The Conclusion of a Contract in Accordance with UNIDROIT Principles

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The necessary basis for an international business transaction is the conclusion of a legally valid contract entered into by the parties to the transaction. Although in the great majority of cases that are submitted to ordinary law courts or (arbitration) tribunals, these all too obvious prerequisites do not give rise to an examination in detail,[1] there will always be isolated cases whose constellation is such as to call for the settlement of important points of law – be it only because a party to the contract raises objections as to its conclusion or validity in law merely with a view to avoiding the consequences ensuing from it.[2] Every body of rules designed to regulate international trade relations will therefore, in one way or another, have to take up a position on the question of the conclusion and the validity of contracts. These points of law may be dealt with in different ways, ranging from a mere reference made to the applicable national law concerned to the setting up of a special body of rules that are as comprehensive as they can be. In the first case it is only a harmonization of the subject matter concerned that is aimed at, a solution that offers the advantage, potentially at least, of being more readily accepted by the different legal systems, as it does not interfere with general systematics of the private law of the country concerned. This course of action was followed in part also when the CISG[3] – hitherto the most successful[4] regulation in the field of an international standardization of private law to date[5] – was elaborated. Its success is due to the fact that

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1 This may be the reason why the provisions on the conclusion of the contract of the Principles have so far hardly been noticed in literature.

2 This is referred to by U. Magnus, 'Das UN–Kaufrecht: Fragen und Probleme seiner praktischen Bewährung' in (1997) *ZEuP* 823–846, at p. 835, with regard to an application of the CISG.

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

4 Up to 1 January 1997, 45 states, including almost all of the important states with regard to world trade, have ratified the Convention and incorporated it into their national laws; *see also* H. Honsell, *Kommentar zum UN–Kaufrecht* (Berlin 1996) at pp. 1089 et seq.

5 M. Bonell, 'The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments' in (1996) *Uniform Law Review* 26–39, at p. 26: 'a landmark in the process of international unification of law.'

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diverging opinions held on certain matters were overcome by leaving them more or less intact, without insisting on a common solution.[6] According to its Article 4, the CISG is not, for instance, concerned with the validity of a contract, and the applicability of provisions relating to the conclusion of a contract (Articles 14–24 of the Convention) is under the proviso, according to Article 92 of the CISG, that a contracting state has not excluded this part of the Convention from ratification.[7] The disadvantage of this course of action taken in the unification of the law lies in the splitting of the applicable legal systems, which tends to reduce the practical effect of any harmonization achieved. Acceptance and splitting are, in inverse proportion, also the characteristic features of the other procedure, the laying down of special rules, with its advantages and disadvantages.

Conscious of the fact that the extent of the regulation achieved by the CISG is the maximum of what can be achieved for the present time in the way of 'global legal thinking', UNIDROIT has renounced the idea of laying down provisions in the form of a binding international agreement when elaborating its Principles of International Commercial Contracts.[8] UNIDROIT has given preference to a non-legislatorial harmonization in the way of an 'international restatement of contract law',[9] thus making it possible to pursue the idea of a comprehensive regulation. This accounts for the great number of rules on the conclusion and the validity of commercial contracts provided for by the Principles.

In this article, the essential provisions on the conclusion of the contract shall be explained and their purport briefly commented on. The commentary will take its bearings from the principle expressed by Article 1.6 of the Principles, whereby their interpretation shall take account of their international impact and their subject, that is the uniform application of the law. The regulations relating specifically to the conclusion of the contract, are laid down essentially in Articles 2.12.22 of the Principles and are dealt with in a separate, second chapter. There are, however, other regulations laid down in the first and in the third chapter, which are of particular importance with regard to the establishment of the conclusion and the contents of an international commercial agreement. These regulations shall also be dealt with. As it is these rules of the Principles, in particular, that take their bearings from the

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6 With regard to matters not dealt with by the CISG, *see* K. Siehr, 'Commentary of Artt. 1–6, 89–101 CISG' *Kommentar zum UN–Kaufrecht* (H. Honsell (ed.)) (Berlin 1996), Art. 4, marginal notes 1 et seq., as well as Bonell, note 5, at pp. 28 et seq. on the relationship between the CISG and the Principles, and U. Drobnig, 'Substantive Validity' in (1992) *Am. J.C.L.* 635–644, at pp. 636 et seq., on the problems of validity in law.

7 The Scandinavian states Denmark, Finland, Norway and Sweden, have made use of the reservation pursuant to Art. 92 of the CISG and have ratified the Convention without the provisions on the conclusion of the contract; *see* Siehr, note 6 Art. 92.

8 This does not mean, however, that the Principles could not some day take the form of a convention or model law; *see* M. Bonell, 'Das UNIDROIT-Projekt für die Ausarbeitung von Regeln für internationale Handelsverträge' in (1992) *RabelsZ* 274–644 at p. 282.

9 Bonell, note 5 at p. 29.

provisions of the CISG on the conclusion of the contract,[10] the two regulations shall be compared with each other[11] with a view to illustrating the substantial differences existing between them.[12] A comparative examination of the UNIDROIT Principles and the Principles of European Contract Law (PECL) may be renounced,[13] as the latter do not, for the time being, comprise any special provisions on the conclusion of the contract.[14]

A. Basis for the Conclusion of the Contract

Where it appears doubtful whether a contract has been validly concluded with regard to concrete facts, it is not only the specific provisions relating to the conclusion of the contract, but also several aspects of a general nature that acquire importance. Some of the most important of these aspects will be dealt with in the following.

I. Extent of the Freedom of Contract

For any legal system that upholds the principle of self-determination of the individual, the guarantee of private autonomy is the starting point of all economic activities engaged in by the individual. This principle also constitutes the cornerstone of world trade, whose development must be based on an open market and therefore a competition oriented economic system.[15] This is the reason why the Principles expressly provide for the freedom to enter into a contract and the freedom to determine its contents, stating in Article 1.1 the principle that 'the parties are free to enter into a contract and to determine its contents'. Beside the freedom to enter into a contract and the freedom to determine its contents, the Principles stipulate in

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[10] Bonell, note 5 at p. 30; M. Fontane, *Les principes pour les contrats commerciaux internationaux élaborés par UNIDROIT, Revue de droit international et de droit comparé* (1991), pp. 25–40 at p. 33.

[11] J.M. Perillo, 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review' in (1994) *Fordham Law Review* 281–317, at p. 283: 'principles is a better, a more mature product.'

[12] For a general comparison of the Principles with the CISG *see* Bonell, note 5 at pp. 26 et seq.

[13] *See* O. Lando and H. Beale, *The Principles of European Contract Law, Part I: Performance, Non-Performance and Remedies* (Dordrecht 1995) at p. xix.

[14] For a general comparison of the Principles with the PECL *see* M. Bonell, 'The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?' in (1996) *Uniform Law Review* 229–245 at pp. 229 et seq.

[15] UNIDROIT, Principles of International Commercial Contracts. The black letter text with Commentary (Rome 1994), Art. 1.1, marginal note 1.

Article 1.2 the absence of requirements as to form.[16] Article 1.5 of the Principles completes the parties' freedom of contract when entering into or executing a contractual relationship by pointing out that the rules laid down are optional in principle, that is in so far as their mandatory nature is not expressly stipulated. However, a considerable restriction of the freedom of contract is provided for by Article 1.4 of the Principles, which makes a reservation in favour of mandatory rules of national, international and supranational origin, which shall apply in a specific case, irrespective of the legal sector the mandatory provisions belong to[17] and without allowing for the possibility that the Principles may have been included in a legal relationship merely as a supplementary agreement, or the contract subjected to the Principles with respect to its legal qualification, by way of an arbitration agreement.[18] It follows from this reservation that in practice the applicable law must be searched for mandatory legal provisions that are contrary to what the parties had agreed on, or that the parties must agree on a choice of law clause and put up with any inconvenience this may bring about.

II. Criteria for the Interpretation of the Parties' Declarations

Explicit rules on the interpretation of the contract and the parties' statements and conduct are laid down in Articles 4.1 to 4.8 of the Principles. These rules cannot be dealt with exhaustively in the present context, but the basic criteria should be outlined here. The starting point for the finding of justice is, according to Articles 4.1(1) and 4.2(1) of the Principles, invariably the observation that with regard to the interpretation of the contract the common intention of the parties, or, with regard to the interpretation of certain statements or of a certain conduct, the intention of one of the parties, is not discernible in a given case. The basis for an interpretation is, according to Articles 4.1(2) and 4.2(2) of the Principles, the objective meaning of a statement, such as any reasonable person of the same kind as the parties would give to it in the same circumstances. As for the criteria to be used, a difference must be made between interpretation on the one hand and the filling of a gap on the other.

The interpretation of a statement or of a certain conduct shall, according to Article 4.3 of the Principles, take account of all the circumstances of the individual case, inclusive of preliminary negotiations between the parties, practices which the parties have established between themselves according to Article 1.8(1) of the

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[16] Even though this provision refers to the written form only, all requirements of the conclusion of a contract are also included: *see* UNIDROIT, Commentary, note 15, Art. 1.2, marginal note 1. This interpretation of the provision stems from a practical need of using ever more rapid means of communication, renouncing written documents in business transactions, in agreement with Art. 1.10 of the Principles.

[17] For example the exchange control, anti-trust or price law, laws imposing special liability regimes or prohibiting grossly unfair contract terms; *see* UNIDROIT, Commentary, note 15, Art. 1.1, marginal note 3.

[18] UNIDROIT, Commentary, note 15, Art. 1.4, marginal notes 2, 3.

Principles), the nature and purpose of the contract, the meaning commonly given to terms and expressions in the trade concerned, as well as usage (see Art. 1.8(2) of the Principles). Furthermore, account must be taken of the complexity principle (Art. 4.4 of the Principles) according to which terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear, and the global principle (Art. 4.5 of the Principles) whereby contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect. In the event of linguistic discrepancies between different versions of a contract that has been drawn up in more than one language, preference is to be given to the interpretation according to the original version (Art. 4.7 of the Principles). Where the results of the interpretation of contract terms that are supplied by one party only are not in agreement, the construction that profits the party supplying the terms is to be rejected in accordance with the *contra proferentem* rule (Art. 4.6 of the Principles).

A gap that is due to the fact that the contracting parties have failed to agree on a provision that is important for the determination of their rights and obligations, shall, according to Article 4.8 of the Principles, be filled by an appropriate term. In determining what is an appropriate term, regard shall be had, in particular, to the intention of the parties, the nature and purpose of the contract, good faith and fair dealing (see Art. 1.7 of the Principles) as well as reasonableness.

III. Principles of Effectiveness of Party Declarations

The effectiveness of declarations of any kind, inclusive of those acquiring importance with regard to the conclusion of a contract, is dependent on two major aspects. According to the principle of appropriateness, a declaration or notice does not have to be transmitted by the sender by any particular means; it must, however, be conveyed by appropriate means. The ways and means of communication that are deemed to be appropriate depend on the circumstances prevailing in a given case, in particular on the availability and safety of the means of communication, as well as on the urgency of the communication.[19] Account has to be taken not only of circumstances prevailing in the state of the sender, but also of those at the place of destination.

The reception principle is also stated. A verbal notice is deemed to have been received the moment it is given, other notices or statements have reached the receiver when delivered at his place of business or mailing address, no matter whether the reception has actually come to his attention.[20] Irrespective of the diverging opinions held on the practicality of the reception or the dispatch principle, this clause provides for a clear cut solution to the practical problem of the communication risks to be assumed by either of the parties. It may, however, make sense to depart from this basic rule in a particular case and to agree, with regard to certain notices, on the

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[19] UNIDROIT, Commentary, note 15 Art. 1, marginal note 1.
[20] UNIDROIT, Commentary, note 15 Art. 1.9, marginal note 4.

dispatch principle. This applies above all for notices where the risk of a partly or wholly abortive delivery does, on material grounds, not necessarily have to be assumed by the sender, as for instance in the event of notice of termination of the contract being given pursuant to Article 7.3.2 of the Principles, or where it proves difficult to supply evidence of the delivery at the place of the receiving party.

B. Procedure of Conclusion of the Contract

Basically, the conclusion of a contract is brought about by a consecutive procedure of conclusion consisting exclusively of a formal sequence of two mutual declarations of intent, in the form of an offer and an acceptance.[21] Even though, due to existing differences between the legal systems, diverging opinions are held on some particular features of this procedure, there is no disagreement as to the basic mechanism of offer and acceptance.[22] This rather formal approach ensures that, in the event of a dispute, it is usually possible to draw the line between non-binding talks held by the parties and their legally binding declarations of intent that bring about a contract.[23] In spite of its advantages, the conclusion of a legally valid contract by means of this procedure is not without difficulties in the event of an agreement between the parties being reached after lengthy negotiations or by signatures being affixed, to one and the same document, by both parties simultaneously, or even in the event of cross offers where the parties' concurrent proposals addressed to each other coincide in terms of time.[24] Although the facts of a case often allow the mechanism of offer and acceptance to be maintained by the deduction, from the conduct of the persons involved, of implied declarations, the theoretical question arises as to the extent to which the existence of a legally valid contract is to be denied merely on account of the erroneous choice of the procedure of conclusion of the contract.

The UNIDROIT Principles, contrary to the CISG,[25] try to avert from the start all

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[21] *See* for instance K. Zweigert and H. Koetz, *Rechtsvergleichung* (Tübingen 1996, 3rd ed.), at p. 350.

[22] *See* for instance S. Van Erp, 'Formation of Contracts' in *Towards a European Civil Code* (A. Hartkamp et al. (eds.) (Nijmegen 1994), at pp. 117–134, at p. 118, on the legal system of the European Community.

[23] Van Erp, note 22 at p. 119.

[24] UNIDROIT, Commentary, note 15, Art. 2.1, marginal note 2 and Van Erp, note 22 at p. 123.

[25] Opinion shared by Perillo, note 11 at p. 284. When the CISG was being prepared, the inclusion of a provision on a non-consecutive procedure of conclusion of the contract was explicitly declined on the grounds that it would prove too difficult to find an adequate phrasing, and with reference to the flexibility of the offer-and-acceptance mechanism. Such a procedure therefore may be assumed only in the event of the parties having at least

difficulties that might arise in the field of legal theory. Consequently, they do not provide for any particular manner of formation of the contract. In Article 2.1 of the Principles a general rule is laid down, according to which a contract may be concluded either 'by the acceptance of an offer' or by 'conduct of the parties that is sufficient to show agreement'. The conclusion of a contract therefore is not subject to a predetermined formal procedure, but rather to a certain consciousness of the parties that is sufficiently manifested in order to find its expression in mutual agreement, without there being any formal requirements to be complied with. The application of this general clause will reveal, however, that it does not solve any problems; it merely relocates them, because to renounce the formal requirements of consecutive declarations of intent does not mean that the agreement with regard to the contents of a contract is any easier to determine. To draw conclusions from the parties' general conduct as to specific elements of the contents of the contract whose purport subsequently gives rise, in the event of a dispute, to at least an asserted lack of agreement, a potential dissent will prove a very difficult enterprise when objective criteria are used. Where the contents of the contract cannot be verified in detail by means of the extensive rules on the determination of the purport of the performance owed, according to the individual obligations as per Articles 2.1.3, 2.1.4, 5.1 et seq., and 6.1.1 et seq. of the Principles,[26] a dissent, and consequently the absence of a contract, must be assumed in spite of the Principle's general intent aiming at the preservation of the validity of international commercial agreements.[27] By the general clause of Article 2.1 of the Principles, the contracting parties are, nevertheless, deprived of the objection that the contract had not been validly concluded on account of a lacking formal offer or declaration of acceptance.

This comprehensive general clause reveals its importance especially when applied in practice to lengthy and complex negotiations. Its importance is of two kinds. On the one hand, the contracting parties are released from their duty to provide evidence of formal offers and declarations of acceptance. It should not, however, be overlooked that evidence of the purport of any specific detail of the contract can yet only be supplied by way of an explicit agreement. On the other hand, such negotiations may bring about a state of mutual agreement the parties may not even be aware of, their expectations being focused on explicit subsequent declarations to be made. With a view to avoiding a premature conclusion of a contract, which might not take account of specific interests of a party, it is convenient to provide for a reservation to the effect

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arrived at an implied agreement that diverges from the offer-and-acceptance mechanism provided for in Art. 14 et seq. of the CISG; *see* A.K. Schnyder and R.M. Straub, 'Commentary of Artt. 14–24 CISG' in *Kommentar zum UN–Kaufrecht* (H. Honsell (ed.)) (Berlin 1996), Art. 18, marginal notes 8 et seq.

[26] For details *see* M. Fontaine, 'Content and Performance' in (1992) *Am. J.C.L.* 645–655 at pp. 647 et seq.

[27] In substance not unlike UNIDROIT, Commentary, note 15 Art. 2.2, marginal note 1.

that the contract is not concluded until an agreement on certain points has been reached, or certain formal requirements have been complied with. The binding character of such a reservation is stated in Article 2.13 of the Principles.

Any attempt to grasp the parties' agreement of intentions without having recourse to the offer-and-acceptance mechanism meets with difficulties. This is illustrated also by the fact that the other Articles of Chapter 2 of the Principles contain provisions on the consecutive procedure of conclusion of the contract. Consequently, it is only these provisions and the particular problems relating to them that are dealt with in the following. By virtue of Article 1.6(2) of the Principles, these regulations shall, nevertheless, also be applied *mutatis mutandis* to the non-consecutive procedure of conclusion of the contract.

C. The Basic Elements of the Consecutive Procedure of Conclusion of the Contract

The basic elements of the consecutive procedure of conclusion of the contract are the offer, the acceptance and the conclusion of the contract, such as they are defined by the Principles.

I. The Offer

The legal requirements of an offer are defined by Article 2.2 of the Principles, according to which an offer is a proposal for concluding a contract that is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. The essential elements that constitute the offer therefore are: the proposal for concluding a contract, the sufficient definition of the said proposal, and the intention of being bound indicated by the offeror.

1. The Proposal for Concluding a Contract

The proposal for concluding a contract must, pursuant to Article 2.3(1) of the Principles, be received by the offeree; it is a declaration of intent for which, according to Article 1.2 of the Principles no form is required. It must, however, contain the request addressed to the offeree to enter into an international commercial agreement under the terms stated in the declaration, as well as the offeror's anticipated consent to the congruent indication of assent by the accepting offeree. The term 'business transaction' comprises any commercial transaction that does not fall within the scope of consumer contracts.[28] Since the Principles, contrary to the CISG,[29] do not provide

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[28] *See* UNIDROIT, Commentary, note 15 Preamble, marginal note 2; M.J. Bonell, *An International Restatement of Contract Law* (New York 1994), at pp. 32 et seq.

[29] Art. 2, lit. a of the CISG; *see also* Siehr, note 6 Art. 2, marginal notes 11 et seq.; R. Herber,

for an explicit definition of the commercial transaction, and national regulations providing for the protection of the consumer usually are mandatory law, diverging national delimitation rules will not allow of a completely uniform application of the Principles. This applies *mutatis mutandis* also to the fact that provisions on representation in the event of a proposal for concluding a contract or an indication of assent, are lacking.[30]

2. *Sufficient Definition of the Proposal for Concluding a Contract*

Unlike Article 14, paragraph 1 of the CISG, the UNIDROIT Principles do not supply any further description of the minimum requirements as to the definition of a proposal for concluding a contract. In spite of this, it is to be assumed in the present context, too, that the sufficient definition of a proposal for concluding a contract is given only if the particulars contained in the proposal itself are such as to allow of a performable contract to be concluded merely on account of a declaration of assent made by the offeree simply answering in the affirmative. The basic requirement for the conclusion of an effective contract pursuant to the Principles therefore is the denomination of the contracting parties and the designation, in terms of kind and quality, of the performance and counter-performance, the latter being in most cases the price to be paid for the former. As the Principles, unlike the CISG in Article 14, paragraph 2, do not provide for the 'public offer', the proposal that is not addressed to one or more specific persons, i.e. the invitation to make an offer, the dividing line between the recommendation of goods without binding force and the legally binding proposal for concluding a contract addressed to an undetermined group of persons, is to be drawn in accordance with the applicable general rules mentioned before.[31]

The essential points of a contract are sufficiently defined if they are unequivocal. This definition is reached where the proposal for concluding a contract leaves no doubt as to the nature of the performance, the performance in terms of quantity, and the price at which it is offered or ordered. The required definition is given if the nature of the performance, the quantity and the price are determinable only. It is sufficient that the exact details of the offer may be gathered by the offeree from a

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'Commentary of Artt. 1–6 CISG' in *Kommentar zum Einheitlichen UN-Kaufrecht* (P. Schlectriem (ed.)) (Munich 1994, 2nd ed.), Art. 2, marginal notes 5 et seq.; U. Magnus, 'Kommentar zum Wiener UN-Kaufrecht', in *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, v. Bar ua. (Red.), (Staudinger ed.) (Berlin 1994, 13th ed.), Art. 2, marginal notes 10 et seq.

30 As the scope of the Principles is not limited to contracts for the sale of goods, the fact that a regulation has been renounced cannot be explained by the existence of the UNIDROIT Convention on Agency in the International Sale of Goods of 16 February 1983, but rather by the fact that it has not been widely accepted by the contracting states of the CISG. The UNIDROIT Commentary does not provide any explanation either.

31 Perillo, note 11 at p. 284, holds the differentiation of offer and invitation in the CISG for 'erroneous, at best confusing'.

calculation or facts to be verified by means of objective data or references, without the parties being in a position to influence on such data and references after the conclusion of the contract.

The basis for the determination of the minimum requirements is, at best, an express or implied definition of individual points of contract by the offeror, and alternatively an implied reference to usage and customs of the trade concerned, or, if need be, the extensive provisions of the Principles on the determination of certain points of the contract, such as they are laid down in Articles 5.1 et seq. and 6.1.1. et seq. These provisions contain subsidiary regulations for the determination of the time of performance, the order of part performances, the place of performance, the way of settling accounts, as well as the determination of the currency and of the price and quality of goods.[32] The effectiveness of a proposal for concluding a contract will therefore quite often depend on the possibility of filling gaps left in the contract, by subsidiary regulations provided for by the Principles.[33] As the Principles in their Article 5.7, unlike the CISG,[34] contain precise rules on the determination of the price,[35] the problem of deciding the extent to which a sufficiently determined price is a prerequisite for the conclusion of the contract does not arise.

3. *Intention of Being Bound*

The offeror's intention of being bound comprises both the design of executing a commercial transaction on the terms named in the declaration, and his anticipated agreement to a congruent indication of assent made by the offeree. The offeror must give to understand, positively and without any doubt, that he means to be bound by the contract that is brought about by the acceptance of his offer.

Article 2.2 of the Principles does not contain any explicit rules as to the determination of the intention of being bound. This is not surprising, considering the large number of existing possibilities of forming this intention. The term 'indicate' being used means that it is neither the sender's subjective perception, nor that of the individual addressee that is decisive. It is rather the objective meaning of the declaration contained in the proposal for concluding a contract that is decisive, and which is to be established in accordance with the criteria laid down in Article 4.1 et seq. of the Principles and already referred to above.

As the intention to be bound is hardly ever explicitly formulated, it must be inferred from the contents of the proposal for concluding a contract and from the

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[32] For details *see* Fontaine, note 26 at pp. 648 et seq.

[33] In substance not unlike UNIDROIT, Commentary, note 15, Art. 2.2, marginal note 1.

[34] For details *see* Schnyder and Straub, note 25 Art. 14, marginal note 50; P. Schlechtriem, Commentary of Artt. 14–24 CISG in *Kommentar zum Einheitlichen UN-Kaufrecht*, (P. Schlechtriem (ed.), (Munich 1994, 2nd ed.), Art. 14, marginal otes 8 et seq.; Magnus, note 29 Art. 14, marginal notes 23 et seq.

[35] Fontaine, note 26 at p. 647; *see also* M. Karollus, 'Besprechung der Principles of International Commercial Contracts' in (1997) 61 *RabelsZ* 582–592 at p. 587.

circumstances in which it was manifested. The more detailed the elaboration of the proposal for concluding a contract, the more it is justified to assume the intention of being bound. However, there is no link of causality existing between the minimum contents of the proposal and the intention of being bound. In this context, it is the regulation laid down in Article 2.13 of the Principles that acquires importance. According to this provision, the conclusion of a contract, and consequently even the making of an offer, may be made dependent on an agreement on specific matters or on a specific form. In the event of negation clauses, such as 'subject to prior sale', or 'without engagement', or mere restriction clauses, such as 'till stocks are exhausted' or 'availability reserved' being used, the absence of the intention of being bound is, in principle, to be assumed.

II. Acceptance

The basic condition for an acceptance within the meaning of the UNIDROIT Principles is laid down in Article 2.6. The acceptance is defined as 'a statement made by or other conduct of the offeree indicating assent to an offer'. Any manifestation by the offeree indicating assent therefore constitutes the decisive criterion of the transformation of the offer into an effective contract. Further particulars are, however, provided for in Articles 2.6, 2.7 and 2.8 of the Principles: the mode of acceptance, the time of acceptance and the contents of an indication of assent. The phrasing 'indicating assent to an offer' makes it clear that there is a connection between the proposal for concluding a contract on the one hand and the indication of assent on the other. The latter therefore must, in principle, comprise the offeree's assent to the execution of a commercial transaction on the terms stipulated in the proposal for concluding a contract. Taking account of the principle of freedom of form laid down in Article 1.2 of the Principles, the indication of assent therefore constitutes a declaration of intent that must be received and which must be made within a certain period and from which the offeror may understand that the offeree is seriously and without any doubt willing to be bound and that the content of his declaration, which is necessary for the conclusion of the contract, is congruent with the offer.

An indication of assent to an offer may, pursuant to Article 2.6(1) of the Principles, take the form of a statement of acceptance or that of a conduct indicating acceptance. A statement of acceptance is an explicit, direct or indirect manifestation of consent by the offeree to the offer made by the offeror. The manifestation may be conveyed verbally, in writing, or by electronic or any other means of communication, its phrasing being of no consequence. Conduct indicating acceptance is an implied, indirect indication of assent by the offeree, expressed by the execution or non-execution of a certain act that reveals the offeree's consent and intention of being bound in all seriousness and without any doubt. The objective meaning of a certain conduct is determined by an interpretation according to the common intention of the parties (Art. 4.1 et seq.). The provision makes it quite clear that neither silence, nor inactivity does, by itself, amounts to an acceptance of the offer.

This does not, however, exclude that silence or inactivity may, by virtue of a special agreement or established usage or practices, also be qualified as an indication of assent. This effect must, however, be verifiable in each individual case.

According to Article 2.6(2) of the Principles, the effectiveness of an acceptance presupposes that the indication of assent has reached the offeror. This applies not only for a statement of acceptance, but also for conduct indicating acceptance. The prerequisites for a communication to be deemed to have reached the person to whom it is addressed, are embodied in the reception principle laid down in Article 1.9(3) of the Principles. The indication of assent will therefore become effective, in practice, with the purport received by the offeror and not in the form in which it has been sent off by the offeree. Consequently, it is the latter who bears the risk of an incorrect transmission. Article 2.6(3) of the Principles provides for an explicit exception to this rule for cases where the offeree indicates assent merely by performing an act, without notice to the offeror. The precondition for such an indication of assent is the existence of an entitlement to this effect on the part of the offeree, arising from the offer itself, from an international commercial usage, or from practices which the parties have established between themselves. Whether the entitlement exists, is decided by way of an objective interpretation of the circumstances in each individual case pursuant to Article 4.1 et seq. of the Principles. Without a special agreement to this effect, there is no need for the offeror to be informed subsequently of such an act indicating assent being performed.

There is, invariably, a time limit for the reception of the indication of assent, which, if it arrives late, does not produce any legal effects. Several cases of time limitations are provided for.

Pursuant to Article 2.7, phrase 2 of the Principles, a verbal offer must be accepted immediately, unless the circumstances indicate otherwise. A verbal offer is an offer made in the course of interactive phonetic communication. In this sense, the term 'immediately' signifies that assent to the proposal for concluding a contract must be indicated in the course of that very conversation held by the parties. It follows that it is not necessary for the offer to be accepted by the very first phrase following the offer. On the other hand, there is no room for a revocation once the offer has been accepted. Circumstances indicating a different time limitation, are invariably to be seen in a special agreement providing for the offeree to be entitled to answer the verbal offer within a predetermined, or within a not previously fixed, but reasonable, period of time. Whether or not a time limitation has been stipulated shall be decided by way of an objective interpretation of the meaning of the proposal for concluding a contract in accordance with Article 4.1 et seq. of the Principles.

Where the offeror has explicitly fixed a time for the offer to be accepted, the offeree must, according to Article 2.7 of the Principles, indicate his assent within the time fixed for acceptance. The statement of acceptance must reach the offeror before the expiry of this time limit and evidence of conduct indicating acceptance and of the performance of an act indicating assent without notice to the offeror must be supplied within the same period. An explicit time limit is a definite period of time fixed by the offer, making it quite clear that assent has to be indicated up to a certain moment.

This time limit may be indicated either by fixing a certain date, or a period of time. Request or exhortations in which conceptions of time are employed, such as 'before long', 'immediately', 'without delay', etc. are not to be qualified as time limits. Explicit rules on the expiry of time limits fixed by the offeror are laid down in Article 2.8 of the Principles. Paragraph 1 of the said article regulates the determination of the beginning of the time limit with regard to different means of communication, whereas paragraph 2 contains special rules on the inclusion of official holidays and non-business days in the calculation of the period of time and the determination of the expiry of the period. The wording of this provision is exactly identical with that of Article 20 of the CISG.[36]

Where the offeror has not fixed a time for acceptance, the offer must necessarily be accepted within a reasonable time, which is determined with regard to the 'circumstances, including the rapidity of the means of communication employed by the offeror' (Art. 2.7 of the Principles). It is above all the time used for the transmission of the offer, an adequate period of time for reflection, and the time needed for the transmission of the acceptance that are to be qualified as 'circumstances', with special conditions known to the parties also being taken account of. The adequate time for reflection is dependent on the size, the subject and the characteristic features of the transaction proposed. The means of communication chosen by the offeror is indicative of the urgency of the transaction. As a rule, the offeree may chose the same means of communication for his declaration as the offeror has chosen for his offer. Travelling time of offer and acceptance corresponds to internationally accepted transmission standards relating to the means of communication concerned. A limitation by an adequate period also applies to cases where acceptance is indicated merely by an act being performed, without notice to the offeror, pursuant to Article 2.6(3) of the Principles, since neither the systematics of the Principles, nor the aim and object of a limitation, allow of the conclusion that such an act may be performed without any restriction in terms of time.

III. Conclusion of the Contract

Article 3.2 of the Principles states the principle of the conclusion of the contract: a contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement. This means that neither the requirement of the consideration of the common law systems, nor the characteristics of the cause or real-contracts in civil law systems constitute a prerequisite or an obstacle with regard to the conclusion of the contract, if they are not to be taken account of in a particular case because of their mandatory nature in accordance with Article 1.4 of the Principles.[37] If a manifestation by the offeree complies, with regard to regularity

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[36] For details *see* Schnyder and Straub, note 25 Art. 20, marginal notes 1 et seq.; Schlechtriem, note 35 Art. 20, marginal notes 1 et seq.; Magnus, note 29 Art. 20, marginal notes 1 et seq.

[37] UNIDROIT, Commentary, note 15, Art. 3.2, marginal notes 1 et seq.

and punctuality, with the prerequisites of an assent within the meaning of the Principles, the contract is concluded the moment the manifestation becomes effective; that is, in the event of an indication of assent by way of a statement of acceptance or a conduct indicating acceptance, the moment the manifestation reaches the offeror and, in the event of the assent being indicated by performing an act without notice to the offeror, the moment the act is performed. If these requirements are not satisfied, the effective conclusion of a contract, is, as a rule, excluded, unless specific regulations of the Principles apply. These regulations are dealt with in the next section.

D. Disturbances to the Conclusion of the Contract

In the reality of international commercial relations, disturbances to the consecutive procedure leading to the conclusion of the contract make themselves felt on many occasions and prevent the conclusion of an effective contract because the above requirements relating to offer and acceptance are not satisfied. These disturbances are, in particular, the cancellation of the proposal for concluding a contract, or an indication of assent, by party declarations that run counter to them, a late indication of assent by the offeree and incongruity, as to their contents, of offer and assent. In the interest of legal security in international trade and commerce, the Principles provide for regulations in Articles 2.3 to 2.5, 2.10, 2.9 and 2.11, which allow of such disturbances to be dealt with adequately or, if possible, even to be eliminated altogether.

I. Period of Validity of the Offer

The problem of the cancellation of an offer by a contrary declaration made by the offeror relates to the period of validity of that offer, which is dealt with by several provisions of variable contents of the Principles. According to these provisions one has to differentiate between the termination and the ineffectiveness of an offer. Whereas the termination of the offer means that it ceases to exist directly, the ineffectiveness of the offer is the consequence of the impossibility of its being accepted by the addressee. The differentiation becomes relevant in so far as in the first case the offeror has to submit a new offer in order to bring about the conclusion of a contract, whereas in the second case it is sufficient to extend its acceptance period.

1. Termination of the Offer

The offer is terminated if the proposal for concluding a contract submitted by the offeror is cancelled completely with effect *ab initio* (*ex tunc*). This is the legal consequence of the withdrawal, the revocation and the expiry of an offer.

(A) WITHDRAWAL

The withdrawal of the offer is regulated by Article 2.3(2) of the Principles, whose wording is exactly the same as that of Article 15, paragraph 2 of the CISG. The harmonization of diverging opinions on the binding force of offers prevailing in the different legal systems[38] therefore is dealt with in the manner already chosen by the CISG. Consequently, a withdrawal is always possible as long as the notice of withdrawal reaches the offeree before or at the same time as the offer. According to an explicit rule to this effect, this applies even in the event of the offer having been declared irrevocable by the offeror.

The notice of withdrawal is a declaration of intent that must be received by the offeree and make it quite clear that the offeror positively does not intend to maintain his proposal for concluding a contract. The basis for the verification of these requirements is the objective meaning of the declaration concerned. In accordance with the principle whereby there is no requirement as to form, the declaration may take any form the offeror may choose. Its communication therefore does not have to be of the same kind as the offer, nor does the means of communication have to be the same. According to Article 1.9(4) of the Principles, its denomination is immaterial. The moment the notice of withdrawal is deemed to have reached the offeree is to be determined in accordance with Article 1.9(3) of the Principles stating the principle of reception. For the effectiveness of the withdrawal it is necessary only that it reaches the offeree not later than the offer; it is not, however, necessary that the addressee has actually taken notice of the withdrawal before having taken notice of the offer. Nothing stands in the way of declaring a partial withdrawal only.

For factual reasons alone, the withdrawal of a verbal offer is not possible. Where the manifestation of the intention to propose the conclusion of a contract is broken off by a declaration to the contrary, the offer is incomplete from the outset. If, however, the proposal for concluding a contract has been made in full, by a manifestation to this effect, the declaration is directly accessible to the receiver. A subsequent notice of withdrawal therefore constitutes a revocation and as such it is subject to the provisions of Article 2.4 of the Principles.

(B) REVOCATION

Once the offer is effective, that is from the moment it reaches the addressee, it may still be revoked under the terms of Article 2.4 of the Principles. The revocation is also a declaration of intent that must be received and from which the offeror's positive and unequivocal intention not to maintain his proposal for concluding a contract must arise. With regard to delivery, form, choice of the means of communication and reception of the notice of revocation, the requirements are those applying for the notice of withdrawal. The declaration of a partial revocation is admissible, too.

The effectiveness of the revocation of an offer is conditional upon the reception of

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[38] For details *see* Zweigert and Koetz, note 21, at p. 351 et seq.

the notice of revocation not only before the contract has been concluded, but before the offeree has dispatched an indication of assent. The provision demonstrates the intention to admit a revocation – taking account of the interests of the offeree – only up to the moment the offeree indicates his assent in a recognizable and understandable manner, and not up to the moment the contract is concluded.[39] As there are different forms in which assent may be indicated, the possibility of notifying a revocation may end at different times.

If the offeree indicates his assent by means of a statement of acceptance, the possibility of revoking the offer does not end only on receipt of this declaration by the offeror and the resulting conclusion of the contract, but at the moment of its dispatch already. But here again the effective conclusion of a contract is subject to the statement of acceptance having been dispatched to the offeror in due time with the proper means of communication being used.

In the event of conduct indicating acceptance, it is, as a rule, also the dispatch of the notice informing of the performance of the act that is decisive in so far as the offeror is informed by way of this notice of the offeree's assent. However, conduct indicating assent immediately ends the possibility of a revocation of the offer if such conduct occurs within the sphere of the offeror, no matter whether the offeror has actually taken notice thereof.

Where assent is indicated by performing an act without notice to the offeror, a revocation is, without exception, admissible only up to the moment the act concerned is performed.

However, the possibility of a revocation of the offer is excluded altogether in two cases, pursuant to Article 2.4(2) of the Principles.

By means of a respective declaration, the offeror may indicate his intention of being bound by his offer positively and without leaving any doubt, thus making it clear that he renounces the possibility of a revocation. This intention may be expressed by an explicit renunciation of a revocation, by fixing a time limit, or by any other conduct that indicates an intention to be bound. An explicit renunciation of a revocation results from the offeror's reference made in his declaration to his intention to be bound, by such additions as: 'irrevocable', 'we shall be bound', or 'firm offer'. The fixing of a time limit for the acceptance of an offer must, for reasons of systematics, be considered to be tantamount to an irrevocability clause, as the regulation of Article 2.7 of the Principles providing without exception for a reasonable acceptance period, would otherwise not make sense any more.[40] An

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[39] UNIDROIT, Commentary, note 15, Art. 2.4, marginal note 1: 'Such a solution may cause some inconvenience to the offeror who will not always know whether it is still possible to revoke the offer. It is, however, justified, in view of the legitimate interest of the offeree if the time available for revocating is shortened.'

[40] With regard to the legal situation under the CISG, reference is made to Schnyder and Straub, note 25, Art. 16, marginal note 20; Perillo, note 11 at p. 285, who holds the provision to be equivocal.

exception only results in the event of this regulation being contracted out of pursuant to Article 1.5 of the Principles. This contracting out must, however, be clearly indicated by the circumstances prevailing in a particular case.[41] As for the rest, conduct indicating an intention to be bound comprises all forms of declarations making irrevocability sufficiently clear.

A binding effect on account of justified confidence presupposes both justified confidence in the irrevocability of a declaration and conduct evidencing this confidence. Justified confidence on the side of the offeree is to be presumed where the circumstances of the particular case justly lead the offeree to believe that the offeror meant to be bound by his offer without any reservation. Whether this is the case is determined on the ground of the objective meaning of the offer pursuant to Articles 4.2 et seq. of the Principles. The conduct evidencing confidence consists in certain measures taken or omitted in view of the acceptance of the offer, such as the purchase of materials for instance. The possibility, or probability of the offeree suffering damage is not, however, necessary.

(C) EXPIRY OF THE OFFER

An offer may expire for several reasons.

Pursuant to Article 2.5 of the Principles, an offer is terminated when a rejection reaches the offeror. The wording of this provision is identical with that of Article 17 of the CISG. The rejection is a declaration of intent that must be received by the offeror and by which the offeree clearly states his intention not to make use of the offer. As for the form, the delivery and the reception of the declaration, the comments made on the offer also apply here. The rejection must, however, be marked off from a mere inquiry or a proposal for a modification by means of the determination of the objective meaning of a statement or other conduct in accordance with Article 4.1 et seq. of the Principles. In the event of the declaration of assent and the declaration of rejection reaching the offeror at the same time, the rejection is to be qualified, according to Article 2.3(2) and Article 2.19 of the Principles, as the withdrawal of the assent.

An indication of assent that purports to be an acceptance, but departs substantially from the offer, is, according to Article 2.11(1) forcibly a rejection of the offer. The offeror's notice of termination sent to the offeree without undue delay, pursuant to Article 2.9(2), in the event of an acceptance having been received late on account of circumstances preventing its transmission in due course, terminates the offer with retroactive effect by cancelling the contract which had already been

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[41] Identical, in substance UNIDROIT, Commentary, note 15, Art. 2.4, marginal note 2a, according to which there should, however, not be any predetermined rule-exception relation; opinion shared by E.A. Farnsworth, 'An American View of the Principles as a Guide to Drafting Contracts' in *The UNIDROIT Principles for International Commercial Contracts: A new lex mercatoria?*, (ICC Publication n. 490/1, Paris 1995) pp. 85–93, at p. 89.

concluded. The same applies to a notice pursuant to Article 2.11(2) of the Principles, by which the offeror objects to a discrepancy between offer and acceptance.

2. Ineffectiveness of the Offer

An offer is ineffective if, due to the acceptance period having lapsed, the offeree is no longer in a position to bring about the conclusion of the contract by himself, no matter whether the acceptance period was an adequate or explicitly fixed time limit, or whether acceptance had to be declared immediately as in the case of a verbal offer. The offer does not, however, become extinct in the sense of termination through rejection according to Article 2.5 on expiry of the acceptance period. This follows from the regulation of Article 2.9(1) of the Principles, as otherwise the offeror could not inform the offeree that he is willing to treat the late acceptance as an acceptance in due course. If the offer had become extinct even on account of the acceptance period having lapsed, the offeror could not bring about a contract merely by informing the offeree that he considers the late acceptance to be nevertheless effective; the offeror would have to make a new offer if his original offer had become ineffective.

II. Validity of the Acceptance

The setting aside of an indication of assent by the offeree may also be effected in more than one manner. A difference has to be made between the indication of assent that becomes extinct and the ineffectiveness. The extinction of the indication of assent is brought about by its withdrawal or revocation, the ineffectiveness of the indication of assent by its definite delay.

Article 2.10 of the Principles provides for the withdrawal of an indication of assent by the offeree, the preconditions for a withdrawal of an offer applying by analogy. Particularities only result from the function of the indication of assent. A withdrawal of a verbal indication of assent is excluded for factual reasons alone. The same applies for the withdrawal of an indication of assent by performing an act without notice to the offeror. In these cases, the contract is concluded the moment the assent is manifested or the act performed, so that a declaration indicating a withdrawal of an acceptance which reaches the offeror before the acceptance, is quite impossible. These principles also apply in the event of a late indication of assent, so that the withdrawal of a late acceptance is possible only up to the moment it is received, and not until the offeror declares that he considers the late acceptance to be effective.

Once the effective acceptance has been received, it dissolves into the contract. The revocation of an acceptance therefore is possible only where the parties have, in a particular case, provided for the right of revocation pursuant to Article 1.5 of the Principles.

Where a late indication of assent by the offeree is not accepted immediately as effective by the offeror, pursuant to Article 2.9(1) of the Principles, it remains without effect because in spite of its not having become extinct, the offeror is no

longer in a position to bring about a contract either. This applies also in the event of the offeror informing the offeree, according to Article 2.9(2) of the Principles, that his acceptance was late and the offer consequently had lapsed, because as a result of this notification of the expiry of the offer, a late indication of assent by the offeree can no longer be accepted by the offeror.

III. The Late Indication of Assent

Special rules are laid down in Article 2.9 of the Principles on the not infrequent case of the offeree's indication of assent being received late by the offeror. The delay occurred is due either to the indication of assent being sent late, or to a disturbance of its transmission. The swift reaction that is demanded of the offeror either in the form of a declaration to the effect that he considers the late acceptance to be effective, or in the form of the information of the offeree that the offer has lapsed, brings about a high degree of legal security with regard to legal effectiveness of the contract. The wording of this provision corresponds exactly to that of Article 21 of the CISG. Contrary to the rule laid down in the CISG, the declarations to be made by the offeror must, however, pursuant to the explicit rule of Article 1.9(2) of the Principles, be received by the offeree, so that it is the offeror, who bears the risk of transmission. Therefore, there can be no uncertainty on the part of the offeree as to the effectiveness of the contract.

The applicability of this provision is subject to two conditions: the offer must not have become extinct and the indication of assent must have arrived late, which means that the acceptance period has expired. The reason why the indication of assent is late is, in principle, of no consequence: the delay may even be due to an error or fault on the side of the offeree. The only exception to this rule is the regular reception in due course being prevented by the offeror himself. In this case, the reception principle leads to the assumption of a fictitious indication of assent in due course. It is not possible, however, to interpret the purport of a late indication of assent in such a way as to consider it to contain a counter-offer.

1. Disturbance of Transmission

Where the proper transmission of the indication of assent was recognizably disturbed, so that it did not reach the offeror in due time, pursuant to Article 2.9(2) of the Principles the offeror has to inform the offeree immediately that he considers the offer to have lapsed in order to prevent the acceptance, and consequently the contract, from becoming definitively effective. This regulation constitutes a legislatorial right to revoke the offer, which is tantamount to the reservation of the subsequent dissolution of a contract that had already been concluded. If the offeror so notifies the offeree of the offer having lapsed, the contract is terminated, with retroactive effect, as of the moment the late acceptance has reached the offeror.

A disturbance of transmission means a delay due to circumstances that make themselves felt during transport, only after the notice concerned has been dispatched, and which are not caused by the offeree, no matter whether the letter or other writing

has gone astray, or whether the disturbance is due to circumstances of a general nature, such as strikes or technical impediments. The disturbance of transmission must be recognizable, the offeror must be aware of the disturbance of transmission. Consequently, it must be apparent that the indication of assent did not reach the offeror in due time on account of circumstances the offeree had no control over. It is not necessary for the offeror to be aware of the specific reason for the delay. He must, however, be able to recognize the disturbance of transmission and to realize that, in the event of a normal transmission the indication of assent would have reached him in due time. The normal transmission is the transmission that takes as much time as is required, under normal circumstances, for an international delivery of a declaration by an appropriate means of communication. The time employed in the event of a normal means of communication being used is not decisive. If the time limit for the acceptance of the offer could from the beginning not have been complied with even in the case of a normal transmission, this provision of Article 2.9(2) shall not apply, even though, in the event of a faster means of communication being chosen, the declaration would have reached the offeror in due time.

The notice informing the offeree that the offer has lapsed constitutes a declaration of intent that is not subject to any formal requirement, but must reach the offeree and make it clear that the offeror has firmly decided to cancel the proposal for concluding a contract on account of late acceptance. According to the legislative arrangement, such notice may be given verbally or in writing only; mere conduct indicating the intent is not admissible. The notice must further be given without undue delay. The appropriate time limit is determined by the relevant circumstances influencing on the parties' intentions, in accordance with Articles 4.1 et seq. of the Principles. The notice remains ineffective if it is given in advance; Article 2.9(2) of the Principles does not allow of any such notice being given by the offeror before the late indication of assent has actually reached him. Such a measure being taken in advance would not be in line with the systematics of the Principles either. The late acceptance being treated, in those cases, as an effective indication of assent, the offer may be revoked only subject to the terms of Article 2.4 of the Principles, according to which a revocation is not possible after the dispatch by the offeree of the effective indication of assent which, in the event of a disturbance of transmission, may be also a late indication of assent.

2. *Delay of the Indication of Assent*

Pursuant to Article 2.9(1) of the Principles, the offeror may, at his discretion, arrange for a late indication of assent, whose delay is not due to a disturbance of transmission, to become nevertheless effective by immediately giving notice to the offeree to that effect. This notice to be given by the offeror makes the effectiveness of the late acceptance subject to the approval by the offeror. If such notice is duly given, the contract is deemed to be concluded with retroactive effect the moment the late indication of assent, which is now considered to be effective as an acceptance, has reached the offeror.

The notice by which the offeror informs the offeree that he considers the acceptance to be effective in spite of its delay, constitutes a declaration of intent that must be received by the offeree but is not subject to any requirements as to form. It must appear from the offeror's declaration of intent that he decidedly and without any doubt means to accept the late assent by the offeree, without any reservation, as an effective acceptance. With regard to the manner and time of the dispatch of the declaration, the observations made on the offeror's notice informing the offeree that he considers the offer as having lapsed, apply by analogy. An early declaration to the effect that the late acceptance is considered to be effective, takes effect only from the moment the offeree's indication of assent reaches the offeror, as the offeree is not to be deprived of his right to withdraw his declaration even in the event of his indication of assent being late.

IV. Discrepancies Between the Contents of Offer and Indication of Assent

Article 2.11 of the Principles deals with the problems arising from discrepancies between an indication of assent and the contents of the relating offer. The provision is in essence modelled after Article 19 of the CISG but renounces the setting up of an interpretation rule such as it is laid down in Article 19, paragraph 3 of the CISG, which has given rise to fierce controversy in literature.[42]

A discrepancy arises whenever the contents of the proposal for concluding a contract and the indication of assent such as they have been objectively established in accordance with the rules laid down in Article 4.1 et seq. of the Principles, are not in agreement. It is of no consequence whether it is the form or their contents that diverge. If, however, the acceptance, contrary to the offer, contains a number of individual regulations laid down in the Principles or provided for by a national legal system, this is not deemed to constitute a divergence. Discrepancies appear in different shapes, from new conditions being stated to the rejection of conditions stated in the offer.

The legal effects of a diverging indication of assent depend on the extent of the divergence. A divergence can be of great importance or of minor importance; the differentiation is to be made in accordance with Articles 4.1 et seq. of the Principles, taking into account the relevant circumstances influencing the parties' intentions, the decisive question being that of knowing whether the divergence between the performance of the proposed contract and the manifestation of assent is of minor importance, so that it appears, objectively, that the offeror will be more inclined to accept the divergence rather than to insist on a rejection. Irrespective of a theoretical differentiation, it is always up to the offeror to inform the offeree, in the event of a

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[42] For details *see* Schnyder and Straub, note 25 Art. 19, marginal note 14; Schlechtriem, note 35 Art. 19, marginal note 8; Magnus, note 29 Art. 19, marginal notes 15 et seq.

late acceptance, that he considers the offer as having lapsed, thus preventing the conclusion of the contract.

A substantially diverging indication of assent is, pursuant to Article 2.11(1) of the Principles, to be qualified as a counter-offer, by which the offer is not accepted, but rejected. The offer consequently is terminated in accordance with Article 2.5 the moment the diverging assent becomes effective. In order for a contract to be concluded, the offeror's congruent indication of assent in reply to the counter-offer is required.

Pursuant to Article 2.11(2) of the Principles, a slightly diverging indication of assent is deemed to be an effective acceptance and as such brings about a contract comprising the terms and conditions of the offer with such modifications as have been introduced by its acceptance. This contract is, however, subject to termination by means of an immediate objection raised by the offeror against the discrepancy. According to Article 1.9(2) of the Principles, the notification of an objection constitutes a declaration of intent that must reach the offeree and which, according to explicit regulations is effective when given orally or delivered in some other well-defined form. The time limit within which a discrepancy must be objected to is determined by the relevant circumstances influencing the parties' intentions, in accordance with Articles 4.1 et seq. of the Principles. An early objection is not admissible as it would be tantamount to an evasion of Article 2.4 providing for the revocation. In the event of an objection becoming effective, the contract is terminated, with retroactive effect, as of the moment the contract was concluded. As the principle, whereby a notice must reach the addressee, also applies to the notification of an objection, the objection may be withdrawn pursuant to Articles 2.3 and 2.10 of the Principles, which apply by analogy.

The provisions of Articles 2.9 and 2.11 deal with different situations and their simultaneous application is not excluded. Where an indication of assent is both late and diverging from the offer, different constellations may arise.

If the offeree's indication of assent diverges substantially from the offer, so that it is deemed to constitute a counter-offer, the conclusion of a contract is excluded for want of acceptance, no matter whether the acceptance as such is late, or whether its transmission has been delayed. The question that may possibly arise is whether the offeror's notice given to the offeree to the effect that the late acceptance is nevertheless effective as an acceptance, may, in a particular case, be qualified as the acceptance of the counter-offer.

Where the divergence of the indication of assent is not substantial, and the offeror is aware of it being late on account of a disturbance of transmission, the contract is deemed to have been concluded the moment the indication of assent has become effective because both Article 2.9(2) and Article 2.11(2) of the Principles provide for the same legal consequence in the event of a late and in the event of an effective acceptance. This contract may, however, be cancelled by the offeror by his objection to a discrepancy being notified to the offeree, or by his notifying the offeree that the offer has lapsed.

If the delay is not due to a disturbance of transmission, a contract is not

concluded even though the divergence of the indication of assent from the offer is not a substantial one. In this event, Article 2.11(1) reserves the offeror's right to approve the modified acceptance by means of a notice informing the offeree that he considers it to be effective. In this case it is only by means of such a declaration that a contract may be validly concluded.

E. Special Factual Issues

Beside the above provisions relating to the elimination of disturbances affecting the procedure of conclusion of the contract, the UNIDROIT Principles also contain a number of specific provisions dealing with particular cases and factual issues arising in connection with the conclusion of a contract.

I. General Terms and Conditions

Contrary to the CISG, Articles 2.19 to 2.22 and 4.6 of the Principles contain specific rules on the treatment of standardized contractual terms. Article 2.19(1) of the Principles states that the general rules on the formation of the contract apply subject to Articles 2.20 to 2.22.

Pursuant to the surprise clause of Article 2.20 of the Principles, a term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective only if it has been expressly accepted by the other party. Where a surprising term contained in standard terms is examined, the object of the examination is its content, language and presentation. It is to be regretted that a general control of abusive practices is not provided for. This explains why national regulations are justly resorted to. In order to avoid this fall back position on national regulations, a casuistic control of standard terms based on the principles of good faith and fair dealing expressly laid down in Article 1.7 of the Principles, which the parties may not exclude or limit, should be introduced and developed.

Article 2.21 of the Principles states the priority of the individual agreement over a standard term in the event of conflict between them.[43] In case of a provision that is not clear, the *contra proferentem* rule pursuant to Article 4.6 of the Principles applies.

Article 2.22 provides for a conciliatory solution in case of a battle of forms, which means that where the parties reach agreement on all points except on conflicting standard terms, a contract is concluded on the basis of the individual terms and on those standard terms which they have in common. This contract is subject, however, to a notice given immediately by one party informing the other that it does not

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[43] *See* decision rendered by the Cour d'Appel de Grenoble of 24 January 1996, 'Summaries of Cases Nr. 4', in (1997) *Uniform Law Review*, at p. 180.

intend to be bound by the contract. The principles that apply to this notice are those applying also to the notice informing the offeree that the offer has lapsed and to the objection raised by the offeror against a discrepancy between offer and acceptance as well as to the notice of disapproval by which one party clearly[44] indicates even before an agreement is reached that it will not approve of a conciliatory solution. Irrespective of the diverging opinions on the most convenient solution to the problem arising from the battle of forms, Article 2.22 provides an unequivocal rule enabling the parties to prevent an undesirable contract from becoming effective.

II. Commercial Letter of Confirmation

The letter of confirmation, which has expressly not been dealt with in the CISG, so that according to Article 29 CISG it cannot have any further influence on the conclusion of a contract any more,[45] has been made the subject of a special regulation by the Principles in Article 2.12. The fact that the letter of confirmation may be sent by either the offeror or the offeree, so that it cannot simply be assigned to the offer or the acceptance, has been taken in account. The provision resumes, in essence, the general rule of Article 2.11. The diverging terms contained in the letter of confirmation become part of the contract only if they do not materially alter the contract or if, in the event of minor discrepancies, the recipient does not immediately raise an objection. As for the notice of objection, it is governed by the same principles that apply to the notice informing the offeree that the offer has lapsed and to the objection raised against a discrepancy between offer and acceptance.

III. Contract with Terms Deliberately Left Open

Article 2.14 of the Principles contains a most extensive regulation designed to facilitate the effectiveness of a contract even though its content has not been fully defined. This provision has no parallel in the CISG and is even likely to be in contradiction with the general requirement of determinateness stated in that Convention. In Article 2.14, paragraph 1 of the Principles, the basic rule is laid down, whereby a term left open does not prevent a contract from coming into existence if the parties intend to agree on this term in further negotiations or leave it to be determined by a third person. The provision thus states an interpretation rule that works to the advantage of the party asserting the conclusion of a valid contract in spite of existing gaps. Thus it does not follow from a term that has deliberately been left open by the parties, that the contract has not become effective. Pursuant to paragraph 2 this applies even if the parties fail to reach a subsequent agreement on

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[44] The inclusion of such a declaration in the general terms and conditions of a party is not sufficient because it comes within the scope of Art. 2.22 so that there is always an incongruity with the terms of the other party. In substance as UNIDROIT, note 15 Commentary, Art. 2.22, marginal note 3; Karollus, note 34 at p. 585.

[45] Schnyder and Straub, note 25 Art. 19, marginal note 35 with further references.

the term concerned, or if the third person does not determine the term concerned either, provided there is a possibility to determine the purport of the term by means of objective criteria, inclusive of the subsidiary rules of the Principles.

IV. Conclusion of Contract Dependent on Agreement on Specific Matters

Article 2.13 of the Principles, on the other hand, states that no contract is concluded where one of the parties declares the agreement on a specific matter or in a specific form to be indispensable. Whether this attitude is actually assumed, or maintained, by one of the parties, is a matter to be decided by virtue of the relevant circumstances influencing the parties' intentions pursuant to Article 4.1 et seq. of the Principles.

V. Liability for Damage Caused by Negotiations

It ensues from the parties' contractual freedom that Article 2.15(1) of the Principles states that the parties are free to negotiate and that they are by no means liable for failure to reach an agreement. This provision rules out any claims to be raised for damage caused by breach of duty prior to contract (*culpa in contrahendo*) under national law. According to Article 2.15(2) of the Principles, this rule does not apply, however, when a party enters into negotiations intending not to reach an agreement. This provision therefore penalizes damage caused in bad faith by frustrating the efforts of another participant in economic life by useless negotiations. This exception to the rule is a specific variety of the principle of good faith and fair dealing laid down in Article 1.7 of the Principles.[46]

VI. Further Provisions

Article 2.16 regulates the parties' duty of confidentiality with regard to information given as confidential by one party to the other.[47] The duty not to disclose such information is to be discharged whether or not a contract is concluded and it continues after the conclusion of the contract or after negotiations have been broken off. Failure to comply with this duty entails the general penalties provided for by the

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[46] H. Van Houtte, 'The UNIDROIT Principles of International Commercial Contracts' in (1995) *Arbitration International* 373–390 at p. 377, states that bad faith on the domestic level is not bad faith in international relations, so that a unification should be brought about also with regard to the factual situation.

[47] The view held by U.C. Mayer, 'Die UNIDROIT – Prinzipien für internationale Handelsverträge. Zielsetzung, Anwendungsbereich und ihre Bedeutung für die schweizerische Rechtspraxis' in (1998) *AJP* 499–513 at p. 506, whereby a duty of confidentiality is to be presumed as being the parties' implied intention, should be rejected because the parties have a legitimate interest in pointing out to a potential contracting party that there are other possible contractual relationships they could enter into; in substance not unlike UNIDROIT, Commentary, note 15 Art. 2.16, marginal note 1.

Principles. Article 2.16 also provides for the possibility of a compensation payment to the injured party based on the benefit received by the other party.

Article 2.17 of the Principles contains a so-called merger clause, indicating that a contract in writing completely embodies the terms on which the parties have agreed, so that the contract cannot be contradicted by prior statements or agreements. Such statements or agreements may, however, be used to interpret the contract.

Article 2.18 of the Principles expressly states a customary written modification clause. With a view to forestalling an abusive contradictory conduct, this clause also provides for a preclusion of a party from asserting such a clause.

F. Conclusion

The rules on the conclusion of international commercial contracts and their legal consequences contained in the UNIDROIT Principles are, on the whole, comprehensive and to the point. The individual regulations are well-balanced and coherent to a high degree, thus meeting the requirement of legal security, which is indispensable in international trade. Naturally, legal reality will, in the course of time, relentlessly reveal their weaknesses resulting from the fact that certain matters have not been regulated.[48] Therefore, every endeavour with a view to filling existing gaps should be made in the near future. There can be no doubt that an individual regulation is not always above criticism if it is seen against the background of a national legal system and seemingly better regulations may always be advocated. It should not, however, be forgotten that the examination of a single legal problem quite often brings forth a distorted picture, because legal systems that govern a concrete individual case by means of different legal concepts and provisions, may nevertheless arrive at results that are almost identical. This is why the Principles should also be judged as a whole, taking account of all the rules in context, something that goes beyond the scope of this article. The success of the Principles will depend much less on the theoretical legal approach chosen to deal with a point of law, and more on the willingness of the judicial organs called upon to decide on a point of law, to break away from their own national legal concepts and to grasp the international character and purpose of these rules, such as it is stated in Article 1.6 of the Principles, and on their ability to further their uniform application by a convincing and rational argumentation. The respective decisions must be published in such a way as to make them easily accessible to interested circles of economic life and their legal advisers in order to make the effects of these rules predictable, thus ensuring their growing influence on international commercial transactions.[49]

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[48] *See*, in general, Karollus, note 34 at pp. 585 et seq.
[49] Perillo, note 11 at p. 317.