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## The Formation of Contracts & the Principles of European Contract Law

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# THE FORMATION OF CONTRACTS & THE PRINCIPLES OF EUROPEAN CONTRACT LAW

María del Pilar Perales Viscasillas\*

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## I. INTRODUCTION

The Principles of European Contract Law (PECL)<sup>1</sup> dedicates Chapter 2 to the formation of the contract; that is, to regulate the process of the formation of the contract mainly through the exchange of two declarations of will: the offer and the acceptance.<sup>2</sup> Once the acceptance is made and becomes effective, the contract is concluded and the parties are bound by their commitments.<sup>3</sup> Section 1 of Chapter 2 of the PECL is devoted to

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<sup>1</sup> COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I AND II COMBINED AND REVISED (Ole Lando & Hugh Beale eds., 2000) [hereinafter PECL].

<sup>2</sup> The rules in Chapter 2 also apply to the modification and termination of a contract. Usually the modification and termination of contracts follows the offer-acceptance process.

<sup>3</sup> See PECL, *supra* note 1, Chap. 2.

the general provisions of contract formation, while Section 2 is dedicated to contract formation through offer and acceptance.

The Uniform Commercial Code (UCC)<sup>4</sup> Article 2, Part 2, regulates the formation of the contract mainly by the exchange of offer and acceptance. As we will see, there are similarities between the PECL and the UCC in the process of contract formation, although there are also great divergences derived from the different legal backgrounds of both texts. The PECL is mainly a "European product" drafted in a continental style and with a civil law system heritage, while the UCC is a "common-law product." Despite their differences, the UCC has indirectly influenced the PECL. Its impact comes from the consanguinity that exists among the PECL, UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles)<sup>5</sup> and the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>6</sup> all of which were influenced by the UCC. Furthermore, since two countries within the European Union, the United Kingdom and Ireland, belong to the common-law family, the PECL has also been drafted to take into account the perspectives of their legal systems.

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<sup>4</sup> Uniform Commercial Code (1977) [hereinafter U.C.C.].

<sup>5</sup> International Institute for the Unification of Private Law, *Principles of International Commercial Contracts* (Rome, 1994) [hereinafter UNIDROIT Principles].

<sup>6</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF. 97/18, Annex 1, *reprinted in* 19 I.L.M. 668 [hereinafter CISG].

For information about the formation of contracts under the CISG, see MARÍA DEL PILAR PERALES VISCASILLAS, *LA FORMACIÓN DEL CONTRATO DE COMPRAVENTA INTERNACIONAL DE MERCADERÍAS* (1996) [hereinafter *LA FORMACIÓN*].

For information about the formation of contracts under the UNIDROIT Principles, see *COMENTARIO A LOS PRINCIPIOS DE UNIDROIT PARA LOS CONTRATOS DEL COMERCIO INTERNACIONAL 97-160* (David Morán Bovio et al. eds., 1999).

For a comparison between the CISG, the UNIDROIT Principles, and the U.C.C., see generally David A. Levy, *Contract formation under the Unidroit Principles of International Commercial Contracts, UCC, Restatement and CISG*, 30 UCC L.J. 249 (1998).

For information about the UNIDROIT Principles, see MICHAEL-JOACHIM BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW. THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (2d ed. 1997); María del Pilar Perales Viscasillas, *Unidroit Principles of International Commercial Contracts: Sphere of Application and General Provisions*, 13 ARIZ. J. INT'L & COMP. L. 380 (1996).

Although the civil law and the common-law systems have a common meeting - the analysis of contract formation problems via the traditional separation into two declarations of will (offer and acceptance) - there are also divergences that seem, at first sight, impossible to solve. The PECL learned from the obstacles that had to be overcome in its "precedents," particularly the CISG and the UNIDROIT Principles, and has achieved a set of rules balanced between the different principles that inspire both common-law and civil law systems. This does not mean that the contract formation rules of the PECL, or the entire text of the PECL, were created on the basis of "melds" or "patches" by selecting the most appropriate civil law or common-law rules, or the rules common to the different legal systems. On the contrary, the PECL evidences its own specific system. It has been built on the basis of enabling commercial exchanges between the European Union Member States, influenced by developed trade practices, and on the basis of providing its own autonomous interpretation of the rules of international trade in accordance with the principles of uniformity and good faith.<sup>7</sup>

## II. FREEDOM OF FORM: NO CONSIDERATION OR CAUSE

In principle, contracts that are governed by the PECL are not subject to any form or evidence requirement to determine their validity, their effectiveness, or the existence of contractual declarations of will. A contract may be concluded either verbally or in writing, including electronic correspondence.<sup>8</sup> PECL Article 2:101 is clear in this respect: "A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses."<sup>9</sup>

The principle of freedom of form is widespread in countries with civil law traditions. This is unlike those countries with common-law systems, although common-law systems have become less strict about requiring that sales contracts be in writing. UCC section 2-201, entitled Formal Requirements: Statute of Frauds, requires written evidence in order to prove the existence of contracts of more than \$500, which implies that a con-

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<sup>7</sup> See PECL, *supra* note 1, art. 1:106.

<sup>8</sup> See *id.* art. 1:301.

<sup>9</sup> *Id.* art. 2:101.

tract is required to be in writing not for its formation, but rather, for its enforceability.<sup>10</sup> The principle of freedom of form implies that the offer and acceptance need not be in writing. Moreover, in PECL Article 2:101, the formal requirements for the conclusion of a contract are reduced in such a way that a contract is concluded if the parties intend to be legally bound and reach a sufficient agreement *without any further requirement*.<sup>11</sup> This implies that the contract can be concluded without the existence of the formal and typical requirement of the common-law system known as consideration,<sup>12</sup> and without the requirement of *causa*, or cause, in civil law systems.<sup>13</sup> In fact, this clearly shows the way common-law systems are changing as they find the requirement for consideration more restrictive.<sup>14</sup> Such freedom is also in accordance with the general principle embodied in CISG Article 11 and UNIDROIT Principles Article 1.2, which both reflect the common understanding in the civil law tradition.<sup>15</sup>

### III. CONSTRUCTION OF THE CONTRACT: THE PAROL EVIDENCE RULE AND MERGER CLAUSES

Merger clauses, or clauses that restrict acceptable forms of proof are frequently used by contracting parties under common-law systems and are relatively unknown in civil law systems. This is because, in common-law systems, the well-established parol evidence rule prevents the interpretation of the party's intentions in their negotiations when a written contract exists that expressly states - as in a merger clause - that all elements agreed upon by the parties are contained in that contract.

The parol evidence rule also comes into play in those contracts where merger clauses do not exist. In order to apply the rule under those circumstances, the judge must determine if the written contract reflects all or only part of the terms of the agreement. In the first case, the contract is considered "completely integrated," without the possibility of admitting any va-

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<sup>10</sup> See U.C.C. § 2-201.

<sup>11</sup> See PECL, *supra* note 1, art. 2:101.

<sup>12</sup> See RESTATEMENT (SECOND) OF CONTRACTS, §§ 17, 71, 79.

<sup>13</sup> See PECL, *supra* note 1, art. 2:101.

<sup>14</sup> See *e.g.*, U.C.C. § 5-105.

<sup>15</sup> See CODIGO DE COMERCIO [hereinafter C. COM.] art. 51 (Sp.); CODIGO CIVIL [hereinafter C.C.] art. 1278 (Sp.).

riation in the terms of the written contract, unless proven otherwise. In the second case, the contract is considered "partially integrated," and may be modified to the extent that the parties agree to additional terms that are consistent with the contract, rejecting those that are contrary to its written term.<sup>16</sup>

The PECL, following UNIDROIT Principles Article 2.17 on this issue, contains a provision relating to merger clauses that attempts to include the Anglo-American doctrine in its text. In particular, PECL Article 2:105(4) provides that one party may not allege a merger clause when the other party has reasonably relied upon the declarations or conduct of the former.<sup>17</sup> At the same time, PECL Article 2:105(2) states that if the merger clause was not independently negotiated by the parties, it will be presumed that they intended their previous declarations or agreements not to form a part of the contract.<sup>18</sup> Finally, PECL Article 2:105(3) provides that the parties may not exclude or restrict this rule.<sup>19</sup>

Despite such differences in content between the American doctrine and the text of the PECL, it must be noted that the meaning of the articles is the same. By virtue of a written merger clause, the contracting parties agree in writing that any previous declaration or agreement will be considered irrelevant. A merger clause also extends its effect to the modification of the contract. Invoking the principle of freedom to negotiate in PECL Article 1:102, the PECL verifies that incorporating such a clause into the contract does not pose any problem.<sup>20</sup> Neither the wording of PECL Article 2:105 itself nor, any clause similar to it, which is incorporated into the contract excludes the possibility that previous negotiations may be used to interpret what

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<sup>16</sup> For a discussion of completely and partially integrated contracts, see James Gordley, *An American Perspective on the Unidroit Principles*, in CENTRO DI STUDI E RICERCHE DI DIRITTO COMPARATO E STRANIERO. ROMA: 22 SAGGI, CONFERENZE E SEMINARI (1996) (who indicates the problems that American jurisprudence has in determining when a written contract is partially or completely integrated). See also, David H. Moore, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, BYU L. REV. 1352 (1995).

<sup>17</sup> See PECL, *supra* note 1, art. 2:105(4).

<sup>18</sup> See *id.* art. 2:105(2).

<sup>19</sup> See *id.* art. 2:105(3).

<sup>20</sup> See *id.* art. 2:102.

is in writing.<sup>21</sup> Furthermore, merger clauses do not extend to the negotiations or to agreements that take place following the conclusion of the contract.

Clauses that attempt to restrict modifications to the contract are, like merger clauses, usually used by parties from countries with an Anglo-Saxon legal tradition. Such clauses are known in common-law systems as "no oral modification clauses" (NOM clauses).<sup>22</sup> By agreeing to such a clause, the parties to a contract attempt to avoid its modification in any way other than by writing. In this way, they seek to avoid changes to the contract of which the parties involved in the transaction are not clearly aware. The requirement that modifications to the contract must be made in writing creates an exception to the general rule that contractual modification or termination is not subject to any formal requirement; that is, that modification can be carried out verbally, in writing, or by acts of performance. PECL Article 2:106 clearly establishes that a NOM clause only presumably provides for a writing requirement for the modification of a contract.<sup>23</sup> However, this provision may remain ineffective because of the declarations or actions of one of the parties.

#### IV. FORMATION OF THE CONTRACT: EXCHANGING AN OFFER FOR ITS ACCEPTANCE?

PECL Chapter 2, Section 2 and UCC Part 2, Article 2 follow the classic pattern of two declarations of will, offer and acceptance, in deeming a contract concluded. The adoption of this process is justified for two reasons: 1. the great majority of legal systems have adopted it; and 2. it makes analyzing the formation of the contract easy for the parties, judges or arbitrators. Nevertheless, at times it is difficult to determine what exactly is an offer or an acceptance, such as when negotiations are long and complicated. Such occurrences, however, would not prevent the conclusion of a contract, even though the moment when con-

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<sup>21</sup> See *id.* art. 2:105.

<sup>22</sup> See U.C.C. § 2-209(2); See also María del Pilar Perales Viscasillas, *Tratamiento Jurídico de las Cartas de Confirmación en la Convención de Viena de 1980 sobre Compraventa Internacional de Mercaderías*, 13 REVISTA JURÍDICA DEL PERÚ (TRUJILLO) 241, Introduction (1997).

<sup>23</sup> See PECL, *supra* note 1, art. 2:106.

clusion occurs cannot be easily determined or the offer and acceptance cannot be clearly identified. Naturally, the fact that the contract is being performed by both parties is sufficient to prove that at some prior point, the contract was concluded.

Some of the general provisions of the PECL regarding the formation of the contract recognize this practical issue, as did the UCC long ago. A doctrine similar to the one stated in UCC section 2-204 and in *Restatement (Second) of Contracts* section 22, was adopted in PECL Articles 2:101 and 2:211.<sup>24</sup> Therefore, the possibility of submitting every contractual formation process to the traditional offer and acceptance pattern is conceivable, with adjustments. The fact that a contract does not follow the traditional pattern and is consequently concluded without isolating the offer and the acceptance, does not detract from the value of the rules set forth in PECL Chapter 2. However, it must be recognized that finding the precise moment in which the contract is concluded could be very difficult if there is no offer and acceptance. In any case, the contract must be deemed concluded, failing other conclusive proof, either when there is sufficient agreement between the parties or when there is performance of the contract by both parties.

It should also be noted that the concept of contract embodied in the PECL includes not only the common law concepts of bilateral and unilateral contracts, but also the civilian concepts of contracts with reciprocal obligation and unilateral promises, which are binding without acceptance and are not considered contracts.<sup>25</sup>

## V. THE OFFER: ESSENTIAL ELEMENTS

PECL Article 2:201 establishes the minimum essential elements that must be found in order for a proposal to amount to an offer. These requirements are: 1. the terms must be sufficiently definite; and 2. the offeror must intend for the proposal to result in a contract if the other party accepts it (i.e. it must indicate the intention of the offeror to be bound in case of its acceptance.) The PECL and UNIDROIT Principles Article 2.2 do not set requirements for the definiteness of an offer as does

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<sup>24</sup> See also, UNIDROIT Principles, *supra* note 5, art. 2.1.

<sup>25</sup> See PECL, *supra* note 1, arts. 2:101, 2:107.

the CISG. The CISG follows the general rule of civil law systems, which requires that contracts, and by extension, offers contain the so-called *essentialia negotii*. The PECL, in contrast, adopts the more flexible approach as taken from common law countries in which the will of the parties (i.e. the agreement) and their intention to be bound by the agreement, are the essential elements for the conclusion of the contract. Under the PECL, any gaps are filled by implied terms,<sup>26</sup> the reasonable principle,<sup>27</sup> common uses, established practices between the parties,<sup>28</sup> or by the tribunal if it is able to find an appropriate remedy.<sup>29</sup>

Under the CISG, for an offer to be considered sufficiently definite it must identify the goods, quantity and price.<sup>30</sup> By not fixing the essential elements necessary for the conclusion of a contract, the PECL has not only followed a more practical and logical approach, especially in light of the fact that in addition to sales contracts, the PECL applies to civil and commercial contracts, but it also has avoided many of the problems that arose under the CISG, especially those related to open price contracts.

Is it possible to have a contract that says nothing about the price element? Western legal systems are not in agreement on the treatment of this question. While Spanish and French law,<sup>31</sup> among others, do not permit the existence of a contract without a specified price, common-law systems like those of the United States and England<sup>32</sup> allow for the existence of contracts lacking the price element. The question is a complicated one under the CISG and it was also greatly debated during prior drafting sessions. On the one hand, CISG Article 14 requires that the price appear in the offer of a contract, while on the other hand, CISG Article 55 establishes a method to cure the

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<sup>26</sup> See *id.* art. 6:102.

<sup>27</sup> See *id.* art. 6:104; U.C.C. § 2-305.

<sup>28</sup> See PECL, *supra* note 1, art. 1:105.

<sup>29</sup> See U.C.C. § 2-204(3).

<sup>30</sup> See CISG, *supra* note 6, art. 14(1).

<sup>31</sup> See C.C., *supra* note 15, arts. 1449, 1450.

<sup>32</sup> See U.C.C. § 2-305; Sale of Goods Act, art. 8 (1979) (Eng.). *But see* GERMAN CIVIL CODE § 317 [hereinafter BGB]; AUSTRIAN CIVIL CODE §1054 [hereinafter ABGB]; ITALIAN CIVIL CODE §1474 [hereinafter C.c.]; SWISS CODE OF OBLIGATIONS §212.1 [hereinafter OR].

lack of the price element when the contract has been validly concluded. In particular, CISG Article 55 indicates that one must apply the price generally charged for such goods sold under comparable circumstances in the trade concerned at the time of the conclusion of the contract.

Commentators on this question have expressed divergent opinions. Some consider the existence of a contract without the price to be impossible, except in very particular circumstances (i.e., when countries have made a reservation under CISG Article 92.) Others hold that it is indeed possible to conclude such a contract and that the method for determining the price contained in CISG Article 55 would adequately fill that gap.<sup>33</sup> Finally, there are those who regard the issue as a question of validity that must be judged in accordance with applicable domestic law.

In principle, a correct interpretation of CISG Articles 14 and 55 would first seek to determine the meaning of the expression "when the contract has been validly concluded," which are the introductory words of CISG Article 55. Under CISG Article 55, it seems that a contract may be validly concluded without the price being included if the will of the parties, either expressly or implicitly expressed,<sup>34</sup> leads to that conclusion. This is something that certainly occurs in those cases in which a contract has been performed. Consequently, it is recognized that when the price element indicated in CISG Article 14 is implicitly excluded from the contract, the contract may nevertheless still be valid, in which case such exclusion must be interpreted in light of CISG Article 8. More problematic, however, are those situations in which the contract has not been performed. The case law that has addressed this issue has held that it is impossible to consider a contract to be concluded under those circumstances. For example, a contract cannot be considered concluded when the offer<sup>35</sup> does not mention the price of the

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<sup>33</sup> See generally JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 137 (3d ed. 1999); Vincente Fortier, *Le prix dans la Convention de Vienne sur la Vente Internationale de Marchandises: Les Articles 14 et 55*, 2 *Journal du Droit International* 389 (1990); LA FORMACIÓN, *supra* note 6, at 315.

<sup>34</sup> See CISG, *supra* note 6, art. 6.

<sup>35</sup> See CISG, *supra* note 6, art. 19(1).

goods,<sup>36</sup> and additionally provides no guidelines for determining a price.<sup>37</sup>

Another departure from the CISG is that the PECL unifies the legal treatment of the so-called "offer to the public." The CISG requires that the offer be addressed to one or more specific persons, making that which is addressed to the general public only an invitation to receive an offer in the future.<sup>38</sup> That is to say, so-called public offers are not offers in the sense of the CISG unless the offeror clearly indicates otherwise, or rather, expressly indicates that the declaration directed to the general public is in fact an offer. Nevertheless, between those cases in which an offer is addressed to one or more specific persons, and those in which an invitation to make an offer is addressed to the general public, there are certain intermediate situations whose legal classification is not clear. These include common cases of mailings of catalogs, prospectuses, pamphlets or similar materials to a certain number of people identified by name (i.e., the name of a company or personal details identifying an employer), and in which all other elements of CISG Article 14 are contained. Such cases must be treated as if they were invitations to make offers<sup>39</sup> since in international commercial trade the use of these materials has a perfectly clear purpose: to convey information or to motivate the recipient to make an offer.

As mentioned earlier, the PECL's approach is slightly different from the CISG in that under the PECL, an offer may be made to one or more specific persons or to the public.<sup>40</sup> Such a proposal would generally be considered as an offer, although it may also be considered an invitation for an offer, depending on

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<sup>36</sup> See, e.g., the Supreme Court for the Republic of Hungary held that a contract for airplane motors which did not set the price of the motors being offered, and where performance was lacking, could not be considered concluded. *United Technologies International Inc., Pratt and Whitney Commercial Engine Business v. Magyar Legi Kozlekedesi Vallalat (Ma lev Hungarian Airlines)*, available at <http://cisgw3.law.pace.edu/cases/920925h1.html>.

<sup>37</sup> See, e.g., Judgment of March 4, 1994 (Provincial Court of Appeal, Frankfurt, Germany 1994), available at <http://cisgw3.law.pace.edu/cases/940304qI.html>.

<sup>38</sup> See CISG, *supra* note 6, art. 14.

<sup>39</sup> See generally, LA FORMACIÓN, *supra* note 6, at 287 *et seq.*; Honnold, *supra* note 33, § 136; E. Allan Farnsworth, *Formation of Contract*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 3.03 (Galston & Smith ed., 1984); PETER SCHLECTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2d ed. 1998).

<sup>40</sup> See PECL, *supra* note 1, art. 2:201(2).

the circumstances (i.e., an advertisement selling a house) and on the intention of the offeror. At the same time, a proposal to supply goods or services for a certain price made by a professional supplier in a public advertisement or a catalogue, or by a display of goods, is presumed to be an offer to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, has been exhausted. This approach recognizes the fact that the addressee of the offer may be a consumer.

Another notable similarity between the PECL and the UCC is that both have found a way to overcome the rigid approach of those civil law systems where the power that one of the contracting parties or a third party may have to set certain terms of the contract is taken into account.<sup>41</sup> According to PECL Articles 6:105 and 6:106 and UCC sections 2-305 and 2-306, the unilateral determination of the price or any other contractual term by one of the contracting parties or by a third party, is possible.<sup>42</sup> The fact that the party making the determination exceeds its power does not render the contract null or void, since a reasonable price or term would be supplied by the court.

Finally, the UCC and the PECL also permit the setting of the price by a third party, which is possible under the rigid rules of civil law systems. However, the UCC and the PECL have taken a different approach to that of civil law systems with regard to those situations in which the third party cannot or will not make the determination. In civil law systems, the contract would be considered to have no effect,<sup>43</sup> while under the PECL the parties are presumed to have empowered the court to appoint another person to determine the price.<sup>44</sup>

## VI. THE OFFER: WITHDRAWAL, REVOCATION AND EXPIRATION

Following the pattern of the CISG and the UNIDROIT Principles, PECL Articles 2:202 and 2:203 are devoted to the revocation and lapse of the offer. In the chapter dedicated to the formation of the contract, there is no rule like that contained in CISG Article 15 or in the UNIDROIT Principles Article 2.3 re-

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<sup>41</sup> See, e.g., C.C., *supra* note 15, art. 1449, which prohibits the unilateral determination of the price by one of the parties.

<sup>42</sup> See also UNIDROIT Principles, *supra* note 5, art. 5.7(2)(3).

<sup>43</sup> See C.C., *supra* note 15, art. 1447.

<sup>44</sup> See PECL, *supra* note 1, art. 6:106(1).

lating to the withdrawal of an offer. In fact, there is no need for one, since the revocation rule in PECL Article 2:202 can also cover those situations in which the offeror changes his mind, and consequently takes back, or revokes his offer.<sup>45</sup> In any event, the withdrawal of a notice, a concept that extends to the offer and acceptance, is regulated under PECL Article 1:303(5) and is a useful concept from a theoretical point of view. One must take into account that the distinction between the withdrawal and revocation is somehow artificial and that the withdrawal has no practical impact due to the utilization of modern means of communication. The withdrawal is only possible when the offer has been sent by mail or telegraph and is limited in effectiveness by the receipt principle. This means that the withdrawal is only possible if the notification thereof reaches the addressee before or at the same time as the offer.

The revocation of the offer is possible so long as the offer is not irrevocable and it arrives to the offeree before he has sent his notice of acceptance.<sup>46</sup> The PECL clarifies that an offer can be revoked when its acceptance has been made by conduct before the contract is concluded (i.e., when the offeror receives notice of such actions or performance begins.)<sup>47</sup> Also, the PECL states that when an offer is made to the public, it can be revoked by the same means as were used to make the offer, following the approach taken in *Restatement (Second) of Contracts* Section 46. This rule is not expressly adopted by the CISG, but is defended by a number of scholars.<sup>48</sup>

Aside from the possibility of revoking an offer, which is reserved for the offeror, the offeree may also terminate the offer by means of a rejection.<sup>49</sup> The rejection becomes effective when it reaches the offeror. The rejection of the offer prevents it from

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<sup>45</sup> In fact, under the legal system of the United States, the word "revocation" covers both cases: the withdrawal and the revocation of the offer. See Peter Winship, *Formation of International Sales Contracts under the 1980 Vienna Convention*, 23 INT'L LAW. 7 (1983). But see E. ALLAN FARNSWORTH, ON CONTRACTS §3.17 (3d ed. 1999).

<sup>46</sup> See PECL, *supra* note 1, art. 2:202(1). Cf. CISG, *supra* note 6, art. 16(1); UNIDROIT Principles, *supra* note 5, art. 2.4(1).

<sup>47</sup> See PECL, *supra* note 1, art. 2:205.

<sup>48</sup> See LA FORMACIÓN, *supra* note 6, at 476. But see C.c., *supra* note 32, art. 1336, which allows for the revocation to be made by similar means.

<sup>49</sup> See PECL, *supra* note 1, art. 2:203; UNIDROIT Principles, *supra* note 5, art. 2.5; CISG, *supra* note 6, art. 17.

coming back to life, for example, if the offeree changes his mind about rejecting the offer and attempts to accept it again. This Rule is followed by the majority of legal systems, although there are some significant exceptions, such as option contracts under common-law systems as derived from *Restatement (Second) of Contracts* section 37.<sup>50</sup>

## VII. IRREVOCABILITY OF THE OFFER

One of the most controversial rules under the CISG is the one relating to the irrevocability of an offer. Just as the CISG establishes the general rule of when an offer can be revoked, it also sets out when an offer can be considered irrevocable. The CISG states that an offer cannot be revoked: 1. if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or 2. if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.<sup>51</sup>

In commercial trade, the most common way for the offeror to indicate the irrevocability of an offer is to show that it is irrevocable either by stating such or by using other forms of expression with a similar meaning. In that sense, the offeror can expressly declare that his offer is irrevocable through clauses such as: "I guarantee my offer for 15 days," "I will hold this offer open during a period of 30 days," "I promise not to revoke this offer until . . . ," "offer binding during the indicated period" or, finally, simply by declaring that his proposal is irrevocable.<sup>52</sup> These examples, that correspond to the wording of the CISG, "an offer cannot be revoked: if it indicates [ . . . ] that it is irrevocable,"<sup>53</sup> are convenient and simple examples of offers in which the offeror's commitment not to revoke his offer is doubtlessly indicated through clear expressions or words that are generally understood in trade as the will to be bound. This is also the approach taken by PECL Article 2:202(3)(a).<sup>54</sup>

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<sup>50</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 37.

<sup>51</sup> See CISG, *supra* note 6, art. 16.

<sup>52</sup> See Gyula Eörsi, *Revocability of Offer*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 157 (Bianca & Bonell eds., 1987).

<sup>53</sup> CISG, *supra* note 6, art. 16(2)(a); UNIDROIT Principles, *supra* note 5, art. 2.4(2)(a).

<sup>54</sup> See PECL, *supra* note 1, art. 2:202(3)(a).

A different problem arises when the offeror neither expressly nor tacitly indicates if the offer is irrevocable, but rather sets out a fixed period of time in which the offeree can accept the offer. The stating of a fixed period of time to accept (i.e. "you have twenty days to accept the offer") in many legal systems, especially those with German influences, indicates the general rule of irrevocability of the offer.<sup>55</sup> In common law systems on the other hand, it does not imply irrevocability, but rather just the opposite. As a general rule, common law systems follow the revocability of the offer, irrevocability being the exception. Those exceptions are: an offer under seal,<sup>56</sup> an option with consideration,<sup>57</sup> a firm offer<sup>58</sup> or the application of the doctrine of detrimental reliance, also known as promissory estoppel.<sup>59</sup> In any case, the power of the offeror to revoke his offer ends when the acceptance is sent.<sup>60</sup> Under the CISG, however, it is not clear whether a fixed period of time for acceptance means that the offer is irrevocable, or that a time period exists for the offeree to accept the offer, past which time the offer expires.

This ambiguity results from the very wording of CISG Article 16(2)(a), which was written imprecisely because no agreement could be reached on the meaning of a fixed period of time for acceptance. The differences between common-law and civil law<sup>61</sup> approaches prevented a unanimous solution. The consequence of the compromise will most likely be divergent interpretations by the courts. While some authors consider that an offer which indicates a period for acceptance, expressly or tacitly, in-

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<sup>55</sup> See BGB, *supra* note 32, § 145.

<sup>56</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 95 *et. seq.*; U.C.C. § 2-203.

<sup>57</sup> See *Payne v. Cave*, 3 Term Rep. 653, 100 E.R. 492 (1789); *Oxford v. Davies*, 12 C.B., N.S. 748 (1862); *Dickinson v. Dodds*, L.R.2 Ch.d. 463 (1876). See generally, FARNSWORTH, *supra* note 45; RESTATEMENT (SECOND) OF CONTRACTS § 42; JOHN E. MURRAY, ON CONTRACTS 111 (3d ed. 1990).

<sup>58</sup> See U.C.C. § 2-205. In civil law systems, the use of the expression "firm offer" will amount to an irrevocable offer. Under U.C.C. § 2-205, the firm offer has a similar meaning, although several conditions must be met in order for it to apply.

<sup>59</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 90.

<sup>60</sup> See generally *Adams v. Lindsell*, 106 E.R. 250 (1818); FARNSWORTH, *supra* note 45; CHITTY, ON CONTRACTS (Volume 1, 27<sup>th</sup> ed. 1994); SAMUEL A. WILLISTON, TREATISE ON THE LAW OF CONTRACTS 378 (Volume 2, 4<sup>th</sup> ed. 1990); MURRAY, *supra* note 57, at 148.

<sup>61</sup> See, e.g., BGB, *supra* note 32, § 145; U.C.C. § 2-205.

dicates that it is irrevocable,<sup>62</sup> others maintain the exact opposite position, which is, that the offer simply sets out a period of time for acceptance, but not for irrevocability. The position that appears to have the most success among commentators is that which indicates that such a question will have to be left up to the courts.<sup>63</sup>

The PECL, conscious of the divergent solutions under the CISG, solves the problem in PECL Article 2:202(3)(b), by stating that the revocation of an offer is ineffective if it states a fixed period of time for its acceptance.<sup>64</sup> Again, this seems to be a sensible approach, especially if one considers that the PECL is also applicable to consumer contracts.

Another way in which an offer may be considered irrevocable, even when the offeror has not indicated so, is when an offer creates the appearance to the offeree of being irrevocable and the offeree carries out some type of action in reliance on the offer. This doctrine, also known as promissory estoppel, which is derived from common-law systems,<sup>65</sup> is also recognized in civil law systems as the general principle of *venire contra factum proprium*. In such situations, the offeror cannot revoke his offer.<sup>66</sup> This is because those situations in which a period of time is set for acceptance could create the understanding by the offeree that the offer is irrevocable. Thus, if the offeree carries out some type of action related to the offer, such as investments in his company or purchase of materials, hiring of experts, consultants, lawyers, etc., he can rely on the protection of the PECL.<sup>67</sup>

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<sup>62</sup> See generally John E. Murray, *An Essay on the Formation of the Contracts and related problems under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 25 (1988).

<sup>63</sup> See LA FORMACIÓN, *supra* note 6, at 436. See also Luis Díez Picazo, *La Compraventa Internacional de Mercaderías*, in COMENTARIO DE LA CONVENCIÓN DE VIENNA 176 (Madrid, 1998).

<sup>64</sup> See PECL, *supra* note 1, art. 2:202(3)(b).

<sup>65</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 90; FARNSWORTH, *supra* note 45, § 2.19, § 3.25; J.D. CALAMARI AND J.M. PERILLO, THE LAW OF CONTRACTS §§ 6-1, 6-7 (3d ed. 1987).

<sup>66</sup> See PECL, *supra* note 1, art. 2:202(3)(c); CISG, *supra* note 6, art. 16(2)(b); UNIDROIT Principles, *supra* note 5, art. 2.4(2)(b).

<sup>67</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 87; FARNSWORTH, *supra* note 45, § 3.25; MURRAY, *supra* note 57, at 124.

## VIII. ACCEPTANCE

An acceptance is the positive response to an offer. It must be made clear and unconditional by the acceptor. Acceptance can take place in three ways: 1. by means of a declaration; 2. an action; or 3. even by silence or inaction.<sup>68</sup> Unless the offeror sets out a specific form of acceptance, the offeree is free to accept the offer either verbally or in writing.<sup>69</sup> The declaration of acceptance can either be written (a letter, telegram, telex, fax, e-mail, etc.) or oral (either with the parties in person or over the phone, on the radio, etc.) In both circumstances, in order for the acceptance to be effective and, in turn, conclude the contract, it must reach the offeror within the time period established in the offer or, in the absence of such provision, within a reasonable amount of time.<sup>70</sup>

An acceptance can also take place by means of conduct or by acts of performance. When acceptance occurs by conduct (such as raising a hand and nodding one's head), "the contract is concluded when notice of such conduct reaches the offeror,"<sup>71</sup> i.e., when he learns of it. If the acceptance takes place through acts of performance (for example, by delivering the goods and paying the price), it is not necessary to notify the offeror of acceptance, since the very act of delivery or payment concludes the contract as long as it is made within the time set by the offeror for acceptance, or within a reasonable amount of time if no such period is set.<sup>72</sup> Nevertheless, in order to accept through performance without the need for sending a communication to the offeror, it is necessary that the offer allow for such performance (i.e., "begin manufacturing," "send immediately," "buy in my name without delay,"<sup>73</sup> or "make payment to my account number. . .") or that it is permitted by virtue of established practices of the contracting parties or by usage.<sup>74</sup> The approach

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<sup>68</sup> See PECL, *supra* note 1, art. 2:204.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* arts. 2:205(1), 2:206(1-2).

<sup>71</sup> *Id.* art. 2:205(2).

<sup>72</sup> See *id.* arts. 2:205(3), 2:206(3).

<sup>73</sup> CISG, *supra* note 6, art. 18.(3), (see § 11 of the Secretariat's Commentary).

<sup>74</sup> See PECL, *supra* note 1, art. 2:205(3).

taken by the PECL is similar to that of CISG Article 18<sup>75</sup> and is also universally followed.<sup>76</sup>

Silence or inactivity does not in and of itself amount to acceptance.<sup>77</sup> Therefore, silence or inactivity, must be considered along with other factors, in order to amount to an acceptance of the offer. Such factors to consider are:<sup>78</sup> 1. legal provisions such as in PECL Articles 2:208(3)(b) and 2:207, or CISG Articles 19(2) and 21; 2. usage and practices established between the parties (i.e. customarily the offer-order is not answered but rather the goods are delivered directly);<sup>79</sup> and 3. the existence of a duty to answer.<sup>80</sup> Nevertheless, no value can be given to a statement found in an offer establishing that silence on the part of the offeree would be considered an acceptance, since, in that case, the offeree would be bound from the very birth of the contract by a simple unilateral declaration of the offeror.

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<sup>75</sup> See CISG, *supra* note 6, art. 18; LA FORMACIÓN, *supra* note 6, at 534 *et seq.*

The PECL, unlike the CISG, discusses the acceptance by acts of performance and does not include a rule related to the time limit for acceptance when the offer is made orally. In the case of oral offers, the CISG requires that the acceptance be immediate, unless circumstances indicate otherwise. In other words, the CISG establishes a more rigid period of time for acceptance for offers that are made orally, than for offers that are made in writing.

<sup>76</sup> See *e.g.*, UNIDROIT Principles, *supra* note 5, art. 2.6; U.C.C. § 2-206; RESTATEMENT (SECOND) OF CONTRACTS §§ 30(1), 50.

<sup>77</sup> See PECL, *supra* note 1, art. 2:204(3); UNIDROIT Principles, *supra* note 5; CISG, *supra* note 6, art. 18.1.

<sup>78</sup> See LA FORMACIÓN, *supra* note 6, at 512.

<sup>79</sup> See *id.*

<sup>80</sup> That is exactly how the courts in the United States understood it in one of the first cases to apply the CISG: *Filanto v. Chlewich*, 789 F. Supp. 2d 1229 (S.D.N.Y. 1992). As a matter of fact, the U.S. District Court for the Southern District of New York, in its ruling on April 14, 1992, was faced with the question of whether a clause containing a submission to arbitration before the Moscow Chamber of Industry and Commerce should be held to be incorporated into the contract. The court first turned to Article II of the New York Convention of 1958. It then proceeded to examine the norms on contract formation in the CISG to determine if the parties had agreed to an arbitration clause. In conformity with the norms of the CISG, in particular that relating to silence or inactivity of the offeree (CISG, Article 18(1), the court found that the arbitration clause had to be understood as forming part of the contract. The decision is logical because the offeree's silence or inactivity was combined with his initiating the execution of the contract (opening the letter of credit).

## IX. COUNTEROFFER

A declaration of acceptance must coincide with each and every term of an offer in order to conclude a contract.<sup>81</sup> This requirement is known as the “mirror image rule,” since the acceptance must be the very reflection of the offer, like that of a reflection of an object in a mirror. However, there is an exception that allows for the possible introduction of new terms into the acceptance that do not substantially alter the offer. In such a case, the acceptance will be valid and the contract will consist both of the terms of the offer and those included in the acceptance that do not substantially alter the offer, so long as the new terms are not objected to by the offeror without delay,<sup>82</sup> the offer does not expressly limit acceptance to the terms of the offer,<sup>83</sup> the offeree does not make his acceptance conditional upon the offeror’s assent to the additional or different terms, and the assent reaches the offeree within a reasonable period of time.<sup>84</sup>

On the other hand, if the element that is introduced in the acceptance adds new terms, modifies the terms of the offer, or introduces any other type of limitation in the offer that substantially alters it, the contract will not be considered concluded, and the response to the offer will become a counteroffer.<sup>85</sup> The offer still must meet all the requirements under the PECL to be considered an offer in and of itself.<sup>86</sup>

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<sup>81</sup> See PECL, *supra* note 1, art. 2:208(1); UNIDROIT Principles, *supra* note 5, art. 2.11(1); CISG, *supra* note 6, art. 19(1).

<sup>82</sup> See PECL, *supra* note 1, art. 2:208(3)(b), CISG, *supra* note 6, art. 19(2); U.C.C. § 2-207(2)(c).

<sup>83</sup> See PECL, *supra* note 1, art. 2:208(1); U.C.C. § 2-207(2)(a).

<sup>84</sup> See PECL, *supra* note 1, art. 2:208(3)(c); UNIDROIT Principles, *supra* note 5, art. 2.11(2); U.C.C. § 2-207(1).

<sup>85</sup> See PECL, *supra* note 1, art. 2:208.

<sup>86</sup> See *id.* art. 2:208(1); UNIDROIT Principles, *supra* note 5, art. 2.11(1); CISG, *supra* note 6, art. 14; U.C.C. § 2-207.

In order to determine when an element that is introduced in an acceptance materially alters the offer, thereby concluding the contract or not, a list of items is provided by the CISG. This list merely provides examples of such elements, as can be derived from the expression in CISG Article 19(3) “among other things.” Furthermore, the list has a presumptive nature since it predetermines that such “additional or different terms . . . are considered to alter the terms of the offer materially” (emphasis added.) The list includes the following elements: price—only those modifications relating to the total amount of the offering price (*Internationale Jute Maatschappij BV v. Marin Palomares S.L.*, (Supreme Court, Spain 2000), available at <http://cisgw3.law.pace.edu/cases/00012854.html>); clauses that modify the price because of increases in costs (*Fauba France FDIS GC Elec-*

## X. BATTLE OF THE FORMS

The battle of the forms is an expression that refers to a situation in which the parties exchange general conditions - preprinted forms - that add one or more terms that materially

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tronique v. Fujitsu Mikroelektronik Gmb H, (Supreme Court, France 1995), *available at* <http://cisgw3.law.pace.edu/cases/950104f1.html>); method of payment (Judgment of December 22, 1992, (District Court, Giessen, Germany 1992), *available at* <http://cisgw3.law.pace.edu/cases/921222g2.html>); quality and quantity of merchandise (Judgment of March 31, 1995, (Provincial Court of Appeal, Hamm, Germany 1995), *available at* <http://cisgw3.law.pace.edu/cases/950331g1.html>); place and time of delivery (Judgment of February 8, 1995 (Provincial Court of Appeal, Munich, Germany 1995), *available at* <http://cisgw3.law.pace.edu/cases/950208g1.html>); the extent of one party's liability to the other (Judgment of August 14, 1991 (District Court, Baden-Baden 1991), *available at* <http://cisgw3.law.pace.edu/cases/910814g1.html>); and the settlement of disputes. Nevertheless, it is very possible that courts consider the list in the sense that the aforementioned terms substantially alter an offer in every case. For example, an indication of a material alteration is the rejection of packaging bacon "in polyethylene bags" by means of a counteroffer in which the packaging is established as "loose" (Judgment of September 22, 1992 (Provincial Court of Appeal, Hamm, Germany 1992), *available at* <http://cisgw3.law.pace.edu/cases/920922g1.html>). In order to arrive at a clear set of rules for interpreting when a modification to an offer is material or not, the term "material" must be interpreted in a limited way. See FRANK ENDERLEIN AND DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 100 (1992).

The list that is offered contains only substantive elements that refer to rights and obligations that arise in a sales contract, eliminating certain elements from being considered material alterations, such as the initiative of the offeree to negotiate again and small changes in the wording of the offer that have no effect on the acceptance. An example of such non-material alterations is an acceptance in which certain complaints are added ("I accept because I urgently need the merchandise," or "I agree but was hoping for a more satisfactory agreement"), or recommendations are made or questions are asked ("I accept. Payment should be in bills of 100 euros," or "I accept. Would it be possible to include an arbitration clause?"), or requests are made ("Keep the acceptance confidential until it is announced publicly by both parties.") See United Technologies International Inc. Pratt and Whitney Commercial Engine Business v. Magyar Legi Koumlz Lekedesi Valla lat (Malev Hungarian Airlines), (Metropolitan Court, Budapest 1992), *available at* <http://cisgw3.law.pace.edu/cases/920110h1.html>. In the same way, the adding of a term that is an integral part of an offer in the response to that offer could not be considered a material alteration for several possible reasons: because the term would become a part of the applicable law governing the contract (for example, repeating one of the provisions of the Convention); because it mentioned a practice that is common between the parties or a usage that binds them; or because it is a term derived from good faith (for example, if one added in his acceptance, "in conformity with the usual standard of quality.") Finally, a modification of an offer whose content benefits the offeror should not be considered material either. See Judgment of March 20, 1997 (Supreme Court, Austria 1997), *available at* <http://cisgw3.law.pace.edu/cases/970320a3.html>.

modify the offer. It is a controversial issue under the CISG, where some scholars believe the last-shot rule applies, a rule which has been rejected by UCC section 2-207(3), which instead applies the knock-out rule.<sup>87</sup> The PECL, following UNIDROIT Principles Article 2.22, has adopted the common-law approach, which is articulated in PECL Article 2:209.<sup>88</sup>

To find a solution to the conflict of the battle of the forms is not easy. The situation is complicated by the customary practice of sending offers and acceptances that contain general conditions. Such conditions may reveal contradictions if litigation arises and may raise the following two questions: "Has a contract been concluded?" and, if so, "What are the terms of the contract?" The opinion of the majority is that when forms are used, the rules of the CISG should apply, and, consequently, any variation of those forms would be a counteroffer. Such a counteroffer would most certainly be accepted through some type of act of performance. Below, some solutions that have been given to the problem under the CISG will be examined to show the different approaches to solving this critical issue of contract formation.<sup>89</sup>

The battle of the forms is considered a gap that must be resolved by applying the general principles that the CISG is based upon. Following this approach, there is the belief that the principle of good faith should apply, and that those clauses contained in the forms which are contradictory should cancel each other out, leaving the issue to be governed by the applicable law, usage, or good faith. That is, they adopt the solution that is followed in other countries' legal systems, such as the United States' knock-out rule of UCC section 2-207(3), the *partiell dissens* rule from German Civil Code sections 154 and 155, or the solution from UNIDROIT Principles Article 2.22. A variation on this theory is that the situation produces an implied exclusion of CISG Article 19.

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<sup>87</sup> See U.C.C. § 2-207(3).

<sup>88</sup> See UNIDROIT Principles, *supra* note 5, art. 2.22; PECL, *supra* note 1, art. 2:209.

<sup>89</sup> See generally María del Pilar Perales Viscasillas, *Battle of the Forms under the 1980 United Nations Convention on Contracts for the International Sale of Goods: A Comparison with Section 2-207 of the UCC and the Unidroit Principles*, 10 PACE INT'L L. REV. 97 (1998).

The approach that has been most widely followed leads to the application of what is known as the last shot rule, under which the last person to send his form is considered to control the terms of the contract. An example of the application of this rule is the following:

A German buyer ordered doors that had to be manufactured by the seller according to his specifications. The seller sent the buyer a confirmation letter that contained his general conditions of sale on the back. Those conditions included the following statement: "The seller must be notified of any defects of the merchandise within eight days of delivery." Subsequently, the seller sent the merchandise and the buyer received it.

In this example, the confirmation letter was considered a counteroffer that became implicitly accepted by the buyer's conduct when he received the merchandise.

As shown, the different approaches lead to different answers to the same problem. In solving this problem, the PECL has decided to follow a more modern trend by applying the knock-out rule to solve the battle of the forms problem, thus adopting the innovative approach of the UCC.<sup>90</sup>

## XI. WRITTEN CONFIRMATION

Sending a confirmation letter following the conclusion of a contract is a common practice in international commercial transactions, as well as national transactions that take place between businessmen. The purpose of such a letter is to set in writing what was previously negotiated, to establish proof of what was agreed to, and to eliminate or reduce doubts or errors that might arise by setting out the terms by which the contract is governed. When the terms contained in the confirmation notice coincide with those that were actually agreed upon (i.e., they are a summary, exact repetition, or confirmation of such) no problems exist. However, what usually happens is that prior to, or simultaneous with the execution of the contract, a confirmation letter or invoice is sent out that alters or adds terms to the contract, when the contract has already been formalized. Such changes take place by including certain new elements, or general conditions, or by adding an entire set of general condi-

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<sup>90</sup> See generally PECL, *supra* note 1.

tions that had not been previously discussed by the parties or indicated as included in the contract, or conditions that provide for something different than what was agreed upon. Such occurrences raise the question of how these confirmation letters should be treated under applicable laws.<sup>91</sup>

In countries such as Germany, Austria, and Switzerland, which place a great deal of importance on the legal treatment of confirmation letters, a distinction is made between the *Auftragsestätigung* and the *Bestätigungsschreiben*. The *Auftragsestätigung*, or confirmation of an order, has somewhat more significance than a mere acknowledgment of the receipt of an offer. It expresses the will to carry out what is asked for in the contract, consequently comprising an acceptance (or counteroffer, in such case.) The *Bestätigungsschreiben*, however, corresponds with what is identified elsewhere as a letter of confirmation.<sup>92</sup> Furthermore, when the contractual relationship is between merchants, these countries provide that silence or inactivity on the part of the recipient of the confirmation letter produces an acceptance. However, even though said modifications may be accepted, this does not mean that the confirmation letters containing them are regarded in the same light as the original offer and acceptance.

In Anglo-American law, confirmation letters are regulated in a similar manner to the battle of the forms issue,<sup>93</sup> although with certain differences. In particular, jurisprudence has indicated that a confirmation conditional upon the recipient's acceptance of new terms is not possible because it would mean imposing conditions on a contract that has already been concluded.<sup>94</sup> The way Anglo-American law regulates written con-

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<sup>91</sup> See Perales Viscasillas, *supra* note 22, at 241.

<sup>92</sup> See generally Michael R. Will, *Conflits entre Conditions Generales de Vente*, in LES VENTES INTERNATIONALES DE MARCHANDISES. COLLECTION DROIT DES AFFAIRES ET DE L'ENTREPRISES DIRIGÉE PAR YVES GUYON (1981); Katherina S. Ludwig, *Der Vertragsschluss nach UN-Kaufrecht im Spannungsverhältnis von Common-Law und Civil-Law: Dargestellt auf der Grundlage der Rechtsordnungen Englands und Deutschlands*, in STUDIEN ZUM VEGLEICHENDEN UND INTERNATIONALEN RECHT 86, 88 (1994); KARL NOUSSIAS, DIE ZUGANGSBEDÜRFTIGKEIT VON MITTEILUNGEN NACH DEN EINHEITLICHEN HAAGER KAUFGESETZEN UND NACH DEM UN-KAUFGESETZ 121 (1992).

<sup>93</sup> See U.C.C. § 2-207.

<sup>94</sup> This would mean that the final part of U.C.C. § 2-207(1) would not be applicable "unless acceptance is expressly made conditional on assent to the additional

firmations of an already concluded contract is quite erroneous, since it is difficult to understand how a confirmation letter that includes new terms can be considered the acceptance of an offer. To escape from this paradox, basically two solutions are proposed by the doctrine: 1. understand it as an error in the rules relating to offer and acceptance; or 2. understand that the confirmation acts to validate a verbal contract in conformity with UCC section 2-201, which regulates the Statute of Frauds, a rule requiring that sales contracts be in writing. Under these solutions, a confirmation letter that is sent and not objected to is considered sufficient to fulfill the requirements of UCC section 2-201. Additionally, such a letter will give validity to the contract under UCC section 2-207(2), or rather, function as an acceptance of the terms of the contract.<sup>95</sup> The case law on these confirmations has required that they be reasonable, definitive, and in writing, following a previous oral agreement.<sup>96</sup> Furthermore, confirmations must be sent within a reasonable time from the oral conclusion of the agreement. Additional terms in the confirmation are considered proposals to modify the contract that will automatically become part of the agreement unless they materially alter the contract or are objected to by either of the parties.<sup>97</sup> For those terms that differ, Official Commentary Six indicates that the knock-out rule of UCC sec-

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or different terms." JAMES WHITE AND ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE 48 et seq.* (1988).

<sup>95</sup> See WILLISTON, *supra* note 60, at 255. *But see* MURRAY, *supra* note 57, at 171 (where the author states that there are two distinct problems and therefore the two sections cannot be mixed); R.W. Duesenberg, *Contract Creation: The Continuing Struggle with Additional and Different Terms under Section 2-207 of the Uniform Commercial Code*, 34 *BUS. LAW.* 1477 (1979) (where the author has analyzed decisions—especially those of the courts of New York—that apply U.C.C. § 2-201(2) with the goal of solving the battle of the forms or confirmation letters, thereby confusing two sections whose objectives are different).

<sup>96</sup> Since, if it were an agreement in writing, any written confirmation following such would be considered an attempt to modify the contract under U.C.C. § 2-209, which addresses modification, rescission and waiver, or even U.C.C. § 2-208, which addresses course of performance or practical construction.

<sup>97</sup> See U.C.C. § 2-207.

tion 2-207(3) is to be applied.<sup>98</sup> None of the other commentaries throughout this section oppose this solution.<sup>99</sup>

The solution at which the PECL arrives is simple: it applies the rules of offer and acceptance from Chapter 2 of the PECL. With a similar solution to that of PECL Article 2:208 relating to acceptances with modifications, PECL Article 2:210 provides that additional or different terms that are included in a confirmation letter become part of the contract unless they substantially alter the terms of the contract, or the recipient of the letter objects, without delay, to their inclusion.

## XII. CONCLUSION OF THE CONTRACT: TIME AND PLACE

The moment in which a contract is concluded under the framework of the PECL is summarized in PECL Article 2:205.<sup>100</sup> The PECL follows the receipt theory in determining the moment when a contract is concluded.<sup>101</sup> PECL Article 2:205, sections (1) and (2) state that "if an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror, or in the case of acceptance by conduct, when the notice of the conduct reaches the offeror." The issue of what is meant by "reaches" is clarified by PECL Article 1:303(3).<sup>102</sup> Therefore, the PECL sets up a general system to indicate that declarations of acceptance and any indication of intention become effective at the moment of their arrival, that is, when they are received by the offeree. The use of the term "reaches" in the English version of the PECL corresponds to the

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<sup>98</sup> See U.C.C. § 2-207 Official Commentary Six (1977). *But see* CALAMARI AND PERILLO, *supra* note 65, at § 2-21 (the authors suggest that where additional terms exist that are not contradictory to the other terms of the contract, UCC § 2-207(2) applies. If a contradiction does exist, the terms would not form part of the content of the contract, which will, therefore, be made up of the terms previously agreed upon, those that coincide between the forms and, lastly, those that would apply in conformity with the provisions of the UCC).

<sup>99</sup> See generally Caroline Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 940 (1991); FARNSWORTH, *supra* note 45, § 3.21 (regarding those terms that do not materially alter the contract); WILLISTON, *supra* note 60, § 6:25.

<sup>100</sup> See also CISG, *supra* note 6, art. 23; María del Pilar Perales Viscasillas, *Contract Conclusion Under the CISG*, 16 J.L. & COM. 315 (1997).

<sup>101</sup> See also CISG, *supra* note 6, art. 23; UNIDROIT Principles, *supra* note 5, art. 2.6(2).

<sup>102</sup> See also CISG, *supra* note 6, art. 24; UNIDROIT Principles, *supra* note 5, art. 1.9(3).

phrase "receives" in the American UCC,<sup>103</sup> or to what is known in the German system as *zugehen*, and in general to the "reception theory" in respect to written declarations.

The conclusion of the contract can be inhibited if the acceptance is withdrawn before or at the same time as it would have become effective.<sup>104</sup> Thus, it is evident that, just as is the case with a withdrawal of an offer, a withdrawal of an acceptance is only possible when the declaration of acceptance has been sent by mail or telegraph. The Reception Theory or Receipt Theory, which is also known as *Zugangstheorie* or *Empfangstheorie* in the German system and *Teoría de la Recepción* in the Spanish system,<sup>105</sup> requires that declaration of will be received in order to conclude a contract. The CISG adopts it as a general rule to all written declarations of will and any form of communication found in PECL Chapter 2. Since it is well established in common law systems that the mailbox rule is not applicable when the offeree uses means of communication other than the mail or telegraph,<sup>106</sup> a contract is concluded "upon receipt" of the acceptance when the offeree uses means of instantaneous communication (i.e., telex, fax, electronic data interchange (EDI), and electronic mail (E-mail.))

In cases in which the contract is accepted by acts of performance of the type described in PECL Article 2:205(3), under the dispatch rule, the contract is concluded when performance of the act begins.<sup>107</sup> In common-law systems, when an acceptance is dispatched by mail or telegram, it is referred to as the mailbox or postbox rule,<sup>108</sup> in the German system as *Übermit-*

<sup>103</sup> See U.C.C. § 1-201.

<sup>104</sup> See PECL, *supra* note 1, art. 1:303(5); CISG, *supra* note 6, art. 22; UNIDROIT Principles, *supra* note 5, art. 2.10.

<sup>105</sup> This theory is also adopted by BGB, *supra* note 32, § 130.1; ABGB, *supra* note 32, § 862; C.c., *supra* note 32, arts. 1326.1, 1335; GREEK CIVIL CODE § 192; OR, *supra* note 32, art. 5.

<sup>106</sup> For the North American system, see FARNSWORTH, *supra* note 45, § 3.22; Williston, *supra* note 60, § 6:34. For the English system, see CHITTY, *supra* note 60, § 67; G.H.TREITEL, THE LAW OF CONTRACT 25 (8<sup>th</sup> ed. 1991).

<sup>107</sup> See also UNIDROIT Principles, *supra* note 5, art. 2.6(3); CISG, *supra* note 6, art. 18(3).

<sup>108</sup> Since 1818, when the famous English case *Adams v. Lindsell*, 106 E.R. 250 (1818), was decided, it has been held that the moment of a contract's conclusion where the acceptance is made by letter or telegram is determined by the mailbox rule. See also *Dunlop v. Higgins*, 73 R.R. 98 (1848) (where the rule is clearly formulated); *Harris L.R. 7 Ch. 587* (1872); *Byrne v. Van Tienhoven*, L.R. 5 C.P.D. 344

*tlungstheorie* or *Absendetheorie*, and in the Spanish system as *Teoría de la Expedición* or the Expedition Theory. The contract is concluded when the offeree sends his acceptance to the offeror. Besides the CISG, which adopts the Expedition Theory as an exception to the Receipt Theory, the Spanish Commercial Code also adopts this theory in order to determine when a commercial contract has been concluded.<sup>109</sup> The Expedition Theory leads to one important consequence: the transmission risk of the acceptance has to be born by the offeror.<sup>110</sup>

It is possible that a contract will be concluded despite the fact that the acceptance arrives after the legal or contractual period of time allocated for acceptance has lapsed. This is known as a late acceptance and is regulated in PECL Article 2:207, which follows CISG Article 21 and UNIDROIT Principles Article 2.9. Under the late acceptance rule, two possible situations exist: 1. an acceptance that arrives late by fault of the offeree, that is, it is presumed that the delay was caused by the offeree either because he sent the acceptance after the allowed time period or because he sent it without taking into account the time needed for it to reach the offeror;<sup>111</sup> and 2. an acceptance that arrives late because of an irregularity in the means of transmission, for instance, a strike of postal employees.<sup>112</sup> In the first case, the acceptance cannot conclude the contract, but rather, the offeror may orally inform the offeree or send him a notice validating the acceptance, at which moment the contract

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(1880). See generally CHITTY, *supra* note 60 at 111-17. The mailbox rule is also adopted by the RESTATEMENT (SECOND) OF CONTRACTS § 63 (where it states that "unless the offer provides otherwise, an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as it is put out of the offeree's possession, without regard to whether it ever reaches the offeror.")

The mailbox rule was created to protect the offeree from the offeror's revocation power and its function is to determine the moment of a contract's conclusion. Thus, the CISG does not adopt the mailbox rule as a general rule for contract conclusion, since the reasons behind this rule are not present in the CISG. For instance, the CISG does not demand the requirement of consideration to deem an offer irrevocable, making the offeror's revocation power under the CISG more narrow.

<sup>109</sup> See C. COM., *supra* note 15, art. 54.

<sup>110</sup> At least theoretically, because in practice the rule is not applied in the common-law systems when the result is absurd. For the English system, see CHITTY, *supra* note 60, § 69; for the North American, see MURRAY, *supra* note 57, § 47.

<sup>111</sup> See PECL, *supra* note 1, art. 2:207(1).

<sup>112</sup> See *id.* art. 2:207.

would be considered concluded. In the second case, the opposite holds true, and the acceptance is considered capable of concluding the contract, reserving for the offeror the right to declare it otherwise, in which case he would be required to orally inform the offeree or dispatch a notice of his intention without delay. If the offeror does not communicate with the offeree, the contract is concluded upon receipt of the acceptance. It is important to note, however, that in practice the term "without delay" generally allows the offeror the maximum amount of time allowed, in which to inform the offeree that the offer has expired. In contrast, when the offeror has fixed a period of time in which to accept the offer, the offeree must accept it within such time. A problem arises in those cases where the offeror does not specify a beginning, also known as *dies a quo*, or ending limit to the period for acceptance (i.e., he has only indicated that the offer must be accepted within a month.) In those cases, PECL Article 1:304 applies.

In regard to the place of formation of the contract, the PECL, as well as the CISG, both do not foresee a rule to such effect, which leads one to believe that it is a question that is governed by the applicable domestic law.