in mind, however, that these cases constitute exceptions to the general rule of formlessness in English contract law.[708] It is due to this deviation that particular requirements have been imposed on documents in order for these to be legally valid. The situations which are regulated as well as the methods (modes) are diverse. Similarly, the consequences may vary: The form requirement may be a substantive one, rendering the undertaking without legal effect if not observed,[709] or it may simply have evidentiary character, so that it relates to the enforceability of the contract.[710] These types relate to the three aims that are typically used to justify form requirements:

For further details on how to effect delivery, see Clarke and others, ibid 78, and Bridge, ibid 172–174.

703 See *Halsbury's Laws Vol 9* (fn 33) paras 210, 212.

704 Cartwright (fn 181) 112 in fn 5. Interestingly, the authority cited by him states the division as between contracts under seal and those 'which are not', see *Beckham v Drake* (1841) 9 Meeson and Welsby 79 (Exchequer), 152 ER 35, 40 (Abinger L). Sealing will be discussed in Section iv. below.

705 *Halsbury's Laws Vol 9* (fn 33) para 214 note 3.

706 See ibid paras 214, 209; *Halsbury's Laws Vol 32* (fn 62) paras 201, 339, 341.

707 There are, at the same time, instances in which formlessness is explicitly allowed, see, eg, s 54 subs 2 LPA 1925: leases for a duration of up to three years can be concluded orally.

708 One reason behind this may be the importance placed in English law on the autonomy of contracting parties, especially when these are merchants. Compare Griffith and Harrison (fn 26) 657. On the written form having been viewed as something deviating from the general common law rules in the past, see fn 302 above.

709 This is true for the requirement of consideration, discussed in the previous section. While perhaps not truly a formality, it does at least seem to fulfil a similar function, in that it raises the question of whether the parties have agreed on a bargain, but not how this was done. See on this Cartwright (fn 181) 112 in fn 4 and 134 para 4-15.

710 See ibid 111 para 4-01.

cautionary, ensuring the parties' awareness of the legal (trans)action; evidential as to the existence and content (terms) of a contract; labelling, so that third parties can know what kind of contract it is and what its consequences are.[711] Related to these aims, it can be stated at the outset that the stringency of the regulation depends on the situation envisaged. Thus, in contrasting commercial and consumer contracts, regulation of the former is normally more lenient, but stricter for the latter. Reasons for this difference are commercial convenience (cost of time and money) on the one hand and better protection of the consumer on the other.[712] Where no form is prescribed by law, the parties may nevertheless choose to use one, the reasons for which may be manifold: to obtain an advantage that a chosen form entails,[713] such as the evidentiary weight, the enforceability against or by third parties,[714] or the limitation period;[715] or simply for commercial convenience.[716]

This section will analyse the different forms found in English contract law and their application. First, a brief note will be made on the classification of things in the English legal system in Section i. below, as this has a bearing on the kinds of formalities that are required. Subsequently, the different methods and the consequence(s) in case of their non-fulfilment will be explored: writing (in Section ii.), deeds (Section iii.), the signs used

711 These aims were set out by the Law Commission in relation to deeds; they may, however, be said to be of more general validity. See Law Commission, *Transfer of Land: Formalities for Deeds and Escrows* (Working Paper No 93, 1985) 4–5 at 3.2. Instead of labelling, the third aim is sometimes stated as being that of channelling, see, eg, Law Commission, *Transfer of Land: Formalities for Deeds and Escrows* (Law Com No 164, 1987) 7 at 2.11. For further references and discussion of these reasons, see Cartwright (fn 181) 113–115 para 4-03.

712 Compare the statement made in *Golden Ocean v Salgaocar* (fn 413) [28] (Tomlinson LJ) that '[i]t is in the interests of those who deal with consumers to keep the documentation clear and simple, otherwise they may find that the cost and complexity of attempted enforcement outweighs the potential benefit.'

713 See Cartwright (fn 181) 111 para 4-01, who also names optional formalities as sometimes being alternatives to substantive requirements.

714 Compare Andrews and Millet (fn 697) 43 at 2-021, who name a deed poll, under which the benefiting third party may enforce the deed against the executing party. See further *Halsbury's Laws Vol 9* (fn 33) para 211.

715 For example, a deed running twelve years in contrast to six years for simple contracts, see s 8 and s 5 Limitation Act 1980 respectively. For further details on the limitation period for deeds, see Andrews and Millet (fn 697) 43 at 2-021, 325–329 at 7-012 et seq.

716 See Griffith and Harrison (fn 26) 655, noting recording as a reason for both efficiency and certainty in transactions.

to authenticate a document (Section iv.), and electronic forms (Section v.). Other formal requirements, namely, registration of title to land and stamp tax, are considered in Section c.

Before addressing these topics, an issue that sometimes arises with what are known as 'subject to contract' clauses will be discussed briefly.[717] Having said that particular forms are sometimes prescribed by law, the parties are of course free to agree — in other instances — on formalities which ought to be observed before an agreement is seen as binding and enforceable.[718] In one case, *Eccles v Bryant and Pollock*,[719] the parties had agreed on the sale of a house 'subject to contract'. The documents were drawn up, but their exchange was not completed. The issue was whether an exchange of formal contractual documents had formed part of the parties' intention or whether signing without the exchange had concluded the contract. Greene LMR stated: 'Parties become bound by contract when, and in the manner in which, they intend and contemplate becoming bound.' [720] The court went on to find that in this case the parties' contemplation 'was the ordinary, customary, convenient method of exchange.'[721] As a consequence, the purchaser, in not posting his signed contract, refused to exchange contracts, and it was held that no contract had formed.

The existence of a subject to contract clause will not, however, be conclusive. This is illustrated by *Storer v Manchester City Council*[722], in which a contract was held to have been concluded despite the contract form containing a subject to contract clause. The reason given was that the defendant's objective in providing the form was 'to dispense with legal formalities'.[723] In contrast, where there is no express clause, the court will not infer such an intention readily.[724]

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717 For further details on this issue, see Treitel/Peel (fn 65) paras 2-090, 4-011 et seq.

718 This has been called 'formality as choice' in order to obtain certain benefits as opposed to statutory (mandatory) formality requirements by Cartwright (fn 181) 129 para 4-10.

719 [1948] Ch 93 (CA).

720 *Eccles v Bryant* (fn 719) 104 (Greene LMR).

721 Ibid.

722 See fn 420 above.

723 *Storer v Manchester City Council* (fn 420) 1408 (Denning LMR). Another reason, despite not stated explicitly, was a policy consideration: The defendant's refusal to complete the contract was due to a change in local (political) policy. See ibid 1406 (Denning LMR).

724 A recent example is the case of *Dayman v Anfield Services Ltd* [2006] EWHC 2937 (QB), 2006 WL 3485359 (official transcript). The issue was whether a contract on the transfer of a share in a taxi license had been concluded through an

i. Excursus: The Classification of Things in English Law

The way English law classifies objects differs from that of other legal systems, in particular those of continental Europe. This is because objects are not grouped into movable and immovable property, which is a distinction derived from Roman law.[725] Instead, English law has traditionally divided things into real and personal property, sometimes also termed realty and personalty respectively.[726] Personal property is a residual class, since everything that is not realty (land) is personalty (chattels).[727] The first step is therefore to see what the term 'land' means.

A short definition of 'land' can be found in sch 1 Interpretation Act 1978, according to which the term 'includes building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land'. The definition contained in s 205 subs 1 (1)(ix) Law of Property Act 1925 ('LPA 1925') is more detailed. It states:

> 'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) […]; also […] a rent […], and an easement, right, privilege, or benefit in, over, or derived from land; … and "mines and minerals" include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same […].

Thus, land includes the ground itself, and all that is fixed to it, or beneath and above it, in other words: from the core of the earth to the heavens.[728] Consequently, plants, such as timber or crops, are deemed as being part of land if grown naturally; otherwise, if they are *fructus industrialis*, they will

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exchange of correspondence. Seymour J held at [33], [27], [39]–[40] that it had and rejected the claimant's argument that the agreement had been made subject to contract. While a formal document had been drawn up, discussions ensued over one point, so that it was never signed by both parties, but only by the claimant.

725 See Bridge, '*Property*' (fn 182) 20–21, explaining succinctly how the other classification is applied in English choice of law rules.

726 Ibid.

727 Ibid 10 and 12, who goes on to give a brief historical explanation for this distinction at 11–12.

728 See Kate Green and Joe Cursley, *Land Law* (5th edn, Palgrave Macmillan 2004) 8, 48.

be treated as separate things.[729] Within this category, a distinction is made between land itself and fixtures of land.

An issue that may arise in relation to fixtures is whether these are attached to the land so as to form part of it or whether these remain separate chattels.[730] The answer depends on two things: the method and degree to which the thing in question is attached to the land; and for what purpose it is attached, whereby the second limb is of greater importance than the first. This was laid down by the CA in the case of *Berkley v Poulett*[731], in which pictures affixed to a wall panelling were not held to be fixtures but chattels, as the purpose of attaching them to the land were to better enjoy them, not to improve the land; while a statute standing on a plinth and a sundial on a pedestal, neither attached, were equally held to be chattels.[732] Irrespective of whether a thing is attached to land in some way, if it cannot be removed without doing damage to the land or suffering damage (or destruction) itself, it will become a fixture, or part and parcel of the land.[733] Consequently, buildings will usually form part of the land that they are erected on; unless they can be dismantled and erected in a different place.[734]

In this way, an object forming part of land can become a chattel upon being severed from the land,[735] such as crops or wood being cut down. Thus, the distinction between real and personal property can be illustrated as follows: for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 ('LPMPA 1989'), a sale of naturally grown crops or timber will be a sale of an interest in land if property in these crops is to pass before having been severed from the land; whereas it will be a sale of goods if the crops are severed from the land before property passing, which

729 Compare *Halsbury's Laws of England Vol 23* (5th edn, LexisNexis 2016) para 32.

730 Only a rough sketch can be provided here. Readers interested in further details are referred to, eg, Bridge, '*Property*' (fn 182) 127 et seq.

731 [1977] 1 Estates Gazette Law Reports (EGLR) 86 (CA); (1977) 241 Estates Gazette (EG) 911; [1976] EWCA Civ 1 [12]–[13] (Scarman LJ).

732 Ibid [14]–[15] (Scarman LJ), [41], [43] (Stamp LJ).

733 In ibid [13] (Scarman LJ), it was held that 'serious damage' or destruction of even part of land due to removal of something makes that thing a part of land. As to damage to the thing, see *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HoL), 690–693 (Lord Lloyd), 697–699 (Lord Clyde), which concerned a wooden bungalow resting on a concrete foundation and despite this was found to have become part and parcel of the land.

734 This was suggested by Lord Clyde in *Elitestone Ltd v Morris* (fn 733) 699.

735 Bridge, '*Property*' (fn 182) 13.

will then fall within the scope of the SGA 1979.[736] Presumably, if the crops are produced (cut) before contracting, the time of property passing becomes irrelevant in this sense, as the sale will in no case be a sale of land, but a sale of chattels.

Coming back to personal property, chattels are divided into chattels real and chattels personal. The former basically consists of leases (leasehold interests), whereas the latter are again a residual class encompassing all chattels that are not real.[737] These are then divided further into things (traditionally referred to as 'choses') in possession and things in action.[738] The former are all tangible or corporeal things that can be physically possessed, such as clothes or vehicles, while the latter are any thing intangible or incorporeal, such as debt, company shares, bills of lading, or intellectual property.[739] Issues have arisen in recent times on the classification of digital items such as software, and, in particular, whether these can constitute goods in contract of sales. It seems that the common law and English legislation currently do not recognise software by itself as property capable of constituting goods.[740] Intangible things such as software, information, and electricity are therefore regularly not goods.[741]

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736 *Halsbury's Laws Vol 23* (fn 729) para 32, giving further references. The intention for a sale of goods may be demonstrated if the contract foresees, eg, that the seller is to harvest or fell and deliver the crops or trees. See on this ibid.

737 See Bridge, '*Property*' (fn 182) 12.

738 Ibid 12–13.

739 For further details, see ibid 13–20, in particular on the further distinction made between 'pure intangibles' (eg, debt) and 'documentary intangibles' (eg, bills of lading).

740 This was held in an *obiter dictum* by Glidewell J in *St Albans City and DC v International Computers Ltd* [1996] 4 All ER 481, [1997] Fleet Street Reports (FSR) 251 (CA), 265–266, in which software was held to constitute goods within the meaning of the SGA 1979 only when contained on a physical device like a computer disc. While not constituting binding authority, the CA has recently held software not to be goods within the meaning of another piece of legislation, the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, see *Computer Associates UK Ltd v The Software Incubator Ltd* [2018] EWCA Civ 518, 2018 WL 01382596 (official transcript) [21] et seq (Gloster LJ). Indeed, as the court noted at ibid [64]–[65], [67], the CRA 2015 'opted to create a *sui generis* obligation – the supply of digital content – rather than widening the meaning of "goods."' (original emphasis). In effect, digital products and goods are thus kept separate in relation to consumers as well, see s 2 subs 8–9 CRA 2015. See also Treitel/Peel (fn 65) para 7-088, who note that a contract for digital content and goods or services makes a mixed contract.

741 See on this Clarke and others (fn 99) 302–303 for the SGA 1979. cf s 2 subs 8 CRA 2015, which allows electricity, water, and gas to be goods 'if they are put

Two terms appearing in the definition of land given above will be explained briefly before leaving the topic of property:[742] 'estate' and 'interest' both relate to the English concept of ownership in land, which is legally complex. Rather than one or several persons together simply owning something, the correct legal term is to say that someone has an interest in real property.[743] There are two greater interests, properly called estates, namely, the freehold and the leasehold, and several lesser interests, such as rights of way (a type of easement) or mortgages.[744] Interests can be of legal or equitable nature,[745] but relate directly to the land, not its 'owner', so that the rights or obligations arising from interests in some particular real property pass onto the new 'owner' due to being attached to the property itself.[746] Thus, taking the example of an apartment owner, who rents it out, the land lord has the freehold estate and retains the title of ownership,[747] while the tenant has the leasehold and will be in possession of the apartment during the term of the lease.[748] With these terms and denominations in mind, the different form requirements will now be analysed.

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up for supply in a limited volume or set quantity.' cf also Saidov and Green (fn 111), who analyse software in terms of the requirements of goods to be tangible and moveable and argue that it ought to be allowed to be goods under the SGA 1979 and the CISG in the right circumstances, but in the end call for an international instrument on the matter.

742 For a brief explanation of the whole definition, see, eg, Green and Cursley (fn 728) 9.

743 See ibid 3.

744 Ibid 10, 9.

745 In s 1 LPA 1925, an exhaustive list of the legal estates and interests in English law is given. Equitable interests are any other interests (s 1 subs 3 ibid).

746 Green and Cursley (fn 728) 10–11. The distinction is important not only because different remedies are available, but because enforcement of the interest may be (im)possible, see ibid 11–12.

747 In English law, the concept of property rights is a relative one. Thus, ownership can be described as 'the best available possessory right'. It is viewed as a bundle of rights, including the rights to possess and enjoy the object and its fruits. Consequently, where rights concerning the object are granted to other persons, the owner basically retains the other remaining (residual) rights over the object. See Bridge, '*Property*' (fn 182) 30, 45, 46, and, more generally, ibid 43–48.

748 Possession is a factual state under English law, legally consisting of factual control over an object and the intention to exclude other persons from exercising such control. See Bridge, '*Property*' (fn 182) 33 and 32–43 for further details on the concept.

ii. Written Forms: Standard Written Form and Evidence in Writing

The first and perhaps most basic kind of form requirement relates to a contract being in written form. In English law, two methods must be distinguished: legislation may either require an agreement to be '*made* in writing' or to be simply '*evidenced* in writing'. The difference between these two forms will be discussed by briefly analysing the requirements for each in Section aa). Examples of situations in which these forms are required are then given in Section bb).

aa) The Requirements of Writing and of Evidence in Writing

As the terminology already suggests, the difference between the written and the written evidence form is that the former requires a document that contains the contract, whereas a memorandum of an agreement that has been either previously or subsequently reached through other means, ie, orally, suffices for the latter.[749] The liberalism of the requirement of a memorandum becomes apparent when considering that the note need not even be made in order to satisfy the evidentiary purpose, so that a letter from one party to their agent or a written offer that is accepted orally are both equally sufficient.[750] Unless provided for otherwise by statute, the generally applicable definition of the interpretation of 'writing' is that it 'includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form […]'.[751]

A written contract is deemed to indicate a stronger intention of the parties to contract;[752] however, it has been stated that this form requirement

749 On the latter, compare the wording of s 4 Statute of Frauds 1677 ('SOF 1677'), speaking of an agreement in writing on the one hand, and a memorandum or note of the same on the other. On the time of creation of the latter document, see Treitel/Peel (fn 65) para 5-025.

750 See Treitel/Peel (fn 65) para 5-025.

751 Section 5, sch 1 Interpretation Act 1978. Sometimes, a statutory provision will reiterate the definition of what 'writing' constitutes, see, eg, s 2 BEA 1882. The question whether electronic documents fall within this definition will be discussed in Section v. below.

752 This has been indicated indirectly by the courts in, eg, *Pao v Lau* (fn 88) 631 (Scarman L): 'It matters not whether the indemnity thus given be regarded as the best evidence of the benefit intended to be conferred in return for the promise not to sell, or as the positive bargain which fixes the benefit on the faith of which the promise was given – though *where, as here, the subject is a*

may not be an efficient caution to persons considering whether to enter or about to enter into a contract. The reason is said to be that it does not to pose a 'significant hurdle' for parties, since it forms an integral part of our everyday lives.[753] If this is true for the requirement of writing, it must be equally, if not even more strongly applicable to instances of evidences in writing, seeing as the contract itself will often have been concluded orally and been put into writing only later. Indeed, it seems that a written document traditionally only had an evidentiary, rather than a dispositive function.[754]

This danger inherent in both methods could explain why a statute may not simply foresee for something to be made in writing, but to prescribe other details.[755] At a minimum, this will normally include a signature.[756] Furthermore, what were known as contracts under seal had to bear a seal impression.[757] Rather than an additional act being required, particular phrases or manners of expression for the text may be prescribed for a written document.[758] Other provisions for a document's content may be made, for example, a written contractual document may have to contain all express terms of the agreement.[759] Similarly, the common law required that the inducement or consideration for a contract be stated in a written

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written contract, the better analysis is probably that of the "positive bargain' (emphasis added). A written document thus aids the courts to find a bargain or an agreement.

753 See Cartwright (fn 181) 116, who says it does not 'make the parties stop and think'.

754 Simpson, '*History*' (fn 232) 15–16.

755 Cartwright (fn 181) 116.

756 Ibid 117 in fn 21. An exception is found in, eg, reg 4 (1) Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226), which disapplies several statutory provisions requiring evidence in writing of more than financial collateral arrangements (on which see reg 3). Signing is discussed in Section iv. below.

757 *Halsbury's Laws Vol 9* (fn 33) para 282. Sealing is also discussed in Section iv. below.

758 A classic example is a deed, which has to state 'on its face that it is intended to be a deed' (s 1 subs 2 para a LPMPA 1989). Further examples in relation to consumers (information duties) are given by Cartwright (fn 181) 119.

759 See, eg, s 2 subs 1 LPMPA 1989. As has been mentioned above in fn 173, this provision does not apply to actual land conveyance documents (executed contracts; regulated in ss 51–55 LPA 1925), but only to agreements to sell (executory contracts). As regards guarantees, see Andrews and Millet (fn 697) 68 para 3-022 and 71 para 3-023, who go on to note at 73 that the parties must be identified.

contract.[760] Sometimes, requirements in relation to a document evidencing a contract can be greater than for the written contract.[761] Conversely, it is at least true for memoranda of agreements of guarantee that these may be contained not in a single document but in a series of these, if all of them are signed by the guarantor.[762] Details on the signature and seal will be given in Section iv., after a particular form of written documents, the deed, has been discussed in Section iii.

bb) Instances of the Written and the Written Evidence Forms

There are only few situations in which writing or a memorandum are required for contracts in English law. Two typical examples of the written and the written evidence forms are s 2 subs 1 LPMPA 1989 (Contracts for sale etc of land to be made by signed writing) and s 4 SOF 1677 (Contracts of guarantee) respectively, which not only require a document or memorandum, but that these be signed.[763] Other examples of signed writing being required are bills of exchange (s 3 subs 1 BEA 1882) and consumer credit agreements[764] (s 61 Consumer Credit Act 1974).

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760 *Morley v Boothby* (fn 292) 456–457 (Best CJ): There is no set form; however, there must be 'clearness enough for the courts to judge [on the consideration's] sufficiency'. At least for guarantees, this is no longer necessary (s 3 Mercantile Law Amendment Act 1856). For a discussion of the issue of proving consideration, see Andrews and Millet (fn 697) 42–43 at 2-020.

761 This is the case with a guarantee, for example. In a similar fashion to conveyances and agreements to sell land, the courts have distinguished between guarantees concluded in written form and those which are only recorded in writing after having been concluded: The latter must contain a statement to the effect that the guarantor acknowledges the contract. See *Golden Ocean v Salgaocar* (fn 413) [24] (Tomlinson LJ).

762 See Andrews and Millet (fn 697) 69 para 3-022.

763 For further discussion of s 2 LPMPA 1989, see, eg, Treitel/Peel (fn 65) para 5-009; *Halsbury's Laws Vol 22* (fn 172) para 224. For the SOF 1677, see, eg, Cartwright (fn 181) 117–118 para 4-05. For guarantees, see, eg, Andrews and Millet (fn 697) 2–10 paras 1-004 et seq. On the purpose of the SOF 1677, see, eg, *Golden Ocean v Salgaocar* (fn 413) [21], [29] (Tomlinson LJ). Note that s 53 subs 1 LPA 1925 seems to be applicable to equitable dispositions of (interests in) land, compare *Halsbury's*, ibid, para 226.

764 Section 8 subs 1 Consumer Credit Act 1974 provides that these are 'agreement[s] between an individual ("the debtor") and any other person ("the creditor") by which the creditor provides the debtor with credit of any amount.'

iii. Special Instrument: Deed

Rather than a simple written form, a handful of special kinds of documents developed throughout the history of English law. In essence, these documentary instruments fulfil particular requirements as to their style or content. Focus in this dissertation will be on the deed, the perhaps most prominent and important of these instruments in transactions.[765] It can also be termed the most formal requirement in English law. Its requirements (see Section aa) below) and examples of situations in which a deed is necessary (Section bb)) will be examined subsequently.

aa) Requirements of Deeds

Contracts that are made in the form of a deed are traditionally and formally referred to as 'contracts under seal' or 'by speciality'.[766] This terminology may have been derived from the formalities applicable to this special kind of document. They relate to several aspects, namely, the intention of the party or parties in making the instrument, its form (execution), and its content.

In terms of intention, the instrument must be meant to be a deed (s 1 subs 2 (a) LPMPA 1989). While use of the word 'deed' is not required, 'what is needed is something showing that the parties intended the document to have the extra status of being a deed'.[767] Interestingly, the fact that a document is 'executed under seal' does not on its own satisfy s 1 subs

765 Other instruments include bonds and instruments under hand only. On these, see *Halsbury's Laws Vol 32* (fn 62) paras 289 et seq and paras 339 et seq respectively.

766 *Halsbury's Laws Vol 9* (fn 33) para 210. Having said this, a deed is not the only contract under seal, but one important form. Another example is a will, or a document signed and sealed by a company director, see *Halsbury's Laws Vol 32* (fn 62) para 201.

767 *HSBC Trust Co (UK) Ltd v Quinn* [2007] EWHC 1543 (Ch), 2007 WL 1942791 (official transcript) [51] (Nugee QC). The case concerned an alleged sale of land between a third party (decedent) and the claimant. The defendants were the executors of the decedent's will. In that case, an intention for a written endorsement on a valuation of the property to be a deed was rejected by the court, although it was not denied that the document was meant to be void of legal effect, see ibid at [48]–[49], [51] (Nugee QC).

2 (a) LPMPA 1989 (s 2A LPMPA 1989), whereas formerly, ie, before the LPMPA 1989, deeds had to be sealed in order to be validly executed.[768]

The requirements as to the valid execution of a deed are set out in s 1 subss 3 et seq LPMPA 1989. Accordingly, a deed must be signed by an individual before a witness[769] (ibid subs 3 (a)) and be delivered (ibid subs 3 (b)). Contrary to what one might expect, the latter requirement does not mean physical delivery, but rather that the signing person has the intention to be bound by the deed. This must be shown by some act — arguably one other than signing,[770] whereby this act or conduct can be express or even implied.[771] In practice, this seems to be the case when a solicitor enters a date into a deed instrument that has already been signed, as this addition apparently shows that the deed has been adopted by the signatory.[772] Formerly, the party making the deed would speak some words affirming that the instrument was their 'act and deed' while holding a finger over the seal on the deed; a practice that seems to have gone out of use today.[773]

Finally, as for the content of a deed, it has been stated that it must 'purport to convey property, title, interest, or authority', or at least confirm the passing of an interest or property.[774] Initially, the common law rule was that a deed had to be written on parchment or paper, not on other materials such as wood or cloth, as the former were deemed less corruptible.[775] Nevertheless, even seemingly more durable materials such as stone or steel were not permissible.[776] These restrictions — like those on the form of deeds — were abolished by s 1 subs 1(a) LPMPA 1989. A deed need not be written on individual sheets of paper, but may be recorded in a book, using any marking material such as ink, graphite, or

768 See Bridge, '*Property*' (fn 182) 174. See further Section iv. below.

769 Where the person does (can) not sign themselves, the deed can be signed by someone else instead at the person's 'direction and in his presence' (s 1 subs 3(a)(ii) LPMPA 1989). In this case, two witnesses need to be present (ibid). These provisions do not apply to companies, see ibid subs 10.

770 See Bridge, '*Property*' (fn 182) 175.

771 *Halsbury's Laws Vol 32* (fn 62) para 231.

772 Green and Cursley (fn 728) 28.

773 *Halsbury's Laws Vol 32* (fn 62) para 231.

774 *Reg v Morton* (1872-75) LR 2 Court for Crown Cases Reserved (CCR) 22 (Criminal Appeal Court), 27 (Bovill CJ).

775 See Cartwright (fn 181) 119 in fn 34.

776 *Halsbury's Laws Vol 32* (fn 62) para 202.

paint; any mode of recording, including handwriting, printing (including lithography), or even photography; and even any language or characters.[777]

bb) Instances of Deeds

The most prominent use of deeds in practice today is in transactions relating to land. This includes[778] conveyances, ie, the transfer of property of land, and leases for more than three years, both of which are void at law if not contained in a deed (see s 52 subss 1, 2(d), s 54 subs 1 LPA 1925). This is in stark contrast to leases whose term is for less than three years, which can be concluded orally (s 54 subs 1 ibid).[779] Instances of a deed being required other than in relation to land include another kind of document of importance in contracting, namely, powers of attorney (s 1 subs 1 Powers of Attorney Act 1971). A deed may furthermore be used in connection with gratuitous transactions,[780] ie, gifts.[781] This is necessary where a gift is made of tangible goods (choses in possession) and the goods are not delivered at the time of making of the gift.[782] In this regard, a promise of a gift does not become binding until the deed is created; or, alternatively, until the gift is otherwise executed, such as through delivery of the object.[783]

Apart from the prerequisites just described, another important difference exists between deeds and the other documentary forms discussed in the previous section: a deed on its own is sufficient to render a contract binding, while the latter constitute a requirement that has to be fulfilled in addition to those of offer, acceptance, consideration, and contractual intention.[784] In other words, a contract which does not have to take the form of a deed and which fulfils all criteria except for having been made or being evidenced in writing may be held to be unenforceable in court, although the agreement itself may still be valid.[785] Whether the agreement

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777 See ibid with further references.
778 Other examples, such as mortgages, can be found in ibid para 214.
779 For further discussion, see Green and Cursley (fn 728) 28.
780 This use is stipulated in s 1 subs 2 (d) SGSA 1982, according to which such instruments are not covered by the stipulations of the Act.
781 *Reg v Morton* (fn 774) 27 (Bovill CJ).
782 On this, see *Halsbury's Laws Vol 32* (fn 62) para 213.
783 See Bridge, '*Property*' (fn 182) 171.
784 See Treitel/Peel (fn 65) para 5-002; McKendrick (fn 48) 259.
785 Stone (fn 429) 33–34.

is void depends on the statutory provision in question.[786] An example for voidness is s 2 subs 1 LPMPA 1989 regarding 'contract[s] for the sale or other disposition of an interest in land', which are to be made in writing (see Section ii. above).[787] Bills of exchange that do not fulfil the requirements set out in the BEA 1882 are not invalid, but will not be regarded as bills of exchange,[788] and as such will not display the effects of these bills.[789] Similarly, contracts of guarantee not in writing or at least evidenced in written form are not invalid, only unenforceable (s 4 SOF 1677).[790] Where the agreement is not void, it can still be enforced outside the courts, eg, if the other party recognises their liability.[791]

iv. Signing and Sealing

The requirements that a written document be either sealed or signed has long tradition in English contract law.[792] Having said this, there was a period of 75 years during which a particular instrument had to be both signed and sealed: a deed.[793] This rule was changed with effect from 1990, and the regulation now varies slightly depending on whether the party is an individual or (forms part of) a legal entity. This will be discussed further below. First, the terms 'signature' and 'sealing' will be defined.

786 Whincup (fn 34) 108 para 4.4.
787 Although the provision does not state this consequence, McKendrick (fn 48) 262 deduces it. cf Treitel/Peel (fn 65) para 5-011: the contract 'does not come into existence' if the statutory requirements are not met.
788 Section 3 subs 2 BEA 1882.
789 In other words, they cannot be negotiated (transferred, s 31 subs 1 BEA 1882). Compare Treitel/Peel (fn 65) para 5-006. For details on negotiability, see ibid paras 15-046–15-049.
790 See on this further Treitel/Peel (fn 65) para 5-027.
791 Arthur T von Mehren, *Chapter 10: Formal Requirements*, in: David and others (fn 21) Vol VII/1 52–53.
792 Sealing will be explored in more depth in Section D.III.2.b. below.
793 This was required by s 73 subs 1 LPA 1925, which was repealed by s 1 subs 1 LPMPA 1989. See on this *Halsbury's Laws Vol 9* (fn 33) para 282 and *Halsbury's Laws Vol 32* (fn 62) para 201. See also the previous section.

aa) 'Signing' and 'Sealing' Defined

While there is no exact statutory definition, a signature is recognised as a physical mark on a document indicating consent to the document's content,[794] so that anything from an 'X', over a person's initials, to one's full name is sufficient, whereby it may be written by hand, stamped, typewritten, or printed.[795] Indeed, s 1 subs 4 LPMPA 1989 provides that 'signing' generally 'includes making one's mark on the instrument'. It is not the form, but the intention with which the signature is made, namely, that the signatory accepts the content and intends to be bound by it (authenticates the document), that is important.[796] Thus, a signature need not be personalised,[797] or even forgery-proof,[798] so that even 'a pseudonym or a combination of letters and numbers' can be sufficient, provided that these are used with the intention to function as a signature.[799] Similarly, where a person is represented through an authorised person, this person may sign in their own name or in the name of their principal.[800]

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794 See Griffith and Harrison (fn 26) 654. Compare s 1 subs 4 LPMPA 1989.

795 See Law Commission, '*Electronic Commerce*' (fn 502) 12–13 at 3.25 with further references to case law. Similarly, the court in the case of *Mackenzie v Coulson* (fn 65) 374 (Sir James Vice Chancellor) held that writing one's initials on a slip of paper meant that the persons (underwriters) were willing to be bound by the terms (of an insurance policy) stated on the paper.

796 See Griffith and Harrison (fn 26) 654; Law Commission, '*Electronic Commerce*' (fn 502) 13 at 3.26.

797 Law Commission, '*Electronic Commerce*' (fn 502) 13 at 3.25.

798 Griffith and Harrison (fn 26) 654.

799 See *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 [27] (Pelling J). In that case, the question was whether an e-mail, which did not contain a signature in the normal sense but showed the sender's e-mail address, was a signed memorandum for the purposes of s 4 SOF 1677. The court found this not to be the case. The argument will be discussed further in Section v. below.

800 Compare s 2 subs 3 LPMPA 1989 ('[…] signed by or on behalf of each party'). This seems to be true at least for persons authorised by a power of attorney. It seems that solicitors may only sign on behalf of their client, and only when they have express authority to do so, see *Halsbury's Laws Vol 23* (fn 729) para 186. Where more than one person is a client, express authority must be given from all, see *Suleman v Shahsavari* (1989) 57 P&CR 465 (HC Chancery Division). In this case, a married couple at first intended to sell their house and then changed their minds after contracts, purportedly signed on both their behalf by their solicitor, had been exchanged. The issue was whether the solicitor had been authorised. Although the court found the solicitor to have been expressly authorised by the wife, he found no authorisation of any kind from the husband, so

Despite this liberalism,[801] it is generally said that signing a document adds to the level of seriousness of an act,[802] although — similar to the case for writing — the hurdle for this requirement is said to be low.[803] Indeed, it might in some circumstances be dangerously low, as is exemplified by *L'Estrange v F Graucob Ltd*[804]. The case concerned the sale of a slot machine. The order form contained a number of terms, some of them in small print, including an exclusion of liability clause. The plaintiff signed the order form and failed in her case against the defendants for delivering a machine not fit for its intended purpose. The court's reasoning was that a person having signed a document cannot claim ignorance of its terms and thus not being bound. Indeed, knowledge of its contents was said to be irrelevant where a document was signed without fraud or misrepresentation by another party.[805]

As with signatures, there seems to be no statutory definition of a seal, or the act of sealing; rather, it seems to be a presupposed notion.[806] Hereinafter, 'seal' will refer to the object used to leave an ink mark or an impression in other materials; 'sealing' or 'seal impression' will be used for the actual mark or impression made by the object.[807] A seal is no longer necessary today, specifically not for a deed (s 1 subs 1 (b) LPMPA 1989; see also Section iii. above). Even before this statute came into force, it was held by English courts that a real seal impression was no longer necessary. It was sufficient instead for the document to show where the seal ought to

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that the contract was not properly concluded, see ibid 473–475 (Andrew Park QC).

801 By way of example, the court in the case of *Stidolph v ASLET Ltd* (fn 496) found the lack of a signature on a notice to have been healed by the notice having been sent together with a signed covering letter and a stamped and addressed envelope, which was deemed to be 'substantially to the like effect' of the form foreseen in the notice regulations to the Tenant and Landlord Act 1954 (see ibid at 803–805 (Denning L MR), 807 (Edmund Davies LJ, Cross LJ)).

802 Compare Cartwright (fn 181) 117 para 4-05. In *Golden Ocean v Salgaocar* (fn 413) [21], Tomlinson LJ noted that a signature was an acknowledgement 'of the solemnity of the undertaking'.

803 See Griffith and Harrison (fn 26) 654.

804 See fn 527 above.

805 *L'Estrange v F Graucob Ltd* (fn 527) 404 (Scrutton LJ), 405–406 (Maugham LJ).

806 Thus, eg, s 45 Companies Act 2006 (hereinafter 'CoA 2006') relates to the 'common seal' of companies but provides no explanation of what the term means. It merely states in subs 2 that such a seal should bear the company's name by having it engraved.

807 This follows the definitions used by Dominique Collon, '*Glossary*', in: ibid, *7000 Years of Seals* (British Museum Press 1997) 223–224.

be, eg, by having a circle with the letters LS (for *locus sigilli*) printed on it, and the signature being placed there.[808]

bb) Instances of Signing and Sealing

The instances requiring a signature include the provisions relating to land already mentioned above, namely, s 53 LPA 1925 (dispositions, declarations of trusts), s 2 LPMPA 1989 (contracts for sale)[809], and s 4 SOF 1677 (guarantees). It becomes apparent from this enumeration that the requirement of signing normally accompanies that of writing. Under the LPMPA 1989, the contract will come into existence when all parties[810] have signed the contract document, or, as the case may be, a copy of the contract each that is exchanged with that of the other party.[811] In terms of the consequences of the prescribed form not being fulfilled, at least guarantees are said to be unenforceable, but not void of effect *inter partes*.[812]

As for the employment of seals, the most prominent example is that of a deed. Since 1990, private persons are no longer required to seal deeds, although companies must still employ the company seal when executing instruments (s 74 LPA 1925), including deeds.[813] Having said this, subsequent to the abolition in 1990 of the rule that companies must have a seal,[814] and in case of companies formed under the Companies Act 2006 ('CoA 2006'), a signature by either two 'authorized signatories' or one

808 In *First National Securities Ltd v Jones* [1978] 2 WLR 475 (CA), [1987] Ch 109, the issue before the court was whether a mortgage had been duly executed as a deed. In the event, the instrument was titled legal charge, but contained the typical formulation of a deed at the end, in particular the words 'IN WITNESS whereof the mortgagor has hereunto set his hand and seal the day and year first before written' and 'SIGNED SEALED AND DELIVERED by the above-named mortgagor in the presence of […]'. The purported mortgagor's (defendant's) signature was placed on top of the printed LS-circle for the seal. This was sufficient, see ibid 114–118 (Buckley LJ), 119–120 (Goff LJ), 121 (Sir David Cairns).

809 The distinction between contracts for sale (executory) and sales itself (executed contracts) was already discussed in fn 173 above.

810 In case of co-owners, co-trustees, or partners, one person may sign on behalf of the others, see *Halsbury's Laws Vol 23* (fn 729) para 186.

811 See ibid paras 2, 185–186.

812 See, eg, *Golden Ocean v Salgaocar* (fn 413) [15] (Tomlinson LJ). For further discussion, see Andrews and Millet (fn 697) 7 at 1-007 and 89–91 at 3-028.

813 *Halsbury's Laws Vol 32* (fn 62) paras 227, 232, 240.

814 See Andrews and Millet (fn 697) 43 at 2-021.

director in the presence of a witness seems to suffice for the execution of contracts if the company does not have a seal (s 44 subss 1, 2 CoA 2006).[815] Where a company has laid down its own requirements for deeds in its articles of incorporation, these must be adhered to.[816] Consequently, deeds executed by companies need not necessarily bear a seal. Where they do and this is not done, the document will not count as a deed, which in turn may mean that the transaction for which the deed ought to have been executed is invalid (compare Section iii.bb) above).[817]

A deed is not the only example of a sealed document. Legal entities, such as societies, or institutions such as the Church, may seal and sign documents executed by them, so that various kinds of certificates, such as a for admissions or awards, are not deeds despite bearing seal imprints.[818] Similarly, seals are still used in particular professions, such as notaries public.[819] In line with these facts, statute precludes a sealed document from being automatically deemed to have been intended to be a deed (s 2A

815 *Halsbury's Laws Vol 32* (fn 62) para 241. See also Leonard S Sealy and Sarah Worthington, *Sealy and Worthington's Cases and Materials in Company Law* (10th edn, OUP 2013) 131. As mentioned above, the company seal, termed 'common seal', is regulated in s 45 CoA 2006.

816 On the 'mode of execution' of deeds, see generally *Halsbury's Laws Vol 32* (fn 62) para 241.

817 cf *OTV Birwelco Ltd v Technical & General Guarantee Co Ltd* [2002] EWHC 2240 (TCC) (QB), 2002 WL 31050475 (official transcript), in which the court found that a bond (deed) sealed with a company's trading name instead of its registered name did not invalidate it. The court held that s 36 and s 36A Companies Act 1985, dealing with the execution of documents and deeds by companies, concerned the manner of making a deed and the identities of the persons sealing or signing it but not the company's name that is used. Nevertheless, the company in question was found to have contravened s 350 subs 1 of the same Act in using a seal that did not bear its registered name and thus incurred a fine. See paras 22, 28–29, 32–33, 40, 45–46, 49 et seq of the decision.

818 A letter of orders to ordain a deacon in the Church of England, although sealed, has been held not to be a deed for the purpose of a criminal statute relating to the forgery of deeds, see *Reg v Morton* (fn 774) 26–27 (Bovill CJ), in which a range of examples are given of what are not deed instruments, though sealed. See also ibid 27 (Blackburn J). Further references can be found in *Halsbury's Laws Vol 32* (fn 62) para 201. For companies, see ss 43–45 CoA 2006 and Sealy and Worthington (fn 815) 131.

819 See on this the description of the organisation of notaries public given by the Notaries Society at www.thenotariessociety.org.uk/pages/the-notarial-profession.

LPMPA 1989).[820] In conclusion, in order for an instrument to be a deed, other requirements must be met, as explained above.

v. Electronic Communication: Writing and Signatures

As was already illustrated by the discussion above concerning the effectiveness of declarations of offer and acceptance, the development of new technologies has made it necessary from time to time for certain principles of English contract law to be examined and adapted to new frameworks. The main issue that arose with respect to digital communication was whether electronic forms of correspondence and of contracting ought to be given the same treatment as traditional, ie, paper, forms. To put it in another way: The question was whether it was (or is) desirable to accord electronic documents the same legal effect as paper documents.[821] In line with the nature of the common law, it has been not solely the work of legislation but also of case law to deal with this situation.[822] In fact, there are only few explicit regulations in English law that provide for electronic forms of contracting. This may be due to the fact that previously existing rules are adaptable.[823] Consequently, English law does not contain definitions for terms such as 'electronic contract'. Having said this, there has been legislative activity, in particular with regard to electronic signatures. This will be examined in Section bb), after the legal situation for electronic documents, ie, things in electronic forms of writing, has been considered in Section aa).

820 This seems to be in line with a long-standing construction as enunciated over 100 years earlier by Blackburn J in *Reg v Morton* (fn 774) 27: '[T]he affixing of a seal does not make a deed.'

821 See on this Cartwright (fn 181) 120–121 para 4-06.

822 Indeed, the English courts first embarked on the venture of accommodating the new technologies and changing business practices. Apart from the cases discussed in Section a.iii.cc) above in relation to the effectiveness of acceptance in particular, more recent concerns were related to formal documents like guarantees and the requirement of a signature.

823 Compare Cartwright (fn 181) 121.

aa) Electronic Documents: Writing

As mentioned above, there seems to be no statutory definition of what an electronic document is. This may not be necessary, as the definition of 'writing' is wide: It may be in any kind of form, as long as it is visible (see Section ii.aa) above). This wide notion has been applied in *Golden Ocean v Salgaocar*[824], in which it was held on the question whether a guarantee in relation to a charter party existed that a sequence of e-mails can constitute an agreement in writing for the purposes of s 4 SOF 1677.[825] Therefore, standard forms of writing or written evidence ought to be fulfilled where the documents in question are digital,[826] including where the document is digitalised by scanning it.[827] Having said this, caution is advisable where a contract must fulfil other requirements (see Section c. below) that might require a paper document.[828]

bb) Electronic Signatures: English and EU Law

English legislation does not contain a rule on the validity of electronic signatures. Section 7 Electronic Communications Act 2000 (hereinafter 'ECA 2000') provides that an electronic signature is admissible as evidence in civil litigation if it is 'incorporated into or logically associated with a particular electronic communication' (ibid subs 1(a)), whereby the communication method can be through an 'electronic communications network' or 'other means but while in electronic form' (s 15 subs 1 ibid).[829] While the provisions do not lay down exact requirements, they generally allow electronic forms of documents, signatures, and seals to be used in court as

824 See fn 413 above.
825 *Golden Ocean v Salgaocar* (fn 413) [10], [20]–[22], [38] (Tomlinson LJ).
826 Compare the opinion expressed in Law Society, *Execution of a document using an electronic signature* (Practice Note, 21 July 2016), www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/.
827 Compare Law Society, *Execution of documents by virtual means* (Practice Note, 16 February 2010), www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-documents-by-virtual-means/.
828 Compare Law Society, '*Virtual Documents*' (fn 827).
829 Similar provisions are made for electronic seals (in s 7A ECA 2000) and electronic documents (in s 7C ibid).

evidence, thus supporting the move towards electronic documents.[830] Consequently, the issue of validity has to be considered under the common law rules, unless the EU Regulation on electronic documents, signatures, and seals that has generally come into force in all EU Member States on 1 July 2016, applies.[831]

Under that Regulation, an electronic document is 'any content stored in electronic form, in particular text or sound, visual or audiovisual recording' (art 3 para 35 eIDAS Regulation 2014), while an electronic signature is data that is used by a person ('signatory') to sign and is associated with or attached to other data (art 3 paras 10, 9 ibid). Apart from this simple type, the Regulation defines two varieties: the 'advanced' and the 'qualified' electronic signatures. Despite their slightly misleading denominations, it seems to be the 'qualified' electronic signature that has the highest rank. While the 'advanced' electronic signature must fulfil a range of criteria under art 26 of the Regulation, the 'qualified' signature is an advanced signature which has a 'qualified' certificate and was created using a special ('qualified') electronic signature creation device (ibid paras 11–12, 14–15, 22–23). The latter requirements for a qualified signature, regulated in art 28 and Annex I (certificates) as well as in arts 29–31 and Annex II (creation devices) of the Regulation, will not be discussed further.[832] For the purposes of the current discussion, it suffices to state that the certificate must contain particular information, including the name or pseudonym of the signatory and the electronic signature (Annex I points c and g).[833]

830 Compare Law Society, '*Electronic Signatures*' (fn 826), where it is noted that the ECA 2000 does not regulate the validity of electronic signatures.

831 See art 52 para 2 Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC [2014] OJ L 257/73 (hereinafter 'eIDAS Regulation 2014'). Note that the Regulation deals exclusively with electronic identification service schemes and trust service providers, ie, with the legal-technical matrix for e-commerce, thus leaving all laws relating to the conclusion of contracts and form requirements untouched, whether on EU or national level (see art 2 paras 1 and 3, recital 2).

832 The same goes for the rules found in arts 35 et seq (Regulation on electronic seals), which, in parallel to signatures, can be simple, 'advanced', and 'qualified' (art 3 paras 25–27 eIDAS Regulation 2014).

833 On this regime, see also the discussion in Section III.3.b.v.bb) below.

Where the signature is not to be 'qualified' or 'advanced' within the meaning of the eIDAS Regulation 2014,[834] a signature can be electronic in the following sense: a scanned image of a hand-written signature being inserted into an electronic document; writing a signature into an electronic document by using a finger, computer mouse or other device; using an e-signature platform to insert a hand-written or typed signature into the document; or, by typing one's name into the document.[835] The last of these methods was considered in *Golden Ocean v Salgaocar*[836]. It was held that an e-mail signed by one of the shipbrokers of the defendants (charterer) using only his first name constituted a signature within the meaning of writing of s 4 SOF 1677 for guarantees.[837] Similarly, in the case of *J Pereira Fernandes SA v Mehta*[838], an e-mail that was not signed in the traditional sense but contained the sender's e-mail address and had been accepted orally (by telephone) was held to be able to constitute a written and signed memorandum as required by s 4 SOF 1677; however, the e-mail address was not seen as equivalent to a signature, as it had been inserted automatically by a technical process rather than by the sender themselves or their agent.[839] Nevertheless, typing one's name or that of one's principal as part of the main text in the e-mail can amount to an electronic signature.[840]

Another specific ruling was made by the CA concerning a proxy form, purportedly issued according to the Insolvency Rules 1986[841] in the case of *Re a Debtor*.[842] The issue was whether a faxed proxy form could be deemed to have been signed according to those rules. The court held that it was

834 It was suggested in Law Commission, '*Electronic Signatures*' (fn 826) that such signatures were 'not commonly used in England' in 2016.

835 See Law Society, '*Electronic Signatures*' (fn 826). It is suggested in Department for Business, Energy & Industrial Strategy, *Electronic Signatures and Trust Services* (Guide, August 2016) 4 that there are yet other ways of signing electronically, like '[a] unique representation of characters', or '[a] digital representation of characteristics, for example, fingerprint or retina scan'. The Guide is available online at www.gov.uk/government/publications/electronic-signatures.

836 See fn 413 above.

837 *Golden Ocean v Salgaocar* (fn 413) [30]–[35], [38] (Tomlinson LJ).

838 See fn 799 above.

839 *J Pereira Fernandes SA v Mehta* (fn 799) [27], [29]–[32] (Pelling J).

840 Ibid [29]–[32] (Pelling J). See also *Golden Ocean v Salgaocar* (fn 413) [32] (Tomlinson LJ): using one's first name, initials or nickname, as (well as) an electronic signature can be sufficient.

841 SI 1986/1925.

842 [1996] British Company Cases (BCC) 189.

sufficient, although the court emphasised that the result may be different if other legislation applied.[843] In its reasoning, Laddie J stated that the signature requirement existed to 'indicate, but not necessarily prove' that the document has been authenticated by the principal. Moreover, and the judge noted that signatures other than those by hand, ie, a signature made with a stamp, as well as a faxed signature, would be deemed sufficient both from the standpoint of being done by the principal or on his authority and from the point of view that it afforded no less authenticity than other forms of signature of a person unknown to the recipient.[844] This case has been cited as authority for a scanned signature sent in electronic form to be sufficient for authentication purposes, and has been applied to e-mail and other forms of 'electronic transmission'.[845]

Another manner in which digitalisation is promoted in legislation is through ss 91 et seq Land Registration Act 2002 (hereinafter 'LRA 2002'), which foresee a system of electronic conveyancing.[846] This system allows electronic documents to be recognised as documents 'in writing' or as deeds, and to be signed and sealed, where applicable (s 91 ibid). Although s 92 gives the registrar the power to provide 'an electronic communications network', plans were at first put on hold.[847] A business e-services portal has been launched since, allowing regular business customers to, *inter alia*, submit applications and documents online.[848] As will be seen, the fact that individuals cannot use the registration service is only logical, since it is professionals who normally take on this task.

c. Other Requirements under English Law

There may be other requirements related to contracts which are not one of form and yet have a bearing on its legal effectiveness, or at least on its enforceability. Two instances that will be considered subsequently are the

843 *Re a Debtor* (fn 842) 195 (Laddie J).
844 Ibid 194.
845 Law Commission, '*Electronic Commerce*' (fn 502) 14 paras 3.32–3.33.
846 The registration of property in land will be discussed in Section c.i. below.
847 See Cartwright (fn 181) 121 in fn 41, citing a report by the Land Registry from 2011.
848 For further details, see www.gov.uk/guidance/hm-land-registry-business-e-services and www.gov.uk/guidance/hm-land-registry-electronic-document-registration-service.

need to register one's title to land (in Section aa) below) and stamp tax duty (Section bb)).

i. Registration of Title to Land

Before going into the topic of registration, it should be noted that title to land in the UK is largely (around 85%) registered and only a small portion remains unregistered.[849] This becomes relevant not only for the conveyance procedure, but — more importantly — for the effect that the completion of the contract has.[850] This latter aspect will now be considered.

Whenever a contract effects the transfer of a freehold or leasehold estate in unregistered land, the title must be registered in the Land Register (ss 4, 6 LRA 2002).[851] Similarly, if a title has previously been registered, the change in title resulting from the conveyance must be registered before the transaction will display its legal effects (s 27 subs 1 LRA 2002).[852] Conversely, legal title to unregistered land will pass by virtue of the deed.[853] In either case, failure to register will render the conveyance void as regards the creation or transfer of the legal estate (s 7 subs 1 LRA 2002); in other words, the title will revert to the original owner.[854] Consequently, while registration has no bearing on the contract, it does affect the contract's legal consequence, namely, the transfer of the legal title, and is therefore relevant in transactions.

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849 Gavin Curry, *Why the missing owners are missing out* (HM Land Registry Land and Property blog, 9 October 2014), http://blog.landregistry.gov.uk/giving-85-per-cent/.

850 There is another effect, which relates to interests of third parties in the land in question. For details on this, see Green and Cursley (fn 728) 148–160.

851 The requirements for registration are set out in sch 2 LRA 2002. One related requirement found outside the LRA is the submission of a certificate issued by the Inland Revenue that revenue requirements have been met. Unless this certificate is presented, the registration cannot be made (s 79 Finance Act 2003).

852 While no legal title will be transferred, equitable title will pass to the buyer, see Green and Cursley (fn 728) 161. Thus, the transaction will have some but not its full effect.

853 Ibid 18.

854 Having said this, that party will then hold the land on trust for the buyer (s 7 subs 2(a) LRA 2002). Therefore, the buyer will still have equitable title to the land, see Green and Cursley (fn 728) 161.

In practice, it is the buyer's solicitor who will effect the registration.[855] This has to be done within two months of the conveyance (s 6 subs 4 LRA 2002), unless an application for extension has been granted (s 6 subs 5 ibid). Registration of unregistered land can be made voluntarily where no event requiring compulsory registration occurs.[856] The amount payable as the registration fee depends on several factors: the type or reason for the transfer; the value of the property (in case of commercial property under scale 1, including Value-added Tax); whether the registration is voluntary, or, where it is compulsory, the method used for registration.[857] Using a simple example, the registration of title for real property to the value of £300,000 (approx. €350,000) would range between £135 and £270 (approx. €160–€315) under scale 1, and would be £40 or £80 (approx. €46–€95) under scale 2.[858]

ii. Stamp Tax on Land Transactions

The other requirement that will be considered is stamp tax. First, it ought to be noted that the following discussion will focus on what is termed 'stamp duty land tax', the stamp tax applicable to transactions concerning land (see s 42 subs 1 Finance Act 2003; hereinafter 'FA 2003'). The other two kinds of stamp taxes imposed today are 'stamp duty' on instruments relating to corporate transactions, such as transfers of interests in partnership holding stock or marketable securities, and 'stamp duty reserve tax' on, *inter alia*, transfer agreements of securities for money or money's worth.[859]

While the history of stamp taxes goes back to the seventeenth century, it has been changed over time, with the last comprehensive change to stamp

855 *Halsbury's Laws Vol 23* (fn 729) para 2.

856 Section 3 LRA 2002. This has the advantage of securing a discount on the registration fee, see Curry (fn 849). On the events triggering compulsory registration, see s 4 LRA 2002. These include 'transfer[s ...] for valuable or other consideration, [or] by way of gift' (s 4 subs a (i) LRA 2002).

857 For details on the fees, see HM Land Registry, *Registration Services Fees* (Guide, March 2017), available online at www.gov.uk/guidance/hm-land-registry-registration-services-fees.

858 See ibid.

859 For further information on these two duties, see *Halsbury's Laws of England Vol 96* (5th edn, LexisNexis 2012) paras 301–424.

duty land tax in 2003 under the FA 2003.[860] It is a charge imposed on instruments (ie, any kind of written document, see s 122 subs 1 Stamp Act 1891; hereinafter 'SA 1891') upon their execution,[861] meaning upon being signed (see ibid). Where the instrument is subsequently altered in any material way, it needs to be stamped anew.[862] Payment of this duty must be made by the purchaser[863] within 30 days from the execution of the instrument (inferred from s 15A subs 1 (b) and s 15B subs 1 SA 1891) and should not be omitted or circumvented, as the consequences not only encompass a monetary fine (interest on the duty and a penalty), but furthermore make the document unenforceable in court and unregistrable in a public register.[864] Thus, although a contract's validity will not be affected by a failure to pay stamp tax, there may be practical disadvantages where the contract document has to be presented in court or to a register.[865] Although s 122 subs 1 SA 1891 provides that 'stamp' means an impression with a die as well as adhesive stamps applied to a document, in practice, only the former is used today.[866] The stamp must be placed on the face of the instrument (s 3 subs 1 SA 1891).

Whether, and if so, how much duty is payable depends not on the document's title, but on its content, that is, its legal effect.[867] If several instruments are contained in one document, each is taxable separately, so that each must be stamped (see s 3 subs 2 SA 1891).[868] With land, taxable instruments concern 'land transactions', meaning 'any acquisition of a chargeable interest' (s 43 subs 1 FA 2003), whereby this interest encompasses not only estates, interests, rights, or powers in or over land,

860 See ibid paras 303, 304.
861 Ibid para 303. For further details, see ibid para 310.
862 See on this ibid para 317.
863 See s 85 subs 1 FA 2003: 'The purchaser is liable to pay the tax in respect of a chargeable transaction.' In practice, it is their solicitor who pays the tax, see *Halsbury's Laws Vol 23* (fn 729) para 2.
864 See on this *Halsbury's Laws Vol 96* (fn 859) paras 307, 322–323. Thus, unstamped documents cannot be used as evidence in civil proceedings, see s 14 SA 1891. Other consequences are foreseen in ss 15–17 SA 1891. On the registration issue, see Cartwright (fn 181) 115 in fn 14.
865 This is the same for the Japanese stamp tax, discussed in Section C.IV.1.c.ii. below.
866 See *Halsbury's Laws Vol 96* (fn 859) para 325.
867 See ibid para 311.
868 Similarly, if one instrument contains several separate taxable matters, each must generally be taxed distinctly (s 4 SA 1891). See on this further *Halsbury's Laws Vol 96* (fn 859) para 315. In this respect, where an exchange of land is agreed, each piece of land and its transfer is taxable separately, see s 47 FA 2003.

but also options to enter into a legal transaction (s 46 subs 1 (a) ibid) and obligations affecting the same (s 48 subs 1 ibid). In particular, sales by conveyance (see s 44 FA 2003) and leases are included, the latter being 'an interest or right in or over land for a term of years (whether fixed or periodic)' (s 120 subs 1 (a) FA 2003).[869] Exceptions include licences to use or occupy land, and tenancies at will (s 48 subs 2 ibid).[870] Furthermore, it ought to be noted that the tax is owed irrespective of whether the transaction is effected through an instrument or not, and, where an instrument exists, whether it is executed in- or outside the UK (s 42 subs 2 FA 2003).

The amount of stamp tax depends on the 'chargeable consideration', ie, the money or its worth given for the land (s 55 subs 1, sch 4 FA 2003). In case of a lease, it depends on the rent over the term of the lease (s 56, sch 5 ibid). In either case, it is a percentage of the amount that differs for residential and non-residential (or mixed) property. 'Residential' means that the property can be used as a place to live (dwelling, see s 116 subs 1(a) Finance Act). The difference is best illustrated by using examples. Supposing a sale of land with residential property was for £1,000,000 (approx. €1,150,000), the applicable percentage would be 4%, so that the stamp tax would amount to £40,000 (approx. €47,000).[871] If residential property were to have an annual rent of £24,000 (approx. €28,000) and the lease was for a term of two years, the total amount would fall below the £60,000 (approx. €70,000) threshold, so that no stamp tax would be due.[872] Anything over that amount would be taxable at 1%, so that if the term were for three years instead, the stamp tax would amount to £720 (approx. €840). If the property were commercial or mixed, the threshold would be £150,000 (approx. €175,000) with anything above that amount taxable at 1%.[873]

d. Current Legal Practice in England

Several trends exist in English legal practice. These will only be alluded to briefly. One is the use of standard contracts or pre-printed forms that are

869 For further details on the meaning of lease, see *Halsbury's Laws Vol 96* (fn 859) para 435.

870 See further sched 3 FA 2003.

871 In fact, the result would be the same for commercial or mixed property, since the percentages are the same for values of more than £250,000 (approx. €292,000), see Tables A and B under s 55 FA 2003.

872 See Table A in sch 5 FA 2003.

873 See Table B in sch 5 FA 2003.

filled out by one or both parties.[874] In this context, a prominent problem in business situations arises from the phenomenon called the battle of forms. It occurs where both contracting parties insist on using their contract templates, including standard terms.[875] Issues often arise in relation to these terms, their inclusion, and their validity, none of which will be contemplated in this dissertation.[876] Another development — which seems to run counter to the previous trend — is that of reduced formalism in commercial contracts. It seems that this practice has increased due to the rise of e-commerce,[877] as discussed in Section b.v. above.

4. Summary of Results

As we have seen in this section, the law of contract under the common law system in England developed out of procedural law and individual strands of notion of contract were gradually combined to make a — perhaps patchwork-like — fabric. A contract is understood as a bargain and is typically formed through matching declarations of offer and acceptance. These declarations of intention are distinguished from invitations to treat and other non-binding statements and acts. In order to constitute legally relevant statements, the declarations must furthermore be certain and be communicated to the other party. Two doctrines are applied to the coming into effect of these declarations: the mailbox and postal rules. The latter accelerates the contracting process, as a declaration of acceptance already becomes effective on being sent out. Nevertheless, this rule is only applied to letters and telex; for all other methods of acceptance and other declarations of intention, the mailbox rule and thus receipt is the pertinent point in time.

Contracting is facilitated further by the fact that only few legislative provisions require the agreement to be made in a mandatory form. Exceptions are transactions involving land and singular cases like guarantees. Forms include a standard and a simple written form, as well as a special kind of document called 'deed'. Nevertheless, offer and acceptance alone are not

874 See Whincup (fn 34) 125 at 5.2.
875 Ibid.
876 Interested readers are referred to the discussion in, eg, McKendrick (fn 48) 315 et seq.
877 Unnamed author, *Email, e-signatures and e-commerce* (Reed Smith LLP Client Alert, 2 February 2002), www.reedsmith.com/en/perspectives/2002/02/email-esignatures-and-ecommerce.

sufficient, even if no mandatory form applies: the parties must have the intention to enter into a legally binding relationship when contracting, and — unless the agreement is contained in a deed — consideration must be paid by the offeree. Moreover, while of no effect on the contract's validity, practical concerns demand that changes in property of land be registered, and that stamp tax be paid, where applicable. There is therefore often more to a contract that is concluded under English law than a consensual agreement.

III. Contracts in German Law

The analysis of the German law of contract will begin by defining the German term for 'contract', *Vertrag* (in Section 1. below), and exploring its historical development from Modern times (Section 2.). As will be seen from this analysis, the notion of contract and its legal regulation was based on Roman law initially, but has transformed and evolved to become distinct. This is visible in the current requirements of a contract, as well as in German legal practice, which will be the focus of Section 3. In this respect, German law has taken a different development route from English law, although, as will become clear later, the practical result is not so very different.[878]

1. '*Vertrag*'(Contract) Defined

German law contains no statutory definition of a contract, nor detailed rules on its formation. Given that Germany is a civil law system and thus regularly relies on codified law, as well as the fact that the *Bürgerliches Gesetzbuch* (German Civil Code, 'BGB') was seen as one of the most systematic and advanced codifications of its time,[879] this seems surprising.[880]

878 On the development of English contract law, see Section II.2. above. A comparison of current English, German, and Japanese law is made in Section D. below.

879 Compare Whincup (fn 34) 38 para 1.48, who states the BGB to be 'one of the last but most important expressions of the age of codification of the 19th century.' Similar: John O Haley, *Rivers and Rice: What Lawyers and Legal Historians Should know about Medieval Japan* (2010) 36 Journal of Japanese Studies 313, 314.

880 Even more so, when considering that one of the aims of the codification of the BGB was to provide 'a complete and exhaustive legal regulation' ('*eine*

The reason for this omission is two-fold. One the one hand, there was an academic divide at the time when the BGB was drafted concerning the definition of two terms that are closely linked to that of *Vertrag*, namely, 'legal transaction' (*Rechtsgeschäft*)[881] and 'declaration of intent' (*Willenserklärung*).[882] On the other hand, an explicit provision concerning the formation process was seen as superfluous for being 'a matter of course' (*selbstverständlich*).[883] Furthermore, the opinion was that the elements necessary for the conclusion of a contract could be deduced from the other provisions on contracts.[884]

Despite the lack of a legal definition, descriptions found in German legal academic works state that a 'contract is a bi- or multi-lateral legal regulation of a legal relationship, which is made consensually by the contracting parties'.[885] In other words, a contract is formed when the parties reach a consensus with regard to the rights and duties that they owe each other.[886] Thus, a contract is a legal transaction through which the parties regulate their legal relationships.[887] It becomes obvious from these

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abschließende und erschöpfende gesetzliche Regelung'). Franz J Säcker, *Einleitung (Einl. BGB)* [Introduction (Intro. Civil Code)], in: ibid and others (fn 158; 8th online edn 2018) paras 1, 26. cf Honsell (fn 140) 68, who notes that the BGB's drafters were aware that the creation of a code without gaps was not viable. The creation of the BGB is considered in Section 2.b.ii. below.

881 The term is also sometimes translated as 'juridical act', see, eg, Smits (fn 37) 9, 23.

882 The term is sometimes translated as 'declaration of will', see, eg, Youngs (fn 34) 546; Whincup (fn 34) 39 para 1.53. Both of these terms will be explored further in Section 3. below.

883 See Schmidt J (fn 25) 26–28. While a proposal in the draft version of the BGB had foreseen an explicit provision on the conclusion of contracts, this was subsequently deleted. See on this Benno Mugdan (ed), *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich* [The Complete Materials to the Civil Code of the German Empire] (R v Decker's Verlag 1899) Vol I 688. This development will be discussed further in Section 2.b.iii. below.

884 See Mugdan (fn 883) Vol I 688; Reinhard Bork, *Vorbemerkungen zu §§ 145–156* [Preliminary Notes on Ss 145–156], in: von Staudinger and others (fn 140; 2015) para 36.

885 Bork, '*Vor § 145 BGB*' (fn 884) para 1: '*Der Vertrag ist die zwei- oder mehrseitige rechtsgeschäftliche Regelung eines Rechtsverhältnisses, die von den Vertragsparteien einverständlich getroffen wird*.' The theoretical basis of this understanding goes back to Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts Zweiter Band Das Rechtsgeschäft* [General Part of the German Civil Code Vol 2 The Legal Transaction] (4th edn, Springer Verlag 1992) 602.

886 See Hein Kötz, *Vertragsrecht* [Contract Law] (Mohr Siebeck 2009) 37 para 80.

887 See Bork, '*Vor § 145 BGB*' (fn 884) para 1.

statements that the general principle of the formation of a contract under German law follows the model of the consensual contract.[888] This is not only true for private transactions under the BGB, but also for commercial transactions (*Handelskäufe*) governed by the *Handelsgesetzbuch* ('HGB'), since the formation rules contained in the BGB also apply to commercial transactions.[889]

The parties' consensus is made up of matching declarations of intention aiming at the same result (legal consequence),[890] and usually come in the form of an offer (*Angebot*)[891] and acceptance (*Annahme*).[892] There are instances in which the identification or separation of these two kinds of intention is difficult, such as during contractual negotiation processes; it is sufficient in these cases that all the parties have expressed their agreement with the result.[893] The intentions necessarily need to foresee that the stipulated regulation is to be binding and must correspond in terms of their content.[894] Although this is not regulated explicitly in the BGB, a contract is formed once an offer is accepted.[895] These two elements, as well as other requirements to a contract, will be analysed in Section 3. below. Before turning to this, the different types of contract will be set out briefly.

There are numerous types of contract under German law that must be distinguished, whereby the classification can be made according to the

888 Indeed, it has been stated that contractual obligations derive their validity from the parties' consensus (*Konsens*), see Wolf and Neuner (fn 48) 433 para 66.

889 See Adolf Baumbach (founder) and Klaus J Hopt and others, *Beck'sche Kurz-Kommentare Band 9 Handelsgesetzbuch* [Beck's Concise Commentary Vol 9 Commercial Code] (38th online edn, CH Beck 2018) at '*Einleitung vor § 373*' [Introduction before s 373] para 2. The authors go on to state at para 9 that most of the provisions on commercial transactions formerly contained in the *Allgemeines Deutsches Handelsgesetzbuch*, the forerunner of the HGB, were mostly incorporated into the BGB. On this commercial code, see Section b.ii. below.

890 Compare Bork, '*Vor § 145 BGB*' (fn 884) para 2.

891 The formal term used in the BGB is '*Antrag*', see, eg, § 145 (*Bindung an den Antrag*; Binding effect of an offer).

892 Kötz, '*Vertragsrecht*' (fn 886) 37 para 80; see also Schmidt J (fn 25) 7.

893 This requirement can be deduced from the rule found in § 154 para 1 BGB (*Offener Einigungsmangel*; Overt lack of agreement). cf Wolf and Neuner (fn 48) 417 para 2. On the difficulty of identifying the declarations of intention, see also Jan Busche, *§ 145 Bindung an den Antrag* [Section 145 Binding effect of an offer], in: Säcker and others (fn 158) para 4. This problem was already discussed under English law in Section II.3.a.i. above.

894 See Wolf and Neuner (fn 48) 417 para 1.

895 See Bork, '*Vor § 145 BGB*' (fn 884) para 37, noting that this can be deduced from the provisions in § 145 et seq BGB.

nature of the agreement, the obligatory relationships that arise from it, or according to its content.[896] Consequently, a distinction can be made, firstly, depending on whether a contract foresees that something of value be given either in return for something, or in return for nothing, so that a contract will be either for value (*entgeltlich*) or gratuitous (*unentgeltlich*) respectively.[897] A second way is to contrast two constellations with respect to the contractual obligations. On the one side, there are *einseitig verpflichtende Verträge* (unilaterally obliging contracts), under which only one party is legally bound to do or to refrain from doing something.[898] Conversely, the other party or parties are not required to act in any way, so that there is only one side that must fulfil their obligation while the other(s) do not have any obligations.[899] In other words, the legal consequence is

896 The different classifications are discussed succinctly by Bork, ibid paras 87–90.

897 Compare ibid para 87. For further details on the distinction between these two kind of acts, see Wolf and Neuner (fn 48) 335 paras 81–82. The latter type of contract is also referred to as *Gefälligkeitsverträge* (accommodation agreements), compare, eg, Dirk Olzen *§ 241 Pflichten aus dem Schuldverhältnis* [Section 241 Duties Arising from an Obligation], in: von Staudinger and others (fn 140; 2015, updated 21.12.2017) para 71. These kind of contracts will be considered in further detail in Section 3.a.iv. below.

898 See Wolf and Neuner (fn 48) 326 para 29. Contrast von Mehren, '*Introduction*' (fn 21) 7, who states that pure unilateral acts are distinguished from contracts and are deemed unenforceable. He bases his argument on what was § 305 BGB (now § 311 para 1 BGB), which 'respect[s] autonomous ordering', see ibid 8 in fn 29. The provision says: 'In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute' ('*Zur Begründung eines Schuldverhältnisses durch Rechtsgeschäft sowie zur Änderung des Inhalts eines Schuldverhältnisses ist ein Vertrag zwischen den Beteiligten erforderlich, soweit nicht das Gesetz ein anderes vorschreibt*.'). This provision will be discussed further in Section 3. below. A similar statement to that by von Mehren is made by Bork, '*Vor § 145 BGB*' (fn 884) para 2, who stresses that a contract must be '(at least) two-sided' ('*(mindestens) zwei-seitig*[...]'), so that '[a] one-sided legal transaction can never be a contract; at most, it can be equated to one' ('*Ein einseitiges Rechtsgeschäft kann niemals ein Vertrag sein, sondern diesem allenfalls gleichgestellt werden*').

899 See Bork, '*Vor § 145 BGB*' (fn 884) para 88. This type of contract is therefore radically different from the English unilateral contract: Under the German model, there is no exchange of any kind between the parties, whereas under an English unilateral contract, both parties act in a certain way, albeit only one side being legally bound to do so. For further details of this distinction, see Schmidt J (fn 25) 125–126. In order to avoid any conceptual misunderstanding with the English notion, the German model will therefore not be translated as 'unilateral contract', but as 'unilaterally obliging contract'.

brought about through the act of one party.[900] On the other side, there are two kinds of contracts under which all parties are obliged to act: *gegenseitige Verträge* (reciprocal contracts, §§ 320 et seq BGB), under which the parties have mutual obligations forming a synallagmatic exchange;[901] and *zweiseitig verpflichtende Verträge* (bilaterally obliging contracts), under which the parties' obligations are independent and do not make up an exchange.[902] By way of example, a *Schenkung* (gift) is a gratuitous and unilaterally obliging contract, while a contract of sale (*Kaufvertrag*) is a reciprocal contract for value.[903] Finally, a gratuitous loan (*Leihe*, § 587 et seq BGB) is an example of a bilaterally obliging and gratuitous contract.[904]

Contracts are thirdly classified according to their content.[905] Apart from the examples just given, the BGB contains regulations for other agreements, such as exchanges (*Tausch*, § 480 BGB), leases (*Mietverträge*, §§ 535 et seq BGB; or *Pachtverträge*, §§ 581 et seq BGB).[906] While these

900 See Reinhard Bork, *Allgemeiner Teil des Bürgerlichen Gesetzbuchs* [General Part of the Civil Code] (4th edn, Mohr Siebeck 2016) 170 para 424.

901 See Wolf and Neuner (fn 48) 326 para 29.

902 See on this ibid.

903 See Bork, '*Allgemeiner Teil*' (fn 900) 193 para 491. cf English law, under which gifts are not contracts as such, although the estimation of a sale is the same. On this, see Section II.1. above.

904 See Wolf and Neuner (fn 48) 326 para 29. It is also an example of a *Gefälligkeitsvertrag*, see Olzen, '*§ 241 BGB*' (fn 897) para 71.

905 It goes beyond the scope of this dissertation to enumerate all contract types; the following analysis covers a selection. For a brief discussion of special contract types not discussed, such as *Rahmenverträge* (basic or framework agreements) or *körperschaftliche Satzungen* (corporate bye-laws), see Busche, '*Vor § 145 BGB*' (fn 158) paras 40 et seq.

906 Under German law, these two kinds of leases must be distinguished. This is first done by looking at the object in question. While *Miete* can be for movable or immovable property ('*Sachen*' within the meaning of §§ 90 et seq BGB) including software, *Pacht* can be for both *Sachen* or incorporeal things such as rights. This can be deduced from the BGB's wording: § 535 BGB speaks of a '*Mietsache*' ('leased property'), whereas § 581 BGB refers to a '*Pachtgegenstand*' ('leased object'). The definition of things and legal objects will be discussed in more detail in Section 3.b.i. below. Seeing as there is an overlap in the objects of *Miete* and *Pacht*, a second criterion is necessary. As the English translation of the term as 'usufructory lease' suggests, *Pacht* allows the lessee to enjoy the fruits of the object (§ 581 para 1 BGB), which is not stated in § 535 BGB in relation to *Miete* (a standard lease). It seems that the latter is the more important criterion, compare BGH decision of 7 March 2018, XII ZR 129/16, NJW 2018, 1540–1542, para 13. The case concerned the question of whether a *Mietvertrag* had been concluded in written form. On the differentiation and further details on each of the two institutions, see Volker Emmerich, *Vorbemerkung zu § 535* [Preliminary

arrangements concern the obligation to transfer either the property or the possession of things, there is also a whole range of other contracts, such as *Darlehensverträge* (credit agreements[907], §§ 488 et seq BGB), or service or work contracts (*Dienstvertrag* and *Werkvertrag*, §§ 611 et seq BGB). A new category has recently been introduced, namely, the *Bauvertrag* (construction contract) with the subcategory of a *Verbraucherbauvertrag* (consumer construction contract), regulated in the newly-inserted §§ 650a–650n BGB.[908] These are contracts that concern work contracts for construction (see § 650a BGB, *Bauvertrag*; Construction contract), whereby the latter are between an entrepreneur and a consumer, ie, B2C contracts.[909]

Notes on S 535], in: von Staudinger and others (fn 140; 2018) paras 31, 1–2; ibid, *Vorbemerkungen zu § 581* [Preliminary Notes on S 581], in: von Staudinger and others (fn 140; 2018) paras 33–34, 1 5, 10–108.

907 Interestingly, the source indicated in fn 131 above uses the term 'loan contract' to refer to '*Darlehensverträge*', but translates '*Verbraucherdarlehensverträge*' as 'consumer credit agreements' into English, see, eg, §§ 488 and 491 BGB respectively. In order to avoid confusion with the notion of *Leihe* (gratuitous loan), the translation of 'credit agreement' will be used for *Darlehensverträge*.

908 These and other provisions concerning construction contracts were introduced by art 1 *Gesetz zur Reform des Bauvertragsrechts, zur Änderung der kaufrechtlichen Mängelhaftung, zur Stärkung des zivilprozessualen Rechtsschutzes und zum maschinellen Siegel im Grundbuch- und Schiffsregisterverfahren* [Law to Reform the Law on Construction Contracts, to Change the Liability for Defects under Sales Law, to Strengthen the Legal Protection in Civil Procedure, and [the Use] of Mechanical Seals in Procedures of the Land and of the Ship Register] of 28 April 2017, BGBl 2017 I 969 (hereinafter 'BauVertrRefG'). The provisions apply to contracts entered into after 1 January 2018 (art 229 § 39 *Einführungsgesetz zum Bürgerlichen Gesetzbuche* ('EGBGB')), to be exact, from midnight on that day, see Sebastian Omlor, *Der neue Verbraucherbauvertrag* [The New Consumer Construction Contract] (2018) NJW 817. For a summary of the legislator's objectives, see Deutscher Bundestag, *Beschlussempfehlung und Bericht des Ausschusses für Recht und Verbraucherschutz (6. Ausschuss) zu dem Gesetzentwurf der Bundesregierung – Drucksache 18/8486. Entwurf eines Gesetzes zur Reform des Bauvertragsrechts und zur Änderung der kaufrechtlichen Mängelhaftung* [Final Recommendation and Report by the Commission on Law and Consumer Protection (6th Committee) on the Government's Draft Law – Printed Matter 18/8486. Draft of a Law to Reform Construction Contract Law and to Amend Commercial Warranties] (8 March 2017), available online at http://dip21.bundestag.de/dip21/btd/18/114/1811437.pdf. See also www.bundesgerichtshof.de/DE/Bibliothek/GesMat/WP18/B/Bauvertragsrecht.html.

909 The provisions will be discussed later in relation to formalities.

2. The Historical Development of the German Law of Contract

The concept of contract that was explored in the previous section is one that developed over time. While first traces of commerce and contract-like agreements go back to the times of the Romans, the following exposition will begin after the Middle Ages, at the dawn of modern times.[910] To be precise, the account starts at the time of the *alte Reich* (Section a.), in which the first extensive legal codifications were drafted. The next section (b.) then goes on to examine the time of the drafting of the BGB, while the final section (c.) concludes with an overview of subsequent developments in German (contract) law to date.

a. Contracts in the *Alte Reich* (16th ~ 19th Century): Emergence of the First Great Private Law Codifications

The time until the nineteenth century in Germany is that of the *Heiliges Römisches Reich deutscher Nation* (Holy Roman Empire of the German Nation) — in academic literature known as the *alte Reich*,[911] and marked the beginning of the Modern Era (*Neuzeit*).[912] Not only was the structure of society and political power different from today (see Section i.), so was the law (Section ii.). In fact, a duality of a sort of German common law (Section iii.) and a pan-German codification of (private) law (Section iv.) existed, which only changed in the nineteenth century (on which see Section b. below).

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910 A concise account of the earlier developments can be found in, eg, Schmidt J (fn 25) 7–19. See also Uwe Wesel, *Geschichte des Rechts: Von den Frühformen bis zur Gegenwart* [History of Law: From Ancient Forms to the Present] (3rd edn, CH Beck 2006) 213–219 (Roman times), 276–277 (Germanic times), 294–295 (Franconian times), 332–334 (Middle Ages).

911 See Axel Gotthard, *Das Alte Reich 1495–1806* [The Old Reich 1495–1806] (Wissenschaftliche Buchgesellschaft 2003) 1, who notes this to be an abbreviation of the empire's long name that was contrasted with the nineteenth-century *Deutsche Reich* (on which see Section b. below). The empire was established well before the sixteenth century and subsisted until 1806, see Encyclopaedia Britannica, *Germany* (Online Academic Edition 2018) at 'History', https://academic.eb.com/levels/collegiate/article/Germany/106260 and ibid, *Supplemental: Holy Roman Empire*, https://academic.eb.com/levels/collegiate/additionalcontent/10389182. On the fall of the empire, see the succinct account by Kroeschell (fn 141) 112–113.

912 Wesel (fn 910) 355.

i. Political and Social Background

As was just intimated, the structural background during the *alte Reich* was very different from today. This concerned both society and politics. The society of that period was clearly divided into different classes, called estates (*Stände*), namely: *Adel* (nobility), *Bürger* (citizens), and *Bauern* (peasants), each of which had its own rules regarding work, obligations, even clothing and life style, as well as (criminal) punishments.[913] At least at the beginning of the period, only a fraction of the people lived in cities; the majority of the population (around 95%) lived in rural areas.[914] A number of cities already existed at the end of the sixteenth century, including Hamburg, Lübeck, Augsburg, Nürnberg, and Vienna, which were of importance as centres of commerce or residences to rulers.[915] It is interesting that some of these cities, notably Hamburg and Lübeck, formed part of the former commercial association of merchants and cities known as the *Hanse* or (German) Hanseatic League,[916] which explains their importance due to the

913 Compare ibid 357, 416. On these three estates, see further the seventeenth-century German text reprinted in Kroeschell (fn 141) 39–40. There was also the *Klerus* (clergy) of the church, something like a fourth estate, see Wesel (fn 910) 357, 416; cf Barbara Stollberg-Rilinger and others, *Einführung in die Frühe Neuzeit* [Introduction to the Early Modern Period] (online resource available at www.uni-muenster.de/FNZ-Online/Welcome.html, 2003) at '*Soziale Ordnung*' [Social Order], 2.1.2. *Stände* [Estates], naming three estates, whereby the clergy is said to have been counted as part of either the nobility or the citizens. This latter classification seems more accurate, as one territorial code, the *Allgemeines Landrecht für die Preußischen Staaten* (discussed in Section iii. below) contained regulations on the '*Bauerstande*' ('peasant-estate'), the '*Bürgerstande*' ('citizen-estate'), and the '*Adelstande*' ('nobility-estate') in the *Zweyter Theil* (Part Two), Titles 7–9. In contrast, there is no section on a 'clergy-estate', although churches were generally regulated in Title 11.

914 Compare Barbara Stollberg-Rilinger and Ulrich Pfister, *Einführung in die Frühe Neuzeit: Wirtschaftliche Grundstrukturen und Entwicklungen* [Introduction to the Early Modern Period: Economic Basic Structures and Developments] (online resource available at www.uni-muenster.de/FNZ-Online/Welcome.html, 2003) at 2.2. *Stadt und Land* [City and Countryside]. City in this sense means a municipal with a population of at least 10,000 people; *Großstädte* are those cities with at least double that population; in contrst, *Ackerbürgerstädte* were one kind of small-scale cities with certain privileges, see ibid. On the development of the population-size, see Wesel (fn 910) 354; for further details, see Stollberg-Rilinger and Pfister ibid at 2.1. *Bevölkerungsentwicklung* [Population Development].

915 Compare Stollberg-Rilinger and Pfister (fn 914).

916 For a map showing all the cities in Germany and Europe that were connected to this association, as well as for further discussion of its development, see

reach and wealth that association afforded. The establishment of the postal service and, later, in the nineteenth century, railway connections,[917] will have aided in this upturn; however, it also had an effect on the contract conclusion mechanism (see Section iii.bb) below).

Despite its denomination as an empire ('*Reich*'), there was as yet no unified German state during this period; instead, there was a *Reichsverband*, an association of a large number of individual territorial states and cities.[918] One territory of importance was the Duchy (Kingdom from 1701) of Prussia, an absolute monarchy that would become one of the great European powers in the second half of the eighteenth century alongside England, while the power of, say, France, dwindled.[919] Another was the Duchy, also later Kingdom, of Bavaria.[920] For administrative purposes, German states were grouped into ten larger *Reichskreise* (Imperial districts).[921] All of these conditions had an effect on the structure of the law.

Encyclopaedia Britannica, *Hanseatic League* (Online Academic Edition 2018), https://academic.eb.com/levels/collegiate/article/Hanseatic-League/39167.

917 Peter Oestmann, *§§ 130–132 Wirksamwerden von Willenserklärungen* [Sections 130–132 Coming into Effect of Declarations of Intention], in: Mathias Schmoeckel and Joachim Rückert and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB Band 1 Allgemeiner Teil* [Historical, critical Commentary on the Civil Code Vol 1 General Part] (Mohr Siebeck 2003) 532, 546–547 para 20.

918 For further discussion of the structure of the *Reichsverband*, see Gotthard (fn 911) 1–9. See also Stollberg-Rilinger and others (fn 913) at '*Strukturen von Recht und Herrschaft*' [Structures of Law and Governance], 1.2.1 *Das 'Reich'* [The 'Empire'].

919 See Stollberg-Rilinger and others (fn 913) at '*Politische Ereignisse und Entwicklungen*' [Political Events and Developments], and at 5.3.5. *Preußen* [Prussia]. For further discussion, see, eg, Encyclopaedia Britannica, *Prussia* (Online Academic Edition 2018), https://academic.eb.com/levels/collegiate/article/Prussia/61665.

920 For further details on the history of Bavaria, see, eg, Encyclopaedia Britannica, *Bavaria* (Online Academic Edition 2018), https://academic.eb.com/levels/collegiate/article/Bavaria/13830.

921 See on this Stollberg-Rilinger and others (fn 913) at '*Strukturen von Recht und Herrschaft*' [Structures of Law and Governance], 1.2.5. '*Reichskreise*' [Imperial Districts]. See also Gotthard (fn 911) 25–28, stating that these circles gradually gained importance in terms of their role in the empire's political administration. Maps of the *Reichskreise* are available online at www.uni-muenster.de/FNZ-Online/recht/reich/quellen/kreise.htm (in German) and https://legacy.lib.utexas.edu/maps/historical/shepherd_1911/shepherd-c-113.jpg (in English).

ii. The General Structure of Law

It may already be evident from the foregoing exposition that each of the parts of the 'empire' were (legally) independent and had their own rulers. Due to this territorial and governmental fragmentation, the law was equally diverse. This is true both in terms of the sources and of the reach of the laws. On the one hand, there were distinct sources of law in the sense of laws having different origin(ator)s. First, there was *Kirchenrecht* (canon law), but also learned Roman law (*gelehrtes römisches Recht*), and customary law (*Gewohnheitsrecht*); on the other hand, in terms of positive (legislated) law, there were laws on three levels, namely, that of the imperial state (*Reichsrecht*), that of the individual territories (*Landsrecht*), and that of the cities (*Stadtrecht*).[922] Finally, Canon and Roman law together formed the basis of the *ius commune* or *gemeines Recht* (common law) across the empire.[923] All of these laws had different spheres of application.

Contrary to a common misperception, it was not the emperor (*Kaiser*) who had the sole or chief legislative power; he had to cooperate with the imperial estates (*Reichstände*) in order to legislate, so that there was little imperial law.[924] Even where it did exist, however, it was initially only a

922 Compare Stollberg-Rilinger and others (fn 913) at '*Strukturen von Recht und Herrschaft*' [Structures of Law and Governance], 4.1.1. *Wahrung des Rechts* [Preservation of the Law]. cf Wesel (fn 910) 371, referring to the law having two layers (*römisches-* and *Ortsrecht*, Roman and local law) until the end of the period (first half of the eighteenth century), at which point a third layer, namely, a systematic blend of Roman law (in the form of what was known as the *Usus Modernus*) and natural law, was added. See on this further Wesel, ibid 370–371. Arguably, '*Stadtrecht*' and '*Ortsrecht*' have the same meaning, namely, that of a geographically closely-limited local law as opposed to the law of territories, which had wider application. The two terms will thus hereinafter be treated as being interchangeable. There was in fact one other law, the French Civil Code, which was applied in some Western territories, like Baden, see Wolf and Neuner (fn 48) 81–82. As it will not be discussed further in this dissertation, see Schmidt J (fn 25) 41–51 for a discussion of the development of the French code.

923 See on this Klaus Luig, *Gemeines Recht* [Common Law], in: Albrecht Cordes and others (eds), *Handwörterbuch zur deutschen Rechtsgeschichte* [Handbook on German Legal History] (online edn, Erich Schmidt Verlag 2018) Vol II paras 60–77, in particular at III., who states that the norms contained in the *Corpus Iuris Canonici* and the *Corpus Iuris Civilis* were changed by the different schools of thought of German legal theory, *inter alia*, natural law, *Usus Modernus*, and the pandectists.

924 See on this Wesel (fn 910) 366, 316. For more details on the competences of the emperor and the legislative process, see Gotthard (fn 911) 11–12, 20–21. Kroeschell (fn 141) 44 notes that the *Reichsfürsten* (princes) only became true

subsidiary source to the laws of the territories and of the cities.[925] Thus, while the empire had over-arching institutions like a *Reichstag* (imperial assembly[926]) producing *Reichsschlüsse* (in effect, these were imperial laws approved by the emperor) and two imperial courts (the *Reichskammergericht* and the *Reichshofrat*),[927] these played only a subordinate role.[928]

By definition, the laws of a territory or of a city were pertinent in their particular locality only. Having said this, the application of city laws was sometimes extended beyond a city's borders by agreements with other cities. This was the case for the law of Lübeck, which was applied in other German cities such as Hamburg from the thirteenth century.[929] Beside all these laws, there were customs, which had a particularly strong influence on commercial law.[930] These could be local or, as in the sphere of commerce, 'trans-regional'.[931]

By virtue of a presumption of consistency (*fundata intentio*, *Vermutung der Schlüssigkeit*), *gemeines Recht* had priority over any special laws, ie, over the positive laws having a more particular focus (thus termed *Partikularrecht*), if the existence of the latter could not be proven.[932] In essence, therefore, *gemeines Recht* was subsidiary to particular laws.[933] Having said this, it seems that the regulated content of the common and of the particu-

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sovereigns at the end of the *alte Reich*. Indeed, he goes on to note at ibid 80 that the idea of the ruler being vested with the sole legislative power penetrated the general perception in the seventeenth and eighteenth centuries.

925 Wesel (fn 910) 366.

926 This was a gathering of the *Reichsstände*, imperial estates, namely, of those natural or legal persons having some form of jurisdictional rights, and of representatives of cities.

927 For further details, see Gotthard (fn 911) 19–24 (*Reichstag*), 16–19 (*Reichsstände*), 9–13 (*Kaiser*), 28–30 (*Reichskammergericht*).

928 This is more true for the law than for the courts; in fact, Gotthard (fn 911) 30 calls these last-instance courts 'an important brace for the imperial association' ('*eine wichtige Klammer für den Reichsverband*').

929 See Encyclopaedia Britannica, '*Hanseatic League*' (fn 916).

930 Compare Thomas Henne, *Handelsgesetzbuch* [Commercial Code], in: Cordes and others (fn 923) Vol II paras 712–714.

931 On the latter, see Karsten Schmidt, *Vorbemerkung zu § 1* [Foreword to S 1], in: ibid (ed), *Münchener Kommentar zum HGB* [Munich Commentary on the Commercial Code] (4th online edn, CH Beck 2016) Vol 1 paras 1, 20: '*überregional verbreitete[…] Handelsbräuche*'.

932 See Luig K (fn 923).

933 See Martin Schennach, *Partikularrecht* [Particular Law], in: Cordes and others (fn 923) Vol IV paras 408–410, who also gives a sketch of the meaning of the term. See also Honsell (fn 140) para 24. It ought to be noted that the *gemeines Recht* applied exclusively in some areas of the *Reich*, namely, in large parts of

lar laws did not overlap too often, and where it did, the decision on which had priority was made on a case-by-case basis.[934]

The volume of positive law increased over time on all levels.[935] A problem that arose with the particular laws was that the rules of, eg, private law, were scattered among these individual legal texts, which made an overview over this area of law difficult.[936] At least in the territories, this increase in legislative activity was due to a shift in administrative power, which in turn led to a change in legislative authority in the individual states and was fully vested in the territorial rulers by the eighteenth century.[937] As a consequence, this era brought forth a series of codifications of more general character, which were applicable in larger parts of the German territories. These include the *Allgemeines Landrecht für die Preußischen Staaten* (General State Laws of the Prussian States, enacted 1794, hereinafter 'ALR'),[938] the *Codex Maximilianeus Bavaricus Civilis* (Maximilian Civil Code of Bavaria, enacted 1756), the Austrian *Allgemeines Bürgerliches Gesetzbuch* (General Civil Code, enacted 1811),[939] and the Saxonian *Bürgerliches Gesetzbuch* (Civil Code, enacted 1863).[940] In order to keep the length of the subsequent discussion brief, only the rules found in the ALR will be analysed more closely. The reason for this choice is that, as will become

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northern Germany, in particular what is today Lower Saxony, and only partially in few others, see the map provided by Kroeschell (fn 141) 166.

934 Luig K (fn 923) at X.

935 Cf Stollberg-Rilinger and others (fn 913) at '*Strukturen von Recht und Herrschaft*' [Structures of Law and Governance], 4.1.2. *Rationale vs. traditionale Rechtsgeltung* [Rational vs Traditional Application of Law], only explicitly naming the law of the territories and of the cities.

936 See Kroeschell (fn 141) 104.

937 Compare Wesel (fn 910) 367–368, 362–364. See also fn 924 above.

938 In the following, unless otherwise stated, sources used for the ALR are: a scan of the print version of the ALR from 1804, available online at http://digital.staatsbibliothek-berlin.de/suche?queryString=PPN646281224; and a text-version based on the 1794-edition, available at https://opinioiuris.de/quelle/1621. The ALR was divided into three parts: an *Einleitung* [Introduction], followed by *Erster* and *Zweyter Theil* [Part One and Two]. The Introduction and Part One (hereinafter 'Vol I') are of particular relevance to the discussion. Part Two was concerned with diverse topics such as family and succession law, the different social estates, tax, and even criminal law. It contained, furthermore, the first comprehensive regulation of 'German' commercial law, compare Claus-Wilhelm Canaris, *Handelsrecht* [Commercial Law] (24th edn, Beck 2006) 17 para 48.

939 See Wesel (fn 910) 414.

940 See Wolf and Neuner (fn 48) 81. A succinct account of the background of these codes is given by Kroeschell (fn 141) 68–72.

evident later, several of the concepts and norms of this codification in relation to the conclusion of contracts prefigure those of the BGB, enacted over one hundred years later, so that it could be said that the ALR constitutes the (doctrinal) foundation of the BGB,[941] which replaced the ALR a little over one hundred years after it had come into force.

iii. The Law of Contracts: *Gemeines Recht* (Common Law) and the *Allgemeines Landrecht für die Preußischen Staaten* (General State Laws of the Prussian States)

The period between the sixteenth and nineteenth centuries was one of reception of Roman law, which saw the existing legal rules common to the different German states, ie, the *gemeines Recht*, being altered.[942] This law was not merely applied, however; rather, as noted above, it seems to have been elaborated, as it departs from Roman law theory in several aspects. Moreover, the importance of the *gemeines Recht* was diminished by the appearance of codifications like the ALR.[943] While the aim of this codification was to unify the territory on a legal level, its application was limited to some extent, as it came secondary to '*besondre Gesetze*', special legislation (Introduction § 1 ALR). All of this affected the notion of contracts (see Section aa) below), the way these were concluded (Section bb)), the coming into effect of declarations of intention (Section cc)), the contract's forms (Section dd)), and a common legal practice of the time, the giving of *arrha* (earnest; see Section ee)).

941 The BGB's historical development will be explored in Sections b. and c. below, while its contract rules are discussed in Section 3.

942 Compare Ferdinand Gastreich, *Die Draufgabe und ihre historische Entwicklung: Eine Darstellung arrhalischer Rechtsformen in ihrer essentiellen und funktionellen Bedeutung nach altem und neuem Rechte* [Earnest and its Historical Development: An Account on the Legal Forms of Arrha in their Essential and Functional Meaning in Old and New Law] (Regensbergschen Buchdruckerei Münster i.W. 1933) 51, discussing earnest (*Draufgabe*, *arrha*). Cf Wesel (fn 910) 391, noting that the legal developments of this period were a continuation of those of the Middle Ages, albeit under the influence of Roman and Canon law.

943 Having said this, the former seems to have been effective until the BGB came into force, see on this Luig K (fn 923) at X.

aa) Definition and Types of Contract

One departure from Roman law was that the Roman notion of *pactum* became *stipulatio* in obligatory contracts under the *gemeines Recht*, an important part of which was the parties' agreement.[944] Accordingly, an eighteenth-century textbook describes a contract as 'agreements, which have a name or existing cause to be obligating, and are binding due to their nature'.[945] It is perhaps due to this development that the limitation of contract types under Roman law was abandoned, a freedom of form existed, and that consensual contracts were not only admitted but deemed to be the normal rule, so that real contracts (*Realverträge*) became the exception.[946] An example of a real contract was the transfer of property in a sale of movable things (*bewegliche Sachen*).[947]

Under the ALR, a contract was seen as a 'mutual agreement on the purchase or sale of a right' (Vol I Title 5 § 1 ALR).[948] This definition is similar to current contract law.[949] It seems that there were various contract types under the ALR. On the one hand, there could be mutual or one-sided obligatory contracts, called '*lästiger Vertrag*' or '*wohlthätiger Vertrag*' (Vol I Title 5 § 7 and § 8 ALR respectively). On the other hand, the law allowed agreements to be made on any object capable of being contained in a declaration of intention (Vol I Title 5 § 39 ALR); however, the object must have been capable of identification (Vol I Title 5 § 71 ALR), so that certainty was required to some extent.[950] Following this logic, even

944 See Wesel (fn 910) 391–392. On the term *pactum*, see also Ekkehard Kaufmann and Gerhard Köbler, *Pactus, pactum*, in: Cordes and others (fn 923) Vol IV paras 303–305.

945 The original text reads: '*CONTRACTUS sunt conventiones, quae habent nomen vel caussam praesentem, sua natura civiliter obligantem*', reproduced in Kroeschell (fn 141) 17, with a German translation at 19.

946 Compare Gastreich (fn 942) 51–52, who notes that even where a real contract was to be concluded, a consensual agreement already meant a contract to enter into a real contract. In effect, the parties were thus already bound through the consensual agreement. On the question of form, see also Flume (fn 885) 246.

947 Wesel (fn 910) 390.

948 The original says: '*Wechselseitige Einwilligung zur Erwerbung oder Veräußerung eines Rechts, wird Vertrag genannt*.'

949 Compare the notion of a contract under current German law as set out in Section 1. above.

950 This is still true today, see Sections 3.a.ii.cc) and iii.cc) below. Under the ALR, a contract foreseeing that the specification of the object be at the sole discretion of the obliged person (*Verpflichteter*) was not seen as binding (Vol I Title 5 § 71

rights could be the object of contracts, as Introduction § 99 ALR permitted non-personal rights to be transferred. In terms of a contract's content, a wide range of possibilities thus existed. Beside obligatory contracts, there were also real contracts, such as for loans (*Leihvertrag*, Vol I Title 21 § 229) and credit agreements (*Darlehnsvertrage*, Vol I Title 11 § 653 ALR).[951]

bb) Contract Conclusion: Offer and Acceptance

Under the *gemeines Recht*, two ways of concluding contracts existed, depending on whether the contract was real or obligatory. The latter kind of agreement was based on a consensual agreement through the influence of natural law, in particular Hugo Grotius and his idea of a translative promise-agreement (*translativer Versprechensvertrag*).[952] It was his work which first analysed the contract more closely and described it as a consensus that must be declared, and that the necessary declarations of intention be an offer (*promissio*, promise) and acceptance (*acceptio*).[953] In this way, the idea that an agreement was formed by way of offer and acceptance was recognised.[954] Due to the influence of Roman law, offers were not seen as binding, since they were deemed to be one-sided promises, which in turn were not recognised under Roman law.[955]

The offer-and-acceptance model was adopted in the ALR as well. Consequently, contracts were concluded consensually through an exchange of declarations of intention (*Willenserklärungen*, on which see Vol I Title 4 § 1 et seq ALR), namely, of a *Versprechen* (promise, Vol I Title 5 § 2 ALR; also referred to as *Antrag*, offer, see, eg, ibid § 91) and *Annahme* (also referred to as '*Acceptation*', acceptance, ibid § 78 ALR). This can be deduced from Vol I Title 5 § 4 ALR, which says: 'The reality of a contract

ALR), but if the specification was to be made by a third party, the contract came into effect once this was done (ibid § 72).

951 See Schmidt J (fn 25) 110.

952 See the succinct account of Grotius' contract theory by Schmidt J (fn 25) 20–21. She argues at 25 and 20–21 that Grotius' model was not consensual as such, but one of a 'translative promise-contract' ('*translativer Versprechensvertrag*'), since both parties made promises that included conferring the other party a right to claim the fulfilment of the promise; instead, it was due to the work of Friedrich Carl von Savigny that the contractual model became truly consensual. On this change, see Section b. below.

953 See Wesel (fn 910) 377–378.

954 Ibid 392.

955 See on this Flume (fn 885) 640–641.

essentially requires that a promise be accepted. (S 78 et seq)'.[956] Having said this, the ALR sometimes foresaw specific forms that, if constitutive and not fulfilled, affected the validity of the contract (see ibid § 109–110, discussed in Section cc) below). With respect to the declarations of intention, 'promises' were contrasted with 'mere utterances' ('*bloße Aeußerung*'), the latter of which were not seen as legally binding (compare Vol I Title 5 § 3 ALR). Similarly, '[*b*]*loße Gelübde*' (mere vows) were deemed as one-sided promises ('*einsieitge*[...] *Versprechen*') and as such were non-binding (ibid § 5). Acceptance had to be unconditional and unqualified ('*unbedingt und uneingeschränkt*', Vol I Title 5 § 84 ALR). A degree of certainty was therefore required of both declarations, ie, of the offer and the acceptance.

The real contract (*Realvertrag*, also known as a *Realkontrakt*) required not only concurrent declarations of intention, but furthermore a *Realakt* (real or factual act[957]), namely, the delivery of an object (*Sachübergabe*) under the *gemeines Recht*.[958] Delivery was sometimes substituted for a sign of earnestness, *arrha* (discussed in Section dd) below). Under a sale of movable things, the contract (agreement) was seen as the *titulus* (in Roman law it was a *iusta causa*), and the delivery was the external form, the *modus* (in Roman law known as *traditio*).[959] Conversely, local law remained of importance for the transfer of property in land. Accordingly, a declaration by the owner had to be made before a court or the city council (*städtischer Rat*), which were followed by an *Auflassung* (conveyance) and an entry into the public records (*öffentliche Bücher*).[960] Under the ALR, real contracts were also concluded through a real act (*Realakt*) in addition to mutual declarations of intention, the act of which was usually in the form of the

956 The original provision states: '*Zur Wirklichkeit eines Vertrages wird wesentlich erfordert, daß das Versprechen gültig angenommen worden*. (§. 78. sqq.)' Vol I Title 5 § 78 ALR reads: '*Durch die Annahme eines gültigen Versprechens wird der Vertrag geschlossen*.' In English: 'The acceptance of an effective offer concludes a contract.'

957 As the name suggests, the legal consequence flowing from the act arises automatically, ie, without an intention for this to happen on part of the acting party being necessary, see Kaufmann (fn 112) 53. For further details on real acts, see Christian Armbrüster, *Vorbemerkung (Vor § 116)* [Foreword (to S 116)], in: Säcker and others (fn 158) para 14, who notes that the intention with real acts is to bring about something concrete, rather than a legal consequence (which is the case for declarations of intention of volitional acts).

958 See Schmidt J (fn 25) 110.

959 Wesel (fn 910) 390, who goes on to note that the effectiveness of the transfer depended on the effectiveness of the *titulus*.

960 See ibid.

handing over of the object.[961] This was true for two kinds: *Darlehnsvertrage* (credit agreements, see Vol I Title 11 § 653 et seq ALR) and the *Leihvertrag* (gratuitous loan contracts, see ibid Title 21 § 229 et seq).

cc) The Coming into Effect of Declarations of Intentions

It seems that the issue of when declarations of intention come into effect only arose in the eighteenth century and became increasingly dire as commercial transactions concluded through the post across distances increased while the time required decreased through technological advances like the development of the railway system.[962]

In the spirit of this development, the ALR recognised two ways for the conclusion process of contracts: either in person, ie, between contracting parties or their agents who were physically present, or by letter (Vol I Title 5 § 86 ALR). While the former case seems straightforward, there is an inherent distance in terms of both space and consequently also time in the latter case. Rules to bridge this difference were therefore needed for legal certainty. Compared with current German law, a surprisingly detailed regulation of the formation process existed in the ALR with respect to the coming into effect of declarations of intention, ie, for offers and acceptance; perhaps because it was a novel legal issue.

It seems that offers came into effect upon their arrival, irrespective of whether their articulation was made orally or in writing. While this was not laid down explicitly, it can be deduced from Vol I Title 5 § 96 ALR, which provides:

> Where the offer between absent persons is made in writing, what matters is the point in time at which the letter could arrive at the place of the other person if the postal service operates in the usual manner.[963]

Conversely, unless otherwise expressly provided, declarations of acceptance principally seem to have come into effect upon being uttered, or,

961 See Schmidt J (fn 25) 110–111.
962 Oestmann (fn 917) 546–547 para 20.
963 The original provision states: '*Ist der Antrag unter Abwesenden schriftlich geschehen, so kommt es auf den Zeitpunkt an, da der Brief an dem Orte, wo der Andre sich aufhält, nach dem gewöhnlichen Laufe der Posten hat eingehen können*.' Note that the principle of receipt applies today, see Section 3.a.ii.dd) below.

rather, once the offeree had done everything necessary in order to make the declaration known to the offeror. This can be inferred from Vol 1 Title 5 § 102 ALR, which provides:

> In all cases in which nothing to the contrary has been expressly agreed, it will be assumed that an acceptance be made at that point in time at which the offeree has done everything necessary on his part to make his declaration known to the offeror.[964]

This rule is interesting for two reasons. First, it seems close if not identical to the English postal rule.[965] More importantly, this rule no longer exists today; the BGB contains one single rule for all declarations of intention, according to which receipt of the declaration is pertinent, not the moment when it has been sent out.[966]

Rules existed for the time frame of making acceptance. Thus, Vol I Title 5 § 97 ALR stipulates that the response to an offer 'must be made by the next […] post departing after [the offer has arrived]', where the contracting process was conducted by letter and no explicit stipulation was made.[967] In contrast, where the parties were both present and no time frame was stipulated, a declaration of acceptance was normally expected immediately if made orally (ibid § 94 ALR), or within 24 hours if made in written form (ibid § 95 ALR). Otherwise, the stipulated time frame was pertinent (ibid § 91 ALR). Once the time for accepting had elapsed, the offeror was free to retract his offer by notifying the offeree of this (ibid § 103–104 ALR). It

964 The original provision reads: '*In allen Fällen, wo nicht ein Andres ausdrücklich bestimmt ist, wird dafür gehalten, daß die Annahme in dem Zeitpunkte geschehen sey, wo der Annehmende alles gethan hatte, was von seiner Seite zur Bekanntmachung seiner Erklärung an den Antragenden erforderlich war.*'

965 On this rule, see Section II.2.b.iii.bb) above.

966 This is discussed further in Section 3.a.ii.dd) below. The reason for the ALR's rule not being used — although not stated expressly — seems to be the incompatibility of this rule (related to the '*Äußerungstheorie*' [expression theory]) with the requirement that the addressee needs to have knowledge of the declaration. On the assessment of the different points in time in which a declaration of intention may come into effect during the creation of the BGB, see Mugdan (fn 883) Vol 1 438.

967 The original provision says: '*Mit der nächsten* […] *Post, welche nach* [*der Ankunft des Antrags*] *abgeht, muß der Antrag beantwortet werden.*' While this is so, the offeree had to wait for the following day's post to arrive in case there was some incident preventing the declaration of acceptance from arriving sooner (ibid § 98 ALR).

can be deduced from these rules that an offer was not generally revocable, at least where a time frame for acceptance had been stipulated.[968]

dd) Contract Forms

Both the *gemeines Recht* and the ALR foresaw different forms in which contracts had to be made. Under the former, legal practice had an increasing interest in fixing agreements, including contracts, in written form, whereby the document was authenticated by sealing.[969] Other existing albeit far less common forms of authentication were signatures and hand-signs (marks; *Handzeichen*).[970] One particular documentary form was the *Chirographierung*, according to which a written instrument was cut apart so that its authenticity could be verified by placing the parts together once again.[971] A similar procedure existed in the English common law: bilateral covenants were indented. This involved the deed containing the covenants being cut into pieces with a wavy line, thus allowing the veracity of the parts to be tested when the pieces were put back together.[972]

As was mentioned above, the ALR foresaw forms for contracts, namely, three types: *Schriftliche Form* (written form), *Punctationen* ('*vorläufige Aufzeichnungen der Vereinbarung*',[973] a preliminary or provisional fixation of an agreement), and the *gerichtliche Niederschrift* (judicial record).[974] Generally, writing meant that a document had to be signed in order to become effective (Vol I Title 5 § 116 ALR), so that hand-written documents on their own were not sufficient (ibid § 118).[975] Furthermore, documents needed

968 This remains true today, see Section 3.a.ii.ee) below. On the current rules on acceptance, see Section 3.a.iii. below. Busche, '*§ 145 BGB*' (fn 893) para 3, notes that a similar provision existed later in the forerunner of today's HGB, the *Allgemeines Deutsches Handelsgesetzbuch*. On this Code, see Section b. below. This situation is in contrast to English law, which generally deems offers to be revocable, see B.II.3.a.ii.ff) above.

969 Compare Andrea Stieldorf, *Siegelkunde* [The Study of Seals] (Hahn 2004) 44–45.

970 See Stieldorf (fn 969) 45.

971 On this, see ibid 44.

972 For further details on this, see Simpson, '*History*' (fn 232) 35, 91.

973 Thus described in Mugdan (fn 883) Vol 1 452.

974 This form is not considered further below; interested readers are referred to Vol I Title 5 § 126 ALR.

975 At least in contracts concluded in court (*gerichtliche Verträge*), illiterate persons could use a mark or an x instead of writing their signature, see Vol I Title 5 § 175 ALR. This was also true later in the *Deutsche Reich*, where a *Handzeichen*

to be sealed, unless the document was signed, delivered, and mentioned or was otherwise treated as bearing a seal. This can be deduced from the wording of Vol I Title 5 § 119 ALR, which says: 'A signed and delivered instrument need not be sealed, if it intends a seal'.[976] Where it was not a legal requirement but the parties' stipulation that the contract be made in written form, it was presumed to be a constitutive requirement, without which the contract would not arise (ibid § 117).

Legal transactions of a certain value, namely, of 50 *Taler* (thaler)[977] and more, had to be put in writing under the ALR (ibid § 131). This rule applied to bilateral and unilateral transactions (see Vol I Title 5 § 133 ALR), and, furthermore, to renunciations or waivers ('*Entsagungen und Verzichtleistungen*'), land charges ('*Grundgerechtigkeiten*'), periodical performances ('*terminliche Leistungen*'), and what were known as '*gewagte Verträge*', ie, bilateral contracts of uncertain content in the sense that its outcome was determined by chance, such as with insurance contracts or bets;[978] it did not, however, apply to servant's contracts (*Gesindemiethe*; ibid § 134–136, 139, 137).

Standard written instruments, namely, formal contracts, were distinguished from *Punctationen* (pre-contracts or contract drafts). This can be

could replace a signature if it was certified by a notary. See on this Mugdan (fn 883) Vol 1 454.

976 The original provision reads: '*Die Besiegelung eines unterschriebenen und ausgehändigten Instruments aber ist nicht nothwendig, wenn gleich darin der Siegel gedacht wird*.' On the meaning of '*gedenken*' as to intend or mean to do something, see entry no 2 for '*gedenken*' in Duden online at www.duden.de. The contemporary use of seals will be discussed in Section 3.b.iii., while the historical development will be explored further in D.III.2.b. below. On a seal being mentioned in the document, see Christian F Koch, *Lehrbuch des preußischen gemeinen Privatsrechts Band 2* [Textbook on Prussian Common Private Law Vol 2] (Verlag der Trautw'in'schen Buch- und Musik-Handlung 1852) 198, who notes that '*die Besiegelung* [*der schriftlichen Aufsetzung der getroffenen Verabredungen*] *soll entbehrlich sein, selbst wenn der Siegel Erwähnung geschehen*' ('sealing [of the written draft of the agreement] is unnecessary, even if the seal is mentioned').

977 *Taler* referred to silver *Courant*. For further details on the different currencies in the German states of that time, including Prussia, see, eg, Encyclopaedia Britannica, *Coin* (Online Academic Edition 2018), http://academic.eb.com/levels/collegiate/article/coin/105949, at 'The Later Medieval and Modern Coinages of Continental Europe'.

978 See the entry '*Aleatorische Verträge*' in *Brockhaus' Konversations-Lexikon Vol 1* [Brockhaus' Conversation Dictionary Vol 1] (14th edn, FA Brockhaus Verlag 1898) 354.

deduced from Vol I Title 5 §§ 120 and 125 ALR, as the former provides that:

> A punctuation that is signed by both parties and contains their mutual consent to all essential conditions of the transaction has the same validity as a formal contract.[979]

This kind of written document therefore had to contain all of the contract terms; oral evidence as to any ancillary agreements were inadmissible and the court would determine any missing terms using normal interpretation rules (ibid § 127–129).[980]

It is interesting to note that while the ALR did not actually prescribe form as a general constitutive requirement for all contracts, this was nevertheless the practical effect, as the scope of the cases which were caught by the form requirements was very wide.[981] The consequence of non-fulfilment was invalidity (see Vol I Title 5 § 109 ALR), or at least unenforceability of the agreement: In case of statutorily prescribed written requirements that were not fulfilled, the contract in question was not enforceable, unless one of the parties had begun to perform under it.[982] Having said this, in cases where the ALR merely foresaw a penalty for non-fulfilment of a form requirement, the contract would not lose its validity (see ibid § 110).

ee) The Further Requirement of Giving Arrha or Draufgabe (Earnest)

As the notion of the real contract declined, the German *arrha*, an earnest that was traditionally given when concluding the agreement to symbolise the fulfilment of one's obligation and in so doing making it enforceable, would no longer be deemed as a constitutive requirement for a contract

979 The original provision states: '*Eine von beyden Theilen unterschriebene Punctation, aus welcher die gegenseitige Einwilligung derselben in alle wesentliche Bedingungen des Geschäfts erhellet, ist mit einem förmlichen Contract von gleicher Gültigkeit.*'

980 Where the document only contained part of the contract's essential terms, whether by omission or due to an agreement between the parties to agree on certain points later, this was a *Tractat* (composition, see ibid § 125).

981 Compare the observations made in Mugdan (fn 883) Vol 1 450.

982 See on this Koch (fn 976) 203, who states the reason to be that the contract is then seen as a kind of real contract. Arguably, that contract is enforceable because a real act is done. On this kind of contract, see also Section iii.aa) above.

but rather as evidence of the same under German *gemeines Recht*.[983] In practice, a plethora of different names were used in the German states instead of '*arrha*', such as *Lohngeld*[984], *Gottespfennig*, or *Weinkauf* (literally 'wine purchase'; reflecting the custom of the contracting parties and the witnesses drinking wine together after concluding an agreement), as well as *Handgeld* ('hand money')[985], *Schlüsselgeld* ('key money', used in purchases of country estates) or *Zaumgeld* ('bridle money', used in purchases of horses).[986] Initially, small personal objects such as rings or other jewellery and weapons were handed over; these were gradually replaced by money.[987] The object had to be given and be received with the intention that the object be proof of the contract, ie, function as *arrha*.[988] In effect, the earnest thus given created a legal presumption that an agreement (an obligation) was made,[989] and could consequently be a sign or indication of

983 See Gastreich (fn 942) 46–47, 52. In effect, *arrha* was initially used as a substitute for performance in real contracts in order to circumvent the usual contracting method requiring concurrent fulfilment by both parties. This was necessary, since only performance or use of a form would make a contract effective, see ibid 45, 44. The denomination as '*arrha*' seems to go back to Roman law, which in turn derived the name from the Greek term '*arrhabo*', see ibid 11. To be more precise, it was termed *arrha conformatoria* in accordance with its function, see ibid 7, 23. A similar notion is found in the concept of consideration of sixteenth- and seventeenth-century England, see Section II.2.a.iii.cc) above.

984 Compare the English notion of 'consideration', which also means 'payment for a service', see, eg, the entry in the Cambridge Dictionary (online version), https://dictionary.cambridge.org/. For details on the concept in English law, see further Section II.3.a.v. above.

985 Compare the name of the Japanese concept of earnest money, which literally means 'hand-touch' money (手付, *tetsuke*). See on this Section C.IV.1.c.iii. below.

986 See Gastreich (fn 942) 46, 49, 51. See also the ways to bind oneself in the Middle Ages in England, discussed in Section II.2.a.iii.cc) above.

987 See ibid 53, 28–29, who is of the opinion that only corporeal objects were capable of constituting *arrha*, namely, only if they could function as a symbol of the concluded agreement.

988 Ibid 28 notes that this would regularly be the case where the object given was commonly deemed as an '*arrhalisches Beweismittel*' ('arrhalian means of evidence').

989 See ibid 52. This was achieved because the understanding of *arrha*, already in existence in Roman times, was that *arrha* would only be given where a contract had been concluded, so that such a contract would be a factual pre-requisite for *arrha*, see ibid 25. Having said this, *arrha* did not form part of that contract; rather, the giving and receiving of *arrha* with the required intention created a second contract ('*pactum arrhale*'), which was like an 'accessory contract' (*asses-*

that party's earnestness.[990] This use was reflected in particular laws, such as the city law (*Statuten*) of Hamburg from 1771[991], which say in Part II Title 8 Art 10:

> A lasting purchase and a lasting sale may be agreed in this good city, even without God's penny. If, however, it is given, the purchase will be all the more reinforced.[992]

The fact that *arrha*, here called *Gottes-pfenning*, is mentioned in relation to a sale may not be coincidental, as this was the contract type for which *arrha* was predominantly used. Other uses included livestock trade, as well as lease and service agreements, although *arrha* could theoretically be given for any contract.[993] The phrasing of Art 10 hints at another custom: while earnest could be given by either party, in practice, it was usually the purchaser who did so.[994] A second use of *arrha* was as a kind of contractual

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sorischer Vertrag) to the other agreement, see ibid 53, 25. This notion is the same in Japanese law, see Section C.IV.1.c.iii. below.

990 Compare Peter Gottwald, *§ 336 Auslegung der Draufgabe* [Section 336 Interpretation of Earnest], in: Säcker and others (fn 158) Vol 2 (7th online edn, CH Beck 2016) para 1, using the term '*Seriositätsindiz*' (indication of seriousness) coined by Konrad Zweigert and Hein Kötz. See on this latter term fn 23 above.

991 *Der Stadt Hamburg Statuten und Gerichts-Ordnung* [Statutes and Court Rules of the City of Hamburg] (new unchanged edn 1771), available online at http://reader.digitale-sammlungen.de/de/fs1/object/display/bsb11201503_00009.html.

992 The original provision reads: '*Ein Kauff und Verkauff kann in dieser guten Stadt, auch wol ohne Gottes-Pfennig, beständiglich getroffen werden. Wenn aber derselbige ergangen; ist der Kauff dadurch desto mehr bekräfftiget*.' Transcription and translation by this author from the scanned print edition of 1771 (fn 991). Translation note: the term '*beständiglich*' is an old form of '*beständig*', meaning something is enduring or of lasting nature, resistant. On the contemporary meaning, see the entry for '*beständig*' in Duden online at www.duden.de.

993 See Gastreich (fn 942) 53. Note that 'service contract' refers to '*Gesindeverträge*', whereby '*Gesinde*' was the denomination for servants employed. Compare the entry for '*Gesinde*' in Duden online at www.duden.de.

994 See Gastreich (fn 942) 31. It ought to be noted that the verb 'to give' does not merely refer to the physical handing over of the object. The act was one of transfer of property in the object that was handed over, whereby the receiver would be obliged to return the object once the contract had been fulfilled by the other party; or, where earnest was given as money, the amount received would be counted as part of the giver's fulfilment of their payment obligation, see ibid 54. Earnest in the form of *arrha* must be distinguished from a down payment (*Anzahlung*). The reasons are their different natures. Most importantly, the latter did not have the same function as the former, namely, to act as evidence. Conversely, the former did not *a priori* function like the latter in that it counted as part-fulfilment of the giver's obligation, although arguably their

penalty: either contracting party could cancel the contract, namely, as the giver by forfeiting the *arrha*, or as the receiver by returning it, as the case may be.[995]

The ALR also foresaw different ways to strengthen the bindingness of contractual agreements ('*Verstärkung der Verträge*'), one of which was the giving of earnest ('*Draufgabe*', ibid § 205 et seq).[996] It is interesting that the ALR stipulated these methods, as the legal thinking of that time already acknowledged the consensuality of contracts; it was only in particular limited situations that a specific form was required as a constitutional element, ie, in order to give effect to the agreement. This concept is of particular interest, as it can still be found in the current BGB (§ 336 et seq).[997]

As in the *gemeines Recht*, *Draufgabe* functioned as evidence that a contract had been concluded (Vol I Title 5 § 205 ALR).[998] Exceptionally, it

effect of reducing the amount of money the giver had to pay to the receiver was the same where money was provided as *arrha*. See on this ibid 37 and fn 998 below.

995 Ibid 53; cf ibid 20, where it says that in Roman law, the receiver had to return twice the amount of *arrha*. In accordance with this function, it is known as *arrha poenalis*, compare ibid 7; see also Gottwald (fn 990) para 1.

996 Note that the ALR uses the term '*arrha*' (in ibid § 205) exclusively, without giving alternative denominations, such as *Gottes-Pfennig*, which might be explained on the continuing influence of Roman law in this era. See fn 983 above. The other ways to strengthen an agreement was by way of acknowledgement of the contract ('*Anerkenntniß*', Vol I Title 5 § 185 et seq ALR), by renouncing to object to the agreement ('*Entsagung der Einwendungen*', ibid § 193 et seq), and by judicial confirmation of the contract ('*gerichtliche Bestätigung*', ibid § 200 et seq).

997 For further details, see Section 3.c.ii. below. In contrast, the other methods are no longer contained in German law.

998 Similarly, *Draufgabe* was generally differentiated from an '*Angeld*', a down payment; however, it seems that the stipulation of the parties was important: where something was given with the intention of constituting a down payment, it was deemed as such (compare ibid § 206); if nothing was stipulated, the object given was deemed to fulfil the function of both *Draufgabe* and *Angeld* (ibid § 207). Compare *Miethgeld* with service contracts, which would normally be deducted from the servant's wages (Vol II Title 5 § 25–26 ALR). This seems to suggest that it was the employers who gave the earnest. Indeed, compare ibid § 27, which speaks of the servant receiving *Miethgeld*: '*Hat sich ein Dienstbote bey mehrern Herrschaften zugleich vermiethet: so gebührt derjenigen,* von welcher er das Miethgeld zuerst angenommen *hat der Vorzug*' (emphasis added). In English: 'Where a servant has loaned himself to several masters: so that master shall have preference, *from whom he first accepts the Miethgeld*' (emphasis added). This was not true where the object given did not correspond to what the giver was obliged to give under their contractual obligation (ibid § 208). Here, earnest would not, however, be returned to the giver upon fulfilment of their obliga-

would be constitutive for contracts of employment of servants (*Gesindeverträge*), as it could replace the required written form (see Vol II Title 5 § 22–23 ALR).[999] This constituted a deviation from the *gemeines Recht*. Another deviation from the *gemeines Recht* was that, unless the parties explicitly provided for the possibility, *Draufgabe* could not generally be used to cancel a contract (see ibid §§ 212, 209–210).

b. Contracts in the Time from the *Deutsche Bund* to the *Deutsche Reich*: The Drafting of the BGB and of the HGB (19th Century)

The nineteenth century was a turning point for Germany in terms of the political and social, as well as the legal developments: The country came together politically, its economy improved, and new comprehensive legislation in private law was created for the country (see Sections i.–ii. below). As a consequence, the rules on contract law were altered (see Section iii.).

i. Political and Social Background

After the end of the Holy Roman Empire of the German Nation at the beginning of the nineteenth century and following several internal and external political struggles, a somewhat stronger union emerged between a number of larger German states in 1815 in the form of the *Deutsche Bund* (German Confederation), each of the states of which retained their own sovereigns.[1000] These rulers did not have sole legislative power; constitutions of some states, like Bavaria, required that legislation be enacted by the sovereigns together with the estates (*Stände*).[1001] This was an expression of the fact that *Bürger* (citizens) — understood as encompassing both the old estate of citizens, ie, the educated middle-class, as well as part of the nobility — took on an increasingly important role, not only in terms

tion, but be treated as a *Zugabe* (bonus), which the receiver would keep. See Gastreich (fn 942) 55.

999 See also Gastreich (fn 942) 55.

1000 See Kroeschell (fn 141) 134. For further details, see, eg, Encyclopaedia Britannica, '*Germany*' (fn 911).

1001 A quote from the Bavarian constitution can be found in Kroeschell (fn 141) 153.

of economic contribution.[1002] Despite these differences, the new political framework demanded a new legal order.

ii. Structural Changes in the Law: Creation of an Imperial Supreme Court and the Codification of the BGB and the HGB

Under the constitution of the *Deutsche Bund* of 1849, legal unification was required to be established in private and commercial law among others.[1003] First attempts to unify the law were made, based on the emerging wish for 'a modern national Code'.[1004] Accordingly, a commission drafted the *Allgemeines Deutsches Handelsgesetzbuch* (Common German Commercial Code, hereinafter 'ADHGB'), which was recommended by the confederation's assembly, the *Bundesversammlung*, in 1861, and subsequently enacted in most German states,[1005] in the form of *Partikularrecht*.[1006]

In 1871, the *Deutsches Reich* (German Empire) was established, and full legislative competence was obtained by the *Reich* two years later, in 1873,

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1002 Compare ibid 123, who refers to this period as the 'age of citizens' ('*bürgerliches Zeitalter*') and notes that members occupied in industry and commerce were not initially included in this notion. The class seems to have expanded subsequently. Nevertheless, with the advancement of industrialisation, the part of this class that was labourers split from the rest to form a distinct class, compare ibid 178. The interests of the different estates diverged further subsequently: At the end of the nineteenth century, 'almost every estate represent only their own particular interests', Honsell (fn 140) para 8: '*fast jeder Stand vertritt einseitig seine Sonderinteressen*'.

1003 See Kroeschell (fn 141) 165. See also Honsell (fn 140) paras 19–20.

1004 Compare Kroeschell (fn 141) 124. See further ibid 165, where he notes that legal unification was thought to bring about national unification. See also Honsell (fn 140) para 19, according to whom a shared legal culture ('*Rechtskultur*') was seen as a strong bond for unifying the German people. In what follows, only the modification of civil and commercial law will be explored. For details on the new legislation in civil procedure and criminal law, see Kroeschell, ibid 167.

1005 See Canaris (fn 938) 17 para 51, who goes on to note at 18 para 52 that, due to the lack of a common civil code, the ADHGB contained numerous provisions which would normally be found in a civil code. For further details on the creation of the ADHGB, see Andreas M Fleckner, *Allgemeines Deutsches Handelsgesetzbuch* [Common German Commercial Code], in: Basedow and Hopt and Zimmermann (fn 16) Vol I 45–50.

1006 See Henne (fn 930). cf Kroeschell (fn 141) 165, stating the ADHGB to be 'general law' ('[*a*]*llgemeines Recht*') as opposed to 'common law' ('*gemeines Recht*').

when the State's powers were broadened to encompass private law.[1007] This paved the path for the enactment of pan-German legislation in the areas of commercial and private law. In this way, the ADHGB became part of the *Reichsrecht* and was thus applicable throughout the entire empire.[1008] Seeing as *Reichsrecht* had to be enforced by a central institution, the *Reichsgericht* (hereinafter 'RG') was established in 1879 as the court of last instance in civil and criminal matters of the *Deutsche Reich*.[1009] It seems that the higher courts began to include a reasoning in the decision and to publish these. This may have aided in the establishment of a culture of '*ständige Rechtsprechung*' ('settled case law').[1010]

As a consequence of the legal unification, commerce flourished throughout the country,[1011] which in turn necessitated a deviation from the formalism of the law of the *Alte Reich*, in particular that of the ALR. Work thus began on drafting both a pan-German civil and a new commercial codification.[1012] The fact that the needs of commerce were heeded is visible in several regulatory approaches, whereby focus in the following account will be had on the formation of contracts and formalities.

iii. Contract Law in the Draft Legislation

One way in which commerce was encouraged was the provision of a smooth and speedy process by which contracts could be concluded. This was realised in several ways in the *Erster Entwurf* (first draft) of a 'German' civil code — what would eventually become the BGB (hereinafter 'BGB

1007 For details, see Honsell (fn 140) paras 1–2, 21–22. Previously, only the law of obligations and that of commerce were within the State's powers, see Wolf and Neuner (fn 48) 82 para 2. For further discussion of the political constitution of the *Reich*, see Kroeschell (fn 141) 221–223.

1008 See Canaris (fn 938) 17 para 52.

1009 See www.bverwg.de/gebaeude.

1010 See on this Kroeschell (fn 141) 171–172.

1011 cf Wolf and Neuner (fn 48) 82 para 1, stating that the legal diversity (*Zersplitterung*) hindered commerce. On the legal fragmentation, see also Honsell (fn 140) para 24.

1012 The drafting commissions were established in 1874 and 1856 respectively. On the latter, see Fleckner (fn 1005) 47; on the former, see Hans-Peter Haferkamp, *Bürgerliches Gesetzbuch* [Civil Code], in: Basedow and Hopt and Zimmermann (fn 16) Vol I 229.

first draft') — published in 1888 after thirteen years of intensive work.[1013] In particular, offers were made to be binding by default (in § 80 BGB first draft) and the default time frames for accepting offers (and thus completing the contract) were kept as short as possible (in §§ 82–84 ibid).[1014] The underlying aim was also aided by the stipulations as to form.

The move away from the formalism that had determined the ALR by way of the freedom of form was accomplished by the gradual recognition of a *rechtsgeschäftlicher Wille* (legal volition) as the constitutive element of a contract, ie, of consensual contracts.[1015] This trend is reflected in the BGB first draft, which contained the following two stipulations:

> Section 77 For the conclusion of a contract, it is required that the contracting parties mutually declare their coinciding intention.[1016]
> Section 91 A form is necessary for a legal transaction only if such is prescribed by statute or a legal transaction.
> Where a special form is prescribed by law, the legal transaction will be void in case of non-observance of the form, unless something to the contrary is stipulated by law. In case of doubt, the same is true where a form agreed on in a legal transaction is lacking.[1017]

1013 For further details on the process, see, eg, Säcker, '*Einleitung BGB*' (fn 880) para 9.

1014 On the arguments in favour of this regulation, see Mugdan (fn 883) Vol 1 443–444, 445–446.

1015 Compare Lutz-Ingo Plewe, *Die gesetzlichen Formen des Rechtsgeschäfts: Eine Bestandsaufnahme zu Beginn des 21. Jahrhunderts* [The Statutory Forms of Legal Transactions: A Review from the Beginning of the 21st Century] (Shaker 2003) 2. As to the theoretical foundation provided by von Savigny, see fn 952 above and further Schmidt J (fn 25) 25–26. cf the observations in Mugdan (fn 883) Vol 1 450, where it is stated that German civil codes other than the ALR, as well as the *gemeines Recht* already acknowledged the freedom of form.

1016 Text transcribed from Mugdan (fn 883) Vol 1 LXXIX; translation by this author. The original text reads: '*§ 77 Zur Schließung eines Vertrages wird erfordert, dass die Vertragsschließenden ihren übereinstimmenden Willen sich gegenseitig erklären*.'

1017 Text transcribed from Mugdan (fn 883) Vol 1 LXXIX; translation by this author. The original text states: '*§ 91 Für ein Rechtsgeschäft ist eine besondere Form nur dann erforderlich, wenn eine solche durch Gesetz oder Rechtsgeschäft bestimmt ist.*
Ist durch Gesetz eine besondere Form vorgeschrieben, so ist das Rechtsgeschäft im Falle des Mangels der Form nichtig, sofern nicht ein Anderes vorgeschrieben ist. Dasselbe gilt im Zweifel im Falle des Mangels der durch Rechtsgeschäft bestimmten Form.'

The quoted provisions were deleted in the course of the BGB's legislative process, as the opinion predominated that they were superfluous.[1018] In the case of the freedom of form, because it was deemed to be a matter of course.[1019]

The respect for this freedom is also visible in the discussion surrounding the nature of the *Draufgabe*: While it was suggested to give constitutive meaning to *arrha* in accordance with the 'German' instead of the Roman tradition, this was rejected by the majority of the drafting commission, in order to avoid misunderstandings regarding the consensual nature of contracts.[1020] Consequently, the wording of the provision was later amended to bring out more clearly the *Draufgabe*'s default function as proof.[1021]

In contrast to this explicit regulation, it was stated in the motives (*Motive*) to the BGB[1022] that the term *Rechtsgeschäft* (legal transaction) ought not to be defined; it was deemed better to leave it to the courts to demarcate its scope.[1023] Arguably, this ought to extend to contracts, which were defined simply as '*zweiseitige Rechtsgeschäft*[*e*]' ('two-sided legal transaction[s]') in the motives to the BGB.[1024] The commission hesitated to make explicit statements in other respects as well. One example relates to *Darlehen* (credit agreements) and the nature of this kind of contract: While traditionally a *Realvertrag*, arguments were put forward that loans

1018 Compare Mugdan (fn 883) Vol 1 688. For details on the discussion, see Schmidt J (fn 25) 26–29.

1019 Compare Plewe (fn 1015) 2. See also Mugdan (fn 883) Vol 1 696. While the text of the provision was altered only slightly in the second draft (§ 104), the final version (§ 121; today found in § 125 BGB) constituted a complete deviation in that the freedom of form was no longer mentioned and only the legal consequence of non-fulfilment was contained. A juxtaposition of the three versions is provided in Mugdan (fn 883) Vol 1 LXXXI.

1020 See Mugdan (fn 883) Vol 2 714.

1021 Compare the juxtaposition of the two drafts in ibid Vol 2 XLVIII at 'I § 417'. For other changes regarding this legal institute, see ibid at 'I § 418' and 'I § 419', as well as at 715–717 (protocols to the commission's debate).

1022 This publication acted like a commentary or explanatory notes to the BGB first draft.

1023 See Mugdan (fn 883) Vol 1 421. cf Schmidt J (fn 25) 27, who states that the intention was to avoid impeding 'dogmatic developments' ('*dogmatische Entwicklungen*'); but that there was also an ongoing scientific debate. This latter fact possibly prevented an accord being reached on several definitions. Interestingly, it had been likewise suggested that the provision on *Draufgabe* was unnecessary in so far as it made the function of proof explicit, see Mugdan, ibid Vol 2 714–715.

1024 See Mugdan (fn 883) Vol 1 422.

were now consensual in nature; however, the commission decided to leave this scientific discussion aside and opted for letting the loan's nature be, focusing instead on regulating the consequences of that contract.[1025]

The deletion of § 91 from the BGB first draft is only one of several changes made after heavy criticism had been levelled at the composition.[1026] A third draft was eventually enacted as law in 1986 and the BGB came into force on 1 January 1900.[1027] The new commercial code, the *Handelsgesetzbuch* ('HGB'), which was the ADHGB adapted to the (existence of the) BGB, came into force on the same day.[1028] Despite, or perhaps because of this difficult process, the contract law embodied in the BGB is liberal in nature and formulated on a general or abstract level that was applicable to the whole of German society for the first time; moreover, it bestows self-determination on the contracting parties due to the dispositive nature of most of its provisions.[1029] As its rules will be analysed in detail in Section 3. below, no further discussion will be made at this point. Nevertheless, the following section will give a brief overview of the changes to contract law that were made subsequent to the BGB's (and the HGB's) coming into effect.

c. The Subsequent Development of German (Contract) Law (20th Century~)

German law experienced several changes from the twentieth century as well. These were due, in part, to the transformations on the political level (see Section i. below), but also due to other developments in society. As will be seen (in Section ii.), adjustments have been made to contract law in

1025 See ibid Vol 2 169–170. See on this further Schmidt J (fn 25) 111–113.

1026 Details on the ensuing criticism and the subsequent process can be found in, eg, Wolf and Neuner (fn 48) 82–83. See also Haferkamp (fn 1012) 230–231.

1027 On the process, see, eg, Kroeschell (fn 141) 180–181. See also Haferkamp (fn 1012) 231.

1028 See on this Canaris (fn 938) 18 para 53; see also Schmidt K (fn 931) paras 22, 24.

1029 Compare Karl Riesenhuber, *Verbraucherschutz und Schuldrechtsmodernisierung* [Consumer Protection and the Modernisation of the Law of Obligations], in: Makoto Tadaki and Harald Baum (eds), *Saiken-hō kaisei ni kansuru hikaku-hōteki kentō: nichidoku-hō no shiten kara* [A Comparative Analysis of the Modernisation of the Law of Obligations in Japan: From the Perspective of Japanese and German Law] (Chūō Daigaku Shuppan-bu 2014) 147, 148.

general, but — apart from form requirements — the basic formation rules have been left almost untouched.

i. Overview of Political Developments

The *Deutsche Reich* was followed by a quick succession of different kinds of states in Germany: the *Weimarer Republik* (Weimar Republic, 1918–1933), the *Dritte Reich* (Third Reich, 1933–1945), the subsequent splitting of Germany into the *Deutsche Demokratische Republik* (German Democratic Republic) and the *Bundesrepublik Deutschland* (Federal Republic of Germany, 1945–1989), ending with its re-unification in 1989/1990. While the national political framework has remained constant since, other dimensions, particularly the EU, have had an impact on Germany and, of course, its law.[1030] It goes beyond the scope of this dissertation to discuss all the historical events of these phases; only some legal developments in the area of contract law will be examined subsequently.[1031]

ii. Overview of (Contractual) Legal Developments

Both the BGB and the HGB have been in force for almost 120 years, despite all the changes in the political framework intimated above.[1032] It may be needless to say that during this period, there have been developments in German society and its predominant thinking, commerce, and, especially in more recent times, technology. All of these changes have made the adaptation of the BGB's and of the HGB's rules necessary. Amendments relevant to contract law will now be considered cursorily.

1030 Compare Wolf and Neuner (fn 48) 87, 88.

1031 Interested readers will find a concise account of the historical events in the Encyclopaedia Britannica, '*Germany*' (fn 911).

1032 This excepts the German Democratic Republic, which had its own civil code (*Zivilgesetzbuch der Deutschen Demokratischen Republik* of 19 June 1975) from 1 January 1976 to 3 October 1990. The legislation can be found online at www.jurion.de/gesetze/zgb_ddr/. For a brief discussion of the differences to the BGB, see Wolf and Neuner (fn 48) 86–87. Similarly, the HGB seems to not have been applicable in the Democratic Republic and only came back into force in 1990, see Schmidt K (fn 931) para 25; cf Henne (fn 930), who says the HGB was partially in force then.

On the one hand, there have been alterations on a general level, especially in the areas of family law (*Familienrecht*) and consumer law (*Verbraucherrecht*).[1033] On the other hand, different contract types, such as the package travel contract (*Reisevertrag*, §§ 651a et seq BGB) and brokerage contracts (*Vermittlungsvertrag*, §§ 481b para 1 et seq BGB), were added over time. In contrast, the basic formation rules remain almost unaltered until today.[1034]

Perhaps the most important amendments to the BGB to date — apart from reforms of German family law after WWII — were brought about under the *Schuldrechtsreform* (reform of the law of obligations), which entered into force in 2002 and, due to the changes made to over two hundred provisions, constituted the first mayor amendment of that part of the BGB.[1035] It lead to the BGB's second book being rearranged, which was not only done in order to make the norms more easily understandable, but was necessary due to the fact that consumer law regulation was incorporated into the Code.[1036] It furthermore adapted the form requirements to technological advancements and ended a long ongoing academic debate on the nature of credit agreements (*Darlehensverträge*) by explicitly providing that these create obligations to hand over the object (§§ 488 and 607 BGB), rather than being created once the object is delivered, and thus moving these away from real- and to consensual contracts.[1037]

Since the 2002-reform, the next extensive amendments were made recently under the BauVertrRefG, which came into force on 1 January 2018 and created another new contract type, namely, the consumer construction contract (*Verbraucherbauvertrag*, §§ 650i et seq BGB).[1038] Keeping these de-

1033 On these and other changes after WWII, see Säcker, '*Einleitung BGB*' (fn 880) paras 15–23. For an overview over the changes in the commercial sphere, see Canaris (fn 938) 18 para 54; for more details, see Schmidt K (fn 931) para 27.

1034 See Schmidt J (fn 25) 32, who shows the low number of amendments in fn 231.

1035 Compare Säcker, '*Einleitung BGB*' (fn 880) para 22. At least for the second book's first provision, § 241 BGB, it was the first amendmend in over 100 years, see Olzen, '*§ 241 BGB*' (fn 897) para 1. A reform of commercial law of similar general importance, but not of relevance to the present discussion, occurred in 1998. See on this Canaris (fn 938) 18 para 55 and Schmidt K (fn 931) para 28.

1036 For an in-depth discussion of consumer law, see Riesenhuber (fn 1029) 147–177.

1037 Compare Schmidt J (fn 25) 31–33 and 113. For a more in-depth discussion of this change, see Robert Freitag, *§ 488 Vertragstypische Pflichten beim Darlehensvertrag* [Section 488 Typical Contractual Typical Contractual Duties in a Loan Contract], in: von Staudinger and others (fn 140; 2015) paras 3 et seq.

1038 This law was already discussed briefly in Section 1. above.

velopments in mind, focus will now turn to the current regulation of the formation of contracts in Germany.

3. Contracts in Current German Law and Legal Practice

While the BGB contains both general and specific rules for contracts, it should be noted that provisions of the first book (*Allgemeiner Teil*, General Part) apply automatically to all kinds of contracts, unless some provision foresees otherwise.[1039] Thus, while specific regulations exists for electronic contracts (*elektronische Verträge*) or those involving a consumer (*Verbraucher*), these contracts are still principally governed by the general formation rules of the BGB as considered in Section a. below. Before attention is turned to this subject, a note needs to be made of the meaning of 'consumer'.

The term consumer (*Verbraucher*) has been defined in § 13 BGB as 'every natural person who enters into a legal transaction for purposes that predominantly are outside his trade, business or profession'.[1040] As a consequence, legal persons are — just as under EU law — principally not consumers, although a civil law partnership (*Gesellschaft bürgerlichen Rechts*, hereinafter 'GbR') can be a consumer if it acts in such a capacity and its partners are natural persons.[1041] The person's purpose is assessed objectively at the time of contracting,[1042] and in case of doubt is to be deemed to be a consumer and not a commercial purpose.[1043] As a consequence, it ought

1039 See Wolf and Neuner (fn 48) 70–71 paras 12–13.

1040 The original provision reads: '*Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu Zwecken abschließt, die überwiegend weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden können*.' This definition is complex, but, due to the provision's wide sphere of application, brings uniformity to German consumer law. Compare Jörg Fritzsche, *§ 13 Verbraucher* [Section 13 Consumer], in: von Staudinger and others (fn 140; 2018) para 30. The requirements are discussed subsequently.

1041 See Fritzsche, '*§ 13 BGB*' (fn 1040) paras 31, 34–36. It was already noted in Section II.3. above that the meaning of 'consumer' is limited to natural persons under EU law.

1042 Fritzsche, '*§ 13 BGB*' (fn 1040) paras 42–43.

1043 BGH decision of 30 September 2009, VIII ZR 7/09, NJW 2009, 3780–3781, para 10. In this case, the court ruled on the issue of whether a natural person acts as a consumer where the facts known to the other party seem to indicate a commercial purpose. Here, the fact in question was the address indicated by the claimant (buyer) as her place of work. The court held that § 13 BGB

to be presumed that a natural person enters into a contract as a consumer, unless there are unambiguous indications that the person is acting in a commercial capacity.[1044] As to the question of how transactions relating to objects of dual use, ie, capable of both private and commercial use, are to be classified, it seems that the transaction ought to be deemed to be of a consumer.[1045] This definition of a consumer is not only applicable to the BGB, but moreover to the HGB.[1046] Moreover, it is important to note that the regulation is also applicable in C2C transactions.[1047]

The term consumer is contrasted with that of an 'entrepreneur' (*Unternehmer*), which, according to § 14 para 1 BGB, is 'a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession.'[1048] Here, legal entities include foundations (*Stiftungen*, §§ 80–88 BGB), companies with legal personality, like a stock company (*Aktiengesellschaft*, §§ 1 *Aktiengesetz*[1049]), as well as public legal entities.[1050] This definition must be contrasted with the one found in § 1 paras 1–2 HGB, under which a merchant (*Kaufmann*) 'is a person who carries on a commercial business', ie, 'any commercial enterprise unless, by reason of its nature or size, the enterprise does not require a commercially organised business

contained a presumption of a consumer purpose and that this remains true in case of doubt, but not if the commercial purpose is unequivocal from the point of view of the other party. It found the mere indication of the address of a place of business (office) not to be conclusive as to the purpose of the purchase and therefore regarded the claimant as having acted as a consumer. See paras 1–2, 10–13 of the decision.

1044 BGH decision of 30 September 2009 (fn 1043) para 11. For further discussion of the nature of the activity, see Fritzsche, '*§ 13 BGB*' (fn 1040) paras 48–61.

1045 On this, see Fritzsche, '*§ 13 BGB*' (fn 1040) paras 47–47d.

1046 Wolf and Neuner (fn 48) 141 para 2.

1047 Fritzsche, '*§ 13 BGB*' (fn 1040) para 41.

1048 The original reads: '*Unternehmer ist eine natürliche oder juristische Person oder eine rechtsfähige Personengesellschaft, die bei Abschluss eines Rechtsgeschäfts in Ausübung ihrer gewerblichen oder selbständigen beruflichen Tätigkeit handelt*.' Jörg Fritzsche, *§ 14 Unternehmer* [Section 14 Enterpreneur], in: von Staudinger and others (fn 140; 2018) para 2 notes that this notion of an entrepreneur is a 'mirror image' (*Spiegelbild*) of the one for consumers.

1049 Stock Corporation Act of 6 September 1965, BGBl 1965 I 1089; English translation available online at www.gesetze-im-internet.de/englisch_aktg/index.html.

1050 See Fritzsche, '*§ 14 BGB*' (fn 1048) para 37.

operation.'[1051] Since the BGB's 'entrepreneur' includes self-employed business ventures, whereas the HGB's 'merchant' does not, the former notion is wider than the latter.[1052]

a. The Current Legal Background

Although the BGB and the HGB contain no explicit rules on the formation of contracts, the generally accepted contract theory is that a contract in German law is formed through the agreement or consent of the parties.[1053] This is usually achieved through the process of an offer being accepted (see Section ii. below).[1054] While this is true, it is also necessary for the parties to have an intention to be bound by the agreement (Section iv.).[1055] Moreover, the contract's terms contained in the declarations of intention must be certain.[1056] Unless mandatory forms apply (Section b.), the parties may even freely stipulate in which way the agreement is to be brought about.[1057] This consensuality may be seen as a deference to the principle of private party autonomy (*Privatautonomie*), in that it allows persons to regulate their own affairs by means of consensual acts (*einverständliches Handeln*).[1058] The principle has several implications, of which the freedom of contract (*Vertragsfreiheit*) is the most important one for the

1051 The original provision reads: '(1) *Kaufmann im Sinne dieses Gesetzbuchs ist, wer ein Handelsgewerbe betreibt.* (2) *Handelsgewerbe ist jeder Gewerbebetrieb, es sei denn, daß das Unternehmen nach Art oder Umfang einen in kaufmännischer Weise eingerichteten Geschäftsbetrieb nicht erfordert*.'

1052 See Fritzsche, '*§ 14 BGB*' (fn 1048) para 17. For further details of the notion of merchant under the HGB, see Baumbach and Hopt (fn 889) at '*§ 1 [Istkaufmann]*' [Section 1 [Merchant]] paras 3, 5–10.

1053 Compare Gregor Christandl, *Introduction before Art 2:101*, in: Jansen and Zimmermann (fn 38) 231, 233 para 2. See also Bork, '*Vor § 145 BGB*' (fn 884) para 1. Note that there used to be a theory of 'factual contracts' (*faktische Verträge*), which has not been followed since the mid-1950s. On this theory, which will not be discussed further, see Olzen, '*§ 241 BGB*' (fn 897) paras 94 et seq.

1054 Compare Bork, '*Vor § 145 BGB*' (fn 884) para 4, who notes that this is not reflected in the BGB's provisions.

1055 See Whincup (fn 34) 39 para 1.53.

1056 Compare Christandl, '*Before Art 2:101 PECL*' (fn 1053) 233 para 2. See also Sections a.ii.cc) and a.iii.cc) below.

1057 See Wolf and Neuner (fn 48) 418 para 2.

1058 Compare Reinhard Singer, *Vorbemerkungen zu §§ 116–144* [Preliminary Notes on Ss 116–144], in: von Staudinger and others (fn 140; 2017) para 6.

discussion of this dissertation.[1059] This in turn entails several freedoms, such as the (either positive of negative) freedom of conclusion of a contract (*Abschlussfreiheit*), ie, to accept or decline to enter into a contract, or to be free to make an offer or an acceptance (*Angebots-* and *Annahmefreiheit* respectively).[1060] And while there is also a freedom of form (*Formfreiheit*), there may be statutory requirements, including the involvement of third parties, through which the law recognises the legal validity of a contract, while they constitute a (limited) restriction of the parties' freedoms in relation to contract at the same time.[1061] Other general limitations may stem from the objective to protect one party, usually perceived to be in a weaker position, such as under consumer law, or through the regulation of, eg, standard terms (*Allgemeine Geschäftsbedingungen*, hereinafter 'AGB') or anti-discrimination.[1062] Furthermore, in cases of cross-border contracts, international law in the form of the United Nations Convention on Contracts for the International Sale of Goods ('CISG') will often be applicable.[1063]

A contract is generally necessary for the creation of an obligatory relationship (§ 311 para 1 BGB).[1064] This relationship bases itself on an obligatory act (*Verpflichtungsgeschäft*), according to which one party undertakes

1059 See on this generally Busche, '*Vor § 145 BGB*' (fn 158) para 2, who goes on to emphasise at para 6 that it acts as a 'substantial possibility of contractual self-determination' ('*substanzielle Möglichkeit zu vertraglicher Selbstbestimmung*'). For a concise overview over its historical development in German law, see, eg, Busche, ibid para 5.

1060 See Wolf and Neuner (fn 48) 100 para 35, 99 para 32. On the exception to this freedom, known as '*Kontrahierungszwang*' (obligation to contract), see Busche, '*Vor § 145 BGB*' (fn 158) paras 12–23. Interestingly, Busche notes at para 12 that the freedom of contract is inherently limited whenever a contract is concluded, as each party's freedom confronts another party's freedom.

1061 Compare Wolf and Neuner (fn 48) 97 para 24. See further Busche, '*Vor § 145 BGB*' (fn 158) para 4, mentioning restrictions stemming from EU law. Form requirements will be considered in Section b. below, while the involvement of third parties, particularly persons of public authority, will be discussed in D.III. and V. below.

1062 On the last of these, see Honsell (fn 140) para 113b.

1063 The rules of this Convention are considered in Section E.II. below.

1064 This norm was introduced by the 2002-reform of the German law of obligations, already discussed in Section 2.c.ii. above. An exception is found in, eg, §§ 657 et seq BGB (*Auslobung*; Promise of a reward), as the promise is created one-sidedly, see Olzen, '*§ 241 BGB*' (fn 897) para 69.

to do or omit from doing something.[1065] It must be contrasted with a *Verfügungsgeschäft* (act of disposition), an act to immediately affect some existing right or legal relationship, ie, to execute the legal transaction.[1066] As a consequence of the difference in the bases, the scope of effectiveness is different: obligatory acts are only effective relatively, ie, only affect the parties involved, whereas acts of disposition have an *erga omnes* effect absolutely, ie, against everyone.[1067]

These two kinds of acts are in two forms of contracts, called *schuldrechtlicher* and *dinglicher Vertrag* respectively.[1068] They are separated in German law under the *Trennungsprinzip* (separation principle);[1069] yet, they are both part of an acquisition of property.[1070] This separation means that both kinds of acts are necessary in order to effect a transfer of property, since the obligatory act, like a sales contract, will only bind the parties. In order to effect the change of ownership,[1071] ie, of the *dingliches Recht*

1065 See Wolf and Neuner (fn 48) 325 para 28. For further details, see, eg, Bork, '*Allgemeiner Teil*' (fn 900) 177 paras 448–449. This type of act seems similar to the English executory contract, see Section II.1. above.

1066 See Bork, '*Allgemeiner Teil*' (fn 900) 176 para 445. The object (right) can be affected in a number of ways, so that it may be changed, transferred, or even brought to an end. For further details, see Bork, ibid 177–178 paras 450–451. This type of act seems similar to the English executed contract, see Section II.1. above.

1067 See ibid 330 paras 52, 51.

1068 The terms are used by, eg, Wolfgang Ernst, *Einleitung* [*zum Schuldrecht*] [Introduction [to the Law of Obligations]], in: Säcker and others (fn 158) Vol 2 para 20; and by Reinhard Gaier, *Einleitung zum Sachenrecht* [Introduction to Property Law], in: ibid Vol 7 (7th online edn, CH Beck 2017) para 7 respectively.

1069 See Jan Lieder and Daniel Berneith, *Echte und unechte Ausnahmen vom Abstraktionsprinzip* [Genuine and Artificial Exceptions to the Abstraction Principle] (2016) JuS 673.

1070 Bork, '*Allgemeiner Teil*' (fn 900) 176–177 para 447, who notes that this kind of transaction will usually involve three contracts: one obligatory contract and two dispositions — one by the buyer for the transfer of money, and one by the seller for the transfer of the property in the thing in question. This is not true for gifts, which merely involve a disposition by the donor; nor for a loan, which involves a real act. See ibid.

1071 See Whincup (fn 34) 39 para 1.52. See further Andreas Wacke, *Eigentumserwerb des Käufers durch schlichten Konsens oder erst mit Übergabe? Unterschiede im Rezeptionsprozeß und ihre mögliche Überwindung* [Acquisition of Property of the Buyer by Consensuality or upon Delivery? Differences in the Reception Process and Possibilieties to Overcome these] (2000) ZEuP 254, 255; Lieder and Berneith (fn 1069) 673–674.

(right in rem), an act of disposition is necessary.[1072] This separation is highlighted in the structure of the BGB, in which obligatory transactions are regulated in book two (*Schuldrecht*, Law of Obligations) and acts of disposition are governed by the provisions found in book three (*Sachenrecht*, Law of Property).[1073]

Furthermore, according to the *Abstraktionsprinzip* (abstraction principle), the ineffectiveness of the former act does not affect the latter.[1074] The abstraction principle is generally applicable to transactions over both movable and immovable property; however, the requirements beyond an agreement between the parties vary.[1075] The advantage of this principle becomes apparent in instances of a series of sales over an object, whereby the buyer resells the object to a third party. As the acts concerning the obligation and the disposition are separated, the third party does not have to concern itself with the previous *schuldrechtliche* transaction; the acquisition by the third party is protected, if the act of disposition in the previous transaction between the original seller and buyer is effective.[1076] By way of exception, the abstraction principle may not be applicable in two cases: First, if the acts of obligation and of disposition are connected under what is known as a *Bedingungszusammenhang* (conditional relationship).[1077] Secondly, if the two acts may be seen as a *Geschäftseinheit* (transactional unit)

1072 For further information on this class of rights and their effects according to German academic opinion, see, eg, Gaier (fn 1068) paras 4–6.

1073 See Wolf and Neuner (fn 48) 70 para 9. See further Lieder and Berneith (fn 1069) 674, who also remark that the BGB does not contain the separation principle explicitly. It ought to be noted that contracts and their formation are regulated in the general part of the BGB.

1074 See Bork, '*Allgemeiner Teil*' (fn 900) 176–177 para 478; Youngs (fn 34) 547. See also Wacke (fn 1071) 255. See further, eg, OLG Rostock order of 28 April 2006, 7 U 48/06, OLG-Report (OLGR) Rostock 2006, 601–602, para 16. This case is discussed in fn 1105 below. Compare Lieder and Berneith (fn 1069) 674, who speak of there 'not necessarily' ('*nicht zwangsläufig*') being a correlation between the ineffectiveness of one or of the other transaction. They go on to note, however, that the separation principle is the prerequisite for the abstraction principle.

1075 The classification of property and these requirements will be discussed in Section b. below.

1076 Compare Lieder and Berneith (fn 1069) 674.

1077 See on this ibid 675, who show the difference between this kind of stipulation and a condition (*Bedingung*) in the usual sense. This must be an explicit arrangement between the parties, as an implicit deviation from the abstraction principle is not possible, ibid.

within the meaning of § 139 BGB (*Teilnichtigkeit*; Partial invalidity).[1078] This provision contains a presumption, according to which a legal transaction is void in its entirety when a part of it becomes invalid, save where the parties have provided otherwise.[1079] Accordingly, the parties' agreement, often in the form of severability clauses (*salvatorische Klauseln*), displaces this dispositive provision.[1080] In this way, the principle of party autonomy is safeguarded.[1081]

i. Basic Principles: Contracts as *Rechtsgeschäfte* (Legal Transactions) and *Willenserklärungen* (Declarations of Intention)

A contract is one, albeit perhaps the most important, legal transaction (*Rechtsgeschäft*) of the BGB.[1082] Due to the tendency in German jurispru-

1078 See ibid 676, 675.

1079 See Herbert Roth, *§ 139* [Section 139], in: von Staudinger and others (fn 140; 2015) paras 1, 5. For a detailed discussion of the application requirements, namely, as to a transactional unit, its divisibility (*Teilbarkeit*), and whether the parties intended to go forward with the remaining contract, see ibid paras 26 et seq.

1080 ibid paras 4, 8. The author states furthermore at para 2 that this presumption is a 'rebuttable presumption of invalidity' ('*widerlegliche Nichtigkeitsvermutung*'). This is in line with a statement made by the BGH that a severability clause rebuts the presumption contained in § 139 BGB, see, eg, BGH decision of 5 December 2012, I ZR 92/11, BGHZ 196, 254–270 para 53. The case concerned the sale of a pipeline through a public institution and the question whether the contract was void for contravening state aid law. The court found the stipulation on the sale price to be void, which, being an essential clause, rendered the whole agreement void, despite the parties having inserted a severability clause. See paras 48 et seq of the decision. For further discussion of severability clauses, see Roth, ibid para 22.

1081 See Roth (fn 1079) para 1. Nevertheless, even the use of such severability clauses cannot prevent that a contract becomes entirely ineffective if the affected (void) part is an essential provision, or if the parties knew of the invalidity, ibid paras 22, 24; see also BGH decision of 5 December 2012 (fn 1080) paras 55–56. Moreover, if upholding the remaining contract would go against the parties' intentions, the whole contract will become void despite the existence of a severability clause, BGH, ibid, para 53. It is important to note that a court must first attempt to interpret a contract in a way to fill a gap created due to partial invalidity of terms before resorting to § 139 BGB, Roth, ibid, para 25.

1082 Compare Fritzsche, '*§ 13 BGB*' (fn 1040) para 40; Bork, '*Allgemeiner Teil*' (fn 900) 172 para 432, stating contracts to be the 'typical means of autonomous private legal ordering' ('*das typische Mittel privatautonomer Rechtsgestaltung*'). cf Flume (fn 885) 601, stating that '[t]he rules on legal transactions are applied

dence to start from abstract rather than from specific principles, the theoretical foundation of contracts is rooted in that of the *Rechtsgeschäft*. This transaction is seen as 'a set of facts that is based on the will of the parties and which is to bring about the legal consequences that are foreseen in at least one declaration of intention'.[1083] The 'act of will' in this definition means that there must be at least one declaration of intention (*Willenserklärung*).[1084] In this sense, a declaration of intention, while being the main element of a legal transaction, is at the same time the vehicle used to create it.[1085] At the conclusion of a contract, the declarations made are an *Angebot* (offer) and an *Annahme* (acceptance).[1086] The terms of *Rechtsgeschäft* and *Willenserklärung* will be considered more closely in the following, in reverse order.

aa) '*Willenserklärungen*' Defined

The term *Willenserklärung* is said to contain two parts: the 'will' or intention (*Wille*) of one person, which is announced (*kundgegeben*) to one or several other persons. Only by combining these two parts will an intention

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mostly to contracts' ('*Die Normen für das Rechtsgeschaft finden vornehmlich ihre Anwendung auf Verträge* […]').

1083 Fritzsche, '*§ 13 BGB*' (fn 1040) para 40: '*Es handelt sich um einen auf dem Parteiwillen aufbauenden Gesamttatbestand, der einen mit mindestens einer Willenserklärung angestrebten Rechtserfolg herbeiführt*.' cf the definition contained in Mugdan (fn 883) Vol 1 421: '[*Ein*] *Rechtsgeschäft* [...] *ist eine Privatwillenserklärung, gerichtet auf die Hervorbringung eines rechtlichen Erfolges, der nach der Rechtsordnung deswegen eintritt, weil er gewollt ist*' ('[A] legal transaction [...] is a private declaration of intention made in order to bring about a legal result that arises under the law because it is intended'). See also Kaufmann (fn 112) 53. On differentiating between legal transactions and transaction-like legal acts (*Rechtsgeschäftsähnliche Handlungen*), such as a notice (*Mitteilung* or *Anzeige*), see Bork, '*Allgemeiner Teil*' (fn 900) 165–167 paras 412–416, who notes that the latter bring about legal consequences by reason of some legal provision, not based on the intention of the acting person. Other acts that must be distinguished from a legal transaction will be discussed in relation to the intention to be legally bound (*Rechtsbindungswille*) in Section iv. below.

1084 Compare Singer (fn 1058) para 5.

1085 See ibid.

1086 Sometimes other terms are used, like *Antrag* or *Gebot* for offer, or *Zuschlag* for acceptance. This will be discussed in Sections ii. and iii. below respectively.

be declared effectively, as an unannounced will is of no consequence.[1087] Similarly, the announcing person must state that they will be obliged in some way in order to be bound by the declaration.[1088]

German jurisprudence differentiates between the inner and the outer state of affairs, sometimes also referred to respectively as the subjective and the objective matter of a declaration of intention.[1089] The latter means that a declaration must be made in order to bring about a legal consequence (*Rechtsfolge*).[1090] If such a result is not intended, ie, when facts are merely to be communicated, the statement is said to be merely declaratory (*deklaratorisch*), and may take the form of a *Vorstellungs-* or *Willensmitteilung* (communication of conception or volition).[1091] The subjective matter relates to the substance of the will, ie, to the intention itself, in that there must be three types of volition: *Handlungswille* (volition to act), *Erklärungswille* (volition to declare, sometimes also referred to as 'declaration-awareness', '*Erklärungsbewusstsein*'), and *Geschäftswille* (volition to transact).[1092] These three kinds of intention are expressed when a person deliberately gives a declaratory sign with the intention for the statement be legally relevant, and where they intend a particular legal consequence to be effected by means of the declaration.[1093] It should be noted that while

1087 Compare Wolf and Neuner (fn 48) 337 para 1, 338 paras 5–6. Thus, it was stated in the motives to the BGB that '[*es s*]*elbstverständlich ist, daß die Willenserklärung dem anderen Theile in Folge des Willens des Erklärenden zugekommen sein muß; es genügt nicht, daß ein Unberufener den auf dem Schreibtisch liegen gebliebenen Brief befördert* […]' ('[it is n]atural, that a declaration of intention must have reached the other party with the will of the declaring person; it is not sufficient, that an unappointed person sends the letter left on the desk'), see Mugdan (fn 883) Vol 1 439. The theory underlying this principle is the *Geltungstheorie* (validity theory), which can be contrasted with the *Willenstheorie* (will theory) and the *Erklärungstheorie* (declaration theory). For a succinct account of these theories, see Singer (fn 1058) paras 15–17.

1088 Compare Wolf and Neuner (fn 48) 338–339 para 6. The issue of a 'will to be bound' will be discussed in Section iv. below. As to the interpretation of a declaration, see Section cc) below.

1089 See ibid 340 para 1.

1090 See Singer (fn 1058) para 1. On differentiating between binding and non-binding declarations, see the discussion in Sections ii. and iii. below.

1091 See on this Armbrüster (fn 957) paras 16–18. Compare Singer (fn 1058) para 2, who speaks of '*Willensäußerungen*' (expression of one's volition) as a *geschäftsähnliche Handlung* (transaction-like act), as contrasted with a *Willenserklärung*.

1092 See Singer (fn 1058) para 26.

1093 See Wolf and Neuner (fn 48) 347 para 1 and 351 para 20. See also Armbrüster (fn 957) paras 22–28, who also describes the flaws in the different kinds of

the majority opinion of German academics deems the first element to be essential in order for there to be a declaration of intention in the legal sense, there is a divide as regards the second and third elements: the former may or may not be constitutive, while only a minority deems the third absolutely necessary.[1094]

bb) Types of Willenserklärungen and Methods of Declaration

Declarations can be classified into those that need to be received by the other party (in German known as '*empfangsbedürftige Willenserklärungen*') and those which do not need to be received ('*nicht empfangsbedürftige Willenserklärungen*'), whereby the latter exist only in special circumstances, ie, ordinarily where a declaration affects solely the affairs of the declaring person.[1095] In other words, a declaration of intention will usually be one that needs to be received.[1096] Thus, both offer and acceptance constitute declarations of intention requiring notice by another person, while promise of rewards are examples of declarations which do not require this.[1097]

Declarations which need to be received imply that they must reach someone, while, in contrast, a perceptible declaration is sufficient by

volition. See further Singer (fn 1058) para 27, who emphasises that the action be controlled (*beherrscht*) by the person.

1094 See on this Wolf and Neuner (fn 48) 347 para 1, 352 paras 21–22, 353 para 25. A succinct summary of the development of the jurisprudence concerning declarations of intention and the discussion surrounding the necessary requirements is given by Hans-Joachim Musielak, *Zum Verhältnis von Wille und Erklärung: Eine Auseinandersetzung mit dem Tatbestand der Willenserklärung* [Concerning the Relationship Between Volition and Declaration: A Discussion of the Requirements of a Declaration of Intention] (2011) 211 No 6 AcP 769–802, particularly at 777 et seq.

1095 See Armbrüster (fn 957) para 5.

1096 Dorothee Einsele, *§ 130 Wirksamwerden der Willenserklärung gegenüber Abwesenden* [Section 130 Coming into Effect of the Declarations of Intention Between Absent Persons], in: Säcker and others (fn 158) para 1.

1097 See ibid paras 1, 5. Another example of acceptance not requiring receipt is acceptance of bids (*Zuschläge*) in auctions, see, eg, BGH decision of 24 April 1998, V ZR 197/97, BGHZ 138, 339–348, para 7. The case concerned the voluntary sale by auction of a piece of land and the question of form, namely, whether the auctioneer must be present during the notarial authentication (which the court affirmed). See paras 1, 6–9, 11 of the decision.

itself in case of those declarations that do not need to be received.[1098] In either case, the intention must be manifested in some way and communicated.[1099] In this sense, an intention is said to have been declared (*abgegeben*) when the declaring person has done everything that is necessary to effect the declaration of intention.[1100] With declarations not requiring reception, this is realised upon utterance of the intention; with the other kind, it is additionally required that the declaration be directed at the addressee.[1101]

Declarations of intention, once made, are seen as morally and legally binding for the purpose of legal certainty.[1102] This general bindingness has been relaxed in particular circumstances, eg, by allowing a declaration to be revoked or for this right to be excluded, as will be seen in Sections ii. and iii. below. There are two ways in which an intention may be declared, unless the law or the parties foresee otherwise: explicitly (*ausdrücklich*), namely, by using express words or phrases which convey this, such as 'I hereby declare…' or 'accepted'; and implicitly (*konkludent*).[1103] Activity can be deemed as an implicit declaration, namely, when there is a *Willensbetätigung* (exercise of one's volition), as is foreseen in § 151 BGB (*Annahme ohne Erklärung gegenüber dem Antragenden*; Acceptance without declaration to the offeror).[1104] One special case of implicit declarations that deserves mentioning is silence (*Schweigen*; in adjective form '*stillschweigend*'), where-

1098 Compare § 130 BGB, which speaks of '[a] declaration of intent that is to be made to another' ('*Eine Willenserklärung, die einem anderen gegenüber abzugeben ist*') as a declaration that needs to be received. See further Armbrüster (fn 957) para 5.

1099 See Wolf and Neuner (fn 48) 355–356 for further discussion.

1100 Einsele, '*§ 130 BGB*' (fn 1096) para 13. The coming into effect of declarations of intention will be discussed in Sections ii. and iii. below.

1101 See ibid para 13.

1102 This is related to the principle of *Selbstverantwortung* (personal responsibility) underpinning the BGB. Compare Wolf and Neuner (fn 48) 97 para 23.

1103 See Armbrüster (fn 957) paras 6–7.

1104 See Armbrüster (fn 957) para 11. A *Willensbetätigung* differs from a *Willenserklärung* in that it need not be received, because it lacks a communication requirement. It is similar in that it intends to bring about some legal consequence. See on this Singer (fn 1058) para 4. In other words, a *Willensbetätigung* is an act that is manifested externally and confers the actor's acceptance uniquivocally, see, eg, BGH decision of 28 March 1990, VIII ZR 258/89, BGHZ 111, 97 paras 19–20. In this case, the court found that cashing a cheque obtained from the claimant in order to conclude a compensation agreement (*Abfindungsvereinbarung*) did not constitute implicit acceptance by the defendant, as other circumstances (letter by the defendant rejecting the proposal)

by, in limited circumstances only, an inference as to a declaration of intention can be drawn from a person's silence or inactivity.[1105] In instances where the parties agree on silence as a declaration, even as a standard term, this is usually unproblematic.[1106] Some authors have stated that such cases amount to an explicit declaration.[1107] Finally, a declaration can be created through a legal fiction, such as under § 455 BGB (*Billigungsfrist*; Approval period [in a sale on approval]).

cc) Interpretation of *Willenserklärungen*

Before turning to *Rechtsgeschäfte*, a quick note needs to be made on the interpretation of the parties' declarations of intention.[1108] Two provisions are important: First, according to § 133 BGB, the declared intention of the par-

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indicated that the defendant had no intention of accepting the offer. See paras 2–6, 12 et seq of the decision.

1105 Armbrüster (fn 957) paras 6, 8, who says this is to be assessed from the addressee's perspective. A special case before the German courts concerned an entry of ownership in the German land register (*Grundbuch*), whereby one party to the transfer of the real estate in question, albeit being present during the notarial authentication (*notarielle Beurkundung*), had not signed the contract. The question was whether that party had consented to the transfer of the real estate implicitly, ie, by their silence. If this were so, the entry in the register was valid, despite the contract of disposition (*Auflassung*) being invalid due to non-fulfilment of the necessary form requirements. The court found that by attending and yet not objecting to the contract, the party had, despite not having signed the contract, implicitly assented to the transfer. See OLG Rostock order of 28 April 2006 (fn 1074) paras 1–4, 10–12, 15. In thus deciding, the court followed precedents and the leading opinion that a *Auflassung*, while needing to be declared before a notary, need not be authenticated. For a succinct discussion of this issue, see Rainer Kanzleiter, *OLG Rostock: Vor dem Notar erklärte Auflassung ohne Unterschrift* [OLG Rostock: Disposition Declared Before a Notary not Signed] (2007) DNotZ 220–225.

1106 This was held by the OLG Düsseldorf in the decision of 28 December 2004, 21 U 68/04, NJW 2005, 1515–1516, see paras 25–28, 36. The case concerned the sale of a heating system, whereby the contract had been allegedly concluded by way of an offer that had been accepted by silence. The contract stipulated that if no objection was raised against the offer within four weeks, it was deemed to be accepted. See para 25 of the decision.

1107 See, eg, Armbrüster (fn 957) para 8.

1108 These rules are of general application to *Rechtsgeschäfte* and *Willenserklärungen*, but of course encompass offer and acceptance as well, compare Schmidt J (fn 25) 135. For further details on the interpretation process, see Jan Busche, *§ 133 Auslegung einer Willenserklärung* [Section 133 Interpretation of a Declara-

ties is interpreted by ascertaining the parties' '*true intention* rather than adhering to the literal meaning of the declaration' (emphasis added).[1109] This has been interpreted to mean that the focus ought to be on the meaning of the declaration, rather than the way it is phrased and thus understood.[1110] It is employed where the parties' understanding of the declaration is the same.[1111] In contrast, where the recipient does not understand the declaration in the same way as the maker of the statement, what is referred to as a normative standard is usually used, which takes into account all relevant circumstances to the act of declaring.[1112] Essentially, this method enquires what the recipient objectively ought to have understood.[1113] Where an act is made orally, the wording is usually interpreted according to ordinary language usage; however, where the persons involved are professionals or members of another kind of community, any particular usage of language is taken into account.[1114] Declarations having to be made in a particular form are likewise interpreted in this way,[1115] namely, by asking whether the parties had the same understanding or whether it differed.[1116] In terms of the point in time at which the meaning is interpreted, it is the time of receipt of the declaration that is relevant.[1117]

The other important provision is § 157 BGB and requires that contracts are interpreted in accordance with the principle of good faith and custom-

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tion of Intention], in: Säcker and others (fn 158) paras 13 et seq. See also Bork, '*Allgemeiner Teil*' (fn 900) 194–219.

1109 The original provision states: '*Bei der Auslegung einer Willenserklärung ist der* wirkliche Wille *zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften*' (emphasis added).

1110 See Bork, '*Allgemeiner Teil*' (fn 900) 198 para 501 and 197 para 499, stating that what matters is what is 'actually intended and not what is understood', whether by the parties or in general ('*dass es auf das tatsächlich Gewollte und nicht auf das Verstandene oder auf das allgemeine Verständnis ankommt*').

1111 See Busche, '*§ 133 BGB*' (fn 1108) para 14. See also Bork, '*Allgemeiner Teil*' (fn 900) 202–203 paras 518–519.

1112 Wolf and Neuner (fn 48) 394 para 29, 388 para 4 and 389 para 7. Compare also Busche, '*§ 133 BGB*' (fn 1108) para 14.

1113 On this, see Bork, '*Allgemeiner Teil*' (fn 900) 204–205 paras 525–527. This is the same as the English approach, discussed in Section II.3.a.i. above.

1114 Wolf and Neuner (fn 48) 388 para 5.

1115 The issue of whether the form requirement has been fulfilled is only considered in a second step, Wolf and Neuner (fn 48) 396 para 36. Form requirements are discussed in Section b. below.

1116 See Busche, '*§ 133 BGB*' (fn 1108) para 14.

1117 For further details, see ibid para 5. The coming into effect of declarations of intention will be discussed in Sections ii.dd) and iii.dd) below.

ary practice (*Verkehrssitte*), so that an objective standard is applied.[1118] The difference between these two rules is that § 133 BGB requires a 'simple interpretation' ('*einfache Auslegung*') of a declaration of intention, while § 157 BGB aims to fill lacunae through a 'complementary interpretation' ('*ergänzende Auslegung*').[1119] Consequently, the second rule is applied in cases where the other two interpretation standards described above do not aid in the interpretation of legal transactions, because there is a lacuna.[1120] As the issue of incomplete agreements is outside the scope of this dissertation, this method is not considered further.

dd) *Rechtsgeschäfte* (Legal Transactions)

The number of declarations of intention that are necessary to constitute a legal transaction depends on the type of transaction, namely, on whether the legal transaction is one-sided or multilateral (*ein- oder mehrseitiges Rechtsgeschäft*).[1121] Examples of particular interest are promises of rewards (*Auslobung*, one-sided) and contracts (bi- or multilateral).[1122] A contract must thus be formed through two or more matching declarations of intention, namely, an offer and acceptance, as discussed in Sections ii. and iii. below. A *Rechtsgeschäft* may also be constituted by one declaration of intention and some other circumstance, such as a real act in a real contract.[1123]

Another way to classify legal transactions is to distinguish their function. In accordance with the distinction explained above between obligatory and dispositionary acts, these are closely related to obligatory or property transactions (*schuldrechtliche* and *sachenrechtliche Rechtsgeschäfte*) respectively, which in turn affect either an obligatory relationship or a

1118 See Bork, '*Allgemeiner Teil*' (fn 900) 197 para 499.
1119 See Busche, '*§ 133 BGB*' (fn 1108) para 6.
1120 On this, see Bork, '*Allgemeiner Teil*' (fn 900) 206–209 paras 532–537 for further details.
1121 Wolf and Neuner (fn 48) 312 para 4, 320 para 1.
1122 Bork, '*Allgemeiner Teil*' (fn 900) 170 para 427 and 172 para 432. Other examples include the granting of a *Vollmacht* (power of attorney; one-sided) and *Beschlüsse* (resolutions; multilateral) of legal entities, see on this Wolf and Neuner (fn 48) 320 para 2 and 322–323 paras 10 et seq.
1123 See on this Bork, '*Allgemeiner Teil*' (fn 900) 162–163 para 399. For details on real acts, see ibid 165 paras 407–411, where it is explained that these legal acts bring about legal consequences, while an intention of the acting person is not required.

property right.[1124] Examples are those mentioned for one-sided and bilateral transactions as obligatory acts, while the giving up of a property right (one-sided), or the *Einigung* (agreement; bi- or multilateral) to transfer property are examples of proprietary acts.[1125]

ii. *Antrag* or *Angebot* (Offer)

The first element in a German contract is an *Antrag* or *Angebot* (offer). After analysing the meaning of this term in Section aa), the notion of *Angebot* is distinguished from *invitationes ad offerendum* (invitations to make an offer) in Section bb) below. Attention is then given to the requirement of certainty (in Section cc)) and the rules surrounding the effectiveness of an *Antrag* (in Sections dd)–ee)).

aa) '*Antrag*' or '*Angebot*' Defined

Despite the lack of an explicit legislative definition, the wording of § 145 BGB at least suggests that an offer, referred to in the code as an *Antrag*, is a proposal. In academic literature, it has been defined as 'a one-sided declaration of intention that needs to be received and that aims at the conclusion of a contract.'[1126] Other descriptions add that the declaration needs to be capable of being accepted (*annahmefähig*).[1127] Furthermore, whilst not explicit under the BGB, German private law requires offers to be certain and that the offeror have an intention to be bound.[1128] Thus, the offer

1124 Wolf and Neuner (fn 48) 323 paras 15, 17. There are, furthermore, legal transactions in relation to family and succession law (*familienrechtliche* and *erbrechtliche Rechtsgeschäfte*). As family arrangements are not considered in this dissertation, interested readers are referred to ibid 323–324 paras 19 et seq for further details.

1125 Bork, '*Allgemeiner Teil*' (fn 900) 174–175 para 441 and 177 para 447.

1126 Busche, '*§ 145 BGB*' (fn 893) para 5: '*Der Antrag (Angebot, Offerte) ist eine einseitige, empfangsbedürftige Willenserklärung, die auf den Abschluss eines Vertrages gerichtet ist*.'

1127 Reinhard Bork, *§ 145 Bindung an den Antrag* [Section 145 Binding Effect of an Offer], in: von Staudinger and others (fn 140; 2015) para 1; see also Schmidt J (fn 25) 130.

1128 Schmidt J (fn 25) 130. See also Bork, '*§ 145 BGB*' (fn 1127) para 2. The former issue will be considered in Section cc); the latter issue will be discussed in Section iv. below.

must contain all, or at least the essential terms (*essentialia negotii*)[1129] of the contract, as the proposal must be accepted as is, ie, without modification, in order for a contract to arise.[1130] For this reason, a draft contract (*Vertragsentwurf*) that is signed by one party constitutes an offer.[1131] In contrast, if modifications to the offer are made by the other party, this counts as a rejection of the original offer and the purported acceptance becomes a counter-offer (§ 150 para 2 BGB).[1132] The offer may be in the form of a 'real offer' (*Realofferte*), where goods or services are made available to the potential offeree prior to contracting,[1133] or through individualised or automatic declarations of intention.[1134] An offer may thus be made

1129 Non-essential terms are referred to as *accidentalia negotii*, see, eg, Schmidt J (fn 25) 253.

1130 See BAG decision of 19 April 2005, 9 AZR 233/04, BAGE 114, 206–218, NJW 2006, 1832–1836, para 17, in which this was stated in relation to applications for the reduction of working hours by an employee during the period of child rearing (*Elternzeit*). This necessity can also be deduced from § 154 para 1 BGB, which states that a contract is not concluded until all contract terms have been agreed upon. The issue of essential terms will be discussed in further detail in Section cc) below.

1131 See BGH decision of 18 October 2001, XII ZR 179/98, NJW 2001, 221–223 para 14.

1132 This occurred in the BGH decision of 18 October 2001 (fn 1131), where the offeree signed the contract with a note saying 'valid only in conjunction with our letter dated [20 September 1993]' ('*gilt nur im Zusammenhang mit unserem Schreiben vom 20.9.93*'). The court stressed that a new offer had been made even though the proposed modifications concerned 'unimportant side issues' ('*unbedeutende Nebenpunkte*'). It stated that while such minor modifications exceptionally do not lead to a rejection of the original offer and the making of a new one, such instances were confined to insurance and international sale contracts (governed by the CISG) and were thus not applicable to the lease contract in question; nor was there reason to extend these exceptions to the current situation. Furthermore, since the offeree had explicitly stated in their letter that their agreement was only given for the modified contract, the modifications could not be disregarded. See paras 1–5, 14–18 of the decision.

1133 For further details, see Busche, '*§ 145 BGB*' (fn 893) para 16. Examples given include offers of goods in vending machines and of public transportation, as well as the delivery of unsolicited goods.

1134 BGH decision of 16 March 2006, III ZR 152/05, BGHZ 166, 369–383, para 11. In this case, an automatic message stating what kind of service (telephone connection by reverse-charged call) would be provided and at what price was held to be sufficient.

both expressly or implicitly and can be in any form, including electronic means, unless the law or the parties have foreseen otherwise.[1135]

While an offer will usually be directed at a specific offeree, it is equally possible under German law for the declaration to be addressed to an undefined group of people (*ad incertas personas*), as is the case with a petrol pump,[1136] or a sale by (online) auction.[1137] These kinds of offers in particular must be distinguished from *invitationes ad offerendum* (invitations to make an offer), as discussed subsequently. Furthermore, the offer can be made by either party, ie, by the seller or the buyer. In fact, the latter occurs regularly in auctions,[1138] or where the first declaration (made by the seller) is not an offer, but an invitation to make an offer.

bb) *Angebot* and *Invitatio ad Offerendum* (Invitation to Make an Offer)

Whether a declaration amounts to an offer or whether it is merely a non-binding statement is an important issue. The answer first and foremost depends on the intention of the statement maker, so that it is an offer if

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1135 Compare Busche, '*§ 145 BGB*' (fn 893) para 5. On offers through electronic means, see ibid, '*Vor § 145 BGB*' (fn 158) paras 37–38; on implicit offers, see BGH decision of 22 May 1991, IV ZR 107/90, NJW-RR 1991, 1177–1178. The court considered the question of whether an insurance contract (*Versicherungsvertrag*) had been concluded between the claimant (insured) and the defendant (insurer). The court found that the defendant had made an implicit offer (based on an expired offer made by the claimant) by collecting the first insurance premium, which had been accepted by the claimant in not objecting to this payment collection and by ensuring that his account always had sufficient funds for subsequent collections. Implicit offers were generally possible, at least for insurance contracts, because it was usual practice but not prescribed by law that these contracts be made in writing. The caveat with assuming an implicit offer, however, was that the claimant must have had no reason to doubt that the defendant was willing to conclude a contract on the original terms. This was not the case. See paras 2–5, 10–14, 16–17 of the decision.

1136 Wolf and Neuner (fn 48) 419 paras 10–11.

1137 See LG Berlin decision of 20 July 2004, 4 O 293/04, NJW 2004, 2831–2833, para 40, discussed in fn 1155 below.

1138 See Wolf and Neuner (fn 48) 419 para 9. See further BGH decision of 24 April 1998 (fn 1097) para 7: the bid (*Gebot*) constitutes the offer. In the LG Berlin decision of 20 July 2004 (fn 1137) paras 42–43, the court left the question open whether the declaration of intention to sell an old-timer in an online auction constituted an offer, or whether the bid on the auction was the offer.

the declaring party intends to be bound by their statement, otherwise it is an *invitatio ad offerendum* (invitation to make an offer, in German also referred to as '*Aufforderung zur Abgabe eines Angebots*').[1139] Before going on to examining the issue of *invitatio ad offerendum* further, it ought to be noted that there is another class of cases that falls into neither the category of offers, nor of *invitationes ad offerendum*. This concerns what are termed *Gefälligkeitsverhältnisse* (literally 'courtesy relations', whereby '*Gefälligkeit*' means favour or accommodation).[1140] The difference between these two non-binding situations is that while an *invitatio ad offerendum* is made with the intention to bring about a contract by showing one's willingness to contract, statements in relation to *Gefälligkeiten* are not meant to establish a legally-binding relationship.[1141] The latter will therefore be discussed together with the issue of the intention to be legally bound in Section iv. below.

The case of invitations to make an offer typically arise where the statement maker obviously reserves themselves the right to decide on the conclusion of a contract, for example.[1142] This is not the only factor. Consequently, offers containing terms such as '*freibleibend*' ('non-binding') do not automatically count as invitations to make an offer.[1143] In other

1139 Compare Bork, '*§ 145 BGB*' (fn 1127) paras 2–3. Note that the evaluation is made from the position of the addressee, see Schmidt J (fn 25) 194.

1140 See Schmidt J (fn 25) 174.

1141 Ibid 173.

1142 cf Busche, '*§ 145 BGB*' (fn 893) para 1. See BGH decision of 4 February 2009, VIII ZR 32/08, BGHZ 179, 319–329, para 12, in which a catalogue containing the notice 'while stock lasts' was deemed as a form of advertisement and thus to be an invitation to make an offer. Similarly, a questionnaire containing a note that the filling out of the questionnaire would not form a basis of claim to the measures that had been described in a letter accompanying the questionnaire was held not to be an offer, see BAG decision of 17 December 2009, 6 AZR 242/09, NJW 2010, 1100–1103, para 21. The court also found that the letter and the questionnaire did not contain the *esentialia negotii*, see BAG ibid. It can be deduced from this that the submission of the filled-out questionnaire would constitute an offer, whereas the questionnaire itself only constituted an invitation to make an offer.

1143 See on this Wolf and Neuner (fn 48) 421 para 15, explaining that such declarations exclude both the statement maker being bound and the addressee being able to accept. They state further that there is no fixed rule as to the assessment of these declarations. Thus, other phrases such as '*soweit Liefermöglichkeit vorhanden*' ('to the extent of delivery being possible') reserve the offeree a right to rescind the contract (*zurücktreten*). Where the addressee accepts the non-binding offer, the offeror must, if they are to refuse the transaction, react promptly (*unverzüglich*; ie, without undue delay, '*ohne schuldhaftes zögern*', as

circumstances, German law assumes that a declaration is an offer, namely, where it is directed at an unspecific group of people (*ad incertas personas*).[1144] This will regularly be the case with a petrol pump.[1145] Similarly, the provision of public transportation is deemed as an offer to the general public, since the providers have a general obligation to contract (*Kontrahierungszwang*).[1146] This explanation is now doubtful, because it is no longer the leading doctrine, so that the normal process of offer and acceptance applies instead.[1147] Accordingly, a customer will accept the offer made by the company operating the service by, eg, boarding the vehicle.[1148] According to the majority of German academics, another example might be a vending machine.[1149]

Other instances in which declarations are deemed as mere invitations to treat in German law comprise advertisements, including price lists displayed in a shop or sent out (eg, in form catalogues),[1150] as well as online

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defined in § 121 para 1 BGB); otherwise, their silence will be deemed as assent under the principle of good faith. It ought to be noted that this is not the case with invitations to make an offer. See ibid.

1144 Ibid 419 para 10. It has been stated that § 156 BGB makes it clear that conducting an auction is merely an invitation to make an offer, see BGH decision of 24 April 1998 (fn 1097) para 7.

1145 Here, the contract is formed as soon as the customer fills petrol into the tank of their car, see Schmidt J (fn 25) 224–225.

1146 See on this Wolf and Neuner (fn 48) 419 para 8.

1147 See on this Schmidt J (fn 25) 228.

1148 See ibid.

1149 See generally ibid 221. On this classification, see also, eg, Busche, '*§ 145 BGB*' (fn 893) para 12, noting the caveat that the machine is functioning, be stocked and that it is used appropriately. cf Wolf and Neuner (fn 48) 419 para 11, who classify vending machines as *invitationes ad offerendum*, arguing that a contract will not automatically arise with a vending machine when money is inserted, because the machine may be empty or defective. See also Section aa) and fn 1133 above.

1150 See BGH decision of 4 February 2009 (fn 1142) paras 12–13, in which catalogues and newspaper advertisements were held to be invitations to treat, due to considerations such as willingness to contract with a particular other person, or the object still being in stock indicating that an intention to be bound immediately is not given. Note that this categorisation was already envisaged by the drafters of the BGB, see Mugdan (fn 883) Vol 1 444. The term used then was '*Anerbietungen*' (offerings, in the sense of showing one's willing to do something or making a proposal (*Vorschlag*), see the entries for '*anerbieten*' and '*Anerbieten*' in Duden online at www.duden.de). Interestingly, the ADHGB explicitly differentiated between binding offers ('*Anerbietungen zum Verkauf*') and non-binding statements in art 337, see Schmidt J (fn 25) 194

presentations of goods or services.[1151] Similarly, goods displayed in shop windows or inside self-service shops regularly do not constitute offers.[1152]

cc) Certainty of Angebote

As has already been stated above, an offer must be sufficiently certain, which means that the contract's essential terms (*essentialia negotii*) must be contained in the declaration of intention.[1153] What is deemed as an essential term may differ according to the type of contract in question. In general, the contract's type, object, performance and, where applicable, the counter-performance, as well as the parties must be stipulated.[1154]

For a sale, it is the object and its price, or a mechanism to determine these terms, that are necessary.[1155] In instances of lease contracts under German law, the contracting parties, as well as the lease object, the beginning and the duration of the arrangement,[1156] and the price must be

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and Mugdan ibid. In contrast, the current HGB, just like the BGB, contains no such provision.

1151 For goods see, eg, BGH decision of 21 September 2005, VIII ZR 284/04, NJW 2005, 3567–3569, para 15. The case concerned the question whether a standard term (AGB) of the defendant contravened §§ 307–308 BGB, which the court held to be true. For services see, eg, BGH decision of 16 October 2012 (fn 1110) para 14, in which an online booking service for flights has been deemed as an *invitatio ad offerendum*, whereby the offer was made by the service user in completing the booking form.

1152 Wolf and Neuner (fn 48) 419 para 7. Note that a discussion exists on whether goods on a shop's shelves constitute offers in German legal academia. For an overview of the arguments and an analysis, see Schmidt J (fn 25) 211–213 and 217–220, who comes to the conclusion that the treatment of display of goods in shelves as invitations to make an offer is preferable.

1153 Compare Bork, '*§ 145 BGB*' (fn 1127) para 17. The same is true for any additional, ie, non-essential terms; these must equally be certain, see Schmidt J (fn 25) 253.

1154 See ibid. On the contracting parties being an essential term, compare Wolf and Neuner (fn 48) 435 para 2.

1155 Compare LG Berlin decision of 20 July 2004 (fn 1137) paras 40, 38. In this case, the mechanism to determine the price was an online auction, whereby the price of the offer was to be set as the highest bid at the auction's end.

1156 See Volker Emmerich, *§ 550* [Section 550], in: von Staudinger and others (fn 140; 2018) paras 24, 24b, 24f.

stipulated.[1157] Another particular case is that of a declaration of suretyship (*Bürgschaft*), which must state the surety giver's intention to take on the obligation in case of the original debtor's default, the obligation that is assumed, the surety creditor, and the debtor for whom the surety is given.[1158]

While it is not necessary that the parties be named explicitly, they must nevertheless be determined to a sufficient degree, which again depends on the legal transaction in question. It seems that where one party (the offeree) does not have particular interest in knowing the exact identity of the contracting partner, a general understanding by that one party of who the other party (the offeror) is, can suffice.[1159] On the contrary, it seems plausible that where the offeree has a great interest in the identity of the contracting partner, that other party must be identified, ie, named. Arguably, this line of reasoning, namely, that the other party need not always be specified exactly, would apply to and help to explain offers *ad incertas personas* (to undefined person(s)).[1160]

As for the obligations of the parties, these will regularly constitute some performance on the one side and payment of a sum of money on the other, irrespective of whether the contract is for a sale, lease, or for the provision of some service. It seems that the price must be objectively determinable, whether directly or by the use of some method.[1161] German

1157 See BGH decision of 27 September 2017, XII ZR 114/16, BGHZ 216, 68–83, JZ 2018, 789–792, para 17. The case will be discussed in relation to the written form in Section b.ii. below.

1158 Compare Plewe (fn 1015) 44.

1159 See BGH decision of 16 March 2006 (fn 1134), in which it was held that the provision of special telecommunication services, namely, of what are known as '*R-Gespräche*' (reversed-charge calls), constituted 'every-day mass services' ('*alltägliche Massendienstleistung*[*en*]') that were preformed instantly and that the service user held no particular interest in the identity of the service provider. This was the case where a user accepted a service without information on the provider, so that it is sufficient if the offer indicates that the provider will be the user's contracting partner without being named. See paras 1, 12 of the decision.

1160 Compare Schmidt J (fn 25) 253.

1161 See BGH decision of 20 June 2000, IX ZR 434/98, WM 2000, 1600–1605, in which it was held that the parties had not agreed on a price, and, although a '*Freundschaftspreis*' (special price for a friend) had been mentioned, it was impossible for a third party to determine the value of such a 'friendship price', so that none of the BGB's default rules could be applied. Consequently, the purported agreement contained gaps which could not be filled, leading to the conclusion that no contract had arisen. See paras 23–26 of the decision.

legislation sometimes foresees presumptions concerning the counter-performance (remuneration or price). Thus, § 612 and § 632 BGB presume an implicit stipulation for the remuneration of services and work respectively and contain default rules to determine its amount. These regulations are said to be exceptions to the general principle that a price must be agreed.[1162] Instead of fixing a price, it is possible for the parties to stipulate that the price be set by either of them, or by a third party.[1163] This is generally possible by virtue of §§ 315–317 BGB, which enable the specification of the extent of the main obligation or of the counter-performance[1164] by either of the parties or by one or more third parties. In case of the main obligation, the determination of its extent is to be made using reasonable discretion (*billiges Ermessen*), unless provided for otherwise (§ 315 para 1 and § 317 para 1 BGB).[1165]

dd) Coming into Effect of *Angebote: Empfangstheorie* (Receipt Theory)

Due to the abstractness of its provisions, the BGB does not contain specific regulations for the coming into effect of offer and acceptance separately; instead, there are universal rules for all kinds of declarations of intention. Furthermore, the BGB only contains an explicit regulation for declarations of intention that need to be received (*empfangsbedürftige Willenserklärungen*), such as offer and acceptance,[1166] and that are made between absent persons (*Abwesenden*) as coming into effect upon their receipt (*Zugang*, § 130 para 1 BGB, containing the *Empfangstheorie*, Receipt

1162 See Wolf and Neuner (fn 48) 435 in fn 7. For further details on these and other similar interpretation rules, see Schmidt J (fn 25) 253–254.

1163 See Wolf and Neuner (fn 48) 418 para 5.

1164 Note that § 316 BGB says 'specification of consideration' in the English translation. In order to avoid confusion with the English concept, the more general term 'counter-performance' will be used hereinafter.

1165 For further details on the (third) parties' power to determine the performance, see Schmidt J (fn 25) 254–256.

1166 See Einsele, '*§ 130 BGB*' (fn 1096) para 1. A case example showing that declarations of acceptance belong to this category is the BGH decision of 26 November 1997, VIII ZR 22/97, BGHZ 137, 205–211. A letter sent as registered mail had not been picked up from the post office and was returned to the sender (offeree). The court held that the declaration contained in the letter, the acceptance, had not reached the addressee and no contract had been concluded. See para 13 of the decision. Note that implied acceptance under § 151 BGB need not be declared. This provision is discussed in Sections iii.aa)–bb) below.

Theory).[1167] Having said this, even where the parties are in each other's presence (*anwesende Personen*), the addressee will normally have an interest in knowing of the addressor's intention, so that the provision is said to be applicable in this circumstance as well.[1168] In contrast, it has been stated that declarations not needing to be received (*nicht empfangsbedürftige Willenserklärungen*), such as offers of rewards (*Auslobung*, § 657 BGB), come into effect upon being announced (*verlautbart*).[1169]

Whether persons are in each other's presence or not does not simply depend on physical proximity,[1170] but on the way in which communication is possible.[1171] Thus, where communication is instant and knowledge of the conveyed message can be had, those persons will be deemed to be 'present', as is the case with persons in physical proximity, but also with telephone calls (see § 147 para 1 BGB), and online chats or calls.[1172] In contrast, persons are 'absent' whenever the communication is not immediate

1167 See Bork, '*Allgemeiner Teil*' (fn 900) 284 para 723; Wolf and Neuner (fn 48) 335 para 1 and 357 para 10.

1168 Wolf and Neuner (fn 48) 357 para 10. See also Bork, '*Allgemeiner Teil*' (fn 900) 234 para 602. cf Einsele, '*§ 130 BGB*' (fn 1096) para 2, who states that this is the leading opinion concerning 'corporeal' (*verkörperte*) declarations, ie, those made in a durable form such as in writing or those sent as electronic messages.

1169 Einsele, '*§ 130 BGB*' (fn 1096) para 5. Compare Bork, '*Allgemeiner Teil*' (fn 900) 234–235 paras 603–604, noting that only one parties' declaration of intention is required, as (the possibility of) knowledge by the recipient is not necessary.

1170 cf § 312c BGB (*Fernabsatzverträge*; Distance contracts), in whose para 2 'means of distance communication' are defined as those communication methods used which do not require 'the simultaneous physical presence of the parties to the contract'. In this sense, the BGH has ruled recently that the contract between a lawyer and their client, which arose from the client filling out, signing, and sending several forms including a power of attorney through fax as an offer on the one hand, and the lawyer subsequently acting on the client's behalf without prior communication with the client as implicit acceptance on the other hand, was a distance contract in the sense of § 312 para 1 (former version). See BGH decision of 23 November 2017, IX ZR 204/16, paras 8–13, 15, 17, 19–20. Even in cases of physical proximity, special circumstances such as the contracting process being conducted outside the merchant's business premises (*Geschäftsräume*) may lead to particular regulation being applicable, see §§ 312b et seq BGB.

1171 See *Einsele*, '*§ 130 BGB*' (fn 1096) paras 1–2, who is critical of this traditional classification and advocates instead to differ between 'corporeal' and 'incorporeal' (*nicht verkörperte*) declarations.

1172 Bork, '*Allgemeiner Teil*' (fn 900) 235 para 605. See also Niko Härting, *Internetrecht* [Internet Law] (6th online edn, Verlag Dr Otto Schmidt 2017) para 664.

and instantaneous, such as when it is made by letter, fax, or e-mail,[1173] ie, whenever some non-instantaneous medium is interposed.[1174]

Zugang means that the declaration must reach the addressee (§ 130 para 1 BGB). As a consequence, the sender (offeror) bears the risk of the declaration being delayed, lost, or transmitted incorrectly from the time of sending it until it reaches the offeree.[1175] Nevertheless, it is sufficient under what is known as the *Empfangstheorie* (receipt theory) that the addressee *can have* knowledge of the declaration; actual knowledge is not required.[1176] Exceptionally, the *Vernehmungstheorie* (perception theory) is said to be applicable to oral declarations, as it is pertinent that the addressee hears the message as uttered by the declaring person.[1177] Thus, oral declarations, including those communicated over the telephone, or in a chat message, come into effect upon being heard, as long as there are no problems in the auditory perception.[1178] The *Empfangstheorie* implies that the addressee has access to the declaration; thus, it is required that the declaration has entered the sphere of influence (*Machtbereich*) of the addressee.[1179] In this sense, postal mail such as normal letters or other

1173 See Wolf and Neuner (fn 48) 357 para 11. On the latter, see also Einsele, '*§ 130 BGB*' (fn 1096) para 18; compare also Härting (fn 1172) para 664.

1174 Bork, '*Allgemeiner Teil*' (fn 900) 235 para 605.

1175 On the risk, see Einsele, '*§ 130 BGB*' (fn 1096) paras 3, 16. cf Härting (fn 1172) para 668, who lists a range of possible reasons for a transmission being faulty (*Störungen*), some of which may put the risk on the sender. Two examples are the incompatibility of software or another error such as the recipient's mailbox being full, both of which will, if known or ought to have known by the sender, hinder a declaration from being deemed to be received.

1176 See Bork, '*Allgemeiner Teil*' (fn 900) 237 para 609. See also Einsele, '*§ 130 BGB*' (fn 1096) paras 9, 11. Other theories in this respect are the *Äußerungs-*, *Entäußerungs-*, *Vernehmungs*, and the *Besitztheorie*. Interested readers are referred to, eg, Einsele, ibid, paras 7–10 for further details.

1177 See Wolf and Neuner (fn 48) 362 para 37. On the interpretation of declarations, see Section a.i.cc) above.

1178 See on this further Einsele, '*§ 130 BGB*' (fn 1096) para 28. On chats, see Härting (fn 1172) para 666.

1179 See Wolf and Neuner (fn 48) 358 para 14. Bork, '*Allgemeiner Teil*' (fn 900) 237 para 609 speaks of the recipient's sphere of dominion ('*Herrschaftssphäre*'). Einsele, '*§ 130 BGB*' (fn 1096) para 16 adds that the declaration must be brought within such proximity of the addressee that it is up to the addressee to take knowledge of the message. See further, eg, BGH decision of 3 November 1976, VIII ZR 140/75, BGHZ 67, 271 paras 12–14, in the case of which a notification that the registered mail (discussed further subsequently) containing the declaration was being held at the post office was not sufficient as nor did it substitute receipt. Although the notification had entered the addressee's sphere

written communication is deemed as received when it has been handed over to the addressee, or otherwise when delivered in the post box, while e-mails are received once they enter the addressee's mail server or customer message inbox on websites.[1180] A declaration sent by fax or telex is generally deemed to be received once the addressee's machine has completed the printing process.[1181] It ought to be noted that the effect is not always

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of influence, the letter itself had not, so that the declaration could not be known to him. Nevertheless, the declaration of a lease contract termination was deemed to be effective in the sense of being on time (*rechtzeitig*), due to the special relationship between the parties, see ibid paras 18–19. cf BGH decision of 26 November 1997 (fn 1166), in which a declaration of acceptance sent by registered mail that had not been picked up from the post office by the offeror and was returned to the offeree was not held to have reached the offeror even though the parties were negotiating a contract, as the court found that the offeree ought to have tried to have the declaration delivered to the offeror once more, see paras 13–20. On another occasion, the BGH has held that the contractual relationship between two parties has the effect that refusing to accept the delivery of a document without cause counts as the document having entered the addressee's sphere of influence and thus as having been received by the addressee, see BGH decision of 27 October 1982, V ZR 24/82, NJW 1983, 929 at 930–931. For a critical discussion of the legal estimation of registered mail and their notifications, see Michael Behn, *Das Wirksamwerden von schriftlichen Willenserklärungen mittels Einschreiben: Zur Bedeutung der Zurücklassung des Benachrichtigungszettels* [The Coming into Effect of Written Declarations of Intention: On the Importance of the Notification] (1978) 178 No 6 AcP 505–532. The parties' relationship can also work the other way, see, eg, OLG München order of 15 March 2012, Verg 2/12, Neue Zeitschrift für Baurecht und Vergaberecht (NZBau) 2012, 460–464, discussed in fn 1192 below.

1180 Einsele, '*§ 130 BGB*' (fn 1096) para 17 speaks of the declaration reaching the addressee's 'receiving equipment' (*Empfangseinrichtung*). Indeed, Bork, '*Allgemeiner Teil*' (fn 900) 243 para 622 states that a voice message is received once saved on the recipient's answering machine. In case of e-mails, the address must be the one that the addressee usually uses for legal transactions, see on this further Einsele, ibid, para 18. Compare Härting (fn 1172) para 672, stating that sending a declaration to a wrong (misspelt) e-mail address will not lead to receipt being presumed.

1181 BGH decision of 21 January 2004, XII ZR 214/00, NJW 2004, 1320–1321, para 13. The case concerned a declaration of intention needing to be received (a contract termination notice) and its receipt if sent by fax and letter and where the recipient (plaintiff) is absent on vacation. In the event, the court held that the notice had been received after the fax message had been printed and that the defendant's absence was irrelevant, because it was for the defendant to arrange for the handling of postal or other messages during their absence. See paras 4, 12–14 of the decision.

immediate: both business people and private persons are not assumed to have constant access to incoming communication. Therefore, a time lag is fictionally inserted between physical or digital receipt and legal effectiveness of the receipt. Furthermore, it is important to note that if a form is prescribed for a declaration, this must be fulfilled as well in order for the declaration to become effective.[1182]

Although it was stated above that actual knowledge is not required, a declaration is not deemed to have reached the recipient simply upon entering the addressee's sphere of influence. Rather, the concrete point in time at which the declaration comes into effect, ie, the moment it is deemed to reach the recipient, is the moment from which the recipient could under normal circumstances have knowledge of the declaration.[1183] In the event that actual knowledge is had before the period for presumed knowledge has ended, the earlier moment is pertinent.[1184] If a third person takes delivery of a declaration on behalf of the addressee, it will be deemed to have been received by the addressee if the person is their agent and that person is in the position to have knowledge of the declaration; if that person is merely a messenger, however, receipt occurs when the addressee can have knowledge of the declaration.[1185]

The length of the lag time between delivery and the possibility of knowledge varies according to the dispatch method used, but is generally based on prevailing opinion (*Verkehrsanschauung*) and is thus connected to business hours.[1186] Consequently, letters, fax, and e-mails that arrive to a place of business outside standard business hours (after 6 pm[1187]) will

1182 See Einsele, '*§ 130 BGB*' (fn 1096) para 33. Formalities are discussed in Section b. below.

1183 See Wolf and Neuner (fn 48) 359 para 21. Bork, '*Allgemeiner Teil*' (fn 900) 243 para 623 notes that the relevant moment is when having knowledge of the declaration is reasonable ('*zumutbar*').

1184 Einsele, '*§ 130 BGB*' (fn 1096) para 16.

1185 See Wolf and Neuner (fn 48) 363 para 41, 364 para 46. Note that in the latter case, the risk is on the addressee, compare ibid para 46.

1186 Concretely, it relates to the time at which the emptying of the (e-)mail-box can be expected, Einsele, '*§ 130 BGB*' (fn 1096) para 19; Bork, '*Allgemeiner Teil*' (fn 900) 243 para 623. Arguably, this is so because the addressee must first be aware of the existence of a declaration in order to be able to take notice of it. According to prevailing academic opinion, there may be other factors delaying receipt, such as the addressee not possessing sufficient language ability to understand the declaration. In this case, receipt is postponed until the time that a translation can normally be deemed to have been obtained, see Einsele, ibid, para 31, and Bork, ibid, 245 para 629.

1187 Compare Wolf and Neuner (fn 48) 359 para 24.

only be deemed to have been received when business hours begin on the next (working-)day.[1188] Similarly, private persons will only be deemed to have received declarations sent to them by such means at the time that knowledge of these can be generally expected to be had, namely, at the earliest after business hours,[1189] and at the latest one day after the declaration physically reaches the recipient.[1190] Exceptionally, actual knowledge is pertinent where the e-mail address to which the declaration is sent is not the usual one used by the addressee, ie, is not generally known.[1191]

While the risk of loss or other negative circumstances, ie, the risk of (mis-)transmission, is usually on the addressor, if the cause relates to the addressee, either through wilful prevention of reaching of the declaration, or through other circumstances in their *Risikosphäre* (sphere of risk or responsibility), such as prolonged absence or computer problems, the addressee is deemed to have received the declaration.[1192]

1188 On letters and fax, see Einsele, '*§ 130 BGB*' (fn 1096) paras 19–20; on e-mails, see Härting (fn 1172) para 668. Einsele, ibid, states that the pertinent moment for letters is the time at which an emptying of the mailbox can be expected. In this respect, the BGH has stated in an *obiter dictum* that subjective particularities as to mail delivery are irrelevant; prevailing opinion only is of importance for the question whether it can be expected that the mail be taken from the post-box on the same day as it being inserted, see BGH decision of 21 January 2004 (fn 1181) para 16. cf generally Wolf and Neuner (fn 48) 359 para 24, stating the time to be by 6 pm of the following working day. On business e-mails, cf AG Meldorf decision of 29 March 2011, 81 C 1601/10, NJW 2011, 2890–2892, in which the court held that e-mails were not deemed to have reached the recipient at the beginning of the following working day if sent outside business hours on the previous day; however, the court left the question of when a merchant ought to be deemed to have knowledge of an e-mail open, see paras 16–26 of the decision.

1189 See Wolf and Neuner (fn 48) 359 para 24.

1190 On letters and fax, see Einsele, '*§ 130 BGB*' (fn 1096) paras 19–20; on e-mails, see Härting (fn 1172) para 668.

1191 Compare Wolf and Neuner (fn 48) 359 para 24, speaking of the addressee not using the e-mail address in legal transactions ('*Tritt der Empfänger im Rechtsverkehr nicht unter der E-Mail-Adresse auf* […]').

1192 See on this ibid 365–366 paras 49 et seq. See also the cases discussed in fns 1179 and 1180 above. The BGH decision of 21 January 2004 (fn 1181) para 14 is an example for absence due to being on vacation. An example of technical problems is the decision of the LG Hamburg of 7 July 2009, 312 O 142/09, Kommunikation & Recht (K&R) 2010, 207–208, in which an e-mail containing a declaration of intention (*Abmahnung*, caution) that had been blocked by the addressee's firewall but had not been sent back to the addressor was deemed to have been received, since the risk was on the recipient, see paras 15–16, 18–21. On e-mails being deemed to be received, cf OLG München

Seeing as § 130 para 1 BGB is dispositive, the parties may make stipulations as to the time of receipt of a declaration,[1193] and to its method,[1194] waive a right to revoke,[1195] and even dispense with formalities altogether.[1196] Where such provisions are made, these must be assessed separately from any form requirements of the declarations of intention stipulated by the parties.[1197] Similarly, an offeror can freely stipulate a period of validity for their declaration of intention, ie, a period in which acceptance may be made.[1198] This will be considered below, together with the issue of an offer's bindingness.

ee) Bindingness and Loss of Effect of Angebote

As was indicated above, a declaration is not automatically binding, ie, does not inevitably constitute an offer. Apart from merely being an *invitatio*

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order of 15 March 2012 (fn 1179), in which the court held that the relationship of the parties, ie, being in the middle of a public bidding process, and good faith precluded the addressor from relying on an e-mail having been received by the addressee. The e-mail in question had in fact entered the addressee's sphere of influence; however, the addressor had received an automatic reply informing them of the addressee's absence; the addressor chose not to react and later claimed that the period set for making rebukes (*rügen*) against the addressor's decision had begun on the day of receipt. Compare paras 1, 8, 15, 50–54 of the OLG-decision.

1193 Wolf and Neuner (fn 48) 361 para 31. The authors note that standard terms creating fictions or special requirements for receipt are void under §§ 308 no 6 and 309 no 13 BGB respectively. The latter provision is found in the amended § 309 no 13 lit c BGB (in effect since 1 October 2016, see art 229 § 37 EGBGB).

1194 Einsele, '*§ 130 BGB*' (fn 1096) para 12.

1195 See ibid para 40.

1196 See BGH decision of 7 June 1995, VIII ZR 125/94, BGHZ 130, 71–76 para 13, in which the dispensation of specific delivery methods by the parties was upheld by the court.

1197 This was stated in, eg, BGH decision of 21 January 2004 (fn 1181) para 11, in which the court distinguished between the stipulated form requirement for a declaration of intention (termination of a lease, to be made in writing) and its delivery method (by registered mail), whereby it considered only the former to be a constitutive requirement. Furthermore, it can be deduced from this that it is generally possible for parties to stipulate that the delivery method be an essential requirement, since the court stated that there were no indications as to the parties having agreed on this (see ibid).

1198 See § 148 BGB; see also Wolf and Neuner (fn 48) 274 para 2, speaking of time periods generally.

ad offerendum, the statement or conduct may simply be one of kindness (*Gefälligkeit*).[1199] Where a declaration amounts to an offer, the question then becomes whether, and if so, from what point in time the declaration of intention is binding and effective.

In general, an offer will be binding on the offeror and become effective upon reaching the addressee,[1200] unless one of the following is true: First, that the offeror 'has excluded being bound by it' ('*die Gebundenheit ausgeschlossen hat*', § 145 BGB).[1201] This means that an offeror is bound, by default, by their offer,[1202] so that the offer is generally irrevocable (*unwiderrufbar*), unless the offeror's declaration of intention not to be bound reaches the offeree before or at the latest together with the offer itself.[1203] This irrevocability will subsist until the offer's bindingness elapses, which

1199 On the former, see Section bb) above. On the latter, see Section iv. below.

1200 While not stated explicitly, this has been deduced for declarations of intention from § 130 para 1 BGB. Compare, eg, Einsele, '*§ 130 BGB*' (fn 1096) para 3. In the LG Berlin decision of 20 July 2004 (fn 1137) para 38, the court was of the opinion that an offer in an online auction constituted a 'legally binding offer of sale' ('*rechtsverbindliches Verkaufsangebot*'). The court therefore held further that such an offer could not simply be 'deleted' in the sense of being revoked, but could only be avoided (*angefochten*), which had not been done in this case, ibid para 39. Something similar has also been stated by the BGH in relation to declarations of suretyships: the declaration must reach the other party, ie, come into their sphere of influence, in order to have been issued ('*erteilt*'), see BGH decision of 27 May 1957, VII ZR 223/56, WM 1957, 883, 885.

1201 Wolf and Neuner (fn 48) 421 para 15 note that this seems to occur only rarely in practice. Even if terms such as '*freibleibend*' (non-binding) are used, these are often intended to give the seller the final decision whether to contract. It seems thus that such declarations are not offers but invitations to make offers (on which see Section bb) above). Similarly, while the possibility to modify the offer's bindingness exists, the stipulation might be found to be invalid, especially if in the form of a standard term (AGB). This was the case in BGH default judgement (*Versäumnisurteil*) of 7 June 2013, V ZR 10/12, NJW 2013, 3434–3436, which concerned the purchase of real estate. As the issue of AGB goes beyond the scope of this dissertation, readers are referred to paras 9–13, 18 et seq of the decision for further details on the argument used by the court. The gist was that the open-endedness of the offer's validity bound the offeror in an unreasonable manner, even though it was revocable, and contravened the objective of § 146 and § 147 para 2 BGB (discussed below).

1202 See Busche, '*§ 145 BGB*' (fn 893) para 1.

1203 See Wolf and Neuner (fn 48) 420 paras 12–13. Under the principle of good faith (*Treu und Glauben*), this is qualified for offers which are to be open for acceptance for a long stretch of time and where the circumstances change during the waiting period, so that it becomes unreasonable to keep the offeror bound, see ibid.

occurs when the foreseen time frame for acceptance expires, or where the offer is rejected.[1204] Secondly, a revocation is possible if the offeror reserves themself the right to do so, namely, by declaring a *Widerrufsvorbehalt* (revocation proviso).[1205] Thirdly, an offer — like all declarations of intention — can be withdrawn before reaching the addressee. This can be achieved by a declaration to that effect reaching the addressee before or at least together with the offer itself.[1206] If the offer's effectiveness ends, whether by revocation or otherwise, that brings the contract formation process to an end. A new process may be started by the offeror or the offeree making a new offer.[1207]

Where the offer made under German law is revocable (*widerrufbar*), the revocation is treated like other declarations in that its receipt, ie, entering the addressee's sphere of influence but not knowledge of its content, is of importance.[1208] Revocations need not be made in the same form as the declaration that is to be revoked.[1209] Note that revocation will no longer be possible once a declaration of acceptance has reached the offeror.[1210] Arguably, a revocation will equally not be possible if the offer loses its effectiveness in accordance with § 146 BGB: ie, if it is either refused or not accepted on time by the offeree, as discussed in Section iii. Let it be noted at this point that while the offeror may foresee a period of acceptance, ie, a period of validity for the offer under § 148 BGB, an offer not making such stipulations will nevertheless not be open endlessly. This can be deduced from §§ 146, 147 para 2 BGB, so that an offer can be accepted during 'the time when the offeror may expect to receive the answer under ordinary circumstances' (§ 147 para 2 BGB). In other words, the offer will expire automatically after the lapse of this period of time.[1211] Before turning to

1204 Bork, '*Allgemeiner Teil*' (fn 900) 286 para 726. See also Busche, '*§ 145 BGB*' (fn 893) para 1. This issue relates to §§ 147–148 BGB and is discussed in the subsequent section.

1205 Wolf and Neuner (fn 48) 420 para 13. Bork, '*Allgemeiner Teil*' (fn 900) 285 para 724 notes that the declaration made under such a proviso may only amount to an invitation to make an offer.

1206 To be precise, the revocation prevents the offer from coming into effect, see § 130 para 1 BGB; Einsele, '*§ 130 BGB*' (fn 1096) para 40.

1207 On the latter case, see § 150 para 1 BGB. See also BGH decision of 22 May 1991 (fn 1135) para 10.

1208 Compare Einsele, '*§ 130 BGB*' (fn 1096) para 40.

1209 See ibid.

1210 See Wolf and Neuner (fn 48) 420 para 13.

1211 See ibid 421 para 16.

the question of how long this period of time is, the same question will first be considered for the scenario of a period of acceptance being stipulated.

Determining the ordinary response period is not straightforward. Section 147 para 1 BGB states that an offer made to a present person can only be accepted 'immediately' ('*sofort*'). In contrast, offers sent to an absent person will be open for some time. Three factors are considered in assessing the regular response period of § 147 para 2 BGB objectively: the transmission speed of the offer to the addressee; the consideration and response time of the addressee; and the duration for the communication of acceptance to the offeror.[1212] Thus, atypically, the time period will be considered from the moment the offer is sent out, not once it reaches the addressee.[1213] Letters sent within Germany are said to take two days to reach their destination.[1214] As an offeror can expect the same communication method to be used for the offeror's response,[1215] this means that an offeror can normally expect a response letter in at least four days, plus however long an appropriate consideration time is under the circumstances. A businessperson is normally expected to react quickly, within one or two days; if, however, the addressee is expected to take longer, due to first having to make some enquiries for example, the consideration period

1212 BGH decision of 11 June 2010, V ZR 85/09, NJW 2010, 2873–2876, para 11: '*Die nach objektiven Maßstäben zu bestimmende Annahmefrist […] setzt sich zusammen aus der Zeit für die Übermittlung des Antrages an den Empfänger, dessen Bearbeitungs- und Überlegungszeit sowie der Zeit der Übermittlung der Antwort an den Antragenden*.' The case concerned a purported sale of real estate, whereby the offer to buy was made by the purchaser. The declaration of intention contained a period of acceptance lasting almost three months. Although the seller reacted within this period, the court found the time stipulation to be invalid for being unduly long and restricting the offeror too strongly. Due to the individual stipulation being invalid, the rules of the BGB were applied. The court held that an appropriate time period for acceptance would have been four weeks, which the seller had not met. Consequently, no contract of sale had arisen between the parties. See paras 1, 5–6, 8, 11–14 of the decision. Another issue discussed by the court was that of an implicit acceptance of a new offer in accordance with § 150 para 1 BGB. This point will be considered in Section iii.bb) below.

1213 See BGH decision of 11 June 2010 (fn 1212) para 11.

1214 See Wolf and Neuner (fn 48) 422 para 19.

1215 cf Bork, '*Allgemeiner Teil*' (fn 900) 287 para 731, who notes that while it is not necessary to use the same communication method, where another mode is used, it is required that a faster method is chosen.

is extended accordingly.[1216] It is important to note that the assessment is made from a reasonable offeror's perspective, so that any unusual delays that occur during transmission are irrelevant.[1217] Having said this, if the offeror knows of the existence of some reason hindering or delaying the addressee's response, this fact becomes pertinent for the calculation.[1218]

iii. *Annahme* (Acceptance)

The addressee of an offer has different options when receiving a proposal to contract: they may accept it, reject it, or do neither. Accepting means that a contract will normally arise in that moment,[1219] unless other requirements need to be fulfilled.[1220] In contrast, while the rejection of an offer brings the matter to an end,[1221] doing nothing may have different

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1216 See Wolf and Neuner (fn 48) 422 para 19. See also BGH decision of 11 June 2010 (fn 1212), in which four weeks were deemed an appropriate response time due to the complexity of the necessary preliminary enquiries and actions.

1217 See BGH decision of 11 June 2010 (fn 1212) para 14.

1218 See Bork, '*Allgemeiner Teil*' (fn 900) 287 para 731.

1219 Compare Wolf and Neuner (fn 48) 417 para 2. Anticipating the discussion further below, it ought to be noted that this moment is usually the point in time at which acceptance comes into effect (see Section dd) below); however, there are exceptions. In cases where §§ 151, 152, or 156 BGB apply, the contract is concluded without acceptance being communicated to the offeror, so that the normal rule does not apply. Compare on this Jan Busche, *§ 147 Annahmefrist* [Section 147 Period for Acceptance], in: Säcker and others (fn 158) para 35.

1220 One example is an auction. While § 156 BGB (*Vertragsschluss bei Versteigerung*; Entry into contracts at auctions) provides that the contract will arise through the bid (*Gebot*) and 'the fall of the hammer' (*Zuschlag*), the contract will not be effective where other formalities are necessary and these have not been fulfilled. See BGH decision of 24 April 1998 (fn 1097), which concerned a sale by auction of immovable property. Anticipating the discussion in Section b.iv. below, contracts in relation to this kind of property must be made in a notarial form, called *notarielle Beurkundung* (notarial authentication). Since the authentication that had been made in that case was defective for procedural reasons (not discussed here), the contract was held to be void. Form requirements and the legal consequences of non-fulfilment are discussed in detail in Section b. below.

1221 This will of course not be true if the offeree then makes a (new) offer to the offeror. This can happen through modification of the original offer (see § 150 para 2 BGB), or the drafting of a completely new offer. Furthermore, late acceptance will be deemed as a new offer (§ 150 para 1 BGB). Both provisions will be discussed further below.

effects depending on the circumstances. This issue will be discussed subsequently, together with the meaning of the term '*Annahme*'.

aa) '*Annahme*' Defined

Similar to offers, acceptance is not defined in the BGB. It is ordinarily understood as a declaration of intention that needs to be received, and which furthermore expresses consent to the offer.[1222] There are exceptions to this, two of which are found in §§ 151–152 BGB (discussed subsequently). As a consequence of the receipt requirement, acceptance must be communicated in some way.[1223] The declaration must therefore be directed at the offeror.[1224] Moreover, it must constitute an unconditional assent to the offer.[1225] This is in accordance with § 150 para 2 BGB, under which a declaration of acceptance cannot make alterations to the offer, as it will otherwise count as a rejection and the declaration will turn into a new offer (see Section ii.aa) above and Section dd) below). It ought to be noted that acceptance can only have the effect of concluding a contract if the offer does not foresee otherwise. Thus, where an offer is not 'acceptable' due to it excluding its bindingness, or because the offeror reserves themself the right to decide on whether to contract after a purported declaration of acceptance is made,[1226] the contract does not arise at that point.

Indeed, not all declarations of intention made in response to an offer amount to acceptance. Apart from the obvious case of a rejection, or ineffective acceptance (discussed in Section dd) below), non-binding statements must be distinguished from acceptance. One illustration are confirmations, nowadays often in electronic form (e-mail), sent after an order or a booking has been made online. It has been held by the BGH that electronic booking confirmations will normally be a mere confirmatory statement but can be combined with a declaration of intention so as to constitute acceptance. In particular, where the confirmation is automatic, it will be a declaration of acceptance if it contains an unconditional notice

1222 Bork, '*Allgemeiner Teil*' (fn 900) 290 para 738. See also BGH decision of 28 March 1990 (fn 1100) para 15. Busche, '*§ 147 BGB*' (fn 1219) para 2 adds that it is a one-sided declaration.
1223 On this, see the discussion in Section ii.cc) above.
1224 Wolf and Neuner (fn 48) 423 para 25.
1225 Bork, '*Allgemeiner Teil*' (fn 900) 291 para 741.
1226 Compare Wolf and Neuner (fn 48) 421 para 15.

that the order will be fulfilled.[1227] Thus, in a sale transaction conducted online, an automatic e-mail confirming the receipt of the order will generally be deemed as a confirmatory statement only, unless the message shows the seller's unconditional intention to fulfil the order.[1228]

bb) Method of *Annahme*

Acceptance can be made in any form, unless the offer or statutory provisions provide otherwise.[1229] Nevertheless, an offeree is not expected to use the same communication method for their response as the one used to make the offer; a faster method may be used, and this may even become necessary where the offeree's response might not reach the offeror on time.[1230]

Acceptance is usually made expressly. Examples include accepting a bid in an auction through the 'fall of the hammer' (*Zuschlag*),[1231] the pressing of a combination of buttons on a telephone,[1232] the signing and sending back of a contract draft,[1233] or the simple statement of agreement, such as a 'yes' or 'agreed'.[1234] Having said this, acceptance need not be express. Thus, where a seller in mail order or online businesses delivers the object to the buyer, this can be deemed as implicit acceptance on part of the seller of

1227 See BGH decision of 16 October 2012 (fn 1110) para 19. In this case, the automatic booking confirmation of a flight reservation for an accompanying person, having been named as 'as yet unknown' in the booking form, was held not to constitute acceptance. This was because the denomination of the accompanying person in the name field of the form violated the terms and conditions of transportation, see ibid paras 16–20. See also BGH decision of 21 September 2005 (fn 1151) para 16, in which emphasis was placed on how the buyer perceives the confirmation. Despite this, it was held that partial delivery combined with an announcement by the seller that the rest will be delivered later will usually be deemed as acceptance by the seller.

1228 Busche, '*§ 147 BGB*' (fn 1219) para 4.

1229 Ibid para 2.

1230 See Wolf and Neuner (fn 48) 422 para 21.

1231 See § 156 BGB; BGH decision of 24 April 1998 (fn 1097) para 7. See further Wolf and Neuner (fn 48) 419 para 9, who note that online auctions do not fall within the scope of § 156 BGB. This has been stated by the court on several occasions, see, eg, LG Berlin decision of 20 July 2004 (fn 1137) para 41.

1232 Compare BGH decision of 16 March 2006 (fn 1134) para 10.

1233 See BGH decision of 18 October 2001 (fn 1131) paras 19, 1–6.

1234 Busche, '*§ 147 BGB*' (fn 1219) para 4.

an offer made by the buyer when ordering the object.[1235] Vice-versa, if the buyer takes delivery of an object, this can be deemed as acceptance of an offer from the seller.[1236] Similarly, payment of the contract price can be implied acceptance; however, in all cases of implicit acceptance, the offeree must have the necessary volition. This means that the person must at least have doubts concerning the contract having arisen without more and thus deem a declaration on their part as being necessary to bring the contract about.[1237] Using mass services such as public transport is deemed to be implied acceptance.[1238] In fact, any use of goods or services that are usually not provided gratuitously are deemed as declarations of acceptance.[1239] In commercial settings, a merchant may furthermore accept a contract proposal implicitly if they do not react to a *kaufmännisches Bestätigungsschreiben* (commercial letter of confirmation) sent after the conclusion of negotiations.[1240]

German law assumes acceptance in some situations under legal fictions, such as with gifts (§ 516 para 2 BGB), promises of rewards (§ 657 BGB), or, between merchants, with the solicitation of business transactions for other persons (§ 362 para 1 HGB: '*die Besorgung von Geschäften für andere*').[1241]

1235 See BGH decision of 21 September 2005 (fn 1151) para 15.

1236 Compare Wolf and Neuner (fn 48) 423 para 26.

1237 Compare BGH decision of 11 June 2010 (fn 1212) para 17–18, in which this volition was not given for the offeree and payment of the price was deemed as fulfilment of the contract, not as implied acceptance.

1238 See Armbrüster (fn 957) para 10; see also Busche, '*§ 147 BGB*' (fn 1219) para 4.

1239 Singer (fn 1058) para 54. He gives the example of using a taxi.

1240 See Martin Rothermel and Julius Dahmen, *Schweigen ist Silber* [Silence is Silver] (2018) 4 Recht der internationalen Wirtschaft (RIW) 179, 180. See also, eg, BGH decision of 24 September 1952, II ZR 305/51, BGHZ 7, 187, in which the question arose whether an arbitration clause had been incorporated effectively into a contract by reference in a commercial letter of confirmation to some third party commercial standard terms. It was held that the defendant had implicitly accepted the claimant's offer to sell rice in the form of the confirmation letter sent after the parties' negotiations, because the defendant had not reacted (especially, rejected) the letter's proposal. In this way, the standard terms including the arbitration clause had become part of the contract. See paras 5–7, 9–11 of the decision.

1241 Section 362 para 1 HGB has been translated by Rittler (fn 132) 276 into English as follows: 'Should an offer be made to a merchant whose business includes solicitation or conclusion of business transactions for other parties, and such offer is from someone with whom the merchant has a business relationship and the offer concerns solicitation or conclusion of such transactions on behalf of the offeror, the merchant is obliged to reply promptly; a merchant's silence is deemed as acceptance of this offer. The same applies in

According to the latter provision, acceptance is implied where an offer for the conclusion of a transaction on behalf of another is made to a merchant who regularly undertakes to conclude such transactions on behalf of other persons and receives this proposal from a party with whom the addressee has a business relationship, but the merchant-addressee does not react promptly (*unverzüglich*).[1242] Since the provision speaks of *Geschäftsbesorgung*, the application of § 362 HGB is said to be limited to service contracts, but does not encompass sale transactions.[1243] Similarly, under § 454 para 1 and § 455 BGB, a potential purchaser's silence regarding the approval of an object received under a proposed sale will be deemed as approval, ie, acceptance, upon which the contract of sale arises.[1244] With regard to unilaterally-obliging contracts, such as a gift (*Schenkung*), acceptance by the donee is implied where the donor has fixed a period in which acceptance of the gift is to be made and this time elapses without the donee having reacted (§ 516 para 2 BGB).[1245]

In contrast, silence or inaction generally does not constitute acceptance — neither in private nor in commercial law[1246] — and it is even excluded in particular circumstances, such as in transactions involving real estate.[1247] Caution is advisable where a clause that foresees silence or inaction by a party as being deemed as acceptance is inserted into a contract; the

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case that a merchant receives an offer to conclude transactions from someone to whom he has offered his services in concluding such transactions.'

1242 See the translation by Rittler (fn 132) in fn 1241 above.

1243 See Rothermel and Dahmen (fn 1240) 180.

1244 In other cases, a provision may look like a legal fiction when this is not actually the case, such as with § 377 para 2 HGB on the notification of defects. This provision is not a rule on deemed acceptance but actually constitutes a shortening of the period of guarantee. See on this Armbrüster (fn 957) para 13.

1245 For further details, see, eg, Tiziana J Chiusi, *§ 516 Begriff der Schenkung* [Section 516 Concept of Donation], in: von Staudinger and others (fn 140; 2013, updated 20 June 2018) paras 3, 2, 62. von Mehren, '*Introduction*' (fn 21) 8 notes that acceptance of such contracts is sometimes also implied where the 'promisor does not seek a return act or performance'. The cited case, RG decision of 25 March 1930, VII 440/29, RGZ 128, 187–191, concerned a donation *mortis causa* in the form of the benefit under a life insurance. In the event, the court held at 189 that a declaration of acceptance by the donee-beneficiary was usually not expected by the insurer, so that it was not required by the provisions of the BGB.

1246 For further discussion, see Rothermel and Dahmen (fn 1240) 179 et seq.

1247 In BGH decision of 11 June 2010 (fn 1212) para 16, the court held that this was so for acceptance of a new offer arising from a delayed acceptance under § 150 para 1 BGB.

stipulation may be struck down as a standard term in accordance with § 308 no 5 BGB (*Klauselverbote mit Wertungsmöglichkeit, Fingierte Erklärungen*; Prohibited clauses with the possibility of evaluation, Fictitious declarations).[1248] Where such a clause is used, the contract will arise once the period has elapsed in which the offeror can expect an explicit declaration from the offeree.[1249] Conversely, where a commercial practice requiring express objection of a proposal exists, silence may exceptionally be seen as acceptance.[1250] In conclusion, the presumptions just explained exceptionally allow inaction to be seen as assent, whereas mere silence or inaction will not suffice.

In accordance with § 151 BGB, there may be no need for the declaration of acceptance to be received in exceptional circumstances. These are of two kinds: either where there is an express or implied waiver of receipt by the offeror, or where no acceptance is 'expected according to customary practice' (*Verkehrssitte*, § 151 BGB). It seems that this provision is of little practical relevance and that express waivers are unusual.[1251] Thus, it is often a question of interpretation of whether an implied waiver was made or whether a customary practice exists.[1252] It ought to be noted that the provision does not automatically apply in relation to § 241a BGB (*Unbestellte Leistung*; Unsolicited performance), namely, where a consumer receives goods or a service without having solicited them. In such instances, rather than mere receipt or the customer making use of the goods or service, it is required that the consumer declares their agreement (explicit acceptance) or pays (implied acceptance) in order for there to be a contract.[1253] Other

1248 It will not be struck down if a 'reasonable period' ('*angemessene Frist*') is granted for an express declaration and the standard term's user has obliged themself to point out the significance of the provision to the other party when the period begins to run. See § 308 no 5 BGB.

1249 See Rothermel and Dahmen (fn 1240) 179. cf Armbrüster (fn 957) para 9, stating this principle to be applicable to both private and commercial instances.

1250 See Rothermel and Dahmen (fn 1240) 180.

1251 See Jan Busche, *§ 151 Annahme ohne Erklärung gegenüber dem Antragenden* [Section 151 Acceptance without declaration to the offeror], in: Säcker and others (fn 158) paras 2, 4. An example where it does become relevant is where a party is under an obligation to contract (*Kontrahierungszwang*). For further details, see Wolf and Neuner (fn 48) 419 para 8.

1252 Compare Busche, '*§ 151 BGB*' (fn 1251) para 4, who notes that the differentiation often becomes blurred, since customary practices are used as an interpretation tool to determine whether an implied waiver existed. For further details on both cases, see ibid paras 5 et seq.

1253 See Singer (fn 1058) para 54. Note that discussion on this position is ongoing. For a succinct overview of this debate and references, see Schmidt J

exceptions to the need for receipt of a declaration of acceptance are contained in § 152 and § 156 BGB, relating to notarial authentications (see Section b.iii.cc) below) and auctions respectively.[1254]

cc) Certainty of *Annahme*

Acceptance must, just like the offer, be certain. It is said that this follows from the requirement that acceptance has to correspond to the offer.[1255] The declaration of intention must be meant to be binding and express this accordingly. In this sense, acceptance has to be differentiated from mere announcements of acceptance: phrases such as 'details to follow by letter' ('*Einzelheiten brieflich*') in, say, an e-mail, point towards the latter, whereas an e-mail or fax stating that it has been sent 'in advance' ('*vorab*') and that a letter will follow, is deemed as acceptance, because this is usually done in order to ensure the on-time arrival of a declaration.[1256]

dd) Coming Into Effect and Loss of Effect of *Annahme*

The BGB does not contain specific rules for the coming into effect of offer and acceptance but rather regulates declarations of intention generally in §§ 130–132, so that what was stated in relation to offers in Sections ii.dd) and ee) above is equally true for declarations of acceptance. Consequently, acceptance becomes effective upon its receipt.[1257] Acceptance made to an absent person can be withdrawn (*widerrufen*) if the declaration of intention to revoke acceptance reaches the offeror before or at the latest at the same time as the declaration of acceptance (§ 130 para 1 BGB).

There is a caveat regarding the coming into effect of acceptance. Seeing as acceptance is a declaration of intention that usually needs to be received

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(fn 25) 488–489. For further details on § 241a BGB, see, eg, Dirk Olzen, *§ 241a Unbestellte Leistungen* [Section 241a Unsolicited Performance], in: von Staudinger and others (fn 140; 2015), in particular paras 19 et seq.

1254 Busche, '*§ 147 BGB*' (fn 1219) para 2. On § 152 BGB, see also Bork, '*Allgemeiner Teil*' (fn 900) 294 para 748.

1255 Busche, '*§ 147 BGB*' (fn 1219) para 3.

1256 See ibid, who goes on to note that letters in the first case will constitute acceptance, whereas the ones in the second case are mere 'declaratory confirmation letters' ('*deklarative*[…] *Bestätigungsschreiben*').

1257 Bork, '*Allgemeiner Teil*' (fn 900) 294 para 746.

(*empfangsbedürftige* or *zugangsbedürftige Willenserklärung*), acceptance made to an absent offeror must reach them within the specified time frame,[1258] or, otherwise, 'until the time when the offeror may expect to receive the answer under ordinary circumstances' ('[...] *bis zu dem Zeitpunkt* [...], *in welchem der Antragende den Eingang der Antwort unter regelmäßigen Umständen erwarten darf*', § 147 para 2 BGB).[1259] If this is not the case, acceptance will regularly be invalid. Exceptionally, where it was sent out in a way so that 'it would have reached [the offeror] in time if the declaration had been forwarded in the usual way' ('*sie bei regelmäßiger Beförderung ihm rechtzeitig zugegangen sein würde*') and the offeror ought to have realised this, acceptance may yet be deemed effective, ie, not to be late, if the offeror does not immediately give notice of the delayed receipt (§ 149 BGB).[1260] As it is of importance under these circumstances that the declaration of acceptance be sent out on time, this situation constitutes an exception to the general rule of receipt being pertinent; having said this, the provision does not aid an offeree who sends out their reply too late.[1261] In this case, acceptance will not be effective. Furthermore, it ought to be noted that where an offer reaches an addressee so late so that a response may no longer be expected by the offeror, the offeree can no longer accept the offer as it has expired.[1262]

While this is true, a purported declaration of acceptance that is ineffective for being too late will count as a new offer by virtue of § 150 para 1 BGB. If this is accepted by the original offeror, a contract is formed.[1263] Another instance in which a new offer may arise instead of acceptance is where the offeree's declaration or act does not conform with the offer, so as to change its terms. Thus, where goods different from those ordered are delivered, the act of delivery constitutes a new offer by the original offeree

1258 See Wolf and Neuner (fn 48) 276 para 12.

1259 The aspect of time has already been considered in Section ii.ee) above.

1260 The offeror could know of the delay by looking at the date of posting or sending as recorded on the letter or telegram, for example. See Wolf and Neuner (fn 48) 424 para 27. It ought to be noted that the provision does not apply if the delay was foreseeable to the offeree, eg, postmen being on strike, as the offeree ought to have used a different communication method in this case, see ibid para 28.

1261 Compare ibid. See also Bork, '*Allgemeiner Teil*' (fn 900) 288 para 732.

1262 Compare Wolf and Neuner (fn 48) 422 paras 21–22, 423–424 para 27; §§ 146–147 para 2 BGB.

1263 Compare Bork, '*Allgemeiner Teil*' (fn 900) 288 para 732.

(seller) under § 150 para 2 BGB that needs to be accepted by the original offeror (buyer).[1264]

iv. The Further Requirement of a *Rechtsbindungswille* (Intention of Legal Commitment)

A *Rechtsbindungswille* (intention of legal commitment)[1265] is another important element of a contract under German law. According to the prevailing German academic opinion, such an intention is necessary in a legal transaction in order to distinguish legal acts (*Rechtshandlungen*) from other, non-binding acts such as gentlemen's agreements, or acts of kindness (*Gefälligkeitshandlungen*),[1266] already discussed briefly in Section ii.bb) above.

The latter two arrangements, while similar in not being legally binding, could be said to be opposites. This is because a gentlemen's agreement is an arrangement that is made under the premise that it is not to be legally binding.[1267] In contrast, acts of kindness often arise out of social contexts,

1264 BGH decision of 21 September 2005 (fn 1151) para 15.

1265 Smits (fn 37) 64 uses the English phrase 'intention to create a legal commitment'.

1266 Compare Olzen, '*§ 241 BGB*' (fn 897) para 79. cf Singer (fn 1058) para 29, who speaks of the objective requirement of a declaration of intention (and thus arguably also of a legal transaction) lacking if there is no intention of legal commitment. On *Gefälligkeitshandlungen*, see BGH decision of 22 June 1956, I ZR 198/54, BGHZ 21, 102–112. The case concerned the question whether the action of the defendant towards the claimant (providing a lorry driver) had the character of a mere act of kindness, or whether it was legally binding. The court found that it was binding, so that the defendant was legally responsible for the driver's act (ibid paras 16–18). It goes without saying that without legal bindingness, there can be no contractual claim against the other party. See on this Bork, '*Vor § 145 BGB*' (fn 884) paras 83–86. cf Olzen, ibid para 90, according to whom some gentlemen's agreements are intended to be binding and yet are meant not to give rise to judicially enforceable claims. For further discussion of these unenforceable claims, see Olzen, ibid paras 129 et seq. cf also what is referred to as *betriebliche Übung* (informal practice), a non-binding practice established through repetition, whereby the protection of a legitimate expectation (*Vertrauensschutz*) creates a claim for the beneficiary. See on this Olzen, ibid para 92.

1267 See on this Bork, '*Vor § 145 BGB*' (fn 884) para 3, who goes on to state that the reason for such arrangements are two-fold: The parties either trust that the agreement be upheld, making it superfluous, in their opinion, to stipulate bindingness of the terms; although they think or know that if they tried to

whereby the parties never give a thought to the possibility of there being any legal bindingness to their arrangement.[1268] It ought to be noted that *Gefälligkeitshandlungen* and the relationships arising from these acts (*Gefälligkeitsverhältnisse*) must be differentiated further from *Gefälligkeitsverträge* (accommodation contracts), which are legally binding.[1269] It becomes clear from the existence of this range of relationships how important the element of an intention of legal commitment is, because it acts as the criterion used to differentiate between them.

Seeing as this intention is neither regulated in German legislation and only seldom addressed explicitly by the parties, it becomes a question of interpretation.[1270] For this, an objective assessment has to be made.[1271] In this respect, the BGH has held that the question of whether an act is of a legal(ly-binding) nature generally depends on the circumstances of each case.[1272] The court went on to enumerate three indicators to aid in the determination. These will be analysed briefly.

The first indicator is gratuity (*Unentgeltlichkeit*). This is indispensable for a *Gefälligkeit*; however, it is not by itself conclusive as to the legal (non-)bindingness of an act, since the BGB foresees a range of gratuitous acts that are legally binding, such as gifts (*Schenkung*, §§ 516 et seq BGB).[1273] The second criterion is obligation (*Verpflichtung*): the fact that one is not obliged to do the act in question does not automatically lead

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make their agreement binding, it would not be deemed effective for some reason, such as it violating a statutory prohibition. Compare Olzen, '*§ 241 BGB*' (fn 897) para 89, who states that the parties may rely on, say, their word of honour (*Ehrenwort*) instead of legal bindingness, or that such bindingness is deemed superfluous due to the existence of (commercial) customs or practices.

1268 Olzen, '*§ 241 BGB*' (fn 897) paras 72, 74.

1269 See ibid para 71. See also Bork, '*Vor § 145 BGB*' (fn 884) para 80. As already mentioned in Section 1. above, examples of the latter include the gratuitous loan (*Leihe*, §§ 598 BGB et seq).

1270 Compare Wolf and Neuner (fn 48) 315 para 18. cf Bork, '*Vor § 145 BGB*' (fn 884) para 81. cf further Olzen, '*§ 241 BGB*' (fn 897) para 90, who notes that the normal rules for the interpretation of the parties' declarations of intention, ie, § 133 BGB (discussed in Section i.cc) above), ought to be applied. Such an interpretation can lead to the agreement being found to be binding, see Olzen, ibid.

1271 See Singer (fn 1058) paras 1, 29.

1272 BGH decision of 22 June 1956 (fn 1266) *Leitsatz* (headnote) 1.

1273 Ibid para 12. Furthermore, Olzen, '*§ 241 BGB*' (fn 897) para 72 notes that this criterium is generally shared with *Gefälligkeitsverträge*. It ought to be noted that gifts are not contracts and thus not automatically legally binding under English law, see Section II.1. above.

to it not being legally binding, while, vice versa, an obligation designates a *Rechtsgeschäft*.[1274] The third, and perhaps most important[1275] indicator is intention (*Wille*): where the addressee of an act cannot objectively perceive an intention on the part of the statement maker to be bound, or where such bindingness has been excluded either explicitly or implicitly, the act will not have the nature of a legal transaction.[1276] It is noteworthy that it is not the actual statement maker's intention, but the addressee's perception in good faith that is of importance in this respect.

This evaluation must take into account the circumstances of the case and any applicable usages (*Verkehrssitten*).[1277] According to the court, other factors that may influence this assessment are circumstances such as the type of act, its reason, objective, meaning (legally and economically), the value of an entrusted object,[1278] and the interests of the persons involved.[1279] In particular, where the acting party has an interest in the act, this points towards an intention of legal commitment.[1280] Conversely, it is said that there is no such intention where the fulfilment is left to the discretion of the debtor.[1281] An act perceived to be one of everyday life, a *Gefälligkeit*, will be a strong argument against an intention of legal commitment.[1282]

In terms of the economic meaning of the act, one interesting situation is one person taking another person to someplace by car. It has been stated that a promise to take someone who is going on an important business trip to the airport amounts to a mandate (*Auftrag*, §§ 662 et seq BGB).[1283] Otherwise, unless no pressing interest exists, giving someone a

1274 See BGH decision of 22 June 1956 (fn 1266) para 13.
1275 See Olzen, '*§ 241 BGB*' (fn 897) para 77.
1276 BGH decision of 22 June 1956 (fn 1266) para 14.
1277 Ibid. cf Bork, '*Vor § 145 BGB*' (fn 884) para 81.
1278 cf BGH decision of 13 November 1973, VI ZR 152/72, NJW 1974, 234, para 13, in which the court held that the act of letting someone ride a horse was a 'purely factual act of everyday life' ('*rein tatsächlicher Vorgang des täglichen Lebens*') and as such no legal intention to be bound could be attributed, so that the handing over of the horse did not constitute a gratuitous loan (*Leihe*).
1279 BGH decision of 22 June 1956 (fn 1266) para 15.
1280 Ibid.
1281 Olzen, '*§ 241 BGB*' (fn 897) para 76.
1282 See Bork, '*Vor § 145 BGB*' (fn 884) para 81.
1283 See Wolf and Neuner (fn 48) 316 para 19. A mandate (*Auftrag*) also counts as a *Gefälligkeitsvertrag*, see Bork, '*Vor § 145 BGB*' (fn 884) para 80.

ride has been deemed to be a *Gefälligkeit*.[1284] In this situation, the focus seems to be on the importance placed by the receiver on the act if relied upon. Thus, if, in the first example, the volunteering driver declined to drive the other person on short notice, this might — in the worst case — lead to that person missing their flight and not being on time for a business appointment, which in turn might have negative consequences. Conversely, if the promise involved the receiver being driven to, say, buy something heavy that needs to be transported by car, it can be argued that the consequence will not usually be as dire if the driver does not keep their word.

Similar considerations are made in cases of information being provided. Where the receiver of information relies on the information in making decisions of consequence, so that the piece of information is of obvious importance to the receiver, the conclusion of an *Auskunftsvertrag* (literally 'information contract') is implied.[1285] While a large amount of case law exists for other situations as well, these are too numerous to be discussed here.[1286]

It is evident from this that anything less than an intention of legal commitment is insufficient. Consequently, a mere meeting of the minds or a *schlichte Einigung* (plain agreement) will not lead to a contract being formed.[1287] At the same time, certain aspects of life have been held to fall outside the scope of legal arrangements and will thus regularly not lead to obligatory relationships,[1288] such as those concerning procreation.[1289] Similarly, there are instances in which legal bindingness is excluded. This occurs if the parties make an arrangement knowing that there is no legal bindingness due to some legal provision not being fulfilled,[1290] such as requirements of form.[1291] As a consequence, the knowledge by the parties that a part of an agreement is void means the lack of an intention of legal commitment, so that the void section will not form part of the legal

1284 See, eg, Schmidt J (fn 25) 175 and Bork, '*Vor § 145 BGB*' (fn 884) para 82 with further references.
1285 See Schmidt J (fn 25) 175–176.
1286 For a succinct overview over these cases, see, eg, Olzen, '*§ 241 BGB*' (fn 897) para 87.
1287 See Busche, '*Vor § 145 BGB*' (fn 158) para 31.
1288 Contrast Olzen, '*§ 241 BGB*' (fn 897) para 80, stating that all aspects of social life are in principle able to create claims and responsibilities.
1289 See on this Wolf and Neuner (fn 48) 316 para 20 with further references.
1290 Busche, '*Vor § 145 BGB*' (fn 158) para 32.
1291 See Armbrüster (fn 957) para 23.

transaction.[1292] At the same time, there are grey zones, instances which sometimes form obligatory relations and at other times do not. One example in German law is a form of business letter, the LOI.[1293]

b. Form Requirements in German Law

As a general rule, no formalities are applicable when concluding a contract under German law,[1294] so that the parties are free to agree and use any form under the principle of freedom of form.[1295] While this is true, there are a couple of explicit exceptions in German private law.[1296] In such cases,

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1292 See on this Roth (fn 1079) para 24.

1293 Busche, '*Vor § 145 BGB*' (fn 158) para 31 refers to it as a hybrid form, which can contain both binding and non-binding stipulations. For further discussion, see, ibid paras 58–59.

1294 See, eg, ibid para 29; Christian Hertel, *§ 125* [Section 125], in: von Staudinger and others (fn 140; 2017) para 3. Indeed, form requirements have been called '*Ausnahmevorschriften*' ('exception rules') by Hans Köbl, *Die Bedeutung der Form im heutigen Recht* [The Importance of Form in Current Law] (1983) DNotZ 207, 213.

1295 Wolf and Neuner (fn 48) 101 para 39, 509 para 3. Compare Busche, '*Vor § 145 BGB*' (fn 158) para 29. In a similar manner, the parties are equally free to do away with the stipulated form. This may be done informally, in certain circumstances even by conduct, see Wolf and Neuner, ibid 524 para 83. This is not true for cases of what are known as 'double written-form requirements' (*doppeltes Schriftformerfordernis*). On this, see BGH decision of 2 June 1976, VIII ZR 97/74, BGHZ 66, 378–384, paras 45–49, which concerned a contract between merchants containing a clause that '[*a*]*uf das Formerfordernis kann nur durch eine schriftliche Erklärung verzichtet werden*' ('[t]he stipulation as to form may only be varied in writing'). Accordingly, an oral offer to cancel the contract was held to be void. See also BAG decision of 24 June 2003, 9 AZR 302/02, BAGE 106, 345–352 paras 35–37 on an employment contract between non-merchants with a formality clause that was held to inhibit a *betriebliche Übung* (informal practice), ie, a variation by conduct, from arising.

1296 The origin of these compulsory legal forms seems to be Roman law, under which form was the general rule; however, the strict regulation was successively relaxed over time, leading to formlessness becoming the standard rule with formalities becoming the exception. For a brief account of this historical development, see Plewe (fn 1015) 1–2. It seems to flow from the freedom of form that statutory form requirements, being deviations from that principle, must be explicit, compare Köbl (fn 1294) 207. See also Peter Mankowski, *Formzwecke* [Functions of Forms] (2010) 65 No 13 JZ 662, 663.

it is a necessary requirement that the form be fulfilled,[1297] whereby the form requirement is an additional step the parties need to take; it does not do away with the other requirements discussed above. Thus, even where a form requirement such as writing applies, the elements of offer and acceptance,[1298] as well as the *essentialia negotii* must still be present.[1299]

Under the *Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr* [Act on the Amendment of Provisions of Form in Private Law and Other Provisions in Accordance with Modern Legal Transaction Methods] (hereinafter 'FormAnpG')[1300], two new statutory forms were created that relate to electronic commerce. These are the electronic form and the text form (§ 126a and § 126b BGB respectively; introduced by art 1 paras 2–3 FormAnpG). As a consequence, the spectrum of forms for contracts has been broadened, with the range now spanning a simple text form (*Textform*, see Section ii. below) and the electronic form (*elektronische Form*, Section v.) as a variation of the written form (Section ii.) on one end, and a notarial authentication (*notarielle Beurkundung*, Section iii.cc)) on the other, whereby

1297 Hertel, '*§ 125 BGB*' (fn 1294) para 1. On the consequences of non-fulfilment, see Section vi. below.

1298 This has been true since the times of the *Deutsche Reich*, see RG decision of 21 June 1918, II 121/18, RGZ 93 175–176: '*Zum Abschluß eines schriftlichten Vertrags genügt nun aber keineswegs* [...] *die Unterzeichnung derselben Vertragsurkunde durch die Vertragsschließenden. Vielmehr kann* […] *auch ein schriftlicher Vertrag zwischen zwei Parteien nur dadurch zustande kommen, daß die eine die Schließung des Vertrags der anderen anträgt (§ 145) und daß die andere den Antrag rechzeitig annimmt (§§ 146 flg.)* […].' ('It is by no means sufficient [...] for the conclusion of a written contract that the same contract document be signed by the contracting parties. Rather, [...] a written contract can likewise only arise between the parties where one proposes the conclusion of the contract to the other (§ 145) and the other accepts the offer on time (§§ 146 et seq)').

1299 In the BGH decision of 27 September 2017 (fn 1157) para 17, the court stated this opinion with regard to § 550 BGB. The case is discussed further in Section ii.aa) below.

1300 Law of 13 July 2001, BGBl 2001 I 1542. For a brief overview over the law's legislative process, see Reinhard Nissel, *Rechtsgeschäftsmodernisierungsgesetz* [Legal Transaction Modernising Law] (1st edn, online, Nomos 2001). According to Nissel, this was the first major modification of the form requirements found in German private law. A further albeit minor addition to the form requirements was made quite recently through the BauVertrRefG in 2018 (see Section ii.cc) below). The partially increasing regulation of form, especially in the area of consumer law, has been said to amount to a 'renaissance' of form, compare Bernd Mertens, *Die Reichweite gesetzlicher Formvorschriften im BGB* [The Scope of the Statutory Form Requirements of the BGB] (2004) 59 No 9 JZ 431.

the latter is more complex and deemed to be higher in rank.[1301] The aspect that all required forms have in common, namely, the signature, will be considered in Section iv. below.

Form requirements are foreseen not only for contracts, but also for other related documents, in particular for preliminary contracts,[1302] or power of attorneys granted for the purpose of a legal transaction that is subject to form requirements.[1303] Conversely, non-binding documents

1301 See Wolf and Neuner (fn 48) 508 para 1. cf Köbl (fn 1294) 208, speaking of formalities being tiered (*abgestuft*). See also Hertel, '*§ 125 BGB*' (fn 1294) para 4, who goes on to note at para 6 that there used to be a requirement of an explicit oral declaration for the making of a will under § 2232 BGB (*Öffentliches Testament*, Public will), which was eliminated in 2002.

1302 One example of preliminary contracts subject to form requirements are those in relation to termination agreements conerning employment contracts. In this sense, the BAG held in its decision of 17 December 2009 (fn 1142) para 25 that while § 623 BGB (*Schriftform der Kündigung*; Written form of termination) applied to the main termination contract only; '[h]owever, it can not be inferred that a preliminary contract which requires the parties to conclude a termination agreement does not require the written form' ('*Daraus kann aber nicht abgeleitet werden, dass ein Vorvertrag, der die Parteien zum Abschluss eines Aufhebungsvertrags verpflichtet, nicht der Schriftform bedarf*'). The court explained that whether a preliminary agreement was governed by the same form requirements as the main contract depended on the function of the requirement. Where it was to caution ('*Warnfunktion*'), such as is the case with § 623 BGB, the form requirements applied to both; whereas an evidentiary function ('*Beweis- und Klarstellungsfunktion*') did not necessitate such prerequisites to be fulfilled. See ibid. Cf Marius Mann, *Commercial Contracts in Germany* (CH Beck 2015) 22, stating that all kinds of agreements relating to real estate, including preliminary agreements, require a notarial recording, since § 311b para 1 BGB fulfils a cautioning function. Similar: Georg Maier-Reimer, *Die Form verbundener Verträge* [The Form of Connected Contracts] (2004) NJW 3741. The different functions will be discussed in more detail subsequently.

1303 This has been argued by, eg, Plewe (fn 1015) 7, 30–32. Although this seems to contradict § 167 para 2 BGB (*Erteilung der Vollmacht*; Conferment of authority), under which no form is applicable to power of attorneys, this view can be supported by German case law, such as the BGH decision of 29 February 1996, IX ZR 153/95, BGHZ 132, 119–132, in which it was held that a power of attorney to modify a guarantee required a written form in accordance with § 766 BGB, see paras 6–19 of the decision. The court also noted that powers of attorney in relation to real estate transactions that were governed by § 313 BGB (as it was then; now § 311b para 1 BGB) required a notarial authentication, see para 11 of the decision. This case is considered further in Sections iii. and iv. below. cf Mertens (fn 1300) 434–435, who is critical of the court's reasoning and advocates a focus on the internal relationship (*Innenverhältnis*) between the giver and receiver of the power of attorney. Accordingly, he would make

such as LOI are not governed by form requirements.[1304] Unless stipulated otherwise, the rules on these forms will also apply to a mutually agreed form (§ 127 para 1 BGB), although in such a case the requirements may be less stringent, as discussed for each form in the subsequent sections. It goes without saying, however, that mandatory requirements cannot be circumvented by the parties stipulating otherwise.[1305] Apart from prescriptions of a particular form, it ought to be remembered that the abstraction principle of German law demands more than a consensual agreement in order to deem a transfer of ownership to be legally effected. These requirements are set out in Section c. below, together with another act that relates to the conclusion of contracts: *Draufgabe* (earnest). The consequences of not fulfilling the requirements, as well as ways to heal the imperfection, will be set out in Section vi. Before going into these matters, the functions of the different form requirements will be considered briefly.[1306]

The broad function of the formality provisions is to allow the law to recognise a contract or other legal act to be legally effective.[1307] As such, one function of a form can thus be said to be one of clarification (*Klarstellung*), which permits the differentiation between these binding and other non-binding acts such as contract negotiations.[1308] Several other functions exist besides, namely: as proof, foremost of the agreement, but also sometimes of the identity of the parties; for information about or disclosure

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those appointments subject to form in which the principal leaves the decision on the legal transaction to the agent, ie, gives up control, see Mertens (fn 1300) 435. For a concise overview of the discussion in academic literature and in case law, see Plewe, ibid 25–30. The issue of the scope of form requirements will be considered once more in Section vi.cc) below.

1304 See Wolf and Neuner (fn 48) 512 para 22. Arguably, the parties may nevertheless subject such documents to a form by agreement.

1305 See, eg, BGH decision of 7 June 1995 (fn 1196) para 9 (notarial deed). See also Köbl (fn 1294) 209.

1306 For a detailed discussion of the different functions, see, eg, Plewe (fn 1015) 7–18, or Hertel, '*§ 125 BGB*' (fn 1294) paras 34–53.

1307 Wolf and Neuner (fn 48) 97 para 24. cf Plewe (fn 1015) 5, who states one function as 'the recognisability of the legal transaction for third parties' ('*die Erkennbarkeit des Rechtsgeschäfts für Dritte*').

1308 See Hertel, '*§ 125 BGB*' (fn 1294) para 42. Interestingly, the author goes on to note that a handshake (*Handschlag*) is an act used like a kind of form in that it signalises that an (informal) agreement has been reached. In contrast, with formal agreements that are put into writing, the signature marks the concluded contract.

(*Publizität*) of the transaction; as a caution to prevent hasty actions;[1309] to ensure instruction and counselling of the parties; or for control through public authorities.[1310] Another important role is the protection of the contracting or third parties, as well as of the general public.[1311] Particularly this last function explains why, under certain circumstances, not all but only one party's declaration of intention necessitates a particular form, as is the case for § 518 para 1 (*Schenkungsversprechen*; Promise of donation) or § 766 para 1 (*Bürgschaftserklärung*; declaration of suretyship) BGB, discussed in Sections iii. and ii. below respectively.[1312]

It is noteworthy that the statutory forms usually relate to obligatory acts (*Verpflichtungsgeschäfte*) in order to ensure their purpose, which is particularly true for those requirements seeking to caution, like a declaration of suretyship; in contrast, requirements as to acts of disposition (*Verfügungsgeschäfte*), such as the *Auflassung* (Declaration of conveyance, § 925 BGB), normally ensure broader, public interests.[1313]

i. Excursus: The Classification of Things in German Law

The German legal system classifies *Rechtsgegenstände* or *Rechtsobjekte* (legal objects), which are made up of 'property protected by law' ('*rechtlich geschützte*[*s*] *Gut*[...]'),[1314] in two steps. First, legal objects are divided into two orders. *Herrschaftsobjekte* (objects under control) are things over which

1309 During the drafting process of the BGB, it was stated that formalities raise the parties' 'legal awareness' ('*juristisches Bewußtsein*') and facilitate meditated rather than hasty decisions, see Mugdan (fn 883) Vol 1 451.

1310 See Wolf and Neuner (fn 48) 509–511 paras 4 et seq for further details. See also Busche, '*Vor § 145 BGB*' (fn 158) para 30; Mann (fn 1302) 22. A more precise differentiation between the above-named functions and a concise discussion of a range of fourteen (!) different functions can be found in Mankowski (fn 1296) 663–668.

1311 See Busche, '*Vor § 145 BGB*' (fn 158) para 29. This function is sometimes said to relate to that of the cautioning function, see, eg, Köbl (fn 1294) 208. See further Köbl, ibid 226.

1312 See Wolf and Neuner (fn 48) 511 paras 18–19. Note that a contract to terminate (*Aufhebungsvertrag*) a guarantee or a promise for donation does not require any particular form, see ibid, 512 para 22.

1313 For further details on this, see Köbl (fn 1294) 210–212. See also Maier-Reimer (fn 1302) 3744.

1314 Malte Stieper, *Vorbemerkungen zu §§ 90–103* [Preliminary Notes on Ss 90–103], in: von Staudinger and others (fn 140; 2017) para 7.

a right can subsist and make up the first order, whereas *Verfügungsobjekte* (objects of disposition) are the rights over *Herrschaftsobjekte* and form the second order.[1315] There are, however, cases that overlap, such as *Forderungen* (claims), which can be both a right relating to a legal object or the subject of rights.[1316]

In a second step, the two categories are defined further. Accordingly, *Verfügungsobjekte* include not only rights, but also legal relationships (*Rechtsverhältnisse*), such as rights in rem and contractual relationships.[1317] *Herrschaftsobjekte* include *körperliche* (corporeal) and *unkörperliche* (incorporeal) things.[1318] Only the former category is regulated in § 90 et seq BGB. It encompasses objects that are tangible (*greifbar*) and 'space-filling' (*raumfüllend*), so that liquids and gases in containers or software on data mediums are included.[1319] Having said this, not all corporeal things are automatically *Sachen*. Thus, § 90a BGB explicitly excludes animals, although the provisions on things may be applied by analogy where appropriate. Accordingly, animals form a separate category of corporeal things.[1320] Furthermore, anything that cannot be controlled by humans, such as clouds, stars, or running water, as well as things in which the general public interest is strong, such as religious objects, or administrative seals, cannot be things in the sense that private (exclusive) ownership may be established over them.[1321]

1315 See Wolf and Neuner (fn 48) 71 para 14, 279–280 paras 2–3.

1316 See further ibid 280 para 3.

1317 See ibid 279 para 2, 280–281 para 6.

1318 See Bork, '*Allgemeiner Teil*' (fn 900) 100 para 228.

1319 Ibid 103 para 234, who notes at 100 para 228 that corporeal objects can be 'seen and touched' ('*sehen und anfassen*'). cf Stieper, '*Vor §§ 90–103 BGB*' (fn 1314) para 9, stating that coporal things must be perceptible by human senses ('*sinnliche Wahrnehmbarkeit*') and enclosed ('*Abgegrenztheit*') in order to be capable of being controlled ('*beherrschbar*'). Note that academic opinion is divided on the question whether software by itself constitutes a thing. While both sides vary in their classification-method, they nevertheless agree that sales law (*Kaufrecht*) is applicable to software. For the purposes of this dissertation, this common point suffices. Readers interested in the discussion are referred to Wolf and Neuner, ibid, para 2 for further references on the two sides of the debate. A similar difficulty has arisen under English law; however, it seems that software alone does not constitute goods for the purpose of sales law, see Section II.3.b.i. above.

1320 Stieper, '*Vor §§ 90–103 BGB*' (fn 1314) para 1. Critical of this new categorisation: Bork, '*Allgemeiner Teil*' (fn 900) 103 para 235. Note that English law does not have a special rule for animals, see Section II.3.b.i. above.

1321 See Wolf and Neuner (fn 48) 285 paras 3–4.

Albeit not being included in the BGB, German law recognises rights over certain incorporeal objects. One area of importance relates to intellectual property (*Gewerblicher Rechtsschutz*), the different forms of which are regulated in patent (*Patent-*), trademark (*Marken-*), and copyright law (*Urheberrecht*).[1322] Another type of incorporeal object is a right relating to other rights, such as pledges (*Pfand*) or beneficial interests (*Nießbrauch*; *usufruct*).[1323] The third category of incorporeal objects consists of parts depicting one's personality, such as one's name, or a photograph.[1324]

Of particular interest to the discussion in this dissertation is the implicit differentiation in provisions of the BGB between movable (*bewegliche*) and immovable (*unbewegliche*) things. This conceptual differentiation is reflected in the structure of the BGB, which has both general and specific rules for each category. The property law of the former is called *Mobiliarsachenrecht* (law of movable property) and that of the latter is *Immobiliarsachenrecht* (law of immovable property).[1325] Both of these categories have further subdivisions that need to be considered.

When referring to immovable property, the BGB uses the term *Grundstück* (plot of land) and sometimes *Gebäude* (building), although these are seen as a part of land (§ 94 para 1 BGB).[1326] The reason is that immovable property is any thing that cannot change its physical situs (*räumliche Belegenheit*),[1327] so that 'things firmly attached to the land' form an essential part of it (§ 94 para 1 BGB).[1328] A similar provision for buildings is found in § 94 para 2 BGB, according to which materials used for its construction become an essential part of that building. In more general terms, things that cannot be detached from another thing without being damaged, ie, without being changed in their nature[1329], or even destroyed, are deemed

1322 While it goes beyond the scope of this dissertation to treat this fascinating subject in detail, it can be stated in summary that this area of law concerns products of intellectual processes, such as inventions or artistic creations and designs. For a concise overview, see, eg, ibid 296–297 paras 1 et seq.

1323 See on this ibid 297 para 11.

1324 For further information on this category, see ibid 297 para 10.

1325 See Gaier (fn 1068) para 2. As noted in Section II.3.b.i. above, English law makes a different distinction, namely, between land and personalty (chattels).

1326 For further details on this, see Malte Stieper, *§ 94* [Section 94], in: von Staudinger and others (fn 140; 2017) para 10.

1327 Compare Bork, '*Allgemeiner Teil*' (fn 900) 105 para 241.

1328 By the same token, *§ 96* BGB provides that rights relating to land are deemed to form a part of it.

1329 The BGH has held that the question of whether a thing is changed in its nature depends on whether the separated parts can be used in the same man-

to be an 'essential part' of another thing (§ 93 BGB). This is also true for plants, whether grown naturally or cultivated, which become part of the land as soon as the seed or plant is planted (§ 94 para 1 BGB).[1330]

Having said this, not all things which are attached to one thing form part of it. This is particularly true in relation to immovable property and objects that are attached 'only for a temporary purpose' ('*nur zu einem vorübergehenden Zweck*', § 95 BGB). This principally depends on the intention of the person in the moment of attaching the object.[1331] An example is a tree that has been planted only temporarily.[1332] Another example is a fitted kitchen (*Einbauküche*), which is sometimes seen as a component, sometimes merely as an accessory (*Zubehör*) of a building.[1333]

In this sense, *Sachbestandteile* (components of things)[1334] as just discussed must be contrasted with mere *Zubehör* (accessories, §§ 97–98 BGB). This is important for the former category of *Sachebstandteile*, because all things are legally treated as one, so that any legal act or change of circumstance affecting one will affect all parts. In contrast, the same consequence

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ner after having been separated, see BGH decision of 27 June 1973, VIII ZR 201/72, BGHZ 61, 80, para 9. Where this is not possible, the unusable parts lose in value, ibid para 12. The things in question were a car and a motor, which had been inserted into the car. The court found that a motor could be used in other cars of the same type as well as on its own as a standalone motor, so that it was not a component (*Bestandteil*) of a car, see ibid paras 9, 11. Furthermore, the two things were easily separable without being damaged and without great effort (ibid para 13), which seems to favour the view of the two things being separate. In consequence, it seems that a motor and a car merely form a *Sachgesamtheit* (collective of things).

1330 For further discussion, see Stieper, '*§ 94 BGB*' (fn 1326) paras 17–18.

1331 See on this further Wolf and Neuner (fn 48) 292–293 paras 33–34.

1332 Bork, '*Allgemeiner Teil*' (fn 900) 109 para 249.

1333 See BGH decision of 1 February 1990, IX ZR 110/89, WM 1990, 603, which includes references to academic literature and court decisions on both sides in para 7. The court held in this case that the kitchen was an accessory (paras 13–14, 19); it could not be seen as forming a part of the land, since it could be separated without damage and used in another kitchen (paras 11–12).

1334 This general term has two subdivisions: there may be *wesentliche* (essential) or *unwesentliche* (non-essential) *Bestandteile*. This differentiation is important in considering whether the component in question can be subject to a special right (*Sonderrecht*), such as an *Eigentumsvorbehalt* (retention of title, § 449 BGB). This aspect will not be discussed further in this dissertation. Instead, see Wolf and Neuner (fn 48) 289–291 paras 21 et seq. Further details on essential parts of buildings and land can be found in ibid 291–292 paras 28 et seq.

is not automatically applied to the latter.[1335] Having said this, there is a presumption that an obligatory transaction over the main object covers any accessories (§ 311c BGB), and, similarly, accessories to land are included in any acts of disposition over the land (§ 926 para 1 ibid) whenever doubt over whether an agreement was made exists. Things will be considered to be an accessory where the things are only put together with other things for a single purpose, namely, in order for the accessory to serve the main object.[1336]

The distinction among movable objects is more straightforward. They are simply divided into fungible things (*vertretbar*, § 91 BGB) as 'movable things that in business dealings are customarily specified by number, measure or weight' on the one hand and consumable things (*verbrauchbar*, § 92 BGB) as 'movable things whose intended use consists in consumption or in disposal' on the other.[1337]

ii. Written Forms: *Schriftform* and *Textform*

German private law originally only knew one standard written form, namely, § 126 BGB; however, since 2001, a simpler form called 'text form' (*Textform*) is found in § 126b BGB.[1338] The differences of the requirements are best brought to light through a juxtaposition of the two provisions. Section 126 BGB (*Schriftform*; Written form) requires:

> (1) If written form is prescribed by statute, the document must be signed by the issuer with his name in his own hand, or by his notarially certified initials.

1335 Compare Bork, '*Allgemeiner Teil*' (fn 900) 107–108 para 246 (*Sachbestandteile*) and 111–112 paras 258–260 (*Zubehör*).

1336 Compare the phrasing of § 97 para 1 BGB. See further, Wolf and Neuner (fn 48) 294 para 37.

1337 The original § 91 BGB reads: '*bewegliche Sachen, die im Verkehr nach Zahl, Maß oder Gewicht bestimmt zu werden pflegen*'; while § 92 states '*bewegliche Sachen, deren bestimmungsmäßiger Gebrauch in dem Verbrauch oder in der Veräußerung besteht*'. For further details, see, eg, Bork, '*Allgemeiner Teil*' (fn 900) 105–106 paras 242–243.

1338 The introduction of this form was already considered in Section b. above. It has not been changed since then, see Christian Hertel, *§ 126* [Section 126], in: von Staudinger and others (fn 140; 2017) para 1. Plewe (fn 1015) is critical of this form, see 178–179, 182–184.

> (2) In the case of a contract, the signature of the parties must be made on the same document. If more than one counterpart of the contract is drawn up, it suffices if each party signs the document intended for the other party.[1339]

Two components are required: first, a written instrument called *Urkunde*; and, second, a hand-written or notarially-certified signature. As signatures are considered in Section iii. below,[1340] only the meaning and requirements as to the document will be explored here. Before doing so, it ought to be noted that the other provision, § 126b BGB (*Textform*), stipulates:

> If text form is prescribed by statute, a readable declaration, in which the person making the declaration is named, must be made on a durable medium. A durable medium is any medium that
> 1. enables the recipient to retain or store a declaration included on the medium that is addressed to him personally such that it is accessible to him for a period of time adequate to its purpose, and
> 2. allows the unchanged reproduction of such declaration.[1341]

Instead of a document, a 'readable declaration' ('*lesbare Erklärung*') containing the statement maker's name[1342] made on a 'durable medium'

1339 The original provision states: '(1) *Ist durch Gesetz schriftliche Form vorgeschrieben, so muss die Urkunde von dem Aussteller eigenhändig durch Namensunterschrift oder mittels notariell beglaubigten Handzeichens unterzeichnet werden*.
(2) *Bei einem Vertrag muss die Unterzeichnung der Parteien auf derselben Urkunde erfolgen. Werden über den Vertrag mehrere gleichlautende Urkunden aufgenommen, so genügt es, wenn jede Partei die für die andere Partei bestimmte Urkunde unterzeichnet*.'

1340 Signatures certified by a notary are included in Section iii.

1341 The original provision reads: '*Ist durch Gesetz Textform vorgeschrieben, so muss eine lesbare Erklärung, in der die Person des Erklärenden genannt ist, auf einem dauerhaften Datenträger abgegeben werden. Ein dauerhafter Datenträger ist jedes Medium, das*
1. *es dem Empfänger ermöglicht, eine auf dem Datenträger befindliche, an ihn persönlich gerichtete Erklärung so aufzubewahren oder zu speichern, dass sie ihm während eines für ihren Zweck angemessenen Zeitraums zugänglich ist, und*
2. *geeignet ist, die Erklärung unverändert wiederzugeben*.'

1342 'Name' does not necessarily mean a person's full name; just a first name or even a pseudonym is sufficient, as long as this identifies the declaring person to the addressee. It thus depends on the circumstances, see Deutscher Bundestag, *Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr* [Draft Law of the Government: Draft of a Law to Adapt the Form Requirements in Private Law and other Provisions to Modern Legal

('*dauerhafter Datenträger*') is required here.[1343] This form was apparently created to fill a gap: While there was a need to have some written and readable record of declarations, both legal and business practice required a less cumbersome, speedy method to the standard written form.[1344] The text form can thus be seen as a compromise between a need for legal certainty and swift and simple procedures,[1345] but which fulfils the function

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Transactions] (Drucksache [printed matter] 14/4987, 14 December 2000; hereinafter 'FormAnpG Draft Law') 20. See also Dorothee Einsele, *§ 126b Textform* [Section 126b Text Form], in: Säcker and others (fn 158) para 7. All first names are equal, so that any of several first names can be used on its own. See on this Dirk-Ulrich Otto, *Grundstückskaufverträge* [Contracts for the Sale of Land], in: Sebastian Herrler (ed), *Münchener Vertragshandbuch Band 5: Bürgerliches Recht 1* [Munich Handbook on Contracts Vol 5: Civil Law 1] (Beck 2013) 9. Apparently, it is without consequence where the declaring party's name appears in the document: It can be contained in the header of the document, in the text, or as a(n inserted) signature, see Einsele, ibid. cf the situation with a signature, discussed in Section iv. below.

1343 cf Plewe (fn 1015) 177, who states that a signature must be reproduced or otherwise denoted at the end of the declaration. Indeed, the FormAnpG foresaw such a phrase in art 3; however, it is no longer contained in the current version of the BGB, as the provision was amended by art 1 para 3 *Gesetz zur Umsetzung der Verbraucherrichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung* [Law to Transpose the Consumer Regulation and to Regulate Accommodation Services] of 20 September 2013, BGBl 2013 I 3642. Einsele, '*§ 126b BGB*' (fn 1342) para 8 notes that this requirement, while no longer stated explicitly, is nevertheless still necessary to show that the declaration is complete and meant to be legally binding. She also argues that the German legislator stated that although the wording of the provision was altered, no changes in content were intended. While this may be true, it begs the question why the words were eliminated completely, rather than substituted, as had been done with the phrase '*auf andere zur dauerhaften Wiedergabe in Schriftzeichen geeignete Weise*' (substituted by '*dauerhaften Datenträger*'). The requirement is easily met, however, as stating the declaring person's name, a(n inserted) signature, phrases such as '*Diese Erklärung ist nicht unterschrieben*' ('this declaration is not signed'), or even just a greeting is sufficient, see Einsele, ibid para 8. Contrast Truiken J Heydn, *Germany*, in: Dennis Campbell (ed), *E-commerce and the Law of Digital Signatures* (Oceana Publications 2005) 221, 236, who states that a signature is not required under the text form.

1344 Compare Nissel (fn 1300).

1345 Compare ibid, who states that the text form was created for instances in which a signature was deemed 'dispensable' ('*entbehrlich*'). See also Einsele, '*§ 126b BGB*' (fn 1342) para 1. Plewe (fn 1015) 182–184 is critical of this form, deeming it more of a superfluous requirement, and not facilitating contracting as much as a simple de-regulation (elimination of form requirements) would have.

of ensuring documentation.[1346] How documentation is achieved becomes apparent when considering the requirements in §§ 126, 126b BGB. These come down to two differences: whether a physical document containing the declaration is required (see Sections aa)–bb) below); and whether the written declaration must be signed (see Section iv. below).

aa) The Requirements of the *Urkunde*

The term *Urkunde* is not defined in the BGB, but has been described as '*eine schriftlich verkörperte Gedankenerklärung*' ('a statement embodied in writing'),[1347] namely, one document that must contain the whole legal transaction in question.[1348] Furthermore, the document needs to be understandable generally, or at least to the persons privy to the document in question; it has to show the document's creator; and it must be intended as proof of a legally relevant fact.[1349] There may be further requirements in specific cases, such as the parties to a contract of guarantee (*Bürgschaftserklärung*) and its object being stated in the document.[1350]

It is irrelevant if the document is drawn up by hand or using a machine,[1351] such as a personal computer;[1352] it may even be based on a standard form or model contract.[1353] In line with this, the document need

1346 See on this Einsele, '*§ 126b BGB*' (fn 1342) para 9.

1347 Wolf and Neuner (fn 48) 513 para 25. On German civil procedural law, see also Klaus Schreiber, *§ 415 Beweiskraft öffentlicher Urkunden über Erklärungen* [Section 415 Evidentiary value of public records and documents regarding declarations], in: Wolfgang Krüger and Thomas Rauscher (eds), *Münchener Kommentar zur ZPO* [Munich Commentary on the Code of Civil Procedure] Vol 2 (5th online edn, CH Beck 2016) para 5: '*die schriftliche Verkörperung einer Gedankenerklärung durch Lautzeichen*' ('the embodiment of a statement in writing by phonograms').

1348 See Plewe (fn 1015) 43–44.

1349 Jörg Bettendorf, *Elektronische Dokumente und Formqualität* [Electronic Documents and Quality of Form] (2005) Rheinische Notar-Zeitschrift 227.

1350 Plewe (fn 1015) 44.

1351 The LG Dortmund stated as much in its decision of 21 April 2017, 10 O 12/17, para 38, although the statement related to provisions of the ZPO. Cf Schreiber, '*§ 415 ZPO*' (fn 1347) para 9, who states that printouts of digital documents will regularly meet the requirements of an *Urkunde*, as discussed below. cf Wolf and Neuner (fn 48) 513 para 25, who make a similar statement to that of the LG, but without reference to German procedural law.

1352 Hertel, '*§ 126 BGB*' (fn 1338) para 109.

1353 See ibid.

not be drafted by the declaring person, but can be created by a third party.[1354] While the creation process is thus not important, the material used for the document is at least not entirely irrelevant. This is because the product must be 'visually ascertainable' ('*optisch erfassbar*').[1355] In addition, it has to be suitable for recording the content, the written characters, permanently.[1356] While these characteristics are fulfilled by paper, this is not true for computer screens.[1357] As a consequence, not only paper but other writing materials are acceptable, while electronic recordings are not.[1358] As for the writing itself, the document need not be in German; foreign languages are normally unproblematic.[1359] In contrast, as it needs to be in writing (*schriftlich*), ie, written in alphabetic characters[1360], it cannot

1354 See Plewe (fn 1015) 43. This is also true for German procedural law. See on this Klaus Schreiber, *§ 416 Beweiskraft von Privaturkunden* [Section 416 Evidentiary Value of Private Records and Documents], in: Krüger and Rauscher (fn 1347) para 5. As will be seen below, this is particularly important for notarial authentications.

1355 Bettendorf (fn 1349) 277.

1356 See Plewe (fn 1015) 43. cf Hertel, '*§ 126 BGB*' (fn 1338) para 108, stating durability to be a general requirement of the written form. Note that 'permanent' is not equivalent to 'eternal'; it need not even be long-term, compare Einsele, '*§ 126b BGB*' (fn 1342) para 6. It nevertheless seems a little surprising that a testament made on a blackboard (*Schiefertafel*) has been deemed sufficient in the past, at least when made by a farmer. See RG decision of 15 February 1910, IV 241/09, Deutsche Juristen-Zeitung (DJZ) 1910, 594. Having said this, it is questionable whether this ruling would be applied to contracts, especially nowadays.

1357 See Wolf and Neuner (fn 48) 513 para 25. More will be said on electronic forms in Section v. below.

1358 Hertel, '*§ 126 BGB*' (fn 1338) paras 110–111.

1359 LG Dortmund decision of 21 April 2017 (fn 1351) para 41. The caveat seems to be that the language needs to be generally known ('*bekannt*'), see Plewe (fn 1015), which suggests that it has to be a real as opposed to an individually created language. Thus, Hertel, '*§ 126 BGB*' (fn 1338) para 108 states that a secret code, which is not known by third parties, is not admissible. On this, see further Schreiber, '*§ 415 ZPO*' (fn 1347) para 5, who states that the language at least needs to be accessible to experts or translators. Consequently, secret languages are not admissible, see Schreiber, ibid. If the *Urkunde* is recorded by a *Notar* (notary public), the language must be known to the notary (§ 5 para 2 *Beurkundungsgesetz*, Notarial Authentication Law of 28 August 1969, BGBl 1969 I 1513, hereinafter 'BeurkG').

1360 In line with what was said about the document's language, characters from other writing systems ought to be acceptable, like kanji. See Hertel, '*§ 126 BGB*' (fn 1338) para 108, who names Chinese and Arabic characters. Compare

be recorded as sounds; nor as pictures or drawings.[1361] As concerns the language, the choice is thus not important, as long as it is one that is generally comprehensible to third parties, so that, eg, secret codes would not be allowed.[1362]

As a consequence of the requirement that the document be one whole unit, an exchange of declarations is not sufficient for the statutorily-required written form.[1363] This is in line with the wording of § 126 para 2 BGB, which suggests that there may be just one document, or several duplicates of an identical document, but does not state that separate declarations of intention are sufficient.[1364] Connected to this, the issue may arise as to what constitutes a unit (*Einheit*) in a document. Formerly, it was necessary to physically connect all parts of a document or several documents, by stapling them together or by some other means so as to make a separation without damaging the document impossible. The BGH eased this requirement around 20 years ago, so that indicators such as consecutive numbering of pages or paragraphs, or text continuing over two pages, are deemed sufficient.[1365] It seems that the mechanism used must — as had previously been required for the physical connection — impede subsequent manipulation.[1366] For there to be a unit consisting of several documents, like a contract and appendices, there needs to be a

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further Wolf and Neuner (fn 48) 513 para 25, according to whom numbers, or even the dots used in sign language are adequate.

1361 Schreiber, '*§ 415 ZPO*' (fn 1347) paras 5–6.

1362 See Hertel, '*§ 126 BGB*' (fn 1338) para 108. See also fn 1359 above.

1363 See, eg, BGH decision of 18 October 2001 (fn 1131) para 19, in which the court went on to state that such an exchange would be sufficient for a written form agreed on by the parties.

1364 One exception is found in § 492 para 1 BGB, regulating the form of consumer credit agreements (*Verbraucherdarlehensverträge*) and providing that '[t]he requirement of written form is satisfied if the offer and acceptance by the parties to the contract are declared in writing in separate documents' ('*Der Schriftform ist genügt, wenn Antrag und Annahme durch die Vertragsparteien jeweils getrennt schriftlich erklärt werden*').

1365 Compare BGH decision of 18 December 2002, XII ZR 253/01, NJW 2003, 1248–1249 paras 13 and 15, giving further references. For further discussion of this change, see Plewe (fn 1015) 44–47.

1366 Compare Wolf and Neuner (fn 48) 513 para 26, who suggests that signing each page will aid in this endeavour. See also Carolina M Laborde, *Electronic Signatures in International Contracts* (Peter Lang 2010) 23, making a similar statement also with respect to writing one's initials on each page or next to subsequent changes. Contrast Plewe (fn 1015) 43, who is generally critical of § 126 BGB protecting against forgeries.

reference in the main document to the appendices, and each annex must be signed by the parties.[1367]

At least for the purpose of German procedural law, the instrument must be *verkehrsfähig* (negotiable), which implies that its content must be accessible directly at all times.[1368] Anticipating the discussion in Section v. below, a consequence is that electronic mediums such as USB-sticks or other mobile data carriers, as well as audio- or video tapes in themselves cannot be an instrument in the sense of an *Urkunde*, as technical equipment is necessary for accessing the data contained on these mediums.[1369] While this is true, a tangible copy of the data, like a printout, can be seen as a written instrument if the printed declaration is meant to replace the

1367 See BGH decision of 18 December 2002 (fn 1365) para 13, stating further that the lack of a reference in the annex to the main document is not detrimental. cf BGH decision of 27 September 2017 (fn 1157): While the court held at paras 17–18 that a '*gedankliche Verbindung*' (literally 'mental connection', association) is sufficient and that it was not necessary that a subsequent reference to any appendices (*Anlagen*) be added to the original contract document, it did state that an annex must refer to the original agreement with sufficient clarity ('*muss* [...] *hinreichend deutlich auf den ursprünglichen Vertrag hinweisen*'). The case concerned a commercial lease made in written form, whereby some essential terms had been amended subsequently in separate documents. The last of these, namely, an amendment of the price, was found not to fulfil the written requirement. This was because it consisted of a letter by the claimant, expressing the wish to amend the price index, to which the defendant responded by modifying the proposed term through a hand-written note and signing the letter before returning it. While it might be thought that this one-sided modification by the defendant would render the amended term ineffective, the court held instead at para 22 that the written form was not fulfilled because the letter did not refer to the original contract. As a consequence of the essential term regarding the price being void, the whole contract became ineffective, see ibid paras 22, 15.

1368 Schreiber, '*§ 415 ZPO*' (fn 1347) para 7. See also Bettendorf (fn 1349) 277. cf Wolf and Neuner (fn 48) 513 para 25, who state that the declaration 'must be directly accessible to human senses' ('*muss der menschlichen Wahrnehmung unmittelbar zugänglich sein*').

1369 In terms of proof, they may still count as *Augenscheinsobjekte* (objects of visual inspection) and be deemd as evidence taken by visual inspection under §§ 371, 371a ZPO, see Schreiber, '*§ 415 ZPO*' (fn 1347) paras 6–7. He points out further that written documents are more trustworthy as they can be manipulated less easily, which is their advantage over electronic mediums in particular, see ibid 7.

digital version.[1370] It seems from this that it is not the creation process, but the end product as it were, that matters for the form. Thus, a digitally-created document that is printed and executed in print ought to fulfil the requirement of writing.[1371] Note that *Urkunden* can be private or public in nature, which will have an effect on its evidentiary weight or authenticity in German civil procedure.[1372]

bb) The Requirement of the *lesbare Erklärung auf einem dauerhaften Datenträger*

Like the content of an *Urkunde*, the content of the text form must be 'readable' ('*lesbar*'; see § 126b BGB). It ought to be noted that this requirement concerns the message as received by the addressee.[1373] This has several implications. First, that the declaration or information must reach the addressee, ie, at least enter their sphere of influence (*Machtbereich*),

1370 This regularly seems to be the case, unless the printout is made for mere information purposes only; in contrast, where the copy is of a paper document, the case is not as clear-cut. See on this ibid paras 9, 8.

1371 cf the instance in which a document is created by a device autonomously by processing data and is printed out subsequently. See on this ibid para 9, who denies these documents the quality of being 'written'.

1372 A public record (*öffentliche Urkunde*) is one that is drawn up by a public authority (§ 415 para 1 ZPO), whereas a private record (*private Urkunde*) is any record 'that does not count as a public one', see ibid para 3. For further details, see ibid paras 4 et seq. On public records, see Schreiber, ibid paras 1 et seq. It is noteworthy that the requirements of a public record are only met where the stipulated form is realised, see ibid, para 21. Private documents cannot be turned into public records as such. Even a *Beglaubigung* (certification) by, eg, a notary will not achieve this; however, the attestation clause (*Beglaubigungsvermerk*) on the document is deemed public, see ibid, para 22.

1373 See Einsele, '*§ 126b BGB*' (fn 1342) paras 4, 11, who notes that the required conditions need to be met when the declaration is made and when it is received. See also BGH decision of 10 July 2013, IV ZR 224/12, BGHZ 198, 32 paras 17 et seq, in which the court found that while the making of a declaration may be subject to a form, delivery of the same is not. In that case, this was held for § 2281 BGB (*Anfechtung durch den Erblasser*; Avoidance by the testator); however, the same was said to be true for § 766 BGB (*Schriftform der Bürgschaftserklärung*; Written form of the declaration of suretyship). See also FormAnpG Draft Law (fn 1342) 19, 20.

whereby the risk of the message being lost is on the declaration maker.[1374] Secondly, as a consequence of the required 'readability' of the declaration, a message in, say, audio form is not sufficient, as there is no visible (readable) text that reaches the addressee.[1375] Thirdly, displaying a text on a website is equally insufficient,[1376] unless its content can be downloaded and printed and if no consumers are involved.[1377] For similar reasons, displaying information as videotext on a television device, eg, in teleshopping, is not sufficient.[1378] The reason is that such texts, whether on a computer monitor or on a television screen, although visible in writing as such, cannot be saved or retained as required by § 126b no 1 BGB.[1379] It also follows from this that the declaration can be contained in a paper document under the text form as well, despite being a variation of the standard written form.[1380]

In parallel to the electronic form, discussed in Section v. below, a text form can also be an electronic document.[1381] Furthermore, it can be transmitted as an e-mail[1382] or fax,[1383] or by being saved on a portable device such as a CD-ROM;[1384] also on a DVD, USB-stick, or other storage

1374 Compare Einsele, '*§ 126b BGB*' (fn 1342) para 11. On these issues, see also the discussion of declarations of offer reaching their recipient in Section a.ii.dd) above.

1375 See Einsele, '*§ 126b BGB*' (fn 1342) para 4.

1376 See Wolf and Neuner (fn 48) 518 para 44.

1377 Einsele, '*§ 126b BGB*' (fn 1342) paras 6, 11. The possibility alone is often sufficient; it need not actually be done, see Wolf and Neuner (fn 48) 518 para 44 and Einsele, ibid 6. See also FormAnpG Draft Law (fn 1342) 19, 20.

1378 See Einsele, '*§ 126b BGB*' (fn 1342) para 11.

1379 Compare ibid para 4. Note that what was said for the *Urkunde* above on the fixation being permanent is also true for the text form, see ibid para 6. Thus, the information must be stored for an 'appropriate' length of time, ibid para 11.

1380 See ibid para 4.

1381 See Nissel (fn 1300).

1382 Einsele, '*§ 126b BGB*' (fn 1342) paras 6, 11. It ought to be noted, however, that where the declaration is sent to a non-existing e-mail address, the requirement is not fulfilled, ibid para 12.

1383 As to a copy of a contract document sent via fax not being sufficient for § 126 BGB, see, eg, BGH decision of 7 March 2018 (fn 906) para 18. Note that other requirements of a written form, eg, § 550 BGB (*Form des Mietvertrags*; Form of the lease agreement), may not be as strict, so that in such cases a copy sent via fax, or arguably also by other means, is sufficient. See on the case of § 550 BGB, ibid, paras 19 et seq.

1384 See Mann (fn 1302) 22.

device.[1385] In this sense, the words '*dauerhafter Datenträger*' convey the meaning that an oral declaration is insufficient, but that the declaration needs to be fixed in some reproducible format.[1386]

Similar to § 126b, § 127 para 2 BGB provides:

> For compliance with the written form required by legal transaction, unless a different intention is to be assumed, it suffices if the message is transmitted by way of telecommunications and, in the case of a contract, by the exchange of letters. [...][1387]

Accordingly, a declaration of intention made in written form as stipulated by the contracting parties satisfies this form even if transmitted using, eg, e-mail or (e-)fax,[1388] as long as the requirements for the text form contained in § 126b BGB have been met.[1389] In contrast, a statutorily-prescribed written form or a contract will not be sufficient if the declaration is made by this method.[1390] Instead, the former will be governed by § 126 BGB, meaning that all declarations of intention, especially offer and acceptance, must be made in writing and reach the other party in that form,[1391] whereas the latter must be made by 'exchange of letters' ('*Briefwechsel*',

1385 See Einsele, '*§ 126b BGB*' (fn 1342) para 6.

1386 Compare the general explanations given by Nissel (fn 1300) on the former requirement being made '*auf andere zur dauerhaften Wiedergabe in Schriftzeichen geeignete Weise*' (art 1 para 3 FormAnpG; 'by other means capable of being perpetually reproduced in written characters').

1387 The original provision states: '*Zur Wahrung der durch Rechtsgeschäft bestimmten schriftlichen Form genügt, soweit nicht ein anderer Wille anzunehmen ist, die telekommunikative Übermittlung und bei einem Vertrag der Briefwechsel*. […]'

1388 The German legislator in fact stated that 'all kinds of telecommunication using telecommunication devices' ('*alle Arten der Telekommunikation mittels Telekommunikationsanlagen*') were sufficient, see FormAnpG Draft Law (fn 1342) 20–21, and went on to enumerate examples, including those given above.

1389 Wolf and Neuner (fn 48) 525 para 87.

1390 On sending a declaration as a telegram, see BGH decision of 27 May 1957 (fn 1200) 884–885. The case concerned a declaration of suretyship, but the written requirement of § 126 BGB was also discussed. Interestingly, the court noted at 884 that the drafters of the BGB had considered allowing transmissions as telegrams, or even of not having a written form for sureties, but eventually decided against both.

1391 See, eg, BGH decision of 7 March 2018 (fn 906) para 17: '*Ein Vertrag, für den die gesetzliche Schriftform vorgeschrieben ist, kommt grundsätzlich nur dann rechtswirksam zustande, wenn sowohl der Antrag als auch die Annahme (§§ 145 ff. BGB) in der Form des § 126 BGB erklärt werden und in dieser Form dem anderen Vertragspartner zugehen*' ('A contract that is governed by the statutory written form will, as a general rule, arise only if both the offer and the acceptance

§ 127 para 2 BGB). In instances of letters, the exchanged documents need not be exactly identical in content.[1392]

cc) Instances of Written or Text Form

Instances of the text form being required are limited. In contrast, the written form is encountered more often in German legislation. Examples of the text form are found in relation to changes in tenancy agreements under the BGB, or for notifications of dangerous goods under the HGB.[1393] As a consequence, this form will regularly not normally apply to the formation of a contract, unless the parties choose this form in accordance with § 127 BGB.[1394] By way of exception, there is an obligation to document contracts and notify consumers in text form in three cases under the BGB: in contracts for delivery by instalments (*Ratenlieferungsverträge*; § 510 para 1 BGB); in credit intermediation contracts (*Darlehensvermittlungsvertrag*; § 655b para 1 BGB); and in consumer construction contracts (*Verbraucherbauvertrag*; § 650i para 2 BGB).[1395]

Prominent examples of the standard written form are a declaration of suretyship (*Bürgschaftserklärung*), a promise to fulfil an obligation (*Schuldversprechen*) or an acknowledgement of a debt (*Schuldanerkenntnis*). Here, one has to differentiate whether the declaration is made by a merchant or by a private person. This is important, because only the BGB (in §§ 766, 780 and 781 respectively) foresees that declarations to such effect must be declared in writing; in contrast, § 350 HGB explicitly provides that

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(§§ 145 et seq BGB) are declared in the form under § 126 BGB and reach the other contracting party in this form').

1392 On this, see, eg, Hertel, '*§ 126 BGB*' (fn 1338) para 15.

1393 A list of the provisions can be found in Nissel (fn 1300), and in Einsele, '*§ 126b BGB*' (fn 1342) para 2.

1394 Compare Einsele, '*§ 126b BGB*' (fn 1342) para 9, who considers the text form not be part of declarations of intention, but about fulfilling obligations.

1395 There may be other information duties for a merchant who deals with a consumer, such as under § 482 para 1 BGB (*Vorvertragliche Informationen* [...]; Preliminary contract information [...]), which may be fulfilled by providing the information in text form. Pre-contractual information duties (*Aufklärungspflichten*) exist beside this form requirement. See on this Martin Franzen, *Vorbemerkung (Vor § 481)* [Foreword (to S 481)], in: Säcker and others (fn 158) Vol 3 (7th online edn, CH Beck 2016) para 3, and ibid, *§ 482* [Section 482], in: ibid paras 1, 5.

the provisions of the BGB on the form of these three kinds of declarations are not applicable where a legal transaction is commercial.[1396]

Another example of relevance to this dissertation is contained in § 484 BGB and applies to the conclusion of three different B2C contracts: First, to *Teilzeit-Wohnrechteverträge* (time-share agreements), contracts under which an entrepreneur promises to or actually procures a right for the consumer to use a building 'several times for a period that is specified or to be specified, for the purposes of overnight stays, for the duration of more than one year' (§ 481 para 1 BGB).[1397] Secondly, *Verträge über langfristige Urlaubsprodukte* (contracts relating to long-term holiday products) for a period of over one year, under which an entrepreneur promises to procure or actually procures the right 'to receive price reductions or other benefits with regard to accommodation' for a consumer, are regulated in § 481a BGB. Thirdly, contracts covered by §§ 481–481a BGB that are brokered by an entrepreneur, called *Vermittlungsverträge und Tauschsystemverträge* (brokerage contracts and exchange system contracts), are regulated in § 481b BGB. All three kinds of contract have a B2C constellation and a minimum period of over one year in common. Furthermore, they must all be made in writing, unless stricter provisions apply (§ 484 para 1 BGB).[1398]

Apart from such explicit regulation, the written form may appear as an implicit requirement. Thus, while not required directly under § 550 BGB (*Form des Mietvertrags*; Form of the lease agreement), the provision foresees that '[i]f a lease agreement for a longer period of time than one year is

1396 See the provision's wording, which says: '*Auf eine Bürgschaft, ein Schuldversprechen oder ein Schuldanerkenntnis finden, sofern die Bürgschaft auf der Seite des Bürgen, das Versprechen oder das Anerkenntnis auf der Seite des Schuldners ein Handelsgeschäft ist, die Formvorschriften des § 766 Satz 1 und 2, des § 780 und des § 781 Satz 1 und 2 des Bürgerlichen Gesetzbuchs keine Anwendung*.' Rittler (fn 132) 273 translates this as follows: 'The formal requirements of § 766 sentence 1 and 2 of the Civil Code do not apply to a suretyship, an admission of liability or a debt acknowledgement to the extent that a suretyship on the part of the surety, or an admission of liability or debt acknowledgement, on the part of the debtor, is a commercial transaction.' It has been stated that this deviation from the general (BGB) rule is made as merchants are deemed not to require protection (from making hasty decisions), see Köbl (fn 1294) 208. On suretyship, see also, eg, BGH decision of 27 May 1957 (fn 1200) 884–885. It ought to be noted that revocations of a declaration of suretyship are not governed by the provision, see Wolf and Neuner (fn 48) 512 para 22.

1397 The original provision states: '*für die Dauer von mehr als einem Jahr ein Wohngebäude mehrfach für einen bestimmten oder zu bestimmenden Zeitraum zu Übernachtungszwecken zu nutzen*'.

1398 On pre-contractual information duties, see fn 1395 above.

not entered into in written form, then it applies for an indefinite period of time'.[1399] In this way, the stipulated consequence makes the written form applicable tacitly.[1400]

iii. Special Forms Involving Public Authorities: *Öffentliche Beglaubigung* (Official Certification) and *Notarielle Beurkundung* (Notarial Authentication)

Under German law, public authorities and in particular a *Notar* (notary public) may be involved in the contracting process. For the latter, this occurs mainly in two instances: either where a person's declaration is authenticated, or where a person's signature is certified in accordance with § 128 and § 129 BGB respectively. As a variation of the latter, a notary may also certify a person's mark (*Handzeichen*, see § 126 para 1 BGB). These forms will be considered in reverse order. Before turning to this, a brief excursus will be made on the use of seals by public authorities.

aa) Excursus: Seals of Public Authorities

German public authorities wield seals even today.[1401] Thus, the HGB refers to a *Dienstsiegel* (official seal), which is furnished by the German Ministry of Justice (BMJV) and bestowed on the legal person to whom the task of maintaining the *Unternehmensregister* (Business Register, § 8b HGB) is transferred in accordance with § 9a para 1 HGB (*Übertragung der Führung des Unternehmensregisters; Verordnungsermächtigung*; Transfer of Operation of the Business Register; Authorisation to Issue Ordinances).[1402] This kind

1399 The original provision reads: '*Wird der Mietvertrag für längere Zeit als ein Jahr nicht in schriftlicher Form geschlossen, so gilt er für unbestimmte Zeit*.'

1400 Hertel, '*§ 126 BGB*' (fn 1338) para 4. Note that the provision applies to leases of land, both in the form of a *Miete* and those in the form of a *Pacht*, see §§ 578 para 1 and 581 para 2 BGB respectively.

1401 On the use of seals by private persons, see Section iv. below. The historical development of these uses will be explored in Section D.III.2.b. below.

1402 For further information on this register, see, eg, Alexander Krafka, *§ 8b Unternehmensregister* [Section 8b Business Register], in: Schmidt K (fn 931). For further discussion of the transfer of the task of maintaining the same, see, eg, ibid, '*§ 9 Übertragung der Führung des Unternehmensregisters; Verordnungsermächtigung*' [Section 9 Transfer of Operation of the Business Register; Authorisation to Issue Ordinances] in ibid.

of seal is used by the legal person in charge only for 'certification of print outs from the Business Register' ('*Beglaubigungen von Ausdrucken aus dem Unternehmensregister*').[1403]

bb) *Unterschrifts-* and *Handzeichensbeglaubigung* (Certification of Signatures and Marks)

One way in which a notary participates in the contracting process is where need exists for either a notarially-certified mark (*notariell Beglaubigtes Handzeichen*) in lieu of a hand-written signature under § 126 para 1 BGB, or for a certification of the person's signature or mark in a *öffentliche Beglaubigung* (official certification) as required by § 129 para 1 BGB.[1404] Despite the latter provision's title, the certification of the signature is done by a notary (see § 129 para 1 BGB in connection with § 20 para 1 *Bundesnotarordnung*[1405], hereinafter 'BNotO'). It ought to be noted that while § 126 BGB does not explicitly state so, it is accepted that a notarially-certified signature may replace a hand-written one, which is due to the principle that a certification by a notary is seen as a higher form than a standard signature.[1406]

In attesting that a particular person made the signature in a document, the notary certifies the signature, whereby the certification in turn needs to bear the notary's seal and signature. These two elements are the necessary constituents of a certification.[1407] In accordance with §§ 39, 40 BeurkG, the certification is made in the following manner: The person whose signature or mark is to be certified must either sign in the presence of the notary, or their signature or mark has to be acknowledged (*annerkannt*) by the notary (§ 40 para 1 BeurkG). The notary subsequently makes an endorsement on the document containing the signature or mark and signs and seals it (§ 39

1403 § 2 *Verordnung über die Übertragung der Führung des Unternehmensregisters und die Einreichung von Dokumenten beim Betreiber des elektronischen Bundesanzeigers* [Ordinance on the Transfer of the Management of the Business Register and the Submission of Documents to the Operator of the Electronic Federal Gazette] of 15 December 2006, BGBl 2006 I 3202.

1404 The characteristics of these two 'signs' are explored in Section iv. below.

1405 Federal Ordinance on Notaries of 13 February 1937, BGBl 1937 III No 303-1.

1406 Compare Hertel, '*§ 126 BGB*' (fn 1338) para 150.

1407 Christian Hertel, *§ 129* [Section 129], in: von Staudinger and others (fn 140; 2017) para 3.

BeurkG).[1408] All three things must be placed below the other person's signature, whereby this can be on the same page of the document or on a separate page that is attached to the rest by use of a string and an imprint of the notaries' seal.[1409]

In accordance with § 39a BeurkG, the certification can be made electronically. In this case, the notary's 'qualified' electronic signature is added to the electronic document (§ 39a para 1 BeurkG).[1410] Both the document which is to be signed and the signature must meet the requirements laid down in § 126 BGB.[1411] While this is true, signatures not meeting those standards, such as those not written by hand, may still be certified as a mark.[1412]

The effect of the certification is to furnish a private document with a public instrument (*öffentliche Urkunde*) and to verify the authenticity of the signature.[1413] Thus, while the notary verifies the signing person's identity and their signature, they do not generally concern themselves with the document itself; if this service is required, a notarial authentication (*notarielle Beurkundung*) is normally done instead.[1414] In fact, under § 129 para 2 BGB, a notarial certification can be replaced by a notarial authentication, as discussed subsequently.

cc) *Notarielle* and *Öffentliche Beurkundung* (Notarial and Official Authentication)

In contrast with a certification, an authentication creates a public instrument (*öffentliche Urkunde*). The latter process is more complex. In instances of declarations of intention, or of a whole contract being authenticated, § 8 BeurkG prescribes that the authentication be made by way of a notarial

1408 Note that this procedure is used for standard documents. For further details on this, see ibid paras 69 et seq. If the certification is to be made by way of a *Niederschrift* (notarial recording), § 37 BeurkG is applicable. This provision is considered below.

1409 Compare Hertel, '*§ 129*' (fn 1407) paras 103–104. On the attachment, see § 44 BeurkG.

1410 On electronic signatures, see Section v. below.

1411 See Hertel, '*§ 129 BGB*' (fn 1407) paras 54 et seq.

1412 Ibid para 61.

1413 Ibid paras 2, 112–113.

1414 Bork, '*Allgemeiner Teil*' (fn 900) 419 para 1070.

recording (*Niederschrift*).[1415] A contract need not be contained in a single document; a successive authentication of the declarations of offer and acceptance is sufficient (see § 128 BGB). In essence, the process involves the parties making their declaration of intention before the notary, who then records this intention.[1416]

The document of the recording (*Niederschrift*) must identify the parties, as well as the notary, contain the declarations of intention (§ 9 para 1 BeurkG), and state the date and time of the authentication (ibid para 2). The notary must state their full name and function as notary, as well as their business address,[1417] whereas the parties must be described in such a way that the possibility of mistakes as to their identity is avoided (§ 10 para 2 BeurkG). Thus, all first names and the family name, where applicable the maiden name, as well as the person's address are stated.[1418] In this respect, the notary must be certain of the parties' identity and, where they do not know the persons personally, must verify the identities (see § 10 paras 3, 1 BeurkG). This is usually done by verifying the person's details from an identity document containing a photograph (*Lichtbildausweis*).[1419] The parties' relation to the notary must be stated in the instrument (§ 10 para 3 ibid).

The notary also plays a central role in the drawing up of the instrument: In practice, a draft contract is usually provided by the notary to the parties, who review the draft before the authentication.[1420] At the time of the authentication, the notary will usually advise the parties on certain points of law (compare § 17 BeurkG).[1421] In accordance with § 13 para 1 BeurkG, the document must be read out to the parties by the notary,[1422] who then

1415 Christian Hertel, *Beurkundungsgesetz* [Notarial Authentication Law], in: von Staudinger and others (fn 140; 2017) para 225.

1416 Bork, '*Allgemeiner Teil*' (fn 900) 418 para 1067.

1417 Hertel, '*BeurkG*' (fn 1415) para 328, who goes on to note that the notary's details need not be written at the beginning of the document. It is sufficient if a reference to the notary's function as the authenticating person is contained in the text itself and the word notary is placed with the notary's signature.

1418 See ibid para 332.

1419 Compare ibid para 334.

1420 Ibid paras 229, 228.

1421 Bork, '*Allgemeiner Teil*' (fn 900) 418 para 1069. Perhaps due to this advising practice, it is sometimes said that the function of the notarial authentication is to ensure that the parties have been properly counselled on the transaction, see Köbl (fn 1294) 208.

1422 Where the document makes reference to certain types of other documents, such as balance sheets or inventories, these need not be read out if the parties

give their approval and sign it by hand. The notary must also sign the instrument and write down their function (ibid para 3). A phrase expressing these requirements, eg, '*verlesen, genehmigt und unterschrieben*' ('read out, approved and signed'), is usually inserted into the instrument.[1423] After signing, the authentication process ends and the document cannot be changed any longer; any subsequent necessary alterations must be made in an instrument called *Nachtragsurkunde*.[1424]

dd) Instances of *Beglaubigungen* and of *Beurkundungen*

The certification of a person's signature (*Unterschriftsbeglaubigung*) is not typically required in relation to contracts. The most relevant instance is the making of declarations to or revoking the same before, eg, the German Land Register (*Grundbuch*, see §§ 29 para 1, 31 *Grundbuchordnung* [Land Registration Law], hereinafter 'GBO'[1425]),[1426] or the Commercial Register (*Handelsregister*, see § 12 HGB (*Anmeldungen zur Eintragung und Einreichungen*; Applications for Registration, and Submissions)).[1427]

In contrast, there are a numerous instances in which an authentication (*Beurkundung*) is required. This ranges from promises of donations (*Schenkungsversprechen*, § 518 para 1 BGB), whereby only the donor's promise needs to be recorded,[1428] to contracts relating to land under § 311b BGB (*Verträge über Grundstücke, das Vermögen und den Nachlass*; Contracts on plots of land, assets and an estate). The latter provision

waive the reading, in which case this waiver must be noted in the instrument (§ 14 paras 1, 3 BeurkG). In such cases, the documents need to be provided to the parties for inspection and must be signed by them subsequently (ibid para 2).

1423 Hertel, '*BeurkG*' (fn 1415) para 355.

1424 For further details, see ibid.

1425 Law of 26 May 1994, BGBl I (1994) 1114.

1426 Hertel, '*§ 129 BGB*' (fn 1407) para 2. On acts required at the Land Register, see Section c.i. below.

1427 For a list of other instances of this form, see Hertel, '*§ 129 BGB*' (fn 1407) para 5.

1428 See Wolf and Neuner (fn 48) 511 para 19. Note that a revocation (*Aufhebung*) need not be in any particular form, see ibid 512 para 22.

applies to agreements of transfers of land and to obligations to purchase land (ibid para 1), even where the sale is by auction.[1429]

iv. *Unterschreiben*(Signing) and *Siegeln* (Sealing)

As was seen in the previous section, § 126 BGB explicitly requires either a personal signature (*eigenhändige Unterschrift*) or a notarially-certified mark (*notariell Beglaubigtes Handzeichen*) for the written form and the *Urkunde*. In contrast, a signature is not required under § 126b BGB.[1430] Similarly, there is not one provision in the BGB that requires the use of a seal (*Siegel*). It is already discernible from this that private persons in Germany nowadays do not use seals in legal transactions, so that the focus in this section is solely on the signature.[1431] Having said this, German public authorities still wield seals, as was pointed out in Section iii.aa) above.

aa) *'Unterschrift'*Defined

Although it is a term often used in German law, there is no statutory definition of a signature (*Unterschrift*, also referred to as a *Signatur*[1432] or a *Namensunterschrift*[1433]) in either the BGB or the HGB, nor in special laws such as the BeurkG. According to the common German definition, a signature is a 'name written holographically at the bottom of a document

1429 This is because the contract concluded by virtue of § 156 BGB is of an obligatory nature and does not affect the disposition by way of conveyance. See on this BGH decision of 24 April 1998 (fn 1097) paras 6, 16.

1430 On this, see Einsele, '*§ 126b BGB*' (fn 1342) para 1, who goes on to note at para 8, however, that a signature can be inserted to satify the requirement that the end of the declaration be discernible ('*Erkennbarkeit des Abschlusses der Erklärung*').

1431 This is true for legal as well as private matters, as the signature took over the seal's function, see Stieldorf (fn 969) 52–53 and 35 respectively. The history of seals in Germany and their use is considered in further detail in Section D.III.2.b. below.

1432 See, eg, the entry for '*Signatur*' in Duden online at www.duden.de.

1433 See, eg, Hertel, '*§ 126 BGB*' (fn 1338) para 2; Wolf and Neuner (fn 48) 515 para 32.

or a text as a sign of one's confirmation, agreement, or similar'.[1434] Even the BGH has defined a signature simply as '*ein Gebilde aus Buchstaben einer üblichen Schrift*' ('a formation of letters of a common font').[1435] Nevertheless, German courts and academics have identified several important characteristics of a signature.

bb) Characteristics of an *Unterschrift*

A range of features have been identified in order to verify the existence of a signature. This is important for distinguishing this sign from mere marks (*Handzeichen*; see below). The first characteristic is that the writing or font must have individual character ('*individuellen Charakter*') and be difficult to forge for third parties.[1436] In addition, it must identify the signatory.[1437] While it need not be legible, so that the name need not be readable, the sign must clearly be made up of characters in the form of a signature.[1438] Similar to the text of an *Urkunde*, the signature need not be in German; it can be in any common language, including foreign characters, but not,

1434 See the entry for '*Unterschrift*' in Duden online at www.duden.de: '[Z]um *Zeichen der Bestätigung, des Einverständnisses o.Ä. eigenhändig unter ein Schriftstück, einen Text geschriebener Name*'.

1435 BGH decision of 4 June 1975, I ZR 114/74, NJW 1975, 1705–1706, para 6. The case concerned the question of whether the signature of a *Rechtsanwalt* (lawyer) on a brief fulfilled the requirements of § 130 no 6 ZPO. The court found that it had. The reasons will be discussed subsequently.

1436 BGH decision of 4 June 1975 (fn 1435) para 6. cf Plewe (fn 1015) 48, stating that the signature must denote the identity of the signing person: '*Mit der Unterschrift muß ein einmaliger, die Identität des Unterschreibenden ausreichend kennzeichnender, individueller Schriftzug vorliegen* […]'. Contrast the position in English law, on which see Section II.3.b.iv.aa) above.

1437 *Bayerischer Verwaltungsgerichtshof* [Bavarian Administrative Court] order of 16 August 1976, 118 VIII/75, NJW 1978, 510–511, para 20 (discussed below). This accords with the signature's function of associating a document with the signing person (in German: '*Zuordnungsfunktion*'), compare Hertel, '*§ 126 BGB*' (fn 1338) para 125. On its other function, namely, the *Abschluss- und Deckungsfunktion* (function of showing closure and coverage of a document), see Hertel, ibid para 126.

1438 BGH decision of 4 June 1975 (fn 1435) para 6. Exceptionally, the signature needs to be legible in particular instances, such as under labour law. On this, see Hertel, '*§ 126 BGB*' (fn 1338) para 147 with further references.

say, in a secret code.[1439] As the term '*Namensunterschrift*' suggests, the signature must consist of a name, namely, of the family name, or, in case of a person acting on behalf of a company, the name of the company; in contrast, a first name only is not sufficient for common people, as opposed to the clergy or royals.[1440] Similarly, a known pseudonym may suffice, while a purely made-up name or a description like 'your wife' will not.[1441]

A signature must be contrasted with a mark (*Handzeichen*). It is a written sign other than one's full name,[1442] such as an abbreviation of one's (family) name,[1443] one's initials,[1444] or even just several Xs.[1445] In contrast with a signature, it need not enable the writer to be identified, nor is it necessary that the same mark be used by the person every time.[1446] Normally, such a mark will not be sufficient, so as not be deemed equivalent to a signature for the written form,[1447] unless it is certified by a notary (see § 126 para 1 BGB).[1448] Similarly, German procedural law, namely, § 416 *Zivilprozessordnung* (German Code of Civil Procedure, 'ZPO') speaks of 'private records and documents [...] signed by the parties issuing them, or have been signed using a mark that has been certified by a notary'.[1449] It seems, therefore, that not only an *Unterschrift* (signature), but also an *Unterzeichnung* (literal-

1439 Accordingly, the *Bayerischer Verwaltungsgerichtshof* held a signature in Arabic characters to be valid for the purposes of German procedural law, see order of 16 August 1976 (fn 1437) para 21. Hertel, '*§ 126 BGB*' (fn 1338) para 136 notes that block letters are admissible besides the cursive writing style, which is more common in Germany for signatures.

1440 See Wolf and Neuner (fn 48) 515 para 32; Hertel, '*§ 126 BGB*' (fn 1338) paras 137–138, 141. Interestingly, the latter notes at para 137 that using just one name of a double family name, or even a maiden name is acceptable.

1441 Hertel, '*§ 126 BGB*' (fn 1338) paras 139–140; Wolf and Neuner (fn 48) 515 para 32.

1442 Compare the entry for '*Handzeichen*' in Duden online at www.duden.de: '[*M*]*it der Hand ausgeführtes Zeichen anstelle des Namenszugs*' ('[A] mark executed by hand in lieu of the name').

1443 Compare BGH decision of 10 July 1997, IX ZR 24-97, NJW 1997, 3380–3381, para 7.

1444 Wolf and Neuner (fn 48) 515 para 32. On the differentiation between a mark or initials and a signature, see Hertel, '*§ 126 BGB*' (fn 1338) paras 143–146.

1445 Hertel, '*§ 126 BGB*' (fn 1338) para 151.

1446 Ibid.

1447 See Wolf and Neuner (fn 48) 515 para 32.

1448 Compare Hertel, '*§ 126 BGB*' (fn 1338) para 150. Details on the certification were provided in Section iii.bb) above.

1449 The original text reads: '*Privaturkunden* [... *d*]*ie von den Ausstellern unterschrieben oder mittels notariell beglaubigten Handzeichens unterzeichnet sind* [...]'

ly 'under-signing'), and therefore a mark (*Handzeichen*) is equally sufficient for this purpose.[1450]

Another requirement of a signature is that the text and the signature be arranged in a way that show the signatory's authorship of the document, or which at least makes the text attributable to them.[1451] Where, in contrast, the sign(ature) concludes the document, so that it is found below the text, this is normally assumed. Where the signature is found in other places, especially before the end of the text, eg, if something is inserted subsequently, this is not necessarily, or, as with the last example, usually not, the case.[1452] No problems arise where the contract is a one-page document that is signed at its bottom. Similarly, where a contract has several pages, one signature at the end of the document suffices if the pages are either connected physically or conceptually ('*gedanklich*'), eg, by consecutive numbering of the pages.[1453] Having said this, as long as a relation can be stablished in terms of its location, it seems that the time sequence of the drafting of the text and signing becomes irrelevant.[1454] As a consequence, what is known as a *Blankounterschrift* (blank signature) or *Blankett* (blank form) is generally admissible, so that a blank paper that is signed first and text is added above subsequently, the content will be attributed to the signatory.[1455]

1450 Compare Schreiber, '*§ 416 ZPO*' (fn 1354) para 4.

1451 Compare ibid.

1452 See generally ibid.

1453 See Emmerich, '*§ 550 BGB*' (fn 1156) para 20, who notes that this is also true for instances of several contracts being concluded but it being intended that these belong together.

1454 Compare Schreiber, '*§ 416 ZPO*' (fn 1354) para 4. Contrast the case of declarations of suretyship (§ 766 BGB): The BGH has held that a suretyship cannot be created with a blanc form, see BGH decision of 29 February 1996 (fn 1303) paras 6 et seq.

1455 See BGH decision of 29 February 1996 (fn 1303) para 17: '*Nach der Rechtsprechung des Bundesgerichtshofes muß in entsprechender Anwendung des § 172 Abs. 2 BGB derjenige, der ein Blankett mit seiner Unterschrift aus der Hand gibt, den durch dessen Ausfüllung geschaffenen Inhalt einem gutgläubigen Dritten gegenüber als seine Erklärung gegen sich gelten lassen, unabhängig davon, ob der vervollständigte Text seinem Willen entspricht oder nicht*' ('According to the jurisprudence of the [BGH], by applying § 172 para 2 BGB analogously, a person who gives a blanc form bearing their signature away must accept the content created by the filling out as being their declaration against third parties in good faith, irrespective of whether the completed text corresponds to their will or not').

cc) The Method of *Unterschreiben*

German private and procedural law also vary in another respect, namely, in whether the signature needs to be '*eigenhändig*' (by one's own hand). While § 126 para 1 BGB clearly states that this is required, the ZPO provision does not contain the word '*eigenhändig*'. This aspect in fact relates to two issues: First, whether the signature can be produced other than by hand, ie, by being copied or printed. Secondly, the question arises whether the signature can only be made by the signing person themselves, or if another person may sign on their behalf. In other words, it relates to agency. Each of these issues will be analysed briefly.

There seems to be no doubt in German academia that a signature under § 126 BGB needs to be written by hand with, say, pen on paper, rather than being printed or otherwise reproduced.[1456] The same is true for a mark (*Handzeichen*).[1457] In contrast, § 127 para 2 and § 550 BGB seem not to require a hand-written signature,[1458] so that a lower standard is set in this respect for contracts put into writing according to the agreement of the parties and for lease agreements. The ZPO is equally liberal: Although academic opinion seems divided on the point, it is generally accepted that a signature under § 416 ZPO need not be written by hand; reproductions of a document, and thus, of a signature, seem to be admissible.[1459]

The ZPO is also more liberal concerning agents used for signing: It is sufficient for the purposes of procedural law if the text of a document is dictated to a third party, who then prints it and either signs it or lets the dictating person sign themselves. Moreover, it is equally sufficient if the

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1456 Hertel, '*§ 126 BGB*' (fn 1338) para 133; Wolf and Neuner (fn 48) 515 para 33. See also Schreiber, '*§ 416 ZPO*' (fn 1354) para 6. Hertel, ibid, notes, however, that being aided in signing by another person is not harmful, if the control of the signing hand is with the signatory and the sign is made with the will of that person. This is also admitted by Wolf and Neuner, ibid para 34, who go on to state that disabled persons may even use their feet or mouth to sign instead of their hand.

1457 Compare Hertel, '*§ 126 BGB*' (fn 1338) para 151.

1458 On § 127 BGB, see BGH decision of 27 May 1957 (fn 1200) 884. See further Jochen Hoffmann and Ulrich Höpfner, *Kündigung per E-Mail im elektronischen Geschäftsverkehr* [Cancellation by E-mail in Electronic Commerce] (2016) 49 Betriebsberater (BB) 2952–2953, who note that a signature is not enough if the transmitted declaration is fixed as a text. On § 550 BGB, see BGH decision of 7 March 2018 (fn 906) paras 18–21. cf Emmerich, '*§ 550 BGB*' (fn 1156) paras 11, 14a.1.

1459 Compare Schreiber, '*§ 416 ZPO*' (fn 1354) para 6.

third party writes the dictating person's name as the document's creator under the text at the other person's direction.[1460] This control by the dictating person is important, as the signatory or, where applicable, their representative (*Vertreter*), must be the person making the declaration.[1461] It seems that this is not possible under the BGB, neither for a mark nor for a signature made in accordance with § 126 BGB;[1462] however, an agent may sign with their own name or the name of the principal on behalf of the declaring person.[1463]

In the case of notarial authentications (*notarielle Beurkundungen*), explained in the previous section, the situation is clear: According to § 13 para 1 BeurkG, the parties must sign the notarial instrument by hand ('*muß* […] *eigenhändig unterschrieben werden*'). Where this has been done, a legal fiction assumes that the instrument was either read out to the parties, or, where it was checked by them, acknowledged by the parties (ibid). This fiction of acknowledgement or consent can also be found in other parts of German law. Thus, under German civil procedural law for example, it is generally assumed that a declaration made in a document footed by an authentic signature expresses the intention of the signatory.[1464] The requirements of an authentication further include the signature of the person doing the authentication, this usually being the notary, and that the pages of the document be bound with a cord that is fixed with a seal impression of the authenticating party.[1465]

1460 Ibid para 5. See also BGH decision of 27 May 1957 (fn 1200) 884.

1461 See Schreiber, '*§ 416 ZPO*' (fn 1354) paras 5, 4.

1462 Hertel, '*§ 126 BGB*' (fn 1338) paras 151 and 109 notes that the mark or signature must be '*eigenhändig*' (by hand).

1463 Ibid paras 148, 149. See also Wolf and Neuner (fn 48) 515 para 33. Whether the agent is authorised to do so is a separate issue, and therefore does not affect the question of form: Hertel, ibid para 148a.

1464 In the BGH decision of 29 February 1996 (fn 1303) para 14, the court stated that this presumption is contained in § 440 para 2 ZPO (*Beweis der Echtheit von Privaturkunden*; Evidence of the authenticity of private records and documents). See also Klaus Schreiber, *§ 440 Beweis der Echtheit von Privaturkunden* [Section 440 Evidence of the Authenticity of Private Records and Documents], in: Krüger and Rauscher (fn 1347) para 5.

1465 See Schreiber, '*§ 415 ZPO*' (fn 1347) para 21. In effect, these requirements are therefore the same as under the BGB, see Hertel, '*§ 126 BGB*' (fn 1338) para 125.

v. Electronic Communication: Data, Documents and Signatures

Advances in technology have gradually changed the way in which legal transactions have been concluded. In particular, there seems to be a growth in what is termed 'electronic legal transactions' (*elektronischer Rechtsverkehr*; the term 'e-commerce' is also used often[1466]). This growth is not limited to transactions between contracting parties; endeavours have also been made in Germany in recent years to facilitate electronic communication with public institutions or facilities such as the courts and public registers.[1467] It can therefore be expected that the volume of electronic transactions will rise further in future.

The increase in business opportunities and the facilitation of commerce notwithstanding, e-commerce brings with it certain risks, in particular

1466 See, eg, Heydn (fn 1343) 222.

1467 This has been expressed legislatively in two laws: On the one hand, the *Gesetz zur Förderung des elektronischen Rechtsverkehrs mit den Gerichten* [Act to Facilitate Legal Transactions with Courts] of 10 October 2013, BGBl 2013 I 3786. For a concise account of this law and its effects, see Hanseatische Rechtsanwaltskammer Hamburg, *Aktuelles zum elektronischen Rechtsverkehr beim Finanzgericht* [Latest News on Electronic Legal Transactions with the Finance Court] (Kammerreport No 4 2014, available at ww.rak-hamburg.de/f/100d606ffd.pdf) 12–14. On the other hand, the *Gesetz zur Einführung des elektronischen Rechtsverkehrs und der elektronischen Akte im Grundbuchverfahren sowie zur Änderung weiterer grundbuch-, register- und kostenrechtlicher Vorschriften* [Act to Introduce Electronic Legal Transactions and Electronic Records in Land Register Procedures as well as to Change Other [Related] Rules] of 11 August 2009, BGBl 2009 I 2713, introduced the possibility of, *inter alia*, electronic petitions and submissions to the land register, see art 1 para 1 no 19 of that Law. Further specifications were later laid down in regulations, particularly the *Verordnung über die technischen Rahmenbedingungen des elektronischen Rechtsverkehrs und über das besondere elektronische Behördenpostfach* [Ordinance on the Technical Conditions of Electronic Legal Tranasctions and the Special Electronic Mailbox of Authorities] of 24 November 2017, BGBl 2017 I 3803. Beside these endeavours, requirements of the written form in over 180 pieces of legislation and regulations of German administrative law were recently deleted or substituted for requirements of an electronic form by virtue of the *Gesetz zum Abbau verzichtbarer Anordnungen der Schriftform im Verwaltungsrecht des Bundes* [Law to Reduce Dispensable Requirements of the Written Form in Federal Administrative Law] of 29 March 2017, BGBl 2017 I 626. For a description of the aims of this law, see Bundesrat, *Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zum Abbau verzichtbarer Anordnungen der Schriftform im Verwaltungsrecht des Bundes* [Draft Law of the Government: Draft of a Law to Reduce Dispensable Requirements of the Written Form in Federal Administrative Law], Drucksache [printed matter] 491/16, 02 September 2016.

regarding the identity or the identification of the parties and the security of information.[1468] The following exposition will consider electronic forms of contracts, in particular electronic documents and electronic signatures. This examination will begin with the meaning of electronic contracts and electronic declarations of intention (in Section aa)), and then turn to the form as regulated in § 126a BGB and electronic signatures (in bb)).[1469]

aa) 'Electronic Contract' and 'Electronic Declarations of Intention' Defined

The BGB simply defines an electronic contract (*Vertrag im elektronischen Geschäftsverkehr*, literally 'contract in electronic commerce') in § 312i para 1 BGB as a contract that is concluded through the use of tele-media services (*Telemedienste*). According to the definition in § 1 para 1 *Telemediengesetz* (Tele-media Law, hereinafter 'TMG')[1470], 'tele-media' means electronic information- and communication services ('*elektronische Informations- und Kommunikationsdienste*'). Tele-media services are thus said to include the use of the internet, telebanking, and online databases allowing the ordering of goods or services.[1471] In contrast, the term does not encompass services using older (outdated) technologies such as telegram or telex.[1472] While the provision only refers to tele-media services, it seems that another kind of service relevant in e-commerce, *Mediensdienste* (media-services), is included as well, since the regulation of tele- and media-services seems to be so similar as to make no difference in practice.[1473] Consequently, teleshopping also seems to fall within this category.[1474] As

1468 For further details, see Laborde (fn 1366) 21–25.

1469 Electronic communication methods such as e-mail have already been considered in relation to the declarations of offer and acceptance in Sections 3.a.ii. and iii. above respectively.

1470 Law of 26 February 2007, BGBl 2007 I 179.

1471 See Wolf and Neuner (fn 48) 431 para 58 (note that the authors refer to § 312g, the former § 312i BGB; on the history of the provision, see Christiane C Wendehorst, *§ 312i* [Section 312i], in: Säcker and others (fn 158) Vol 2 para 2).

1472 Heydn (fn 1343) 227.

1473 See on this ibid 224, 221–222. Indeed, the provision explicitly referred to both kinds of services until 2012 and it has been suggested that while the wording was changed, no alteration in the scope of its application was intended, compare Wendehorst, '*§ 312i BGB*' (fn 1471) para 2.

1474 Compare Wolf and Neuner (fn 48) 431 paras 58, 57.

the provision does not make reference to particular kinds of persons, such as consumers, all kind of users of tele-media seem to be within the scope of the regulation.[1475]

In terms of general requirements for electronic contracts, the same rules as to analogue contracts apply.[1476] Thus, a contract that is made in electronic form arises through the agreement of the parties by way of offer and acceptance as regulated in §§ 145 BGB et seq, unless the parties have stipulated otherwise.[1477] As such, the basis of electronic contracts is still a congruency of declarations of intention; the difference being that here, these are electronic rather than oral or in writing.[1478]

It seems that the parties are not completely free in making deviating provisions. While § 312i para 2 BGB allows contracting parties to stipulate something that departs from the obligations contained in § 312i para 1 BGB, this is only true if no consumers are involved. Thus, seeing as the provision speaks of a trader and a customer (*Unternehmer* and *Kunde* respectively), the provision will apply to B2C and B2B, but not to C2C contracts.[1479] Having said this, the provision is not applicable in any case where 'personal communication' ('*individuelle Kommunikation*') is used exclusively for the conclusion process (§ 312i para 2 BGB), such as e-mail.[1480]

Where declarations of intention are transmitted through electronic communication devices, such as e-mail, one question is whether an addressee ought to expect a declaration to be sent by such means, and, in anticipating this, ought to have devices available to receive or otherwise handle such electronic declarations. This issue arises in relation to both the electronic and the text form of the BGB; however, it seems that it is sufficient that the declaration be sent in the required form.[1481] A caveat is that the declaration's receipt must not be impossible, so that sending a declaration to a non-existent e-mail address does not meet the requirements.[1482] In terms of fulfilling a formality, the moment of sending is important; where-

1475 Compare Heydn (fn 1343) 228, who states that the application of the TMG extends to legal and natural persons.
1476 Busche, '*Vor § 145 BGB*' (fn 158) para 37. See also Wolf and Neuner (fn 48) 431 para 57.
1477 See, eg, BGH Decision of 16 October 2012 (fn 1110) para 13.
1478 Compare Heydn (fn 1343) 230, stating that declarations of intention 'can be in any form, such as over the internet.'
1479 See Wolf and Neuner (fn 48) 432 para 59.
1480 See ibid 431 para 58.
1481 See Einsele, '*§ 126b BGB*' (fn 1342) para 12.
1482 Compare ibid.

as a declaration's general effectiveness, as seen in Section a. above, depends on its receipt. These two points must therefore be distinguished, which is also important because an addressee can waive receipt of a declaration made in a specific form but cannot do so for its dispatch.[1483]

bb) Electronic Form and Electronic Signatures

Section 126a BGB regulates the electronic form (*Elektronische Form*) of documents. It provides:

> (1) If the electronic form is to replace the written form prescribed by statute, the issuer of the declaration must add his name to it and provide the electronic document with a qualified electronic signature.
> (2) In the case of a contract, the parties must each provide a counterpart with an electronic signature as described in subsection (1).[1484]

Paragraph 1 makes it clear that the electronic form can generally act as a substitute for the standard written form. This rule is excluded in particular instances, such as in §§ 766, 780, 781, and 623 BGB for declarations of suretyships, promises to fulfil an obligation, acknowledgements of a debt, and terminations of employment contracts respectively.[1485] At least the first three examples mentioned should nevertheless be possible if the declaring person is a merchant, as § 350 HGB explicitly denies the application of the BGB provisions for these cases.[1486]

Where the parties mutually agree[1487] on using the electronic form (allowed implicitly under § 127 para 1 BGB), § 127 para 3 BGB lowers the

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1483 Ibid.

1484 The original provision states: '(1) *Soll die gesetzlich vorgeschriebene schriftliche Form durch die elektronische Form ersetzt werden, so muss der Aussteller der Erklärung dieser seinen Namen hinzufügen und das elektronische Dokument mit einer qualifizierten elektronischen Signatur versehen*.
(2) *Bei einem Vertrag müssen die Parteien jeweils ein gleichlautendes Dokument in der in Absatz 1 bezeichneten Weise elektronisch signieren*.'

1485 The reason lies in the function of the provisions in question. On this, see Wolf and Neuner (fn 48) 510 para 11, who go on to explain that the inhibition threshold (*Hemmschwelle*) to contract is perceived to be lower with electronic forms than with documents that are signed by hand.

1486 See Section b.ii.cc) above, where this issue has already been discussed.

1487 The decision cannot be one-sided: It is necessary that the addressee at least implicitly agrees on using the electronic form, see FormAnpG Draft Law (fn 1342) 41. Such agreement is deemed to have been given either where the

standard for the electronic signature: Generally, the signature need not satisfy the requirements of § 126a BGB; however, a signature that does meet those requirements may be requested by the parties subsequently. Nevertheless, it seems that where a party asks for an electronic signature in accordance with § 126a BGB, this request only has declaratory but not constitutive character.[1488] Consequently, if the request is not fulfilled, the contract will remain effective.

In laying down the requirements of form, the provision differentiates between electronic declarations of intention in general and contracts in particular. The former must contain two elements: first, an electronic document; and second, the declaring person's (being the 'issuer', '*Aussteller*')[1489] electronic signature (§ 126a para 1 BGB). The same is true for contracts executed in electronic form; the only difference being that each party must electronically sign a contract document (para 2). While an exact definition is not given, it is clear that the document must include the declaring person's name (para 1), consist of the whole declaration, and be capable of being saved in a way that allows a perpetual and legible reproduction.[1490] One suggested definition is more specific, as it states that

> [a]n electronic document is a declaration that is embodied by technical means but is not fixed in writing, that can be made comprehensible generally, or at least to the persons privy to the document in question, that it shows the document's creator (declaring person) and that it be intended as proof of a legally relevant fact.[1491]

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addressee does not reject the declaration and treats it as being valid, or where the transaction process is electronic, compare Wolf and Neuner (fn 48) 516 para 38.

1488 Wolf and Neuner (fn 48) 525 para 87.

1489 See Dorothee Einsele, *§ 126a Elektronische Form* [Section 126a Electronic Form], in: Säcker and others (fn 158) para 5, who goes on to discuss the question of an agent or other third party in paras 5, 21.

1490 See Wolf and Neuner (fn 48) 516 para 39, using the term '*dauerhaft lesbare Wiedergabe*'. See also Einsele, '*§ 126a BGB*' (fn 1489) para 3, noting that a 'continuous possibility to reproduce' ('*dauerhafte Wiedergabemöglichkeit*') the declaration is necessary in order for the form to fulfil its function as proof.

1491 Bettendorf (fn 1256) 278: '*Ein elektronisches Dokument ist eine mit einem technischen Mittel verkörperte, jedoch nicht schriftlich niedergelegte Erklärung, die allgemein oder für Eingeweihte verständlich gemacht werden kann, den Aussteller (Erklärenden) erkennen lässt und die zum Beweis einer rechtlich erheblichen Tatsache bestimmt ist*.'

This definition clarifies that a written fixation is not required. In addition, it implies that the declaration is composed of electronic data that is not comprehensible on its own, ie, without using technical equipment.[1492] This seems to be in line with a definition found in EU law, namely, that '"electronic document" means any content stored in electronic form, in particular text or sound, visual or audiovisual recording'.[1493] Under these circumstances, the fact that the declaration need not be visible for a long stretch of time is not surprising.[1494] Thus, it is sufficient that the declaration can be read on a screen, or be saved on a hard disk or other medium.[1495] Note that the rule concerning documentary unit (*Dokumenteinheit*) of written instruments apply.[1496]

As § 126a BGB mentions the declaring person's name *and* a signature, it can be deduced that the former need not be in the form of the latter, so that the name may be written as normal text.[1497] Consequently, the name does not need to appear at the end of the declaration, but may be stated somewhere within or even above the end of the text.[1498] The function of completing the declaration (termed '*Abschlussfunktion*' in German) is fulfilled by the electronic signature instead.[1499] In this respect, the BGB has left open what a 'qualified' electronic signature is. This issue now seems

1492 Compare the explicit description by Einsele, '*§ 126a BGB*' (fn 1489) para 3. See also FormAnpG Draft Law (fn 1342) 25; Wolf and Neuner (fn 48) 516 para 39.

1493 Article 3 para 35 eIDAS Regulation 2014. This Regulation was transposed into German law by virtue of the *Gesetz zur Durchführung der Verordnung (EU) Nr. 910/2014 des Europäischen Parlaments und des Rates vom 23. Juli 2014 über elektronische Identifizierung und Vertrauensdienste für elektronische Transaktionen im Binnenmarkt und zur Aufhebung der Richtlinie 1999/93/EG (eIDAS-Durchführungsgesetz)* [Law to Implement Regulation No 910/2014 of the European Parliament and of the Council (EU) of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (eIDAS-Implementation Law)] of 18 July 2017, BGBl 2017 I 2745.

1494 Compare Einsele, '*§ 126a BGB*' (fn 1489) para 3.

1495 Ibid; FormAnpG Draft Law (fn 1342) 19.

1496 See Wolf and Neuner (fn 48) 516 para 39.

1497 Compare ibid, who puts this down to the function of the statement of the name, namely, as an identification tool, rather than as an authentication mechanism.

1498 See Einsele, '*§ 126a BGB*' (fn 1489) para 6.

1499 Ibid.

to be governed by the eIDAS Regulation 2014, discussed in II.3.b.v.bb) above.[1500]

The common requirements for advanced and qualified electronic signatures under art 26 of the Regulation compare to those of standard signatures under German law: First, the electronic signature must be 'uniquely linked to', and — very much like a hand-written signature — identify the signatory (art 26 points a and b). Furthermore, similar to an *Urkunde*, the electronic signature must be 'linked to the data signed therewith in such a way that any subsequent change in the data is detectable' (point d). Finally, the creation device used for the signature must be under the sole control of the signatory (point c). While the first two conditions relate to the identity of the signing person and its authentication, the latter two aspects relate to security. This is important, as the manipulation or faulty transmission of electronic documents is easier or more likely to happen than with paper documents.[1501] A properly executed qualified electronic signature has the same legal effect as a hand-written signature (art 25 para 2 eIDAS Regulation 2014). Likewise, the Regulation gives protection to the other variations of electronic signatures by foreseeing that

> [a]n electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.[1502]

In this way, EU law has created a minimum level of protection for electronic signatures, which is in line with the objective of enhancing trust in e-commerce (recital 2).[1503]

1500 Matthias Frohn and Vladimir Primaczenko, *§ 126a Elektronische Form* [Section 126a Electronic Form], in: Johannes Hager and others, *beck-online.GROSSKOMMENTAR: BGB* [beck-online.Comprehensive Commentary: German Civil Code] (online edn, CH Beck 2018) para 1.

1501 On this and other weak points of electronic documents, including identity fraud (*Identitätstäuschung*), see Bettendorf (fn 1349) 278–279.

1502 Article 25 para 1 eIDAS Regulation 2014.

1503 This objective is realised further through another mechanism, namely, of ensuring mutual recognition by EU Member States of electronic signatures and electronic identification schemes, see art 25 para 3 and art 6 para 1 of the Regulation respectively.

vi. Legal Consequences of Non-Fulfilment and Healing Methods

The BGB foresees various consequences that occur if the stipulated form requirements are not met. By default, this will be voidness of the transaction (see Section aa) below); however, there are, exceptionally, other consequences that apply (Section bb)). Beside the kind of consequence, an important consideration is to what extent the form requirements operate (Section cc)), and, where a consequence applies, if the imperfection can be healed or otherwise avoided (Section dd)).

aa) General Consequence of Non-Fulfilment: Voidness

In cases where a particular form is foreseen by statute and the prescribed requirements are not fulfilled, the contract will normally be *nichtig* (void; § 125 BGB), so that the contract will not display effects.[1504] As was intimated above, this rule is mandatory and may not be deviated from through individual arrangement by the parties; what is more, the courts must consider this issue *ex officio*, without either of the parties having to raise the question.[1505]

Where the parties agree on a particular form, the contract must generally be executed in that form before it will come into effect (see § 125 BGB).[1506] In particular, § 154 para 2 BGB prescribes that the contract in the case of a notarial authentication (*notarialle Beurkundung*) being foreseen will not arise 'until the recording has taken place'.[1507] Seeing as the provision is an interpretation tool (*Auslegungsregel*), it will not apply

1504 See Hertel, '*§ 125 BGB*' (fn 1294) para 1. Use is apparently made of this drastic legal consequence in order to better enforce the form requirements, see Köbl (fn 1294) 209.

1505 See Wolf and Neuner (fn 48) 520 para 57. Under the principle of good faith, the voidness of a contract may — under very limited circumstances — not be claimed. See ibid 521–523 paras 63 et seq.

1506 Hertel, '*§ 125 BGB*' (fn 1294) para 2.

1507 Cf the original text, which reads: '*Ist eine Beurkundung des beabsichtigten Vertrags verabredet worden, so ist im Zweifel der Vertrag nicht geschlossen, bis die Beurkundung erfolgt ist*.' The provision is said to be applicable to written and electronic recordings (*schriftliche Beurkundung* and *elektronische Form*) as well, as it explicitly mentions a '*Beurkundung*', see Wolf and Neuner (fn 48) 437 para 11.

if an intention of the parties to the contrary can be discerned.[1508] This can be deduced from the phrasing of the provision, which contains the words '*im Zweifel*' (in doubt): These words indicate that non-effectiveness is not the necessary consequence; this will only be the case if the parties' intention does not indicate otherwise.[1509] Similarly, § 125 and § 127 BGB also contain 'in doubt'-clauses for formalities stipulated by the parties, so that the provisions only apply if the parties' intention is not clear and a contract is not necessarily ineffective even if the form stipulated by the parties is not fulfilled.[1510]

These provisions presume that the parties did not intend for a mutually agreed form to be constitutive (*konsitutiv*).[1511] Moreover, unless indications of a contrary intention exist, the parties will be deemed to have stipulated the form by which they chose to execute the contract.[1512] This conforms with the general principle that a form requirement is met where a declaration of intention is made in the prescribed manner.[1513] By applying this principle, the parties' belief that the contract is valid is upheld. This is equally true where the parties have executed the contract, which is accomplished by presuming that, firstly, the parties abandoned the stipulated form, and, secondly, that the contract was subsequently confirmed (*bestätigt*) by the parties in accordance with § 141 BGB.[1514]

1508 On this issue, see BGH decision of 29 September 1999, XII ZR 313/98, NJW 2000, 354–359, para 52. The case concerned a commercial lease agreement, which, according to the claimant, was void for non-fulfilment of the mandatory form. The court held that the parties had stipulated a form, but that, in any case, the statutory requirements had been met, so that the contract was valid. See paras 49–53 of the decision.

1509 See on this Wolf and Neuner (fn 48) 524 para 81.

1510 See Busche, '*Vor § 145 BGB*' (fn 158) para 29.

1511 Wolf and Neuner (fn 48) 524 para 81.

1512 See BGH decision of 29 September 1999 (fn 1508) para 52.

1513 Einsele, '*§ 126b BGB*' (fn 1342) para 4 notes that where the declaration is one that needs to be received, it must of course also be received by the addressee in order to become effective.

1514 See Wolf and Neuner (fn 48) 524 para 82.

bb) Exceptional Instances of Other Consequences

The sanction contained in § 125 BGB is heavily perforated by exceptions.[1515] Thus, the different functions of the form in question as discussed above may influence the stringency of the legal consequence of a breach of form: A prerequisite aimed at protecting or warning a party will, if not fulfilled, usually lead to the purported transaction being wholly void; whereas a less strict or even no legal consequence may arise for forms with other functions.[1516] One prominent example is a lease for a period of more than one year not in writing. Under § 550 BGB, a mandatory provision,[1517] the lease will be deemed to be concluded for an unlimited period that may not be cancelled within the first year after its conclusion. This relatively mild consequence may be explained by the function of the provision, which is said to be to warn and caution on the one hand, but, on the other hand, to ensure furthermore that the agreement be sufficiently documented so that a subsequent purchaser of the real estate may be able to have knowledge of the agreement.[1518]

cc) Extent of Operation of Form Requirements and their Consequences

One problem that arises in relation to form requirements is whether these apply to the whole legal transaction or only to certain parts. This becomes particularly relevant where two or more legal transactions are combined, whereby one of the acts may be governed by form requirements while the

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1515 Köbl (fn 1294) 217. There is also the principle of good faith, which sometimes demands that an *a priori* void transaction be upheld so that a claim for performance (*Erfüllungsanspruch*) may arise. On this, see ibid 218.

1516 Compare in this respect BAG decision of 17 December 2009 (fn 1142) paras 24–25, in which it was held that § 623 BGB (*Schriftform der Kündigung* [*von Arbeitsverhältnissen*]; Written form of termination [of employment]) was applicable to preliminary contracts concerning the termination of employment, because the provision's form requirement (written form) fulfilled a cautioning function. As this form had not been met, the preliminary agreement was held to be void. Compare also the exposition by Mann (fn 1302) 22 on a sale of real estate. The requirement's function may also affect the kind of alternative form that is available. Thus, as already mentioned in Section v.bb) above, the electronic form is explicitly excluded in some instances of a written form being required.

1517 See, eg, BGH decision of 27 September 2017 (fn 1157) para 35.

1518 Ibid paras 35–36, 29.

other is not.[1519] An example is the combination of the sale of a piece of land with a lease. In such situations, the question of whether the form governs only one or both parts seems to hinge on whether the transactions are one-sidedly or mutually dependent on the other transaction(s).[1520]

The important factor is whether the agreements form a '*rechtliche Einheit*' (legal unit),[1521] which is assumed where the parties' intention indicates that the agreements were meant to 'stand and fall' together ('*miteinander "stehen und fallen" sollen*').[1522] Thus, it is the parties' intention at the time of entering into the legal transaction that is of importance and not a later point in time.[1523] This question seems to require a case-by-case examination of the parties' intention; however, a presumption that two transactions do not form a unit arises where the transactions are laid down in separate documents.[1524] One party's unarticulated intention to connect

1519 See Mertens (fn 1300) 431. See generally Maier-Reimer (fn 1302) 3741–3745. It seems that the formless transaction does not become governed by form requirements; rather, a form must be respected in such cases due to the formless transaction's connection to another transaction that underlies some form, compare Maier-Reimer (fn 1302) 3743.

1520 See Maier-Reimer (fn 1302) 3741. A related issue, which will not be explored further in this dissertation, is the question of what forms part of the transaction and what constitutes mere *Nebenabreden* (ancillary agreements, sometimes also referred to as *Nebenvereinbarungen*). Where the latter are part of the main contract, any form requirements pertinent for the contract will apply to any ancillary agreements as well; whereas, otherwise, including the case that the arrangement is of no (legal) consequence, the form requirements do not automatically apply. On this, see Wolf and Neuner (fn 48) 512 para 21.

1521 The term '*verbundene Rechtsgeschäfte*' is also sometimes used, see, eg, Roth (fn 1079) para 37.

1522 See, eg, BGH decision of 6 December 1979, VII ZR 313/78, BGHZ 76, 43–50 para 20. The case concerned a construction contract (*Bauwerkvertrag*), which, like other contracts for work and labour (*Werkverträge*; Contract to Produce a Work; §§ 631–651 BGB), is not governed by form. It was alleged that the contract was void for not having been authenticated by a notary (*notariell beurkundet*). This was argued to be necessary, because the contract apparently also contained an obligation of the defendant to purchase a piece of land on which the building was to be constructed. Due to this connection to real estate, the contract ought to be governed by what was then § 313 (today § 311b para 1) BGB. The court held that no such obligation had arisen form the work contract, so that it did not require a notarial recording in order to be effective. See paras 1, 8, 10–12, 20–22 of the decision.

1523 See BGH order of 12 September 2011, IV ZR 38/09, NJW 2012, 296–301, para 58.

1524 See BGH decision of 6 December 1979 (fn 1522) paras 21–22. For a discussion of the issues arising from this approach, see Mertens (fn 1300) 431–432.

the legal transactions is not sufficient; the will must have been expressed in some way and at least acquiesced by the other(s).[1525] If no express intention has been articulated, the apparent intention is examined by considering external signs, such as whether the transactions are contained in a single or several separate documents.[1526] Finally, if no intention exists, the meaning of the transactions is assessed objectively in order to decide if a unit exists.[1527]

Intention of a legal unit means that the transactions are meant to be mutually dependent.[1528] If one part of this unit, ie, one transaction, is governed by some form, this must logically be true for the other part as well.[1529] As a consequence, if one part does not meet the requirements, all parts will be void. Using the example of a unit consisting of a sale of land and a lease, the whole transaction must be authenticated by a notary (*notariell beurkundet*), and, failing that, § 311b para 1 BGB will apply to both parts,[1530] rendering them void in conjunction with § 125 BGB. This test of a legal unit is applicable to other instances in which a notarial authentication is required; however, if only one party is meant to be protected, such as with declarations of suretyship, promises of gifts, or consumer contracts, ancillary agreements benefitting the protected party do not fall under the form requirement of the main agreement.[1531]

Where only one transaction is dependent on the other, it does not follow that the transaction is equally subjected to the form of the other or vice versa. Rather, it depends on whether the dependent or the independent transaction is bound by a form. The situation of a formless transaction (eg, a lease) depending on a form-bound transaction (eg, a sale of land) is simple: the formal transaction must meet the form required for it, whereas the formless one is not bound by the requirement, even though its effectiveness depends on the effectiveness of the formal transaction.[1532] Thus, the form requirement of one transaction does not extend to the other. As a consequence, the formless transaction will not be invalid if not

1525 See Maier-Reimer (fn 1302) 3742.
1526 See Roth (fn 1079) paras 40–41. See ibid paras 42–59 for further discussion.
1527 See ibid para 38.
1528 See Maier-Reimer (fn 1302) 3742.
1529 See ibid 3743.
1530 Roth (fn 1079) para 31.
1531 For further details, see Mertens (fn 1300) 432.
1532 Compare Maier-Reimer (fn 1302) 3743.

made in the form of the formal transaction.[1533] Conversely, where a form-bound transaction is dependent on a formless transaction, but the second transaction is not made in the form required for the first transaction, the former will be void even if it meets the form requirements, while the latter will be effective,[1534] since it is formless.

Apart from such units or dependent transactions, distinctions also need to be drawn between other arrangements which are not the main contract: Preliminary contracts (*Vorverträge*), but not LOI, usually need to fulfil the same form requirements as the main contract.[1535] This is due to their nature: while the former is deemed to be binding if an obligation to conclude the main contract arises, the latter, just like other similar sounding documents, eg, a memorandum of understanding, are used during negotiations as tools to fix the status quo of the discussions.[1536] Similarly, power of attorneys for such transactions require notarial authentication.[1537]

In cases of several transactions being joined as one contract and where that contract seems only partially invalid due to inobservance of a form requirement in one part, § 139 BGB (*Teilnichtigkeit*; Partial invalidity; see Section a. above) may apply, as a consequence of which the whole contract will become ineffective.[1538] It provides that where related transactions are seen as one and the parts are not meant to 'fall together', the whole transaction is void, whereas only the non-conforming part will be void

1533 See ibid. cf Roth (fn 1079) para 31, stating that the latter does not require to be made in any form but does not mention the consequences.

1534 Maier-Reimer (fn 1302) 3743.

1535 Wolf and Neuner (fn 48) 512 para 22. Preliminary agreements only need to be made in the same form as the main contract where the function of the form requirement is to caution, not where it is for documentary purposes or otherwise, as the purpose can still be realised if the main contract is made in that form. See on this Mertens (fn 1300) 436.

1536 See Mertens (fn 1300) 436.

1537 See BGH decision of 29 February 1996 (fn 1303) para 11.

1538 This is the majority view in academic opinion (*herrschende Lehre*), see Roth (fn 1079) para 31. On this application, see Roth, ibid. See further Wolf and Neuner (fn 48) 520 para 57, who go on to state at para 58 that there are only a limited number of exceptions to this principle, eg, § 550 BGB (*Form des Mietvertrags*; Form of the lease agreement). Cf Maier-Reimer (fn 1302) 3744–3745, who is critical of using this provision when there is a contract and a *Nebenabrede* and argues that § 140 BGB (*Umdeutung*; Re-interpretation) ought to be applied instead of § 139. Accordingly, the part fulfilling the form requirement would be valid, if the parties would have entered into the agreement without the void part, see ibid.

if 'it is to be assumed that [the remaining transaction] would have been undertaken even without the void part'.[1539]

dd) Healing and Other Ways of Avoiding the Consequences of Non-fulfilment

There is, in some circumstances of voidness, a possibility to heal the imperfection, namely, where the contract's bindingness is ensured through some means other than the required form.[1540] In relation to declarations of suretyship, § 766 BGB foresees that a lack of form will be healed by 'the surety discharg[ing] the main obligation' ('*Soweit der Bürge die Hauptverbindlichkeit erfüllt* […]'). Similarly, effecting a gift will 'cure' the defect in form (§ 518 para 2 BGB). By analogy to these exceptions, the conclusion of a main contract (*Hauptvertrag*) is said to save a preliminary agreement (*Vorvertrag*) that did not fulfil some form requirement.[1541] In cases of a signature being certified (see Section iii.bb) above), but where the notary's seal was not used, the notary's subsequent sealing of the document can heal the defect.[1542] Furthermore, it has been held by German courts that registration of a fact can heal certain defects in the observation of formalities foreseen for the contract in question.[1543] Similarly, § 311b para 1 BGB foresees that a contract for the sale of land not made in the form of a notarial authentication 'becomes valid with all its contents if a declaration of conveyance and registration in the Land Register are effected'.[1544]

1539 The original provision says: '*wenn* [...] *anzunehmen ist, dass es auch ohne den nichtigen Teil vorgenommen sein würde*.'

1540 Wolf and Neuner (fn 48) 519 para 56 and 520 para 59. cf Köbl (fn 1294) 217, who adds the caveat that the causal transaction (*Kausalgeschäft*) must have been fulfilled.

1541 See Köbl (fn 1294) 217.

1542 Hertel, '*§ 129 BGB*' (fn 1407) para 101.

1543 See, eg, BGH decision of 17 October 2017, KZR 24/15, paras 15, 34, 27–30, in which the defects in the form of an increase in capital of a German limited company (*Gesellschaft mit beschränkter Haftung*, GmbH) and those in an acquisition through shares were held to have been healed through the registration of the former in the German Commercial Register (*Handelsregister*).

1544 The original provision reads: '*Ein ohne Beachtung dieser Form geschlossener Vertrag wird seinem ganzen Inhalt nach gültig, wenn die Auflassung und die Eintragung in das Grundbuch erfolgen*'. The declaration of conveyance (*Auflassung*) in accordance with § 925 para 1 BGB involves the buyer and seller of the land in question declaring their agreement to the transfer of ownership before a

While these statutory curing methods exist, the parties are not free to stipulate their own healing clauses. In practice, what are termed *Schriftformheilungsklauseln* (literally 'written form healing clauses') are often used and oblige the parties to do everything necessary to ensure that a written form that has not been met be fulfilled.[1545] It has been held by the BGH that such clauses are not admissible in relation to § 550 BGB, as the provision on leases contains a mandatory regulation foreseeing a particular consequence if the prescribed form is not met.[1546] Thus, it seems that where German law foresees a legal consequence deviating from the general rule contained in § 127 BGB, the parties' *Schriftformheilungsklausel* will not be effective. Arguably, this should equally apply to instances in which the law foresees other healing mechanisms, such as performance of the transaction (see above).

Where healing is achieved, the legal transaction will usually display its effects *ex nunc*, ie, from the time of healing.[1547] Furthermore, the parties may have foreseen a severability clause in their standard terms, which may provide that the contract be valid despite an agreed form requirement not having been met.[1548] Under exceptional circumstances, the principle of good faith demands that a contract be upheld despite the required formalities not having been fulfilled.[1549]

The problem of non-fulfilment of a form can be avoided altogether, as it is possible to use a form which is seen to be on a higher level than the form that is required.[1550] This has been expressly provided for in § 126 paras 3 and 4 BGB, which stipulate that the written form may be replaced by the electronic form or a notarial authentication respectively. Logically, while no corresponding provision is found for the text form, it should nevertheless be possible to replace this form with any other form, seeing as it is said to be the lowest level of form.[1551]

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notary in the other party's presence (ibid). Although this declaration is made before a notary, just like the authentication procedure, the two are distinct acts. See Köbl (fn 1294) 209.

1545 See, eg, BGH decision of 27 September 2017 (fn 1157) para 27.

1546 See ibid paras 28–29, 36–37, 39.

1547 See Wolf and Neuner (fn 48) 520 para 59. See also Hertel, '*§ 129 BGB*' (fn 1407) para 101.

1548 Compare Roth (fn 1079) para 22.

1549 See on this briefly, eg, BGH decision of 24 April 1998 (fn 1097) para 18.

1550 Wolf and Neuner (fn 48) 101 para 39, 508 para 1.

1551 See Einsele, '*§ 126b BGB*' (fn 1342) para 10; FormAnpG Draft Law (fn 1342) 20.

c. Other Requirements under German Law

As has been stated above, German law requires acts beyond a mere agreement between the parties to effect a change of ownership in particular cases, whereby these prerequisites do not count as form requirements.[1552] Two types will be considered briefly. First, the delivery of the object and registration of title (Section aa) below). Secondly, another act that will be considered is the handing over of *Draufgabe* (earnest), but which is not constitutive for contracts (Section bb)).

i. Delivery and Registration of Property

Certain acts are required under German property law beyond an agreement in rem (*dingliche Einigung*; with immovable property known as '*Auflassung*')[1553] between the parties in order to effect the transfer of ownership of both movable and immovable property.[1554] The kind of act that is necessary depends on whether the object is movable or immovable: The former is regulated in § 929 BGB; whereas the latter is governed by § 873 and § 925 BGB.[1555]

While movable property must generally be delivered to the purchaser to effect a transfer of property (§ 929 BGB, *Einigung und Übergabe*; Agreement and Delivery), the parties can substitute physical delivery by an agreement that gives the buyer 'indirect possession' ('*mittelbarer Besitz*',

1552 See Köbl (fn 1294) 209. cf Wolf and Neuner (fn 48) 312 para 4, who speak of 'acts of execution'. Similarly, Singer (fn 1058) para 5 speaks more generally of further requirements to legal transactions.

1553 See Gaier (fn 1068) para 7. It seems that the etymological origin of the word relates to a ritual that used to be practiced in former times: The former owner of a house would perform certain acts, such as opening (in German: *aufmachen* or *öffnen*) doors and windows, before leaving the house. Thus, the owner would leave the house open (in German: '*offen*' or '*auf lassen*'). Another person would then enter the house and close all openings, thus becoming the new owner. On this ritual, see Plewe (fn 1015) 1; Köbl (fn 1294) 216.

1554 The underlying reasons for these further requirements are transparency of law (*Rechtsklarheit*) on the one hand and legal certainty (*Verkehrsschutz*) on the other, see Ernst (fn 832) para 22. cf Wolf and Neuner (fn 48) 226 para 53, who speak of registration being a publication method (*Publizitätsmittel*).

1555 See Wacke (fn 1071) 255.

§ 930 BGB).[1556] The law on immovable property is more complex: Ownership over land must be registered in order to be effective (see § 873 para 1 BGB).[1557] Thus, it could be said that a contract concerning land is not complete once the contract is formed, but when the registration of the new ownership is made. Having said this, once the *Auflassung* to real estate has been made and is binding under § 873 para 2 BGB, and either an application for the registration of the transfer of ownership has been made, or a *Vormerkung* (priority notice) has been registered in favour of the buyer, the seller cannot stop ownership from passing, as this will occur automatically *ipso iure* once the registration of the ownership change is effected.[1558] When a right concerning real estate has been entered into the register, a legal presumption assumes that the entry is correct and, consequently, that the beneficiary is duly entitled to it (§ 891 para 1 BGB). This promotes legal certainty in favour of the beneficiary.

ii. *Draufgabe*(Earnest)

Similar to the ALR, the BGB contains provisions designed to strengthen a contract. These relate to *Draufgabe* (earnest) in §§ 336–338 BGB on the one hand and *Vertragsstrafe* (contractual penalty) in §§ 339 et seq BGB on the other. Only the former will be considered in this dissertation.[1559] The first provision on *Draufgabe*, § 336 BGB (*Auslegung der Draufgabe*; Interpretation of earnest) provides:

1556 This legal fiction is known as *Besitzkonstitut* (constructive delivery). For further details on this, see ibid 259–260.

1557 See Wolf and Neuner (fn 48) 313 para 7, discussing registration as a requirement for effectiveness.

1558 For further details, including the buyer's right of an *Anwartsschaftsrecht* (expectant right), see ibid 224–225 paras 46–47.

1559 Readers interested in the regulation of contractual penalties in German law are referred to, eg, Manfred Löwisch, *Vorbemerkungen zu §§ 339 ff* [Preliminary Remarks on §§ 339 et seq], in: von Staudinger and others (fn 140; 2015), and subsequent entries in ibid.

> (1) Where something is given as an earnest when a contract is entered into, this is deemed to be a sign that the contract has been entered into.
> (2) The earnest is not deemed, in case of doubt, to be forfeit money.[1560]

Both parts of this norm have a clarification purpose. Paragraph 1 clarifies the default function of *Draufgabe* as proof of a concluded contract, whereby para 2 foresees that whatever is handed over as earnest money is not automatically deemed as a vehicle to end the contract by either the giver forfeiting it or by the receiver returning it (or, say, double its amount), as had been standard practice in the *alte Reich*.[1561] Thus, where earnest is given, this creates a legal presumption that a contract has been concluded.[1562] Due to this symbolic function, *Draufgabe* has been referred to as a *Perfektionszeichen* (sign of perfection), as contrasted with a *Perfektionsform* (form for perfection).[1563] Indeed, it seems that *Draufgabe* is of little to no importance in current legal practice, since the symbolism embodied in the gesture is no longer required today.[1564]

Despite its title, the provision does not address the question of what may constitute *Draufgabe*. Rather, it is merely a statutory interpretation rule (*Auslegungsregel*).[1565] The words '*etwas als Draufgabe gegeben*' ('something is given as an earnest') of § 336 para 1 BGB have been interpreted to mean that any movable object that is corporeal is acceptable, eg, money, or even a glass of wine.[1566] In particular where money is given, *Draufgabe* must be distinguished from an *Anzahlung* (down payment): while both are a way to reinforce the formation of a contract, the latter constitutes partial

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1560 The original provision states: '(1) *Wird bei der Eingehung eines Vertrags etwas als Draufgabe gegeben, so gilt dies als Zeichen des Abschlusses des Vertrags*.
(2) *Die Draufgabe gilt im Zweifel nicht als Reugeld*.'

1561 See Section 2.a.iii.ee) above. This notion is very different from the English doctrine of consideration, on which see Section II.3.a.v. above.

1562 This presumption is rebuttable by virtue of § 292 ZPO (*Gesetzliche Vermutungen*; Legal presumptions). See Manfred Löwisch, *§ 336 Auslegung der Draufgabe* [Section 336 Interpretation of Earnest], in: von Staudinger and others (fn 140; 2015) para 1.

1563 See Gastreich (fn 942) 7.

1564 Indeed, this argument is used when criticising the fact that its provisions have been maintained when the BGB was reformed. Compare, eg, Löwisch (fn 1562) paras 4, 2. On the former use of *Draufgabe*, namely, as a substitute for performance in real contracts, see Section 2.a.iii.ee) above.

1565 See Löwisch (fn 1562) para 1.

1566 Ibid para 5.

performance, which the former does not,[1567] although it can be 'credited against the performance owed by the giver of the earnest' (§ 337 para 1 BGB). In accordance with § 337 para 2 BGB, *Draufgabe* must be returned if the contract is terminated; however, the receiver may keep it where the termination is due to the giver (§ 338 BGB). Note that something that is given as earnest will only be deemed thus if the contract to which it relates comes into force. Conversely, if the contract is void *ab initio* and never comes into effect, the given object has no contract to relate to and thus cannot be earnest in the sense of §§ 336 et seq BGB.[1568]

d. Current Legal Practice in Germany

Several legal practices exist in Germany that are of interest for the discussion of contract formation in this dissertation. It is often said that the aim for German lawyers in drafting contracts is to provide a framework for their clients that will enable them to have a well-functioning, often mid- or even long-term, relationship.[1569] As such, care ought to be taken to ensure as much legal security as possible by means of the contract.[1570] This does not entail that current legal practice is synonymous with contemporary legal regulation. Making use of statutory freedoms in arranging contractual relationships is of course one important part. Such freedom is provided

1567 See ibid para 7. See also Section 2.a.iii.ee) above.

1568 See OLG Köln decision of 27 April 1971, 15 U 126/70, NJW 1971, 1367–1369 paras 16 and 14, in which the court stated that *Handgeld* (money that is sometimes paid by soccer clubs to players with whom they wish to enter into a contract) might count as *Draufgabe* in the sense of § 336 BGB. It held that the provisions on this legal figure did not apply where the contract was void *ab initio*, but only where a contract was rescinded after coming into effect. In this case, the contract negotiated between the claimant (soccer club) and the defendant (a potential new player of the claimant) was found to be void, since it had been agreed on the suspending condition (*aufschiebende Bedingung*) that the player's transfer from his current team be approved by the soccer association having jurisdiction in the applicable regional league. As this did not in fact occur, there was no contract and therefore no legal reason ('*Rechtsgrund*') for the payment. Accordingly, the court allowed the claimant's claim of the money under § 812 BGB (*Herausgabeanspruch*; Claim for restitution) due to unjust enrichment. See paras 1–3, 13–14 of the decision.

1569 Compare, eg, Gerrit Langenfeld, *Vorwort* [Preface], in: Sebastian Herrler (ed), *Münchener Vertragshandbuch Band 5: Bürgerliches Recht 1* [Munich Handbook on Contracts Vol 5: Civil Law 1] (Beck 2013) VI.

1570 Compare Langenfeld (fn 1569) VI–VII.

principally by dispositive norms. In this sense, it is perhaps not surprising that the use of pre-formulated forms and standard terms (*allgemeine Geschäftsbedingungen*, AGB) is widespread in Germany.[1571] These standard terms, as well as the different duties to inform consumers or provide documentation of a contract lead to long contract documents.[1572] Furthermore, the regulation of these topics and of anti-discrimination is being critically discussed as a limitation of private autonomy.[1573] Beyond the adherence to statutory requirements and voluntary regulation within the given statutory framework, some customary practices have been maintained despite having been deregulated, such as the handshake marking the conclusion of an agreement.[1574] Conversely, there are former legal practices, such as *Draufgabe* (earnest), which, despite still being regulated, have gone out of fashion.[1575]

One important topic of late is related to digitalisation, namely, 'Legal Tech'.[1576] It concerns the role of law and of legal practitioners in a world becoming increasingly run by automatic or otherwise digital processes, such as smart contracts, so that the law, or rather tools to wield it, become digitalised.[1577] In this sense, the question is whether the practice of using individually pre-drafted clauses to 'build' contracts will in future be performed not by legal practitioners, but by any (lay)person through the use of contract generators (*Vertragsgeneratoren*), ie, collections of contract clauses that can be selected individually.[1578] In contrast to this complete digitalisation, or rather, automatisation, the electronic contract form found in § 126a BGB has not caught on in all areas, such as with lease contracts

1571 Compare Busche, '*Vor § 145 BGB*' (fn 158) para 36.
1572 On these duties, see Section b.ii.cc) above.
1573 This topic goes beyond the scope of this dissertation. An excellent account of the discussion with further references are given by, eg, Karl Riesenhuber, *Privatautonomie – ohne irrationale Schwärmerei* [Private Autonomy – without Irrational Passion] (2019) Special Issue 14 ZJapanR / JJapanL 3–25.
1574 Compare Köbl (fn 1294) 220.
1575 This was discussed in Section c.ii. above.
1576 The following discussion draws from the work by Stephan Breidenbach and Florian Glatz (eds), *Rechtshandbuch Legal Tech* [Handbook on Legal Tech] (CH Beck 2018).
1577 Compare Stephan Breidenbach and Florian Glatz, *Vorwort der Herausgeber* [Foreword by the Editors], in: ibid (fn 1576) V, and ibid, *Einführung* [Introduction], in: ibid 2 para 7.
1578 Compare Breidenbach and Glatz, '*Einführung*' (fn 1577) 2 para 7.

(*Mietverträge*).[1579] The reason seems to be the strict requirements imposed on the electronic signature.[1580]

Another recent concern in German legal practice in relation to international contracts is the as yet unknown consequence of the exit of the UK from the EU (often simply referred to as 'Brexit').[1581] It is difficult, if not impossible, to foresee how the legal landscape will develop from the time of the UK's exit. Two popular alternatives are the continuation of the legal status quo on the one hand, versus a complete non-application of all EU law on the other. Due to this legal insecurity, German practitioners advise to regulate many aspects explicitly in the contract, especially terminology and rights of termination.[1582] This may lead to longer contractual documents being drafted, which would mark a change in the established approach of concise phrasing and little if any inclusion of definitions in contracts, as reliance has traditionally been placed on statutory definitions or (German) interpretation rules.

4. Summary of Results

Modern German contract law has evolved from a mixture of customs, a German common law (*gemeines Recht*), and several eighteenth-century codifications, out of which the *Allgemeines Landrecht für die Preußischen Staaten* (General State Laws of the Prussian States) was discussed above. This Code in particular seems to be connected to the modern German Civil Code, the BGB, which was created at the end of the nineteenth century and is still the most important source for the rules on contract formation under German law.

Already in the eighteenth century, the modern basis of German contract theory, namely, the doctrine of a *Rechtsgeschäft* (juridical act) that is made up of and created by *Willenserklärungen* (declarations of intention) had emerged. Today, a contract is still analysed in terms of offer (*Angebot* or

1579 See Emmerich, '*§ 550 BGB*' (fn 1156) para 17.

1580 See Wolf and Neuner (fn 48) 516 para 37. See further Section b.v.bb) above.

1581 On this event, see Section I.2.a.iv. above. On the German reaction, see, eg, Thomas M Grupp, *Vertragsgestaltung in Zeiten von Brexit* [Contract Drafting in Times of Brexit] (2017) NJW 2065, on which the following paragraph is based. The article discusses various aspects that may be affected, such as choice of law clauses or considerations of competition law, which will not be discussed here.

1582 See, eg, Grupp (fn 1581) 2067, 2070. cf the predictions made by English legal academics, discussed in Section I.2.a.iv. above.

Antrag) and acceptance (*Annahme*). Both of these declarations are treated the same in their requirements. First, they must be certain and coincide in their content. Secondly, in order to become effective, the declaration must reach their addressee (*Zugang*). Before this occurs, they may be revoked (*widerrufen*), but become irrevocable thereafter. There are exceptions for offers, such as where the offeror has reserved themselves the right to withdraw the offer. In this way, the rules are simpler than under English law, where not only the rules on the effectiveness of declarations of intention are more diverse, but also because it has the requirement of consideration.

German private law, in contrast, does not foresee such a sign of earnestness as a constitutive element for concluding consensual contracts. In fact, although a concept vaguely similar to consideration and known as *Draufgabe* exists, it is no longer used in legal practice. Having said this, German law foresees a range of mandatory forms for contracts. These span a simple *Textform* to notarial deeds (*notarielle Urkunden*), a special document that is created in a highly formal procedure called a *Beurkundung* (authentication). Moreover, in a transaction involving immovable property, the transfer of property can only be effected by registering the change in ownership in the *Grundbuch* (land register). Having said this, everyday contracts, such as sales, can generally be concluded without adhering to any particular form, unless the parties have agreed on one.