E. Results of the Comparative Analysis Contrasted and Final Conclusions

This section is dedicated to synthesising the results of the comparative analysis. It goes a step further, however, by first juxtaposing the findings from the previous section against two legal dimensions: On the international level, the provisions on the formation of contract contained in the United Nations Convention on Contracts for the International Sale of Goods ('CISG') are compared (Section I). On the supra-national level, the remarkable endeavours by various parties to create a European legal contractual framework in the form of the Common European Sales Law ('CESL'), the Draft Common Frame of Reference for European Contract Law ('DCFR'), and the Principles of European Contract Law ('PECL') will be contrasted (Section II.). These juxtapositions will allow final conclusions to be made on the points of similarity and difference existing in the three domestic laws (Section III.).

I. Results of the Comparative Analysis Juxtaposed with the International Perspective: The CISG

The United Nations Convention on Contracts for the International Sale of Goods ('CISG') was adopted by eleven countries in Vienna in 1980.[2700] Since then, the number of parties to the treaty has increased to a total of 91 as of August 2019,[2701] including Germany and Japan, but not the

2700 For details on the historical development of the CISG, see the Introduction of the CISG Explanatory Note (fn 162) paras 1–5. A succinct account of the production of the CISG's rules on contract formation is given by Mortem M Fogt, *Contract Formation under the CISG: The Need for a Reform*, in: Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (CUP 2014) 179, 197–199. See further Franco Ferrari and Clayton P Gillette, *Introduction*, in: ibid (eds), *International Sales Law Vol 1* (Edward Elgar Publishing, 2017) xiii. See also the commentary on the CISG's drafting by Hubner (fn 109) 414–416.

2701 The status of the convention can be found online at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-10&chapter=10&clang=_en.

UK.[2702] This number alone indicates the CISG's potential importance in international trade of goods.[2703] After a brief note on the Treaty's sphere of application (Section 1.), the rules on the formation of contract will be given attention (Section 2.). The content of these provisions will be contrasted directly with the comparative results from Section D.

1. The Sphere of Application of the CISG: International Sale of Goods

As its name indicates, the CISG applies to international contracts for the sale of goods. 'International' necessitates that the 'place of business' of the parties be in different countries; which must, moreover, be Contracting States of the Convention (see arts 1 para a, 100 para 2 CISG).[2704] 'Sale of

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2702 The (non-)accession of this convention was discussed already for earch country in Sections B.I.2.b.v., C.I.2.d., and B.I.2.a.v. above respectively.

2703 It has been remarked that the Treaty is theoretically applicable to 'up to two thirds of' all such trade, see Stefan Kröll and Loukas Mistelis and Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary* (2nd online edn, CH Beck 2018) foreword. cf Ingeborg Schwenzer, *Introduction*, in: Peter Schlechtriem and ibid (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP 2016) 1, giving a figure of over 80%. Indeed, it seems that the CISG — in contrast to the ULFC — has been accepted in the Contracting States, compare on this Schwenzer, ibid 6. On the Convention's success, see further Peter H Schlechtriem, *25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts*, re-printed in: Ferrari and Gillette (fn 2700) 44–64, who notes that the treaty has influenced other inter- and transnational projects (see Section III. below), EU law, and even domestic law. Indeed, Schwenzer, ibid 10 notes that the CISG has influenced reforms of the German and Japanese law of obligations. For an overview of the latter, see Takashi Kubota, *Sankō: Saiken-hō kaisei tei'an to CISG no sōi* [Reference: The Differences Between the Proposal for the Reform of the Law of Obligations and the CISG], in: Sugiura and ibid (fn 1639) 16, 18–21.

2704 A clarification of the term 'place of business' is found in art 10 CISG. Having said that the countries need to be Contracting States, art 1 para b provides that the CISG can also be applicable if the conflict of law rules of a country — arguably not necessarily a Contracting State, compare Ingeborg Schwenzer and Pascal Hachem, *Part I. Sphere of Application*, in: Schlechtriem and Schwenzer (fn 2703) on art 1 at 29 para 3 — 'lead to the law of a Contracting State'. See CISG Explanatory Note (fn 162) para 7, where it is also stated that the Convention may apply, furthermore, where the parties choose to make it the law applicable to their contract. Readers interested in the issue of private international law are referred to Franco Ferrari, *PIL and CISG: Friend or Foes?*,

goods' is interpreted to mean 'reciprocal contracts directed at the exchange of goods against the "price"', so that the CISG governs sales by sample or by instalments but probably not barters.[2705] Nevertheless, service contracts are not wholly excluded from the Treaty: In accordance with art 3 CISG, contracts for the 'supply of goods to be manufactured or produced' are deemed to be sales agreements, as long as the manufacturer supplies the necessary materials, or at least the majority part; similarly, the seller's obligations may include service or labour and the transaction will still be qualified as a sale, unless these obligations make up 'the preponderant part'.[2706] Thus, a contract may involve, say, the carriage of goods and nevertheless be deemed as a sale.[2707] Even where a contract is for an international sale, the treaty is not always automatically applicable, however, as its operation is restricted in a number of circumstances.

On the one hand, the CISG limits its sphere of application by excluding particular matters (see arts 2–5). Of particular interest to the discussion in this dissertation is the fact that particular kinds of transactions are excluded: sales by auction[2708], purchases for 'personal use', or where the sale is of commercial instruments, company shares, ships and aircraft, among others (see art 2 CISG).[2709] As a consequence, consumer contracts will usually not

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re-printed in: ibid and Clayton P Gillette (eds), *International Sales Law Vol 1* (Edward Elgar Publishing, 2017) 113–175.

2705 See Schwenzer and Hachem (fn 2704) on art 1 at 30 paras 8–9. On barter, compare ibid 31–32 para 11, where it is argued that barter should fall within the Convention's scope. cf Loukas Mistelis, *CISG Art 1*, in: Kröll and Mistelis and Viscasillas (fn 2703) para 25, speaking of 'money' being paid in exchange for goods and rejecting barter as within the CISG's scope in para 30, but allowing instalment sales in para 26.

2706 For a discussion of the meaning of these provisions, see Schwenzer and Hachem (fn 2704) on art 3 at 61–72 paras e et seq, pointing out that the term 'substantial' is interpreted by taking into account the volume, value, and importance of the materials for the end- product, whereas 'preponderant' is deemed to mean more than 50% of the economic value of the contract.

2707 See Schwenzer and Hachem (fn 2704) on art 1 at 30 para 9. For further kinds of agreements that are not covered by the treaty, see Mistelis (fn 2705) paras 32–35.

2708 It ought to be noted that auctions conducted online are said to be *within* the CISG's scope, see Ulrich G Schroeter, *Part II: Formation of the Contract*, in: Schlechtriem and Schwenzer (fn 2703) in the introductory remarks at 223, 251 para 54. See also Schwenzer and Hachem (fn 2704) on art 2 at 55 para 21.

2709 See Henry Mather, *Choice of Law for International Sales Issues not Resolved by the CISG*, re-printed in: Franco Ferrari and Clayton P Gillette (eds), *International Sales Law Vol 1* (Edward Elgar Publishing, 2017) 362. The simple explanation given in the CISG Explanatory Note (fn 162) para 10 for these exclusions

be governed by this convention, but by domestic law.[2710] Apart from this exclusion, the sale transactions need not necessarily be of a commercial nature; they can be 'civil', ie, private, as long as consumers are not involved and the intended purpose of the goods is for business use.[2711]

This leads to the question of the interpretation of the term 'goods', as no explicit definition is given in the CISG. While the Convention apparently does not define goods in terms of movable and immovable, or tangible and intangible objects, there is no dispute between commentators that tangible goods are within the treaty's scope.[2712] These need to be movable, but can be new or used, alive or inanimate.[2713] Thus, livestock, pharmaceuticals, and cultural items are all goods within the meaning of the CISG.[2714] Conversely, the Convention does not apply to immovable or real property.[2715] Furthermore, sales of incorporeal objects, including intellectual property, know-how, rights, and businesses or companies, would not be a sale of goods for the purpose of the CISG.[2716]

One recent issue in this regard is software. While not contemplated by the Convention, it has been suggested that contracts for digital goods, such as software, ought to fall within the scope of the CISG.[2717] In summary, the arguments put forward were that the meaning of 'goods' under the CISG can encompass incorporeal things like software, although it is

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is that sale contracts on these objects are often 'governed by special rules reflecting their special nature'.

2710 On the possibility of the CISG being applicable in relation to consumers, see Ferrari, '*PIL and CISG*' (fn 2704) 133–134. Schwenzer (fn 2703) 5 notes the reason for this exclusion to be that consumer law is not dispositive but mandatory law.

2711 See Schwenzer and Hachem (fn 2704) on art 1 at 29 para 6, 45–46 paras 47–48, and on art 2 at 48–49 para 4. See also Mistelis (fn 2705) paras 15–16.

2712 See, eg, Mistelis (fn 2705) paras 36, 26; Schwenzer and Hachem (fn 2704) on art 1 at 33–34 para 16.

2713 On moveability, see Schwenzer and Hachem (fn 2704) on art 1 at 34 para 17. On the latter aspects, see Mistelis (fn 2705) para 37.

2714 Schwenzer and Hachem (fn 2704) on art 1 at 33–34 para 16.

2715 Mistelis (fn 2705) para 39.

2716 For further discussion, see Mistelis (fn 2705) paras 38–39, 41 and Schwenzer and Hachem (fn 2704) on art 1 at 35–36 paras 19–22.

2717 See, eg, Mirjam Eggen, *Digitale Inhalte unter dem CISG: Eine Rundschau über Herausforderungen und mögliche Lösungen* [Digital Contents under the CISG: An Overview of the Challenges and Possible Solutions] (2017) Internationales Handelsrecht (IHR) 229–237. Supporting: Schwenzer and Hachem (fn 2704) on art 1 at 34 para 18; Saidov and Green (fn 111). More reserved: Mistelis (fn 2705) para 40.

uncertain whether the same is true for digital copies of music, videos, or texts.[2718] Consequently, contracts concerning software ought to be governed by the CISG, provided that the contract is an exchange of money and such digital goods.[2719] This result is the same under German law: While academic opinion is divided on whether software can be classified as a *Sache* (thing), sales law is nevertheless applied to contracts over it.[2720] In contrast, it seems that a physical device (carrier) is required for software under Japanese and English law, as data or software by itself is not considered to be a thing capable of being the object of rights and thus to constitute goods.[2721]

On the other hand, the CISG's function is restricted because the Convention allows the parties to exclude its application, or to stipulate provisions deviating from its rules (see art 6 CISG). While this gives the parties freedom in contracting,[2722] it also means that the CISG may not be applied even where a contract is an international sale of goods. This principle of derogability is shared with Japanese, German, and English private law: Apart from mandatory rules concerning consumers or form, the basic provisions on the formation of contracts can be replaced by stipulations agreed between the parties.[2723]

2718 See Eggen (fn 2717) 230–231, who notes that individually-created software might also be outside the CISG's scope, as the agreement may constitute a work contract (see subsequent fn).

2719 This poses a problem with software that is created individually rather then being mass-produced, as the contract in such cases will be deemed to be a work contract (*Werkvertrag*), rather than one of sale of goods. See on this Eggen (fn 2717) 231–233, who goes on to considers whether cryptocurrency, like Bitcoin, can be accepted as payment under the CISG and concludes that it can, see ibid 235–236. cf Schwenzer and Hachem (fn 2704) on art 3 at 62 para 3, according to whom a 'sale of standard and customized software' are to be treated in the same way.

2720 See Section B.III.3.b.i. above.

2721 On Japanese law, see Section C.IV.1.b.i. above. On English law, see Section B.II.3.b.i. above.

2722 See CISG Explanatory Note (fn 162) para 12, indicating how the CISG's provisions may be derogated from. See also Fogt (fn 2700) 199, stating party autonomy to be one of the CISG's principles.

2723 On the dispositiveness of the domestic legal provisions, see Sections C.IV.1., B.III.2.b., and B.II.3. above respectively.

Taken together, these exceptions mean that the CISG does not contain a comprehensive regulation of sale of goods contracts.[2724] Rather, it is a Convention that regulates selected aspects of a particular kind of international contract. Nevertheless, the convention's rules on the formation of such sale contracts are of great comparative interest and important for this work.

2. The Formation of Contract under the CISG: Offer and Acceptance, no Form

The CISG does not contain a definition of the term 'contract'; however, the notion that is presupposed is of a bi- or multilateral agreement.[2725] The Convention adopts the offer-and-acceptance model as its contract conclusion mechanism, just like the contract laws of England, Germany, and Japan.[2726] Consequently, an international contract for the sale of goods under the CISG is usually formed once an offer has been accepted. In contrast to English, German, and Japanese law, this principle is explicit in art 23 CISG, which determines the exact point in time of the contract's conclusion as that of the declaration of acceptance becoming effective.[2727] Nevertheless, the offer-and-acceptance model is not the only way in which contracts may be concluded. An agreement between the parties is deemed sufficient, so that the elements of offer and acceptance need not always be identifiable.[2728] Accordingly, an exchange of correspondence or other

2724 See Ferrari, '*PIL and CISG*' (fn 2704) 151. Fogt (fn 2700) 199, 201–202 rightly describes the rules as fragmented and advocates a reform of the scope of these rules to decrease 'uncertainty and national discrepancies'.

2725 Compare Sono (fn 1640) 2, speaking of 'contract' (*keiyaku*, 契約) as agreement (*gōi*, 合意) between the parties.

2726 See Section D.II. above. On Japanese law, see also Sono (fn 1640) 10; Yasutomo Sugiura, *Dai-2-bu keiyaku no seiritsu* [Part II Formation of Contracts], in: ibid and Kubota (fn 1639) 60.

2727 See also CISG Explanatory Note (fn 162) para 17. Schroeter (fn 2708) on art 18 at 341 para 22 states the contract to be 'perfected only when acceptance' is made effectively. After the reform of the Japanese law of obligations has come into force, an explicit provision of this principle will also be found in Japanese law. See on this Section C.V.3.b. above.

2728 See Ferrari and Gillette (fn 2700) xvii. According to Fogt (fn 2700) 187, a consensus between the parties is required, ie, 'a common intention to contract' on the same terms.

forms of negotiations can lead to a contract being concluded under the CISG, as long as the contract's basic terms are discernible.[2729]

The preceding arts 14–22 CISG set out the rules concerning the declarations of offer and acceptance and their effectiveness. These matters will be considered in the subsequent sections. First, the definition of an offer and the distinction between offers and invitations to make an offer will be explored in Section a. This is followed by a description of the element of acceptance in Section b. The third section (c.) will consider the issue of when declarations of offer and acceptance come into effect and how they may lose their effectiveness, before the question of form is addressed in Section d.

a. Offers

The regulation of the declaration of an offer is found in arts 14–17 CISG and largely corresponds to the provisions under English, German, and Japanese law. This is true for the definition of offers and the distinction with non-binding statements (see Section i. below), as well as its requirements (Section ii.).

2729 On this, see Schroeter (fn 2708) in the introductory remarks at 240–241 paras 32–34, 248 para 49. For examples of other mechanisms, see ibid 247 paras 47–48. On the basic contract terms, see the subsequent section (a.). In *Hanwha Corporation v Cedar Petrochemicals Inc*, decision of the Southern District Court of New York on 18 January 2011, 09 Civ 10559 (available online at http://cisgw3.law.pace.edu/cases/110118u1.html), the parties concluded contracts in a 'two-step process'. In the first step, the plaintiff submitted a 'bid' for a specific quantity of a named product at a given price. If this was acceptable to the defendant, a 'firm bid' was formed, ie, an agreement on the goods, price, and quantity. In a second step, signed contract documents 'set[ting] forth the entire agreement' would be provided by the defendant to the plaintiff, which the latter would either counter-sign and thus accept, modify and sign, or not sign. The court found no contract to have been concluded since the parties did not agree on the terms of the contract, namely, the choice of law clause, in the second step of their contracting process. Another contracting process is the ordering (*Order*) by the German purchaser and the order confirmation (*Auftragsbestätigung*) by the Danish seller, see OLG Dresden decision of 30 November 2010, 10 U 0269/10, Internationales Handelsrecht (IHR) 2011, 142–145, available online at www.cisg-online.ch/content/api/cisg/display.cfm?test=2183, para 1. This case will be discussed further below.

i. 'Offer' Defined and Distinction from Invitations to Make an Offer

Like the domestic laws investigated in this dissertation, the CISG differs between statements that lead to a contract being concluded and non-binding statements. An offer is defined in art 14 para 1 CISG as

> [a] proposal for concluding a contract addressed to one or more specific persons […] if it is sufficiently definite and indicates the intention of the offeror to be bound.

The term 'offer' need not be used; other denominations, including 'invoice' or 'letter of confirmation', are admissible.[2730] This definition and the required elements are therefore the same as under Japanese, German, and English law.[2731]

One basic point on which the CISG differs from the three domestic laws is on whether the offeree(s) must be specific. Under the Convention, a proposal that is not directed at specific persons but is addressed to the world at large will constitute an 'invitation to make an offer' by default, unless the proposal indicates the offeror's intention to be bound (compare art 14 para 2 CISG). The dividing line between specific and nonspecific persons can be a fine one: It seems that where the offeror 'has a clear idea of the persons addressed', a statement made to a group of persons as a whole may be deemed to be an offer.[2732] In other words, the addressee(s) need to be ascertainable at least.[2733] The offeror's intention to be bound is apparently assumed where the statement contains phrases such as 'while stocks last' or where a time frame for a response is set.[2734]

The situation is not necessarily the same in the three contract laws discussed earlier in this dissertation: these principally allow offers to be directed at the world at large; however, it is required that the statement

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2730 Schroeter (fn 2708) on art 14 at 269 para 2. On the commercial letter of confirmation or similarly denominated letters as an offer, see further ibid in the introductory remarks at 242–243 paras 36, 39. In this sense, the plaintiff's 'bid' in *Hanwha v Cedar* (fn 2729) could have been an offer, as it specified the goods, the quantity, and the price; however, as the court pointed out, the plaintiff lacked the required intention to be bound, as it was customary for the parties to follow up their negotiations by documenting their contract. See fn 2729 above.

2731 For a synthesis of the definition of offers, see Section D.II.1. above.

2732 Franco Ferrari, *CISG Article 14*, in: Kröll and Mistelis and Viscasillas (fn 2703) para 8.

2733 Schroeter (fn 2708) on art 14 at 271 para 4.

2734 Ibid on art 14 at 287 para 32.

be made with the intention to be bound for it to be an offer and not an invitation to treat.[2735] It might be argued that the requirement is essentially the same and that it is simply phrased differently: the CISG makes invitations to treat to an indefinite number of persons the default rule,[2736] and thus favours an interpretation as an *invitatio*, while Japanese, German, and English law proceed from the stand point that statements to the world *can* be offers. Having said this, the CISG's provisions do allow an offer to be addressed to one or several persons that are specified (see art 14 para 1), which is the same under the three domestic laws. Indeed, the cases that are seen as mere invitations to make an offer are the same under the three domestic laws and the Convention: Advertisements (in newspapers, per e-mail, online, on tv or radio), including prospectuses, catalogues, and price lists all count as invitations to treat.[2737] In the end, the practical difference seems to be a small one.

Beside invitations to make an offer, other non-binding statements such as those made in negotiations, enquiries, or by giving information, must be contrasted with offers under the CISG regime and English, German, and Japanese law, whereby the latter need to be differentiated based on whether the statement maker has an intention to be bound.[2738] This aspect is considered below.

ii. Requirements of Offers: Certainty of Terms and Intention

In terms of the degree of certainty that is required under the CISG, an offer must contain the basic terms of the agreement, so that acceptance brings about the contract, just like under English, German, and Japanese contract law.[2739] This means that at least the goods and a mechanism to

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2735 See Section D.II.1. and ibid a. above.

2736 See Giulio Giannini, *The Formation of the Contract in the UN Convention on the International Sale of Goods: A Comparative Analysis*, in: Ferrari and Gillette (fn 2700) 16, 19, stating that a statement will be an *invitation* 'in case of doubt'.

2737 On the CISG, see Ferrari, '*CISG Article 14*' (fn 2732) para 8. Compare Schroeter (fn 2708) on art 14 at 284–285 paras 29–30 and 286–287 paras 32–33, who notes that such statements can amount to offers in certain circumstances. On the three domestic laws, see Section D.II.1.a.ii. above.

2738 On the three domestic laws, see Section D.II.1.a. above. On the CISG, see Fogt (fn 2700) 194.

2739 See Schroeter (fn 2708) on art 14 at 270 para 3. In the OLG Dresden decision of 30 November 2010 (fn 2729) para 37, the purchaser's e-mail called 'order' contained details on the goods, their quantity, size, the price, and a binding

determine the price and quantity must be stipulated (art 14 para 1 CISG). Accordingly, the exact quantity need not be specified, but can be left open and be determined by either party at a later stage.[2740] Similarly, the goods can be determined by their species; or generically if the nature and type is included.[2741] Consequently, it is sufficient if particular details of goods that are customised for the purchaser are left to be determined later.[2742] Other contract terms, even the names of the parties, are not essential and need not be included, as the CISG makes default provisions for the parties' obligations.[2743]

In terms of the intention to be bound by the offer, it first ought to be noted that this intention is not related to the offer's (ir)revocability (on which, see Section c. below).[2744] The intention need not be stated explicitly; phrases evidencing such an intention, like, for instance, 'while stocks last' or where a deadline for accepting the offer is set, are sufficient.[2745] In contrast, phrases such as 'non-binding' or 'subject to contract' can show that there is no intention to be bound.[2746] It can be generally stated that the likelihood of an intention to be bound being found is higher the more definite an offer is in the sense of meeting the CISG's requirements of containing the contract's terms and specific addressee(s).[2747] Having said

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date for delivery and was therefore deemed to be an offer within the meaning of the CISG by the court. On the domestic laws, see Section D.II.1.b. above. The insertion of a requirement of certainty into the *Minpō* had been proposed under the Japanese law reform, but this has been rejected. On this, see Sugiura, '*Dai-2-bu*' (fn 2726) on art 14 at 65. See also Section C.V.3.b. above.

2740 See Fogt (fn 2700) 193.

2741 Ibid 191–192.

2742 See Schroeter (fn 2708) on art 14 at 270 para 3, giving several examples.

2743 On this, see Ferrari, '*CISG Article 14*' (fn 2732) paras 17, 20. For further discussion of the required indication of the price and the goods, see ibid paras 21–36. On the determinability of the minimum terms, see also Schroeter (fn 2708) on art 14 at 272 et seq. cf Fogt (fn 2700) 188, 189, who states that art 14 para 1 CISG implicitly requires the identity of the parties to 'be evident in the offer', but does not deem this an essential term. Other terms, such as the time of performance, may of course be of essence in a particular situation, in which case the offer has to contain these terms as well, see Giannini (fn 2736) 20. See also Schroeter, ibid 271 para 5.

2744 Schroeter (fn 2708) on art 14 at 282 para 25.

2745 For further discussion, see Ferrari, '*CISG Article 14*' (fn 2732) para 8.

2746 See Ferrari, ibid para 14. Schroeter (fn 2708) on art 14 at 283 para 27 notes that such 'proposals' are deemed to be mere invitations to make an offer.

2747 See Ferrari, '*CISG Article 14*' (fn 2732) para 12.

this, LOI or other similar kinds of business letters are generally treated as being non-binding.[2748] This is the same in the three domestic laws.[2749]

b. Acceptance

The declaration of acceptance is regulated in arts 18–22 CISG. More differences come to light in this respect between the Convention and the three domestic laws. While this does not apply to the definition of acceptance and its distinction from non-binding acts and statements (Section i.), nor to its method (Section ii.), it is true for the requirement of congruency between offer and acceptance (Section iii.).

i. 'Acceptance' Defined; Distinction from Other Acts and Statements

The definition of a declaration of acceptance is found in art 18 para 1 CISG. Both an express statement to the offeror, or some 'other conduct of the offeree indicating assent', such as the offeree fulfilling their obligation (shipping of goods or payment of price, etc) is sufficient.[2750] Another instance of 'other conduct' might be the offeree writing their initials or signing the document containing the offer.[2751]

Acceptance is contrasted with statements that do not lead to the conclusion of a contract, such as mere confirmations of having received an offer, or clarification requests.[2752] Responses to offers that contain 'reservations […] regarding individual points still to be negotiated' are not deemed

2748 On this, see Ferrari, '*CISG Article 14*' (fn 2732) para 14. cf Schroeter (fn 2708) on art 14 at 284 para 28, who states that LOI may be 'a binding preliminary agreement' in some circumstances.

2749 See Section D.II.3. above.

2750 CISG Explanatory Note (fn 162) para 20. For further examples, see Franco Ferrari, *CISG Article 18*, in: Kröll and Mistelis and Viscasillas (fn 2703) para 8. In essence, these constitute performance of the party's obligation or are preparatory acts of the same. According to Fogt (fn 2700) 195, the act can be undertaken upon contract conclusion or subsequently.

2751 Schroeter (fn 2708) on art 16 at 333–334 para 5. Further examples are given at ibid 336–337 para 13.

2752 See Ferrari, '*CISG Article 18*' (fn 2750) para 2, who notes that the distinction is a question of interpretation under art 8 CISG.

as declarations of acceptance.[2753] This differentiation corresponds to the understanding in English, German, and Japanese law.[2754]

ii. Method of Acceptance

Irrespective of the method of acceptance, the assent must be communicated to the offeror, just like under English, German, and Japanese law.[2755] In this regard, art 18 para 3 CISG makes it clear that a separate notice of acceptance is not required where the parties have dispensed with such an announcement through usage or 'practices which the parties have established between themselves'.[2756] Explicit and implicit acceptance must be contrasted with mere '[s]ilence or inactivity', both of which is not 'in itself' enough (art 18 para 1 CISG). Where silence is accompanied by other circumstances, such as some practice between the parties, silence can sometimes amount to acceptance.[2757] Indeed, it might be possible to agree on silence acting as a declaration of intention, as art 9 CISG binds the parties to practices or usages that were agreed or at least (ought to have been) known to them. This is uncertain, however, as it comes down to a question of fact.[2758] Therefore, while an immediate notice of acceptance to the offeror may not always be necessary, there must always be some way for the offeror to have knowledge of the offeree's reaction.[2759] This treatment of mere silence is the same in the three domestic laws; however, German and Japanese law contain an exception for commercial settings. Where a merchant sends a letter of confirmation (*kaufmännisches Bestätigungsschreiben*), inaction by the merchant-addressee may be deemed as acceptance under German law.[2760] Similarly, silence to an offer from regular business part-

2753 Schroeter (fn 2708) on art 18 at 333 para 4.
2754 On the definition and distinction with other statements, see Section D.II.2.a. above.
2755 On the Convention, see CISG Explanatory Note (fn 162) 37 para 20. On the three domestic laws, see Section D.II.2.b. above.
2756 Note that one side alone, ie, the offeror, cannot make silence or inactivity amount to acceptance, although it is possible for the offeror to waive a notice of acceptance, see Ferrari, '*CISG Article 18*' (fn 2750) paras 12, 18, 20.
2757 Schroeter (fn 2708) on art 18 340–341 para 19. Interestingly, a draft version of the CISG had contained a provision admitting silence as a declaration where a practice between the parties allowed this. On this, see Fogt (fn 2700) 185, 184.
2758 See on this Rothermel and Dahmen (fn 1240) 182–183. See also fn 2756 above.
2759 Compare Ferrari, '*CISG Article 18*' (fn 2750) para 10.
2760 See Section B.III.3.a.iii.bb) above.

ners can be acceptance under Japanese commercial law.[2761] The CISG does not admit silence in response to a commercial letter of confirmation to constitute implicit acceptance like under German law, unless a usage or some practice between the parties foresees otherwise.[2762] As a consequence, the practical difference between the Convention's approach and German and Japanese law may not be great.[2763]

iii. Congruence Between Offer and Acceptance

The domestic and international rules deviate more on another point: While art 19 para 1 CISG and the three legal systems discussed above generally require acceptance to be congruent with the offer, ie, not to alter its terms,[2764] the Convention nevertheless allows changes that 'do not materially alter' the offer. Where such deviating terms are not objected to by the offeror 'without undue delay', they are deemed to become part of the contract and the declaration is seen as constituting acceptance (see art 19 para 2 CISG). This approach is unknown in the three domestic laws.

The objection under art 19 para 2 is a statement — not an act — that indicates disagreement with the changes, ie, shows an intention by the offeror not to be bound by the altered terms.[2765] It can be made orally or by way of a notice (ibid), so that communication by telephone, in writing or by electronic means are admissible.[2766] As for the time frame in which this statement must be made, it seems that an immediate reaction is not necessary as long as the delay is not due to the offeror's fault (cf

2761 See Section C.IV.1.a.iii.bb) above.

2762 This was confirmed in the OLG Dresden decision of 30 November 2010 (fn 2729) para 40. See on this generally Franco Ferrari, *CISG Article 19*, in: Kröll and Mistelis and Viscasillas (fn 2703) para 17. See also ibid, '*CISG Article 18*' (fn 2750) para 11.

2763 See Sugiura, '*Dai-2-bu*' (fn 2726) on art 18 at 81.

2764 Schroeter (fn 2708) on art 19 at 351 para 3 notes that the CISG provision 'corresponds to the common law "mirror rule", as well as to […] § 150(2) German BGB […]'. On the correlation with Japanese law, see Sono (fn 1640) 11–12. On the domestic laws, see Section D.II.2.b. above.

2765 Compare Ferrari, '*CISG Article 19*' (fn 2754) paras 21–22. In *Hanwha v Cedar* (fn 2729), the court held the plaintiff's alteration of the choice of law clause to be a counter-offer that was rejected by the defendants.

2766 Schroeter (fn 2708) on art 19 at 362 para 27 also mentions radio transmission and EDI.

art 27 CISG);[2767] however, the period is short, perhaps around three days, unless the transaction requires greater speed.[2768] The pertinent moment for a notice that is not made orally is its time of dispatch.[2769] This approach of allowing small changes unless the offeror objects is 'strikingly different' from Japanese, German, and English law, which have no such provision.[2770]

Modifications that are not allowed are those that relate to the contract's essential terms like the price and payment or on the goods (art 19 para 3 CISG). Of course, the parties are free to determine that a stipulation is immaterial, or to give the offeree discretion to propose a different term.[2771] Moreover, the enumeration found in art 19 para 3 CISG is not exhaustive and, furthermore, constitutes a rebuttable presumption. It therefore becomes a question of interpretation in each case whether the change in a term is material within the meaning of this provision.[2772]

The consequence of a material alteration is that the purported declaration of acceptance is seen as 'a rejection of the offer and constitutes a counter-offer' (art 19 para 1 CISG) that must be accepted by the original offeror.[2773] Here the identity with the three domestic laws reappears: English, German, and Japanese law also deem acceptance altering an offer to constitute a counter-offer.[2774] This is not true where the declaration makes terms explicit that are either implicit in the offer or are default provisions by some usage, the Convention, or domestic law; neither case

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2767 See Ferrari, '*CISG Article 19*' (fn 2754) para 23.

2768 See Schroeter (fn 2708) on art 19 at 362 para 28.

2769 See ibid at 363 para 28. Note that the objection, unlike other declarations of intention (see Section c.i. below), becomes effective upon its dispatch.

2770 Sugiura, '*Dai-2-bu*' (fn 2726) on art 19 at 85 on Japanese law ('著しく異なる', *ichijirushiku kotonaru*). The proposal to amend the rule in art 528 *Minpō* and include the qualification of an 'essential change' (事実的変更, *jijitsuteki henkō*) under the Japanese law reform was not taken up. On this, see ibid 86 and Kubota, '*Sankō*' (fn 2703) 16. See also Minpō Provision Comparison (fn 2240) 102, where no changes to art 528 are listed.

2771 See Schroeter (fn 2708) on art 19 at 356–357 para 15.

2772 On this, see Ferrari, '*CISG Article 19*' (fn 2754) para 10. Factors of importance might be the contract's other terms, as well as the economic circumstances or whether the change benefits the offeror, see ibid para 13. A range of examples of material and immaterial alterations is given by Schroeter (fn 2708) on art 19 at 358–359 para 17 and 361 para 25.

2773 See CISG Explanatory Note (fn 162) para 22. For further details on the ensuing process of counter-offer and its acceptance, see Schroeter (fn 2708) on art 19 at 360 paras 20–23.

2774 See Section D.II.2.b. above.

is viewed as 'additions' under art 19 CISG.[2775] As a modification must relate to the term's content, mere variations of the wording (terminology or typography) or grammar are not problematic,[2776] whereas use of a form other than the one foreseen in the offer makes a material deviation.[2777] In contrast, where no form is prescribed by the offer, acceptance can be made by any means, including one that is different from that used for making the offer, provided that the declaration of acceptance can reach the offeror through the chosen means.[2778]

c. The Effectiveness of Declarations of Intention

Two aspects are relevant when considering the effectiveness of declarations of intention: the time of their coming into effect (see Section i. below), and the end of their effectiveness (Section ii.). While the CISG's rule on the former is straightforward, the latter issue is more complex, as it encompasses several elements that need to be considered. One further aspect to note is that declarations of intention such as offer and acceptance can be made in any manner, ie, orally, in writing, or by electronic means.[2779] In this respect, direct conversations,[2780] telephone calls,[2781] as well as sound and communication transmitted electronically in real time, like in online chats and voice or video calls are deemed to be 'oral' means of communi-

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2775 Ferrari, '*CISG Article 19*' (fn 2754) para 6, who goes on to argue at para 11 that the addition of clauses in a declaration of acceptance regulating issues not contemplated in the offer but which lead to a different result than the applicable law ought to constitute material alterations.

2776 Schroeter (fn 2708) on art 19 at 353 para 6.

2777 See Ferrari, '*CISG Article 19*' (fn 2754) paras 7, 11. The argument used in relation to the latter is that the freedom of form principle of the CISG (see Section d. below) implies that the form prescribed in an offer is of importance to the offeror. Consequently, use of a different form for making acceptance ought to be deemed as a material alteration of the offer. On this argument, see ibid para 12. See also Ferrari, '*CISG Article 18*' (fn 2750) para 4.

2778 See Schroeter (fn 2708) on art 18 at 334–335 paras 7–8, 336 para 11.

2779 Cf art 11 CISG on the form of contracts, discussed in Section d. below. See further Christina Ramberg (Rapporteur), *CISG-AC (Advisory Council) Opinion No 1: Electronic Communications under CISG* (15 August 2003; hereinafter referred to as 'CISG Opinion No 1'), www.cisgac.com/cisgac-opinion-no1/, at 'CISG Art 11'.

2780 Eg, Schroeter (fn 2708) on art 24 at 396 para 5.

2781 Ibid on art 18 at 345 para 33; Franco Ferrari, *CISG Article 22*, in: Kröll and Mistelis and Viscasillas (fn 2703) paras 1, 3.

cation.[2782] According to art 13 CISG, the term 'writing' includes some electronic means of communication, namely, telegram and telex. By way of interpretation, 'any electronic communication retrievable in perceivable form' is generally admissible; in particular, e-mails are deemed analogous to letters and not as an instantaneous communication method.[2783] Similarly, statements on non-interactive ('passive') websites are also deemed to be 'non-real time'.[2784]

i. Coming into Effect of Declarations of Intention

The CISG has adopted one rule to govern the coming into effect of offer and acceptance: the arrival rule. Accordingly, art 15 para 1 and art 18 para 2 CISG require that the declaration must 'reach' the other party in order to become effective. Similarly, other declarations of intention such as withdrawals (art 15 para 2 and art 22 CISG for offers and acceptance respectively) or revocations (art 16 para 1 ibid), discussed below, are governed by this rule.[2785] Thus, even if the recipient becomes aware of the declaration's content by some means other than through the statement itself reaching them, the declaration will be deemed to be invalid.[2786] The caveat is that the declaration is communicated with the declaring person's intention.[2787]

The CISG's rule is tweaked in two particular instances: with offers to the public (Section aa) below) and with acceptance that must be made within a set period (Section bb)). Otherwise, the CISG generally makes no distinction between declarations of intention between persons *inter presentes* and *inter absentes*, nor between declarations made by different methods, ie, written or electronic. Consequently, the receipt rule applies

2782 Compare *CISG Opinion No 1* (fn 2779) at 'CISG Art 18(2)' comment 18.4 and at 'CISG Art 20(1)' comment 20.5.

2783 Ibid at 'CISG Art 13' and at 'CISG Art 20(1)' comment 20.3.

2784 Ibid at 'CISG Art 20(1)' comment 20.4.

2785 Schroeter (fn 2708) on art 24 para 3 notes that objections and approvals in relation to declarations of acceptance under arts 19 para 2 and 21 para 1 CISG are not within the scope of the provision. These statements will be considered in Section ii. below.

2786 See Franco Ferrari, *CISG Article 15*, in: Kröll and Mistelis and Viscasillas (fn 2703) para 1, who goes on to note at para 2 that this rule is in the best interest of both parties, as the risk is distributed evenly.

2787 On offers, see Schroeter (fn 2708) on art 15 at 313–314 para 2. On acceptance, see ibid on art 18 at 341 para 24.

to all kinds of declarations of intention irrespective of their form and the communication method (compare art 24 CISG, discussed below; the meaning of 'reaching' will be examined in Section cc)). The position is the same under German law, but not under English and Japanese law, since the latter two regimes not only use the mailbox (arrival) rule but also apply the postal (dispatch) rule for declarations of intention, depending on their kind or their method.[2788]

aa) Coming into Effect of Offers to the Public

The coming into effect of offers to the public under the CISG is not as straightforward as with offers directed at particular individuals. Presupposing that such statements are offers, their coming into effect depends on the manner in which the offer is made, ie, whether the addressees are identifiable. This situation arises with statements that are communicated directly to a group of people, such as when catalogues are sent out; or more indirectly where the statement is displayed in a publicly accessible place, such as the internet or a magazine. In the former case, the offer will become effective in accordance with the normal rule under art 15 para 1 CISG, whereas the offer in the latter case will be effective from a determined moment, such as a phrase evidencing such intention, or, failing such provision, upon being published.[2789] The three legal systems examined in this dissertation have no such special rule for public offers. Instead, these are treated like offers to individuals.

2788 See Sections D.II.1.c. and D.II.2.c. above for offer and acceptance respectively. For a comparison with Japanese law, see Sono (fn 1640) 16. See also Takashi Kubota, *Honsho no yomikata* [How to Read this Book], in: Yasutomo Sugiura and ibid (eds), *Uīn baibai jōyaku no jitsumu kaisetsu* [Practice Commentary on the Vienna Sales Convention] (2nd edn, Chūō Keizai-sha 2011) 1, 9. Sugiura, '*Dai-2-bu*' (fn 2726) on art 18 at 81, notes that the Japanese law reform will make the arrival rule applicable equally to declarations of offer and acceptance. For details, see Section C.V.3.a. above.

2789 See Schroeter (fn 2708) on art 15 at 314 para 3.

bb) Coming into Effect of Acceptance: Must be Made Within a Set or Reasonable Period; Late Acceptance

A declaration of acceptance must not simply reach the offeror but arrive within the period set for acceptance, or, otherwise, within a reasonable period (art 18 para 2 CISG). This also applies to acceptance under art 18 para 3 CISG, according to which no communication is required. Such a declaration of acceptance becomes effective 'at the moment that the act is performed' (art 18 para 3 CISG).[2790] In contrast, the rule does not apply to acceptance of an oral offer, as these kind of offers must normally be accepted immediately (art 18 para 2 CISG), ie, without any delay.[2791] The three domestic laws know of a similar rule in that they require acceptance to be made within a set or reasonable period as well.[2792] In contrast, the exception for oral offers is only contained in German and Japanese law (compare Section ii. below).

The time frame for acceptance can be set implicitly or expressly, whereby the offeror can either choose a period by specifying the length, by referring to some determinable moment (eg, New Years Day), or by giving an exact deadline.[2793] Like under English, German, and Japanese law, the appropriate length of time where no period is fixed is assessed by taking into account the particularities of the case, especially the speed of the communication method used by the offeror.[2794] Moreover, the time

2790 In the case of an offer in the form of a cheque, its presentation for cashing is the moment of acceptance, see ibid on art 18 at 346 para 36.

2791 Ibid on art 18 at 345 para 31.

2792 See Section D.II.2.c.i. above. On Japanese law, see also Sugiura, '*Dai-2-bu*' (fn 2726) on art 18 at 81.

2793 See Ferrari, '*CISG Article 18*' (fn 2750) para 25. Schroeter (fn 2708) on art 18 at 343 para 27 notes that the date of the event can be uncertain, such as the occurrence of some meteorological event at a certain place. Where an offer including a period specified by length does not contain a starting time, art 20 para 1 CISG contains a default rule for the commencing of the period. On this, compare Schroeter (fn 2708) on art 20 at 373 para 1, who notes that the offeror can specify a starting date. See on this further ibid at 374 para 3, and *CISG Opinion No 1* (fn 2779) at 'CISG Art 20', where the rule is applied by analogy to other (electronic) means of communication, such as fax and e-mail.

2794 This fact is also relevant for cases in which a time frame is set for a reply, since the period begins to run from the moment of the offer's dispatch if communicated by letter (art 20 para 1 CISG). In contrast, where 'instantaneous communication' like telephone or fax is used, the starting point is the time when the offer reaches the offeree (ibid). On the domestic laws, see Section D.II.2.c.i. above.

needed to consider the offer and how long it will take for the declaration of acceptance to reach the offeror are also relevant facts.[2795] In this way, the communication method may lengthen or shorten the reasonable period. In particular, where instant electronic means of communication such as online chats are used, the rule for oral offers may apply, necessitating immediate acceptance.[2796] Nevertheless, it ought to be noted that the offeree does not generally have to use the same communication method as the offeror, although this may be required due to usage, the practices between the parties, or by the offer.[2797] Arguably, this will only be true where the method of acceptance is reasonable in the circumstances.[2798]

Under the CISG, there are two exceptions to the rule that declarations of acceptance must be received by the offeror within a set or reasonable time frame that are also foreseen in Japanese and German law.[2799] First, where a declaration sent by 'letter or other writing'[2800] arrives late and it appears that it ought to have arrived on time 'if its transmission had been normal', acceptance can still be effective if the offeror fails to give oral or written notice of the tardiness 'without delay' (art 21 para 2 CISG). This means that where a written declaration of acceptance arrives late due to

2795 Ferrari, '*CISG Article 18*' (fn 2750) para 28, who goes on to note the factors relevant to determine the reasonable consideration period in para 30: *inter alia*, the nature of the goods and the stability of the price, or 'the need to obtain further information'.

2796 See Schroeter (fn 2708) on art 18 at 343 para 28.

2797 See Ferrari, '*CISG Article 18*' (fn 2750) para 29.

2798 Compare art 18 para 2 CISG, which states that the 'circumstances of the transaction' are to be taken into account when assessing a reasonable period for acceptance. Moreover, it has been held in the OLG Dresden decision of 30 November 2010 (fn 2729) paras 44, 43, that an offer communicated by e-mail must be responded to 'promptly' ('*zeitnah*'). In that case, the reasonable period was held to be one week. The court doubted that the offer could have been accepted on time if the declaration had been communicated by letter. In the event, no response had been made by the purchaser within such a period and the court found that a contract had also not been concluded between the parties by way of an acknowledgement of the effectiveness of the seller's acceptance pursuant to art 21 para 1 CISG, as no such notice had been given. This rule is discussed subsequently.

2799 See generally Section D.II.2.c.i. above for the domestic laws. On Japanese law, see also Sugiura, '*Dai-2-bu*' (fn 2726) on art 21 at 90.

2800 According to Schroeter (fn 2708) on art 21 at 385 para 18, this rule applies to declarations sent by way of electronic means of communication.

circumstances outside the offeree's power, it will still be effective and a contract will be concluded, unless the offeror 'protests'.[2801]

Secondly, the offeror has a discretionary power to admit a late declaration of acceptance as being effective by giving a notice to that effect to the offeree 'without delay' (art 21 para 1 CISG). In this respect, 'late' is not connected to a delay in transmission, but could simply be due to the period of acceptance being formulated vaguely (ie, being uncertain or for a reasonable period) or due to the offeree responding just before the expiry of the acceptance period.[2802] The discretion can only be exercised where art 21 para 2 CISG does not apply and must be exercised within a short period,[2803] such as a day or perhaps two.[2804] In order to do so, the offeror must make a declaration of approval by any means other than conduct.[2805] Where no approval is given by the offeror, acceptance does not become valid and no contract is formed.[2806] Conversely, where a late declaration of acceptance is approved, a contract is formed retrospectively at the time when the late notice arrived or, in case of acceptance by conduct, once the act had been performed.[2807] For the effectiveness of both the offeror's protest and their approval, the moment of dispatch is pertinent (compare art 21 paras 1–2 CISG), so that it is irrelevant whether the declaration actually reaches the offeree.[2808]

2801 On this, see Franco Ferrari, *CISG Article 21*, in: Kröll and Mistelis and Viscasillas (fn 2703) paras 14–16, 12, 18. Named pertinent circumstances include strikes, weather conditions, and the post being misdirected, unless this occurs due to a wrong address having being used.

2802 Schroeter (fn 2708) on art 21 at 379 para 3 and at 380 para 5.

2803 According to Ferrari, '*CISG Article 21*' (fn 2801) para 5, art 21 para 2 CISG contains a special rule. On the period, see ibid para 8, where the author states it to be shorter than the period for the offeror making an objection to added or altered terms under art 19 para 2 CISG, but long enough for the offeror to consider whether to approve.

2804 Compare Schroeter (fn 2708) on art 21 at 381–382 para 8.

2805 See Ferrari, '*CISG Article 21*' (fn 2801) para 6. cf Schroeter (fn 2708) on art 21 at 384 para 15, who notes that silence by the offeror with respect to late acceptance may constitute approval in exceptional circumstances, eg, where a usage to that effect exists between the parties.

2806 See Ferrari, '*CISG Article 21*' (fn 2801) para 10.

2807 Schroeter (fn 2708) on art 21 at 383 para 10.

2808 Compare ibid at 381 para 7 and at 386 para 20.

cc) 'Reaching' Defined

The moment in time at which a declaration 'reaches' the other party is defined in art 24 CISG as the time when the statement is either

> 'made orally to [that party] or [is] delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.'

There are therefore three modes of delivery under the CISG, whereby the Convention distinguishes between two transmission methods: orally, and anything else. In the latter situation, the declaration can be delivered by any means. It has been argued that this phrase makes the provision so wide as to encompass electronic means of communication without the need to state so explicitly.[2809] Indeed, as discussed at the beginning of Section i. above, electronic communication has been admitted under the CISG. Accordingly, letters, fax, SMS, and e-mail among others will be deemed to be made 'by any other means' under art 24 CISG, while direct conversations, including those on the telephone or over the internet, are declarations delivered orally.[2810]

With respect to the mode, a non-oral declaration can either be handed over to the addressee personally, or be delivered to one of their addresses.[2811] Personal delivery means that a corporeal form of the declaration, such as a letter, is handed over to the addressee directly.[2812] Here, the place is irrelevant, as long as the delivery is personal.[2813] In contrast, the CISG

2809 Compare Jan Peter Schmidt, *Art 1:303: Notice*, in: Jansen and Zimmermann (fn 38) 179, 193 in fn 133. Compare also Schroeter (fn 2708) on art 24 at 396 para 6.

2810 See on this generally Franco Ferrari, *CISG Article 24*, in: Kröll and Mistelis and Viscasillas (fn 2703) paras 1, 3–4, 7. See also Schroeter (fn 2708) on art 24 at 396 paras 5–6.

2811 Maria del Pilar Perales Viscasillas, *Contract Conclusion under CISG*, in: Franco Ferrari and Clayton P Gillette (eds), *International Sales Law Vol 1* (Edward Elgar Publishing, 2017) 46, 53–54; Ferrari, '*CISG Article 24*' (fn 2810) paras 10–11. Contrast Schroeter (fn 2708) on art 24 at 400 para 15, who seems to interpret the provision to mean that personal delivery must be made to one of the addressee's addresses. This is not convincing, as the provision's punctuation, namely, the comma between 'personally' and 'to his place of business' etc, and the wording indicate an enumeration of different methods of delivery.

2812 See Schroeter (fn 2708) on art 24 at 401 para 18.

2813 Ferrari, '*CISG Article 24*' (fn 2810) para 10. Contrast Schroeter (fn 2708) on art 24 at 400 para 15, as discussed in fn 2811 above.

provision specifies places to which non-personal delivery can be made and sets an order of preference: Delivery of this kind first ought to be made to the addressee's place of business or their mailing address; only where the addressee has neither of these, declarations may be sent to the addressee's habitual residence.

The exact point in time at which a declaration is said to have reached the other party depends on the communication method. Oral communication being instantaneous, it is deemed to be 'delivered' as soon as it is made, but needs to be perceptible for the addressee, so that they can gain knowledge of it.[2814] In this respect, 'reach' means that the declaration enters the addressee's sphere of influence, so as to enable the addressee to gain knowledge of the declaration.[2815] This means that a letter inserted into the addressee's post-box has reached them.[2816] An offer or acceptance that is made through means of electronic communication, such as e-mail, comes into effect once it has 'entered the [addressee's] server'.[2817] Similarly, a declarations sent via fax is deemed to have reached the addressee when it has been saved by the addressee's fax machine; it may also have to be printed.[2818] In all cases, it seems to be irrelevant whether the declaration arrives within business hours or on, say, public holidays: It will arrive at that time and not on the next usual business day, unless the device for receiving the declaration, ie, the post-box, fax machine, or e-mail server, are not 'reachable' due to being inaccessible or switched off.[2819] This is different from German and English law, which take business hours into account for receipt.[2820]

2814 Cf Schroeter (fn 2708) on art 24 at 398 para 11, according to whom the oral declaration must be perceptible for the addressee.

2815 Actual knowledge is not required. See Ferrari, '*CISG Article 24*' (fn 2810) para 8. cf Schroeter (fn 2708) on art 24 at 401–402 para 18, stating that it is unclear whether the possibility to have knowledge is required.

2816 Ferrari, '*CISG Article 24*' (fn 2810) para 11; Schroeter (fn 2708) on art 24 at 402 para 19. It is unclear whether a notification of a registered letter in the addressee's post-box is sufficient. For: eg, Ferrari, ibid. Against: eg, Schroeter, ibid para 20.

2817 *CISG Opinion No 1* (fn 2779) at 'CISG Art 15'. It is noted at 'CISG Art 18' that the offeror must have agreed to acceptance being made through electronic means of communication.

2818 Schroeter (fn 2708) on art 24 at 403 para 23 deems printing unnecessary. Contrast Ferrari, '*CISG Article 24*' (fn 2810) para 11, according to whom printing is normally required.

2819 Schroeter (fn 2708) on art 24 at 408 para 32.

2820 On this, see Sections B.III.3.a.ii.dd) and B.II.3.a.ii.ee) above respectively.

There are three special cases with offer and acceptance that need to be mentioned: Where an offer is made to a group of unspecified persons, the moment in time at which it comes into effect is the point at which 'it is possible [for each person] to gain knowledge of the offer', unless the offer foresees otherwise.[2821] In case of acceptance that is made implicitly through some conduct, it comes into effect at the time when the act is fully performed and notice of the conduct has reached the offeror.[2822] On the other hand, where a declaration of acceptance modifies the offer in an immaterial manner, it will become effective upon reaching the offeror, although this effect might be undone retroactively by the offeror objecting to the modifications.[2823]

ii. Loss of Effect of Declarations of Intention

Declarations of intentions can lose their effectiveness for several reasons. In case of an offer, it may simply expire. This can happen where an oral offer[2824] under the CISG is not accepted immediately (compare art 18 para 2 CISG). Arguably, an offer will also expire after a reasonable period passes and acceptance is not made (see ibid). As discussed above, German, Japanese, and English law concur on these points.[2825] Declarations of intention can also be withdrawn or revoked under particular circumstances.

Seeing as the arrival rule governs declarations of offer and acceptance, these can be withdrawn, provided that the withdrawal reaches the addressee at least together with the offer or acceptance, as the case may be

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2821 See Ferrari, '*CISG Article 15*' (fn 2786) para 4.

2822 See art 18 para 3 CISG and CISG Explanatory Note (fn 162) para 20. See also Ferrari, '*CISG Article 18*' (fn 2750) para 13.

2823 Compare Ferrari, '*CISG Article 19*' (fn 2754) paras 18, 20, who states that the concluded contract is subject to the condition that the new terms are not objected to by the offeror. See also ibid para 23, where it is noted that the objection 'dissolves' the concluded contract retroactively. Also see the discussion in the foregoing section (b.).

2824 Beside the parties being in each other's physical presence, telephone conversations or announcements on radio fall into this category, whereas communication by e-mail, fax, or videotext do not. The distinction is made on whether acceptance can be indicated immediately after the offer having been made. See on this Ferrari, '*CISG Article 18*' (fn 2750) para 34.

2825 See Section D.II.1.c. above. Note that while English law does not foresee expressly that oral offers need to be accepted immediately, this is a logical deduction from the rules on offer and acceptance.

(arts 15 para 2, 22 CISG).[2826] This is the same position as under English, German, and Japanese law.[2827] Under the CISG, even irrevocable offers can be withdrawn, whereas declarations of acceptance made by conduct cannot.[2828] At least a declaration of acceptance can be withdrawn in part or as a whole,[2829] although, logically, the same ought to be true for offers.[2830] In contrast, notices of approval and of protest under art 21 CISG or objections under art 19 are governed by the dispatch rule and therefore cannot be withdrawn.[2831] Whether a withdrawal itself can be withdrawn before becoming effective is a controversial topic in academic literature. It is submitted that it would be logical to allow withdrawals to be withdrawn before coming into effect and thus to treat it the same as other declarations of intention.[2832]

As a general rule, an offer may be revoked before a contract has been made (art 16 para 1 CISG). Nevertheless, the offeror's right persists on-

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2826 The coming into effect of withdrawals is governed by art 24 CISG, discussed in Section i. above. An offer and its withdrawal that are both sent by letter might arrive simultaneously if both letters are delivered together, see Schroeter (fn 2708) on art 15 at 315 para 5. In case of offers sent by e-mail, these can be withdrawn if a declaration to that effect arrives on the offeree's server before or together with the offer, see *CISG Opinion No 1* (fn 2779) at 'CISG Art 15'. Nevertheless, it is acknowledged in ibid comment 15.2. that this will usually not be possible, as there are no faster means than electronic communication. Schroeter, ibid at 314 para 4 uses the apt phrasing of the withdrawal having to 'overtake' the declaration in question. Irrespective of this, the addressee must have explicitly or implicitly consented to receive withdrawals through that channel, ibid. Such consent will not be deemed to exist where an incorrect e-mail-address is used and the server does not redirect the e-mail to the correct address, see *CISG Opinion No 1*, ibid comment 15.5.

2827 See Sections D.II.2.c. and D.II.3.c.ii. above for offer and acceptance respectively. On withdrawals under Japanese law, see also Sono (fn 1640) 17. cf Sugiura, '*Dai-2-bu*' (fn 2726) on art 22 at 91, noting that acceptance cannot be withdrawn where the dispatch rule applies.

2828 On the former, see art 15 para 2 CISG. On the latter, see Schroeter (fn 2708) on art 22 at 389 para 3.

2829 Franco Ferrari, *CISG Article 22*, in: Kröll and Mistelis and Viscasillas (fn 2703) paras 1, 3.

2830 Compare the offer's revocability under the CISG, discussed subsequently.

2831 Compare Ferrari, '*CISG Article 21*' (fn 2801) paras 7, 19, and Ferrari, '*CISG Article 19*' (fn 2754) para 21 respectively.

2832 In favour of allowing withdrawals to be withdrawn are Ferrari, '*CISG Article 15*' (fn 2719) para 13 (offers), ibid, '*CISG Article 22*' (fn 2829) para 8, and, partially, Schroeter (fn 2708) on art 22 at 389 para 4 (allowed for withdrawals of acceptance). Against this position, see, eg, Giannini (fn 2736) 25.

ly until the declaration of acceptance is dispatched (ibid) and not until the declaration becomes effective upon its receipt under art 18 para 2 CISG, thus bringing the possibility to an end even before the contract is formed.[2833] This means that the revocation has to reach the offeree before they send out their declaration of acceptance.[2834] The declaration can relate to a part or the whole of the offer.[2835] If it reaches the offeree before the offer, it will be deemed as a withdrawal of the offer instead.[2836] While the revocation can be withdrawn, it cannot be revoked.[2837] Therefore, where the revocation takes effect, an offer must be declared anew. In contrast to offers, a declaration of acceptance cannot be revoked, as the contract comes into existence once the declaration is effective.[2838]

Exceptions to the revocability of offers exist in two situations. First, where the offer clearly states in some form that it is to be irrevocable, in particular by foreseeing a time frame for acceptance (see art 16 para 2(a) CISG). Nevertheless, a fixed period of acceptance only raises a rebuttable presumption.[2839] Phrases such as 'fix' or 'firm offer' will generally be deemed to express the offer's irrevocability, whereby the firmness may but

2833 Schroeter (fn 2708) on art 16 at 321 para 4, who goes on to note that this rule is 'more far-reaching' than the English postal rule (while Schroeter erroneously writes 'mailbox rule' in the main text, a quote on the postal rule is given in the accompanying fn), as the CISG's rule applies to all forms of communication, whereas the postal rule only applies to letters and telegrams, as discussed in Section B.II.3.iii.cc) above.

2834 On the point in time of arrival, see Section i. above. For revocations by e-mail, see also *CISG Opinion No 1* (fn 2779) at 'CISG Art 16', where it is also noted that acceptance by e-mail is deemed to have been dispatched once the message 'has left the offeree's server'.

2835 Franco Ferrari, *CISG Article 16*, in: Kröll and Mistelis and Viscasillas (fn 2703) paras 1, 4; Schroeter (fn 2708) on art 16 at 320 para 3.

2836 Schroeter (fn 2708) on art 16 at 320 para 3; Ferrari, '*CISG Article 16*' (fn 2835) para 7.

2837 Ferrari, '*CISG Article 16*' (fn 2835) para 7. Contrast Schroeter (fn 2708) on art 16 at 320 para 3, stating that a revocation's revocation ought to be possible where the addressee has not had knowledge of the original revocation, or has at least not acted in reliance of it.

2838 This can be deduced from art 22 CISG, which allows withdrawals only until the point in time at which a declaration of acceptance becomes effective, while there is no other provision allowing a revocation. See also Ferrari, '*CISG Article 18*' (fn 2750) para 21.

2839 For further details, see Schroeter (fn 2708) on art 16 at 323–324 paras 9–10.

does not have to be limited in time.[2840] Secondly, the offer is irrevocable where the offeree reasonably assumed irrevocability and acted in reliance of this belief (ibid 2(b) CISG). Reliance is placed by the offeree where they undertake preparatory acts for the fulfilment of their obligation, such as purchasing the materials necessary to manufacture the goods under the contract.[2841]

This rule is basically the same under English law, but generally opposite to German law,[2842] and in part both with respect to Japanese law. This is because offers are generally revocable under English law, but irrevocable according to the German regulation; and under the Japanese norms, the general principle of irrevocability is sometimes excepted.[2843] Indeed, the provision apparently constitutes a compromise between English and other European laws.[2844] Where a revocation is attempted for an irrevocable offer, the declaration of revocation will be without effect and not affect the offer.[2845]

An offer will also lose its effectiveness by the offeree rejecting it (art 17 CISG). In order for this to occur, the rejection must reach the offeror like any other declaration of intention governed by the receipt rule contained in art 24 CISG. Arguably, an offer will also expire where the stipulated period of acceptance passes without acceptance having been made. While not stated expressly, this follows logically from the provision in art 18 para 2 CISG, according to which acceptance is not effective unless it reaches

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2840 Ferrari, '*CISG Article 16*' (fn 2835) para 14. Other phrases might convey the intention of an irrevocable offer in a particular trade, such as 'option', Schroeter (fn 2708) on art 16 at 322 para 8.

2841 Ferrari, '*CISG Article 16*' (fn 2835) para 21. Further examples are given by Schroeter (fn 2708) on art 16 at 325 para 11, who notes that omissions, such as no solicitation of alternative offers, may be sufficient in terms or reliance. On whether the reliance is reasonable, see Ferrari, ibid para 20.

2842 Interestingly, Busche, '*§ 145 BGB*' (fn 893) para 3 notes that the drafters of the BGB had considered and rejected a regulation like the CISG's rule. One important reason was that binding offers had become standard practice in commerce so as to become indispensable ('*unentbehrlich*'), see Mugdan (fn 883) Vol 1 443–444.

2843 See Section D.II.1.c. above. On Japanese law, see also Sono (fn 1640) 17; Kubota, '*Yomikata*' (fn 2788) 9; Sugiura, '*Dai-2-bu*' (fn 2726) on art 16 at 75–76. As noted by Kubota, '*Sankō*' (fn 2703) 19, the situation will change by virtue of the Japanese law reform. On this, see Sections C.V.3.c.i. and iii. Above.

2844 Schwenzer (fn 2703) 5. See further Schroeter (fn 2708) on art 16 318–319 para 1.

2845 See Schroeter (fn 2708) on art 16 at 326 para 14.

the offeror within the stipulated time period.[2846] This effect is recognised under German, English, and Japanese law as well.[2847]

d. No Form Requirements

As stated in art 11 CISG, the Convention does not foresee a mandatory form for international contracts of sale. In particular, writing is not required. As a consequence, all declarations of intention under the CISG, ie, an offer, acceptance, or objections, etc, can be made in any form: oral, in writing, and by electronic means.[2848] This freedom of form extends to the modification or the termination of a contract (art 29 para 1 CISG); however, a stipulation by the parties in a written contract that modifications need to be made in writing is generally upheld by art 29 para 2 CISG. Where the parties make express or implicit[2849] stipulations on the contract's form under art 6 CISG, or where usages or practices between the parties foresee otherwise, the form will be mandatory and, eg, a declaration of acceptance made in a different form will be deemed to be a counter-offer for altering the offer's terms in a material way.[2850] Moreover, the parties are free to define the form, such as 'writing' and thus deviate from art 13 CISG.[2851]

The provision's scope is so broad as 'to displace special requirements of consent such as consideration or *causa*', as well as protective provisions such as under (EU) consumer law.[2852] It ought to be noted that Contracting States may make reservations considering the contract form under art 96 CISG, in which case the provisions would not apply in relation to those countries (see art 12 CISG); however, no such reservation has been

2846 Compare Wolf and Neuner (fn 48) 421 para 16.
2847 See Section D.II.1.c. above.
2848 Compare further Franco Ferrari, *CISG Article 11*, in: Kröll and Mistelis and Viscasillas (fn 2703) para 9; Ferrari, '*CISG Article 18*' (fn 2750) para 4.
2849 Martin Schmidt-Kessel, *Article 11*, in: Schlechtriem and Schwenzer (fn 2703) 203, 212 para 20.
2850 On this, see Ferrari, '*CISG Article 19*' (fn 2754) para 12; ibid, '*CISG Article 18*' (fn 2750) para 4; and Section b. above. Cf Ferrari, '*Article 11*' (fn 2848) para 20, who states that where no clear intention as to the nature of the form requirement exists, it will be deemed to have an evidentiary function only.
2851 Schmidt-Kessel (fn 2849) 212 para 20. The meaning of writing under that provision was already discussed in Section c.i. above.
2852 Ferrari, '*Article 11*' (fn 2848) paras 4, 8, 10.

made by Germany or Japan.[2853] Considering that German law foresees a range of form requirements in relation to contracts, this is perhaps surprising, while this is not so much so for Japan, which has a more liberal attitude in this respect.[2854]

3. Summary of Results

To recapitulate, English, German, and Japanese law and the CISG coincide in several respects on the formation of contracts. First, the basis of a (sale) contract is the consensual agreement of the parties; although German, English, and Japanese law sometimes foresee a mandatory form for some (other) contracts, which is not the case under the CISG. Further requirements like consideration or *tetsuke* are not necessary under the Convention either. The standard model for the contract conclusion is by way of offer and acceptance, whereby the declarations of intention must be congruent in order to form a contract. Otherwise, the purported declaration of acceptance will constitute a counter-offer under the domestic laws and the CISG; however, the Convention explicitly allows non-material alterations.

Both declarations of intention are distinguished from other statements or acts. Therefore, a degree of certainty and an intention to be bound by the statement is required under the CISG and the three domestic laws. Having said this, offers to the world at large, ie, unspecific persons, will normally be deemed to be an invitation to make an offer under the Convention, while English, German, and Japanese law assess this on a case-by-case basis. In the end, the situations that fall into the category of invitations to make an offer are the same under the four laws. Although acceptance can be through express or implied acts or statements, neither the CISG nor the three domestic laws allow silence on its own to constitute the offeree's assent. Otherwise, different ways of making declarations, such as orally, in writing, or in electronic form, are recognised under the CISG and the domestic laws.

Unlike English and Japanese law, but congruent with the German approach, the Convention foresees one rule for the coming into effect of declarations of intention, namely, upon its arrival. In order to 'reach' the

2853 For further discussion of this issue, see Mather (fn 2709) 373.

2854 See the discussion in Section D.III. above for a comparison of English, German, and Japanese law. Sono (fn 1640) 7 even calls the freedom of form 'a matter of course' ('当然のこと', *tōzen no koto*) in Japanese legal thought.

other party, the notice of the declaration or conduct has to enter the recipient's sphere of influence, such as their post-box or e-mail server. Two deviations from the arrival rule under the CISG are offers to the public and acceptance by conduct that must be made within a set period. Here, the coming into effect of the former depends on the offeror's intention as evidenced in the offer, while the latter is effective once the act in question has been performed. Although such provisions are not found in the three domestic laws, these recognise a time frame for making acceptance, just like the CISG. Furthermore, German and Japanese law concur with the CISG in that an oral offer must be accepted immediately. These two domestic laws also recognise that declarations that are late because of an unusually long transmission time can still be effective if the offeror does not object and, otherwise, give the offeror the discretion to deem a late acceptance as a new offer.

The ways in which declarations of intention can lose their effectiveness under the CISG is through expiry, rejection (of an offer), withdrawal, and revocation. While English, German, and Japanese law also principally recognise these acts, German law does not allow the revocation of an offer, while Japanese law sometimes allows it but English law generally recognises it. The rules under the contract laws therefore coincide — for the most part — on the main issues but deviate on individual points.

II. Results of the Comparative Analysis Juxtaposed with the European Legal-political Perspective: The DCFR, the CESL, and the PECL

Beside EU law on contract and, in particular, consumer law, several efforts have been made by legal academics to explore principles of a supra-national European private law. Three important projects, namely, the DCFR, the CESL, and the PECL will be considered and contrasted with English, German, and Japanese contract law.[2855] While the provisions of the CESL, the DCFR, and the PECL — unlike the CISG — are all not binding but constitute 'non-legislative codifications'[2856], their nature differs. This

2855 The following analysis is based on the outstanding comparative work on the three European projects by Jansen and Zimmermann (fn 38). It also draws from the work of Schmidt J (fn 25), who compares German, English, and French contract rules with the CESL.

2856 Nils Jansen, *Art 1:101: Application of Principles*, in: Jansen N and Zimmermann (fn 38) 27, 28.

is due to the fact that the objectives for their drafting vary. The CESL is the most ambitious project, as it was originally envisioned as a 'secondary contract law regime' found 'within each [EU] Member State's national law'.[2857] While having been abandoned as a proposal for legislation, it is nevertheless 'a source of inspiration'.[2858] In contrast, the DCFR and the PECL are more humble projects, as they are foreseen as optional sets of uniform rules to be used by drafters of 'legal instruments and contracts', as well as judges.[2859] The provisions of the three projects on the sphere of application and the formation of contracts of these codifications are examined in Sections 1. and 2. below.

1. The Sphere of Application of the CESL, the DCFR, and the PECL

Each of the three European projects contains rules on their sphere of application; however, while all of them concern European private law, there are differences in their scopes. As its name suggests, the CESL's reach is limited to 'cross-border transactions for the sale of goods, for the supply of digital content and for related services' (art 1 CESL Reg).[2860] In contrast, the DCFR and the PECL constitute more general legal regimes for contracts (art I-1:101 DCFR, art 1:101 para 1 PECL). Only the DCFR contains an explicit list of circumstances which are not meant to be covered, *inter alia*, negotiable instruments, immovable property, and employment contracts (art I-1:101 para 2 DCFR). Nevertheless, this does not mean that the PECL's scope is wider; on the contrary, the PECL seems to contain general contract rules while the DCFR encompasses both general and specific contracts, as well as non-contractual obligations.[2861] Having said this, it seems that, in the end, the scope of application of the DCFR depends on the parties in that these may decide freely to apply the Rules to *a priori*

2857 See preamble nos 8 and 9 CESL Reg.

2858 Jansen N and Zimmermann, '*Introduction*' (fn 38) 29. On the project having been abandoned, see fn 37 above.

2859 See the comments to art I-1:101 DCFR in von Bar and Schulte-Nölke (fn 36) 131. See also Jansen N, '*Art 1:101 PECL*' (fn 2856) 28–29 para 2.

2860 Mixed contracts, even where these include sale of goods or of digital content, as well as consumer credit agreements are explicitly excluded under art 6 CESL Reg.

2861 See also Christian von Bar and others, *Introduction*, in: von Bar and Schulte-Nölke (fn 36) 20–21, who state that the DCFR has a wider coverage than the PECL.

excluded matters.[2862] In what follows, only the rules that are pertinent for to the formation of contracts will be considered. It is necessary, however, to make a brief note of the definitions found in the CESL and the DCFR in relation to the terms of their application.

The CESL has two sets of criteria for the definition of 'cross-border', which depend on whether the transaction in question is B2B or B2C. In case of the former, the habitual residence of the traders need to be in different countries (art 4 para 2 CESL Reg), whereas it is sufficient for B2C transactions if the consumer's address, that for delivery, or the one used for billing is not in the same country as the trader (ibid para 3). In either case, one country at least needs to be a EU Member State (ibid). This requirement echoes the CISG's internationality requirement, although the CESL applies to both B2B and B2C transactions, whereas the CISG does not.[2863] Neither the DCFR nor the PECL make such a differentiation; however, it seems that both Principles deal with consumers.[2864] In this respect, the definition of 'consumer' is almost identical in the CESL and the DCFR, as both mean a natural person whose act is for private rather than for business reasons.[2865] A person acting for the latter purposes is termed 'trader' in the CESL (art 2 para e CESL Reg) and 'business' in the DCFR (art I-1:105 para 2). The two definitions are similar in that legal and natural persons are included in both notions.[2866] These definitions are congruent with the conceptions under EU, English, German, and Japanese law.[2867]

In terms of the transactions covered by the projects, the PECL states itself to be applicable 'as general rules of contract law' (art 1:101 para 1),

2862 See von Bar and Schulte-Nölke (fn 36) 131–132 on art I-1:101 DCFR.

2863 Compare art 1 CESL Reg and arts 1, 2, 100 para 2 CISG, as discussed in Section I.1. above.

2864 While the DCFR contains a definition of the term 'consumer' and mentions them explicitly in some rules, the PECL treats the matter implicitly. This will become apparent from the discussion in Section 2.g. below.

2865 cf art 2 para f CESL Reg: "[C]onsumer' means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession'; and art I-1:105 para 1 DCFR: 'A "consumer" means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession'.

2866 Nevertheless, the DCFR contains the additional clarification that 'publicly or privately owned' legal persons can be a business to which the DCFR applies, if the work is on a self-employed basis; moreover, an intention to make a profit from the act is not required.

2867 This was discussed in Sections B.II.3., B.III.3., and C.I.2.b. above.

which explicitly cover issues of agreement in so far as the incorporation of the PECL are concerned (art 1:104 para 1), but are displaced by practices or usages established between the parties (art 1:103 ibid), or by domestic or supranational mandatory law that is applicable irrespective of the law chosen (ibid). According to art I-1:101 DCFR, the Framework 'primarily' covers 'contracts and other juridical acts'. The meaning of these two terms is considered in Section 2.a. below.

The CESL covers 'sales of goods' as well as transactions 'for the supply of digital content and for related services' (art 1 para 1 CESL Reg). It defines 'goods' as any 'tangible movable items' except electricity, natural gas, and water under public utility services (art 2 para h ibid), while 'digital content' is data in any electronic form that can but does not need to be produced or supplied 'according to the buyer's specifications' (ibid para j). This distinction is congruent with the definition adopted in English consumer law (s 2 subs 8–9 Consumer Rights Act 2015, 'CRA 2015'). The distinction between goods and digital things is also found in English commercial law, as well as in German and Japanese law; however, neither of these, nor the CISG, deem data or software to be goods.[2868]

All three projects have in common that their provisions are not automatically binding on the parties, but need to be opted into, unlike dispositive domestic law and the CISG, which needs to be opted out of by providing alternative stipulations.[2869] Where they apply, the parties are generally free to derogate from the provisions contained in the CESL, the DCFR, and the PECL, unless any of the rules foresee otherwise.[2870] This is the same as under the CISG and the three domestic laws examined in this dissertation.[2871]

2868 On this, see Sections B.II.3.b.i., B.III.3.b.i., C.IV.1.b.i., and I.1. above respectively.

2869 See art 1:101 PECL, arts 3, 8 para 1 CESL Reg, and the comments to art I-1:101 DCFR in von Bar and Schulte-Nölke (fn 36) 131. On the non-bindingness of these projects, see also, eg, Schmidt-Kessel and McNamee (fn 13) 432 (DCFR and CESL). On the CISG being automatically applicable unless opted out of, see Section I.1. above.

2870 See art 1 CESL, art II-1:102 paras 1–2 DCFR, arts 1:102–1:103 PECL respectively. The caveat with the CESL is that partial derogation is not possible in B2C constellations, see art 8 para 3 CESL Reg.

2871 On the CISG's derogability, see Section I.1. above. On English, German, and Japanese law, see Section D.II. above.

2. The Formation of Contracts under the CESL, the DCFR, and the PECL

The basis of the conclusion of a contract under the three European projects is an agreement between the parties and an intention to be legally bound by their contract (see art 30 CESL, art II-4:1:01 DCFR, art 2:101 para 1 PECL), which thus adhere to the principle of consensuality.[2872] The standard analytic tool used for finding an agreement is the offer-and-acceptance model, just like in English, German, and Japanese law and the CISG.[2873] Accordingly, the projects contain rules for the declarations of offer and acceptance (see Sections b. and c. below) and the effectiveness of declarations of intention (Section d.). Furthermore, there are stipulations on the sufficiency of the agreement (Section e.), and the intention to be legally bound (Section f.). On the other hand, the three European projects do not foresee further requirements for the conclusion of a contract, such as the *indicia* of seriousness of consideration in English law or *tetsuke* in Japanese law.[2874] As will be seen, no form is prescribed either, not even for what are known as real contracts (Section g.).[2875] Before analysing the content of the formation requirements, the definition of contract is explored subsequently.

2872 Schmidt J (fn 25) 128, who notes at 127 that the concept of real contracts is not included in the three projects. On real contracts in English, German, and Japanese law, see Section D.I. above.

2873 See art 30 para 2 CESL; comments to art II-4:201 DCFR in von Bar and Schulte-Nölke (fn 36) 316; compare arts 2:201, 2:204–2:205 PECL. On the three domestic laws, see Section D.II. above. On the CISG, see Section I.2. above. While the PECL does not foresee the model explicitly, other contract conclusion mechanisms are acknowledged in art 2:211. See Schmidt J (fn 25) 108–110, who also notes that the three projects recognise other contract conclusion mechanisms. Christandl, '*Art 2:101 (1) PECL*' (fn 2874) 239 para 6 remarks that such alternative modes of contracting are spreading in business practice.

2874 This is explicit in art 2:101 para 1 PECL, and in the comments to art II-4:101 DCFR in von Bar and Schulte-Nölke (fn 36) 290. It is implicit in art 30 CESL, as the list of requirements does not contain any other signs of serious intention. See on this further Gregor Christandl, *Art 2:101 (1): Conditions for the Conclusion of a Contract (General)*, in: Jansen and Zimmermann (fn 38) 236, 244–245 para 18; Schmidt J (fn 25) 128. On consideration and *tetsuke*, see Section D.II.4. above.

2875 On real contracts in the European projects, see ibid 248 para 21. On the treatment in the three domestic laws, see Section D.I. above.

a. 'Contract' Defined

Under the DCFR, a contract is understood as a bi- or multilateral 'agreement which is intended to give rise to a binding legal relationship or to have some other legal effect' (art II-1:101 para 1 DCFR). The latter phrase encompasses situations such as contract modification agreements and arrangements to transfer property immediately.[2876] This term is contrasted with uni-, bi- or multi-lateral 'juridical acts', ie, 'any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such' (art II-1:101 para 2 DCFR). Examples include promises, grants of approval, and withdrawals.[2877] This differentiation is also made in German and Japanese legal theory, according to which *Verträge* and *keiyaku* (契約) are one kind of *Rechtsgeschäft* or *hōritsu kōi* (法律行為) respectively.[2878]

In contrast, the PECL and the CESL — just like the CISG and English law — do not make such a distinction.[2879] Nevertheless, the provisions of the European projects listing the requirements for contracts (see above) all have the objective of differentiating between legally binding agreements and irrelevant arrangements or unilateral binding acts.[2880] This difference notwithstanding, the notion of a contract is similar in the three European projects. The CESL — perhaps due to its more narrow scope of application — does not mention juridical acts, but gives a similar meaning to 'contract' as the DCFR, namely, as 'an agreement intended to give rise to obligations or other legal effects' (art 2 para a CESL Reg). While the PECL contains no explicit definition, a contract is also understood as a bi- or multilateral agreement that is intended to have legal effect. This can be deduced from art 2:101 para 1 PECL, which requires 'the *parties* [to] intend to be *legally bound*' and for them to 'reach a sufficient *agreement*' (emphasis added). These two requirements, which will be discussed in Sections f. and e. below, are found in the other two Rules as well (see art 30

2876 See von Bar and Schulte-Nölke (fn 36) 170 on art II-1:101 DCFR.
2877 See ibid.
2878 On German law, see Section B.III.3.a.i. above. On Japanese law, see Section C.IV.1.a. above.
2879 On the CISG, see Section I.2. above. On English law, see Section B.II.3.a. above.
2880 Compare Christandl, '*Art 2:101 (1) PECL*' (fn 2874) 237 paras 2–3. See also the comments to art II-4:101 DCFR in von Bar and Schulte-Nölke (fn 36) 290.

CESL and art II-4:1:01 DCFR). They also form part of the requirements under English, German, and Japanese law.[2881]

b. Offers

All of the three European projects contain rules on offers, in particular in relation to its definition and differentiation from non-binding statements like invitations to treat, but also with regard to its effectiveness, ie, its coming into and loss of effect, as well as its (ir)revocability. The first two aspects will be discussed here, while the effectiveness of the declaration is considered in Section d. below.

The CESL, the DCFR, and the PECL define an offer in an almost identical manner, namely, as a 'proposal' that is geared towards the conclusion of a contract. As such, it must be made with an intention to this effect and furthermore be sufficiently certain in order to form the basis of a contract (compare art 31 para 1 CESL, art II–4:201 para 1 DCFR, art 2:201 para 1 PECL). The intention that is required must be for the statement maker to be bound by their proposal if it is accepted by another person (see art 31 para 1 (a) CESL, art II–4:201 para 1 (a) DCFR, art 2:201 para 1 (a) PECL).[2882] In terms of the certainty of the offer, its content must amount to a contract if accepted (compare art 31 para 1 (b) CESL, art II–4:201 para 1 (b) DCFR, art 2:201 para 1 (b) PECL). This matter is closely connected with the agreement's sufficiency, which is discussed in Section e. below. Finally, all three European projects implicitly require that an offer be communicated. This can be deduced from art 31 para 2 CESL, art II–4:201 para 2 DCFR, and art 2:201 para 2 PECL, which state that an offer is or can be 'made' to some person(s).[2883]

While the Rules are the same thus far in relation to the requirements for offers under the CISG and the three domestic laws discussed in this

2881 For a discussion of the basic requirements, see Section D.II. above.

2882 Where the intention is not express, the statement maker's words will be interpreted in accordance with the rules discussed in Section f. below. See on this generally Gregor Christandl, *Art 2:201: Offer*, in: Jansen and Zimmermann (fn 38) 294, 296 para 5.

2883 See also the comments to art II–4:201 DCFR in von Bar and Schulte-Nölke (fn 36) 316. On the CESL, see also Schmidt J (fn 25) 285. This is also necessary for unilateral juridical acts under art II-4:301 para c DCFR, which generally requires that 'notice of the act reaches the person to whom it is addressed'.

dissertation,[2884] there is one important difference. This concerns the offeree, namely, their number and specificity, whereby the approaches in the European projects are not uniform. On the one hand, the CESL, like the CISG, treats proposals made to the public as non-binding statements by default.[2885] Therefore, 'unless the circumstances indicate otherwise', such statements will be deemed to be invitations to treat and have no legal effect (art 31 para 3 CESL). This approach is the same in English, German, and Japanese law, according to which advertisements and display of goods in shop windows are also treated as *invitationes ad offerenda*.[2886] In contrast, both the DCFR and the PECL foresee that proposals by 'a professional supplier' in the form of advertisements, including catalogues, and displays of goods, are deemed to be offers to supply goods or services at that price until their stock or capacity to perform the service is exhausted (art II-4:201 para 3 DCFR, art 2:201 para 3 PECL). Nevertheless, in circumstances such as the offeree's person being important to the offeror, eg, with lease or employment contracts, an advertisement for one or the other would not automatically be deemed to be an offer under the DCFR and the PECL either, but only as an invitation to make an offer.[2887] The consequence is that the deviation is not as large as it may seem at first glance. Indeed, this is even more true when one bears in mind that all the rules just discussed are only default and not mandatory rules, so that statement makers can make their proposals binding by choosing the wording carefully.[2888] Furthermore, the European projects, the CISG, and the three domestic laws concur in that an offer can be made to more than one specific person.[2889]

2884 Schmidt J (fn 25) 133–134. On the CISG, see Section I.2.a. above. On English, German, and Japanese law, see Section D.II.1.b. above. For a discussion of the differences between the details of the requirement of certainty in the CESL and English and German law, particularly regarding the price, see Schmidt J, ibid 279–282, 252–257, 262–279.

2885 See Section I.2.a. above for a discussion of the CISG's provision.

2886 On this, see Section D.II.1.a.ii. above. For a comparison with the CESL, see Schmidt J (fn 25) 201, 206–207, 210. Other cases are discussed comparatively in ibid 211 et seq.

2887 See von Bar and Schulte-Nölke (fn 36) 316 on art II–4:201 DCFR.

2888 One example given in ibid 317 is an auction sale made 'without reserve'. Another is an advertisement for a sale of land, which is to be done with the first person to pay a specified amount of money in cash.

2889 See art 31 para 2 CESL, art II-4:201 para 2 DCFR, art 2:201 para 2 PECL, as well as the discussions in Section I.2.a. above on the CISG, and in Section D.II.a. above on English, German, and Japanese law.

c. Acceptance

The notion of acceptance is identical under the CESL, the DCFR, and the PECL, as it is defined uniformly as '[a]ny form of statement or conduct by the offeree […] if it indicates assent to the offer' (art 34 para 1 CESL, art II-4:204 para 1 DCFR, art 2:204 para 1 PECL). This has been interpreted to mean a final and clear 'affirmative reaction' to an offer, ie, one that makes clear which offer or terms are accepted.[2890] The definition of acceptance implies that the offeree must have an intention to be bound by the offer and thus to enter into a contract, so that acceptance is distinguished from acts like the mere acknowledgement of an offer.[2891] As was seen above, this is true for the CISG and the three domestic laws as well.[2892]

The definition of acceptance makes it clear that not only verbal statements but also conduct can suffice. Beside express declarations, statements or conduct may imply acceptance, such as performance of the offeree's duty.[2893] In addition, the three European codification projects regulate the converse case exactly like the CISG: 'Silence or inactivity does not in itself amount to acceptance' (art 34 para 2 CESL, art II-4:204 para 2 DCFR, art 2:204 para 2 PECL, art 18 para 1 CISG). While an express provision to the same effect cannot be found in English, German, or Japanese law, all three legal systems do not deem mere silence to constitute acceptance, although implied acceptance is generally allowed.[2894] Nevertheless, both the harmonisation projects and the domestic laws admit silence or inactivity as acceptance under special circumstances, such as a framework agreement between the parties or statements by the offeror to that effect. In particular, it will be admitted where a pertinent practice or usage exists between the parties.[2895]

2890 Gregor Christandl, *Art 2:204: Acceptance*, in: Jansen and Zimmermann (fn 38) 316, 317 paras 2, 4.

2891 See ibid 317 para 3. On the contractual intention to be bound, see further the discussion in Section f. below.

2892 See Sections I.2.b. and D.II.2. above respectively. For a comparison of the CESL and English and German law, see Schmidt J (fn 25) 438, 445.

2893 On this, see Christandl, '*Art 2:204 PECL*' (fn 2890) 319 para 8, who notes that implied statements under the PECL will be interpreted using an objective test. Several examples are given in the comments to art II–4:205 DCFR in von Bar and Schulte-Nölke (fn 36) 339, including the 'production of goods ordered'.

2894 See Section D.II.2.a. above.

2895 See generally Christandl, '*Art 2:204 PECL*' (fn 2890) 320 paras 12–13. On the DCFR, see also the comments to art II–4:204 DCFR in von Bar and Schulte-Nölke (fn 36) 335. On English, German, and Japanese law, see Section

This rule, together with the general requirement of a declaration of intention having to reach the other party (see Section d.i. below), indicates that acceptance, like an offer, must be communicated to the other party, unless the parties or some usage between them dispense with this formality.[2896] This requirement exists likewise under the CISG, Japanese, German, and English law.[2897] The parties are free to stipulate a particular manner of accepting, whereby it would have to be clear that the mode is mandatory.[2898]

One point on which the CESL, the PECL, and the DCFR differ from the three domestic laws is with regard to the congruence of offer and acceptance. While the latter require declarations of acceptance to correspond to the offer,[2899] the former — like the CISG — give the offeree some leeway. Consequently, in accordance with art 38 para 3 CESL, art II-4:208 para 2 DCFR, and art 2:208 para 2 PECL, non-material alterations of the offer's terms do not affect the declaration as acceptance. Nevertheless, the European projects deem material changes as a rejection of the offer, so that the declaration in this case will be a new offer and not acceptance (art 38 para 1 CESL, art II-4:208 para 1 DCFR, art 2:208 para 1 PECL). Moreover, the effect is mitigated further by presumptions of a statement as a rejection, *inter alia*, where the offeror rejects changes without delay (art 38 para 4 (b) CESL, art II-4:208 para 3 (b) DCFR, art 2:208 para 3 (b) PECL), or where the changes relate to the contract's main terms such as the price, goods, or delivery (art 38 para 2 CESL). As a consequence, the result under the European projects, the CISG, and the domestic laws is basically the same.[2900]

d. Effectiveness of Declarations of Intention

Just like under the domestic laws and the CISG, declarations of intention made under the CESL, the DCFR, and the PECL will come into effect and

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D.II.2.a. above. For a comparison of English and German law and the CESL, see Schmidt J (fn 25) 542–545.

2896 See art 35 para 3 CESL, art II-4:205 para 3 DCFR, art 2:205 para 3 PECL. See also Christandl, '*Art 2:204 PECL*' (fn 2890) 317 para 3.

2897 See Sections I.2.b.ii. and D.II.2.b. above respectively. For a comparison of German and English law and the CESL, see Schmidt J (fn 25) 499.

2898 Christandl, '*Art 2:204 PECL*' (fn 2890) 318 para 7.

2899 See Section D.II.2.b. above.

2900 See Schmidt J (fn 25) 478.

may lose their effect at different points in time in various ways. As will be seen in Sections i. and ii. below, the regulation is almost identical in the three European harmonisation projects and the CISG, but differs in several respects from German, English, and Japanese law, in particular with regard to the last two legal orders.

i. Coming into Effect of Declarations of Intention

The coming into effect of the declarations of offer and acceptance are of significance, as the conclusion of the contract depends on these circumstances. Consequently, a contract under the CESL, the DCFR, and the PECL is formed when the declaration of acceptance comes into effect (see art 35 CESL, art II-4:205 DCFR, art 2:205 PECL). This is a codification of a general principle shared by English, German, and Japanese law and the CISG.[2901] The usual point in time at which declarations of intention come into effect under the three European codification projects is the time when they arrive (art 10 para 3 CESL, art I-1:109 para 3 DCFR, art 1:303 para 2 PECL). While this rule is the same under the CISG and German law, and in part English and Japanese law,[2902] the terminology and details in the regulation (on which, see below) differ. With regard to the language, the three projects use the term 'notice' instead of 'declaration of intention'; however, not only legally binding statements like offer and acceptance, but non-binding communications such as requests for and giving of information are included. The term thus encompasses different kinds of unilateral declarations as well.[2903]

Notice can be given 'by any means appropriate to the circumstances' (art 10 para 2 CESL, art I-1:109 para 2 DCFR, art 1:303 para 1 PECL), which has been interpreted to mean that the addressee must reasonably

2901 On the domestic laws, see Section D.II. above. On the CISG, see Section I.2. above.

2902 For the CISG, see Section I.2.c.i. above. For a comparative discussion of the three domestic laws, see Sections D.II.1.c. and D.II.2.c.i. for offers and acceptances respectively. See further Schmidt J (fn 25) 669–682, who makes a comprehensive comparison of the rules under English and German law and the CESL.

2903 A comprehensive list is given by Schmidt JP (fn 2809) 180–181 para 1. He goes on to note at 184–185 para 8 that the term is used inconsistently, in that it sometimes means 'act of communication' and is sometimes used in the sense of a 'statement', whereby an interpretation in the latter sense seems favourable.

anticipate receiving declarations by the means in question.[2904] Similar to art 24 CISG, a notice under these three projects comes into effect at the moment when the declaration is delivered to the addressee, their place of business, or, where applicable, their residence (art 10 para 4(b) CESL, art I-1:109 para 4(a)–(b) DCFR, art 1:303 para 3 PECL). Moreover, the DCFR and the CESL contain a provision for electronic communication, under which a declaration is deemed to have arrived 'when it can be accessed by the addressee' (art I-1:109 para 4(c) and art 10 para 4(c) respectively). Finally, these two codification projects foresee that making the notice available so that the addressee can 'be expected to obtain access to it without undue delay' (ibid paras 4(d)), a 'catch all-provision'[2905].

It ought to be stressed that actual knowledge of the notice or its content is not required by any of the provisions; the declaration entering the addressee's sphere of influence is sufficient for it to come into effect.[2906] The regulation differs from German law and, to some extent, from English law in this respect, as both of these domestic laws — the former decisively more than the latter — take into account the time declarations would normally be accessed, in particular, business hours, while the three codification projects disregard this aspect.[2907]

In cases of declarations of acceptance, the caveat for their coming into effect is that these reach the offeror either within a specified period or at least within a reasonable time (art 36 paras 1–2 CESL, art II-4:206 paras 1–2 DCFR, art 2:206 paras 1–2 PECL). In accordance with art 5 para 1 CESL, art I-1:104 DCFR, and art 1:303 PECL, the appropriate period is assessed by taking into account the circumstances of the contract, including its pur-

2904 See Schmidt JP (fn 2809) 195 para 26, who notes that an explicit or implied consent for the use of electronic communication means is usually said to be required.

2905 Ibid 193 para 22.

2906 Compare ibid 193–194 paras 23–24.

2907 On the projects, see ibid 194 para 24. On German law, see Section B.III.3.a.ii.dd) above. On English law, compare Section B.II.3.a.ii.ee) above. For a comparison of the CESL, English and German law, see Schmidt J (fn 25) 346–347. She interprets the consideration of business hours in England as a requirement of actual knowledge by the addressee; however, her argument at ibid 326–329 is not convincing. While some English legal authors indeed argue that (business) hours ought to be borne in mind, the requirement for offers is only said to be communication, which is apparently necessary in order to allow the offeree to have knowledge.

pose and any existing practices between the parties.[2908] This corresponds to the regulation in art 18 para 2 CISG, as well as English, German, and Japanese law.[2909] Unlike the CISG, § 147 para 1 BGB, and art 507 *Shōhō* (Japanese Commercial Code), neither of the three harmonisation projects foresee explicitly that offers made to a present person must be accepted immediately; however, at least the PECL seems to allow such an interpretation.[2910]

Where acceptance is not made within the time frame, it will normally not be effective; however, the CESL, the DCFR, and the PECL provide two exceptions. On the one hand, the offeror has the discretion to deem a declaration of acceptance to be effective despite it being late; in which case they must inform the offeree without delay (art 37 para 1 CESL, art II-4:207 para 1 DCFR, art 2:207 para 1 PECL). The offeror's declaration of assent can be express or implied from conduct, such as the performance of their obligation.[2911] On the other hand, where it is clear from the postal or other communication of acceptance that its late arrival is due to an unusually long transmission, the declaration will be effective unless the offeror reacts without delay, ie, gives notice of the lateness to the offeree (see ibid paras 2). These exceptions are also known in German and Japanese law and in the CISG.[2912]

Where no communication of acceptance is required (see Section c. above), the declaration of acceptance will consist of an act. Here, acceptance becomes effective when the act has been fully performed, even where the offeror only has notice of this after the time frame for acceptance has lapsed.[2913] This scenario is similar to English unilateral contracts or

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2908 On the point in time at which this period starts, namely, receipt of the offer by the offeree, see Gregor Christandl, *Article 2:206: Time Limit for Acceptance*, in: Jansen and Zimmermann (fn 38) 328, 329 para 3.

2909 On the domestic laws, see Section D.II.2.c.i. above. On the CISG, see Section I.2.c.i.bb) above. For a comparison of English and German law and the CESL, see Schmidt J (fn 25) 578–579.

2910 Christandl, '*Art 2:206 PECL*' (fn 2908) 329 para 2.

2911 See von Bar and Schulte-Nölke (fn 36) 347 on art II-4:207 DCFR.

2912 See Sections D.II.2.c.i. and I.2.c.i.bb) above for the two domestic laws and the CISG respectively. For a comparison of the CESL and German and English law, see Schmidt J (fn 25) 598–599.

2913 See the comments to art II-4:205 DCFR in von Bar and Schulte-Nölke (fn 36) 340. Nevertheless, in such cases, starting performance 'will be at the offeree's own risk' (ibid), presumably because the offeror may assume that the offer has not been accepted and may look to contract with another party. Here, an 'express assent' will avoid such misunderstandings, ibid. It ought to be noted

advertisements offering prizes under German and Japanese law, as the act's performance is pertinent here as well.[2914]

ii. Loss of Effect of Declarations of Intention

In general, declarations of intention can lose their effectiveness in different ways, depending on their kind. All types can usually be withdrawn before they have come into effect. Provisions to this effect exist in the CESL (art 10 para 5), the DCFR (art I-1:109 para 5), and the PECL (art 1:303 para 5), whereby the latter denominates this act as a 'withdrawal', while the former two use the term 'revocation'. Apart from this difference in terminology, the three provisions are identical in content. The same notion is also contained in the CISG (arts 15 para 2, 22; using the term 'withdrawal') and in the three domestic laws discussed above.[2915]

An offer will lose its effectiveness if it is rejected by the offeree (art 33 CESL, art II-4:203 DCFR, art 2:203 PECL) or when the set period for accepting the offer expires.[2916] This can be deduced from the rule that a declaration of acceptance will not come into effect if it does not reach the offeror within the fixed time frame or, at least, within a reasonable period (compare art 36 CESL, II-4:206 DCFR, art 2:206 PECL). As was already mentioned in Section i. above, this is also true for the CISG and the three domestic laws.

Another way in which declarations of intention may lose its effect is through revocation. By virtue of art 32 CESL, art II-4:202 DCFR, and art 2:202 PECL, this is true for offers under these three regimes, unless a fixed period for acceptance or some other circumstance makes it irrevocable.[2917] Accordingly, a revocable offer can be withdrawn until acceptance

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that the initiation of performance is pertinent, while mere preparatory acts are irrelevant in this respect, ibid.

2914 See Section D.II.2.a. above for further details.

2915 See Sections D.II.2.c. and D.II.3.c.ii. above for offer and acceptance respectively. For further details on the CISG's provision, see Section I.2.c.ii. above.

2916 See the comments to art II-4:203 DCFR in von Bar and Schulte-Nölke (fn 36) 333, where it is also noted that a declaration of rejection can be withdrawn under the general rules for notices (explained in the preceding paragraph above).

2917 For a discussion of these exceptions, see Gregor Christandl, *Art 2:202: Revocation of an Offer*, in: Jansen and Zimmermann (fn 38) 301, 309–310 paras 13–15. See further the comments to art II-4:202 DCFR in von Bar and Schulte-Nölke (fn 36) 326–327.

is made, ie, before a statement to that effect is dispatched or the conduct in question has been concluded (ibid paras 1).[2918] Where an offer is to the public, it can be revoked by the same means in which the offer was made (ibid paras 2).[2919] In contrast, acceptance cannot be revoked once it has come into effect, as a contract will have been concluded.[2920] Nevertheless, the declaration of acceptance can be withdrawn before it comes into effect (see above). This regulation corresponds to the norms found in the CISG, which also do not allow acceptance but do allow an offer to be revoked.[2921] In terms of the result, the situation is also the same in English law, but different in German and Japanese law: the former permits the revocation of an offer but not of acceptance; Japanese law sometimes does and sometimes does not, depending on which rule is applicable to the coming into effect of the declaration in question; while German law, in contrast, allows the revocation of acceptance but not of an offer.[2922]

e. The Sufficiency of the Agreement: Certainty or Determinability

As has already been noted above, the three European projects not only require that an agreement be reached, but that it be 'sufficient' (see art 30 para 1(c) CESL, arts II-4:101 and II-4:103 para 1 DCFR, art 2:101 para 1 PECL). According to art 2:103 para 1 PECL, this means that the contract's terms must be either defined in such a way so as to make the agreement enforceable, or that they be determinable by recourse to the PECL. Although the terminology is different, this requirement is the same

2918 In the latter case, the pertinent point in time is the offeror's knowledge of the conduct, so that a revocation that reaches the offeree before the offeror learns of the acceptance-conduct is effective, see the comments to art II-4:202 DCFR in von Bar and Schulte-Nölke (fn 36) 325.

2919 The time limit is the dispatch of the offeree's acceptance. Thus, the revocation must reach the offeree if the advertisement was sent to them directly, or must be available publicly, eg, in the case of a newspaper from the newspaper agent, before acceptance is made. See on this the comments to art II-4:202 DCFR in von Bar and Schulte-Nölke (fn 36) 325.

2920 Compare the comments to art II-4:205 DCFR in von Bar and Schulte-Nölke (fn 36) 339. This is also true for acceptance by conduct, see ibid 340.

2921 On this, see Section I.2.c.ii. above.

2922 For details, see Sections D.II.1.c. and D.II.2.c.ii. on offer and acceptance respectively. For a comparison of the CESL, German, and English law, see Schmidt J (fn 25) 347 and 348 (withdrawal of offer), 420–421 and 424–425 (revocation of offer), 431–432 (rejection and expiration of offer).

under the CESL and the DCFR (see art 30 para 1(c) CESL, art II-4:103 para 1 DCFR).[2923] As a consequence, the contract's content cannot be vague, which normally means that at least the parties' obligations must be discernible.[2924] While English, German, and Japanese law and the CISG do not have provisions that demand the contract to be certain, they nevertheless foresee that the content of the agreement be definite or at least determinable — by requiring an offer to be certain.[2925]

In accordance with the principle of freedom of form, all three Rules allow the parties to make a term essential for the contract's conclusion (see art 30 para 4 CESL, art II-4:103 para 2 DCFR, art 2:103 para 2 PECL).[2926] A similar provision is found in German law (§ 154 para 1 BGB),[2927] but neither in Japanese nor English law, nor in the CISG.

f. The Requirement of an Intention to be Legally Bound

Although the terminology varies, the CESL, the DCFR, and the PECL require the parties to have an intention to be legally bound by their contract. The phrasing of the CESL is widest, simply making it necessary for the parties to 'intend the agreement to have legal effect' (art 30 para 1(b)). The provision in the DCFR provides an alternative set of requirements: The parties may either 'intend to enter into a binding legal relationship *or* bring about some other legal effect' (art II-4:101 para a; emphasis added). On the other hand, the PECL requires that 'the parties intend to be legally bound' (art 2:101 para 1(a)). While essentially the same, there seems to be a subtle difference between these requirements. Both the phrasing of the DCFR and the CESL encompass cases of 'instantaneous transactions',

2923 See art 30 para 1(c) CESL and the comments to art II-4:101 DCFR in von Bar and Schulte-Nölke (fn 36) 290.

2924 Comments to arts II-4:101 and II-4:103 DCFR in von Bar and Schulte-Nölke (fn 36) 290 and 302.

2925 On the certainty of offers, see Section D.II.1.b. above for the three domestic laws, and Section I.2.a. for the CISG.

2926 It ought to be noted that the level of intention required differs between the three projects. While 'any sufficiently clear manifestation of intention' to elevate a term to an essential condition of a contract conclusion is enough under the CESL, the PECL and the DCFR require a stronger intention of one of the parties, namely, to refuse to contract unless the term in question is agreed upon. See on this Gregor Christandl, *Art 2:103: Sufficient Agreement*, in: Jansen and Zimmermann (fn 38) 268 para 1, 270 paras 5–6.

2927 On this, see Christandl, '*Art 2:103 PECL*' (fn 2926) 270–271 para 8.

which are executed immediately, such as purchases of daily items like newspapers or bread, and which are not meant to create long-standing contractual relations between the parties.[2928]

The existence of this intention to be legally bound is assessed on an objective standard, namely, the outward appearance of the parties' intention in the form of their statements and conduct (art 30 para 3 CESL, art II-4:102 DCFR, art 2:102 PECL). In this respect, the PECL and the DCFR make it clear that the objective standard is equal to what was 'reasonably understood by the other party' (ibid). A similar result is reached under the CESL when taking into account the interpretation standard for unilateral acts contained in art 12 para 1 CESL, namely, that such a statement 'is to be interpreted in the way in which the person to whom it is addressed could be expected to understand it.' This objective approach is shared by the three domestic laws, whereby only English law has the standard of the reasonable understanding of a person in the position of the other party.[2929] At least under the PECL, actual knowledge of the statement giver's intention by the addressee trumps over an objective interpretation, just like in English law.[2930]

g. Form Requirements

As was already noted above, none of the three European projects generally require particular contract forms. This is in line with the principle of freedom of form, which is made explicit in art 6 CESL, art II-1:106 para 1 DCFR, and art 2:101 para 2 PECL. Unlike the provision found in art 11 CISG,[2931] however, the application of the provisions just mentioned is not universal. Notably, the European projects foresee forms in relation to contracts involving consumers. Moreover, the DCFR contains a stipulation for gratuitous gifts (donations). We therefore see a partial difference between the international projects and English, German, and Japanese law. This is because currently, none of these three domestic laws make an explicit stip-

2928 See Christandl, '*Art 2:101 (1) PECL*' (fn 2874) 339–240 para 8. For comparative remarks on situations in which no legal relations are intended at all, such as with social arrangements, see ibid 242–244 paras 12–15.

2929 On the situation in English law, see Section B.II.3.a.i. above. On German and Japanese law, see Sections B.III.3.a.i.cc) and C.IV.1.a.i. above respectively.

2930 Gregor Christandl, *Art 2:102: Intention*, in: Jansen and Zimmermann (fn 38) 266 paras 1–2.

2931 For further details on this provision, see Section I.2.d. above.

ulation recognising this principle, even though it undoubtedly forms part of their contract laws.[2932] Having said this, from 1 April 2020, Japanese law introduces a norm whose wording is very similar to those of the provisions in the three European projects.[2933] At least Japanese law will thus come closer to the transnational harmonisation rules. This change will not alter the fact that forms are required for particular contracts, such as in the two instances just mentioned. English and German law go further, as formal requirements are also required for transactions over real estate.[2934] This latter instance is not covered by the DCFR and the PECL, as real estate is explicitly or implicitly excluded from their sphere of application.[2935]

Like in the domestic laws discussed in this dissertation, the European projects contain two different types of written forms: standard writing, sometimes including a signature, and a 'textual form', often to be delivered on a 'durable medium'. The meaning of these two forms will be explored briefly in Section i. before the instances of the form requirements are discussed in Section ii.

i. The Standard Written Form and the Textual Form

The requirements of form discussed in the subsequent section contain four different elements that will be analysed separately. In connection with the standard or traditional written form, the terms 'writing' and 'signature' need to be defined, whereas the meaning of 'textual form' and 'durable medium' are relevant in relation to the other kind of form.

'Writing' by itself is not defined in any of the three European projects. Rather, the traditional notion of a pen-on-paper method seems to be presupposed. This becomes clear from the CESL, which expressly states the word 'paper' in some norms (eg, arts 13 para 4 a, 18 para 1) and contrasts this with 'other durable mediums'. It is equally true for the DCFR, which makes clear that the phrase 'in writing' means 'characters

2932 On this, see Sections B.II.3.a.i., B.III.2.a., C.IV.1.a., and D.III. above.
2933 This is the new art 522 para 2 *Minpō*. On this provision, see Section C.V.3.d.i. above.
2934 These forms were discussed in a comparative manner in Section D.III. above.
2935 cf art I-1:101 para 2 (f) DCFR and art 1:101 PECL, the latter of which merely states to be a set of 'general rules of contract law' and does not mention real estate in any of its provisions. The CESL and the CISG — being rules on sales of goods — also do not regulate transactions on real estate, see arts 1 and 2 para h CESL Reg and Mistelis (fn 2705) para 39 respectively.

which are directly legible from paper or another tangible durable medium' (art I–1:106 para 1), but does not refer to electronic methods.[2936] Indeed, while carvings on stone or braille script fulfil the definition, recordings of sound, e-mail messages, and digital storage mediums such as DVDs in themselves do not, as they are not directly legible, ie, not legible without the use of a technical device.[2937] In contrast to the CESL and the DCFR, the PECL includes electronic forms by clarifying which means of distance communication are admissible for statements made in writing, namely, anything from telegram to e-mail as long as it is 'capable of providing a readable record of the statement on both sides' (art 1:301 para 6). The standard written form admits text written in alphabetic or other characters, but not symbols.[2938]

Closely connected with writing is a signature. It is defined in art I–1:107 DCFR as a class denomination, encompassing two kinds: handwritten and electronic signatures. The former takes on a traditional meaning, namely, as 'the name of, or sign representing, a person written by that person's own hand for the purpose of authentication' (ibid para 2). Despite the definition, written forms under the DCFR do not automatically require a signature.[2939] In contrast, the understanding of a signature as a form of authentication is presupposed in the CESL, which does not contain a definition of the term but provides in art 70 para 2 that the duty of a merchant to bring contract terms to the attention of a consumer is not fulfilled through 'a mere reference to them in a contract document, *even if the consumer signs the document*' (emphasis added). Here, the signature's function as a sign of consent is assumed but denied. This is also the case in art II-9:103 para 3(b) DCFR and art 2:104 para 2 PECL, the applications of which seem not to be restricted to consumers, however, as the provisions refers to 'one' or 'a' and 'the other party'. The same function is ascribed to electronic signatures, which are data that is either 'attached to or logically associated with other electronic data, and which serve[s] as a method of authentication' (art I–1:107 para 3 DCFR). Furthermore, the DCFR foresees 'advanced electronic signatures' to be electronic signatures that are created by means under the signatory's exclusive control, linked to that party, and that can identify them, whereby subsequent changes to the

2936 Compare von Bar and Schulte-Nölke (fn 36) 151 on art I-1:106 DCFR.
2937 Ibid 152.
2938 On the DCFR, compare ibid, where this is noted in relation to the textual form (discussed below).
2939 See ibid 151.

signature are 'detectable' from the data (ibid para 4). These latter two provisions make the DCFR most technologically advanced among the three European projects, as neither the CESL nor the PECL explicitly mention the notion of electronic signatures. The former thus approximates best to the situation in English, German, and Japanese law, as their contract laws also contain provisions on (advanced) electronic signatures.[2940]

In a similar manner, the DCFR is closest to German and, to some extent, English law, since these legal orders know a simpler written form: The former two have a textual form or *Textform*, while the latter has the form of 'evidence in writing'.[2941] It seems that no such form is known under Japanese law.[2942] According to art I–1:106 para 2 DCFR, this form is any 'text which is expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form'. This means that the text need not be available permanently, so that statements displayed on a website are made in the text form under the DCFR, just like under the German *Textform*.[2943] This is because the definition is similar to the requirement under German law for the declaration to be 'readable' ('*lesbar*', see § 126b BGB). In this way, this form embraces electronic statements.

Both the DCFR and German law furthermore require that the statement in textual form be stored on a 'durable medium' ('*dauerhafter Datenträger*'). A medium fulfils the requirement if it is durable and the sender cannot subsequently alter it, so that physical media such as CD-Roms or paper, but also the addressee's e-mail server fall within this definition, while websites are generally not sufficient.[2944] The CESL, unlike the PECL, also speaks of a durable medium in relation to its form requirements. The definition is similar: According to art 2 para t CESL Reg, the durable medium must allow the addressee to store the information for future reference for an 'adequate' period of time and allow 'the unchanged reproduction of the information stored'.

2940 See the discussion in Section D.IV.2.b. above.

2941 There is no such simple written form in Japanese law. On the domestic laws, in particular the difference between the German and English simple written forms, see Section D.III.1.a. above.

2942 Compare Section C.IV.1.b.ii. above.

2943 On the DCFR, see the comments to art I-1:106 DCFR in von Bar and Schulte-Nölke (fn 36) 152. Compare also the comments to art II-9:103 DCFR in ibid 620. For German law, see Section B.III.3.b.ii.bb) above.

2944 See von Bar and Schulte-Nölke (fn 36) 153 on art I-1:106 DCFR.

ii. Instances of Form Requirements

As mentioned above, the CESL, the DCFR, and the PECL require a contract form in three sets of circumstances, whereby two are linked to consumers and only one is shared by the three European Rules. This number is lower than in the three domestic contract laws, which also foresee forms in other cases, in particular with sales or leases of real estate.

The first circumstance in which the freedom of form is restricted under the European projects is in transactions involving consumers. By way of example, the CESL requires for distance contracts concluded on the telephone that the consumer has signed the offer or otherwise gives their written consent to conclude the contract in question (art 19 para 4). Moreover, the trader has to send a confirmation of the distance contract — whether concluded by telephone or other means — to the consumer on a durable medium (art 19 paras 4–5 CESL; compare also art II-3:106 para 4 DCFR). Likewise, the consumer must receive a paper or digital copy (on a durable medium) of an off-premise contract from the merchant under art 18 para 1 CESL.[2945] Similar regulation is also found in the domestic contract laws.[2946]

2945 Furthermore, there are information duties in relation to consumers under arts 13 et seq CESL, according to which the information must be 'made available to the consumer in a way that is appropriate to the means of distance communication used' with distance contracts, or, in paper or digital form with off-premise contracts, unless the price is less than €50 or the contract's object is household goods (see art 13 paras 3–5 CESL). The information duties towards other merchants are more lenient, as a 'disclos[ur]e by any appropriate means' is sufficient (see art 23 para 1 ibid). Finally, there are provisions for contracts concluded by electronic means other than 'exclusive exchange of electronic mail or other individual communication', which also include information duties (see arts 24–25 ibid). Information duties under the DCFR are found in arts II-3:101 et seq. In arts II-3:105 para 2 and II-3:106 para 4 DCFR, the textual form is required. It is recognised in art II-3:106 para 3 DCFR that a form may be required for the information in cases other than distance contracts; however, the provision does not constitute 'a general requirement' of form for information provided. See on this the comments to ibid in von Bar and Schulte-Nölke (fn 36) 260–261. While the PECL do not contain such detailed provisions, a general duty to provide information is inferred from art 4:107 para 3 PECL. See on this David Kästle-Lamparter, *Art 2:401: Duty to Disclose Information*, in: Jansen and Zimmermann (fn 38) 411, 413 para 3, 412 para 1.

2946 This was discussed briefly in Section D.III.1.a. above. For a comparison of, *inter alia*, English, German, and EU law, as well as various harmonisation projects, see David Kästle-Lamparter, *Introduction before Art 2:401*, in: Jansen and Zimmermann (fn 38) 384–410.

Another singular circumstance which requires a contract form also relates to consumers: Under the DCFR, a personal surety involving a consumer must be made in text form on a durable medium and must furthermore be signed by the security provider (arts IV.G-4:104, IV.G-1:101 DCFR). This is one example of a signature being required in the European Rules, albeit an electronic one.[2947] While English, German, and Japanese law also foresee forms for personal guarantees, the requirements range from signed written documents to merely being evidenced in writing.[2948] In contrast, the CESL and the PECL do not regulate this matter.

The other situation is a contract for gratuitious gifts (donations) under arts IV.H-1:101 et seq DCFR. Accordingly, donations of, *inter alia*, goods, money, and some types of incorporeal property must be made in text form on a durable medium that is signed by the donor (arts IV.H-1:103 para 1, IV.H-2:101 DCFR). This does not apply where the donor is a business, or where the donation is executed immediately (art IV.H-2:102 paras a–b DCFR). Again, the CESL and the PECL do not regulate this kind of transaction. Neither does the CISG. Under the domestic laws, gifts are regulated differently: Japanese law requires standard writing, while German and English law require a (notarial) deed.[2949]

3. Summary of Results

In conclusion, consensuality is a basic principle of the CESL, the DCFR, and the PECL, the same as for the CISG, as well as English, German, and Japanese law. Accordingly, a contract is formed through the concurrent intention of the parties coupled with the will to be bound by the agreement. Whether these elements exist depends on whether declarations of offer and acceptance have been made effectively, whereas it is generally irrelevant in what form the contract is concluded. Nevertheless, just as in the three domestic laws, there are single situations in which a written document or text is required under the three European harmonisation projects, namely, in relation to consumers. In particular, the DCFR has a form requirement for donations. A similar stipulation is also encountered in Japanese, German, and English law. Furthermore, the DCFR is similar to English and German law in that it has a simple written form, which is

2947 See von Bar and Schulte-Nölke (fn 36) 153 on art I-1:106 DCFR.
2948 For details, see Section D.III.1.b. above.
2949 See Sections D.III.1.b. and c. above.

not found in the CISG, the PECL, nor in Japanese law. Nevertheless, the CESL also admits electronic modes, like storage on a durable medium.

Both offer and acceptance are distinguished from non-binding statements and acts under the CESL, the DCFR, and the PECL, and a degree of certainty and an intention to be bound are required for these declarations. While this is the same under the CISG and the three domestic laws, the distinction between offers and invitations to make an offer is not *a priori* the same. The DCFR and the PECL deem particular kinds of advertising materials by professionals as offers to supply as long as stocks last, while the CESL deems statements to the undefined public as invitations to make an offer. The latter approach is congruent with the CISG, while the former can lead to the same result under German, Japanese, and English law, provided that the offeror has an adequate intention to be bound. Like the CISG, the three European projects explicitly admit congruence between offer and acceptance, notwithstanding non-material alterations. Such provisions are not known in the domestic laws analysed in this dissertation.

Like the CISG and German law, and in part Japanese and English law, the CESL, the DCFR, and the PECL determine the effectiveness of declarations of intention to begin from their arrival, ie, when the recipient can access the notice and thus have knowledge. Furthermore, all laws concur that acceptance can be made by statements and conduct, but not silence. In principle, its notice must reach the offeror within the set or a reasonable period, although the two exceptions recognised under the CISG are also admitted under the European projects: unless the offeror gives notice of a delay for undue long transmissions, acceptance will be effective; otherwise, the offeror has the discretion to deem a late notice of acceptance as a new offer. In case of acceptance by conduct, however, the notice of conduct must not reach the offeror on time, which is in contrast to the CISG, but similar to German, Japanese, and English law.

Under the three European projects, loss of effect of the declarations of intention may be due to expiry, rejection (of an offer), withdrawal, or revocation. While this is in principle also true for the CISG and the three domestic laws, differences exist. These concern the revocation of offers, which is generally not possible under German law, but admitted under Japanese law in some circumstances and normally allowed under English law. The European projects seem to follow English law in this respect.

III. Synthesis of the Comparative Analysis and Final Conclusions

As can be seen from the foregoing discussion, the rules on the formation of contracts in English, German, and Japanese law converge in respect of their global structure but deviate on finer points of regulation. Similarly, the transnational projects discussed in Sections I. and II. above are largely uniform in their regulatory approaches, although differences among them and, in particular, in juxtaposition with the three domestic laws, appear in several respects. There are several reasons and consequences for the differences.

One factor influencing the divergence is the legal framework in question. First, as discussed in Sections B.I. and C.I. above, the three domestic jurisdictions belong to different legal traditions with particular weighting of the instruments used to materialise the law (legal sources). Consequently, the extent to which legislated codes or statutes, court judgements, customs, and other materials of authority are encountered in legal practice varies in accordance with the type of legal system. English law as the 'mother' of common law[2950] places most importance on case law, with legislation only coming second as a source of law in practice. Furthermore, customs and equity, as well as academic texts (books of authority) are secondary sources, of which, however, only the latter is relevant for the purpose of the discussion in this dissertation.[2951] This is in stark contrast with Germany, which — true to its (Roman-) Germanic legal heritage — traditionally places stronger emphasis on codified law, whereas court decisions are not traditionally recognised as a source of law.[2952] Nevertheless, they are taken into account in legal practice and thus form part of the applicable law.[2953] Despite these differences, both jurisdictions have legislation and case law stemming from the organs of the EU in common.[2954] Japan takes the intermediate position between the two. Due to the multitude of influences this legal system has experienced to date, it has been

2950 See Darbyshire (fn 28) 11 para 1-013.
2951 For details, see Sections B.I.1. and B.I.2.a. above.
2952 Indeed, apart from decisions by the German Federal Supreme Court (*Bundesverfassungsgericht*), which can have force of law under certain circumstances, court decisions are generally not binding on courts in other cases, see Section B.I.2.b.iii. above.
2953 See Sections B.I.1. and B.I.2.b. above for further details.
2954 On this, see Sections B.I.2.a.iii. and B.I.2.b.iv. above for England and Germany respectively.

described as a mixed legal system. True to this nature, legislation, customs, and court judgements are all recognised as legal sources.[2955]

Secondly, each legal system in general and its contract law in particular has historically evolved in a different manner, as was seen in Sections B.II.2., B.III.2., and C.III. above for England, Germany, and Japan respectively. While English contract law has basically been developed from court procedures (writs) and commercial customs and needs, German contract law developed from Roman and customary law.[2956] This development was not uniform, since the law was fragmented throughout the different German territories until the BGB came into force.[2957] The division was perhaps not as severe in England, due to the court procedure being more centralised and the development thus being more uniform.[2958] Although the existence of a direct connection between English and Roman law is generally rejected by English academics, inspiration from Roman law concepts are nevertheless discernible in places, as with the offer-and-acceptance model.[2959] In Japan, contract law first developed from customs and commercial practice and would only be unified with the coming into force of the *Minpō* at the end of the nineteenth century, whereby influences in contract law come down to an amalgamation of elements taken from Japanese, French, German, and English law.[2960] All of these legal developments were of course based on social, economic, and political changes. In particular, the method of concluding contracts moved from barter to promises being exchanged, and from direct contracting between present persons to contracts being concluded at distance through correspondence by post in the eighteenth century, and, later, through telecommunication and now, electronic transmissions.

In terms of the ramifications of this development, all three domestic jurisdictions as well as the four transnational projects considered above require a consensual agreement between the parties in order for there to be a contract. It may be synallagmatic, ie, obliging for all parties, or binding for one side only; however, the concepts of the latter in the form

2955 See Sections C.I.1. and C.I.2. above for furher discussion.
2956 See Sections B.II.2., in particular B.II.2.a.iii.bb), and B.III.2. above for English and German law respectively.
2957 On this situation in the *alte Reich* (from sixteenth century), see Secions B.III.2.a.ii. and iii. above.
2958 On the historical state of the law and the English procedural system, see Sections B.II.2.a.ii. and B.II.2.b.ii. above.
2959 On this, see Section B.II.2.b.ii.bb) above.
2960 See Sections C.III.1. and 2. above for further details.

of unilateral contracts under English law, *einseitig verpflichtende Verträge* under German law, and *henmu keiyaku* (片務契約) under Japanese law differ to some extent.[2961] This is even more true for the DCFR, which does not recognise one-sided contracts, only unilateral juridical acts.[2962] In contrast, the CISG, the CESL, and the PECL only admit bi- or multilateral contracts.[2963] Despite this disparity, the pillars of contract formation are the same in all systems and consist of offer, acceptance, and an intention to be bound by the agreement.[2964] It is remarkable that the understanding and treatment of these concepts under the domestic laws is comparable, as, for example, with the distinction between offers and invitations to treat (*Aufforderung zur Abgabe eines Angebots*; *mōshikomi no yūin*, 申込みの誘引), or the presumptive distinction between legally binding arrangements with commercial relations and non-binding arrangements in social and family relations.[2965] Having said this, differences exist in respect of the classification of invitations to make an offer with the transnational projects. While the three domestic laws deem advertisements to be invitations to treat, the PECL and the DCFR have a default rule according to which they are offers to supply until stocks are depleted.[2966] Moreover, the CISG and the CESL treat offers to the general public as invitations, while the three domestic laws admit these to be offers *ad incertas personas* under certain circumstances.[2967]

While these parallels also exist with respect to the general requirements for declarations of intention,[2968] the regulations diverge on the point of the declarations coming into effect and losing the same. This is due, in

2961 For a comparison of these concepts, see Section D.I. above.

2962 See Section II.2.a. above.

2963 On the CISG, see Section I.2. above. On the PECL and the CESL, see Section II.2.a. above.

2964 This is analysed in Section D.II. above. On the transnational projects, see Sections I.2. and II.2. above.

2965 On this differentiation, see Sections D.II.1.a. and D.II.3. above. In like manner to offers, declarations of acceptance are also distinguished from non-binding statements, see Section D.II.2.a. above.

2966 See Sections D.II.1.a.ii. and II.2.b. above for the domestic and transnational rules respectively.

2967 On the CISG and the CESL, see Sections I.2.a.i. and II.2.b. above respectively. On the domestic laws, see Section D.II.1.a.ii. above.

2968 See Sections D.II.1.b. and D.II.2.b. above for a comparative overview of the requirements for offer and acceptance under the three domestic laws, and Sections I.2.a.–b. and II.2.b.–c. for the rules under the transnational projects. One exception is the congruence of offer and acceptance, which is treated more leniently under the transnational projects than under the domestic laws

part, to the existence of two different sets of rules regulating the coming into effect of declarations of intention. These are the postal rule or *hasshin shugi* (発信主義, dispatch rule) found in English and Japanese law on the one hand, and the mailbox rule, *tōtatsu shugi* (到達主義, arrival rule), or *Empfangstheorie* (literally 'receipt theory') found in English, Japanese, and German law on the other.[2969] The latter is also found in the CISG, the CESL, the DCFR, and the PECL.[2970] Consequently, this issue is straightforward in German law and the transnational projects, since all declarations will normally be required to have been received. In contrast, this point is more complex in English law and even more so in Japanese law, since the rules of posting and receipt apply sometimes to offers and sometimes to acceptance, depending on the nature of the declaration and its communication method. In summary, offers made under English law are governed by the mailbox rule, whereas acceptance may fall under either the mailbox or the postal rule. Similarly, the arrival rule applies to offers while acceptance may be governed by either the arrival or the dispatch rule found in Japanese law.[2971] While this is true, the dispatch rule has been abolished under the reform of the Japanese law of obligations, so that only the arrival rule will be applicable from April 2020, unless the parties foresee otherwise.[2972]

On the other hand, there is also discord on the question of whether declarations of intention are revocable and so may lose their effect before expiring. While English law allows declaration of offer and acceptance not governed by the postal rule to be revoked, German law does not generally allow it, unless special circumstances apply. Under Japanese law, it depends on whether the declaration is made to persons who are physically present or at distance, and what communication method is used.[2973] The

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in that non-material alterations are admitted explicitly under the former Rules. On this, see Sections I.2.b.iii. and II.2.c. above.

2969 In general, see Sections D.II.1.c. and D.II.2.c. above for offer and acceptance respectively.

2970 See Section I.2.c.i. for the CISG and Section II.2.d.i. above for the European projects.

2971 Details of the rules' application can be found in Sections B.III.3.a.ii.dd) and iii.cc) above for German law, in Sections B.II.3.a.i.ee) and ii.cc) for English law, and in Section C.IV.1.a., in particular in iv., for Japanese law.

2972 On this change, see Section C.V.3.a. above.

2973 For a comparative summary, see Sections D.II.1.c. and 2.c. above. For details on English law, see Sections B.II.3.a.i.ee) and ii.cc). For German law, see Sections B.III.3.a.ii.ee) and iii.cc). For Japanese law, see Sections C.IV.1.a.ii.bb) and iii.bb).

transnational projects adopt a similar approach to English law in that revocations of offers are normally allowed, unless the offer is irrevocable.[2974]

The greatest points of disparity may be found in a range of requirements beyond a mere exchange of offer and acceptance in order for there to be a legally binding contract. These prerequisites are of two kinds and can be loosely grouped together as '*indicia* of seriousness' and as form requirements. With regard to the signs of earnestness, differences come to light once again between German law and the transnational Rules on the one side and Japanese and English law on the other. This is because only the latter two know of such external signs in the form of *tetsuke* (手付) and consideration.[2975] Although both are used as indications of the party's serious intention, the concepts are radically different. The simple reason is that consideration is a constitutive element of a contract under English law, while *tetsuke* is an act that is only partially implemented in legal practice.[2976]

The other external sign that is required to varying degrees in the three domestic contract laws and only in singular cases under the transnational projects is a particular form.[2977] German law is most strict, requiring highly formal acts that are performed before a public officer, a *Notar* (notary), for transactions of great consequence, such as transfers of titles to real estate.[2978] The opposite is true for Japanese law, which allows such transactions to be concluded orally.[2979] Similarly, the CISG does not require any form for sale contracts within its sphere of application.[2980] The middle position is adopted by English contract law, whose strictest form is required for transfers of title to real estate, namely, a deed, an instrument

2974 On this, see Sections I.2.c.ii. and II.2.d.ii. above for the CISG and the European projects respectively.

2975 In theory, German law has a concept that is similar to *tetsuke*, called *Draufgabe*; however, as it is no longer used in practice, it has become legally irrelevant. See on this Section B.III. 3.b.vi.bb) above. For a comparison of Japanese and English law, see Section D.II.4. above.

2976 For further differences, see the juxtaposition in Section D.II.4. above. See also Section B.II.3.a.iv. above on consideration and Section C.IV.1.b.vi. on *tetsuke*.

2977 In general, see Section D.III. above on the domestic laws. On the transnational projects, see Sections I.2.d. and II.2.g. above.

2978 For details, see Section B.III.3.b.iii. above.

2979 See Section C.IV.1.b. above for details.

2980 See Section I.2.d. above.

executed by private parties, albeit with professionals (solicitors) normally being involved in the drafting process.[2981]

Beside these traditional forms, German law and the DCFR have a textual form (*Textform*) that facilitates e-commerce.[2982] English and Japanese law also have more lenient requirements: The former has the form of evidence in writing, which is applied to, *inter alia*, guarantees, while the latter requires standard writing or an electromagnetic record.[2983]

These differences in the legal framework are reflected in legal and business practice in the legal cultures of the three domestic laws.[2984] One point in common is that agreements regarding real estate are — regardless of the legal formalities — concluded in some kind of written form in Japan, Germany, and England. Furthermore, several professions support the contracting parties during the transaction to varying degrees. The differences arise from the different course that a real transaction takes in the three countries, which in turn explains why different professionals are involved, in some cases from outside the legal profession.

Seen from a regulatory point of view, the differences described above are not as severe as they may at first appear to be, seeing as lack of one feature in one legal system is compensated by different features in another system. This can be illustrated by the doctrine of consideration in English law and *tetsuke* in Japan: Under both English and Japanese law, statutory form requirements are few in number. Despite this, laypersons generally desire some formality to express their earnestness, while at the same time — perhaps for economic reasons — shy away from voluntarily using a formal mode. Consideration and *tetsuke* may have provided an uncomplicated compromise in satisfying this practical need. In contrast, the need, and therefore the practice of *Draufgabe* may not have endured in Germany due to the high level of statutory mandatory forms, in particular the intervention of a public officer, a *Notar*, being required in some circumstances.

2981 These *executed* contracts must be differentiated from *executory* agreements to sell land, which need only be in writing. See on this difference fn 759 above. On the two form requirements, see Sections B.II.3.b.iii. and ii. for deeds and for other written forms respectively. The involvement of professionals in real estate transactions was discussed in Section D.V.4. above.

2982 A comparison was already made in Section II.2.g. above.

2983 On these forms, see Sections B.II.3.b.ii.bb)–cc) and C.IV.1.b.ii. above respectively.

2984 The practical aspects of the sale of real estate were compared in Section D.V. above.

Finally, it must be noted that the picture sketched in this dissertation is not a static one. As contract law has evolved in history, it will continue to do so in future. In this respect, both globalisation and modern technologies may be driving forces, changing current concepts or even replacing existing practices.[2985] One — from both a legal and a cultural perspective regrettable — example might be Japanese seals, *inshō* (印章), which are sadly faced with declining importance, as requirements of written (paper) forms are apparently gradually being replaced by electronic forms.[2986] It remains to be seen how the laws continue to develop; however, from a comparative lawyer's perspective, it would be preferable if legal culture were not cast aside completely for the sake of global commercial convenience.

2985 The possible impact of legal tech and smart contracts was considered in Section D.IV.3. above.

2986 This prediction is made in *Personal seals in Japan: For the chop*, The Economist (Tōkyō, 23 March 2019).