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Reiner Schulze/Pilar Perales Viscasillas (eds.)

The Formation of Contract

New Features and Developments in Contracting

Nomos

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Foreword

On 12th June 2015 the first Joint Seminar on Spanish and German Law was held at the Universidad Carlos III de Madrid in cooperation with the Centre for European Private Law, Münster. It will be followed by other seminars on various legal topics of key importance in both Spanish and German law. This first seminar was devoted to one of the most fundamental concepts in private law: the formation of contract. Although perhaps not apparent at first glance, new developments in contract practice question the traditional notions of formation of contract. The purpose of the first seminar was therefore to discuss these new features from Spanish and German perspectives with particular focus on pre-contractual duties, formation by offer and acceptance, and other forms of manifestation of consent. The contributions to this volume represent the results of this conference.

The seminar was also a perfect opportunity to present the Liber Amicorum to Professor Rafael Illescas Ortiz on occasion of his retirement from Universidad Carlos III de Madrid after a long career devoted to commercial law, and particularly international and uniform commercial contract law. We thank Professor Rafael Illescas Ortiz once more for his many years of contributing to the development of commercial contract law. We also kindly thank the contributors and the publisher for making this book possible, as well as the Madrid Moot and the Dean of University Carlos III of Madrid, Manuel Bermejo, for the generous sponsorship of the event. Finally, we particularly thank Tatiana Arroyo Vendrell and Mónica Lastiri of the Universidad Carlos III de Madrid, and Aleksandra Socik and Cristina Pardo Mayorga of the Centre for European Private Law, Münster for their help and support in preparing the seminar and this volume.

Madrid and Münster — Pilar Perales Viscasillas

December 2015 — Reiner Schulze

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The Formation of Contract: New Features and Developments in Contracting

Reiner Schulze

I. Introduction

As the legal basis for the exchange of goods and services one can say that the contract is the most important legal instrument of a market economy. A contract gives a legal form to the economic interests and objectives of producers, traders and consumers and is to a certain extent the bridge between private agreements and a legal obligation that can be enforced by the state. It this therefore not surprising that in an age of so-called 'Globalization', with increasing international trade and international communication, the contract is at the centre of the efforts towards adjusting private law to these new economic challenges, to communication and to cultural changes in general. A uniform contract law for the whole world appears at first to only be but a dream. *Ernst Rabel* and several of his contemporaries have created a science from this utopia. The extensive research by Rabel on the '*Recht des Warenkaufs*'[1] ('Law on the Sale of Goods') joined together notions from the continental-European civil law and the common law legal traditions. In so doing, *Rabel* combined experiences from the study of ancient Roman law, which some 2000 years ago developed the foundations for modern day European law, with a clear focus on meeting the demands of the 20th century. This research was the basis for the international conventions which, in the latter half of the 20th century, created a uniform contract law for cross-border sales contracts at international level,[2] in particular the 1980 UN Convention on Contracts for the International Sale of Goods[3] (CISG).

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1 Ernst Rabel, Das Recht des Warenkaufs, vol 1 (1936, reprinted de Gruyter 1964). See also Ernst Rabel, 'A Draft of an International Law of Sales' (1938) 5 University of Chicago Law Review 453.

2 See also the 'Hague Conventions' of 1 July 1964: Convention relating to the Uniform Law for the International Sale of Goods (ULIS); Convention relating to the

The effects of the CISG have rightly been deemed a 'success story'.[4] This success does not just consist of over 80 states worldwide which have ratified this Convention and thus a large proportion of the world has a uniform sales law for cross-border contracts,[5] but this international sales law has also exercised considerable influence over the development of many national laws for 'internal' contracts (i.e. domestic contracts)[6] – e.g. in China[7], in countries of Eastern Europe which over the past 25 years have made the transition to a market economy[8], and also in Germany where the CISG served as a source of inspiration for the major reform of the law of obligations in 2002 ('*Schuldrechtsmodernisierung*').[9] Furthermore, at European level the international CISG has influenced not only numerous national laws but also the common law of the European Union with its 28 Member States. This particularly concerns the consumer law that the European Union created for its common market (especially the Consumer

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Uniform Law of the Formation of Contracts for the International Sale of Goods (ULF).

3 United Nations Convention on Contracts for the International Sale of Goods (CISG) Vienna, 11 April 1980.

4 Ingeborg Schwenzer and Pascal Hachem, 'The CISG – A Story of Worldwide Success' in Jan Kleinemann (ed), *CISG Part II Conference* (Iustus Förlag 2009) 125.

5 For a current list of all 83 Member States (in 2015: Congo, Guyana and Madagascar) see <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 22 October 2015.

6 For a comprehensive overview see Franco Ferrari (ed), *The CISG and its Impact on National Legal Systems* (Sellier 2008).

7 In general on the relationship between CISG and Chinese Law see Michael R Will (ed), *CISG and China – Theory and Practice (An International Exchange)* (Faculté de droit/ Unité de droit allemande 1999).

8 For Romania see, for example, Lucian Bojin, 'The Law of Obligations in Romania' in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe – A New Wave of Codifications* (Sellier 2013) 377, 382–383.

9 See Carsten Herresthal, '10 Years after the Reform of the Law of Obligations in Germany – The Position of the Law of Obligations in German Law' in Schulze and Zoll (n 8) 193; Reiner Schulze and Hans Schulte-Nölke, 'Schuldrechtsreform und Gemeinschaftsrecht' in Reiner Schulze and Hans Schulte-Nölke (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Mohr Siebeck 2001) 3; Peter Schlechtriem, '10 Jahre CISG – Der Einfluss des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts' (2001) 1 [1] Internationales Handelsrecht 12.

Sales Directive[10] of 1999) and the 2011 proposal by the European Commission for a Common European Sales Law[11] (CESL). Although this proposal has since been retracted it is nonetheless an important milestone on the path towards a common European private law. In particular, it forms the basis for the European Commission's current work on a common European law specifically for online trade.[12]

With regard to the CISG's relevance for the law on conclusion of contract, it may suffice to refer to just one example: the CISG has made a significant contribution to the emergence of a tendency in international and European sets of rules to only consider the consensus between the parties as the decisive basis for the conclusion of the contract. Accordingly, it abstains from requiring the fulfilment of further criteria – e.g. 'consideration' in common law, '*cause*' in French law or '*causa*' in Spanish law.[13] This approach is followed, for example, by the Principles of European Contract Law[14] (PECL) drafted by the Lando Commission and the proposal for a Common European Sales Law. The latter only stipulates three requirements for the conclusion of a contract: the parties reach an agreement, they intend this agreement to have legal effect, and that the agreement has sufficient content and certainty to be able to give it legal effect

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10 European Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Consumer Sales Directive).

11 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM (2011) 635 final.

12 Commission, 'Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the regions, A Digital Single Market Strategy for Europe' COM (2015) 192 final.

13 For an overview of the functions see Edward Allan Farnsworth, 'Comparative Contract Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 910; Filippo Ranieri, *Europäisches Obligationenrecht* (3rd edn, Springer 2009) 1049, 1153–1179; Hein Kötz, *Europäisches Vertragsrecht* (2nd edn, Mohr Siebeck 2015) 72 et seq.

14 The Commission on European Contract Law, Ole Lando and Hugh Beale (eds), *The Principles Of European Contract law. Parts I and II* (Kluwer Law International 1999); Part III edited by Ole Lando et al (Kluwer Law International 2003). Concerning the conclusion of contracts see Art 2:101 PECL.

(Art 30(1) CESL[15]). The requirement of 'consideration' (as in the common law) or a '*cause légitime*' (as in French law) are – as in the CISG – not to be found in these European set of rules. However, the CISG and the European sets of rules do not forgo an indication of genuine contractual intention, which is one of the functions of the common law 'consideration' and the French '*cause*' (i.e. the control that a party genuinely intends to conclude a contract and be legally bound rather than a mere favour or 'Gentleman's Agreement'). These sets of rules guarantee this 'seriousness' – similar to German law – through the requirement of an intention to be legally bound: according to Art 14 CISG an offer must indicate the intention of the offeror to be bound in case the offer is accepted. In turn, the proposed Common European Sales Law stipulates that the parties 'intended their agreement to have legal effect' (Art 30(1)(b) CESL). This concept of conclusion of contract, which follows the consensus principle with an intention to be legally bound (without other additional requirements), has gained in influence through the CISG – it is not just a characteristic of international uniform law for the sale of goods but also for a growing number of national laws. Even in France, where the '*cause légitime*' is maintained as a central element of the law surrounding the conclusion of contract, the French government is to decide on a reform proposal that follows the model of the CISG and European sets of rules by renouncing this concept.[16]

Although the CISG is and has been of importance and a source of inspiration for many national contract laws and for European contract law it does not, however, provide answers to all the challenges facing modern contract law. When one compares it with the proposal for a Common European Sales Law one will soon recognize that it is a convention with roots in the 20th century. For instance, it does not regulate matters such as

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15 For detail on this article see Evelyne Terryn, 'Conclusion of contract' in Reiner Schulze (ed), *Common European Sales Law (CESL) – Commentary* (C.H. Beck/Hart/Nomos 2012) 179 et seq.

16 See Art 3 of the 'Projet de loi relatif à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures' under <http://www.senat.fr/leg/pjl14-076.pdf> accessed 22 October 2015. On the history of the draft see Hélène Boucard, 'The curious process reforming France's law of obligations' (2015) 1 Montesquieu Law Review 1.

the electronic conclusion of contract and the supply of digital content (at least not explicitly).[17]

The new challenges for contract law are most broad and diverse and therefore cannot be discussed in full. The scope of this book rather focuses on considerations of new features and developments in contracting within an aspect of contract law, though one which forms the basis for the existence of the contract: the conclusion of contract. At first glance it appears to concern a 'classic' topic that appears to be settled in its nature – law students in Germany learn in their first year that contracts are concluded by the simple acceptance of an offer and now describe the somewhat established 'mechanism of conclusion' as a schematic 'click' between offer and acceptance.[18]

In contrast, the introduction in the topic of the present book shall only focus on selected aspects that warn against such a schematic understanding of conclusion of contract and indicate new challenges for the traditional understanding of how contracts are concluded. It does not give many answers but rather more questions that are posed due to these new developments. These questions particularly concern three issues: the influence of the pre-contractual phase on conclusion of contract, the conclusion of contract 'in several steps' and finally the relationship between conclusion of contract and unilateral promises.[19]

II. The Influences of Pre-contractual Behaviour on the Conclusion of Contract

With regard to the first of these issues – the broad field of the influence of pre-contractual behaviour on the conclusion of contract – the development

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17 Reiner Schulze, 'The New Shape of European Contract Law' (2015) 4 Journal of European Consumer and Market Law 139.

18 As, for example, in Hans Brox and Wolf-Dietrich Walker, Allgemeiner Teil des BGB (39th edn, Vahlen 2015) 43.

19 The scope of this brief introduction does not allow for the appropriate level of analysis of new challenges for the conclusion of contract in e-commerce and in the 'internet of things', such as the 'automated' conclusion of contract. Each of these aspects requires more detailed analysis; with respect to some challenges regarding EU legislation see Reiner Schulze and Dirk Staudenmayer (eds), *Digital Revolution – Challenges for Contract Law* (Nomos 2016).

of doctrine is especially flowing not just in Germany but also in other countries. This particularly concerns three topics, each of which could fill an entire book but which can only be highlighted here with some key words: pre-contractual liability; information duties; pre-contractual public statements.

a) Firstly, in many European countries the pre-contractual liability (the *culpa in contrahendo*) has become an important topic of legislation over recent years; however the German legal scientist, *Rudolf von Jhering*, set the foundations over 150 years ago.[20] *von Jhering* showed that a particular relationship arises between the parties who are negotiating the conclusion of a contract. Commencing negotiations does not give rise to the duty for the parties to conclude the contract they are negotiating as long as the contract is not concluded. However, in preparing the contract the parties enter into a closer relationship than other individuals who are not pursuing such a joint project. They therefore have to consider one another in the process. If one of these parties culpably breaches this duty, the other may be obliged to pay compensation in relation to any resulting loss. In German legal doctrine, *von Jhering's* concept was later particularly founded with the notion of liability for reliance:[21] in order to prepare a contract, the parties have a particular degree of mutual trust. If a party abuses this trust without regard for the other party, it is obliged to pay compensation.

In principle, this compensation is not directed towards the performance interest ('positive interest'); a party could only demand this when the other party was contractually bound and had not performed duties arising from the contract. However, a party may – independent of the conclusion of a contract – have a claim for compensation for the loss that arises from its trust in the correct behaviour by the other party during the negotiation of the contract (the reliance loss; 'negative interest').

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20 Rudolf von Jhering, 'Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen' (1861) 4 Jherings Jahrbücher 1.

21 Kurt Ballerstedt, 'Zur Haftung für culpa in contrahendo bei Geschäftsabschluß durch Stellvertreter' (1950/1951) 151 Archiv für die civilistische Praxis 501, 506; Claus-Wilhelm Canaris, 'Die Vertrauenshaftung im Lichte der Rechtsprechung des Bundesgerichtshofs' in Claus-Wilhelm Canaris and Andreas Heldrich (eds), *50 Jahre Bundesgerichtshof, Festgabe der Wissenschaft*, vol 1 (C.H. Beck 2000) 129, 176 et seq.

Legal doctrine and jurisprudence in Germany initially based this concept of pre-contractual liability on the general provision on 'good faith' in the German Civil Code (§ 242 Bürgerliches Gesetzbuch; BGB).[22] However, during the modernization of the law of obligations in 2002 an express provision on pre-contractual liability was adopted in the German Civil Code (§ 311(2) and (3) BGB). Shortly before, and afterwards, other countries in European Union have introduced provisions on pre-contractual liability – from the new Civil Code in the Netherlands[23] to the reform of the Russian Civil Code[24]. The requirements, under which this 19th century concept by *von Jhering* gains new relevance, and accordingly its form, vary in the different countries. The provision in Germany is especially broad in order to compensate for the weakness in the tort law under the German Civil Code (and even third parties, who never wanted to conclude the contract themselves, may even be liable in particular circumstances).

The positioning between contract law and tort law is subject to controversial discussions at national and international level.[25] However, on the whole there are at least two consequences that can be ascertained: in theory the freedom to conclude remains, in relation to the contract, untouched. However, its use – or abuse – is sanctioned in particular situations (such as breaking off negotiations contrary to the principle of good faith or publication of confidential material given by one party during the course of negotiations). A responsibility for the potential parties to a contract in relationship to one another is therefore recognized prior to the conclusion of contract – a first hint at the topics that will be covered: that the boundaries of contract law can not always be clearly defined by the conclusion of con-

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22 Volker Emmerich, '§ 311 Rechtsgeschäftliche und rechtsgeschäftsähnliche Schuldverhältnisse' in Franz Jürgen Säcker, Roland Rixecker and Hartmut Oetker (eds), *Münchener Kommentar zum BGB*, vol 2 (7th edn, C.H. Beck 2016) paras 36–39; Reiner Schulze, '§ 311 Rechtsgeschäftliche und rechtsgeschäftsähnliche Schuldverhältnisse' in Reiner Schulze (ed), *Bürgerliches Gesetzbuch. Handkommentar* (8th edn, Nomos 2014) para 12; Bundesgerichtshof, 11 May 1979 in (1979) 36 Neue Juristische Wochenschrift 1983.

23 See Arthur S Hartkamp, Mariane M Tillema and Annemarie Ter Heide, *Contract Law in the Netherlands* (Wolters Kluwer 2011) 74 et seq.

24 Anton D Rudokas, 'Contract Formation and Non-performance in Russian Civil law' in Schulze and Zoll (n 8) 153, 153–156.

25 Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort Law and Property Law in Europe. A Comparative Study* (Sellier 2004) 222–231.

tract; and which role is played by 'self-binding without contract'[26] prior to the conclusion of contract.

b) The pre-contractual information duties play a key role in relation to the smooth transitions between the pre-contractual phase and the conclusion of the contract. Above all, it is the relationship between these information duties and the traditional rules on mistake and other defects in consent which belong to the core challenges for the modern theory of contract conclusion; further examination will be necessary from the perspective of the distribution of informational risks between the parties to an existing contract.[27]

c) Furthermore, a particular facet of 'information risks' appears in the form of pre-contractual public statements. In Europe, the legal foundations are to be found in the EU Package Travel Directive[28], the Consumer Sales Directive[29] and their corresponding transpositions into Member State law[30]. For example, if incorrect information on a car's fuel consumption is given an advertisement on television, this will in principle become part of the sales contract. The seller is therefore liable for this information, even if this information was not mentioned during the negotiation of the contract and even if it is not proven that it influenced the buyer's decision (as far as the latter is possible). This not only applies when the incorrect information was given in advertisement by the seller, but also for advertisements by the producer or another person in the distribution chain between the producer and final seller.

These provisions are based on a standardized notion. They take account of the widespread distribution of work in the marketing of goods and services in modern sales systems: above all where mass-produced goods are concerned, the producer or the importer (and not the final seller) often is responsible for the advertising (and the labelling etc.). These measures by

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26 See especially Johannes Köndgen, *Selbstbindung ohne Vertrag. Zur Haftung aus geschäftsbezogenem Handeln* (Mohr Siebeck 1981).

27 See Part I of this volume.

28 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59.

29 Consumer Sales Directive (n 10).

30 For an overview see Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (eds), *EC Consumer Law Compendium* (Sellier 2008). Also available online under <http://ec.europa.eu/consumers/archive/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf> accessed 29 October 2015.

third parties can however exert considerable influence on the final buyer's decision to conclude a contract and his views on the content of the contract; and the final seller gains from this influence through the conclusion of the sales contract. Accordingly, these advertisements by third parties are seen as a factor that is typically also significant for the conclusion of the contract between the final seller and buyer.

The liability for pre-contractual public statements is not unproblematic. It breaches the principle of the relativity of contractual rights and duties because the content of the duties for one party is not solely determined by its relationship to the other, rather from the acts of third parties. One may welcome this as an adjustment to economic developments or criticize it as a violation of principles of contract law; nevertheless it is a part of the normative reality of the conclusion of contract and shows the extent to which conclusion of contract and prior behaviour can be linked together.

III. Conclusion of Contract over Several Steps

This leads to the next central aspect of modern contract practice: the conclusion of contract 'in many steps' or alternatively the 'extended' conclusion of contract. The sanctions for 'unjustifiably breaking off' contractual negotiations and the consideration of pre-contractual public statements in the content of the contract are in some respects already examples for the conclusion of contact 'in many steps'. However, this plays a much greater role in practice, especially in national and international commercial law.

For example, the 'letter of intent' has become a widespread instrument of 'step-by-step' conclusion of contract. It is especially in lengthy negotiations on complex subject-matter (such as the purchase of a factory) that a letter of intent can express the general interest of one or both parties to conclude a contract (even long before the actual conclusion itself) and can outline the material content of the planned contract.[31] The letter of intent therefore serves to generate trust and also in part to determine the content

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31 Giuditta Cordero Moss, 'The function of Letters of Intent and their Recognition in Modern Legal Systems' in Reiner Schulze (ed), *New Features in Contract Law* (Sellier 2007) 139; Benno Heussen, *Letter of Intent* (2nd edn, Dr Otto Schmidt 2014); Roderich C Thümmel, 'Letter of Intent (Absichtserklärung)' in Rolf A Schütze, Lutz Weipert and Markus Rieder (eds), *Münchener Vertragsbuch,* vol 4 (7th edn, C.H. Beck 2012) 1–17.

of the contract. German case law does not hold such letters to be binding, but does consider them to be a pre-contractual 'act of legal relevance'.[32] However, it is by no means not the only form of generating – step-by-step – a contractual bond in modern business law. For example, further widespread approaches include the mutual convergence towards conclusion of contract, which are often summarized under the term 'memorandum of understanding'.[33] Additional approaches involve the transfer of the stipulation or substantiation of individual parts of the content to a party or a third party; and sometimes before the agreement on the remaining content, sometimes at the same time, and sometimes afterwards.

All of these are just examples of approaches that have developed in practice for the consolidation of contractual commitments and content over several steps and at different points in time. There is a great need in practice for such methods, especially when sums of considerable economic importance are at stake. For instance, if a party is interested in the purchase of a factory or an entire company, it will often have to spend a considerable amount of money on the preparation of the contracts. It may be burdened with great expense in seeking expert advice in enquiring into the technical details and the economic standing of the business for sale. It will only want to spend such amounts if the other party uses a 'letter of intent' or 'heads of agreement' to declare its general willingness to sell. In the next step, the other party may require more detailed information on the intention to buy, the price, payment dates etc., before it expresses in a 'memorandum of understanding' that it will abstain from conducting negotiations with other interested parties. However, for each of these 'step-by-step' approaches it is either difficult or impossible to simply apply the traditional model of conclusion of contract by offer and a corresponding acceptance.

However, aside from these examples, the limits of this model have also been discussed in relation to 'crossing statements'. In this respect, the declarations by both parties, in which they each express their intention to con-

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32 See Ralf Bergjan, 'Die Haftung aus culpa in contrahendo beim Letter of Intent nach neuen Schuldrecht' (2004) 9 Zeitschrift für Wirtschaftsrecht 395.

33 Riku Korpela, 'Article 74 of the United States Convention on Contracts for the International Sales of Goods' in Peace International Law Review (ed), *Review of the Convention on Contracts for the International Sales of Goods (CISG) 2004–2005* (Sellier 2006) 152; Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (OUP 2012) 153–154.

clude a contract, have corresponding content. However, these declarations are not made successively (i.e. the second statement is not adjudged as an 'acceptance' of the first statement) but rather they cross in the post. In such circumstances it is not possible to say precisely which statement is the 'offer' and which is the 'acceptance'. If both statements overlap in content, there is no objective reason to negate the conclusion of a contract. An agreement rather also exists just as in the dispatch of an offer and the return of a corresponding acceptance. The decisive element – according to the principle of consensus – is the overlap in statements of intent and not the 'click' mechanism of conclusion of contract. The CISG has not explicitly recognized this, but it is primarily interpreted to this effect.[34] Furthermore, in international 'soft law' the UNIDROIT Principles of International Commercial Contracts[35] (PICC) contain an express rule that a contract can not only be concluded by the acceptance of an offer, but also by 'conduct of the parties that is sufficient to show agreement' (Art 2.1.1 PICC). The 'Principles of European Contract Law' (PECL), drafted by a group of scholars headed by the comparative lawyer, *Ole Lando*, also acknowledge the possibility of conclusion of contract without the traditional division into offer and acceptance. They determine that in such circumstances the rules on offer and acceptance apply with appropriate adaptations (Art 2:211 PECL; see also Art II.–4:211 DCFR[36]).

However, what 'appropriate adaptations' means exactly for the examples given from practice has not been extensively explained. In particular, it remains an open question whether the conclusion of contract can be understood as a process in which the contractual bond arises over the course of different parts (that is to say, in relation to its subject-matter or its intensity 'grows'), or whether the creation of a contractual links is always to be determined by one single point in time. In legal doctrine the former ap-

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34 Ulrich G Schroeter in Ingeborg Schwenzer, *Commentary on the CISG* (3rd edn, OUP 2010) Arts 14–24.

35 The first version of the 'Principles of International Commercial Contracts' was published in 1994. Subsequent versions have been published in 2004 and, most recently, in 2010. The text of the Principles is available online under <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010> accessed 26 October 2015.

36 Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, Definitions and Model* Rules *of European Private Law – Draft Common Frame of Reference (DCFR Outline Edition)* (Sellier 2009).

proach has long been favoured by, for example, *Sjef van Erp*[37]. In contrast, *Thomas Pfeiffer* has recently pleaded for the necessity for the conclusion of contract to be determined by a 'magic moment'.[38]

Both sides to the discussion can contribute goods reasons to the discussion and are each correct in their own respective way. Favouring the necessity of a single, clear point in time for the conclusion of contracts is, for example, that this is the only method by which the consequences of the contractual bond can be fixed by a precise point in time (such as creation of performance obligations, and the time for performance). However, the analysis of the aforementioned practice in which the parties seek to generate contractual links over several steps and for their statements to create a corresponding expectation from the other party rather does not speak in favour of the conviction that the relationship between the parties transfers at a 'magical moment' from contractually unbound to contractually bound.

On the one hand, one will therefore probably have to attempt to develop criteria in order to determine the relevant moment at which the single contract is concluded. However, on the other hand, one will have to attempt to specifically describe the actions by the parties before and surrounding the conclusion of the contract as binding. One will not be able to do so with *only* the traditional concept of contract, but rather one will have to take account of other forms of contractual relationships – not just relationships through other *contracts* (that is through different types of 'pre-contracts'), but also through forms of 'self-binding without contract'. The view will have to extend to both varieties of this 'self-binding': *on the one hand* to being bound by actual behaviour and the trust that this generates (or 'legitimate expectations') from the other party (as seen in relation to *culpa in contrahendo*); *on the other hand* through unilateral statements, that is to say through promises by one party as a unilateral legal act. The legal relations in complex transactions in practice are, in this respect, too colourful and diverse to allow an explanation just with the traditional model of contract.

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37 Sjef van Erp, *Contract als Rechtsbetrekking* (Tjeenk Willink 1990).

38 Thomas Pfeiffer, 'New Mechanisms for Concluding Contracts' in Schulze (n 31) 161.