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I. INTRODUCTION

Practitioners—of comparative law focus their attention mainly on Western European, Eastern European, and common law legal systems.[1] This focus excludes South American systems, which will be discussed in this Article.

South American legal systems are nearly all considered to be civil law systems.[2] These systems are based upon various European codes,[3] including the French *Code Civil*[4] and the German *Bürgerliches Gesetzbuch*.[5] Laws governing the formation of

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1. For articles and books relating to the formation of contracts in these legal systems, see 1 FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (Rudolf B. Schlesinger ed., 1968) [hereinafter FORMATION OF CONTRACTS]; Franco Ferrari, *La formazione del contratto*, *in* ATLANTE DI DIRITTO PRIVATO COMPARATO (Francesco Galgano & Franco Ferrari eds., 1992); Franco Ferrari, *A Comparative Overview on Offer and Acceptance Inter Absentes*, 10 B.U. INT'L L.J. 171 (1992).

2. *See* Francesco Galgano, *Civil Law e Common Law*, *in* ATLANTE DI DIRITTO PRIVATO COMPARATO, *supra* note 1, at 2 (characterizing such countries as Guyana as a common law system).

3. For an historical overview of the various European codes, see HANS SCHLOSSER, GRUNDZÜGE DER NEUEREN PRIVATRECHTS-GESCHICHTE (6th ed. 1988); FRANZ WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT (2d ed. 1967).

4. For a discussion of the influence of the French Civil Code, see Sir Maurice Amos, *The Code Napoléon and the Modern World*, 10 J. COMP. LEGIS & INT'L L. 222 (1922); Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: The French Experience and Its Implications for Louisiana Law*, 56 TUL. L. REV. 477 (1982); THE CODE NAPOLEON AND THE COMMON LAW WORLD (B. Schwartz ed., 1956); Yosiyuki Noda, *La réception du droit français au Japon*, 15 REVUE INTERNATIONALE DE DROIT COMPARÉ 543 (1963); SALACUSE, AN INTRODUCTION TO LAW IN FRENCH SPEAKING AFRICA (1969); Imre Zajtay, *Les destinées du code civil*, 6 REVUE INTERNATIONALE DE DROIT COMPARÉ 792 (1954).

5. For a discussion of the history and the influence of the German Civil Code, see Hans Dölle, *Das Bürgerliche Gesetzbuch in der Gegenwart*, *in* FÜNFZIGJAHRFEIER DES DEUTSCHEN BÜRGERLICHEN GESETZBUCHES 14 (Hans Carl Nipperdey ed., 1950); Hellmut

contracts are no exception. In fact, this is an area where it is particularly easy to identify codes that inspired the legal systems under review. By doing so, this Article will first examine some preliminary considerations, and then focus on the theories of "offer" and "acceptance" to determine when the contract is formed.

II. PRELIMINARY CONSIDERATIONS

A. Agreement of the Parties in General

In all legal systems, the conclusion of a contract requires consent,[6] or agreement of the parties,[7] which is defined as the "manifestation of mutual assent on the part of two or more persons."[8] Consent, however, must meet certain requirements for the contract to be effective and enforceable.[9] The agreement

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G. Isele, *Ein halbes Jahrhundert deutsches Bürgerliches Gesetzbuch*, 150 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 1 (1949); Ernst Rabel, *Private Laws of Western Civilization*, 10 LA. L. REV. 265 (1950); Andreas Schwarz, *Einflüsse deutscher Zivilistik im Auslande*, *in* SYMBOLAE FRIBURGENSES IN HONOREM OTTONIS LENEL 425 (1935).

6. It must be noted, however, that consent "bears two connotations. Under one, consent means a party's acquiescence to the terms and conditions of a projected contract, given with the intent of creating legal effects. Under the other, consent means the accord of the parties' will on the projected contract." Saúl Litvinoff, *Consent Revisited: Offer Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699, 699 (1987). In the context of this Article, the expression is used in the latter sense.

7. Even though the parties' agreement, or consent, is always required, in some situations consent or agreement alone is not sufficient. *See* FRANCESCO MESSINEO, IL CONTRATTO IN GENERALE 39 (1968) (stating that "the consensual contract is not the one which requires consent (in fact consent is required for all contracts) but the one for which the consent is also sufficient"). In fact, while some contracts, called "consensual" contracts, require only this element, in other contracts, "the obligation [arises] not [only] from the agreement of the parties but [also] from the delivery" of the goods that are the objects of the contract to be formed. Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 623 (1919). This category of contracts, also known in Roman law as contracts *re contrahuntur*, is not recognized in all legal systems. *Id.* For a list of contracts *re contrahuntur* in Roman law, see *id.* For a list of European countries that recognize contracts where the delivery is required for the contract to be formed, see Ferrari, *La formazione del contratto*, *supra* note 1, at 69. South American legal systems recognize the category of contracts *qui re contrahuntur*.

8. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1973). For other definitions in civil law systems, see, e.g., Guido Alpa, *Le contrat "individuel" et sa définition*, *in* REVUE INTERNATIONALE DE DROIT COMPARE 329 (1988); Ferrari, *La formazione del contratto*, *supra* note 1, at 70-71.

9. FORMATION OF CONTRACTS, *supra* note 1, at 71-72.

must be "free, serious, precise and intelligible,"[10] which means that it "must be free from illegality, duress, fraud and other defects"[11] and must "meet certain basic tests of earnestness."[12] This Article will focus only on the formation of contracts, not the elements that can vitiate the parties' assent.

B. Agreement As Meeting of Offer and Acceptance

Generally, an agreement of the parties exists only when "a complete coincidence between the declarations of the will of the different parties is reached."[13] These "declarations of will" refer to the concepts of offer and acceptance.[14]

Although it is commonly accepted among legal scholars that agreement of the parties is composed of the declarations of will,[15] this is not always the case.[16] In fact, there may be situations where it is very difficult, if not impossible, to distinguish between an offer and an acceptance.[17] For instance, when the parties sign a writing drafted by a third party, no distinction between offer and acceptance can be made.[18] The same is true with respect to

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10. HELMUT KOZIOL & RUDOLF WELSER, BÜRGERLICHES RECHT 103 (1987).

11. FORMATION OF CONTRACTS, *supra* note 1, at 72.

12. *Id. See also* GORDON D. SCHABER & CLAUDE D. ROHWER, CONTRACTS IN A NUTSHELL 8 (3d ed. 1990) (stating that a contract is an agreement "the terms of which are sufficiently definite and certain to be legally enforceable").

13. FRANCESCO GALGANO, IL NEGOZIO GIURIDICO 61 (1988).

14. *See* Ellison Kahn, *Some Mysteries of Offer and Acceptance*, 72 S. AFR. L.J. 246, 246 (1955) (stating that consent "is usually said to be reducible to an offer . . . by the one party which is accepted by the other"); Peter Klik, *Mass Media and Offers to the Public: An Economic Analysis of Dutch Civil Law and American Common Law*, 36 AM. J. COMP. L. 235, 235 (1988) ("Both civil law and common law treat the formation of a contract as a two-step process.").

15. *See, e.g.*, SAÚL LITVINOFF, *Obligations*, *in* 6 LA. CIV. L. TREATISE 211 (1969) (expressly stating that consent is composed of offer and acceptance); *see also* KONRAD ZWEIGERT & HEIN KÖTZ, 1 INTRODUCTION TO COMPARATIVE LAW 35 (2d ed. 1987) (asserting that "[a] contract is formed when the parties express their agreement in congruent declarations, a prior offer and a subsequent acceptance"); 1980 Vienna Sales Convention arts. 14-24 [hereinafter CISG] (considering the formation of contracts through the process of offer and acceptance).

16. For a similar affirmation, see, e.g., Litvinoff, *supra* note 6, at 702 (stating that the process of formation of contracts by offer and acceptance "is not a ritual, that is, it should not be regarded as indispensable for the formation of a valid contract").

17. *Id.* Indeed, a contract may be contained in a writing that does not reflect which party made the initial offer and which party concluded the contract by his acceptance. Moreover, parties may arrive at a contract through negotiations so involved as to make it extremely difficult to ascertain who made the offer and who made the acceptance. *Id.*

18. For a discussion of the impossibility of analyzing this situation as a traditional offer and acceptance, see POLLOCK ON CONTRACTS 5 (13th ed. 1950); SIR JOHN SALMOND &

counter-offers. "[A]nalysis into offer and acceptance must not be applied too vigorously or facts . . . sacrificed to phrases."[19] Nevertheless, the distinction between offer and acceptance is the traditional method of analyzing the formation of contracts,[20] and all South American legal systems recognize this distinction. Thus, this Article will analyze the formation of contracts in South American countries using the traditional approach of distingusishing between offer and acceptance.

C. Agreement Inter Praesentes

No questions arise as to the existence of an agreement when the contract is concluded between present parties.[21] In all the legal systems reviewed here, as well as in most other legal systems and under the 1980 Vienna Sales Convention, there is an "invariable rule that the offer lapses if the offeree does not accept it on the spot."[22] In other words, between offer and acceptance, no "considerable amount of time"[23] needs to expire. This rule, which is similar to the Roman concept of *sponsio-stipulatio*,[24] has

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GLAINVILLE WILLIAMS, LAW OF CONTRACTS 70-71 (1945). For cases addressing the difficulty of distinction between offer and acceptance, see, e.g., North La. Milk Producers Ass'n v. Southland Corp., 352 So. 2d 293 (2d Cir. 1977); Reid Bros. (S.A.), Ltd. v. Fischer Bearings Co., 1943 A.D. 232 (S.A.); Collen v. Rietfontein Eng'g Works, 1948 [1] A.D. 413 (S.A.).

19. Kahn, *supra* note 14, at 247 (quoting GEOFFREY CHESHIRE & C.H.S. FIFOOT, LAW OF CONTRACTS 24 (3d ed. 1952)).

20. *See, e.g.*, Parviz Owisa, *The Notion and Function of Offer and Acceptance Under French and English Law*, 66 TUL. L. REV. 871, 879 (1992).

21. *See, e.g.*, ZWEIGERT & KÖTZ, *supra* note 15, at 36.

22. *Id.* For a discussion of European laws in this area, see FORMATION OF CONTRACTS, *supra* note 1, at *sub* B.I.I.C. (discussing the laws in Austria, Czechoslovakia, England, Germany, Italy, Russia, and Yugoslavia). For this principle as set forth in the Vienna Sales Convention, see CISG, *supra* note 15, art. 18(2) (stating that "[a]n oral offer must be accepted immediately unless the circumstances indicate otherwise").

23. ALESSANDRI RODRIGUEZ, DE LOS CONTRATOS 20 (1988). *See also* H. GUSTAVO PALACIO PIMENTEL, 1 MANUAL DE DERECHO CIVIL 252 (2d ed. 1987).

24. The prevailing opinion among legal scholars of the Roman *sponsio-stipulatio* is that it "consisted of a formal question that was put by the prospective creditor (promisee): 'Spondesne . . .?' (Do you solemnly promise . . . to give a certain thing?). The prospective debitor (promisor) would formally respond 'Spondeo' (I solemnly promise)." Owisa, *supra* note 20, at 874 n.3. *See also* ROBERT W. LEE, THE ELEMENTS OF ROMAN LAW 345-46 (1956).

It has been argued, however, that "[n]one . . . of the Roman law devices were very similar to the doctrine of offer and acceptance as it later developed. Thus, the influence of Roman law in shaping the present doctrine has been minimal." Owisa, *supra* note 20, at 875.

been codified in many South American countries, including Argentina,[25] Brazil,[26] Chile,[27] Colombia,[28] Peru,[29] Uruguay,[30] and Venezuela.[31]

The application of the aforementioned principle is not limited to agreements reached by persons who are physically present, such as during a face-to-face conversation. Indeed, as in most European systems,[32] most South American systems treat offers made by telephone or similar means as having been made in the presence of the parties,[33] as long as "the person negotiating the deal is operating the machine . . . personally."[34] This language results in

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25. *See* CÓDIGO CIVIL [CÓD. CIV.] art. 1151 (Arg.) ("The proposal or the offer which are made orally are deemed to be accepted only if accepted immediately.").

26. *See* CÓDIGO CIVIL [C.C.] art. 1081 (Braz.) (providing that an offer ceases to bind the offeror "if it has been made to a present person and if it has not been accepted immediately").

27. Some legal systems provide their rules on the formation of contracts in their commercial codes instead of their civil codes. *See* Chile Commercial Code [Chile Com.c.] art. 97.

28. As in Chile, Colombia's rules on the formation of contracts are set forth in the commercial code. *See* Colombia Commercial Code [Colom. Com.c.] art. 850.

29. *See* Peru Civil Code [Peru C.c.] art. 1330. *See also* MOSSET ITURRASPE, CONTRATOS 108 n.74 (1987) (discussing Article 1330).

30. *See* Uruguay Civil Code [Uru. C.c.] art. 1263(1) (providing that "[t]he oral offer has to be accepted immediately").

31. *See* Venezuela Commercial Code [Venez. Com.c.] art. 110 ("In order to be binding, an oral offer must be accepted immediately by the person to whom it is addressed; if there is no such acceptance, the offeror is free.").

32. Some European legal systems have expressly provided rules that govern this situation. *See, e.g.*, ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] § 862 (Aus.); BÜRGERLICHES GESETZBUCH [BGB] § 147(1) (F.R.G.); POLGÁRL TÖRVÉNYKÖNYV [PTK] art. 211(2) (Hung.); CODE DES OBLIGATIONS [CO] art. 4(2) (Switz.); Yugoslavia Law on Obligations [LO] art. 40(2). *See also* FORMATION OF CONTRACTS, *supra* note 1, at 168.

33. For a discussion of this rule in Argentina, see, e.g., ITURRASPE, *supra* note 29, at 108. For Brazilian law, see C.C. art. 1081(1) (Braz.); *see also* DARCY BESSONE, DO CONTRATO TEORIA GERAL 149 (1987); JOAO FRANZEN DE LIMA, 1 CURSO DE DIREITO CIVIL BRASILEIRO 326-27 (1977) (discussing the law). For Colombian law, see Colom. Com.c. art. 850; *see also* GUILLERMO O. FERNANDEZ & EDUARDO O. ACOSTA, TEORÍA GENERAL DE LOS ACTOS O NEGOCIOS JURÍDICOS 153 (3d ed. 1987); ZEA, 3 DERECHO CIVIL: DE LAS OBLIGACIONES 99 (1990) (discussing the law). For Peruvian law, see Peru C.c. art. 1330(3) ("A person who negotiates via telephone is deemed to be present."). For a discussion of this rule in Venezuela, see, e.g., CASAS RINCON, 1 OBLIGACIONES CIVILES: ELEMENTOS 49-50 (1946); MELICH-ORSINI, DOCTRINA GENERAL DE CONTRATO 152 (1985). For a list of methods of communication similar to the telephone, see, e.g., FORMATION OF CONTRACTS, *supra* note 1, at 168 (comparing two-way radios and two-way closed circuit televisions to the telephone).

34. FORMATION OF CONTRACTS, *supra* note 1, at 168. Where the person negotiating the deal is not operating the machine, the aforementioned rule does not apply. *Id.* n.11. This rule also applies to the use of a telex. *Id.*

an unclear distinction between contracts framed in the absence of the parties and contracts formed in the presence of the parties. A better approach would be to distinguish between simultaneous contracts and contracts formed in successive phases.[35]

D. The Form of the Agreement

At this point, it may be useful to examine the form of the agreement. Like most other legal systems,[36] some South American systems allow the parties to form their agreement either expressly or implicitly.[37] The Argentina Civil Code defines express agreement as an agreement "manifested by words, by writings or by signings."[38] Other South American codes, such as the Civil Code of Brazil and the Commercial Code of Chile, use the same definition.[39]

An agreement is implied, or tacit, when the parties manifest their intention by "conduct or acts that presume [the agreement] or that authorize its presumption,"[40] or "when the parties manifest their will by concludent behaviours which do not constitute signs of language and by which the contractual intent can nevertheless be conveyed under specific circumstances."[41] Thus, in these situations, the intent of the parties is indicated by the parties' actions rather than by specific words of agreement.

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35. *See* ALESSANDRA BELLELLI, IL PRINCIPIO DI CONFORMITÀ TRA PROPOSTA E ACCETTAZIONE 16 n.18 (1992).

36. It is universally accepted that the consent (or the different manifestations of will of which it is composed) can be either express or implied. This principle has been expressly laid out in European countries such as Austria and Switzerland. *See* ABGB § 863(1) (Aus.); Co art. 1(2) (Switz.). This rule can also be found in Algeria Civil Code art. 60, Egypt Civil Code art. 90(1), Lebanon Code of Obligations art. 179(1), Quebec Civil Code art. 989, and LO art. 28(1) (Yugo.).

37. *See, e.g.*, CÓD. CIV. art. 1145 (Arg.); C.C. art. 1079 (Braz.); Chile Com.c. art. 103. *See also* BESSONE, *supra* note 33, at 149-51; JORGÉ GAMARRA, 11 TRATADO DE DERECHO CIVIL URUGUAYO 110-12 (3d ed. 1990); MADURO LUYANDO, 3 DERECHO CIVIL: CURSO DE OBLIGACIONES 490-91 (1975); MELICH-ORSINI, *supra* note 33, at 127-29.

38. CÓD. CIV. art. 1145 (Arg.).

39. *See* C.C. art. 1079 (Braz.); Chile. Com.c. art 103. This definition is also used by European countries. *See, e.g.*, CESARE MASSIMO BIANCA, 3 DIRITTO CIVILE IL CONTRATO 212-13 (1987); GALGANO, *supra* note 13, at 63; ERNST KRAMER & BRUNO SCHMIDLIN, DAS OBLIGATIONENRECHT. KOMMENTAR ZU ART. 1-18, 91 (1973).

40. CÓD. CIV. art. 1145 (Arg.). For a similar European definition, see, e.g., BIANCA, *supra* note 39, at 213 (stating that there is an implied agreement when the contracting parties manifest their will "by using instruments which allow with certainty to deduce the existence of a contractual intent").

41. 3 BIANCA, *supra* note 39, at 213.

III. OFFER

A. Willingness To Be Bound

In modern business practice, contracts are formed in successive phases and are generally analyzed by examining the offer and acceptance.[42] An offer is commonly defined either as a declaration of will[43] made by a party[44] or as a declaration addressed to one or more specific persons in which the declarant manifests his or her intent to be bound by a contract.[45] This definition, which is very similar to the definition adopted by the Uruguayan legislature,[46] identifies at least one element required for a declaration to be deemed an offer—the "intention of the offeror to be bound in case of acceptance"[47] must be manifest.[48] It is the requirement of intent that distinguishes an offer from *tratativas* or

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42. *See, e.g.*, FRANCESCO GALGANO, 2(1) DIRITTO CIVILE E COMMERCIALE 156 (1990); MELICH-ORSINI, 3 DERECHO CIVIL: OBLIGACIONES. APUNTES DE CLASES 274.

43. Most South American legal systems have adopted the German notion of *Rechtsgeschäft*, or legal transaction. For the most recent discussion of *Rechtsgeschäft*, see Francesco Galgano, *Il negozio giuridico in Germania e in Italia*, *in* ATLANTE DI DIRITTO PRIVATO COMPARATO, *supra* note 1, at 53; Irina Lucidi, *La recezione del negozio giuridico in altri paesi*, *in* ATLANTE DI DIRITTO PRIVATO COMPARATO, *supra* note 1, at 59. It has been doubted, as in other countries where this concept has been adopted, whether offer and acceptance are a type of *Rechtsgeschäft*. South American and European systems reject this notion. In Colombia, the legislature solved the aforementioned problem by stating that "la oferta o propuesta, esto es, el *proyecto de negocio giuridico* que una persona formula a otra." Colom. Com.c. art. 845.

44. For a similar definition, see, e.g., De Sola, *El tiempo y el especio en la conclusion de los contratos*, *in* STUDIA IURIDICA 60, 72 (1959); 11 GAMARRA, *supra* note 37, at 101; MELICH-ORSINI, *supra* note 33, at 137.

45. For a provision considering proposals made to one or more specific persons, see, e.g., CISG, *supra* note 15, art. 14(1). One must be aware, however, that even a proposal not directed to one or more specific persons, such as a proposal made to an indefinite number of persons, can be deemed an offer to the public. *Id.* Of course, this type of proposal must fulfill the same requirements as an offer to one or more specific persons.

46. *See* Uru. C.c. art. 1262(2) ("The offer is a manifestation by one party of its intent to be bound with the other party.").

47. CISG, *supra* note 15, art. 14(1).

48. This element is required in all South American countries. *See, e.g.*, FERNANDEZ & ACOSTA, *supra* note 33, at 162; 11 GAMARRA, *supra* note 37, at 106; MELICH-ORSINI, *supra* note 33, at 138; 1 PALACIO PIMENTEL, *supra* note 23, at 244; SANOJO, 3 INSTITUCIONES DE DERECHO CIVIL VENEZOLANO 17 (photo. reprint 1953).

negociaçoes,[49] the basis of the offer, or "proposicion definitiva."[50]

B. Invitation To Make an Offer

The intent to be bound also distinguishes an offer from an "invitation addressed to various persons in order to lead them to make an offer of a future contract."[51] Consequently, the declaration of the addressee of the *invitatio ad offerendum* is what constitutes a true offer.[52] The distinction between an offer and an invitation to make an offer is important because the two acts have different effects. While an offer "becomes a contract if it is accepted,"[53] an invitation to make an offer does not give rise to the offeree's power to accept.[54]

Legal scholars have debated "whether the proposal is an offer or an invitation to deal."[55] South American systems, like those of other nations,[56] have developed rules of law that attempt to distinguish between the two. For example, South American systems regard "the solicitation . . . by way of notices, catalogues or price lists"[57] not as offers, but as invitations to make offers.[58]

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49. For a distinction between offer and *tratativas*, or *negociaçoes*, see, e.g., 11 GAMARRA, *supra* note 37, at 106; SILVA PERREIRA, 3 ISTITUIÇOES DE DERECHO CIVIL FONTES DAS OBLIGAÇOES 26 (1986).

50. 1 PALACIO PIMENTEL, *supra* note 23, at 244.

51. 3 MELICH-ORSINI, *supra* note 42, at 271. For similar definitions in South American systems, see also 11 GAMARRA, *supra* note 37, at 106-07; 3 LUYANDO, *supra* note 37, at 491; ITURRASPE, *supra* note 29, at 95. There are other elements that distinguish an offer from an invitation to an offer. In fact, where a "declaration . . . does not contain all the essential elements of the contract to be concluded," it constitutes an invitation to make an offer. GALGANO, *supra* note 13, at 73.

52. *See* 11 GAMARRA, *supra* note 37, at 106.

53. FORMATION OF CONTRACTS, *supra* note 1, at 77.

54. *See, e.g.*, Ferrari, *La formazione del contratto, supra* note 1, at 74.

55. *See* FORMATION OF CONTRACTS, *supra* note 1, at 77.

56. For U.S. and European laws concerning this topic, see, e.g., Ferrari, *La formazione del contratto, supra* note 1, at 74-75; FORMATION OF CONTRACTS, *supra* note 1, at 77-81.

57. ITURRASPE, *supra* note 29, at 95. *See also* 11 GAMARRA, *supra* note 37, at 107. For provisions that expressly lay down this rule, see, e.g., Chile Com.c. art. 105 ("Indefinite offers contained in notices, catalogues, lists of current prices, prospectus or in any other type of printed announcements, are not mandatory upon the offeror."); Colom. Com.c. art. 847 ("The offer of goods with an indication of price addressed to the public in notices, prospectus or any other similar type of written advertisement, do not bind the offeror.").

58. In comparison, in Switzerland this rule has been expressly laid down: "The dispatch of tariffs, price lists or similar items does not constitute an offer." Co art. 7(2) (Switz.).

Furthermore, legal scholars and legislators disagree about what constitutes an offer and what constitutes an invitation to enter into a contract. One often-discussed situation concerns the display of articles in shop windows.[59] Many South American countries, such as Uruguay, hold that a display of articles is no more than an invitation to make an offer, even when the price is indicated.[60] This rule, also adopted by some European civil law countries, such as Germany[61] and Italy,[62] as well as most common law countries,[63] is based on the premise that "if anyone had the right to accept, the merchant would be forced to satisfy everybody, which, from a practical point of view, is absurd."[64] In contrast, countries such as Argentina,[65] Brazil,[66] Colombia,[67] and Venezuela[68] follow the rules of France[69] and Switzland that "the display with price-quotation is generally considered as being an offer."[70] Most of these countries agree, however, that when a declaration of will contains "'clauses without commitment' or

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For an identical rule, see LO art. 35 (Yugo.): "The dispatch of catalogues, price lists, tariffs and similar items . . . does not constitute an offer to form a contract, but only an invitation to make an offer at the publicized conditions." For a more analytical treatment of the European rule, see, e.g., FORMATION OF CONTRACTS, *supra* note 1, at 79.

59. For a discussion on this subject in the legal systems not covered by this study, see FORMATION OF CONTRACTS, *supra* note 1, at 79; Ferrari, *La formazione del contratto*, *supra* note 1, at 74-75.

60. For the Uruguayan rule on display windows, see 11 GAMARRA, *supra* note 37, at 107.

61. For the German rule on display windows, see, e.g., WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS DAS RECHTSGESCHÄFT 635 (4th ed. 1992); FORMATION OF CONTRACTS, *supra* note 1, at 79.

62. GALGANO, *supra* note 13, at 74; Ferrari, *La formacione del contratto*, *supra* note 1, at 70.

63. *See, e.g.*, FORMATION OF CONTRACTS, *supra* note 1, at 79: "Common law countries (England, India, United States) . . . agree that the mere display of articles in a shop window is an invitation to deal, even if the price is indicated." For a comparative treatment of this problem, see Percy H. Winfield, *Some Aspects of Offer and Acceptance*, 55 L.Q.R. 499, 517-18 (1939).

64. *See* 1 CASAS RINCON, *supra* note 33, at 49-50.

65. *See, e.g.*, ITURRASPE, *supra* note 29, at 100.

66. *See* 3 PERREIRA, *supra* note 49, at 28.

67. ZEA, *supra* note 33, at 100. *See also* Colom. Com.c. art. 848.

68. *See* 3 LUYANDO, *supra* note 37, at 492; MELICH-ORSINI, *supra* note 33, at 147-48.

69. *See, e.g.*, HENRI MAZEAUD ET AL., 1(2) LE ÇONS DE DROIT CIVIL: OBLIGATIONS 119 (8th ed. 1991).

70. Co art. 7(3) (Switz.).

'subject to confirmation,'"[71] it will be regarded as an invitation to make an offer.[72]

C. The Definite Offer

Intent to be bound is not the only requirement for a proposal to be considered an offer. In order to constitute an offer, a proposal must also be definite[73] ("completa" or "autosuficiente");[74] in other words, it must contain the essential elements of a contract. This quality of the offer, which is expressly required in only a few systems, has been defined as the "first requirement of the offer. Only in these situations [when a proposal is definite] is it possible to explain that the mere acceptance results in the conclusion of the contract."[75]

The Convention on the International Sales of Goods ("CISG") also requires a proposal to be definite. Article 14(1) identifies some elements necessary to characterize a proposal as an offer rather than a mere invitation to make an offer: "[a] proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes these, or makes a provision for determining the quantity and the price."[76] The above elements are not considered

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71. 11 GAMARRA, *supra* note 37, at 107.

72. For example, in Germany, a proposal containing expressions such as *freibleibend* ("remaining free") or *ohne Obligo* ("without obligation") cannot be deemed an offer. Therefore, where a proposal contains these expressions, which are frequently used in German business practice, "the 'acceptance', namely the affirmative answer to the proposal, is in law an offer which the proponent may or may not accept." Arthur Nussbaum, *Comparative Aspects of the Anglo-American Offer and Acceptance Doctrine*, 36 COLUM. L. REV. 920, 927 (1936).

73. *See* CISG, *supra* note 15, art. 14(1). In France, the expression used is *offre précise*. *See* JACQUES GHESTIN, *Le Contrat: Formation*, *in* 2 TRAITÉ DE DROIT CIVIL (Jacques Ghestin ed., 1988).

See, e.g., LUIS DIEZ-PICAZO & ANTONIO GULLON, SISTEMA DEL DERECHO CIVIL 75 (1988); PIERRE ENGEL, TRAITÉ DES OBLIGATIONS EN DROIT SUISSE 155 (1973); CHRISTIAN LARROUMET, DROIT CIVIL: LES OBLIGATIONS 220 (1986).

74. ITURRASPE, *supra* note 29, at 99. *See also* ANTONIO CHAVES, TRATADO DE DEREITO CIVIL 398 (1984); 11 GAMARRA, *supra* note 37, at 109.

75. ITURRASPE, *supra* note 29, at 99. *See also* 3 ZEA, *supra* note 33, at 98. Argentina expressly requires that an offer be "definite." *See* CÓD. CIV. art. 1148 ("[I]n order to be in the presence of an offer, it must be addressed to one or more specific persons, it must refer to a specific contract and contain all the essential elements of the contract.").

76. CISG, *supra* note 15, art. 14(1). The 1964 Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULFIS") also requires the definiteness of an offer; however, it does not define any of the essential elements.

Some South American legislatures consider price to be an *essentiale contractus*. *See, e.g.*, C.C. art. 1126 (Braz.); Chile C.c. art. 1808; Colom. C.c. art. 1864; Peru C.c. art. 1529;

exhaustive.[77] Indeed, they constitute a "minimum and the offer can encompass all kind of other elements."[78]

D. Revocable Offer

While most legal systems have similar laws concerning intent and definiteness of an offer, laws differ significantly with regards to the "fuerza vinculante," or "obligatoriedad"—or the revocability—of the offer.[79] This issue arises in South American legal systems only when there is no express statement, because "where an offer is expressly stated to be revocable [it] can be revoked,"[80] and, conversely, where an offer is expressly stated to be irrevocable, it cannot be revoked.[81] Consequently, revocability becomes an issue only when the offer is silent as to this question.

Uru. C.c. art. 1664; Venez. C.C. art. 1479. Article 14(1)'s requirement that an offer must indicate the price does not contradict Article 55 of CISG. *See* Eugen Bucher, *Preisvereinbarung als Voraussetzung der Vertragsgültigkeit beim Kauf. Zum angeblichen Widerspruch zwischen Art. 14 und Art. 55 des 'Wiener Kaufrechts,' in* WIENER KAUFRECHT 53 (Eugen Bucher ed., 1991).

For a comparison of laws regarding the price indication requisite, see John Murray, *The 'Open Price' Sale of Goods Contract in a Worldwide Setting*, 89 COM. L.J. 491 (1984); WOLFGANG WITZ, DER UNBESTIMMTE KAUFPREIS. EIN RECHTSVERGLEICHENDER BEITRAG ZUR BEDEUTUNG DES PRETIUM CERTUM (1989).

77. *See, e.g.*, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 129 (Peter Schlechtriem ed., 1990); HANS ENDERLEIN ET AL., KONVENTION DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF: KOMMENTAR 62 (1985); ROLF HERBER & BEATE CZERWENKA, 11 INTERNATIONALES KAUFRECHT: KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN 81-82 (1991).

78. BERNARD AUDIT, LA VENTE INTERNATIONALE DE MARCHANDISES: CONVENTION DES NATIONS-UNIES DU 11 AVRIL 1980, 58 (1990).

79. *See, e.g.*, 11 GAMARRA, *supra* note 37, at 112; MELICH-ORSINI, *supra* note 33, at 269; ITURRASPE, *supra* note 29, at 101; PALACIOS HERRERA, APUNTES DE OBLIGACIONES 354 (1956); 3 SANOJO, *supra* note 48, at 17.

80. FORMATION OF CONTRACTS, *supra* note 1, at 109.

> According to the view prevailing in some systems there is a presumption that such a proposal does not constitute an offer, but only an invitation to deal. This presumption is not conclusive, and in all systems under consideration [Austria, France, England, Germany, India, Italy, Poland, South Africa, and the United States] it is possible by apt words effectively to make a revocable offer.

Id.

81. In some legal systems, an offer that is expressly stated to be irrevocable is, nonetheless, revocable. For example, even in a common law system such as England, "the consideration doctrine stood in the way of holding irrevocable an offer made neither for value nor under seal, even when the offeror had waived his right to revoke." Nussbaum, *supra* note 72, at 925. In India, the same result holds true because of the statutory requirement of consideration. *See* FORMATION OF CONTRACTS, *supra* note 1, at 784 n.4. Consequently, "[t]here is nothing irrevocable about an offer as it can be revoked right up and till the time it is received and before it is accepted." *Id.* n.6 (quoting Pokhar Mal v. Khanewal Oil Mills, A.I.R. 1945 Lah. 260, 263).

The South American legal systems adopt either the French-based or the German-based approach to the issue of revocability. Countries such as Argentina,[82] Chile,[83] and Uruguay,[84] as well as the 1980 Vienna Sales Convention,[85] have adopted rules similar to the French law, providing that "the offer can be revoked until it has been accepted."[86] If, however, "the offeree has relied on the offer in good faith, he has a claim for damages for the loss he suffered in preparing to perform,"[87] in accordance with the doctrine of *culpa in contrahendo*.[88]

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82. CÓD. CIV. art. 1150 (Arg.).

83. *See* RODRIGUEZ, *supra* note 23, at 18.

84. *See* Uru. C.c. art. 1265. *See also* 11 GAMARRA, *supra* note 37, at 113-14.

85. *See* CISG, *supra* note 15, art. 16(1). Article 16(1) states: "[U]ntil a contract is concluded an offer may be revoked, if the revocation reaches the offeree before he has dispatched an acceptance." *See also* Konrad Dilger, *Das Zustandekommen von Kaufverträgen im Aussenhandel nach internationalem Einheitsrecht und nationalem Sonderrecht*, 45 RABELS ZEITSCHRIFT 175 (1981); Shahdeen Malik, *Revocable or Irrevocable Will. Art. 16 of the Convention on Contracts for the International Sale Ensures Uniformity?*, 25 IND. INT'L & COMP. L. REV. 26 (1985); ELISABETH STERN, ERKLÄRUNGEN IM UNCITRAL-KAUFRECHT 23-28 (1990). Not all commentators, however, seem to be aware of the origin of the rule provided in Article 16. *See, e.g.*, 11 HERBER & CZERWENKA, *supra* note 77, at 88; GERT REINHART, UN-KAUFRECHT: KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11: APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF 51 (1991) (arguing that the rule at issue was derived from common law).

86. "Las ofertas pueden ser rectratadas mientras no hayan sido aceptadas." CÓD. CIV. art. 1150 (Arg.). For a discussion of the law, see Ferrari, *La formazione del contratto*, *supra* note 1, at 75; GHESTIN, *supra* note 73, at 227-28; Litvinoff, *supra* note 6, at 714; 1(2) MAZEAUD ET AL., *supra* note 69, at 121; RIEG, LE RÔLE DE LA VOLONTÉ DANS L'ACTE JURIDIQUE EN DROIT CIVIL FRANÇAIS ET ALLEMAND 83-84 (1961). For quotation of French scholars by South American legal writers, see, e.g., CÓDIGO CIVIL Y LEYES COMPLEMENTARIAS COMENTADO, ANOTADO Y CONCORDADO 764 (Belluscio ed., 1984) [hereinafter CODIGO CIVIL]; GAMARRA, *supra* note 37, at 113-14; ITURRASPE, *supra* note 29, at 101-02; 3 ZEA, *supra* note 33, at 100-01.

87. *See* 1 ZWEIGERT & KÖTZ, *supra* note 15, at 41 ("It is difficult to tell from the cases what amount of damages, if any, may be ordered against an offeror who has [revoked] his offer.").

88. *See* Rudolf von Ihering, *Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, 4 IHER. JAHRB. 1 (1861). For a discussion of the doctrine of *culpa in contrahendo*, see, e.g., Ernst Bühler, *Zum Problem der "culpa in contrahendo,"* 75 SCHWEIZERISCHE JURISTENZEITUNG 357 (1979); CLAUS-WILHELM CANARIS, DIE VERTRAUENSHAFTUNG IM DEUTSCHEN PRIVATRECHT (1971); Karl Larenz, *Bemerkungen zur Haftung für "culpa in contrahendo,"* in FESTSCHRIFT BALLERSTEDT 397 (1975); PAUL PIOTET, CULPA IN CONTRAHENDO: ET RESPONSABILITÉ PRÉCONTRACTUELLE EN DROIT PRIVÉ SUISSE (1963).

E. Irrevocable Offer and Withdrawal

Other South American systems, such as Brazil,[89] Colombia,[90] and Peru,[91] have adopted the German rule, which provides that "the offeror is bound by his offer, in the sense that he cannot withdraw it, for the period of time he specifies or, if he specifies no period, for a reasonable time."[92] Countries following this rule differ, however, in their treatment of offers that are revoked before the expiration of the "reasonable" time limit.[93] In some systems, such as that of Colombia, the revocation prevents the conclusion of the contract and results in the offeror's liability.[94]

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89. *See* C.C. arts. 1080-81 (Braz.).

90. *See, e.g.*, Ferrari, *La formazione del contratto, supra* note 1, at 85.

91. *See* Peru C.c. art. 1382; *see also* art. 1330 of the old Peru Civil Code; 1 PALACIO PIMENTEL, *supra* note 23, at 246.

92. 1 ZWEIGERT & KÖTZ, *supra* note 15, at 41. *See* C.C. art. 1081 (Braz.); *see also* Nussbaum, *supra* note 72, at 925. Nussbaum summarizes the reasons for the rule as follows:

> The offeree needs a dependable basis for his decision. It may be that he has to take immediate measures in view of the contract intended. Furthermore, the offeree, prompted by the offer, will possibly order raw materials in the case of a buying offer, or clear stock in the case of a selling offer. [Therefore,] it would seem fair and consistent to keep the offeror to the promise, as expressed in his offer, to its full extent.

Id.

In Germany, however, the parties may decide to make revocable offers. *See* BGB § 145 (F.R.G). "Whoever offers to another to enter into a contract is bound by the offer, *unless he has excluded being so bound.*" *Id.* (emphasis added). Formerly-socialist and Scandinavian systems have also adopted the German rule. For laws in the formerly-socialist countries, see, e.g., Czech C. C. art. 45(3); PTK § 211(1) (Hung.); LO art. 36(1)(Yugo.); *see also* OLYMPIAD S. IOFFE, SOVIET CIVIL LAW 155 (1988); M.G. Rosenberg, *Conclusion of Contract, in* USSR CONTRACT LAW (V.S. Pozdnyakov ed., 1982); VONDRACEK, COMMENTARY ON THE CZECHOSLOVAKAK CIVIL CODE 65-66 (1988); W.J. Wagner, *Obligations in Polish Law, in* POLISH CIVIL LAW 55 (D. Lasok ed., 1974); ALESSANDRO WOLTER, DIRITTO CIVILE POLACCO 274 (1976). For a discussion of the laws in Scandinavian systems, see, e.g., Jan Hellner, *Contracts and Sales, in* AN INTRODUCTION TO SWEDISH LAW 235 (Stig Strömholm ed., 1988); HANS-JOACHIM MERTENS & ECKARD REHBINDER, INTERNATIONALES KAUFRECHT: KOMMENTAR ZU DEN EINHEITLICHEN KAUFGESETZEN 326 (1975); ERNST RABEL, DAS RECHT DES WARENKAUFS: EINE RECHTSVERGLEICHENDE DARSTELLUNG 70-71 (1958); Leif Sevón, *Contract Law, in* THE FINNISH LEGAL SYSTEM 140-41 (Jaakko Uotila ed., 1985).

93. The "reasonable time" limit, like in European systems, "must be determined by the judge, in his discretion, at the appropriate time." 1 PALACIO PIMENTEL, *supra* note 23, at 247. For similar rules in South American law, see ITURRASPE, *supra* note 29, at 104; ARNOLD WALD, CURSO DE DIREITO CIVIL BRASILEIRO: OBRIGAÇOES E CONTRATOS 132 (1989).

94. *See* Colom. Com.c. art. 846; *see also* 3 ZEA, *supra* note 33, at 100-01.

In other systems, such as those of Brazil,[95] Peru,[96] and Venezuela,[97] the acceptance of an offer concludes the contract despite an ineffective revocation and, therefore, does not give rise to liability.[98] Although the Venezuelan legislature preferred the principle of the revocability of the offer,[99] legal writers and the courts preferred the German-based irrevocability doctrine because they believed it would "avoid the extreme consequences of similar principles."[100] Consequently, in Venezuela, "the revocation does not have any effect and the acceptance received by the addressee concludes the contract."[101]

Although it is not possible to revoke an irrevocable offer, all legal systems and the 1980 Vienna Sales Convention recognize that an irrevocable offer may be withdrawn.[102] While a revocation renders an offer ineffective after it is received by the offeree, a withdrawal also makes an offer ineffective if it is still *in itinere*. In some countries, such as Argentina[103] and Uruguay,[104] the revocation does not have to reach the offeree before or at the same time as the offer for a withrawal to be effective. In contrast,

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95. *See, e.g.*, BESSONE, *supra* note 33, at 166; WALD, *supra* note 93, at 130.

96. *See* 1 PALACIO PIMENTEL, *supra* note 23, at 255-56.

97. See CASAS RINCON, supra note 33, at 49-50.

98. The German system takes the same approach. *See* 1 ZWEIGERT & KÖTZ, *supra* note 15, at 41 ("As the wording of the BGB makes clear, the offeror is not simply under a duty not to withdraw the offer but actually has no power to do so; instead of giving rise to liability in damages, therefore, an attempted withdrawal simply has no legal effect at all.").

99. *See, e.g.*, 1 CASAS RINCON, *supra* note 33, at 50-51; 3 LUYANDO, *supra* note 37, at 489; MENDOZA BRANDT, APUNTES SOBRE EL CONTRATO 17 (1938); 3 SANOJO, *supra* note 48, at 16-17.

100. MELICH-ORSINI, *supra* note 33, at 268.

101. 3 LUYANDO, *supra* note 37, at 489. *See also* 1 CASAS RINCON, *supra* note 33, at 54; HERRERA, *supra* note 79, at 354.

102. *See* CISG, *supra* note 15, art. 15(2) ("An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer."). The German Civil Code uses the expression *widerruf* (revocation) not only to indicate a revocation, but also to indicate a withdrawal. *See, e.g.*, BGB § 130(1) (F.R.G) ("A declaration of will required to be made to another, if made in his absence, becomes effective at the moment when it reaches him. It does not become effective if a *revocation reaches him previously or simultaneously*." (emphasis added)). After the enactment of the 1980 Vienna Sales Convention, however, even Germany has distinguished between revocation and withdrawal. Thus, the term *Widerruf* is now used only to indicate a revocation, while the expression *Rücknahme* is used to mean withdrawal.

103. *See, e.g.*, CÓDIGO CIVIL, *supra* note 86, at 765.

104. *See, e.g.*, 11 GAMARRA, *supra* note 37, at 149.

Brazil,[105] Peru,[106] and Venezuela[107] consider knowledge to be the determinative factor, and thus, consider it irrelevant whether the offer or the withdrawal reaches the offeree first. As long as the offeree has knowledge of the withdrawal, the offer will be ineffective even if it reached the offeree first.

IV. ACCEPTANCE

A. In General

After examining the offer, its counterpart, the acceptance, must be examined. Acceptance is defined as the declaration sufficient to conclude the contract,[108] provided that the offer meets all prerequisites. It is the positive exercise of the power of acceptance,[109] i.e., the sense of a "an affirmative response to the offer to contract."[110]

Formal requirements of the acceptance correspond to those of the offer,[111] which are based upon the "general principle of informality."[112] Where a formal prerequisite is required, however, the acceptance must comply with the formal prerequisite.[113] The same is true where the offer "demands that the acceptance be made in a specific manner."[114]

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105. *See, e.g.*, BESSONE, *supra* note 33, at 172-73; GOMES, CONTRATOS 72-73 (1959).

106. *See* 1 PALACIO PIMENTEL, *supra* note 23, at 247.

107. *See* 1 CASAS RINCON, *supra* note 33, at 52-53; MELICH-ORSINI, *supra* note 33, at 144.

108. For a similar definition of acceptance in South America, see, e.g., GOMES, *supra* note 105, at 67; ITURRASPE, *supra* note 29, at 99; PEDRO PINEDA LEON, PRINCIPIOS DE DERECHO MERCANTIL 212 (1972); 3 ZEA, *supra* note 33, at 98.

109. Some assert that the rejection of the offer constitutes a negative exercise of the power of acceptance. *See, e.g.*, LUIGI FERRI, LEZIONI SUL CONTRATTO 81 (1987).

110. GOMES, *supra* note 105, at 70. *See also* CISG, *supra* note 15, art. 18(1) ("A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance . . . .").

111. *See* 11 GAMARRA, *supra* note 37, at 125 ("As far as the form is concerned, one must apply the principles which govern the form of the offer . . . .").

112. 1 ZWEIGERT & KÖTZ, *supra* note 15, at 46. "[I]n many legal systems this principle is made explicit, as in art. 11 OR, which lays down that the validity of contracts depends on a particular form 'only if' the law so specifies (see also §883 ABGB)." *Id.*

113. *See, e.g.*, Uru. C.c. art. 1621.

114. 11 GAMARRA, *supra* note 37, at 125.

Also, like the offer, the acceptance may be express or implied.[115] It is the possibility of implied acceptance, criticized by some, that gives rise to the problem of acceptance by silence.[116]

B. Acceptance by Silence

Most South American legal systems and other legal systems, as well as the 1980 Vienna Sales Convention, adhere to the principle that acceptance cannot be inferred from the offeree's mere silence.[117] This principle contrasts with the principle "el que calla otorga,"[118] which corresponds to the canon law rule on the basis of which "those who remain silent agree."[119] Consequently, South American countries, like most other countries,[120] generally adhere to the Roman rule that "those who remain silent do not agree, nor do they disagree,"[121] or, "[h]e who remains silent does not say anything."[122] This rule also applies where the offer contains a clause providing that the offeree is assumed to have accepted the offer unless he expressly rejects it.[123]

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115. *See, e.g.*, RODRIGUEZ, *supra* note 23, at 17; GOMES, *supra* note 105, at 70.

116. *See, e.g.*, 11 GAMARRA, *supra* note 37, at 189 (criticizing implied acceptance because "the distinction between the expressions express and implied is neither certain nor exact. Would it not be better to depart from that distinction? Since the problem is to verify whether a will has been expressed, there is no interest in distinguishing between the means chosen to express the will. Once a will has been expressed, the will's value is the same, independent from the means employed to express it.").

117. *See, e.g.*, 11 GAMARRA, *supra* note 37, at 217, 224. *See also* CISG, *supra* note 15, art. 18(1) ("Silence or inactivity does not in itself amount to acceptance."); FORMATION OF CONTRACTS, *supra* note 1, at 131 ("As a general rule silence does *not* amount to acceptance of an offer." (emphasis added)).

118. *See, e.g.*, MELICH-ORSINI, *supra* note 33, at 130.

119. *See, e.g.*, GOMES, *supra* note 105, at 57; ITURRASPE, *supra* note 29, at 89 n.19.

120. *See* E.A. Farnsworth, *Comment on Art. 18, in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 166-67 (Cesare M. Bianca & Michael J. Bonell eds., 1987) ("It is a rule in *all* legal systems that an acceptance will not ordinarily be inferred from the offeree's mere silence." (emphasis added)).

Nevertheless, some Swiss legal writers have argued, on the basis of Article 6 of the Swiss Civil Code, that in Switzerland, "silence corresponds to acceptance." PAUL PIOTET, LA FORMATION DU CONTRAT EN DOCTRINE GÉNÉRALE ET EN DROIT PRIVÉ SUISSE 87 (1956). This author does not share their view. For a criticism, see Ferrari, *La formazione del contratto, supra* note 1, at 72-73.

121. DIG. 50.17.142. Even under Roman law, however, there were situations where a rule similar to the canon law principle applied: "quae patris voluntati non repugnat, consentire intelligitur." *Id.* 23.1.12.

122. ITURRASPE, *supra* note 29, at 89; *see also* MELICH-ORSINI, *supra* note 33, at 130 ("[E]l que calla ni ortoga ni niega.").

123. *See, e.g.*, 11 GAMARRA, *supra* note 37, at 24; MELICH-ORSINI, *supra* note 33, at 131. For the rule of law under the 1980 Vienna Sales Convention, see Farnsworth, *supra*

This does not mean, however, that silence can never constitute acceptance. Indeed, "negative conduct (silence), interpreted in the context of accompanying circumstances, may acquire the voice that corresponds to positive conduct."[124] Silence generally constitutes acceptance in the following situations: (1) where the law creates a duty to speak;[125] (2) where the offer has been made for the sole benefit of the offeree;[126] and (3) where both parties agreed that silence would amount to acceptance.[127]

C. Conformity of the Acceptance with the Offer

In order to constitute acceptance, the affirmative answer to an offer must meet certain conditions. One requirement is that the acceptance must conform with the offer.[128] In other words, the acceptance "must coincide with each and all the points or elements of the offer,"[129] so that the acceptance constitutes the offer's "mirror image."[130]

According to the "mirror image" rule adopted in most South American legal systems as well as in most other civil law sys-

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note 120, at 167 ("The offeror cannot by himself derogate from the general rule that the offeree's silence is not in itself acceptance. Thus it would not change the result if the offeror added at the end of his offer to sell goods, 'I shall assume that you have accepted my offer if I do not hear from you within a week.' Even if the offeree remained silent in the face of such an offer, the offeror could not treat the offer as accepted.").

124. 11 GAMARRA, *supra* note 37, at 217. *See also* GOMES, *supra* note 105, at 57-58; MELICH-ORSINI, *supra* note 33, at 130; ITURRASPE, *supra* note 29, at 89.

125. A duty to speak arising from law can be expressly found, for example, in Article 919 of the Argentinean Civil Code: "Silence in contrast to conduct or to a question, is not considered to be an expression of will pursuant to the conduct or the question unless the law requires an explanation." CÓD. CIV. art. 919 (Arg.).

126. *See* BESSONE, *supra* note 33, at 154.

127. *See, e.g., id.*; MELICH-ORSINI, *supra* note 33, at 132; 1 PALACIO PIMENTEL, *supra* note 23, at 250.

128. *See generally* FORMATION OF CONTRACTS, *supra* note 1, at 955. There is acceptance when there is "[c]onformity with the terms of the offer. 'The party making an offer may require the offer to be accepted by the offeree without variance.'" *Id.* For the application of this requirement in South American systems, see, e.g., 11 GAMARRA, *supra* note 37, at 118. For a criticism of the traditional point of view, see BELLELLI, *supra* note 35.

129. ITURRASPE, *supra* note 29, at 105.

130. *See, e.g.*, JOHN CALAMARI & JOSEPH PERILLO, CONTRACTS 102 (3d ed. 1987); Stojan Cigoj, *International Sale of Goods: Formation of Contracts*, 23 NETH. INT'L L. REV. 257, 292 (1976); S.K. Date Bah, *Commentary on United Nation Convention on Contracts for the International Sale of Goods 1980: Overview and Selective Commentary*, 11 GHANA L. REV. 50, 58 (1979); Farnsworth, *supra* note 120, at 178; Hellner, *supra* note 92, at 235.

tems,[131] the acceptance must entirely correspond to the offer. Thus, the offeree must accept not only the "essential" elements, but all of the elements.[132] If the offeree accepts the offer with modifications or reservations,[133] the 'acceptance' is merely a counter-offer. Several South American countries, such as Colombia,[134] Argentina,[135] Brazil,[136] Chile,[137] Peru,[138] Uruguay,[139] and Venezuela[140] have adopted this principle. In these countries, a counter-offer acts as a rejection of the original offer.[141] This results in the "*caducidad*" of the offer, leading to a renewed contractual autonomy for the offeror.[142]

Recently, the "mirror image" rule seems to have lost some of its influence. In fact, the United States and the 1980 Vienna Sales Convention have adopted a different principle: replies containing "additional or different terms which do not materially alter the terms of the offer constitute an acceptance."[143]

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131. *See* DIEZ-PICAZO & GULLON, *supra* note 73, at 75; GALGANO, *supra* note 13, at 62; Ferrari, *La formazione del contratto, supra* note 1, at 76.

132. Some Argentinean legal writers disagree about the existence of the "mirror image" rule. *See, e.g.,* ITURRASPE, *supra* note 29, at 97 (asserting that the contract is formed "where there is an agreement of the essential [clause] even if there is disagreement of the secondary [clause]"). *Id.*

133. The terms generally used in South American countries are *adiçoes* and *restriçoes*.

134. *See* Colom. Com.c. art. 855.

135. *See* CÓD. CIV. art. 1152 (Arg.).

136. *See* C.C. art. 1083 (Braz.).

137. *See* Chile Com.c. art. 102.

138. *See* Peru C.c. art. 1376.

139. *See* Uru. C.c. art. 1267(2).

140. *See* Venez. art. 1137(7).

141. This is in contrast to the laws of some European countries. In Italy, for example, there is doubt that the qualified acceptance, which constitutes a counter-offer, must be considered to be a rejection of the first offer. *See, e.g.,* 3 BIANCA, *supra* note 39, at 231. *But see* CARRESI, IL CONTRATTO 771 n.182 (1987).

142. *See also* BESSONE, *supra* note 33, at 190-91; De Sola, *supra* note 44, at 77; 11 GAMARRA, *supra* note 37, at 119-20; 1 PALACIO PIMENTEL, *supra* note 23, at 251.

143. CISG, *supra* note 15, art. 19(2). Article 19(2) also indicates some of the terms that, if added, would make the reply an invalid acceptance: "Additional or different terms relating, among others things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially." *Id.* In the United States, Section 60 of the *Restatement (Second) of Contracts* sets forth the "mirror image" rule; nevertheless, the rule has become weaker. *See, e.g.*, UCC § 2-207(1).

> [A] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

D. The Time Limit for Acceptance

As noted above, the acceptance generally must conform to all the elements of the offer. For example, there must be "[c]onformity with the manner of acceptance provided for by the offer."[144] In addition, the acceptance must also comply with time limits fixed by the offeror.[145] If the offeror does not impose a time limit, it is set by law or based on the nature of the contract.

Most legal systems, including Argentina,[146] Brazil,[147] Colombia,[148] Peru,[149] Uruguay,[150] and Venezuela,[151] permit the offeror to set a time limit for acceptance. The 1980 Vienna Sales Convention has also adopted this rule.[152] Where the offeror has not fixed a time limit, the general rule in these countries is that the offer remains open for a reasonable period of time.[153] Courts determine what constitutes a reasonable period of time based on criteria such as (1) the time required to communicate the accep-

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Id.

144. FORMATION OF CONTRACTS, *supra* note 1, at 956. For the U.S. law, see RESTATEMENT (SECOND) OF CONTRACTS § 50(1): "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Id.*

145. "[A]ll legal systems agree that the offeror may effectively specify a time limit for acceptance." FORMATION OF CONTRACTS, *supra* note 1, at 166. This has been explicitly provided for in several legal systems not under review here. *See, e.g.*, ABGB § 862 (Aus.); C.c. art. 45(1) (Czech.); PTK § 211(2) (Hung.); C.c. art. 1326(2) (Italy); Co art. 3(1) (Switz.).

146. *See* CÓD. CIV. art. 1150 (Arg.).

147. *See* C.C. art. 1081 (Braz.).

148. *See* Colom. Com.c. art. 853.

149. *See* Peru C.c. art. 1375.

150. *See* Uru. C.c. art. 1266.

151. *See* Venez. C.c. art. 1137(2).

152. *See* CISG, *supra* note 15, art. 20(1).

> A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

Id.

153. This rule has been set forth in Austria, Germany, Hungary, Russia, Switzerland, the United States, and Yugoslavia. *See* Ferrari, *La formazione del contratto, supra* note 1, at 75.

tance,[154] (2) prior conduct of the parties, (3) fluctuating value, and (4) the perishable nature of the goods.[155]

The "reasonable time" rule does not apply, however, if the law imposes a time limit for acceptance. Countries that impose a time limit by law include Chile,[156] Colombia,[157] and Uruguay.[158]

E. Late Acceptance: The Offeree's Delay

Quid iuris applies where the offeree sends the acceptance after the time limit for acceptance has expired. Under Brazilian law, like the German law upon which it is based,[159] a late acceptance constitutes a new offer.[160] The same is true in Argentina,[161] Colombia,[162] and Peru.[163]

In contrast, Venezuela and Uruguay follow different rules. In Uruguay, a late acceptance is nevertheless valid if the offeror does not inform the offeree of his intention not to be bound.[164] In

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154. The time strictly necessary for the offeree's reply to reach the offeror is composed of "a) the time necessary for the offer to reach the addressee of the offer; b) the time passing from the receipt of the offer to the dispatch of the acceptance or the rejection of the offer by the addressee of the offer; [and] c) the time necessary for the offeree's manifestation to reach the offeror." ERNST KRAMER & BRUNO SCHMIDLIN, DAS OBLIGATIONENRECHT. KOMMENTAR ZU ART. 1-18, 262 (1973).

155. *See* FORMATION OF CONTRACTS, *supra* note 1, at 167-68.

156. *See* Chile Com.c. art. 98(2) ("The offer in writing must be accepted or rejected within twenty-four hours if the addressee lives in the same place as the offeror or by return mail.").

157. *See* Colom. Com.c. art. 851 ("[W]here the offer is in writing, it must be accepted or rejected within the six days following the date of the offer, if the addressee resides in the same place as the offeror; if he resides in a different place, an allowance for distance shall be added to the deadline of less than six days.").

158. *See* Uru. C.c. art. 1266(2) ("Acceptance will be considered late if not given within twenty-four hours if the parties live in the same city."); *id.* art. 1266(3) ("If the offeree lived somewhere else, acceptance will be considered late if not given within thirty days counted as of the time that is necessary for both communications to reach their destination.").

159. For references to German law in Brazilian legal literature, see, e.g., WALD, *supra* note 93, at 182. The German rule is set forth in Section 150(1) of its Civil Code: "The late acceptance of an offer is deemed a new offer." BGB § 150(1) (F.R.G.).

160. *See* C.C. art. 1083 (Braz.).

161. In Argentina, this rule has been laid down by legal scholars rather than by the legislature. *See, e.g.*, CÓDIGO CIVIL, *supra* note 86, at 767-68.

162. *See* Colom. C.c. art. 855.

163. *See* Peru C.c. art. 1376.

164. *See* Uru. C.c. art. 851. This rule only applies where the offeror has not expressly fixed the time limit for acceptance. In that situation, "la propuesta se estingue, sin necesidad de manifestación alguna por parte del proponente." 11 GAMARRA, *supra* note

Venezuela and under the 1980 Vienna Sales Convention, the offeror may validate a late acceptance by informing the offeree immediately.[165] At least one commentator argues that this rule is distinguishable from the counter-offer theory, under which the late acceptance by the offeree constitutes a counter-offer and the offeror's notification of his intention to be bound by the late acceptance operates as an acceptance of the counter-offer. Under the late acceptance rule, the offeror's notification gives effect to the offeree's acceptance.[166] Nevertheless, where the original offeror remains silent, both rules have the same consequences: no contract will be formed.[167]

F. Late Acceptance: Delay in Transmission

Some legal systems and the 1980 Vienna Sales Convention provide for an exception where the acceptance is late due to a delay in transmission.[168] Where the acceptance was made timely, but reaches the offeror late, the late acceptance is valid unless the offeror informs the offeree that he considers the offer to have lapsed. If the offeror remains silent, he will be bound by the

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37, at 121.

165. *See* Venez. C.c. art. 1137(3); CISG, *supra* note 15, art. 21(1) ("A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.").

166. Farnsworth, *supra* note 120, at 191.

167. *Id.* In Uruguay, however, the silence of the original offeror results in the conclusion of the contract. Uru. C.c. art. 851.

168. *See* CISG, *supra* note 15, art. 21(2).

> If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Id. Article 2.8(2) of the very recent UNIDROIT Draft on Principles for International Commercial Contracts (Study L.—Doc. 40 Rev. 10) contains a similar provision. Furthermore, several systems not under review here have also adopted similar provisions. *See, e.g.*, BGB § 149 (F.R.G.) ("[I]f an acceptance reaches an offeror late and was sent in such a way that it would have arrived in time with ordinary forwarding, and the offeror must have recognized this, on receipt of the acceptance he shall immediately notify the acceptor of the delay, unless this has already been done. If he delays sending the notification, the acceptance is deemed not to have been late."); PTK art. 214(4) (Hung.); MINPŌ [CIVIL CODE] art. 523 (Japan); GRAZHDANSKII KODEKS RSFSR [GK RSFSR] art. 164 (Russia); CO art. 5(3) (Switz.); LO art. 43(2)(Yugo.). *See* Ferrari, *La formazione del contratto*, *supra* note 1, at 78.

contract. In other words, silence amounts to acceptance.[169] The underlying rationale for this exception is that, where the offeree does not cause the delay, he may reasonably assume that the contract is concluded, especially if he is not aware of the delay.[170]

In Brazil, however, notification to the offeror has a different function: it does not avoid the conclusion of the contract, but makes it impossible to hold the offeror liable for damages.[171] This rule protects the offeree who, unaware of the delay, relies upon the conclusion of the contract.[172]

V. THE MOMENT THE CONTRACT IS CONCLUDED

This Section will discuss the final step in contract formation: the issue of contract conclusion. Determining the precise moment of contract conclusion is important in legal systems in which tangible movable property changes ownership at the moment the contract is concluded (*solu consensu*).[173] That moment of con-

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169. *See* Farnsworth, *supra* note 120, at 191-92. Regarding Article 21(2) of the 1980 Vienna Sales Convention, Farnsworth states: "[T]he only effect of the exception is that in the exceptional situation he is bound if he says nothing. This is a rare instance in which a party's silence results in his being contractually bound." *Id.*

170. The Swiss Civil Code expressly states that "[t]he offeror may assume that his offer has arrived in due time." CO art. 5(2) (Switz.). For the differences between rules governing the late acceptance due to the offeree's delay and the late acceptance due to a delay in transmission, see Farnsworth, *supra* note 120, at 192.

> If, as under [CISG art. 21] paragraph (1), the offeree himself is the cause of the delay, he is not entitled to assume that there is a contract unless he hears something to that effect from the offeror; but if, as under paragraph (2), the offeree is not the cause of the delay, and is presumably unaware of it, he is entitled to assume that there is a contract unless he hears something to the contrary from the offer[or].

Id.

171. *See* C.C. art. 1082 (Braz.). "Se a aceitacao, por circunstância imprevista, chegar tarde ao conhecimento do proponente, este comunicá-lo-á imediatamente ao aceitante, sob pena de responder por perdas e danos." *Id.* Where the offeror does not inform the offeree that he considers his offer as having lasped, the contract is not concluded. The offeror must, however, compensate the offeree for damages caused by his reliance upon the conclusion of the contract.

172. *See, e.g.*, GOMES, *supra* note 105, at 72; 3 PERREIRA, *supra* note 49, at 32.

173. These legal systems include Belgium, France, Iceland, Italy, Mexico, Norway, and Portugal, as well as the U.S. State of Louisiana and the Canadian Province of Quebec. For a comparative overview of the different rules that govern the transfer of property of movable goods, see, e.g., Ernst von Caemmerer, *Rechtsvergleichung und Reform der Fahrnisübereignung*, *in* ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 675 (1939); Franco Ferrari, *Principio consensualistico ed Abstraktionsprinzip: un indagine comparativa*, *in* CONTRATTO E IMPRESA 889 (1992); Francesco Galgano, *Il trasferimento della proprietà in civil law e common law*, *in* ATLANTE DI DIRITTO PRIVATO COMPARATO, *supra* note 1, at 103; Vinding Kruse, *What Does*

tract conclusion differs depending on which theory is adopted.[174] The four different theories applicable to contract conclusion are (1) declaration, (2) expedition, (3) reception, and (4) information.[175]

A. The Theory of Declaration

Under the theory of declaration,[176] a mere declaration of acceptance concludes a contract.[177] "The contract is formed when the offeree is in agreement with the offer."[178] This rule has been criticized because it is difficult to prove when and if a contract has been concluded, i.e., whether the the offeree made an affirmative declaration of assent.[179] In spite of these difficulties, however, some South American systems, such as Chile and Peru, have adopted this theory with regard to commercial contracts.[180]

"Transfer of Property" Mean with Regard to Chattels? A Study in Comparative Law, 7 AM. J. COMP. L. 500 (1958); VENDITA E TRASFERIMENTO DELLA PROPRIETÀ NELLA PROSPETTIVA STORICO-COMPARATISTICA (Letizia Vacca ed., 1991).

174. Of course, the various theories influence more than the transfer of property or movable goods. Indeed, the theory adopted in a particular system also influences the possibility that the offeree may revoke his acceptance, as well as the level of risk associated with the transmission of the acceptance. The choice of theory also determines where the contract is concluded, an important factor in determining the applicable contractual law.

175. *See, e.g.*, Ferrari, *La formazione del contratto*, *supra* note 1, at 78; 11 GAMARRA, *supra* note 37, at 133; 1(2) MAZEAUD ET AL., *supra* note 69, at 130-32; RENATO SCOGNAMIGLIO, DEI CONTRATTI IN GENERALE 99-101 (1970). *See also* FORMATION OF CONTRACTS, *supra* note 1, at 158-60 (discussing the theories of expedition, reception, and information).

176. For a South American legal definition of the theory of declaration, see, e.g., BESSONE, *supra* note 33, at 196; De Sola, *supra* note 44, at 63; GOMES, *supra* note 105, at 75; 3 LUYANDO, *supra* note 37, at 497; ITURRASPE, *supra* note 29, at 110; 1 PALACIO PIMENTEL, *supra* note 23, at 253.

177. *See, e.g.*, Kahn, *supra* note 14, at 254. "Here acceptance takes place as soon as the offeree has expressly declared his assent, for example, by writing the reply, albeit that no notice of the acceptance has been received by the offeror." *Id.*

178. 11 GAMARRA, *supra* note 37, at 133. *See also* Uru. C.c. art. 1261(1).

179. *See* 11 GAMARRA, *supra* note 37, at 135. For an overview of the criticism and the arguments in favor of the theory of declaration, see MELICH-ORSINI, *supra* note 33, at 276-77.

180. *See, e.g.*, RODRIGUEZ, *supra* note 23, at 20-21; 1 PALACIO PIMENTEL, *supra* note 23, at 253. This theory has not been adopted in Europe.

B. The Theory of Expedition[181]

Under the theory of expedition, also known as the mail-box rule, the contract is formed as soon as the acceptance is "put in the course of transmission,"[182] i.e., as soon as the offeree has done "everything which is necessary to bring the message on its way to the offeror."[183]

As a practical matter, the expedition theory results in consequences that partly correspond to those of the declaration theory.[184] For example, the offeror bears the risk of acceptance, because he will be bound by the contract despite his unawareness of the acceptance.[185] This can result in unfair consequences because, under this theory, the offeree "is not answerable for casualties occurring at the post office"[186] or "during the course of transmission."[187] This hardship on the offeror has been the basis for occasional criticisms of the expedition theory.[188] Nevertheless, there is an important difference between the declaration and the expedition theories. Under the latter, it is easier to prove the conclusion of the contract because it presupposes "external signs that can be observed by the offeror and, therefore, it is possible to determine with more accuracy when the contract is concluded."[189]

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181. This theory seems to have been set forth in Adams v. Lindsell, 1 B. & ALD. 681, 106 E.R. 25 (1818).

182. FORMATION OF CONTRACTS, *supra* note 1, at 158. *See also* Saúl Litvinoff, *Offer and Acceptance in Louisiana Law: A Comparative Analysis: Part II—Acceptance*, 28 LA. L. REV. 153, 169 (1968) (stating that the theory of expedition "considers the contract formed at the moment the acceptor parts with the letter containing the acceptance").

183. FORMATION OF CONTRACTS, *supra* note 1, at 159. The offeree's efforts must include the use of the correct address. *Id.*

184. The declaration and the expedition theories have additional elements in common: "Both theories are based on the general concept of the autonomy of the will. There is a contract the moment two different wills exist, because consent takes place thereby." Litvinoff, *supra* note 182, at 170.

185. FORMATION OF CONTRACTS, *supra* note 1, at 159.

186. Dunlop v. Higgins, 1 H.L. Cas. 381 (1848).

187. *See, e.g.*, Household Fire & Carriage Accident Ins. Co. v. Grant, 27 W.R. 858, 48 L.J.Q.B. 577 (1879). *But see* British & American Telegraph Co. v. Colson, 6 L.R. 108 (1871).

188. For critical court decisions, see, e.g., Routledge v. Grant, 4 Bing. 653 (1828); Head v. Diggon, 3 Man. & Ry. 97 (1828).

189. 3 LUYANDO, *supra* note 37, at 497.

Although the expedition theory is generally considered a "classic common law rule,"[190] it also exists in several South American civil law systems, such as Argentina,[191] Brazil,[192] and Colombia.[193]

C. The Reception Theory

The reception theory appears to be "in accordance with civil law tradition."[194] Under this theory, the formation of a contract is based on receipt of the acceptance.[195] The acceptance is valid if it reaches the offeror "in such a way as to enable him to take cognizance of it."[196] Thus, the contract is generally deemed concluded where the acceptance arrives at an "anomalous" time, for example, either at the start of business hours, or, where the acceptance is contained in a letter, at the time mail is normally

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190. Gyula Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 315 (1979). There have, however, been some efforts to show that the expedition theory does not constitute a classic example of the conflict between civil law and common law. *See, e.g.*, Paola Carlini, *La formazione del contratto tra persone lontane: un aspetto della revisione della comparazione tra common law e civil law nel quadro di un diritto comune*, *in* RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 114 (1984) (stating that the expedition rule laid down in *Adams v. Lindsell* can already be found in the *Ius Comune*). Some also suggest that the expedition rule corresponds to a "civilian" doctrine based upon Pothier's teachings. *See* Alan W. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L.Q. REV. 247, 260 (1975).

191. *See* CÓD. CIV. art. 1154 (Arg.); *see also* CÓDIGO CIVIL, *supra* note 86, at 769-71; ITURRASPE, *supra* note 29, at 112; Kahn, *supra* note 14, at 254.

192. *See* C.C. art. 1086 (Braz.); *see also* BESSONE, *supra* note 33, at 197; CHAVES, *supra* note 74, at 401; GOMES, *supra* note 105, at 76; Kahn, *supra* note 14, at 254.

193. *See* Colom. Com.c. art. 864(2). Article 864(2), however, refers only to express acceptance. Where there is an implied acceptance, the theory of information applies. *See id.* art. 854.

The expedition theory can also be found in civil law countries outside of South America. *See, e.g.*, CÓDIGO DE COMERCIO [C.COM.] art. 54 (Spain); Lebanon Code of Obligations art. 184. The same rule was laid down by the courts in France. *See, e.g.*, Cass. com., Jan. 7, 1981, REV. TRIM. DR. CIV. 849 (1981).

194. Eörsi, *supra* note 190, at 315. This rule has been expressly stated in many other legal systems not reviewed in this article. *See, e.g.*, ABGB § 862a (Aus.); C.c. art. 45(1) (Czech); BGB § 130 (F.R.G.); PTK art. 213(1) (Hung.); C.c. art. 451(1) (Pol.); GK RSFSR (Russia); CO art. 5 (Switz.). Belgium, Denmark, Luxembourg, and the Scandinavian Countries have also adopted the expedition theory. *See* Ferrari, *La formazione del contratto, supra* note 1, at 79-87.

195. *See* FORMATION OF CONTRACTS, *supra* note 1, at 159. "The contract is not made until the declaration of acceptance has reached the offeror." *Id. See also* Litvinoff, *supra* note 182, at 170. "According to the third theory, that of *reception*, the acceptance takes place at the moment when its communication reaches the offeror." *Id.*

196. FORMATION OF CONTRACTS, *supra* note 1, at 159. *See also* 1 CASAS RINCON, *supra* note 33, at 58; 11 GAMARRA, *supra* note 37, at 137-38.

delivered.[197] If the acceptance reaches its destination in the manner required and in adequate time, the contract is considered to be concluded even if the offeror is not aware of it.[198]

The reception theory, adopted by Uruguay[199] and, more recently, by the 1980 Vienna Sales Convention,[200] better allocates the inherent risk in concluding a contract between the parties. During the initial phase of a contract, the offeree bears the risk of transmission; if the acceptance is lost, there is no contract even though an acceptance occured.[201] In contrast, during the second phase—after the acceptance reaches an area under the offeror's control[202]—the offeror bears the risk that he will be contractually bound even if he has no knowledge of the acceptance.[203]

D. The Information Theory

The conclusion of a contract may be governed by the information theory, under which a contract is formed when "the offeror actually takes notice of the declaration of acceptance."[204] Al-

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197. This rule is generally accepted in most countries. For relevant court decisions, see, e.g., Helmut Heinrichs, *Kommentar zu BGB §§1-432*, *in* PALANDT BÜRGERLICHES GESETZBUCH 1, 101 (49th ed. 1990).

198. *See* Litvinoff, *supra* note 182, at 170. "Thus, if such a letter arrives at its destination in proper time, but the offeror is not there to receive it until after the time for acceptance has expired, the contract will be concluded." *Id. See also* Kahn, *supra* note 14, at 254 (stating that the contract is concluded where "the letter of acceptance reaches the offeror's address, i.e., before it comes to his mind, and even though it never reaches his mind").

199. *See* Uru. C.c. art. 1265. "The contract agreed upon by messenger or by letter or telegraph, is concluded in the place and by the act in which the acceptance by the offeree reaches the offeror." *Id. See also* 11 GAMARRA, *supra* note 37, at 137. "As a general rule, the Uruguyan Code lays down the theory of reception." *Id.*

200. *See* CISG, *supra* note 15, art. 18(2). "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror." *Id.* This rule, however, is mitigated by Article 16(1) of CISG, which states that an offer may be revoked only if "the revocation reaches the offeree before he has dispatched an acceptance." *Id.* Thus, the general principle that "[u]ntil a contract is concluded an offer may be revoked . . . is a half truth. In fact, the right of revocation ceases when the offeree dispatches the acceptance and not necessarily when the contract is concluded." Eörsi, *supra* note 190, at 160.

201. *See* Litvinoff, *supra* note 182, at 170. "If a letter of acceptance is lost, there is no contract." *Id.* Regarding this risk, see also FORMATION OF CONTRACTS, *supra* note 1, at 159. "The risk of loss or delay of the declaration of acceptance in the course of transmission is on the offeree." *Id.*

202. In Germany, this area is called *Machtbereich des Antragenden*. *See, e.g.*, HANS BROX, ALLGEMEINER TEIL DES BGB § 155 (1986).

203. *See* FORMATION OF CONTRACTS, *supra* note 1, at 162.

204. *Id.* at 160; *see also* DIEZ-PICAZO & GULLON, *supra* note 73, at 76; GALGANO, *supra* note 13, at 70.

though this theory is most consistent with the idea that both parties should be aware[205] of the other party's declaration of assent,[206] it results in a serious disadvantage. Because it would be difficult for the offeree to prove that the offeror had knowledge of the acceptance,[207] the acceptor "would be uncertain as to when the contract is concluded."[208] Under the information theory as adopted by countries such as Peru[209] and Venezuela,[210] the offeree bears the burden of proving the transmission.[211] This occurs in situations where the acceptance is delayed or never reaches the offeror.[212]

The introduction of a presumption (*iuris tantum*), under which the acceptance is presumed to be known when it reaches the offeror, has weakened the rigidity of this rule. Consequently, its disadvantages have been mitigated. In order to deny a *vinculum iuris*, a "legal bond," the offeror must establish ignorance of the acceptance. This mitigated information rule,[213] which has been adopted by Venezuela[214] and resembles the rule adopted in

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205. *See* 11 GAMARRA, *supra* note 37, at 136 (asserting that the theory "of knowledge is the one that more closely fits with the principles of legal logic").

206. This has been expressly pointed out by the official introduction accompanying the Italian Civil Code: "It is not admissible that a subject is voluntarily bound without having knowledge of the commitment which is acquired upon notice of the other party's will of full adhesion to the offer. What is more, this corresponds to the exigencies of commerce which requires security and clarity." RELAZIONE AL RE n.70 (1942).

207. *See* 11 GAMARRA, *supra* note 37, at 136 ("[S]ince the knowledge [of the acceptance] by the offeror is a subjective fact, it is difficult for the offeree to establish [that knowledge].").

208. FERNANDEZ & ACOSTA, *supra* note 33, at 174.

209. *See* Peru C.c. art. 1373. In Peru, however, the information rule does not apply to commercial contracts, which are governed by the declaration theory. *See supra* text accompanying note 211.

210. *See* Venez. C.c. art. 1262(2).

211. This rule has also been set forth expressly in C.c. art. 61 (Alg.); C.c. art. 97 (Egypt); CODICE CIVILE [C.C.] art.1326(1) (Italy); CÓDIGO CIVIL [C.CIV.] art. 1262(2) (Spain). The rationale for imposing the burden of proof upon the offeree is that "at least [the offeree] knows that [the acceptance] was dispatched and it seems natural to have him bear the risk of delay or loss of his own letter rather than to put this burden upon the addressee who is uninformed even as to the act of dispatch." Nussbaum, *supra* note 72, at 927.

212. *See* FORMATION OF CONTRACTS, *supra* note 1, at 160.

213. The "pure" information theory can be found in Peru and Venezuela, at least with respect to commercial contracts. *See* Peru C.c. art. 1374; Venez. Com.c. art. 115.

214. For this presumption in Venezuelan law, see, e.g., MELICH-ORSINI, *supra* note 33, at 159 (asserting that acceptances "are presumed known from the moment they reach the [address of] the addressee, unless it can be proven that he was not at fault in finding himself in a situation where it was impossible for him to know of [the acceptance].").

Italy[215] and Egypt,[216] is similar to the reception theory, which seems to be the best rule.

VI. CONCLUSION

The formation of contracts in South America involves problems similar to those found in common law and European civil law systems. South American legal systems, however, sometimes offer better solutions in the area of contract revocation and its effects.

Examination of the problems of contract formation in South America results in a legal comparison that crosses the boundaries of the traditional comparison between common law and European civil law.

215. *See* C.c. art. 1135 (Italy).
216. *See* C.c. art. 97(2) (Egypt).