Enforced performance of commercial sales contracts in the Netherlands, Singapore and China

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3 Ambit of a commercial sales contract

3.1 Introduction

34. This chapter analyses and compares three specific elements of establishing an enforceable commercial sales contract under the contract law of the Netherlands, Singapore and China. The investigated matters are: the concept of sale (section 3.2), the goods subject to the sales law principles (section 3.3), and the fundamental principles and requirements (from a comparative perspective) for bringing about enforceable obligations under a commercial sales contract (section 3.4). The findings are evaluated against the rules laid down in the CISG, PICC, PECL and DCFR, where relevant. The draft PACL does not include rules on formation of a contract and is, therefore, not taken into account.

There is a theoretical and practical reason for discussing the above-mentioned elements in the context of determining the availability of enforced performance of contractual rights arising under a commercial sales contract. The first reason is to bring about more in-depth insights in the doctrinal differences between the applicable concepts and, subsequently, to enhance the understanding of the impact of the different approaches on determining the actually enforceability of contractual rights. The second reason is to demystify the intricacies of the approaches taken by the discussed legal systems, which may give contracting parties false comfort and could result in a situation where they fall foul of unexpected consequences.

3.2 Concept of a sales contract

35. *Preliminary* – The following analysis focusses on the distinction between a sales contract seen as a type of juridical act, and performance of the obligations resulting therefrom.[186] The structural division between the concept of a sales contract seen as a juridical act, and the obligations resulting thereform is inspired by the purpose of the DCFR to make a clear distinction between the concept of 'contract' and 'obligations'.[187] An analysis of this approach is particularly helpful for enhancing the understanding of the notion of the juridical outcome of the conclusion of a sales contract and the legal relationship (consisting of obligations and rights) to which it gives rise at the national and international levels.

186 *E.g.,* art II.-1:101 Comments A DCFR.
187 *Ibid.*

The following discussion reveals that this undertaking is indispensable when comparing civil law and common law principles, such as in the present comparative study. This is because the two major legal traditions have adopted significantly different dogmatic approaches towards the concept of a sales contract (*i.e.* the juridical act) and the concept of sale (*i.e.* execution of the contractual obligations). It may appear that this discussion is not of any relevance for commercial practice. Nonetheless, understanding the differences is of significant importance for determining the moment a contractual right becomes enforceable.

> *Illustration* – On 1 September 2018, an exporter of spices and a wholesaler conclude a sales contract for the purchase and delivery of a certain quantity and quality of freshly produced vanilla pods from Madagascar, to be delivered by the seller at the warehouse of the buyer before 14 March 2019. However, unknown to both parties at the conclusion of the sales contract, the vanilla pods, which were on board of a ship in transit, had already been legitimately disposed of at sea because they were affected by a plant disease which endangered the other products on the ship.[188] In other words, the goods had already perished at the moment when the parties concluded the sales contract. A comparative review of this situation, where the goods have perished before the contractual obligations are due and the risk in the goods has not yet passed to the buyer, aims to highlight the divergence between the function and impact of the juridical act of concluding a sales contract and performance of the obligations deriving therefrom (*i.e.* bringing about the actual sale from a common law perspective).

36. *Domestic approaches* – Dutch contract law considers a commercial sales contract as a type of agreement which entails a set of reciprocal obligations and rights. This juridical act directly brings about the sale of the goods. In other words, the concept of a sales contract is the counterpart of the concept of sale. The latter should not be confused with performance of the obligations resulting from the juridical act of concluding a sales contract. An important consequence resulting from this approach is that, under Dutch contract law, the juridical act of concluding a sales contract (and thus bringing about a sale) springs from the promise of one party to deliver (existing or future) goods and the other party's promise to pay the price thereof.[189] The obligations deriving from the juridical act of concluding a sales contract are defined as the transfer (*overdracht*) of ownership of the goods sold with their accessories and delivery (*levering*) of the goods in accordance with the stipulated features, in return for payment of the purchase price. This interpretation of a sales contract (and thus a sale) reveals that an agreement entailing an exchange of goods

188 For a similar example under English law, see *Couturier v Hastie* [1856] 5 HL Cas 673, 10 E.R. 1065.
189 Art 7.1 DCC.

(*i.e.* a barter contract) for goods does not constitute a sales contract.[190] Nonetheless, the statutory provisions regarding the sale of goods apply *mutatis mutandis*.[191] However, there are differing opinions on the qualification of barter contracts in other jurisdictions and at the international level.[192]

Under Dutch contract law, the obligation to deliver the goods means giving possession of the thing, or, on a sale subject to reservation of title, control over it.[193] The obligation to deliver the goods and the transfer of property of the goods may coincide if it follows from the nature of the goods that physical possession suffices. In other words, for goods which are not subject to registration (as almost all movable goods are),[194] the ownership and possession of the goods may transfer on conclusion of the sales contract.[195] As well as already existing goods, a sales contract (and thus a sale) can also comprise future or ascertainable goods,[196] because the juridical act of sale only requires a commitment to deliver goods in return for payment of a certain sum.[197] For example, a manufacturer and rental company may bring about a sales contract (and thus a sale) on the basis of the promise of the former to deliver 10,000 bicycles in return for the agreed purchase price when the bicycles have not yet been manufactured.[198] It is not relevant that the bicycles do not exist at the moment of conclusion of the sales contract, because the contract law of the Netherlands does not require that the subject matter actually exists in order to bring about the juridical act of a sales contract, and thus the sale of the goods. It is only required that the parties intend to produce the juridical effects manifested by the sales contract,[199] and that the goods are determinable.[200] The above-described approach taken by Dutch contract law does not mean that a sale of future goods brings about the actual delivery and transfer of the ownership of the goods.[201] This is because delivery and transfer are merely

190 Art 7:49 DCC.

191 Art 7:50 DCC.

192 Schwenzer, Hachem and Kee 2012 (n 13) para 8.18.

193 Arts 7:1; 7:9(1)(2); 7:26(1) DCC.

194 *E.g.,* large vessels and aircrafts are subject to registration; see for an overview of the things subject to registration SE Bartels and AIM van Mierlo, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 3. Vermogensrecht algemeen. Deel IV. Algemeen goederenrecht* (Kluwer 2013) 327; GT de Jong, HB Krans and MH Wissink, *Verbintenissenrecht algemeen* (Studiereeks Burgerlijk Recht, 5th edn, Wolters Kluwer 2018) 11.

195 Arts 3:84(1), 3:90 DCC.

196 *I.e.,* goods which can be defined at a later point in time.

197 Hartkamp 2011 (n 80) para 243.

198 Art 3:97(1) DCC; JFM Janssen, 'De levering bij voorbaat van toekomstige goederen' (2006) 6685 WPNR 745.

199 Arts 6:217, 3:33 DDC.

200 Art 6:227 DCC.

201 Janssen 2016 (n 198) 745, 746.

an execution of the obligations arising from the sale of the goods (*i.e.* concluding a sales contract).[202]

For determining the enforceability of the obligations arising from the sale of the goods, the preliminary assessment entails the question as to whether the subject matter is sufficiently determined, or determinable, to constitute a valid sales contract (*i.e.* a legal title for delivery and for the actual delivery). The thresholds for bringing about enforceable obligations are not set too high as a broad interpretation of the requirement of determinability of the obligations is commonly adopted by the courts,[203] applying the standards of reasonableness and fairness.[204] Nonetheless, if the goods did not exist or had already perished at the time when the parties entered into a sales contract, an order for enforced performance is generally not available due to the operation of the fundamental prerequisite of sufficient interest in obtaining a judicial order for enforced performance.[205] A seller may also defeat a claim for enforced performance where it can be shown that it is impossible to deliver the very thing the parties bargained for,[206] albeit the substantive right to performance does not cease to exist.[207] In practice, the aggrieved party may seek recourse to other judicial actions, such as a claim for monetary compensation.[208] Here, the main point is that the non-existence or perishing of the goods at or after the conclusion of the sales contract does not affect the existence of the contract, unless the sale is annulled on the basis of, for example, duress, fraud or undue influence.[209]

37. The contract law of Singapore starts with the principle that an agreement to sell future, or ascertainable goods and an agreement of sale brings about a juridical act in the form of a sales contract.[210] An important feature of the juridical act of concluding a sales contract under Singapore contract law is that it results in an obligation of the seller to transfer the

202 *Ibid.*

203 CH Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht* (Wolters Kluwer 2018) 285; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 200; MAMC van den Berg, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten. Deel VI. Aanneming van werk* (Wolters Kluwer 2017) 183; Hofmann 1976 (n 84) 14.

204 Art 6:248(1) DCC; Dutch Parliamentary History Book 3 (Kluwer 1981) 1123.

205 Art 3:303 DCC; The time for performance does not necessarily have to be due when a claim for enforced performance is initiated, see para 86.

206 D Haas, 'De grenzen van het recht op nakoming' (Dphil thesis, Vrije Universiteit Amsterdam 2009) 244; De Jong, Krans and Wissink 2018 (n 194) 76.

207 GJP de Vries 1984, *Recht op nakoming en schadevergoeding, excepties en ontbinding volgens NBW en BW* (Studiepockets privaatrecht nr 32, Tjeenk Willink 1984) 21; Dutch Parliamentary History Book 6 (Kluwer 1981) 488–489.

208 Hofmann 1976 (n 84) 16, 17.

209 Art 3:44(1) DCC.

210 SGA, s 2(1); Hunter 2017 (n 7) para 3.11; Chong et al 2016 (n 125) 10.2.13.

ownership or title of property in the goods to the buyer[211] and to deliver the goods, at a later point in time or directly.[212] In return, the buyer is obliged to take delivery and pay the agreed price.[213] Thus, the contract law of Singapore acts on the notion that a promise to deliver goods in return for payment of money constitutes a sales contract. Hence, an exchange of goods for goods (*i.e.* barter contracts) does not qualify as a sales contract and is, therefore, not governed by the sales law provisions.

As for the distinction between a sales contract and the concept of sale, Singapore contract law acts on the notion that where a sales contract derives from an agreement to sell, an additional juridical act (*i.e.* transfer of property in the goods) is required to bring about a sale.[214] In other words, only the execution of the obligation of the seller to transfer the property in the goods under a sales contract constitutes the sale.[215] It depends, however, on the specific characteristics of a sales contract whether the transfer of property comprises conveyance of property or merely the passing of risk.[216] The latter may occur when Incoterms® apply. Thus, under the contract law of Singapore, future goods can be subject to a sales contract entailing an agreement to sell, but this only becomes a sale when the property in the goods is transferred.[217] This notion is also laid down in the statutory principle that when in a sales contract the seller purports to effect a present sale of future goods, the sales contract is operating as an agreement to sell the goods.[218]

As for the determinability of the obligations, a sales contract may entail an agreement to sell unascertained goods; but to bring about a sale (by transfer of property) the goods must be ascertained.[219] If the goods form part of an identified bulk,[220] the sale entails a transfer of the property in an undivided share in a bulk of identified goods.[221] This distinction between the agreement to sell and the actual sale also causes a distinction in effect when the goods perish before or after contract formation. The general starting point is that where there is a sales contract which entails an agreement to sell specific goods, and without the knowledge of the seller the goods have perished at the time when the contract is made, the contract is void.[222] In cases where the goods have perished after the conclusion

211 SGA, s 2(1); Shenoy and Loo 2013 (n 13) para 22.61; Chong et al 2016 (n 125) para 10.2.13.
212 SGA, s 27.
213 SGA, s 27; Hunter 2017 (n 7) para 7.2.
214 SGA, s 2(1).
215 Chong et al 2016 (n 125) para 10.2.13.
216 Shenoy and Loo 2013 (n 13) para 22.61; Hunter 2017 (n 7) paras 4.1, 4.2, 5.5.
217 Hunter 2017 (n 7) para 3.10.
218 SGA, s 5(3).
219 SGA, s 16.
220 SGA, ss 20A(1)(2).
221 Chong et al 2016 (n 125) para 10.4.18.
222 SGA, s 6; Hunter 2017 (n 7) para 3.11.

of the sales contract but before the occurrence of the actual sale, a sales contract is voidable.[223]

38. The contract law of China entails the principle that a sales contract between two commercial parties with equal standing, comprises an undertaking whereby the seller promises to deliver the goods and to transfer the title to the buyer by providing the necessary documents, and the buyer promises to pay the purchase price.[224] An important feature of the juridical act of concluding a sales contract is that it also constitutes the actual sale of the goods. This means in effect, that the obligations of the parties to deliver the goods and to pay the purchase price arise from the juridical act of concluding a contract (and thus a sale). Nonetheless, it should be mentioned that where the agreement entails an exchange of goods (*i.e.* barter contract), the contract is governed by the provisions on sales contracts.[225]

Where a sales contract entails future goods, the obligation to transfer the property and delivery of the goods is postponed.[226] Put differently; it is not required that the goods already exist to constitute a sales contract (and thus a sale).[227] Consequently, a sales contract could include a transaction where the goods and the purchase price are immediately exchanged, and where parties agree to exchange the goods and the purchase price at a future specified place and date. The act of concluding a sales contract for the sale of existing, future and ascertainable goods should be distinguished from determining the effectiveness (*i.e.* validity) of the contract. In other words, parties may have concluded a sales contract, but this does not necessarily mean that the contract obtained effectiveness.[228] Consequently, the time of conclusion of a sales contract does not automatically coincide with the moment the obligations of the parties become effective (*i.e.* the moment at which the contract is legally valid and thus renders binding obligations).[229]

In order to establish an effective sales contract, the parties must comply with specific mandatory law provisions which have the function to prevent any undertaking that significantly harms the public interest.[230] A sales contract which is formed in accordance with these mandatory statutory requirements is directly effective (and thus establishes a

223 SGA, s 7; Hunter 2017 (n 7) para 3.11.

224 Art 130, 133, 135 CCL; Wang Liming, *Contract Law of China* (China Law & Society Library, William S Hein & Co., Inc 2016) 271.

225 Art 175 CCL.

226 Yuanshi Bu (ed), *Chinese Civil Law* (Beck and Hart Publishing 2013) 274.

227 Bu 2013 (n 226) 274.

228 Art 14(1) CCL.

229 Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia 2002) paras 3.002, 3.003; Yi Wang, 'Prospect of Validity in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 216, 223.

230 Read art 58 GPCL in conjunction with art 52 CCL; Liming 2016 (n 224) 84; Yi Wang, 'Prospect of Validity in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 216.

sale) unless the sales contract is subject to specific conditions and where government approval or registration is required.[231] Where the sales contract does not comply with the laws and regulations for effective obligations, the sales contract has no binding effect on the parties (*i.e.* void *ab initio*).[232] Where the mandatory regulations on effectiveness are fulfilled, an effective sales contract may be revoked (*i.e.* voidable) on the basis of mandatory provisions of regulation where there is an infringement of the public order.[233]

In light of the thresholds above for establishing enforceable obligations under a sales contract, it is also important to bear in mind that the quantity and quality of the goods are sufficiently determined.[234] This statutory requirement not only requires conformity with the standards agreed by the parties; it also includes minimum quality requirements imposed by, for example, the state food and drug administration.[235] In addition, the contractually agreed quality standards need to be on par or higher in order to establish a sales contract.[236] That said, where the goods do not exist or have perished, the bindingness of the sales contract is not affected. In these instances, a claim for enforced performance shall be refused by the court on application of the statutory principle that an aggrieved party is not entitled to demand performance where performance is factually impossible.[237]

39. Figure 2 and Figure 3 are diagrammatic representations of the discussed principles in light of the case described under paragraph 35.

231 Art 44 GPCL; Bing Ling 2002 (n 229) para 4.004.

232 Mindy Chen-Whishart, 'Invalidity of Contract in Chinese and English Contract Law' in DiMatteo and Chen 2017 (n 19) 240.

233 Art 54 CCL; An aggrieved party may request the court to modify or revoke a contract where the undertaking is a result of a significant misconception, where the contract is obviously unfair at the moment of conclusion, and where the contract is concluded on the basis of fraud, coercion, or exploitation of the aggrieved party's unfavourable position; Yi Wang, 'Prospect of Validity in Chinese Contract Law' in DiMatteo and Chen 2017 (n 19) 217, 223.

234 Arts 12 (3), (4) CCL; Bing Ling 2002 (n 229) para 3.009; Bu 2013 (n 226) 274.

235 Zhang 2006 (n 41) 125.

236 *Ibid.*

237 Art 110 (1) CCL; Bing Ling 2002 (n 229) para 8.072.

Figure 2 The concept of a sales contract and sale

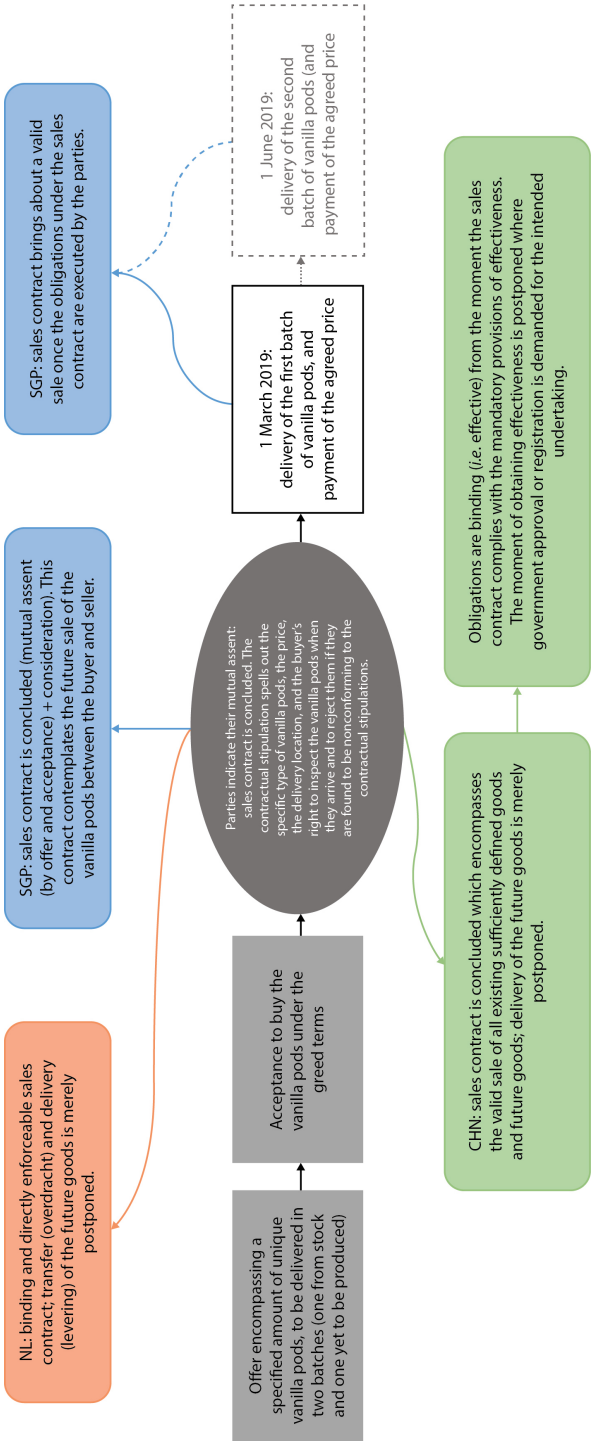
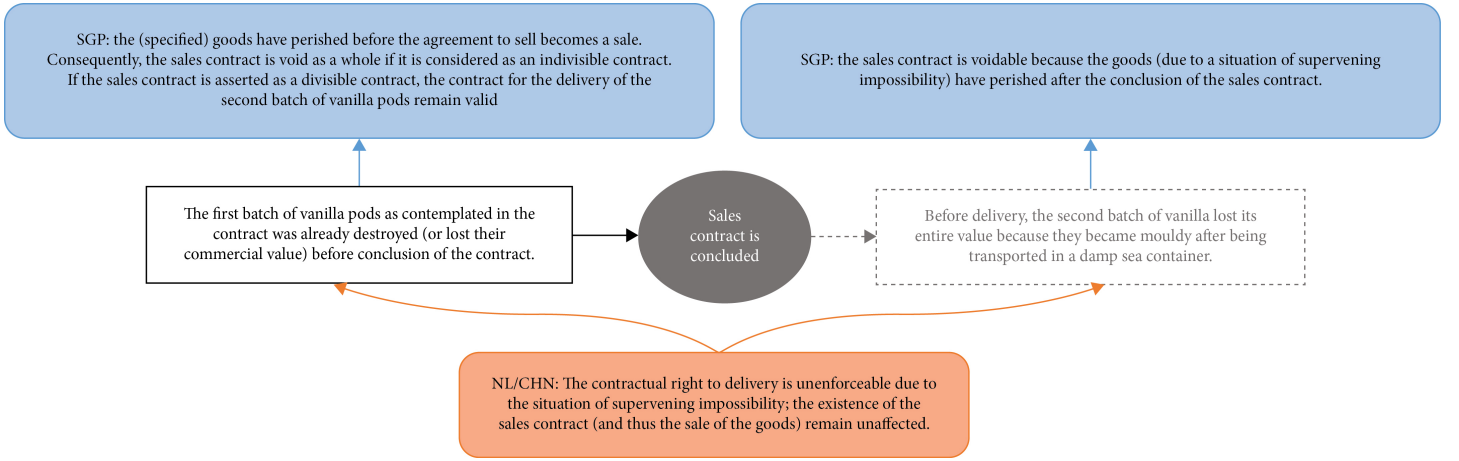


Figure 3 Goods perishing before making the contract / Goods perishing before sale but after conclusion of the contract



40. *Comparative analysis* – Aside from formation formalities,[238] it is unanimously agreed by the three investigated jurisdictions that the juridical act of an agreement to sell (existing, future and ascertainable) goods in return for payment of a certain sum creates a sales contract. The reciprocal element of payment of the purchase price follows a narrow interpretation in the sense that an exchange of goods for goods does not qualify as a sales contract, although Dutch and Chinese contract law have taken the approach that such contracts (*i.e.* barter contracts) are governed by the statutory sales law provisions. This point is of significant importance for those involved in international barter contracts, as it is not clear whether such contracts are governed by the CISG.

More importantly for the present study, there is a crucial difference when comparing the substantive requirements to bring about the actual sale. The contract law of the Netherlands and China start with the notion that the concept of sale is equated with the juridical act of concluding a sales contract, regardless of the nature of the subject matter (*i.e.* existing, future or ascertainable goods). A similar position is attained by the CISG and DCFR, which means that the juridical act of a sales contract is the counterpart of the concept of sale, which may concern a transfer of existing and future goods.[239] The contract law of Singapore adopted the common law structure which is the exact opposite of that of the viewpoint mentioned above; that is, it starts from the juridical act of a sales contract which is available for existing, future and ascertainable goods, but performance of the obligations deriving therefrom (*i.e.* transfer of property in the goods) is required to bring about the actual sale. This divergence between the notion of a juridical act of sale is of significant importance when determining the status of a sales contract in case the goods did not exist or perished at the time of the conclusion of the contract, and where the goods perish after conclusion of the contract but before the due date of the obligations and the transfer of property.

Insofar as the contract law of the Netherlands and China is concerned, the equation of the juridical act of concluding a sales contract with the concept of sale explains that a sales contract (and thus a sale) may concern existing as well as future goods. Furthermore, as the goods are regarded as sold once the contract is concluded, it is not relevant to have a separate discussion about the impediments for enforcement (or the impact on the contract) where the goods did not exist or have perished at the moment a sales contract is concluded. The key point is that the very existence of a sales contract is not affected unless there is a special cause for the court to invalidate the contract. By contrast, when considering the position of the contract law of Singapore, the example mentioned under paragraph 35 requires primarily an assessment of the question whether the sales contract is void (the goods did not exist or have perished before formation of the contract) or may

238 S 3.4.

239 Art 4(a) CISG; Arts IV.A.-1:201, IV.A.-1:202 Comment A DCFR.

be avoided (the goods perished after formation).[240] For those involved in commercial sales across the borders of the investigated jurisdictions, and national legislators aiming to remove legal barriers to international trade, it is of paramount importance to take note of the discussed differences, as validity matters are not governed by the CISG.[241]

3.3 Goods subject to sales law

41. *Preliminary* – This section examines the type of goods which fall under the application of the Dutch, Singapore and Chinese sales law provisions, and to what extent their approaches are in line with the definition of goods in the CISG and the type of goods subject to the sales law provisions of the DCFR.[242] The PICC, PECL and the draft PACL do not include specific provisions on sales contracts and are, therefore, not taken into account. The investigated legal systems show two different methods of defining goods. The first way is a general definition of goods. The second is more negative because it only clarifies which goods are not subject to the sales law provisions. In an ideal world, the outcome of both ways of defining goods should be reviewed on an annual basis because of the ongoing expansion of goods subject to sales transactions.

That having been said, the practical aim of the present undertaking, of determining the type of goods which can be the subject of a sales contract, is to reveal the common core and dissimilarities between the subject legal systems in order to provide clarity about the scope of the investigated sales law principles. The present section is also an attempt to enhance the understanding of the issues arising from the exclusion of certain goods from the CISG, which have thus far not received sufficient attention. The high-level aim of the undertaking of determining the goods subject to sales law is to disclose the underlying reasons for the divergence, which is helpful for obtaining a better understanding of the general availability of enforced performance of non-monetary obligations arising from a commercial sales contract. In particular, this is true for contemporary issues arising from the increasing sale of incorporeal goods in a commercial context.

> *Illustration* – A, a software developer, and company B which integrates digital information, located in different jurisdictions, enter into a software licence agreement for the usage of a specific software product not limited in time. The purchase price was paid on one single occasion and not through monthly instalments. As the software developer refuses to transfer the software to company B, the latter brings an action

240 SGA, s 7; Hunter 2017 (n 7) para 3.11.

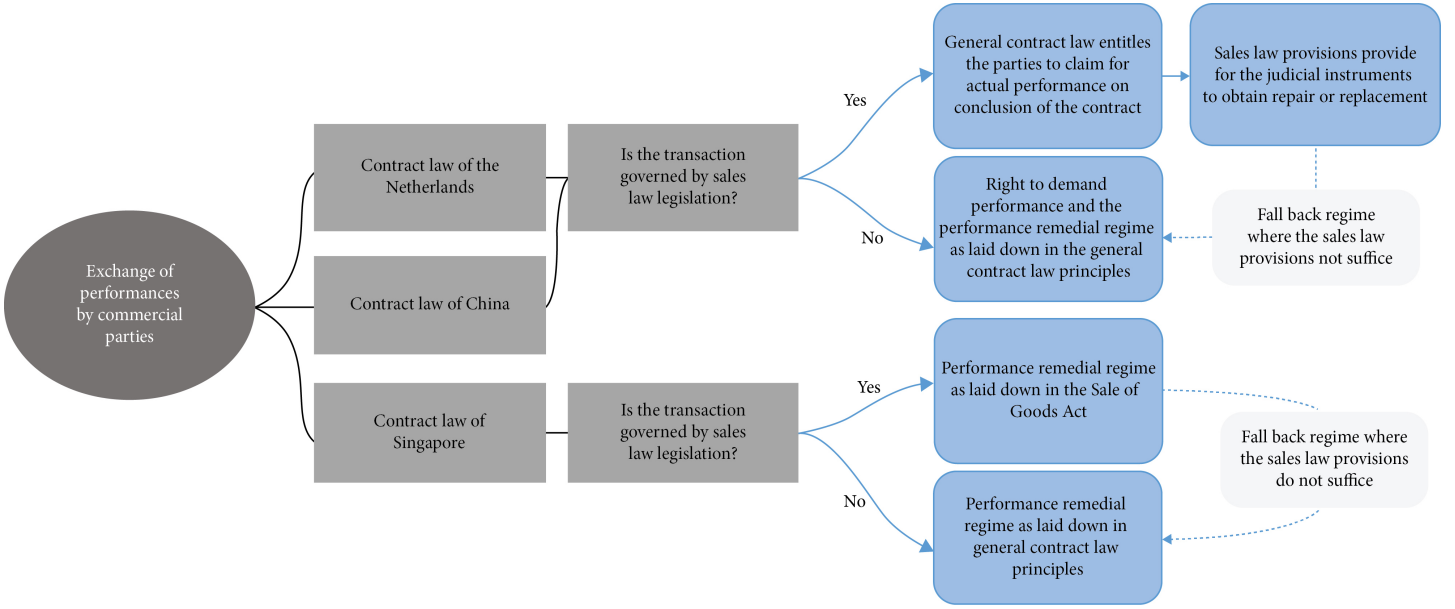
241 Schwenzer 2016 (n 91) art 4 para 31.

242 The PICC, PECL and draft PACL are not taken into account as these unification instruments do not include specific rules on sales contracts.

> against it alleging a failure in the performance of the licence agreement terms and conditions. In this situation, the contract brings about the problematic question – when dealing with parties across civil and common law borders – whether software can be the object of a sales contract, and thus subject to, for example, quality standards and performance remedies as laid down in the national sales law provisions.

42. The process of examining which goods are subject to the sales law provisions is merely a preliminary step for ascertaining the availability of enforced performance of non-monetary obligations arising from a commercial sales contract. The rationale is that in most civil and common law jurisdictions a transaction between two commercial parties is governed by the general contract law principles and, where the subject matter is regarded as a good subject to sales law, also by the applicable statutory provisions for sales contracts. It is, therefore, of paramount importance to assess the entire contract law framework in order to determine the enforceability of non-monetary obligations under a commercial sales contract. The following diagram may be helpful to clarify this point.

Figure 4 The rules governing the exchange of performances by commercial parties



43. *Domestic approaches* – The general sales law provisions of the Dutch contract law convey the word 'things', which is defined as corporeal objects which can be subject to human control.[243] A broad notion of this concept is employed. For example, the sale of a share in an undivided bulk, provided that the goods are described in a sufficiently precise manner at the moment the goods are delivered to the buyer.[244] Although electricity is generally not recognised as something which can be the subject of a sales agreement, the specific statutory provisions for sales contracts stipulate that in the area of consumer sales, electricity, heating, cooling and gas are movable things and,[245] therefore, a subject matter of consumer sales legislation.[246] It is held that in commercial transactions, by analogy, electricity should also be dealt with as a sale of goods.[247] In addition to existing and future goods, a sales contract can also relate to property, proprietary rights and interests.[248] In such a case, the sales law legislation applies to the extent that this conforms to the nature of the right.[249] Thus, corporeal things and patrimonial rights can be the object of a contract of sale,[250] or, in other words, tangible and intangible goods. With regard to immovable goods, the Dutch sales law provisions are supplemented with specific provisions for registration.[251] Specifically designated movable goods can also be subject to registration duties, which need to be fulfilled in order to transfer the property in the subject matter of the contract. For instance, large vessels and aircrafts are subject to a duty of registration despite their movable nature.[252]

A wide interpretation of the concept of things subject to a commercial sales contracts is also seen in recent case law. In 2012, the Dutch Supreme Court considered in *De Beeldbrigade/Hulskamp* and *Hulskamp/Bell Microproducts* that the sale and purchase of software are in principle subject to the sales law provisions.[253] On the basis of both court

243 Arts 7:1, 3:2 DCC; Dutch Parliamentary History Book 3 (n 204) 64.

244 Arts 3:84(2), 6:227 DCC; Hartkamp 2011 (n 80) para 243; Janssen 2016 (n 198); Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 195, 196, 200.

245 Art 7:5(5) DCC; The provisions with regard to a consumer sale apply to deliveries to a natural person (acting for purposes outside his commercial, business, craft or professional activities) of electricity, heating, cooling and gas, to the extent these are not packaged for sale in a limited volume or in a fixed quantity; of district heating and of digital content which is not delivered on fixed physical media but which is individualised and over which the consumer can exercise actual control.

246 Art 7:5(1) DCC.

247 Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 196.

248 Arts 7:2, 7:46, 7:47, 3:6 DCC; J Hijma and MM Olthof, *Compendium van het Nederlands vermogensrecht* (13th edn, Wolters Kluwer 2017) 33; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 197.

249 Art 7:47 DCC.

250 Hartkamp 2011 (n 80) para 243.

251 *E.g.,* arts 7:2, 7:3, 7:8, 7:17(6), 7:26(4, 5) DCC.

252 Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 75a; Bartels and Van Mierlo, *Asser* 3-VI 2013 (n 194) 274.

253 *De Beeldbrigade v Hulskamp* Dutch Supreme Court 27 April 2012, ECLI:NL:HR:2012:BV1301, NJ 2012, 293 paras 3.4, 3.5; *X v Bell Microproducts* Dutch Supreme Court 27 April 2012, ECLI:NL:HR:2012:BV1299, NJ 2012, 294 para 3.3; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 203a.

rulings, it may be assumed that the sale of embedded software (*i.e.* software which is a part of device) and downloadable software are considered as matters subject to the sales law provisions. It may therefore come as little surprise that stocks and shares may also be subject to a sales contract, despite their intangible nature.[254]

44. The sales law of Singapore stipulates that goods include personal chattels other than things in action and money; and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale and include an undivided share in goods.[255] This definition is based on the traditional English common law understanding of the concept of goods. This means in effect that the sales law of Singapore only applies for existing and future tangibles.[256] The tangible nature of aircrafts, ships and other vessels has the consequence that transactions of these goods are governed by Singapore sales law. The focus on the tangible nature of the things sold also explains that transactions of intellectual property rights, stocks and shares are excluded from the definition of goods.[257] The narrow definition of goods is demonstrated in the Singapore High Court case *Kong Swee Eng v Rolles Rudolf Jurgen August* where it was considered that goods do not include shares.[258] Despite the traditional notion that only tangibles are a part of the concept of goods, Singapore courts have not formed a legal precedent regarding software.[259] Nonetheless, in view of the concept of goods conveyed by English sales law and doctrine,[260] it is held that a distinction should be made between the physical (tangible) disk and the program itself (intangible). It should be mentioned that English (case) law is not binding on the Singapore courts since 1993,[261] although commercial decisions were traditionally regarded as a persuasive authority.[262] It appears, however, that Singapore courts are increasingly looking at local circumstances, which sometimes results in a deviation from

254 Arts 7:1, 3:1 DCC; Hijma and Olthof 2017 (n 248) para 537; *Poot v ABP* Dutch Supreme Court 2 December 1994 para 3.4.3, ECLI:NL:HR:1994:ZC1564, NJ 1995, 288; District Court Arnhem 4 March 1999, ECLI:NL:RBARN:1999:BP4960; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 128, 371.

255 SGA, s 61; Chong et al 2016 (n 125) paras 10.2.6, 10.2.7.

256 SGA, ss 5, 16; Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.108; Chong et al 2016 (n 125) para 10.2.8; The distinction between specific, ascertainable and unascertained goods is discussed in s 4.4.3.

257 Hunter 2017 (n 7) para 2.3; Shenoy and Loo 2013 (n 13) para 22.9; Chong et al 2016 (n 125) para 10.2.6., 10.2.7.

258 [2011] SGHC 300, (2010) 1 SLR 873; Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.108.

259 Chong et al 2016 (n 125) paras 10.2.11–10.2.12.

260 *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481 at 493; Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.109; Shenoy and Loo 2013 (n 13) para 22.9.

261 Statutes of the Republic of Singapore, Application of English Law Act (Cap 7A Rev Ed 1994).

262 Paul S Davies and James Penner, *Equity, Trusts and Commerce* (vol 24 Hart studies in private law, Hart Publishing 2017) 52.

the English position.[263] In this light, it is said that if the software in an electronic device fails to perform in accordance with the specifications set out in the contract, the remedial regime of Singapore sales law should apply.[264] This viewpoint is supported by a number of court rulings. For example, in *Management Corporation Strata Title Plan No 1166 v Chubb Singapore Pte Ltd* the Singapore High Court applied the sales law principles to a contract entailing the sale, installation, testing and commissioning of a security and communication system.[265] In *Computer-Aided Design (Asia) Pte Ltd v Sime Darby Singapore Ltd t/a Sime Darby Systems,* the purchase of computer equipment including software was characterised by the Singapore High Court as a transaction under the Singapore Sale of Goods Act.[266] In a similar vein, in *Fujifilm (Singapore) Pte Ltd (Formerly Known As Fuji Photo Film (Singapore) Pte Ltd) v Ultimate Packaging Pte Ltd*, a professional printer (the machine itself) was treated as a good under Singapore sales law.[267] However, if a contract solely considers a licence to use software, the sales law provisions do not apply.[268] Turning to another undetermined subject, electricity. At the moment, it is unclear whether a transaction of electricity can be the object of a sales contract which is governed by Singapore sales law.[269]

45. The contract law of China entails a specific set of principles to determine the rights and obligations of parties who are engaged in a sale of (existing or future) movable and immovable goods.[270] Considering movable goods, a sales contract may entail the transaction of an undivided share in a bulk, if the unit of measure and quality is sufficiently specified in the contract and where the parties agree that the quantity shall be determined in the future.[271] Considering the sale of special movables, such as vessels, aircrafts and vehicles, the agreements could be categorised as either a sale of goods or the delivery of a certain work, depending on the agreed terms of the contract. That said, it is already clear that a shipbuilding contract is regarded as a work by Chinese contract law and, therefore, not subject to the sales law provisions. The sale of rights is covered by other sections of the contract law principles and by specific statutory provisions.[272] In other words, stocks and shares are excluded from the specific provisions for the purchase and the sale of goods.

263 Davies and Penner 2017 (n 262) 53.
264 Hunter 2017 (n 7) paras 2.8, 2.10–2.14.
265 [1999] SGHC 192 [852], (1999) SLR(R) 1035.
266 [1993] SGHC 195.
267 [2012] SGDC 468 [39].
268 Chong et al 2016 (n 125) para 10.2.12; Compare *London Borough of Southwark v IBM UK Ltd* [2011] EWHC 549, TCC para 97.
269 Hunter 2017 (n 7) para 2.16; Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.108.
270 Bu 2013 (n 226) 89, 274.
271 Bu 2013 (n 226) 274.
272 Bu 2013 (n 226) 89.

Any other non-gratuitous contract is required to comply with laws containing applicable provisions, and in the absence of such provisions, these transactions need to be handled with reference to the provisions governing purchase and sales contracts. Contracts concerning the supply of water, gas and heat in return for electricity fees are not governed by the sales law provisions. Instead, the contract law of China comprises a specific set of principles for supply contracts.

The sales law provisions entail the rule that where the contract includes the sale of intellectual property rights, such as computer software, these rights do not belong to the buyer,[273] and, hence, cannot be subject of a claim for enforced performance, unless the applicable laws or contractual stipulations provide otherwise. The treatment of software under the specific provisions of sales contracts indicates that software falls within the sphere of the sales law provisions. This view is also taken by the Supreme People's Court which provided an interpretation of the delivery and transfer of ownership of electronic goods.[274] That said, the transfer of technology is not subject to the sales law provisions. For these transactions, a separate set of statutory principles applies.[275]

46. *International level* – At the international level, there is a significant divergence between the coverage of the CISG and the DCFR. To start with the key instrument for international commercial sales, the CISG does not include a definition for 'goods', but it is undisputed that only existing and future movable, tangible objects can be the object of a sales contract.[276] It is not required that the goods are corporeal at the moment of contracting; it is sufficient that the goods are movable at the moment of delivery[277] – for example, materials which become movable after the demolition of a building. Aside from this general starting point, the CISG takes a negative approach by describing the categories which are excluded.[278] The CISG does not apply to sales contracts including goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.[279] Thus, consumer sales are excluded.[280] The CISG also excludes sales by auction, sales on execution or otherwise by authority of law, sales of stocks, shares, investment securities, negotiable instruments or money, sales of ships, vessels, hovercrafts or aircrafts and sales of electricity.[281] In addition, and in deviation from the approach taken by civil law-based

273 Art 137 CCL.
274 Art 5 Judicial Interpretation of Sales Contracts (n 174).
275 Ch 18 CCL.
276 Schwenzer 2016 (n 91) 33; Schwenzer, Hachem and Kee 2012 (n 13) para 7.06, 7.16.
277 Schwenzer 2016 (n 91) 34.
278 Art 2 CISG.
279 Art 2(a) CISG.
280 Schwenzer 2016 (n 91) 48.
281 Art 2(b-f) CISG.

jurisdictions, it is stipulated that contracts for the supply of goods to be manufactured or produced are governed by the CISG unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.[282] This test for goods to be manufactured is also used to ascertain whether software can be regarded as the purchase of a good to be manufactured.[283] This would be the case if the buyer did not contribute to the development of the software.[284] This situation needs to be distinguished from agreements for temporary use of the software which is not perceived as a sales contract for the purpose of the CISG.[285] In the case of bulk goods, such as rice and salt, a part of the quantity stored can be sold. These transactions of an undivided share in a bulk are said to be regarded as contracts of sale of goods.[286] The only issue which could emerge is whether the identification requirements for the passing of risk can be satisfied.[287] Concerning 'goods' or 'things' of which it is unclear if they can be the object of a sales contract, it is recommended to assess whether the domestic sale of goods provisions offers suitable remedies.[288] The approach taken by the DCFR is much broader. This means in effect that although goods are defined as corporeal movables (including large vessels and aircrafts),[289] the DCFR rules on sales (with appropriate adaption) also apply to contracts for the sale of electricity, software, stocks, shares and an undivided share in a bulk.[290]

47. The following table outlines the goods which can be the object of a sales contract in the investigated legal systems.

282 Art 3(1) CISG.
283 Schwenzer, Hachem and Kee 2012 (n 13) para 7.29.
284 Schwenzer, Hachem and Kee 2012 (n 13) para 7.29.
285 Schwenzer 2016 (n 91) 34.
286 John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer Law International 1999) 46–55.
287 Arts 67(1), 69(3) CISG; Honnold 1999 (n 286) 46–55.
288 Schwenzer, Hachem and Kee 2012 (n 13) para 7.05; Schwenzer 2016 (n 91) 33.
289 Art IV.A.–1:201 Comment A DCFR.
290 Art IV.A.–1:101 Comment A-C DCFR.

Figure 5 Goods subject to sales law

	Software	Stock, Shares	Undivided share in a bulk	Electricity	Large vessels	Aircrafts
Dutch Civil Code	Subject to sales law provisions	Subject to sales law provisions	Subject to sales law provisions	Subject to sales law provisions	Subject to sales law provisions	Subject to sales law provisions
SGA Singapore	Excluded (the program itself)	Excluded	Subject to sales law provisions	Unclear	Subject to sales law provisions	Subject to sales law provisions
Contract Law of China	Subject to sales law provisions	Excluded	Subject to sales law provisions	Excluded	Subject to sales law provisions	Subject to sales law provisions
CISG	Object of a sales contract if the buyer did not substantially contribute to the development	Excluded	Subject to sales law provisions	Excluded	Excluded	Excluded
DCFR	Subject to sales law provisions	Subject to sales law provisions	Subject to sales law provisions	Subject to sales law provisions	Subject to sales law provisions	Subject to sales law provisions

48. Considering the example provided at the beginning of this section, the adjudicating court first has to decide whether the licence agreement is governed by the CISG. Suppose that the CISG is not applicable and, according to the principles of international private law, the substantive elements of the contract are subject to Dutch, Chinese or Singapore contract law (the relevance of the description of the contract versus the intention of parties is not examined in this section). To start with the present approach of Dutch contract law, the purchase of software is subject to sales law principles, albeit that software, in general, is not expressly categorised as a thing which by law is subject to the provisions for sales contracts.[291] Nonetheless, it is generally assumed that an action for the delivery of software in accordance with the agreed terms is subject to the sales law principles. The contract law of China takes a similar stance in the sense that the sale of software, as above described, is subject to the specific provisions for sales contracts. Interestingly, however, the enforcement of the actual performance of the sale of software is excluded on the notion that the rights are not transferable. If the contract law of Singapore applies, it is important to take into account the focus of the sales law principles on tangible versus intangibles when considering if the subject matter of the present contract should be considered as a sale of goods. In Singapore, the sale of software is subject to the sales law legislation if the product is a part of a tangible medium such as DVDs, CDs or USB flash drive. Consequently, it may be assumed that the contract, comprising the mere sale of an intangible digital product, is considered a service contract rather than a sales contract. In case the companies are located in countries which are parties to the CISG, the court is obliged to solve the problem of categorisation of software without consideration of the domestic definition of goods as adopted by domestic sales law legislation. Considering the available case law and the viewpoint reflected in literature, it may be assumed that in the present case the subject of the software licence agreement is to be regarded as 'goods' within the meaning of the CISG.[292] The key factors to take into consideration are the aim of the CISG to provide uniform rules, the intention of parties, the understanding of a reasonable person with regard to the contract,[293] the lack of limitation in time and the payment of the purchase price in one instalment.[294]

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291 *Beeldbrigade v Hulskamp* (n 253); Hijma and Olthof 2017 (n 248) para 537.

292 Schwenzer, Hachem and Kee 2012 (n 13) paras 7.05, 7.24; Schwenzer 2016 (n 91) art 1 para 16; *Corporate Web Solutions v Dutch company and Vendorlink BV* Court of first instance Midden-Nederland 25 March 2015, ECLI:NL:RBMNE:2015:1096; Germany: Oberlandesgericht Koblenz nr 2, 17 September 1993 U 1230/91; Landgericht München nr 8, 8 February 1995 HKO 24667/93; Oberlandesgericht München nr 23, 22 September 1995 U 3750; Austria: Oberster Gerichtshof nr 5, 21 June 2005 Ob 45/05m.

293 The CISG only allows for interpretation of individual statements made by and other conduct of the parties to a commercial sales contract along the lines of the standard of reasonableness (art 8(2) CISG). The CISG does not permit the usage of the good faith principle (art 7(1) CISG) for interpretation of the contract, to strike out unfair terms or penalty clauses; Schwenzer 2016 (n 91) art 8 para 31.

294 Schwenzer 2016 (n 91) art 1 para 18.

49. *Comparative analysis* – This section examined the type of goods which can be the object of a commercial sales contract. This undertaking reveals that the three investigated jurisdictions have not adopted a comprehensive list of goods which are governed by the domestic sales law provisions. This means in effect that the type of goods governed by Dutch, Singapore and Chinese sales law must be established on the basis of general principles. The starting point in this regard is that the Chinese contract law adopted the least restricted scope of transactions governed by sales law provisions. The language of the Dutch contract law appears to be slightly more restrictive due to the notion that things are corporeal objects which can be subject to human control. Nonetheless, a closer examination of both approaches suggests that there is not a significant difference in the scope of the Dutch and Chinese sales law provisions. It seems that Singapore sales law employs the most narrow understanding of the term goods, due to the understanding that goods must be tangible.[295] The CISG and DCFR have taken a completely different approach. Whereas the CISG excludes specific items (*i.e.* negative definition of goods excluded from the CISG), the DCFR governs the sale of corporeal movables and stipulates that (with appropriate adaptions) its principles may be applied to a number of incorporeal and intangible goods. That having been said, the three investigated jurisdictions, as well as the CISG and DCFR encompass an important common denominator in the sense that they do not provide an exhaustive list of goods covered by sales law provisions. This allows the courts to evolve the concept of goods which can be the object of a sales contract by challenging the boundaries of, for example, the notion of 'human control' under Dutch contact law and the notion of tangible versus intangible under Singapore contract law. This proposition entails the suggestion that there is a certain degree of flexibility for the courts (where this is appropriate) to deviate from the historical notion of goods conveyed by the civil and common law traditions. Nonetheless, it cannot be said that the subject legal systems have adopted a unanimous notion of goods which can be the object of a sales contract. The divergence may cause significant issues where a legal system excludes the sale of ships, vessels and aircrafts.[296] For parties who supply component parts of ships, vessels and aircrafts to the final manufacturer, and contract under Singapore law or the CISG, it is of paramount importance to take note of this point. To remove any uncertainty about the question as to whether the sales law provisions apply, contracting parties may draw inspiration from the CISG, which excludes the transaction of ships, vessels and aircrafts, but takes the approach that the sale of component parts can be governed by the Convention.[297] In this regard, particular attention must be paid to the situation where component parts are manufactured by different companies from the main manufacturer

295 This approach is in line with the concept of goods conveyed by traditional English law.
296 See Figure 5.
297 Schwenzer 2016 (n 91) art 2 para 33.

who is also responsible for attaching the component parts to the vessel or aircraft.[298] It is said that in these instances the exclusion of the sale of ships, vessels and aircrafts under the CISG may apply to the sale of the component parts where they are related to the sale (by the manufacturer) of the vessel or aircraft for which the component is used.[299] Aside from these complexities, it seems that qualification issues arising from the increasing variety in transactions concerning an exchange of money against (currently) undefined 'things' can be solved by the national courts irrespective of their domestic notion of goods subject to sales law. This approach is in line with the open-ended definition of goods adopted by the DCFR, although it may require more awareness in the present-day realities of the transfer of money for the delivery of digital (intangible) products between commercial parties (*e.g.* the unprecedented explosion of contracts encompassing the sale of digital products to ensure compliance with the new GDPR).

3.4 Formation of an enforceable commercial sales contract

3.4.1 Introduction

50. This section is structured around the proposition that the divergence between the thresholds for contract formation in the two major legal traditions (*i.e.* civil and common law) are inextricably linked with their attitude towards the enforceability of contractual rights to performance. For example, it appears that where a legal system adopted strict rules on contract formation, enforced performance is only available in exceptional situations. This seems to follow from a need to limit the type of promises which require legal protection by enforcement measures. By contrast, legal systems familiar with a more liberal approach towards the rules on contract formation, generally assume that the parties have a right to enforced performance. In view of these considerations, the following discussion aims to reveal the most fundamental differences between the primary requirements for bringing about an enforceable commercial sales contract under the contract law of the Netherlands, Singapore and China in view of the approaches taken by the CISG, PICC, PECL and DCFR (the draft PACL does not contain articles on contract

298 Mark Kantor, 'The Convention on Contracts for the International Sale of Goods: An International Sales Law', 1 International Law Practicum (NYS Bar Assoc. Autumn 1988) 11; Peter Winship, 'Aircraft and the International Sales Convention', 50 Journal Air Law & Commerce (1985) 1059; Annotated text of CISG, Art 2 words and phrases, ed. Albert H Kritzer <https://cisgw3.law.pace.edu/cisg/text/commentary 2.html#f8> accessed on 2 March 2019.

299 John P McMahon, 'Review' (1990) 21 Journal of Maritime Law and Commerce 306; Annotated text of CISG, Art 2 words and phrases <https://cisgw3.law.pace.edu/cisg/text/commentary2.html#f8> accessed on 2 March 2019.

formation and is, therefore, not taken into consideration). The findings of this assessment (in conjunction with the considerations provided in the previous sections) are ultimately used to determine the underlying reasons for the differences in the availability of enforced performance in the three investigated jurisdictions and to what extent they are related to the availability of enforced performance when a contract is concluded. In the long run, the result of this undertaking may be used at the international level to further the bridging of the gap between the civil and common law contract law principles. This is because a holistic analysis of the larger framework of legal principles provides more insights than a discussion which is only focussed on specific provisions.

51. In view of the foregoing, the first step entails an assessment of the methods of contract formation, and how the required intention to be bound is determined when considering the traditional offer and acceptance model (section 3.4.2). Following this discussion, the second step focuses on the most intractable difficulties which may arise, for example, where a commercial offer does not stipulate the purchase price or a formula to calculate the amount owed by the buyer (section 3.4.3). The main issue boils down to fundamental differences between the civil and common law approach to the interpretation of the words of an offer (*i.e.* statement of one party) and representations not incorporated into the offer.[300] This assessment should be viewed in light of well established differences between the principles and rules for contractual interpretation in civil and common law jurisdictions.[301] Firstly, whereas civil law courts may rely on the rules on the usage of the general notion of good faith to deal with unclear or ambiguous stipulations in an offer, common law courts may appeal to the institution of implied terms in such a situation. In other words, there is a crucial role to play for civil and common law courts when interpretation of the stipulations in an offer is required to determine as to whether enforceable obligations are established. Secondly, civil law jurisdictions would allow a court to take into consideration extrinsic evidence (*i.e.* oral and written representations) for the interpretation of an offer regarding, for example, the quality and price of the goods. By contrast, a strict application of the common law parol evidence rule would bar the court from taking into account contextual factors deriving from representations not recorded in the terms of the offer which, upon acceptance, represent the whole contract (albeit that exceptions apply, such as extrinsic evidence of trade usage or custom). Taking into account the diametrically opposing viewpoints mentioned above and the fiercely disputed approach taken by the CISG for commercial sales contracts entailing an indefinite price, the above

300 Schwenzer, Hachem and Kee 2012 (n 13) paras 26.44–26.50.

301 Catherine Valcke, 'Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric' in Jason W. Neyers, Richard Bronaugh and Stephan G.A. Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009), 77.

mentioned sections assess the position taken by the investigated jurisdictions and whether their approach resonates with the daily reality of cross-border sales transactions.

The third step deals with another potential enforcement conflict deriving from the seemingly irreconcilable principles in civil and common law jurisdictions arising from the bindingness of an offer and the promise to keep the offer open for a specific period, in relation to the effectiveness and time for acceptance (section 3.4.4). The substantive issue in question is whether the obligor is bound to perform (a) once the offer is received, or (b) when the acceptance is dispatched, or (c) when the acceptance is received within the statutory or contractual time limit. The crucial divergence in enforceability arising in this context derives from the applicable civil and common law principles when an offer is made via instantaneous communications or via post. Further enforcement challenges may arise if the promisor revokes the offer despite the promise to keep the offer open for a certain period. Whereas the civil law tradition would find such a promise binding, the common law viewpoint is quite the opposite. This leads to the last step, which examines enforcement conflicts arising in cases where it is held that the agreement does not contain a (sufficient) reciprocal promise (section 3.4.5). The key concern it raises is the impact of the distinction between the civil law requirement of synallagmatic promises to establish an enforceable sales contract and the common law bargain principle which is not easily overcome by the use of boilerplate language in a consideration recital.[302]

3.4.2 Offer and acceptance model

52. *Preliminary* – At the international level, the CISG adopted the notion that a proposal constitutes an offer when it indicates the intention of the offeror to be bound on acceptance.[303] The required intention to be bound may derive from the wording used in a document, such as 'order', 'we order' and 'immediate delivery' and also from the statements made during a conference call. As a result, the court adjudicating the dispute may infer that an enforceable contract is formed if the elements of offer and acceptance are found, which both show an intention of the parties to be bound by their promises.[304] Where the court does not find such an intention, only non-enforceable contractual commitments are made which may qualify as an invitation to treat. Aside from the legal, technical difficulties arising from this two-step approach, the line between an intention to

302 Where a recital consideration is included in the contracts, it is recommended to explicitly describe the fundaments of the bargain underlying the consideration of the parties in order to prove that the parties undertook a true risk.

303 Art 14 (1) CISG; see also art 2.1.2 PICC.

304 Consult: Tribunal Supremo 1 Juli 2013 (Spain) <http://www.unilex.info/case.cfm?id=1823> accessed on 3 October 2018 and Handelsgericht St. Gallen 5 December 1995, HG 45/1994 (Switzerland) <www.unilex.info/case.cfm?id=190> accessed on 22 August 2018.

be bound on acceptance and an invitation to treat is also not easy to draw due to various business values across jurisdictions. The complexity of the undertaking to distinguish an offer from an invitation to treat is exacerbated by the present-day extensive methods of communication.

In an attempt to ascertain whether the Dutch, Singapore and Chinese contract law are capable of accommodating the formation of commercial sales transactions across these jurisdictions, the following discusses first to what extent the subject legal systems have adopted the traditional mechanism of offer and acceptance to bring about an enforceable sales contract and whether other means of contract formation are accepted. The second step entails an assessment of the requirement that parties show their assent with an intention to establish legally binding obligations and the rules for determining the intentions of parties. This undertaking is most relevant for commercial sales contracts encompassing an exchange of transactions which are not performed at the same time. The rationale is that where there is an immediate and direct exchange of goods and payment of the purchase price (*e.g.* sale of a coffee to go), parties are not primarily concerned with establishing a legally binding contract entailing subsequent obligations. The DCFR is the only supranational contract law instrument which acknowledges the relevance of this distinction by stipulating that offer and acceptance (as unilateral acts) requires that the party doing the act intends to be legally bound or to achieve the relevant legal effect.[305]

> *Illustration* – A manufacturer of cereals, located in country A, sent a fax to a producer of wheat, located in country B. The fax contains an order for delivery of a specific amount of wheat, which is a standardized business usage for ordering goods in this specific sector. The producer asks the manufacturer by email to clarify certain details of its request. The parties proceed with their discussion through a conference call, and the manufacturer believes that the details of the transaction are fully worked out. Nonetheless, despite numerous requests of the manufacturer, the producer refuses to deliver the wheat as described in the fax. In response to this, the manufacturer commenced an action against the producer for delivery of the wheat. In this situation, the question arises whether the producer is subject to an enforceable obligation to deliver the wheat.

53. *Domestic approaches* – Dutch contract law acts on the assumption that a sales contract is formed on the basis of the offer and acceptance model.[306] It is, however, held that this statutory offer-acceptance model does not accommodate situations which typically occur

305 Art II.-4:301(a) DCFR; Nils Jansen and Reinhard Zimmerman (eds), *Commentaries on European Contract Law* (Oxford University Press 2018).

306 Art 6:217 DCC.

between those involved in complex international trade transactions. For example, when prolonged negotiations make it difficult to ascertain the actual offer,[307] where a proposal of a third party (*e.g.* a broker in wheat) is accepted by the buyer and the seller, and situations where parties tacitly 'renew' an expired contract.[308] It is said that in these instances, conduct, as an alternative to the traditional offer and acceptance model, may also suffice as a legal basis to constitute an enforceable sales contract.[309] In any case, the declarations of the parties (orally, written or conduct) must show an intention to constitute an enforceable sales contract. This requires an assessment of the thing parties have declared, the meaning the parties have mutually attached to the stipulations, the sense the parties could have reasonably attached in the present circumstances, and that which they could reasonably expect from each other in this regard.[310] This means in effect that statements and conduct are relevant in determining the intention of the parties to be bound, even if the circumstances justify great significance being given to a purely objective interpretation of the wording chosen in an oral or written offer.[311] Thus, the question whether the requirement of an intention to be bound must be ascertained by a subjective-objective interpretation of intrinsic and extrinsic evidence in the form of written declarations, word of mouth (statements) or conduct.[312] The aforementioned considerations should be viewed in light of the statutory rule that an absence of an intention to be bound cannot be invoked against a person who interpreted another's declaration or conduct in conformity with the

307 *Polak v Zwolsman* Dutch Supreme Court 14 June 1968, ECLI:NL:PHR:1968:AC3608, NJ 1968, 331; Dutch Court of Appeal Arnhem 4 January 1972, ECLI:NL:GHARN:1972:AB6792, NJ 1973, 207; *Van Beers v Van Daalen* Dutch Supreme Court 21 December 2001, ECLI:NL:HR:2001:AD5352, NJ 2002, 60; *Batavus v Vriend's Tweewielercentrum* Dutch Supreme Court 16 September 2011, ECLI:NL:HR:2011:BQ2213, NJ 2011, 572.

308 Dutch Parliamentary History Book 6 (n 207) 879.

309 Consult art 2.1.1 PICC; Dutch Parliamentary History Book 6 (n 207) 879; Sieburgh, *Asser 6-III* 2018 (n 203) 189; Hijma, *Asser* 7-I* 2013 (n 48); Hijma and Olthof 2017 (n 248) 465; *Batavus v Vriend's Tweewielercentrum* (n 307) para 3.4; *Lundiform v Mexx Europe BV* Dutch Supreme Court 5 April 2013, ECLI:NL:HR:2013:BY8101, NJ 2013, 214 (applicability of Haviltex principle to commerical contracts (n 310 below)); Tjittes 2018 (n 2) 70.

310 *Haviltex* Dutch Supreme Court 13 March 1981, ECLI:NL:HR:1981:AG4158, NJ 1981, 635; *Batavus v Vriend's Tweewielercentrum* (n 307) para 3.4; *Van Beers v Van Daalen* (n 307); see for the general standard of reasonableness and fairness under Dutch contract law: arts 6:2, 6:248 DCC; Hartkamp 2011 (n 80) para 117; Tjittes 2018 (n 2) 70, 265; The standard for determining whether the parties have concluded a contract is equated with the principles for interpretation of the contract.

311 *Batavus v Vriend's Tweewielercentrum* (n 307) para 3.4; *Van Beers v Van Daalen* (n 307); *Lundiform v Mex* (n 309).

312 Art 3:37 paragraph 1 DCC; *Bunde v Erckens* Dutch Supreme Court 17 December 1976, ECLI:NL:PHR:1976:AC5835, NJ 1977, 241; *Van Beers v Van Daalen* (n 307); *Batavus v Vriend's Tweewielercentrum* (n 307); YG Blei Weissmann, 'commentaar op artikel 127 Boek 6 BW' para 1.8.1 in RJQ Klomp and HN Schelhaas (eds), *Groene Serie Verbintenissenrecht* (Wolters Kluwer 2018); M Vriend, 'commentaar op artikel 248 Boek 6' para 2.10 in RJQ Klomp and HN Schelhaas (eds), *Groene Serie Verbintenissenrecht* (Wolters Kluwer 2018); Sieburgh, *Asser 6-III* 2018 (see n 203) 372; Tjittes 2018 (n 2) 267–269; De Jong, Krans and Wissink 2018 (n 194) 26–33.

sense which he could reasonably attribute to it in the circumstances as a declaration of a particular implication made to him by that other person.[313] As a consequence, the court may find that an enforceable contract is established if the buyer has justifiable reasons to place reliance on the offer. Thus, where a buyer knows that the offer entails an essential mistake, the former may not assume that the requirement of an intention is fulfilled. Where the buyer could assume that the offeror intended to be bound, the latter may argue that, considering the circumstances of the case, the buyer was obliged to investigate whether the declaration represented the actual intent of the seller to be bound.[314] For example, in cases where the alleged obligation to deliver something imposes a strong negative impact on the seller, the buyer can be burdened with the obligation to examine whether the offer reflects the actual intention of the seller.[315] This also applies to the situation where the language of the contract is not fully understood by the buyer.[316] That said, Dutch courts attribute significant weight to the express language of a juridical act (*e.g.* offer and acceptance) in a commercial context.[317] In other words, it is crucial to take into account the capacity of parties when determining the appropriate test for the intention to be bound to an offer.

54. The contract law of Singapore acts on the presumption that the offer and acceptance model is the primary instrument to form an enforceable commercial sales contract.[318] It is, however, also suggested that this archaic mechanism is not absolute, which implies that conduct could also suffice to assume the conclusion of an enforceable contract.[319] When considering the traditional model, the undertaking of an offer and the expression of acceptances (both made expressly or by conduct) requires an intention to be legally bound, which have to be objectively ascertained.[320] This encompasses the assessment of whether a reasonable person (the promisee) could have assumed that the promisor intended to be

313 Art 3:35 DCC; Hijma and Olthof 2017 (n 248) paras 32, 37.

314 Hartkamp 2011 (n 80) para 46.

315 *Coolwijk v Kroes* Dutch Supreme Court 28 May 1982, ECLI:NL:PHR:1982:AG4391, NJ 1983, 2.

316 *E.g., Hajzian* Dutch Supreme Court 14 January 1983, ECLI:NL:HR:1983:AG4523, NJ 1983, 457; *Petermann v Frans Maas* Dutch Supreme Court 2 February 2001, ECLI:NL:PHR:2001:AA9767, NJ 2001, 200.

317 *Haviltex* (n 310); *Meyer Europe v Pont Meyer* Dutch Supreme Court 19 January 2007, ECLI:NL:HR:2007:AZ3178, NJ 2007, 575; *Lundiform v Mexx* (n 309); Tjittes 2018 (n 2) 21.

318 Chong et al 2016 (n 125) para 10.2.16; Phang et al 2012 (n 112) para 03.001; Andrew Phang Boon Leong and Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer 2012) para 85; The same applies to implied contracts: *Cooperative Centrale Raiffeisen-Boerenleenbank BA* (*Trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 [46] and [50] (SGCA).

319 <http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-8/> accessed 14 August 2018.

320 Phang and Goh 2012 (n 318) paras 86, 143; Phang et al 2012 (n 112) paras 3.026, 3.027; *Bakery Mart Pte Ltd (in receivership) v Sincere Watch Ltd* [2003] 3 SLR(R) 462 (SGCA).

bound.[321] This approach shows that the question of whether an offer includes an intention to be bound is to be ascertained from the viewpoint of a reasonable person in the position of the recipient.[322] Thus, the subjective intention of the person who received the proposal is not relevant.[323] The requirement of an intention to be bound is not fulfilled where a buyer knows that the seller has made a mistake in the offer, and where it is unclear for the buyer whether the seller has made objective manifestations of an intention to be bound. Put differently, under the contract law of Singapore it is required that there is an intention on the part of both parties to establish a legally binding sales contract (*i.e.* to create legal relations). As mentioned earlier, the requirement of an intention to create legal relations is subject to an objective examination of the facts of the case.[324] An important indication of the existence of an intention to create a legal relation derives from the rebuttable presumption that parties in business and commercial contexts intend to create a legal relation on acceptance (Dutch contract law also recognises such a presumption).[325] It is held that a commercial context is missing where a party acts administratively and not in a commercial manner.[326] In determining the intention to create an enforceable contract, special problems may arise when commercial parties, who place a high value on the act of making a promise, did not adopt the Western, more formal, way of doing business. In these instances, the courts in Singapore may find it difficult to find an intention to establish a contract with legal effect on the basis of the Western inspired legal standards, as set out above.[327] It is, furthermore, important to note that the requirement of an intention to create legal relations also stands apart from the requirement of a valuable consideration to establish an enforceable contract.[328] The latter condition is satisfied where the buyer's consideration for the seller's obligation to deliver the goods is the purchase price to be paid to the seller, and the seller's consideration for payment of the purchase price is the delivery of goods by the seller (section 3.4.5).

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321 Phang and Goh 2012 (n 318) para 95; *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR(R) 305 (SGCA).

322 *SAL Industrial Leasing Ltd v Teck Koon (Motor) Trading* [1998] 1 SLR(R) 501 (SGCA); *Cooperative Centrale Raiffeisen-Boerenleenbank BA (Trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* (nr 318); *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd* [2010] 3 SLR 956 [37] (SGHC); Phang and Goh 2012 (n 318) paras 302–304; Phang et al 2012 (n 112) paras 3.024, 3.024; Shenoy and Loo 2013 (n 13) para 7.10; Chong et al 2016 (n 125) para 10.2.17.

323 Phang et al 2012 (n 112) paras 3.024, 3.025.

324 Phang and Goh 2012 (n 318) para 304; *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd* (n 322); *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 [72].

325 *Chua Kim Leng (Cai Jinling) v Philip Securities Pte Ltd* [2006] SGHC 221; Phang and Goh 2012 (n 318) para 316.

326 Singapore Court of Appeal in *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR (R) 418 [10]; Phang and Goh 2012 (n 318) para 317.

327 Consult the Malaysian decision in *MN Guha Majumder v RE Donoughare* [1974] 2 MLJ 114, 117; Phang and Goh 2012 (n 318) paras 302–304.

328 *E.g., Gay Choon Ing v Loh Sze Ti Terence Peter* (n 324) [71]; Phang and Goh 2012 (n 318) para 306.

55. The contract law of China requires that the parties have made concordant declarations of intention in order to form a contract (the requirements for formation of a contract should be distinguished from the question whether the contract is effective; that is, a contract only becomes effective once the applicable requirements of government approval or registration are fulfilled). The formation of the declarations of intentions can be reached by means of the offer and acceptance model,[329] although this undertaking as a means to bring about a contract was previously not acknowledged by the three predecessors of the current contract law of China. In China's Economic Contract Law it was stipulated that a contract shall be in writing and it is formed as soon as the parties to the contract achieved agreement (unanimity) on the principal clauses of the contract through consultation in accordance with the law.[330]

It is said that the offer and acceptance model is not the only mechanism by which a contract can be concluded (*e.g.* instances of prolonged negotiations which make it difficult to determine the juridical act of an offer and acceptance).[331] Nonetheless, the offer and acceptance model is the most common basis for finding a sales contract. Where offer and acceptance are not clearly identifiable, it is required that declarations or conduct of parties show an intention to be bound in order to constitute a contract.[332] In any case, the intention of the party making the declaration may be inferred from an express declaration (in writing, by word of mouth or conduct) but also from all the circumstances of the case.[333] For determining the intent of the parties to be legally bound, there are two conflicting viewpoints. First, it is argued that the subjective test applies.[334] However, it is also suggested that only the objective intention of the party making the declaration is relevant and not what the recipient may have reasonably believed.[335] The notion that the subjective approach prevails follows from the reasoning that the contract law of China focusses on the requirement of the desire of the promisor to enter into a contract,[336] which suggests that the actual intent of the promisor is required to constitute an offer.[337] With regard to the idea that the contract law of China follows an objective approach, a leading commentator holds a view more in line with the PICC by focussing on the outward expressions of the

329 Art 13 CCL; Bing Ling 2002 (n 229) paras 3.006, 3.007.

330 Art 3, 9 ECL; Jianfu Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development* (The London-Leiden Series on Law, Administration and Development, v 3, Kluwer Law International 1999).

331 Bing Ling 2002 (n 229) 3.0070; Art 2.1.1 PICC stipulates that a contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

332 Arts 13, 14 CCL; Zhang 2006 (n 41) 97; Liming 2016 (n 224) 23, 24; Bing Ling 2002 (n 229) paras 1.010, 3.006.

333 Bing Ling 2002 (n 229) paras 1.010, 3.012; Liming 2016 (n 224) 28, Zhang 2006 (n 41) 92.

334 Zhang 2006 (n 41) 92.

335 Zhang 2006 (n 41) 92; Liming 2016 (n 224) 25; Fu 2011 (n 169) 80, 81.

336 Zhang 2006 (n 41) 92.

337 Zhang 2006 (n 41) 92.

parties, which should also apply when determining whether the requirement of an intention to be bound is fulfilled.[338] This approach encompasses an examination of what a reasonable person could have understood having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.[339] Due to this factual approach, the question whether the intention to be bound is voluntary or genuine is not essential to the assessment of whether the parties have formed a contract.[340] This undertaking becomes relevant when establishing the effectiveness and thus the enforceability of the obligations arising from the contract.

56. *Comparative analysis* – The present section entails an examination of the traditional mechanism of offer and acceptance, the possibility of inferring a commercial sales contract from conduct and the impact of the most crucial differences between the discussed approaches. The findings reveal an obvious but also very important common denominator, that is, the three investigated legal systems, as well as the CISG, PICC, PECL and DCFR,[341] have all adopted the notion that a sales contract is formed on acceptance of an offer, provided that the requirements attached to both actions are fulfilled. It appears that the Netherlands and China have adopted the most liberal approach towards alternative means of bringing about a commercial sales contract in the absence of a clearly identifiable offer and acceptance. The notion that the traditional offer and acceptance model is not absolute, is in line with the PICC, PECL and DCFR, because they expressly acknowledge that the existence of a contract may also be inferred from conduct by the parties that is sufficient to show agreement.[342] Although the contract law principles of Singapore make no express reference to conduct sufficient to show agreement as a starting point for the formation of a contract, it is suggested that this ground may be used by the courts to find a contract. Nonetheless, it appears that Singapore courts are more hesitant to recognise other forms of expression (other than offer and acceptance) as a method of contract formation. A similar conservative approach is taken by the CISG. The Convention allows parties to be bound by an explicit and implicit trade usage, although it seems unlikely that this principle shall lead to the conclusion of a CISG-contract because the thresholds for finding consensus and the minimum content are very high.[343] That having been said, there are justifiable reasons to recognise other methods of contract formation for specific instances in modern sales transactions where it is not possible to discern an offer and acceptance. This may

338 Bing Ling 2002 (n 229) paras 3.002; 3.012. 5.005.
339 Bing Ling 2002 (n 229) paras 3.002, 3.012.
340 Bing Ling 2002 (n 229) para 3.008.
341 NL arts 6:217(1), 7:1 DCC; SGA, s 2(1) (Singapore follows the English principle that offer and acceptance constitues a contract); CHN Art 13 CCL; Arts 14, 23 CISG; Art 2.1.1 PICC.
342 Art 2.1.1 PICC; Art 2:101(1) PECL; Art II.-4:101 DCFR.
343 Schwenzer 2016 (n 91) 248, paras 47–49.

occur, for example, in the case where prolonged (point-by-point) negotiations (or a lengthy exchange of correspondence) between commercial parties located in different jurisdictions have allegedly led to the reaching of an agreement, or where a party has justifiable grounds to consider silence of the other party as a consent on the basis of international trade usage or a practice that has been developed between the parties. However, where a commercial party argues that an enforceable sales contract is formed, the adjudicating court should not refrain from the principle of consensus, and the principle that the minimum content of the performance must be identifiable.[344]

57. The aforementioned suggestions should be viewed in light of the requirement of an intention to be bound which (though embedded in different legal rules and concepts) is adopted by the three investigated jurisdictions as an important feature of all methods of contract formation.[345] They do, however, place different weights on the objective and subjective intention of the parties in order to assess what the parties may have understood from their respective perspectives. In other words, there is a sliding scale from a purely objective meaning of the declaration to a subjective intention of the promisor. The contract law of Singapore seems to place the most emphasis on the objective meaning of the declaration by adopting the principle that the intention to be bound follows from an assessment of that which the conduct and words of the promisor amount to when reasonably construed by a person in the position of the promisee.[346] The contract law of the Netherlands appears to rely less on the objective meaning of a declaration by allowing the courts to set aside the wording used in the declarations by giving due weight to the interpretation of statements and conduct of the parties. Nonetheless, both legal systems attach considerable weight to the objective meaning of the express wording of an offer where this concerns commercial parties. It appears that the contract law of China adopted the least strict approach by placing more prominence on the actual intent of the parties, although it is also said that the objective approach prevails. This would mean that the intention to be bound has to be found in outward expressions. Despite these differences, the three investigated legal systems are all in line with the approach taken by the CISG, PICC, PECL and the DCFR, to the extent that they acknowledge that where there is a discrepancy between the objective meaning of the declaration and the subjective intention of the promisor, the courts should take into account the understanding a reasonable person

344 Schwenzer 2016 (n 91) 248, para 49.

345 It should be noted that the DCFR also acknowledges that, aside from an intention to establish a legally binding contract, a contract may be concluded on an intention to bring about some other legal effect. See in this regard art II.-4:101(a) DCFR.

346 *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin née Tan* [2004] 4 SLR (R) 330 [43] (SGHC); affirmed *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* [2005] 3 SLR (R) 22 SGCA; Phang et al 2012 (n 112) para 03.012.

(the promisee) would have in the same circumstances.[347] Notwithstanding this common viewpoint and the fact that the assessment of the intention to be bound is to be judged exclusively according to the standards of the CISG, it is of paramount importance to take note of differences when dealing with the intricacies of commercial sales transactions across civil and common law jurisdictions which are a member state to the Convention because the domestic principles on defects in intention (and mistake) may be used by national courts to determine that the alleged agreement between the parties did not amount to a valid and enforceable sales contract.[348]

From a comparative perspective, the considerations above demonstrate that the rules surrounding the traditional offer and acceptance model are not absolute. This means in effect that there is no simple answer to the example mentioned under paragraph 52. Nonetheless, it is submitted here that the subject legal systems may allow for a commercial sales contract to be made without an explicit offer and acceptance, provided that the agreement between parties can be sufficiently inferred from declarations and conduct. In other words, the fax and emails exchanged by the parties and the content of the conference call may suffice to establish a commercial sales contract, although these 'declarations' do not qualify as an express offer and acceptance. Such a mechanism should, however, not easily be applied in the realm of international commercial sales transactions considering the far-reaching consequences of the availability of a claim for enforced performance under domestic law which does not (fully) account for the intricacies of the complexities of cross-border trade.

3.4.3 Definiteness of the obligations assumed in an offer

58. *Preliminary* – The domestic and international sales law principles concerning the definitiveness of an offer to sell in order to constitute an enforceable sales contract may cause significant enforcement issues when dealing with a sales transaction across civil and common law borders.[349] This is particularly true with regard to situations where the applicable law does not provide guidance to the minimum content, where the offer does not stipulate the purchase price or lacks a mechanism to determine a price. For commercial sales transactions between parties from the three investigated jurisdictions, it all starts with the CISG because the countries are signatory states.[350] The starting point under the

347 Arts 14(1), 8(1–3) CISG; Arts 2.1.2, 1.8 PICC; Art 2.102(1)(a) PECL; Art II.-4:102 DCFR; Schwenzer 2016 (n 91) para 26; Vogenauer 2015 (n 19) art 2.1.2 para 3.

348 Schwenzer 2016 (n 91) para 26.

349 The intricacies of the requirement of sufficient definiteness for an offer made to the public is not discussed. See for this issue: Vogenauer 2015 (n 19) art 2.1.2 para 4.

350 <http://iicl.law.pace.edu/cisg/page/cisg-list-contracting-states>.

Convention is that an offer can only amount to an enforceable sales contract if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.[351] This principle appears to contradict with the open-price principle which serves as a safeguard to long-term commercial sales contracts and where the controlling mechanism is required to deal with rapidly changing market prices.[352] It follows from the open-price provision that a commercial sales contract may come into being where the offer does not expressly or implicitly fix or make provision for determining the price.[353] In these instances of an open-price sales contract, the buyer owes the price usually charged at the time of the conclusion of the sales contract for such goods sold under comparable circumstances in the trade concerned (*i.e.* objective test).[354] This rule reflects two schools of thought when a price is not fixed: the buyer owes the market price (this is approach is adopted by a number of civil law jurisdictions),[355] or the buyer must pay a reasonable price (this approach is adopted by UK and US common law and certain civil law jurisdictions).[356] Despite authoritative opinions on the matter,[357] the relation between the above-described principles is not clarified. Although this is more a theoretical than a practical problem, the same cannot be said for the issue that some courts are inclined to allow open-price offers only when they fulfil the prerequisites for the formation of a contract, that is, the offer expressly or implicitly fixes or makes provision for determining the price.[358] The complexity of the issue is further exacerbated where the parties located in one of the investigated jurisdictions are dealing with commercial parties with a place of business in a CISG signatory state, which did not adopt the requirements for the formation of an enforceable sales contract (including the principle that an implicit fixation of the price suffices), and the applicable domestic law does not allow the formation of a sales contract on the basis of an offer which does not fix a price or entails a mechanism for determining the price.[359] For an illustration of possible approaches in instances of an indefinite offer, see Figure 6.

351 Art 14(1) CISG.

352 Amalina Ahmad Tajudin, 'Article 55 on Open-Price Contract: A Wider Interpretation Necessary?' (2014) 3(3) Journal of Arts and Humanities 38.

353 Art 55 CISG.

354 Art 55 CISG; Schwenzer 2016 (n 91) art 55 para 14.

355 Schwenzer, Hachem and Kee 2012 (n 13) para 10.14.

356 UK: SGA 1979, s 8(2); US: § 2–305(1) UCC; Schwenzer 2016 (n 91) art 55, para 14.

357 Schwenzer, Hachem and Kee 2012 (n 13) para 10.18; Schwenzer 2016 (n 91) art 14 para 21.

358 Art 14(1) CISG.

359 Schwenzer, Hachem and Kee 2012 (n 13) paras 10.17–10.18.

Figure 6 Offers (subject to the CISG) which do not stipulate the purchase price nor encompasses a mechanism to determine the purchase price

59. Considering the above, the present section analyses whether and to what extent an indefinite offer suffices to constitute an enforceable sales contract in the three investigated legal systems. The aim is to develop a better understanding of the various scenarios and their implications for the ability of commercial parties to conclude an enforceable sales contract. Important elements to consider in this context are the civil law notion of good faith and the common law institution of implied terms. These legal concepts can be used by the courts in order to establish whether the stipulations in an offer are sufficiently clear to bring about enforceable obligations. Considering the far-reaching impact of law of evidence in this regard,[360] special attention is paid to the role of extrinsic elements (*i.e.* statements, agreements and conduct) where contractual stipulations are clear but the parties disagree as to the actual meaning of the agreed terms.

> *Illustration* – A producer of tomatoes, located in country X, informs a trader of fruits and vegetables, located in country Y, that it will sell 'the entire harvest of organic produced cherry tomatoes for the following three crop years' with their price fixed during the season. On completion of an oral discussion, the producer confirmed via a letter that the deliveries would take place each year between June and August, and payments were to be made within 30 days of each invoice. The trader then places an order for the delivery of the first batch of cherry tomatoes at a price of EUR 2.00 per kg. The subsequent year, the seller sent the buyer a second letter to confirm the delivery of the cherry tomatoes at a price of EUR 2.50. The trader, however, insists that there is no valid contract of sale of cherry tomatoes at the price of EUR 2.50, alleging that the first and second letter are neither to be regarded as offers or commercial confirmation letters.[361]

60. *Domestic approaches* – The contract law of the Netherlands requires that obligations assumed in the offer must be determinable to form an enforceable contract on acceptance.[362] This requirement of determinability can be fulfilled at the moment of concluding the contract or at a later moment by contracting parties or third parties, the court or by other circumstances.[363] Where an offer is not sufficiently determinable in view of the statutory

360 Attention will be paid in particular to the common law parol evidence rule; Tjittes 2018 (n 2) 372–374; J Beaton, A Burrows and J Cartwright, *Anson's Law of Contract* (30th edn, Oxford University Press 2016) 146–148.

361 This example is based on the *Pitted Sour Cherries case*, see <http://cisgw3.law.pace.edu/cases/050803g1.html> accessed on 16 December 2018.

362 Arts 6:217, 6:227 DCC; Dutch Supreme Court 27 February 1980, ECLI:NL:HR:1980:AC6832, NJ 1980, 352.

363 CH Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel I. De verbintenis in het algemeen, eerste gedeelte* (Wolters Kluwer 2016) 23; Sieburgh, *Asser 6-III* 2018 (n 203) 285.

requirements, an enforceable sales contract cannot be formed.[364] It must be noted in this regard that Dutch courts are not given the discretionary power to deviate from the statutory right to enforced performance,[365] the reason being that court rulings, which declare that an offer is not sufficiently determinable and therefore do not constitute an enforceable contract, are scarce.[366] That having been said, the starting point is that a valid offer contains the essential, and sufficiently determinable, elements of a promise to give a thing in return for a price in money.[367] Where an offer is not in accordance with these requirements, the general contract law provisions may apply along with any other statutory provisions appropriate on account of the particularities of the assumed performances. Hence, an indefinite purchase price is not necessarily a barrier for establishing an enforceable sales contract where the parties do not consider the price as an essential feature of the transaction. In instances of an indefinite price,[368] the buyer owes a reasonable price.[369] In determining that price, the prices usually stipulated by the seller at the time the contract is entered into are taken into account.[370] Where this indicator is missing or does not suffice to establish the price (*e.g.* unique goods), the adjudicating court may also seek recourse to general business usage and the requirements of reasonableness and fairness to determine the price owed by the buyer.[371] Thus, a Dutch court may look beyond the four corners of a contract and the benchmark of 'usually stipulated prices by the seller' to establish a reasonable price. It may, therefore, be said that under the Dutch Civil Code extrinsic indicators may be used to determine the price owed by the buyer in the absence of contractual stipulations.

61. To bring about an enforceable commercial sales contract in Singapore, it is also required that the parties specify their reciprocally binding performances by means of an offer and acceptance (in writing, by word of mouth or conduct),[372] which fulfil the requirements for

364 Sieburgh, *Asser 6-I* (n 363) para 23.

365 AC van Schaick, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Procesrecht. 2. Eerste aanleg* (Wolters Kluwer 2016) paras 62, 263; C*laas v Van Tongeren* Dutch Supreme Court 28 June 1985, ECLI:NL:PHR:1985:AC8976, NJ 1986, 356. However, it is at the discretion of the judge, hearing applications for interim measures, to render an immediate provisionally enforceable decision including an order for performance of the contract in return for a satisfactory security.

366 Sieburgh, *Asser 6-III* 2018 (n 203) 285.

367 Arts 6:217, 6:22, 7:1 DCC.

368 District Court Utrecht 23 September 2009, ECLI:NL:RBUTR:2009:BJ8421, NJF 2010, 44; District Court Noord Holland 6 March 2013, ECLI:NL:RBNHO:2013:BZ5985 para 4.6; B Wessels, *Koop: algemeen* (Monografieën BW B65a, Kluwer 2015) para 45.

369 Art 7:4 DCC; Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 214, 216; Schwenzer, Hachem and Kee 2012 (n 13) para 10.14 (footnote 28) mistakenly assume that the market price is to be paid under Dutch law.

370 Art 7:4 DCC.

371 Arts 6:227, 6:248(2) DCC.

372 SGA, s 4(1).

certainty as to the promised performance and completeness.[373] In other words, an offer must contain all essential elements of the envisaged transaction.[374] In answering the question as to whether the stipulations of an offer (upon its acceptance) brings about an enforceable contract and, subsequently, to determine the scope of the assumed obligations, Singapore courts may seek recourse, where necessary, to the below discussed institution of implied terms and the exceptions to the parol evidence rule. As for the former, it is observed by the Singapore Court of Appeal that the good faith principle (on the basis of the intentions of the parties) might fall under the narrow category of terms implied in fact [163].

Concerning a commercial sales contract, the starting point is that an offer is considered sufficiently definite when it encompasses the reciprocal promise to exchange goods in return for paying the price in money thereof.[375] It is, however, important to note that even when a sales contract comes into being under the Singapore Sale of Goods Act because the offer is in full compliance with the applicable requirements, the enforceability of a promise to deliver certain goods depends to a great extent on other specific common law barriers, such as the adequacy of damages test.[376] This is in stark contrast with the primary right of the seller to enforce payment of an implicitly or expressly agreed purchase price. In this regard, an offer may suffice, after acceptance thereof, to constitute an enforceable contract if the purchase price can be determined via a stipulated mechanism or by the course of dealing between the parties. Where both indicators are absent, the buyer owes a reasonable price, which is a question of fact dependent on the circumstances of each particular case.[377] From a practical point of view, the market price and experts are possible sources to determine a reasonable price,[378] but the imposition of a narrow interpretation of the common law statutory parol evidence principle would restrict the court to the language of the contract to be determined from the viewpoint of a reasonable observer (abstract viewpoint).[379] The operative effect of this rule is that extrinsic evidence cannot be used to add to, vary or contradict the terms of a written instrument (*e.g.* an offer) when

373 See the English case *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 13 affirmed for Singapore in *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR (R) 202 [14]. See also the Singapore case *T2 Networks Pte Ltd v Nasioncom v Nasioncom Sdn Bhd* [2008] 2 SLR (R) 1; Phang et al 2012 (n 112) para 03.146.

374 The Contract and Sales Law in Singapore only allows an offer and acceptance as a legal basis to constitute a contract; Phang and Goh 2012 (n 318) para 85; Shenoy and Loo 2013 (n 13) para 7.6; Phang et al 2012 (n 112) para 03.003.

375 SGA, s 2(1).

376 *Yeo Long Seng v Lucky Park (Pte) Ltd* [1968–1970] SGHC 20 [20], [21], [32], (1970) SLR(R) 859.

377 SGA, s 8 (1)(2)(3); Where the SGA does not apply, a term that a reasonable price (objective norm) is to be owed may be implied by Singapore courts. See *Gold Coin Ltd v Tay Kim Wee* [1985–1986] SLR(R) 575; *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2007] 2 SLR(R) 655; Phang et al 2012 (n 112) para 23.344. See the English case *Foley v Classsique Coaches Ltd* (n 373); SGA 1979 (UK) s 8; Supply of Goods and Services (UK) s 15.

378 Hunter 2017 (n 7) paras 3.37, 3.29; Chong et al 2016 (n 125) para 10.2.26; Halsbury's Laws of Singapore (Commercial Law 2014) vol 5(2) para 60.110; *Hock Hin & Co v Allwie & Co Ltd* [1961] MLJ 232.

379 Evidence Act 1997, ss 93–97; Hunter 2017 (n 7) para 3.31.

the stipulations are unambiguous and complete, and (upon acceptance) represent the whole contract.[380] It must be noted that in Singapore, in contrast to England, the principles surrounding the parol evidence rule are codified in a statute.[381] The present comparative work shall not discuss the details of this Act. It is only noted that, as a starting principle, a Singapore court shall refuse the usage of extrinsic evidence (*e.g.* expert statements) to determine the price owed by the buyer on application of the parol evidence rule where the parties disagree as to the meaning of the contractual stipulations which are not ambiguous or incomplete, unless one of the exceptions apply (*e.g.* any fact may be proved which would invalidate a contract due to a failure in consideration).[382] Despite the historical common law fundaments of the contract law of Singapore, the courts of Singapore have not turned a blind eye to the dynamics of modern trade by allowing a more contextual approach for matters not governed by a commercial contract.[383] Hence, the enforceability of an agreement entailing an indefinite purchase price may be successfully challenged when the court ascertains that a conclusive payment term was essential to establish a valid sales contract.[384]

62. Where a sales contract is subject to the contract law of China, it is of paramount importance to make a distinction between the thresholds for the formation of a sales contract and the requirements for obtaining effectiveness.[385] The latter concern issues of legality, defect in capacity and possibility of performance.[386] The question of whether an offer suffices to constitute an enforceable sales contract is a matter of formation.[387] Consequently, when the offer complies with the conditions set out below, a contract may have been formed and the parties could be subject to a contractual claim, even if the contract did not obtain effectiveness yet (*e.g.* when the required government approval is not (yet) provided).[388] To bring about a sales contract, an offer must include the parties (although

380 Anson's Law of Contract (n 360) 146–148; the most significant exceptions are rectification, partly oral and partly written contracts and terms implied through trade usage or custom.

381 Evidence Act 1997, ss 93, 94; Phang and Goh 2012 (n 318) para 995.

382 Evidence Act 1997, ss 93, 94; Hunter 2017 (n 7) para 3.34; see the English case *Chartbook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at 1119–1120, [39].

383 *R1 International Pte Ltd v Lonstroff* AG [2014] SGCA 56, (2015) 1 SLR 521; *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27, (2008) 3 SLR(R) 1029 [132]; *Goh Guan v AspenTech, Inc* [2009] 3 SLR(R) 590; *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd* [2010] 1 SLR 760; Hunter 2017 (n 7) paras 3.37, 3.38, 11.10.

384 Chong et al 2016 (n 125) para 10.2.27.

385 Bing Ling 2002 (n 229) para 3.009.

386 Bing Ling 2002 (n 229) paras 3.002, 3.009.

387 The Contract Law of China only recognises offer and acceptance as a basis to show that parties constituted a contract; Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis of Formation, Performance, and Breach' in DiMatteo and Chen 2017 (n 19) 470.

388 Bing Ling 2002 (n 229) paras 3.003, 3.066; The importance of distinguishing contract formation and obtaining effectiveness follows from the principle that where approval is required for effectiveness, a contract

appropriate capacity is not required to form a contract), an intention to be bound, and the object.[389] It is debated whether the requirement of certainty and definitiveness of the object is an element of the formation of a contract, or a matter of effectiveness.[390] That said, it appears that an offer must sufficiently define the goods transferred by the seller and the price owed by the buyer.[391] With respect to the level of definitiveness of the purchase price to bring about a sales contract,[392] it is not required that an offer makes provision for the purchase price or encompasses a mechanism to determine the price.[393] This also follows from the announcement of the Supreme People's Court which clarifies that a contract is formed, if the court is able to, generally, determine the names of the parties, subject matter and quantity, unless it is otherwise provided for by law or agreed on by the parties.[394] As a result, an open-price sales contract may be used as a basis to constitute a sales contract. Where the parties fail to reach an agreement on the purchase price, the purchase price shall be determined according to the words and sentences used in the contract, the relevant contractual stipulations, the purpose of the contract, the transaction practices and the principle of good faith.[395] This shows that under the contract law of China parties may rely on extrinsic (ancillary) evidence when they are confronted with an indefinite price.[396] Where the price is not clear (which should be distinguished from gap-filling), the People's Court is entitled to determine the purchase price in accordance with the prevailing market price at the place of performance at the time the contract was concluded, which is in accordance with the approach taken by the international sales and contract law principles. However, in a significant divergence from these principles, the contract law of China also stipulates that if adoption of a price commissioned by the government or based on government-issued pricing guidelines is required by law, such requirement applies.[397] It is argued that this remainder of the previously planned economy should be replaced by a 'reasonable-test'.[398]

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can be concluded. However, where approval affects the formation of a contract, the contract only comes into being upon approval.

389 Art 14(1) CCL; Bing Ling 2002 (n 229) paras 3.004, 3.009.

390 Bing Ling 2002 (n 229) paras 3.009.

391 Arts 130, 14(1) CCL.

392 Art 12 CCL.

393 Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis of Formation, Performance, and Breach' in DiMatteo and Chen 2017 (n 19) 478; Liming 2016 (n 224) 23; Bing Ling 2002 (n 229) paras 3.009, 5.035.

394 Art 1 Judicial Interpretation (I) Contract Law (n 173).

395 Art 125 CCL; Zhang 2006 (n 41) 134–136.

396 Zhang 2006 (n 41) 137.

397 Art 62 (2) CCL; Zhang 2006 (n 41) 132, 133.

398 Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis of Formation, Performance, and Breach' in DiMatteo and Chen 2017 (n 19) 479.

63. *Comparative analysis.* – The contract law of the Netherlands, Singapore and China act on the internationally accepted principle that a sales contract is formed on the basis of a sufficiently definitive offer.[399] It appears that the Netherlands and China adopted the broadest approach to the concept of definiteness of an offer. However, when comparing these two jurisdictions, the process of determining whether an offer resulted in an enforceable sales contract under the law of China may seem puzzling from a Western perspective due to the complexity of the distinction between the requirements for the formation of a contract (introducing civil liability) and the thresholds for establishing an effective commercial sales contract. In other words, where the requirements for the formation of an enforceable sales contract are fulfilled, it may not be tacitly assumed that the contract is effective. Should there be a desire to advance international sales law which recognises non-Western principles, it is suggested here to address this specific characteristic of the world's largest exporting country at the level of international sales and contract law principles in order to improve the understanding of non-Western cultural notions and legal traditions.

Another point to take into consideration is the potential restrictive effect of the previously discussed common law parol evidence rule, which necessitates that an offeror must be more specific in its offer to bring about a valid sales contract on acceptance, in comparison to parties subject to Dutch or Chinese contract law. This is because the common law parol evidence rule does not allow contracting parties to seek recourse to manifestations which emerged during the negotiation process when the terms of the agreement are not ambiguous or incomplete and represent the whole contract (albeit that exceptions apply). The CISG adopted for the most part the civil law tradition and rejected the application of the parol evidence rule by acknowledging that due consideration is to be given to all circumstances of the case, including negotiations,[400] although the Convention demands a higher level of definitiveness by requiring that an offer must indicate the goods and expressly or implicitly fixes or makes provision for determining the quantity and price in order to constitute an enforceable sales contract.[401] That said, an indefinite purchase price (open-price contract) is not necessarily a barrier for establishing an enforceable sales contract in the three investigated jurisdictions and the CISG.[402] It appears therefore that the courts may come to the same conclusion when dealing with a commercial sales contract which is governed by Dutch, Singapore or Chinese law or the CISG and the written document does not provide for the price of the goods. The notion that an enforceable commercial sales contract does not necessarily require a price for the goods is in accordance

399 Art 14 CISG; Art 2.1.2 PICC.
400 *Vide* arts 8, 9, 11 CISG; Hunter 2017 (n 7) para 11.10.
401 Art 14(1) CISG.
402 Arts 14(1), 55 CISG.

with the approach taken by the PICC, the PECL and DCFR, which embraced the notion that essential terms may be left undetermined in the offer without necessarily making it insufficiently definite.[403]

Despite the low thresholds in the aforementioned legal systems for sufficient definiteness, the legal concept of an offer still requires close attention when a proposal encompassing an international sales transaction does not make a specific provision for the purchase price or a mechanism to determine the price. The main divergence follows from the principle that the buyer owes the prevailling market price under Chinese contract law, and a reasonable price under Dutch and Singapore contract law. Although the three investigated jurisdictions have not adopted the principle of *pretium certum* (*i.e.* it is not required that the parties have determined the purchase price or rules for determining the price),[404] the aforementioned different approaches may result in major difficulties in practice where a sales contract does not sufficiently make provision for fixing the price. It is therefore of paramount importance that in commercial sales contracts across the borders of the three investigated jurisdictions (and civil and common law borders in general), contractual stipulations provide for the basis of the price owed for the goods. This recommendation should be viewed in light of the principle that an enforceable commercial sales contract does not come into being if the price is essential to the agreement between the parties, but the court is not able to determine the price according to the mechanisms to fill the gap (*i.e.* reasonable price *versus* market price). As mentioned earlier, the contract law of Singapore entails the most restrictive approach in the situation where the parties disagree as to the price to be paid for the goods and the contract is not incomplete or ambiguous on the matter. This, in effect, means that the court is not entitled to rely on declarations made during the negotiations to determine the price to be paid by the buyer when the language of the contract is clear on the matter. In spite of this doctrinal barrier with a significant impact in practice, it is suggested that, within the limitations laid down in the Evidence Act, the courts in Singapore are willing to take a more lenient approach towards the parol evidence rule by taking into consideration the contextual surroundings in determining the price owed for the goods.

The considerations above allow for the conclusion that similar results can be expected if the courts in the three investigated jurisdictions are confronted with the question as to whether a valid commercial sales contract is concluded in the example mentioned under paragraph 59. This case concerns an offer which does not make provision for determination of the goods (*i.e.* entire harvest of three years) and the price. However, commercial parties entering into a commercial sales contract across civil and common law borders, with the

403 Vogenauer 2015 (n 19) art 2.1.2 para 2; Art 2:201(1)(b) PECL; Art II.-4:201(1)(b)DCFR.

404 See for a detailed discussion about the French civil law principle of *pretium certum* Schwenzer, Hachem and Kee 2012 (n 13) paras 10.15, 10.16.

genuine expectation that their performance interest shall be honoured, should take note of the fact that there is no consensus on the requirements for the determinability of the goods and the price. This matters when the language of the contractual stipulations is not in accordance with the initial intentions of the parties.

3.4.4 Binding effect of offer and acceptance

64. *Preliminary* – The present section deals with one of the most pronounced differences between the civil and common law traditions when considering the threshold for determining whether the parties have formed an enforceable sales contract. That is the matter of effect and effectiveness of the undertaking of offer and acceptance. The primary issues are the revocability of an offer and the divergence in the way the different legal systems deal with acceptance in the case of instantaneous communication and where the parties communicate *inter absentes*. The latter is most relevant for international commercial sales contracts and, unfortunately, is also the point where a dramatic difference arises.

> *Illustration* – A producer of women's garments, located in country A, solicits an offer from a fabric manufacturer, located in country B, for different types of fabrics for next season's production. The manufacturer submits its offer on 1 October 2018 which entails a period of ten days for acceptance. The producer relies on the offer when calculating its prices. The producer dispatches its acceptance of the offer on 3 October. The manufacturer sends a communication to the producer revoking its offer on the same day. The key question here is whether the offer is validly revoked or that an enforceable sales contract came into being which obliges the manufacturer to deliver the fabrics as stipulated in the offer.

65. *Domestic approaches* – Dutch contract law entails the principle that an enforceable sales contract comes into being where the parties have provided two declarations (oral or written declaration or conduct), namely, offer and acceptance.[405] The first interesting point from a comparative perspective is that an offer under Dutch law becomes effective when it reaches the promisee,[406] but it only brings about an enforceable contract on the receipt of acceptance.[407] Aside from the ability of the promisor to make an offer binding (for a certain time period) before acceptance, the court may assume the formation of an enforceable sales contract when the offeror did not receive the acceptance of the offer (in time) due to an act of the offeror, or by persons for whom the offeror is responsible, or

405 Art 6:217(1) DCC.
406 Art 3:37(3) DCC.
407 Art 3:37(3) DCC.

due to other circumstances which are personal to the offeror and justify the detrimental effect imposed by the constitution of an enforceable contract between parties.[408] From the rule that acceptance, in order to be effective, only has to reach the promisor, it follows that it is not required that the promisor has actually taken note of the acceptance.[409] In contrast to the below discussed contract law of Singapore, the above-mentioned principles apply equally in instances of instantaneous and *inter absentes* communication. The promisor could prevent a sales contract from coming into being on receipt of the acceptance by sending a notice of withdrawal which must have reached the promisee before or at the same time as the offer.[410] It may be assumed that a promisor is entitled to withdraw revocable offers and offers which provide for their irrevocability (only effective offers are subject to revocability). In instances of a successful withdrawal, the offer does not become effective. Once an offer is effective, the promisor may revoke its offer as long as the offer has not been accepted and a communication accepting the offer has not been sent.[411] Revocation does not have a legal effect where the offer includes a period for acceptance, or it otherwise provides for its irrevocability.[412] Furthermore, the offeror is not able to revoke its offer where it promised to keep the offer open for a certain period.[413]

66. The contract law of Singapore entails the principle that an enforceable contract comes into being by the acceptance of a sufficiently definitive offer, provided that the requirement of a valuable consideration (*i.e.* something of value is given in exchange), and an objective intention to be bound is present. To determine the impact of the offer and acceptance model as a starting point for contract formation, it is important to take into account the distinction in Singapore between the common law rules on the constitution of a contract via instantaneous communication and *inter absentes* (*i.e.* by post).[414] Where the acceptance is made through instantaneous communication, the general rule applies that an enforceable contract is concluded once the acceptance is actually received by the promisor in the form of a written or oral declaration or by conduct.[415] This principle applies where commercial parties communicate face-to-face, or via telephone or fax. It appears that email and text messages (*e.g.* WhatsApp, WeChat) in most cases also qualify as instantaneous communication. There is, however, an exception in common law, which is referred to as

408 Art 3:37(3) DCC.
409 Hartkamp 2011 (n 80) para 38.
410 Art 3:37(5) DCC.
411 Art 6:219(1, 2) DCC.
412 Art 6:219(1, 2) DCC.
413 Hartkamp 2011 (n 80) para 40.
414 Examples of instantaneous communication are provided below.
415 Shenoy and Loo 2013 (n 13) paras 7.57, 7.58; Phang et al 2012 (n 112) para 03.116; Phang and Goh 2012 (n 318) para 152.

the 'postal acceptance' or 'mail box' rule.[416] From this rule it follows that acceptance sent by post (*i.e.* acceptance *inter absentes*) becomes effective, and thus brings about an enforceable contract, at the moment the acceptance is dispatched. It should, however, be noted that Singapore courts may take other factors into account to determine whether an enforceable contract came into being.[417] Nonetheless, the common law postal acceptance rule continues to hold a strong position in Singapore.[418] The aforementioned distinction between instantaneous and *inter absentes* communication should be taken into account when considering the instrument of revocation which allows the promisor to revoke its offer before acceptance, even if a time for acceptance is fixed by the promisor. This notion of free revocability of an offer holds the explanation that the law of Singapore is not familiar with the instrument of withdrawal. The effect of the revocation rule under the contract law of Singapore is that any action to revoke (or any attempt to terminate) an offer which has been accepted (and which therefore brings about an enforceable sales contract when consideration is provided) results in a breach of contract. Considering instances of offers *inter absentes,* the promisor is entitled to revoke its offer until the dispatch of the acceptance by the buyer. It may, however, be impossible for the promisor to determine the timeframe within which the offer can be revoked because the latter does not necessarily know when the acceptance is dispatched.[419] An offer made by instantaneous communication may also be revoked at any time before acceptance,[420] even if the offeror promised to keep the offer open.[421] However, in instances of instantaneous communication, the revocation becomes effective once it has actually been communicated (in writing, by word of mouth, or conduct) to the promisee; a mere mental assent is not sufficient. This principle contrasts to the rule that acceptance of an offer *inter absentes* must not necessarily have reached the promisor.[422]

67. The contract law of China act on the principle that a sales contract comes into being when the promisor receives the notice of acceptance of its offer (arrival rule).[423] It may,

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416 This English common law rule was adopted in Singapore by the Straits Settlement Court in *Lee Seng Heng and others v Guardian Assurance Co Ltd* [1932] SSLR 110.

417 Phang and Goh 2012 (n 318) para 160.

418 Phang and Goh 2012 (n 318) para 159.

419 Hunter 2017 (n 7) para 3.14.

420 *E.g., Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330 (SGHC); Phang and Goh 2012 (n 318) paras 126, 127; Shenoy and Loo 2013 (n 13) paras 7.34–7.38; Phang et al 2012 (n 112) paras 03.078, 03.080.

421 *E.g., Overseas Union Insurance Ltd* (n 420); Phang and Goh 2012 (n 318) paras 126, 127; Shenoy and Loo 2013 (n 13) paras 7.34–7.38; Phang et al 2012 (n 112) paras 03.078, 03.080.

422 See the English cases: *Routledge v Grant* [1828] 4 Bing 653; *Dickson v Dodds* [1876] 2 Ch D 463 at 472 and 474; *Mountford v Scott* [1975] 1 All ER 198; Shenoy and Loo 2013 (n 13) para 7.39; Phang et al 2012 (n 112) para 03.095.

423 Art 26 CCL; Larry A DiMatteo and Jingen Wang, 'CCL and CISG: A Comparative Analysis of Formation, Performance, and Breach' in DiMatteo and Chen 2017 (n 19) 470.

however, not be assumed that an offer (after dispatch but before acceptance) can be freely withdrawn or revoked by the promisor. By contrast, the specific rules on withdrawal and revocation drastically mitigate the sometimes perceived noncommittal nature of an offer.[424] A withdrawal notice must have reached the promisee (the recipient of the offer) before or at the same time as the latter receives the offer.[425] It is said that this rule applies to revocable and irrevocable offers.[426] Once an offer is received by the promisee it may only be revoked by the promisor before the notice of acceptance has been dispatched. This shows that a promisee can be rest assured that a sales contract comes into being by dispatching its acceptance, although a promisee may withdraw its acceptance before it reaches the promisor.[427] The aforementioned right of revocation is not unrestricted. An offer is irrevocable where it indicates a time for acceptance or otherwise explicitly states that the offer is irrevocable, or the promisee has reasons to believe that the offer is irrevocable and has already made preparations for the performance of the contract.[428] In this light, it is important to take note of the rule that acceptance of an offer must reach the promisor within the time limit as stated in the offer or, if no time is fixed, the acceptance has to reach the promisor within a reasonable time.[429] The promisee bears the risk of acceptance being delayed or getting lost. This risk is obsolete in instances of instantaneous communication because in these cases an offer has to be accepted immediately unless the parties agree otherwise.[430] If the promisee has no excuse for an overdue acceptance, the act of acceptance only constitutes a new offer, unless the promisor notifies the promisee in time that the acceptance is effective.[431] If an offer is accepted within the fixed time limit or within a reasonable time (if the offer did not entail a time limit for acceptance), but it reaches the promisor beyond the time limit due to reasons not attributable to the latter, the offer is regarded as accepted and an effective contract is concluded unless the promisor notifies the promisee in time that the acceptance is denied due to its delayed arrival.[432] This notification only gains effect if it has reached the promisee.[433] The premise that the receipt of acceptance after a fixed or a reasonable time may constitute a legally binding contract aligns with the value accorded to the act of promise making, which is reflected in the strict-liability principle discussed later. It also demonstrates the emphasis of the contract

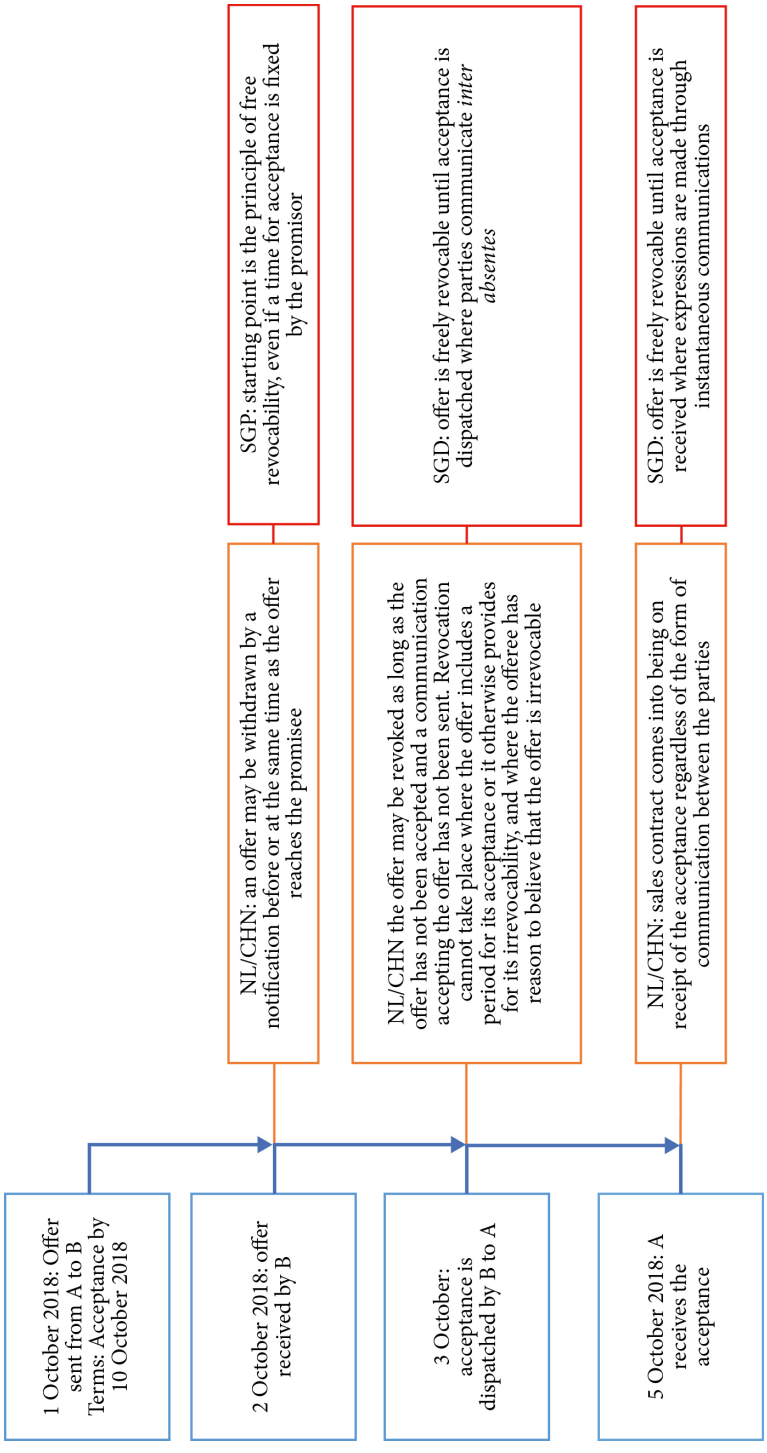
424 Art 17–19 CCL.
425 Art 17 CCL.
426 The rules on revocable offers are laid down in arts 18, 19 CCL.
427 Art 27 CCL; Bing Ling 2002 (n 229) para 3.024.
428 Art 29 CCL; see also art 16(2) CISG and art 2.4(2) PICC.
429 Art 23 (2) CCL; Liming 2016 (n 224) 37.
430 Art 23 (1) CCL; Liming 2016 (n 224) 37.
431 Art 28 CCL; Liming 2016 (n 224) 39 and 40.
432 Art 29 CCL; Liming 2016 (n 224) 38, 39.
433 Liming 2016 (n 224) 40.

law of China on the progressive stance towards the conclusion of contracts.[434] It is therefore understandable that it is stipulated that if an acceptance needs no notice, an effective contract is concluded when an act of acceptance is performed in light of trade practices or as indicated by the offer.[435] This form of implied acceptance also shows the positive approach of the contract law of China regarding trade transactions.

68. See Figure 7 following for the impact of the differences between the three investigated jurisdictions in view of the case mentioned under paragraph 64.

434 Liming 2016 (n 224) 41.
435 Art 26 CCL; Liming 2016 (n 224) 41.

Figure 7 Binding effect of offer and acceptance in light of the revocability of an offer



69. *Comparative analysis* – The three investigated jurisdictions all act on the notion that an offer may bring about an enforceable sales contract the moment its acceptance becomes effective (Singapore contract law also requires consideration). The unification instruments identified take the same approach.[436] They also acknowledge the noncommittal nature of an offer, although their approaches differ considerably. Where the Dutch and Chinese law adopted several exemptions in the form of rules on withdrawal and revocation and provide rules for irrevocable offers,[437] Singapore law generally acknowledges free revocability of an offer, even where the offer itself provides for its irrevocability. This means in effect that the freedom to revoke an offer also applies when a time period for acceptance is fixed by the promisor, which weakens the binding force of an offer. This principle derives from the common law doctrine of consideration which requires that a promise to keep an offer open for a certain period is exchanged for something else as a result of the bargain.[438] From a common law perspective, a fixed time for acceptance is generally interpreted as a period after which the offer merely lapses.

It appears that the efforts of the drafters of the CISG did not result in a successful merger of the two approaches described above. It follows from the Convention that an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable.[439] It is, however, not clear whether the mere fixing of a time period suffices to make an offer irrevocable. More importantly, Dutch and Chinese parties (and others with a civil law background) may interpret this provision as a rule providing for the irrevocability of an offer until the expiration of the time fixed in the offer. From the perspective of parties familiar with the law of Singapore, this rule could be interpreted as a confirmation of the common law principle that an offer must be accepted within the time fixed and that the offer lapses after expiration of this period. The PECL is much clearer in this regard by stipulating in unambiguous terms that an offer is revocable unless it indicates its irrevocability and if the offer entails a fixed time for acceptance.[440]

Notwithstanding the controversial issue of the irrevocability of an offer, it must also be noted that where the parties communicate *inter absentes* (*i.e.* by post), the timeframe for revocation of an offer is the same in the three investigated jurisdictions, as well as at the international level (*i.e.* an offer may be revoked before dispatch of acceptance).[441] As for the situation that the parties communicate via instantaneous communication methods

436 Art 23 CISG; Arts 2.1.1, 2.1.6 PICC; Art 2:205 PECL; Art II.4:205 DCFR.

437 In general, the rules on revocation of an offer apply where an offer has reached the promisee. An offer may be witdrawn before it reaches the promisee, *i.e.,* before it obtains effectivess; Withdrawal of an offer: art 15(2) CISG, art 2.1.3 PICC, art 1:303(5) PECL; Art II.-5:101 DCFR; Revocation of an offer art 16 CISG, art 2.1.4 PICC, arts 1:303(2)(6), 2:202 PECL; Art II.-4:202 DCFR.

438 Schwenzer, Hachem and Kee 2012 (n 13) paras 9.16, 10.26.

439 Art 16(2)(a) CISG.

440 Art 2:202(3)(a)(b) PECL.

441 Art 16(1) CISG; Art 2.1.4 PICC; Art 2:202(1) PECL; Art II.-4:202(1) DCFR.

(*e.g.* telephone, fax and electronic messages) there is, however, still a significant difference between the three investigated legal systems. In this situation, Singapore law acts on the notion that an offer may be revoked until its acceptance is received, rather than the moment the buyer dispatches its acceptance, as is the case under the contract law of the Netherlands and China, as well as the unification instruments. In other words, the contract law of Singapore strikes a different balance in cases of instantaneous communication by adopting the principle that offers are freely revocable, until the moment the notice of acceptance is received. That having been said, on an overall assessment, the discussed controversial issue of the irrevocability of an offer, and the divergence between the principles on the effectiveness of acceptance where the parties communicate via instantaneous communication methods, require more clarity for those involved in commercial sales contracts across civil and common law borders. This is particularly relevant for parties who are communicating via electronic messages. The international commercial courts in the three investigated jurisdictions may consider taking the lead in this regard by providing guidelines (on a case-by-case basis) when confronted with an enforcement dispute arising from the issues mentioned above.

3.4.5 Synallagmatic performances, cause or valuable consideration

70. *Preliminary* – One of the most fundamental differences between the investigated jurisdictions which is of paramount importance from the standpoint of parties involved in international commercial sales across civil and common law borders follows from the civil law concept of synallagmatic (reciprocal) promises, *cause* and the common law doctrine of consideration. From the perspective of the traditional common law viewpoint, the court would not find enforceable obligations where a benefit or detriment (*i.e.* consideration) is not exchanged by way of bargain, and where the promised performance is related to past performance of the promisee or where the reciprocal promise is illusionary in nature (see the example below). This means in effect that mutual assent arising from an offer and acceptance does not suffice. Put differently, the mutual assent only amounts to enforceable obligations if consideration is provided, although it is generally not taken into account whether the value of the promises is comparable or fair.[442] It is only required that the value of the promises are commercially measurable.[443] The requirement of consideration also

442 JF Burrows, J Finn and S Todd, *Law of Contract in New Zealand* (8th edn, Butterworths 1997) 103.

443 Petra Butler, 'The Doctrines of Parol Evidence Rule and Consideration -- A Deterrence to the Common Law Lawyer?' in *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* (Collation of Papers at UNCITRAL, SIAC Conference 22–23 September 2005, Singapore) <https://www.cisg.law.pace.edu/cisg/biblio/butler4.html#46> accessed 3 November 217.

applies to warranties made after the conclusion of the contract, and further arrangements regarding gaps in the initial contractual stipulations.

Generally, civil law jurisdictions take the approach that obligations assumed in the terms of the agreement may constitute a direct exchange of corresponding promises (synallagmatic). For example, the duty of the buyer to pay the sales price upon delivery of the goods by the seller. There are, however, also situations where the assumed obligations would not necessarily be characterized as synallagmatic. For example, where the terms of the agreement stipulate that the buyer is obliged to pay the purchase price if certain marketing targets of the seller are met. Although this obligation does not follow from a direct exchange of interrelated promises, the obligation is enforceable. The traditional civil law understanding even entails the notion that unilateral offers may suffice to constitute enforceable obligations. That said, certain jurisdictions which have historically drawn inspiration from French law are familiar with the requirement of cause (*e.g.* the Quebec Civil Code and the Italian Civil Code), to bring about an enforceable contract. The condition of a cause entails the notion that a contract is only valid if it has a cause and that cause is lawful. In the realm of sales contracts this means that the cause of the seller is payment of the purchase price and the cause of the buyer is to obtain ownership of the goods. However, the interests of a seller to a commercial sales contract can be severely affected when the court uses the absence of a cause to strike down an exemption or limitation clause. In 2016, the requirement of cause was removed from the French Civil Code because it was frequently used to interfere with contracts and, by doing so, causing uncertainty and controversy.[444]

The divergence between the required degree of reciprocity in civil and common law jurisdictions which suffices to constitute an enforceable obligation may cause significant difficulties for those doing business across civil and common law borders. Simply put, at one end of the spectrum, it is not compulsory that the assumed obligations are reciprocally binding. At the other end of the spectrum, it is required that the assumed obligations on either side are the counterparts and that consideration is given for each other. It appears that the drafters of the unification instruments have not managed to narrow the gap between the two viewpoints, and this thus remains an important legal barrier to international trade between parties from the two major legal families. Taking this into consideration, the present section discusses the direction in which the investigated jurisdictions have developed their legal principles in this regard and to what extent they are aligned with the unification instruments. The objective of this assessment is to determine whether the diversity between

444 Soléne Rowan, 'The new French law of contract' (2017) International & Comparative Law Quarterly; The requirement of consideration, which is not demanded by civil law, has led to many disputes involving sales that cross civil and common law jurisdictions; Mark B Wessman, 'Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration' (1993) 48 U. Miami L. Rev 48; Kevin J Fandl, 'Cross-Border Commercial Contracts and Consideration' (2016) 34 Berkeley J. Int'l Law 1, 3, 18; Treitel 1998 (n 55) 246; HW Ballantine, 'Mutuality and Consideration' (1914) 28(2) I, Harvard Law Review 121–134.

the rules on bringing about an enforceable commercial sales contract calls for closer attention in order to advance a legal climate which actually corresponds with the ambitions of the three investigated jurisdictions (chapter 1).

> *Illustration* – A manufacturer of electric vehicles, located in country A, sends a proposal encompassing a letter of support to a ridesharing taxi company, located in country B, indicating that it is able to supply ten electric self-driving cars when government approval is granted. After submission of the support letter, the local authorities provide the required licence for the usage, but the manufacturer refuses to deliver the cars on the basis of the argument that a recent merger of the taxi company resulted in a monopsony, because they will be in complete control of the market for the purchase of electric cars (for commercial usage) in country B. This position enables the ridesharing company to dictate the purchase prices of the cars for its fleet. As a result, it shall be most likely impossible for the manufacturer to make up for the losses incurred by investing in the pilot of the ridesharing company. In response to this declaration, the taxi company claims for the delivery of the electric cars under the terms as stipulated in the initial proposal. The manufacturer counterclaims that nothing in return was promised for the submission of the support letter and is, therefore, not obliged to deliver the electric cars.

71. *Domestic approaches* – The contract law of the Netherlands only requires a bilateral undertaking whereby one or more parties assume an obligation towards one or more other parties,[445] that is, each party has to undertake an obligation with the intention to produce juridical effects.[446] It is not required that the promises are synallagmatic – that is, the promised performance by one party does not have to be an exchange of a corresponding promise by the other party.[447] This approach follows from the notion that 'a promise against a promise' by nature provides the parties with an action on the case,[448] and it holds the explanation that the promises made by the parties do not have to reflect an inextricably linked exchange of benefit or detriment. However, where a contract does not include any benefit for the party who is obliged to act, the principle of reasonableness and fairness could result in a rejection of a claim for enforced performance if enforcement would be

445 Art 6:216(1) DCC; Hofmann 1976 (n 84) 5; De Jong, Krans and Wissink 2018 (n 194) 262; Hijma and Olthof 2017 (n 248) para 453.

446 Arts 3:33, 6:213(1) DCC; The required undertaking to assume an obligation explains why certain unilateral acts not comprising an obligation, such as as a notice of termination of a contract, notice of default and notice of liability, are not qualified as a contract.

447 De Jong, Krans and Wissink 2018 (n 194) 262; Hijma and Olthof 2017 (n 248) 453.

448 See the English case *Strangborough and Warner's Case* [1589] 4 Leo. 3; 74 E.R. 686; WJ Zwalve, *C.Æ. Uniken Venema's Common Law & Civil Law: Inleiding tot het Anglo-Amerikaanse vermogensrecht* (Boom Juridische uitgevers 2008) 503; Hartkamp 2011 (n 80) para 46.

unacceptable in the given circumstances.[449] It is however of paramount importance to note that the derogatory function of the standard of reasonableness and fairness is not easily applied and entails a significantly higher barrier than the supplementing function of the standard of reasonableness and fairness. In a similar vein, Dutch contract law entails the principle that a promisor cannot exercise its right to performance to the extent that it constitutes an abuse.[450] This suggests that where the promisee brings an action to court for enforced performance, the court may indirectly require a *cause* (*i.e.* the civil law equivalent of consideration) via administering the derogative function of the standard of reasonableness and fairness (which requires a manifestly unacceptable impact), and the rules on abuse of rights.[451] It is worth bearing in mind that the absence of a reciprocal promise in the aforementioned situations does not affect the existence of the obligation.[452] To resolve the legal impasse arising therefrom, the parties could alter the terms of their agreement on the basis of mutual consent.[453] However, the creation of an enforceable contract does not necessarily mean that the statutory sales law provisions apply.[454] Put differently: an enforceable contract is only subject to the rules on sales when it comprises an undertaking of one person to give a 'thing' in return for the promise of the other party to pay the price in money.[455] As shown in section 3.4.3, it is not required that the parties already agree on the details of the transaction, for example, the amount of money which is exchanged for the goods.[456] Nonetheless, a sales contract does not come into existence in the case of a fictitious purchase.[457]

72. The contract law of Singapore requires a valuable consideration for the formation of legally enforceable obligations.[458] In other words, whether consideration has been provided by the parties is one of the fundamental steps in determining the enforceability of

449 Arts 6:2(2), 6:248(2) DCC; Hartkamp 2011 (n 80) paras 33, 46.

450 Art 3:13(1) DCC.

451 HC Schoordijk, *Het algemeen gedeelte van het verbintenissenrecht naar het nieuw burgerlijk wetboek* (Kluwer 1979) 464.

452 This concerns cases where a valid contract has come into being, but enforced performance is not available by application of the derogative effect of the standard of reasonableness and fairness (which entails a significantly high threshold in the form of a manifestly unacceptable impact), and the rules on abuse of rights.

453 Hartkamp 2011 (n 80) paras 49, 173.

454 Wessels (n 368) 1, 2.

455 Art 7:1 DCC.

456 Art 7:4 DCC; the buyer owes a reasonable price; in determining that price, the prices stipulated by the seller at the time the contract was entered into are usually taken into account; See s 3.4.3.

457 Hijma, *Asser Koop en ruil* 7-I* 2013 (n 48) 208.

458 Phang et al 2012 (n 112) 195, 199; <http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-8> acccessed on 31 October 2017; *Bankers & Traders Insurance Co Ltd v Insurance Services* [1968–1970] SLR (R) 360; Phang et al 2012 (n 112) paras 04.002, 04.004; Goh Yihan and Yip Man, 'Past Consideration or Unconnected Consideration?' (2012) SAL Ann Rev 553.

contractual obligations. The requirement of a valuable consideration entails the notion that a sales contract must be the result of a situation where two parties expressly or implicitly undertake an obligation to exchange something of economic value for the performance of the other party (consideration does not need to be adequate).[459] The most common and straightforward type of consideration is that where a seller undertakes the obligation to deliver goods for a fixed sum which the buyer undertakes to pay.[460] In Singapore, the required valuable consideration for the formation of an enforceable contract is absent if the contract does not confer a benefit on the other party,[461] the promised performance is illusionary,[462] and where the contractual promise is solely the result of appreciation for previous performance(s) of the other contracting party.[463] For example, if parties to a cross-border sales contract agree on different quality standards for a certain product by modification of the original contract or by entering into a subsequent agreement, the promises of both parties must fulfil the requirements set out above. This means, in effect, that it does not suffice to refer to the obligations which already exist under the initial contract. It is important to note that the traditional usage of the past consideration principle is questioned in Singapore, as it is not uncommon for commercial parties to conclude a contract which, in essence, is inextricably linked with the previous performance of the other party.[464] For example, a manufacturer and a wholesaler conclude a sales contract which entails the promise of the manufacturer to reimburse a percentage of the sums paid by the wholesaler, but the provision does not refer to a specific period for which the discount is granted. After a year, the parties agree on the exact formula to calculate the amount recoverable by the wholesaler. From a traditional common law viewpoint, this subsequent agreement may be unenforceable by application of the past consideration rule.[465] However, the current viewpoint in Singapore case law suggests that the subsequent agreement entailing the formula to calculate the remuneration cannot be isolated from the original

459 For the assessment whether the considerations are exchanged, the court may rely on the core provisions of the contract (in conjunction with a recital) and consideration may be implied from other terms of the contract of conduct of the parties.

460 Treitel 1998 (n 55) para 189; Phang and Goh 2012 (n 318) para 205; Phang et al 2012 (n 112) para 04.001.

461 Where the sale entails a transaction of future goods, the parties only established an agreement to sell the goods (SGA, s 5(3)). An agreement to sell becomes a sale when the goods come into existence (SGA, s 2(6)).

462 *E.g.,* A agrees to pay B S$ 1 in exchange for B's promise to deliver 10 laptops. An enforceable contract is not established if these promises are not the result of an actually undertaking of the parties to commit to a certain risk.

463 In *Rainforest Trading Ltd v State Bank of India Singapore* [2012] 2 SLR 713 [at 34, 35, 36] the past consideration rule was affirmed and further clarified; Phang et al 2012 (n 112) para 04.011; Phang et al 2012 (n 112) 195, 199; Phang and Goh 2012 (n 318) para 213.

464 *Foo Song Mee v Ho Kiau Seng* [2011] SGCA 45; see Goh and Yip (n 458) 558 for a discussion about the English law cases *Dent v Bennett* [1839] 41 E.R. 105 and *Eastwood v Kenyon* [1840] 113 E.R. 482, which each underpin the view of the author that it does not matter if the consideration is past, but 'whether the promisor intended the consideration to be in exchange for the given promise'.

465 *Foo song Mee* (n 464) SGCA 45 [14].

sales contract.[466] It may be held that the sales contract, where no formula for the discount was inserted, is replaced by the agreement which stipulates the basis for a precise amount payable by the producer.[467] Based on this reasoning it may be held that in Singapore the traditional English rule of past consideration has evolved into a requirement of connectivity (*i.e.* connected considerations),[468] which better reflects the dynamics of commercial transactions. The willingness of Singapore to modernise certain legal common law doctrines is also reflected in the principle that the absence of a valuable consideration in an agreement between parties from different legal systems does not necessarily affect the enforceability of the promises made by the parties.[469]

73. According to the contract law of China, a contract requires an agreement between two equal parties comprising an undertaking to establish one or more rights and obligations.[470] It is not required that the performance promised by one party is to be exchanged for that of the other. Hence, the common law concept of consideration does not apply to contracts subject to the contract law of China.[471] In view of the above it appears that unilateral and bilateral promises suffice to establish an enforceable contract if all other requirements for the undertaking of offer and acceptance are fulfilled (*e.g.* the notice of acceptance has reached the promisor).[472] This clarifies why a promise to deliver a certain product or to perform a service without receiving an enforceable obligation in return may bring about a valid contract.[473] This situation occurs where parties enter into a loan, deposit, carriage and gift contract.[474] For example, A agrees to sell a number of large tents and accessories to B. In a subsequent agreement the parties stipulate that B may use the lorries of A to transport the goods to the airport. Two months prior to shipment, A informs B that the lorries are not available. B claims for enforced performance of the promise that the lorries can be used to transport the goods to the airport, and A argues that the subsequent agreement is not enforceable because B offered nothing of value in return. Assuming that the initial agreement is subject to the contract law of China, the undertaking of A to provide the lorries qualifies as an enforceable contractual obligation. Consequently, A is entitled to bring an action to court for enforced performance under the general contract law

466 *Foo song Mee* (n 464) SGCA 45 [20].
467 *Foo song Mee* (n 464) SGCA 45 [20].
468 Goh and Yip (n 458) 560, 564.
469 <http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-8> accessed on 16 July 2018.
470 Liming 2016 (n 224) 3; Zhang 2006 (n 41) 70, 91.
471 Chuan Feng 2016 (n 38) 131.
472 Arts 25, 26 CCL; Liming 2016 (n 224) 3.
473 Arts 4, 8 CCL; Martin Hogg, 'A Scottish Perspective' in DiMatteo and Chen 2017 (n 19) 118; Zhang 2006 (n 41) 70; Bing Ling 2002 (n 229) paras 1.004, 1.005.
474 Bing Ling 2002 (n 229) paras 3.045–3.050.

principles. That said, for application of the sale law principles, reciprocity is required, in the sense that the agreement between the parties must entail the mutual consent concerning the promise of the seller to transfer the goods and the promised performance of the buyer to pay the agreed price.[475] This means in effect that where the aforementioned level of reciprocity is missing, the specific sales law provisions are not applicable, but it does not detract in any way from the result that a valid and enforceable contract is concluded which is subject to the general contract law principles. Nonetheless, it is submitted that the courts may avoid a commercial sales contract where the stipulated price is inadequate to provide the seller the very thing it bargained for.

74. *Comparative analysis* – The distinct view of the investigated legal systems on the required degree of reciprocity for establishing an enforceable sales contract may give rise to significant risks in international trade. In particular, when a party is located in a civil law jurisdiction which did not adopt the legal concept of cause,[476] such as the Netherlands and China, enter into a contract with a party from a common law system, such as Singapore.[477] The difficult issue of the divergence in the required degree of reciprocity appears to be 'fixed' by the unification instruments by excluding the common law requirement of consideration, and the French civil law requirement of a (licit) *cause*,[478] for establishing an enforceable contract.[479]

The CISG has taken the approach that a contract is concluded at the moment of an effective acceptance of an offer, which is sufficiently definite and indicates the intention of the promisor to be bound.[480] A form of cause or consideration is not required. The other unification instruments circumvent the issue of cause and consideration in a similar way

475 Art 130 CCL; Zhang 2006 (n 41) 36, 68; Bing Ling 2002 (n 229) para 1.004, para 3.002, para 3.006; Art 324 (3) CCL prescribes that essential terms that must be included in a technology contract; Compare art 5(2) of the Regulation on the Administration of Contract for the Import of Technology.

476 As mentioned earlier, the French civil law inspired requirement of cause is the equivalent of the common law doctrine of consideration to the extent that the contract is based on a legally valid reason. The French civil law concept of subjective cause is, however, different from the common law concept of consideration in the sense that the reason of a commercial party to bind themselves need not be to obtain something in return. The concept of objective consideration (*i.e.* acquisition of ownership and payment of the purchase) displays greater similarities with the common law concept of consideration.

477 N 444 above.

478 The term cause refers to the expected counter performance. In the French civil law tradition, a distinction is made between the objective cause (*e.g.* acquisition of ownership and payment of the price) and the subjective cause. The subjective cause differs per situation. It is noteworthy that the French Civil Code abandoned the concept of cause as from 1 October 2018; Vogenauer 2015 (n 19) Art 3.1.2, para 5. The contract law of the Netherlands and China follows the Germanic view on contracts, with no requirement of *cause*, nor are the jurisdictions familiar with the concept of consideration.

479 Schwenzer 2016 (n 91) art 11, para 13; Vogenauer 2015 (n 19) art 3.2.1 paras 1–8; Schwenzer, Hachem and Kee 2012 (n 13) para 9.05; Dimitar Stoyanov, 'Causa and Consideration – A Comparative Overview' (2016) 23 Lex ET Scientia Int'l J. 14, 30.

480 Arts 14(1), 23 CISG.

by adopting minimum substantive requirements for bringing about a commercial contract.[481] It is submitted here that this simple, clear and uniform approach taken by the unification instruments has removed any potential legal barrier for international trade following from the distinct requirement of cause and its functional common law equivalent in the form of the requirement of consideration.[482] This means in effect that where the unification instruments apply, commercial parties may assume that an enforceable sales contract is concluded if the relevant requirements are fulfilled, even if there is no cause or consideration. These domestic validity rules are pre-empted in the unification instruments by the rules on contract formation.[483]

That having been said, it seems that the gap is also narrowed at the national level; that is, it appears that Singapore courts have adopted a less restricted view on the traditional common law requirement that the reciprocal promises of the parties must arise from a real bargain, which is not related to a previous performance. This more open approach has narrowed the gap with civil law jurisdictions, which do not require that the promises made by the parties are supported by a cause, such as the Netherlands and China. However, it must be stressed that the investigated legal systems still have a diametrically opposed view on the enforceability of gratuitous promises. For example, a unilateral undertaking of a commercial party, such as a gratuitous promise to deliver ten electric cars to a ridesharing company for an innovative pilot project entailing the usage of these cars on public roads (see the example mentioned under paragraph 70) may have no binding effect in common law because nothing of value is provided in return. Another striking example is a promise of the seller to reimburse a percentage of the invoices paid over a designated year. In contrast to the Netherlands and China, these (sometimes entirely commercially sensible) unilateral promises are not enforceable in Singapore due to the requirement of reciprocity, which means that the contract must comprise an exchange of risks. Taking this into account along with the far-reaching impact of the common law doctrine of a valuable consideration, a sales contracts involving parties from the three investigated jurisdictions may induce serious enforcement risks which are not countered by the CISG. That being the case, the modern viewpoint of the Singapore courts has paved the way to bridging the gap between the thresholds for establishing an enforceable reciprocal sales contract by parties involving both Singapore and civil law jurisdictions, such as the Netherlands and China.

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481 Art 3.2.1 PICC; Art 2:101(1) PECL; Art II.-4:101 DCFR.

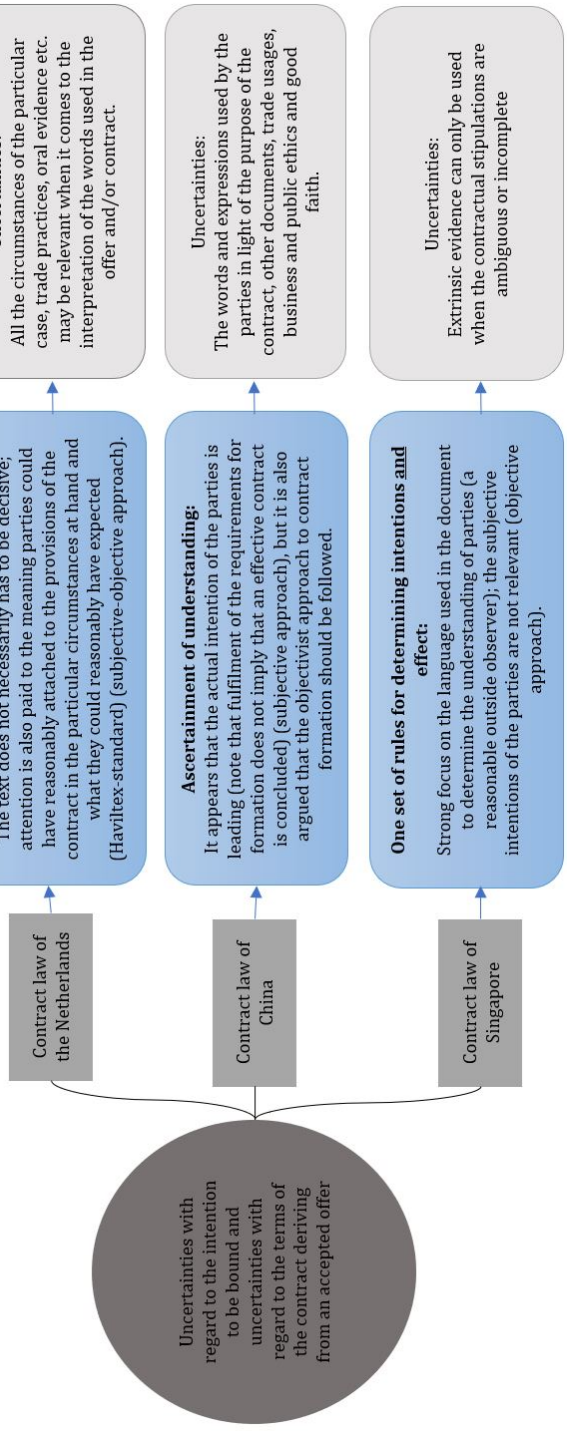
482 Schwenzer 2016 (n 91) art 11 para 13, intro to arts 14–24 para 3; Vogenauer 2015 (n 19) art 3.2.1 para 6, 9; Schwenzer, Hachem and Kee 2012 (n 13) paras 9.03, 9.07, 9.11, 9.12, 9.13–9.25; Stoyanov (n 479) 14, 30.

483 Schwenzer 2016 (n 91) art 11, para 13, intro to arts 14–24, para 3; Vogenauer 2015 (n 19) art 3.2.1 para 6, 9.

3.4.6 Conclusions

75. The contract law of the Netherlands, Singapore and China are familiar with rules on contract formation, although a comparison of the fundamental steps in determining the legally enforceability of a contract reveals important differences between the thresholds for bringing about enforceable obligations. Before diving into a comparative analysis of the disagreement between the subject legal systems, Figure 8 below presents the interplay between the discussed principles. This illustration is particularly useful where there is a disagreement about the existence of an intention to be bound and the understanding of the promised performance. For example, A offers in writing to sell a recycling line for plastic for €100,000 or €500,000. B accepts in writing the offer, but (at the same time) A revokes the offer. In this situation, it is important to take into account that there are significant differences when considering the rules on offer and acceptance (see Figure 7), and the principles for determining the intention and understanding of parties (Figure 8). The civil law notion of good faith, the common law institution of implied terms, and law of evidence play an important role in determining as to whether the offer (upon its acceptance) suffices to establish an enforceable contract and the scope of the assumed obligations. It is therefore, that Figure 8 below also reveals a difference between the contract law of the Netherlands and China, which allows for a holistic assessment of the requirements for contract formation and interpretation of contractual terms, and the Singapore contract law approach which is primarily concerned with the objective expressions of the parties.

Figure 8 Principles for determining the intention and understanding of parties



76. The discussion in this section shows that the unification instruments identified do not provide solutions which bridge the gap between the identified opposing viewpoints. There are four important issues in this regard, which (as later shown) are directly linked with the availability of enforced performance in the three investigated jurisdictions. The first issue concerns the methods of contract formation. The contract law of the Netherlands and China (in line with the PICC, PECL and DCFR) appear to have adopted the most liberal approach towards the notion that a contract can be inferred from an offer and acceptance, but also from conduct that is sufficient to show agreement. It seems that the courts of Singapore are more hesitant to recognise alternative methods of contract formation where there are not clearly identifiable elements of offer and acceptance. This approach is in line with the CISG, which (as shown by the drafting history) requires that the courts take great care in evaluating if it is possible to discern from other sources consensus of the parties and the minimum content required for a contract. As for the required consensus of parties (including the intention to be bound), the analysis of the approaches taken by the investigated legal systems reveals a sliding scale from the requirement of objective intentions to be bound to subjective intentions. As a general proposition, it can be said that the contract law of Singapore and China have adopted a more absolute approach as they show a strong preference for objective and subjective intentions respectively (it should be recalled that it is also argued that the objectivist approach prevails under Chinese contract law). The Dutch contract law holds a middle-ground position in this regard. These findings display that the investigated legal systems mark the border between non-binding promises and an enforceable contract quite differently, although there is an important common denominator in the form of the benchmark of a reasonable person, a basic principle which is also acknowledged by the unification instruments identified.

The analysis of the required level of minimum content, which applies to all methods of contract formation, reveals a second important difference between rules on contract formation, in particular when there is no provision for the purchase price or a method for determining the price. The common core is that the investigated legal systems allow for the formation of a commercial sales contract in this situation, although where the buyer is obliged to pay the market price under the contract law of China, the contract law of the Netherlands and Singapore demands that the buyer pays a reasonable price. That having been said, the three investigated jurisdictions, as well as the unification instruments, accept that a commercial sales contract may come into existence where a price had not been fixed. The danger lies more in the means for determining whether the required level of determinability of the *essentialia negotii* is present. When considering the impact of the parol evidence rule in this regard, which is of significant importance in the contract law of Singapore, it appears that a more liberal approach is adopted by the contract law of the Netherlands and China. The aforementioned considerations show that the latter two

jurisdictions allow for a quite flexible interpretation of legal principles when taking into account the limitations of the discussed common law doctrines.

The impact of the above-described distinction is most apparent when considering the third difference, which is caused by distinct notions of the bindingness of an offer and acceptance. Where the applicable rules under the contract law of the Netherlands and China favour the position of the promisee, the contract law of Singapore generally protects the interest of the promisor. The unification instruments give consideration to both approaches by adopting a general rule of free revocability, although the instruments vary considerably in the way they have limited the impact of this rule.

The fourth and last identified issue is closely connected with the previous points. In essence, where the contract law of the Netherlands and China allows for a flexible interpretation of legal principles within the boundaries provided by the law, the contract law of Singapore follows the common law more conservative approach towards the interpretation of applicable rules and doctrines, although it allows for a significant degree of judicial control. This point is clearly reflected in the common law concept of consideration which requires that parties exchange a benefit and detriment (not related to a past performance). Where the agreement does not display an exchange of value, a valid and thus enforceable contract does not come into being. Moreover, the concept of consideration, as an important pillar of the contract law of Singapore, provides the court a significant level of control over the formation of an enforceable contract. In this regard, the unification instruments are completely in line with the contract law of the Netherlands and China as they are not familiar with the concepts of cause and consideration. It is submitted here that a new approach may be considered at the international level, which, at the very least, reflects the legal traditions described above (harmonising seems impossible). This undertaking must be carried out in view of the fact that the previously discussed domestic thresholds for the formation of a commercial sales contract are closely related to the availability of the actual enforcement of a contract.[484] This is because legal principles in the realm of commercial sales contracts are in essence the result of favouring the protection of the buyer's or seller's interest.[485]

3.5 Conclusions

77. The present chapter aims to define the ambit of a commercial sales contract to disclose the underlying principles for the boundaries set out in the three investigated jurisdictions, and to identify where there are differences or difficulties in view of the approaches taken

484 Ch 4.
485 S 4.2, 4.3, 4.4.

by the unification instruments identified. On an overall assessment, it appears that the investigated legal systems can be divided into two groups. The first group equates the concept of a sale with the juridical act of the conclusion of a sales contract, allow for a broad interpretation of the goods which may be the object of a sales contract and employ a liberal attitude towards the rules on contract formation. The contract law of the Netherlands and China fall into this category. Nonetheless, there are significant differences in the power of the courts to limit the impact of the obligations assumed in an offer. In the case where the contract law of the Netherlands applies and the aggrieved party argues that the offer demonstrates a gross disparity between the purchase price and the value of the goods and therefore a valid contract has not come into existence, a court may only act in exceptional situations. The thresholds for doing so are significantly lower under the contract law of China due to the principle that courts may interfere where adoption of a price is commissioned by the government or based on government-issued pricing guidelines is required by law.

The second group utilises a narrower definition of goods which may be subject to a sales contract, and the parties are generally not allowed to go beyond the applicable legal doctrines for contract formation. That is, the conclusion of a contract on the basis of alternative methods of contract formation (other than offer and acceptance) is only allowed in exceptional situations, the rules on the required consensus of the parties and the minimum content of their agreement are very strict, and the bargain has to reflect an exchange of a benefit and detriment (not related to a past performance). The contract law of Singapore falls into the second category.

The different approaches discussed above require that commercial parties pay careful consideration to the principles and rules for determining the scope of the buyer's and seller's performance obligations assumed in the offer which intend to bring about a commercial sales contract across civil and common law borders, more precisely when it concerns parties from the three investigated jurisdictions. This, in effect, means that commercial parties accustomed to the protective nature of the civil law tradition should be specifically aware of the implications of the ability of common law courts to seek recourse to the instrument of implied terms, the common law parol evidence rule and the doctrine of valuable consideration under Singapore contract law.[486] By contrast, commercial parties more familiar with the common law tradition may take note of the general civil law notion of good faith and the inextricably linked power of the courts in the Netherlands and China

486 The common law parol evidence rule brings about that evidence arising from the negotiations between the parties is not allowed for determining the extent of the performance of the parties when the terms of agreement are clear on the matter and represent the whole contract (s 3.4.3). In this regard it should also be noted that the doctrine of a valuable consideration is generally not concerned with a gross disparity between the assumed obligations (s 3.4.5).

to interfere with the obligations of the parties deriving from the accepted offer, although it should be noted that the thresholds differ significantly.

The distinction between the first and second group seems to be driven by the need of the discussed principles to protect different interests, which can be traced back to the civil and common law origin of the three investigated jurisdictions. This means in effect that although the contract law principles of the Netherlands and China are quite different in the way they operate, their shared civil law roots display an open attitude towards the promises which are provided legal protection. By contrast, the common law origin of the contract law of Singapore reveals a more protective approach arising from a need to clearly define the scope of the promises which deserve legal protection. The extent to which these considerations are correlated to the availability of enforced performance of non-monetary obligations arising under a commercial sales contact is presented in the final conclusion.[487] However, it should already be noted at this point that the unification instruments identified display a strong preference in this regard for certain elements of the civil law approach, which can also be found in the contract law of the Netherlands and China. Without calling into question the justifications for the choices made, it seems fair to say that this one-sided approach is a major bottleneck for bridging the gap between the civil and common law traditions at the international level. That said, the modern approach taken by Singapore courts may provide inspiration for consolidation of the domestic viewpoints at the international level.

487 Ch 9.