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Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules

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Abstract—The article examines how the rules on formation of contract and on mistake, contained in the various transnational model rules that have been published over the past two decades, have taken shape. The approach adopted here is based on an analysis of the ‘textual stratification’ of European private law. The relevant instruments (Convention on Contracts for the International Sale of Goods, Principles of European Contract Law, UNIDROIT Principles of International Commercial Contracts, Draft Common Frame of Reference, *Principes contractuels communs*) are analysed and compared in their historical sequence. To what extent and why have the texts been transformed in the process? The article demonstrates that there is a very considerable common ground reflecting the state of the art of comparative research in these fields over the past hundred years. It also highlights issues on which consensus must still be reached and it suggests patterns towards reaching such consensus. It is argued that the Principles of European Contract Law, rather than the Draft Common Frame of Reference, should provide the point of departure for future discussions. The scene for the article is set by a critical examination of the concepts of contract and legal act, as used in the Draft Common Frame of Reference.

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The model rules under discussion are abbreviated throughout as follows:

ACQP I/II: the Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles): Contract I* (Sellier 2007); *Contract II* (Sellier 2009).

DCFR: C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition, 6 vols (Sellier 2009).

PCC: Association Henri Capitant, Société de Législation Comparée, *Projet de Cadre Commun de Référence—Principes contractuels communs* (Société de Législation Comparée 2008); for an English version (black-letter rules only) see B Fauvarque-Cosson and D Mazeaud (eds), *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules* (Sellier 2008) 573–614.

PECL: *Principles of European Contract Law*, O Lando and H Beale (eds), *Principles of European Contract Law*, Parts I and II (Kluwer 2000); O Lando, E Clive, A Prüm and R Zimmermann (eds), *Principles of European Contract Law*, Part III (Kluwer 2003).

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1. Introduction

With his *History of Roman Legal Science* in 1946, Fritz Schulz created a research method that became known as *Textstufenforschung*, ie the study of the history of the alteration, or ‘stratification’, of texts.¹ The Roman texts from antiquity had been revised and altered not only by Justinian’s compilers, but also already in the post-classical, pre-Justinianic period. They have, therefore, a checkered history that needs to be unravelled in order to be able to understand the development of specific concepts and ideas.² In the future, the notion of *Textstufenforschung* may experience a renaissance in the domain of modern European private law. For here, too, alterations have to be analysed to which key texts in the development of European private law have been subjected.³ Within few years, a large number of ‘restatements’, or non-legislative codifications,⁴ of European contract law have been presented, resulting in a ‘new complexity’ (*Unübersichtlichkeit*)⁵ of texts. The aim of this article is to analyse this state of the law, and to develop means of coping with, or even reducing, this new *Unübersichtlichkeit*.

A. Principles of European Contract Law

The Principles of European Contract Law (PECL) are a core instance of such a text. They mark a first attempt to consolidate and crystallize, by means of establishing a set of general rules, the *acquis commun*, ie the tradition of private law laid down in the national legal systems of Europe.⁶ The PECL may be taken to constitute a general conceptual and systematic foundation for the process of the harmonization of European contract law. In particular, they offer a neutral reference point for an organic assimilation of private law—one which can serve (and does, indeed, increasingly serve) as a source of inspiration for

PICC: UNIDROIT (ed), *UNIDROIT Principles of International Commercial Contracts 2004* (UNIDROIT 2004).

¹ See W Ernst, ‘Fritz Schulz (1879–1957)’ in J Beatson and R Zimmermann (eds), *Jurists Uprooted* (OUP 2004) 176ff. The idea has been further developed by F Wieacker, *Textstufen klassischer Juristen* (Vandenhoeck & Ruprecht 1960).

² H-D Spengler, ‘Textstufenforschung’ in H Cancik, H Schneider and M Landfester (eds), *Der Neue Pauly* vol 15/3 (Metzler 2003) 394–96.

³ See R Zimmermann, ‘Textstufen in der modernen Entwicklung des europäischen Privatrechts’ [2009] *Europäische Zeitschrift für Wirtschaftsrecht* 319.

⁴ On this concept, see N Jansen, *The Making of Legal Authority* (OUP 2010) 5ff.

⁵ See Zimmermann (n 3) 322.

⁶ R Zimmermann, ‘Principles of European Contract Law (PECL)’ in J Basedow, KJ Hopt and R Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* (forthcoming) (hereafter *MaxEuP*).

the traditional agents of legal development in Europe: legislators, judges and professors.⁷ In so far as the PECL may influence the development of private law, they are only able to do so *imperio rationis*,⁸ because they are perceived as a body of rules providing solutions that are both reasonable and free from national bias. It is of significance in this regard that the PECL were developed by a commission of jurists from (at that time) all European Union (EU) Member States; that no national legal system was taken as a model; and that an attempt was made to distil a common core of contract law shared by all Member States and to establish on that basis a workable system.⁹

B. Draft Common Frame of Reference and Principles of International Commercial Contracts

The significance which the PECL have obtained in the international discourse is evident not least in their having become the starting point of an even more ambitious project aiming at the codification of central areas of patrimonial law at large in Europe: the Draft Common Frame of Reference (DCFR).¹⁰ Books II and III of the DCFR rest upon the PECL. However, in the process of drawing up the DCFR, the PECL have been revised.¹¹ Two versions of the DCFR have subsequently been published: the *Interim Outline Edition* in February 2008¹² and the *Outline Edition* in February 2009.¹³ Further, the text of the *Outline Edition* is not entirely identical to that of the *Full Edition* of October 2009.¹⁴

At the same time, however, a joint working group of the *Association Henri Capitant* and the *Société de Législation Comparée* produced a revised version of the PECL, at first (with commentary) in French, then also (limited to the

⁷ R Zimmermann, 'The Principles of European Contract Law' in F Faust and G Thüsing (eds), *Beyond Borders—Symposium in Honour of Hein Kötz* (Heymanns 2006) 141ff.

⁸ For a discussion of legal authority during the era of the *ius commune*, see Jansen (n 4) 28ff; N Jansen and R Michaels, 'Private Law and the State' (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 345.

⁹ The PECL conceive themselves to be a kind of 'restatement' of European contract law. Their authors realized, however, that they were confronted with a 'more creative' task than the draftsmen of the American Restatements: PECL xxvi. On the American and European restatements, see R Michaels, 'Restatements' in *MaxEuP* (n 6); Jansen (n 4) 50ff; N Jansen and R Zimmermann, 'A European Civil Code in All But Name' (2010) 69 *CLJ* 98.

¹⁰ See R Zimmermann, 'Common Frame of Reference (CFR)' in *MaxEuP* (n 6).

¹¹ See H Eidenmüller, F Faust, HC Grigoleit, N Jansen, G Wagner and R Zimmermann, 'The Common Frame of Reference for European Private Law' (2008) 28 *OJLS* 659; T Pfeiffer, 'Von den Principles of European Contract Law zum Draft Common Frame of Reference' (2008) 16 *Zeitschrift für Europäisches Privatrecht* (hereafter *ZEuP*) 679; B Jud, 'Die Principles of European Contract Law als Basis des Draft Common Frame of Reference' in M Schmidt-Kessel (ed), *Der gemeinsame Referenzrahmen* (Sellier 2008); S Whittaker, 'A Framework of Principle for European Contract Law' (2009) 125 *LQR* 616.

¹² C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Interim Outline Edition* (Sellier 2008).

¹³ C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Outline Edition* (Sellier 2009).

¹⁴ On the revision of the *Interim Outline Edition* by the *Outline Edition*, cf C von Bar, Clive and Schulte-Nölke, 'Introduction' in von Bar, Clive and Schulte-Nölke, *Outline Edition* (n 13) 46 [26]ff; on (editorial) changes in the *Full Edition* as against the *Outline Edition*, cf C von Bar, Clive and Schulte-Nölke, 'Introduction' in DCFR I [3].

revised provisions) in English.¹⁵ Apart from international documents, the joint working group bases its 'analyse comparée' upon the *Avant-projet de réforme du droit des obligations et de la prescription*¹⁶ and the so-called Gandolfi proposal [*Code Européen des contrats (Avant-projet)*],¹⁷ ie upon a national (French) and a nationally inspired (Italian) legal text. Although both French groups belong to the CoPECL-Network, financed by the European Commission and charged with the development of a draft for a *Common Frame of Reference* (CFR),¹⁸ the two working groups that actually played the decisive role in the development of the DCFR (the *Study Group*¹⁹ and the *Acquis Group*²⁰) did not take account of this French proposal. That may have been due to the time pressure to which the whole project was subject. In any case, as a result there are now the PECL in their original version; two modified versions attributable to the authors of the DCFR; and a revision carried out by French authors. In the present article, these texts will be compared with each other.

A further project of transnational harmonization will also be considered for the purposes of this comparison: the UNIDROIT *Principles of International Commercial Contracts* (PICC).²¹ The PECL and the PICC are in many ways comparable with one another.²² Moreover, they were created at approximately the same time. Each of the commissions responsible for the two sets of model rules noted the work of the other, and at many points both commissions influenced one another. Also, in terms of content, there is a large degree of correspondence. This makes an analysis of the existing differences of detail all the more interesting.

Finally, the *Acquis Principles* of the aforementioned *Acquis Group*²³ have to be taken into consideration. These were designed to supplement the PECL with respect to one issue that had been very largely disregarded by their draftsmen: the *acquis communautaire*, in particular in the field of consumer contract law. The *Acquis Principles* thus constitute, alongside the PECL, a further important body of European private law. The rules from the first edition (ACQP I) have been incorporated, sometimes unchanged but more often in revised form, in

¹⁵ See * on first page.

¹⁶ See J Cartwright, S Vogenauer and S Whittaker (eds), *Reforming the French Law of Obligations* (Hart 2009).

¹⁷ cf R Zimmermann, 'Der "Codice Gandolfi" als Modell eines einheitlichen Vertragsrechts für Europa?' in *Festschrift für Erik Jayme* (Sellier 2004) 1401–18.

¹⁸ On the *Joint Network on European Private Law* (CoPECL) see <<http://www.copecel.org>> accessed 20 May 2011; on the *Common Frame of Reference-project*, see W Ernst, 'Der "Common Frame of Reference" aus juristischer Sicht' (2008) 208 AcP 248; R Zimmermann, 'European Contract Law: General Report' in *Europäischer Juristentag* (ed), 4. *Europäischer Juristentag* (Manz 2008) 195ff.

¹⁹ cf M Schmidt-Kessel, 'Study Group on a European Civil Code' in *MaxEuP* (n 6).

²⁰ On which, see HC Grigoleit and L Tomasic, 'Acquis Principles' in *MaxEuP* (n 6).

²¹ cf MJ Bonell, *An International Restatement of Contract Law* (3rd edn, Transnational Publishers 2005); J Kleinheisterkamp, 'UNIDROIT Principles of International Commercial Contracts (PICC)' in *MaxEuP* (n 6); Jansen, *Authority* (n 4) 66ff.

²² R Zimmermann, 'Die UNIDROIT-Grundregeln der internationalen Handelsverträge 2004 in vergleichender Perspektive' (2005) 13 ZEuP 264.

²³ See * on first page. On the content of the *Acquis Principles* and the methodical programme on which they are based, see—with reference to ACQP I—N Jansen and R Zimmermann, 'Restating the *Acquis communautaire*?' (2008) 71 MLR 505.

Books II and III of the DCFR; at the same time they underwent a revision themselves, resulting in a second edition (ACQP II).

In view of the great number of existing texts, and of the scope of the PECL, we restrict ourselves to the rules relating to the formation of contracts and mistake. These subjects have been, for decades, a prominent concern of comparative law. Moreover, these areas lend themselves to a first exploration in a genetic perspective for, unlike in the areas of assignment, representation or contracts in favour of a third party, the authors of the DCFR have not fundamentally revised the PECL. It is therefore not necessary to explore, once again, the historical and comparative dimensions of the problems under consideration. Rather, the original text of the PECL may form the starting point, and it will be investigated whether and to what extent the revisions have brought about changes and, possibly, improvements. At the same time we will ask how the PECL and the PICC relate to one another.

2. System and Definitions

A. The Concept of a Juridical Act

Chapter 2 of the PECL (Formation) is split into three sections: General Provisions; Offer and Acceptance; and Liability for Negotiations. The DCFR has removed the third section and placed its two provisions in a newly incorporated chapter with the title ‘Marketing and pre-contractual duties’ (Articles II.–3:101ff DCFR). The third section of the chapter on formation now deals with ‘Other juridical acts’. This marks a doctrinally significant distinction between PECL and DCFR: the DCFR conceptualizes a contract as a ‘bilateral or multilateral juridical act’.²⁴ The introduction of this overarching systematic category is somewhat surprising in view of the fact that in modern comparative law scholarship it has been widely dismissed. Thus, for Zweigert and Kötz the juridical act is ‘far too abstract a notion’.²⁵ Ranieri also, on the basis of his comparative and historical analysis, arrives at the conclusion that the notion of a juridical act is probably not more than ‘a historical remnant of a tradition of legal scholarship whose function in contemporary European civil law may be taken to be exhausted’.²⁶ Moreover, despite its widespread reception in continental legal doctrine,²⁷ it cannot be considered to be part of the *acquis commun* which the DCFR would just have ‘restated’. This is demonstrated already by the fact that it is very difficult to find a suitable

²⁴ Art II.–1:101(1) second sentence DCFR; cf also *Comment A*. It would have been more natural to relate the definition of contract directly to that of the juridical act: ‘A contract is a juridical act which...’.

²⁵ K Zweigert and H Kötz, *An Introduction to Comparative Law* (T Weir tr, 3rd edn, OUP 1998) 146.

²⁶ F Ranieri, *Europäisches Obligationenrecht* (3rd edn, Springer 2009) 150.

²⁷ *ibid* 135ff; Zweigert and Kötz (n 25) 147–48.

English translation for the term.²⁸ Unsurprisingly, therefore, the reaction to this conceptual innovation in the DCFR was critical. It has been considered a piece of the ‘stringent, but incomprehensible logic... borrowed from German law’,²⁹ and as an element which could lead legal historians at some time in the future to conclude that the DCFR is in its structure the BGB (Bürgerliches Gesetzbuch) translated into English.³⁰ It is not difficult to assess the significance of such a perception for the DCFR’s pan-European acceptance. As a historical curiosity it may be noted that, at the same time as the *Full Edition* of the DCFR appeared, the first textbook was published in Germany, the country in which the notion of the juridical act was once conceived, that follows the tradition of English law by giving pride of place to the notion of ‘contract’ and by entirely dispensing with the doctrine of juridical act.³¹

It has rightly been pointed out that the debate over the value of the doctrine of juridical act is of little practical consequence.³² It is also correct that the concept of juridical act is, or can be useful, for legal doctrine.³³ But that is not to say that it should become a central systematic category for structuring a codification. At any rate, it is not advisable to fix a legal definition for such fundamental dogmatic categories in the manner envisaged by the DCFR. Its Article II.–1:101(2) states that a juridical act is any ‘statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such’. The core example of a juridical act is a contract. Further examples provided by the commentary are offers, acceptances, unilateral grants of authority to act as a representative, notices of termination or avoidance, and unilateral promises.³⁴ Notices of set-off and the constitution of a trust are also, in terms of the definition provided in the DCFR, juridical acts. Though Article II.–1:102(2) DCFR corrects the earlier provision of the Interim Outline Edition,³⁵ it still remains unclear what is meant by a statement or agreement intended to have legal effect ‘as such’. No clarification is provided in the *Comments*. Does it mean that the legal effect occurs without any further requirements? An offer is to lead to a contract—the effective conclusion of which, however, requires its acceptance and thus a declaration on the part of the offeree. An offer does not therefore lead ‘as such’, or directly, to the intended legal consequence. According to § 145 BGB, an offer has legal effect

²⁸ Tony Weir, for example, translates the concept as ‘legal act’: Zweigert and Kötz (n 25) 146.

²⁹ O Lando, ‘The Structure and the Legal Values of the Common Frame of Reference (CFR)’ (2007) 3 ERCL 245, 250; cf also R Schulze, ‘The Academic Draft of the CFR and the EC Contract Law’ in R Schulze (ed), *Common Frame of Reference and Existing EC Contract Law* (Sellier 2008) 13–14.

³⁰ W Ernst, ‘Zur Struktur des CFR’ in Schmidt-Kessel (n 11) 70.

³¹ H Kötz, *Vertragsrecht* (Mohr 2009). As far as European contract law is concerned, see H Kötz, *European Contract Law* (T Weir tr, OUP 1997).

³² JP Schmidt, ‘Der “juridical act” im DCFR’ (2010) 18 ZEuP 304, 310ff.

³³ JP Schmidt, ‘Juridical Act’ in *MaxEuP* (n 6).

³⁴ *Comment B* on Art II.–1:101 DCFR.

³⁵ There it had been stated: ‘...any statement or agreement or declaration of intention... which has or is intended to have legal effect as such’. For criticism, see Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann (n 11) 703–05.

in so far as the offeror is bound to his offer. Whether that reflects the offeror's typical intention may be doubted. And indeed, an offer is not binding 'as such' according to the DCFR (and the PECL). For a certain period, at least, the offeror may revoke his offer without having to fear any legal consequences.³⁶

This is not, however, the only conundrum raised by the definition of the juridical act in Article II.-1:101(2) DCFR. Is the giving of notice a juridical act? According to Article I.-1:109 DCFR (modelled on Article 1:303 PECL) apparently not; since otherwise it could not be stated in paragraph (1), second sentence (modelled on Article 1:303(6) PECL, which does not, however, refer to the notion of a juridical act): "Notice" includes the communication of information or of a juridical act'. On the other hand, however, paragraph (3), deals with the moment when the notice becomes effective: as a general rule, when it reaches the addressee. A notice therefore has legal effect, even, presumably 'as such'. This is also made clear by the illustration given for Article I.-1:109:³⁷ If the notice of the extension of a charterparty is given on time, this has the effect that the charter is extended.³⁸

It is therefore probably no accident that national codifications by and large do not contain a legal definition of the notion of a 'juridical act',³⁹ even if they have received the doctrine as such. In Germany, it is widely regarded as a particular strength of the BGB, and as a key for its resilience, that it leaves the discussion of fundamental doctrinal concepts to legal scholarship.⁴⁰ Such legislative restraint is all the more required in view of the fact that—otherwise than in the run-up to the BGB—a European discussion as to the suitability and appropriate formulation of the juridical act doctrine has not yet taken place at all. In addition, it is noticeable that the principal advantage associated with the juridical act doctrine—namely to create a comprehensive and at the same time elegant and economical system of rules without either unnecessary repetitions or unspecific references (as can be found in Article 7 of the Swiss ZGB (*Zivilgesetzbuch*); Article 1324 *Codice civile*, or Article 1:107 PECL)—has not been achieved in the DCFR.⁴¹ This is because in Book II, probably for the sake of better comprehensibility, contract becomes the focus of attention, as in the PECL (and the Swiss ZGB and the *Codice civile*). Thus, the chapters on grounds of invalidity and interpretation, as well as the provision on usages and practices concern themselves, in the first place, only with contracts, and then append another rule, according to which the provisions on contracts apply to

³⁶ Art II.-4:202(1) DCFR (Art 2:202(1) PECL).

³⁷ *Comment C* on Art I.-1:109 DCFR (*Comment C* on Art 1:303 PECL).

³⁸ It is unfortunate that while the term 'notice' is defined in Book I of the DCFR, it is afterwards sometimes used in a different meaning; an example is Art III.-6:105 DCFR. The same is true of the PECL; cf Art 1:303 in contrast to Art 13:104.

³⁹ cf the overview in the *Comparative Notes* to Art II.-1:101 DCFR.

⁴⁰ R Zimmermann, 'Das Bürgerliche Gesetzbuch und die Entwicklung des Bürgerlichen Rechts' in M Schmoeckel, J Rückert and R Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB vol I* (Mohr 2003) [20]f.

⁴¹ See also JP Schmidt, 'Juridical act' (n 32) 317ff.

other juridical acts, with ‘appropriate’ (Article II.–8:202 DCFR) or ‘necessary’ (Article II.–1:104(3), Article II.–7:101(3) DCFR) adaptations. Now and then (form, partial invalidity or ineffectiveness)⁴² it is also, however, expressly stated that precisely the same rules apply to both contracts and other juridical acts.

B. *The Concept of a Contract*

The definition of a juridical act is complemented by another one for a contract: ‘A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect’ (Article II.–1:101(1) DCFR).⁴³ This is supposed to make clear that, according to the terminology of the DCFR, the agreement itself, so far as it is intended to have the given legal effects, is considered to be a contract, and not either the legal relationship resulting from the contract, or the document usually containing the agreement.⁴⁴ This is a somewhat trivial point, made in response to inaccurate usage in general, and to commercial terminology, and also to the terminology of the PECL.⁴⁵ Unanswered, however, are a number of questions raised by the definition itself. What is a binding as opposed to a non-binding legal relationship? What is an agreement? Must the addition of the term ‘binding’ be taken as ruling out mere extra-legal social arrangements as contracts? But do such arrangements then create a legal relationship—though not a binding one? And as far as the agreement is concerned it hardly seems helpful to define one doctrinal category with another one that remains itself undefined.⁴⁶ The clause ‘or to have some other legal effect’ intends to cover agreements by which an existing right or obligation is directly affected.⁴⁷ Does it have any significance that juridical acts, but not agreements or contracts, must have legal effect ‘as such’? Essentially, Article II.–1:101(1) DCFR just states that only an agreement that aims at a legal effect can be called a contract.⁴⁸ The concept of a legal relationship is introduced but not further elucidated. Yet, the doctrinally challenging questions that have been intensively debated within the national legal systems and to which the

⁴² Art II.–1:106 DCFR; Art II.–1:108 DCFR.

⁴³ In the style of a textbook, it is added that a contract is a bilateral or multilateral juridical act. This definition, too, has been changed vis-à-vis the *Interim Outline Edition*. There it reads: ‘... which gives rise to, or is intended to give rise to...’. See H Eidenmüller, ‘Privatautonomie, Verteilungsgerechtigkeit und das Recht des Vertragsschlusses im DCFR’ in R Schulze, C von Bar, and H Schulte-Nölke (eds), *Der akademische Entwurf für einen Gemeinsamen Referenzrahmen* (Mohr 2008) 76.

⁴⁴ *Comment A* on Art II.–1:101 DCFR.

⁴⁵ Here, too, the concept of contract normally refers to the agreement: see *Comment A* on Art 2:101 PECL.

⁴⁶ See already Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann (n 11) 703.

⁴⁷ *Comment A* on Art II.–1:101 DCFR.

⁴⁸ Thus in Art II.–1:101(1) and (2) DCFR the definitions of the concepts of contract and juridical act exactly correspond to each other, except that: (i) a juridical act is not only an agreement but can also be a unilateral declaration; (ii) a juridical act has legal effect ‘as such’; (iii) the agreement in the case of a juridical act, but not in that of a contract, can be express or implied from conduct; and (iv) a juridical act can be unilateral, bilateral, or multilateral, while a contract can only be bilateral or multilateral. Differences (ii) and (iii) are unclear, or meaningless.

French working group dedicated a more than 40-page analysis based on the *acquis commun* and the *acquis communautaire*⁴⁹ have not been addressed either in the black-letter rules or in the *Comments*. Furthermore, there is no attempt to engage in a critical discussion of the definitions of contract recognized in the national legal systems, which differ from each other and also from that of Article II.-1:101(1) DCFR. Of course, once again it must be said that little in practice depends upon such definitions.⁵⁰ Again, however, it would have been wiser to abstain from providing them.⁵¹

3. Requirements for the Formation of Contracts

Of greater significance for a regulation concerning the formation of contracts are its requirements. Article 2:101(1) PECL states in that respect (similarly Article 4:101 ACQP I/II):⁵²

- (1) A contract is concluded if:
 - (a) the parties intend to be legally bound, and
 - (b) they reach a sufficient agreement without any further requirement.
- (2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

The words ‘without any further requirement’ must be seen against the background of the common law and the legal systems derived from French law: the validity of a contract does not depend upon either the presence of consideration or of a *cause*. The contract has its foundation in the (objectively determined) will of the parties to be legally bound and is thus an expression of their private autonomy. The PECL (and the DCFR following that model) abstain from requiring specific indicia of seriousness⁵³ based on a reasonable motivation of the parties to the contract.

In the parallel provision of the DCFR—Article II.-4:101—paragraph (2) has been removed. The *Comments* give no clue why that is so; the relevant comment on the question of freedom of form contained in the PECL has simply also been deleted.⁵⁴ However, the provision has only been relocated; it

⁴⁹ PCC 19; English version 3.

⁵⁰ Kötz, *Vertragsrecht* (n 31) 3.

⁵¹ cf also Eidenmüller (n 43) 76.

⁵² R Schulze, ‘Grundsätze des Vertragsschlusses im Acquis communautaire’ [2005] *Zeitschrift für Gemeinschaftsprivatrecht* 56; T Pfeiffer, ‘Der Vertragsschluss im Gemeinschaftsrecht’ in R Schulze, M Ebers, and HC Grigoleit (eds), *Informationspflichten und Vertragsschluss im acquis communautaire* (Mohr 2003) 103; Jansen and Zimmermann (n 23) 518ff.

⁵³ Kötz, *Contract Law* (n 31) 71ff; H Kötz, ‘Indicia of Seriousness’ in *MaxEuP* (n 6); Ranieri (n 26) 100; cf also Jansen and Zimmermann (n 23) 518f (on Art 4:101 ACQP I/II).

⁵⁴ But see *Comment E* on Art II.-4:101 DCFR: the conclusion of a contract requires no form, save in cases where this is provided for expressly.

is found now in the newly incorporated General Part of Book II of the DCFR. Article II.–1:106(1) DCFR mirrors Article 2:101(2) PECL (with very small changes the significance of which is neither self-evident nor explained in the *Comments*).⁵⁵ In the *Comments*, reference to the possibility to agree otherwise has been deleted. However, this follows from the general provision in Article II.–1:102(2) DCFR.⁵⁶ Article II.–1:107 DCFR of the *Interim Outline Edition* contained a second paragraph according to which particular rules may require writing or some other formality. This has now been deleted as being self-evident.⁵⁷

Added, however, is a rather complex provision on liability for damages. The draftsmen of the DCFR consider it an expression of the principle of good faith and fair dealing,⁵⁸ which underlies the DCFR just as it does the PECL: if one party is aware of the fact that a contract is invalid due to a formal defect, that party may be liable for damages suffered by the other party as a result of having relied upon the validity of the contract. No model in the national legal systems, or in other international documents, is cited for this rule in the *Comparative Notes*. The source of inspiration in this respect may have been German case law and legal doctrine on *culpa in contrahendo* (§ 311 II BGB). However, the requirements for a damages claim in the DCFR are formulated in a relatively open-ended manner, whereas in German law it is emphasized that, in the context of contracts requiring a specific form, there will be liability in damages only for a serious breach of a party's duty not to act in contravention of the precepts of good faith.⁵⁹ Article II.–1:106(2) DCFR, therefore, provides an example for the general tendency of the DCFR to impose far-reaching duties of information and disclosure.⁶⁰

The French working group has interfered more drastically with the text of the PECL. On the one hand, both of the basic requirements for the formation of contracts have been changed. The relevant criteria are: (i) whether the parties have shown their intention to be legally bound (rather than whether the parties intend to be legally bound); and (ii) whether they have reached an agreement on the essential elements of the contract (rather than whether they have reached a sufficient agreement).⁶¹ The proposed modification to (i) actually brings nothing new but rather leads to an inelegant repetition since, according to Article 2:102 PECL, which is taken up by Article 2:202 PCC in modified form, the intention of a party to be legally bound by a contract is to

⁵⁵ See, eg, Art II.–1:106(1) DCFR: 'A contract... need not be concluded, made or evidenced in writing...' compared to Art 2:101(2) PECL: 'A contract need not be concluded, made or evidenced in writing...'.

⁵⁶ Similarly already Art 1:102(2) PECL.

⁵⁷ cf *Comment B* on Art II.–1:106 DCFR.

⁵⁸ *Comment C* on Art II.–1:106 DCFR.

⁵⁹ C Grüneberg in *Palandt, Bürgerliches Gesetzbuch* (70th edn, Beck 2011) § 311 [38]; V Emmerich in *Münchener Kommentar zum Bürgerlichen Gesetzbuch vol 2* (5th edn, Beck 2007) § 311 [108].

⁶⁰ cf eg Arts II.–3:101ff DCFR; on which see Eidenmüller, Faust, Grigoleit, Jansen, Wagner and Zimmermann others (n 11) 693ff.

⁶¹ Art 2:201(1) PCC; on which, see PCC 217ff.

be ascertained from his statements or conduct ‘as they are reasonably understood by the other party’. The phrase ‘sufficient agreement’ is considered to be too imprecise by the French working group,⁶² even if it is specified in Article 2:103(1) PECL.⁶³ Instead, the PCC revert to a distinction, reaching back to medieval law,⁶⁴ between *essentialia* and *accidentalial negotii*. Again, the principle that the parties must have reached agreement as to the *essentialia negotii* is stated twice—namely in addition to Article 2:201(1)(b) PCC also in Article 2:203 PCC,⁶⁵ where an explanation is provided of what constitutes *essentialia negotii* and how terms that are normally considered as *accidentalial negotii* may be elevated to *essentialia negotii*.⁶⁶ Whether it is wise to turn these doctrinal categories into requirements for the formation of contract and whether greater precision than in Article 2:103 PECL is thereby achieved seems questionable to us.⁶⁷ In any case, the French working group’s formulation is not evidently a step forward.

On the other hand, there is no indication in Article 2:201(1) PCC that there are no further requirements for the formation of contracts. What conclusion must be drawn from this is unclear. Is this omission intended to save a place for the French *cause*?⁶⁸ The *Comments* say nothing on the matter. They contain only a puzzling remark on the necessity of bearing in mind the English doctrine of consideration.⁶⁹ As far as the lack of form requirements is concerned, Article 2:201(2) and (3) PCC correspond to Article 2:101(2) PECL. It is explicitly emphasized that the PCC themselves or the law applicable to the contract can make exceptions to the principle of freedom of form. That the parties can agree

⁶² PCC 218, 220.

⁶³ cf also Art II.-4:103(1) DCFR (substantially identical but partly different in its wording). According to Art 2:103(1)(a) PECL there is ‘sufficient agreement’, if the terms of the contract ‘have been sufficiently defined by the parties so that the contract can be enforced’ (cf Art II.-4:103(1)(a) DCFR: ‘...for the contract to be given effect’). The attempt to specify a concept by means of a definition, in which the same concept is used once again, is certainly not a model in the art of drafting. The DCFR exacerbates this in that the concept of ‘sufficient’ determination is also used in alternative (b). The central difference in the formulation of (b) (the terms of the contract ‘can be determined under these Principles’ [PECL] or ‘...can be otherwise sufficiently determined for the contract to be given legal effect’ [DCFR]) appears to have no practical effect; the relevant passages in the comments, at any rate, are virtually identical: see *Comment B* on Art 2:103 PECL viz *Comments B* and *C* on Art II.-4:103 DCFR.

⁶⁴ R Zimmermann, *The Law of Obligations* (paperback edn, OUP 1996) 234 with references.

⁶⁵ Both provisions, incidentally, are formulated in a manner that makes them appear inconsistent with each other. Art 2:203(1) PCC provides that a contract is concluded when the parties have reached an agreement as to its fundamental elements. This does not fit in well with Art 2:201(1) PCC, which states that a contract is concluded when the parties have reached an agreement on its fundamental elements *and* have shown their intention to be legally bound.

⁶⁶ See PCC 224ff.

⁶⁷ Overall, the definition becomes unnecessarily complex as a result of the introduction of an additional conceptual level. Also, a number of questions arise, eg: What is to be understood by the requirement of a ‘but spécialement poursuivi par chacune des parties’ in Art 2:203(2) PCC? Or, what does the cryptic phrase ‘...sur un point accessoire ou déclaré comme tel’ mean in Art 2:203(3) PCC?

⁶⁸ There has been disagreement in the discussion on the French reform of the law of obligations whether that concept should be retained; cf, on the one hand, J Ghestin, *Cause de l’engagement et validité du contrat* (LGDJ 2006); on the other hand, B Fauvarque-Cosson, ‘Towards a New French Law of Obligations and Prescription?’ (2007) 15 ZEuP 428, 442ff. cf furthermore the contributions of J Rochfeld and R Sefton-Green in Cartwright, Vogenauer and Whittaker (n 16) 101–20.

⁶⁹ PCC 220.

upon a form requirement for their contract is not mentioned, even though the official motivation to the revision specifically requests the addition of such rule.⁷⁰

In view of such uncertainties over what should be regulated where and in which manner, it might be advisable to abstain from such a general part of the law relating to the formation of contracts (recognized not even in German law!). This is what the (UNIDROIT) PICC (following the CISG (United Nations Convention on Contracts for the International Sale of Goods) in that respect) do. And, in fact, all that is contained in Articles 2:101–103 PECL and II.–4:101–103 DCFR is a textbook formulation of: (i) the general requirements for the formation of contracts; (ii) the concept of ‘sufficient agreement’; and (iii) a general rule of interpretation. The rule of interpretation would be expected to be part of Chapter 5 PECL (Book 2, Chapter 8 DCFR);⁷¹ and with regard to the other points it is questionable to what extent there is really a need for regulation. This is true, particularly, in view of the fact that not only the PICC, but also the PECL and the DCFR, proceed from the assumption that contracts are normally concluded by means of offer and acceptance and, in this respect, contain a comprehensive and internally consistent set of rules.

4. Offer and Acceptance

A. Common Core

Although there are considerable divergences between the national legal systems in Europe, as far as the particulars of contract formation by means of offer and acceptance are concerned, a uniform model has emerged in comparative legal discourse over the past 50 years or so. That model has shaped not only the provisions of CISG, but can also be found in all of the above-mentioned sets of model rules.⁷² An offer must be such that, through its acceptance, a contract can be brought into existence. It must therefore be sufficiently definite and be based on the intention, on the part of the offeror, to be bound.⁷³ An offer

⁷⁰ PCC 220.

⁷¹ cf also *Comment B* on Art 2:102 PECL: whether a party is bound, also when it does not really wish to be bound, is a question of interpretation, and reference is thus made to ch 5 (Interpretation). However, the rules in ch 5 refer to the interpretation of the contract rather than to the interpretation of the declarations of intention leading to a contract. On this problem (also in ch 4 PICC), see Kötz, *Contract Law* (n 31) 106ff; S Vogenauer, ‘Interpretation of Contracts’ in *MaxEuP* (n 6); S Vogenauer, ‘Interpretation of Contracts: Concluding Comparative Observations’ in A Burrows and E Peel (eds), *Contract Terms* (OUP 2009).

⁷² On what follows, Kötz, *Contract Law* (n 31) 16ff; E Luig, *Der internationale Vertragsschluss* (Lang 2003) 43ff, 90ff, 113ff, 132ff; A Wittwer, *Vertragsschluss, Vertragsauslegung und Vertragsanfechtung nach europäischem Recht* (Giesecking 2004) 129ff, 144ff, 160ff; M Illmer, ‘Contract (Formation)’ in *MaxEuP* (n 6). For a comparative view F Ferrari, ‘Offer and Acceptance inter absentes’ in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (Elgar 2006) 497, 505ff; EA Farnsworth, ‘Comparative Contract Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (paperback edn, OUP 2008) 915ff; Ranieri (n 26) 171ff.

⁷³ Art 14 CISG; Art 2.1.2 PICC; Art 2:201(1) PECL; Art II.–4:201(1) DCFR.

becomes effective as soon as it reaches the offeree;⁷⁴ until that moment the offeror may revoke it at any time.⁷⁵ Even an offer that has already reached the offeree, and has therefore become effective, may however be revoked as long as the revocation reaches the offeree before the latter has dispatched his acceptance. This is not the case if: (i) the offer indicates that it is irrevocable; (ii) the offer states a fixed time for its acceptance; or (iii) the offeree can reasonably rely upon the offer being irrevocable and has already acted in reliance upon the offer.⁷⁶ An offer also, of course, lapses as a result of a rejection reaching the offeror.⁷⁷ In addition, there is a very far-reaching agreement concerning the problems relating to the acceptance: acceptance by means of statement or conduct; the moment when the acceptance becomes effective and the contract is thus concluded; time limits for acceptance and the consequences of late acceptance; modified acceptance.⁷⁸

B. Differences between the PECL and the PICC

A genetic analysis concerning the relevant texts on formation of contract would have to start from the CISG whose provisions have not only occasionally been copied by the PICC.⁷⁹ Deviations and additions are not explained in the *Official Comments* to the provisions of the PICC, but usually, at least, in the academic commentary by Vogenauer/Kleinheisterkamp.⁸⁰ For a comparison of the three transnational model rules, the PICC have to form the starting point. Their rules on contract formation have been drafted before the corresponding provisions of the PECL and were obviously available to the authors of the latter.⁸¹ Compared to the concise set of rules in the UNIDROIT Principles, the PECL contain a number of additions. Thus, it is explicitly mentioned that

⁷⁴ Art 15(1) CISG; Art 2.1.3 PICC. For the PECL and the DCFR, the same follows from Art 1:303(2) and (6) PECL; Art I.–1:109(3) DCFR with *Comment C*.

⁷⁵ Art 15(2) CISG; Art 2.1.3 PICC. cf Art 1:303(5), (6) PECL and Art I.–1:109(5) DCFR.

⁷⁶ Art 16 CISG; Art 2.1.4 PICC; Art 2:202 PECL; Art II.–4:202 DCFR. For a problem that has arisen in respect of Art 16(2) CISG, see P Schlechtriem in P Schlechtriem and I Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods* (2nd edn, OUP 2004) Art 16 [10]; Note 2 on Art 2:202 PECL; Luigi (n 72) 121ff; Zimmermann (n 7) 135; Wittwer (n 72) 158. The formulation in the CISG and in the PICC is also criticized by J Kleinheisterkamp in S Vogenauer and J Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (OUP 2009) Art 2.1.4 [31] and *passim*. For criticism of Art 2:202 PECL (and thus also Art II.–4:202 DCFR), see H Köhler, 'Das Verfahren des Vertragsschlusses' in J Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (Mohr 2000) 40–41; C Armbrüster, 'Zustandekommen und Wirksamkeit von Verträgen aus gemeineuropäischer Sicht' [2007] *Juristische Ausbildung* 321, 321–22.

⁷⁷ Art 17 CISG; Art 2.1.5 PICC; Art 2:203 PECL; Art II.–4:203 DCFR.

⁷⁸ Arts 2:204–2:208 PECL; Arts II.–4:204–4:208 DCFR; cf also Arts 2.1.6–2.1.11 PICC and Arts 18–23 CISG.

⁷⁹ This applies, for instance, to Art 15 CISG (Art 2.1.3 PICC); Art 16 CISG (Art 2.1.4 PICC); Art 18(1) CISG (Art 2.1.6(1) PICC); Art 19(1) CISG (Art 2.1.11 PICC); Art 22 CISG (largely identical with Art 2.1.10 PICC).

⁸⁰ Kleinheisterkamp (n 76), Arts 2.1.1ff. cf AK Schnyder and RM Straub, 'The Conclusion of a Contract in Accordance with UNIDROIT Principles' (1999) 1 *Eur J L Reform* 243; Luigi (n 72).

⁸¹ The rules on the conclusion of contracts were already contained in the first edition of the PICC, whereas the *Lando-Commission* published their corresponding rules only in 2000; there the PICC are cited time and again.

an offer can also be made to the public.⁸² This is self-evident and is also generally recognized in the national legal systems,⁸³ even if it is not (as it is in Italy)⁸⁴ specifically laid down in the respective codes. It is not doubtful that, also under the PICC, a sufficiently definite proposal expressing the offeror's intention to be bound in the case of acceptance by any member of the public also constitutes an offer.⁸⁵ Article 2:202(2) PECL (Article II.-4:202(2) DCFR) again takes up this subject by stating that an offer made to the public can be revoked in the same way as it has been made. This rule may also be read into Article 2.1.3 PICC. The most significant addition, in this context, is Article 2:201(3) PECL (of which Article II.-4:201(3) DCFR presents a slightly modified version). This provision lays down a presumption that proposals to supply goods or services at stated prices made by a professional supplier in a public advertisement, in a catalogue, or by display of goods, constitute an offer to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, is exhausted. The authors of the PECL thereby take up a question with which Article 14(2) CISG is also concerned, even though the latter rule establishes the opposite presumption according to which a proposal not addressed to one or more specific persons is to be taken merely as an *invitatio ad offerendum*.⁸⁶ The draftsmen of the PICC, ie the text genetically connecting the CISG with the PECL, have refrained from laying down a rule in that respect.⁸⁷ And, indeed, the relevant cases are too heterogeneous to be governed by a uniform rule. Rather, the question has to be resolved by applying the general principles of interpretation; and they will counsel caution against finding that the proposal constitutes an offer.⁸⁸ A presumption in favour of an offer can, if at all, only be meaningful if its scope of application is restricted to consumer contracts.

According to all four sets of model rules an offer may only be revoked if the revocation reaches the offeree before he has dispatched his acceptance.⁸⁹ It does not matter, in that respect, at which time the acceptance actually reaches the offeror.⁹⁰ With this rule a reasonable balance is struck between the interests of the offeror and the protection of the offeree;⁹¹ the rule is necessary in view

⁸² Art 2:201(2) PECL (Art II.-4:201(2) DCFR).

⁸³ PECL 161.

⁸⁴ Art 1336(1) *Codice civile*; cf also Ferrari (n 72) 506–07.

⁸⁵ Kleinheisterkamp (n 76) Art 2.1.2 [8].

⁸⁶ The national legal systems differ on this point. Art 14(2) CISG mirrors the legal position, eg in Germany and England, Art 2:201(3) PECL that in France; cf Note 3 on Art 2:201 PECL; Note III on Art II.-4:201 DCFR.

⁸⁷ Kleinheisterkamp (n 76) Art 2.1.2 [18].

⁸⁸ For justified criticism of the presumption in Art 2:201(3) PECL, see Köhler (n 76) 36ff; Wittwer (n 72) 148ff; Kleinheisterkamp (n 76) Art 2.1.2 [18]; Illmer (n 72); Eidenmüller (n 43) 77–78 (on Art II.-4:201(3) DCFR); further Kötz, *Contract Law* (n 31) 19–20; Luig (n 72) 82ff; Ranieri (n 26) 201ff.

⁸⁹ Art 2:202(1) PECL (Art II.-4:202(1) DCFR). Along the same lines Art 16(1) CISG; Art 2.1.4(1) PICC.

⁹⁰ Art 18(2) CISG; Art 2.1.6(2) PICC; Art 2:205(1) PECL; Art II.-4:205 DCFR.

⁹¹ Kötz, *Contract Law* (n 31) 23–4, 25ff; R Zimmermann, 'Vertrag und Versprechen' in *Festschrift für Andreas Heldrich* (Beck 2005) 479–80; G Quinot, 'Offer, Acceptance, and the Moment of Contract Formation' in H MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh University Press 2006) 92ff; Illmer (n 72); Ranieri (n 26) 308–09; Eidenmüller (n 43) 78–79.

of the fact that, according to the transnational model rules (otherwise than in a number of national legal systems), an offer is not normally binding. By contrast, the CISG and PICC rather neglect the possibility (also envisaged by them)⁹² of an acceptance of an offer ‘by conduct’. Here the PECL (and, following them, the DCFR) clarify that the contract comes into existence as soon as notice of the conduct reaches the offeror, and that the offer can be revoked until that point.⁹³ This does not exactly correspond to the rule relating to an acceptance by statement (and also not to the rule relating to cases where established practices between the parties make it possible for the offeree to accept the offer without giving notice);⁹⁴ yet, it may be justified with considerations of legal certainty. Indeed, the conduct in question may be an entirely private matter.

Likewise, Article 2:205(3) PECL (similarly Article II.–4:205(3) DCFR) provides a more specific regulation, compared to Article 2.1.6(3) PICC, in regard to the question when a contract is concluded if, as a result of practices established between the parties or of a usage, the offeree may accept the offer by performing an act without notice to the offeror: the contract is concluded ‘when the performance of the act begins’, rather than ‘when the act is performed’.⁹⁵ Other provisions are more clearly structured in the PECL than in the PICC—a good example is Article 2:206 PECL compared to Article 2.1.7 PICC on the subject of a time limit for acceptance.⁹⁶

Occasionally a rule which is a part of Chapter 2, Section 1 PICC is missing in Chapter 2 PECL (and therefore also in the DCFR). That is the case for Article 2.1.8 PICC⁹⁷ (when does a period of acceptance fixed by the offeror begin to run and what relevance, in this regard, has a time indicated in the offer?) and also for Article 2.1.10 PICC (up to which moment can an acceptance be withdrawn?). In the first of these cases, the relevant rule has been generalized for all types of (written) statements and shifted to a provision in Chapter 1 of the PECL (General Provisions) dealing with the computation of time periods set by a party. In the process, the rule has also been altered in substance: the period begins to run, when the document reaches the addressee (rather than when it was dispatched).⁹⁸

In the other case, the provision has probably been regarded as dispensable since an answer is already given by Article 2:205(1) PECL (Article II.–4:205(1)

⁹² Art 18(1) CISG; Art 2.1.6 PICC; see Schlechtriem in Schlechtriem and Schwenzer (n 76) Art 18 [7]; Kleinheisterkamp (n 76) Art 2.1.6 [5].

⁹³ Arts 2:205(2) and 2:202(1) PECL (Arts II.–4:205(2) and II.–4:202(1) DCFR; however, the reference contained in the latter of the two rules has been deleted).

⁹⁴ See *Comment B* on Art 2:202 PECL; *Comment B* on Art II.–4:202 DCFR.

⁹⁵ According to Art 18(3) CISG and Art 2.1.6 PICC, performance of the act is the relevant moment; for comment, see Schlechtriem in Schlechtriem and Schwenzer (n 76) Art 18, [21]f; Kleinheisterkamp (n 76) Art 2.1.6 [13]f.

⁹⁶ Art 2.1.7 PICC essentially corresponds to Art 18(2) CISG.

⁹⁷ ‘A simplified version of Art 20 CISG’: Kleinheisterkamp (n 76) Art 2.1.8 [1].

⁹⁸ Art 1:304(1) PECL (essentially taken over in Art I.–1:110(8) DCFR). For an overview of the general rules on computation of time, see H Wicke, ‘Computation of Time Limits’ in *MaxEuP* (n 6).

DCFR): for, if the contract is concluded as soon as the acceptance reaches the offeror, it follows that the acceptance becomes effective only at that moment and may be revoked up to that point.⁹⁹ Additionally it is stated, again in Chapter 1 PECL, that notices are ineffective if a withdrawal reaches the addressee before or at the same time as the notice; the concept of 'notice' expressly includes acceptance.¹⁰⁰ Both points illustrate that the authors of the PECL (and likewise those of the DCFR) were concerned to achieve a greater systematization of the legal material.

This systematizing tendency is particularly evident also in the splitting up of the rules on contract formation into a general part and a further section on offer and acceptance. The PICC, by contrast, only have a single section that contains 22 provisions without any systematic subdivision. As already mentioned, there is no parallel in the PICC to the first three 'general provisions' of the PECL.¹⁰¹ The same is true for the interesting and innovative provision, according to which promises that are intended to be legally binding without acceptance are binding.¹⁰² Three further provisions have a counterpart in the PICC but have been subjected to substantial modification. Article 2:104 PECL¹⁰³ details the conditions under which terms that have not been individually negotiated become part of the contract¹⁰⁴ (but abstains from adopting the PICC rule on surprising terms).¹⁰⁵ Article 2:106 PECL¹⁰⁶ tones down, compared to Article 2.1.18 PICC,¹⁰⁷ the effect of 'written modifications only' clauses; and Article 2:105 PECL¹⁰⁸ (unlike Article 2.1.17 PICC) distinguishes, as far as merger clauses are concerned, whether they have been individually agreed upon or not; furthermore, the rule protecting the other party's reliance on conduct intimating that a 'written modifications only' clause

⁹⁹ cf *Comment B* to Art 2:205 PECL. On Art 2.1.10 PICC see Kleinheisterkamp (n 76) Art 2.1.10 [1].

¹⁰⁰ Art 1:303(5) and (6) PECL; substantially identical with Art I.-1:109(5) and (1) DCFR.

¹⁰¹ An interpretation provision along the lines of Art 2:102 PECL can, however, be found in Art 4.2 PICC; the rule in Art 2:103(3) PECL is contained in Art 2.1.13 PICC; on the intention to be legally bound cf Art 2.1.2 PICC.

¹⁰² Art 2:107 PECL; on which, see Zimmermann (n 7) 138–39; generally, M Illmer, 'Promise, Unilateral' in *MaxEuP* (n 6). In the DCFR this provision has been shifted into the General Part and now forms part of a (textbook-like) provision on 'binding effect' (Art II.-1:103 DCFR). As just stated, there is no corresponding provision in the PICC; hence, it is only a *contractual agreement* that is binding. For release this has now been confirmed (in the second edition of the PICC): Art 5.1.9 PICC; for criticism, see Zimmermann (n 22) 285–86. Arts 4:107 ACQP I/4:109 ACQP II take over Art II.-1:103(2) DCFR, but add, as derived from the *acquis*, a provision that rules of contract law 'which protect one particular party apply in its favour'.

¹⁰³ Contained in the DCFR in altered form in ch 9 ('Contents and effects of contracts'): Art II.-9:103(1) DCFR.

¹⁰⁴ Art 2.1.19(1) PICC provides that the general rules on contract formation are applicable with regard to the question whether or not individually negotiated terms become part of a contract. On both provisions, see P Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (Mohr 2010) 373ff. Further, Luig (n 72) 217ff; Wittwer (n 72) 177ff.

¹⁰⁵ Art 2.1.20 PICC. On this provision and the practical significance of this distinction, see Kleinheisterkamp (n 76) Art 2.1.20 [1].

¹⁰⁶ Similarly Art II.-4:105 DCFR.

¹⁰⁷ Taken, almost literally, from Art 29(2) CISG.

¹⁰⁸ Despite some differences, this rule is practically identical to Art II.-4:104 DCFR. For criticism, see C-W Canaris and HC Grigoleit, 'Interpretation of Contracts' in A Hartkamp, M Hesselink, E Hondius, C Joustra, E du Perron and M Veldman (eds), *Towards a European Civil Code* (3rd edn, Kluwer 2004) 459.

would not be relied upon—this rule can be found in both sets of Principles¹⁰⁹—is extended in the PECL also to merger clauses.¹¹⁰

Other rules that form part of the chapter on contract formation of the PICC as well as of the PECL substantially correspond to each other. These rules concern situations in which the conclusion of the contract is made dependent upon agreement on some specific matter;¹¹¹ the problem of conflicting standard terms;¹¹² and the effect of a professional's written confirmation of a contract.¹¹³ The rules relating to contractual negotiations conducted in bad faith, and to the duty of confidentiality, in Articles 2.1.15 and 2.1.16 PICC form a separate section in the PECL¹¹⁴ but are unchanged in substance; and the rule giving precedence to individual terms over conflicting standard terms¹¹⁵ is shifted into the chapter on the interpretation of contracts.¹¹⁶ Article 2.1.14 PICC (contract with terms deliberately left open) has no counterpart in the PECL as far as it relates to the situation where the parties have left the agreement on a certain term to further negotiations.¹¹⁷

C. DCFR

The DCFR constitutes the next textual layer. Its provisions on offer and acceptance are essentially identical to those in the PECL. Occasional differences of formulation do not appear to have any substantial significance. This is probably true also for the change, throughout the chapter, of the phrase 'without delay' into the more flexible 'without undue delay'. Some provisions have been shifted to other parts of the DCFR.¹¹⁸ A new (unilaterally mandatory!) rule has been added according to which, contrary to Article II.–4:202(3) DCFR, a consumer may revoke even a normally irrevocable offer if he would have a right under any rule in Books II–IV to withdraw from the contract resulting from its acceptance (Article II.–4:202(4) DCFR). This is intended to prevent the problem that a consumer, who has a right of

¹⁰⁹ Art 2.1.18 PICC; Art 2:106(2) PECL (almost identical to Art II.–4:105(2) DCFR).

¹¹⁰ Art 2:105(4) PECL (almost identical to Art II.–4:104(4) DCFR).

¹¹¹ Art 2.1.13 PICC; Art 2:103(2) PECL (substantially identical with Art II.–4:103(2) DCFR).

¹¹² Art 2.1.22 PICC; Art 2:209 PECL (in conformity with Art II.–4:209 DCFR). 'General conditions' or 'standard terms' are defined in Art 2:209(3) PECL; Art II.–1:109 DCFR; Art 2.1.19(2) PICC. On the problem of the 'battle of forms' in the model rules here considered, see Bonell (n 21) 110ff; Kleinheisterkamp (n 76) Art 2.1.22; Köhler (n 76) 63ff; Luig (n 72) 235ff; Armbrüster (n 76) 323; cf also Kötz, *Contract Law* (n 31) 32; Wittwer (n 72) 185ff; Ranieri (n 26) 362ff; Illmer (n 72).

¹¹³ Art 2.1.12 PICC; Art 2:210 PECL (substantially identical with Art II.–4:210 DCFR). cf Kötz, *Contract Law* (n 31) 30; Köhler (n 76) 48ff; Luig (n 72) 146ff, 173–74; Ranieri (n 26) 240ff; Illmer (n 72); critical, Wittwer (n 72) 165ff, 172ff. On the CISG, which has no express regulation of this problem, cf Schlechtriem (n 76) Intro to Arts 14–24 [4].

¹¹⁴ Ch 2, s 3, Arts 2:301f. In the DCFR both provisions have been extended and, once again, placed in a different systematic context: Arts II.–3:301f. See generally J von Hein, 'Culpa in contrahendo' in *MaxEuP* (n 6); Ranieri (n 26) 208ff.

¹¹⁵ Art 2.1.21 PICC.

¹¹⁶ Art 5:104 PECL (Art II.–8:104 DCFR).

¹¹⁷ See Kleinheisterkamp (n 76) Art 2.1.14 [2].

¹¹⁸ cf eg above nn 102, 103 and 114.

withdrawal from the contract, seeks to revoke his offer without, however, realizing that this revocation is not effective and without, therefore, also realizing that if he does not want to be bound by the contract that has come into effect as a result of his offer, he still has to exercise his right of withdrawal.¹¹⁹ Whether such a provision, for which there appears to be no precedent,¹²⁰ is really needed is doubtful. On the one hand, an abortive revocation of the offer may normally be taken (also) to constitute a withdrawal from the contract. On the other hand, the offeree must inform the offeror of his right to withdraw from the contract under the consumer protection provisions. If the offeror then thinks that he does not have to withdraw from the contract because he has already effectively revoked his offer, this may be a mere mistake of law.

Alterations have been made, not only occasionally, to the *Comments* to the provisions on contract formation in the PECL, even where the provisions to which the *Comments* relate are identical.¹²¹ It is not always clear what conclusion ought to be drawn from this. Thus the note on liability for damages following *Illustration 1* has been deleted in the *Comments* to Article II.-4:102 DCFR (How intention is determined); and *Illustration 2* (on letters of intent and letters of comfort which may be couched in terms that show an intention to be legally bound) has also been deleted.¹²² Explanations for such changes, and also for changes to the PECL's black-letter rules are generally not given. Occasionally, however, an attempt has now been made in the *Comments* to the DCFR to explain why its authors (and already the authors of the PECL) chose to adopt one out of several solutions that would have been available.¹²³ Most of the time, however, only the problem addressed by the rule and the existing solutions found in national legal systems are mentioned, while the actual reasoning is limited to phrases such as 'it seems better' or 'the rule adopted [here] seems preferable'.¹²⁴ There are no references (either here or in the *Notes*) to comparative legal literature which has discussed these questions—whether such literature was in fact consulted is impossible to determine. Academic criticism directed at certain provisions of PECL has not been taken into account. One example of this are the remarks by Horst Lücke on Article 2:211 PECL (Article II.-4:211 DCFR)¹²⁵ concerning the problem of contract

¹¹⁹ *Comment H* on Art II.-4:202 DCFR.

¹²⁰ None at least is mentioned in the *Comparative Notes*.

¹²¹ Occasionally comments have also been added; cf eg *Comments B* and *C* on Art II.-4:103 DCFR compared to *Comment B* on Art 2:103 PECL.

¹²² cf the respective *Comments A* on Art II.-4:101 DCFR and Art 2:102 PECL.

¹²³ The PICC throughout, and the PECL to large extent, dispense with such reasoning. The authors of the American Restatements clearly formulated the explanation for this: 'It seemed that the Restatement would be more likely to achieve an authority of its own... if exact rules were clearly stated without argument.' See Jansen (n 4) 106–07, 131–32; Jansen and Zimmermann (n 9) 110ff.

¹²⁴ cf *Comments B* on Art II.-4:102 and *D* on Art II.-4:201; cf also *Comment B* on Art II.-1:103.

¹²⁵ cf also Art 4:102(2) ACQP I/II.

formation without offer and acceptance,¹²⁶ or those by Helmut Köhler concerning Article 2:201(3) PECL (goods or services that are offered at stated prices).¹²⁷ Comparative references to national legal systems have been extended to the new EU Member States but have, as far as the old Member States are concerned, frequently not been updated.¹²⁸

D. PCC

As far as the PECL revision by the French working group is concerned,¹²⁹ a textual stratification analysis is complicated by the fact that the group refers throughout to the *Interim Outline Edition* of the DCFR.¹³⁰ As a result, some of the cross-references now occasionally appear to be inaccurate for those who use the Outline and Full Editions.¹³¹ In view of the fact that the French group based its work not only on the PICC and on the CISG, but also on the French reform project¹³² (as well as on the so-called Gandolfi draft),¹³³ it is hardly surprising that the PCC, on the whole, display more deviations from the PECL than does the DCFR, and that they even call into question at various points the consensus that has emerged in comparative legal literature and that is reflected in the other model rules. This is true, for example, for the problem of the revocation of an offer. Such a revocation is possible, according to Article 2:303(1) PCC, as long as the offer ‘n’est pas parvenu à la connaissance de son destinataire’. If the offer has reached the recipient, and no time has been fixed for its acceptance, it can be revoked only after a reasonable time (‘après un délai raisonnable’). The revocation of an offer is, however, ineffective (Article 2:303(2) PCC) if: (i) the offer indicates that it is irrevocable; (ii) a fixed time for its acceptance has been stated in the offer; or (iii) a revocation before the

¹²⁶ H Lücke, ‘Simultaneity and Successiveness in Contracting’ (2007) 15 ERPL 27. Lücke points out that contracts are frequently concluded in a way that cannot be conceptualized as acceptance of an offer. For such cases, a convincing regulation is wanting; in any event, the rule found in the PECL (and in the DCFR as well as the *Acquis Principles*), according to which ‘[t]he rules in this Section [ie on offer and acceptance] apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance’ is unconvincing, and indeed rather absurd. A similar approach has been adopted in Art 2.1.1 PICC where it is merely stated 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’. Detailed rules, however, are only given for the first alternative. On the problem, see also Kötz, *Contract Law* (n 31) 16–17; K Bischoff, *Der Vertragsschluss beim verhandelten Vertrag* (Nomos 2001); Luig (n 72) 33ff.

¹²⁷ Köhler (n 76) 36ff; see above, text before n 86.

¹²⁸ Thus, citation is predominantly from the 1994 version of the PICC instead of the 2004 version; F Terré, P Simler and Y Lequette, *Les Obligations* (9th edn, Dalloz-Sirey 2005) is cited according to the 6th edn, 1996; GH Treitel, *The Law of Contract* (E Peel ed, 12th edn, Sweet & Maxwell 2007) according to the 9th edn, 1995, and A Baumbach and KJ Hopt, *Kommentar zum Handelsgesetzbuch* (34th edn, Beck 2010) according to the 29th edn, 1995. K Larenz and M Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (8th edn, Beck 1997) and an article in the *Betriebs-Berater* from 1971 hardly give a reliable picture of the significance of merger clauses in German law.

¹²⁹ cf text to n 15 and that after n 60.

¹³⁰ See n 12.

¹³¹ An example is the remark in the PCC 242 that Art 2:202 PECL (Revocation of an offer) was adopted without change in the DCFR. Similarly the reference (PCC 239) to Art 2:201 (Offer) (which was, however, already not entirely correct with regard to the *Interim Outline Edition*).

¹³² Which, in turn, has adopted ideas from the PECL and the PICC; see Fauvarque-Cosson (n 68) 428ff.

¹³³ cf n 17.

lapse of a reasonable time would disappoint the legitimate expectations of the offeree who has acted in reliance on the offer. In comparison to Article 2:202 PECL, the binding effect of an offer would, therefore, be strengthened.¹³⁴ This is in accordance with the tradition of French law.¹³⁵ However, there is no reason why these rules should also be internationally followed. On the contrary: Article 2:303 PCC suffers from a number of evident weaknesses. Can an offer, for which no time for acceptance has been fixed, be revoked before a reasonable time has elapsed (as is apparently the case, under certain circumstances, according to Article 2:303(2)(c) PCC) or not (Article 2:303(1) PCC)? Also, the concept of ‘un délai raisonnable’ imports a significant degree of uncertainty into the regulation. Unfortunate also is the reference in Article 2:303(1) PCC partly to the moment when the offer reaches the offeree and partly to the moment when the offeree actually takes notice of it. What if an offer, which fixes a time for its acceptance, has reached the offeree but has not come to his attention? Can it be revoked (as Article 2:303(2)(c) PCC apparently provides) or not (as seems to follow from Article 2:303(2)(b) PCC)?

In other cases, the PCC adopt the provisions of the PECL without changes.¹³⁶ Yet, a number of rules from the PECL have been re-drafted without a substantive modification being intended. The French group repeatedly emphasizes that it wanted to introduce ‘greater precision’ into a rule, or that it wanted to make a rule ‘clearer’ or ‘more easily comprehensible’, or to put it into a logical order. Yet, the advantages of these revisions are often not easily recognizable. On the contrary, occasionally they lead to an obvious deterioration in the quality of the text. Thus the PCC state on the subject of merger clauses in Article 2:205(1): ‘Les parties ont la faculté d’insérer dans le contrat une clause d’intégralité au terme de laquelle les déclarations ou engagements antérieures que ne renferme pas l’écrit n’entrent pas dans le contenu du contrat.’ This text says something that is self-evident, namely that the parties may include a merger clause in their contract. This follows already from the principle of freedom of contract. In addition an (infelicitously formulated)¹³⁷ definition of the concept of a merger clause is given. On the effect of a merger clause, however, the text says nothing, at any rate not expressly. Yet, this is the main point on which a reader would expect to find a statement. In view of this it can hardly be doubted that Article 2:105(1) PECL¹³⁸ (or, alternatively, Article 2.1.17 PICC) is the superior text.

¹³⁴ cf also Art 2:304 PCC compared to Art 2:203 PECL.

¹³⁵ Kötz, *Contract Law* (n 31) 22–23.

¹³⁶ Art 2:306 PCC (Art 2:205 PECL); Art 2:307 PCC (Art 2:206 PECL); Art 2:310 PCC (Art 2:210 PECL); Art 2:312 PCC (Art 2:211 PECL).

¹³⁷ That it has to be a written contract is not made clear straightaway, but emerges only when one reads the entire provision.

¹³⁸ ‘If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract.’

In at least one case the editorial revision also entails a substantive alteration apparently without the French working group being aware of this. A late acceptance is, as Article 2:308(1) PCC provides, to be understood as a rejection combined with a new offer. The French working group regards this as more precise and more easily understandable than the rule contained in Article 2:207 PECL.¹³⁹ The gist of Article 2:207 PECL, however, consists in the fact that a late acceptance may under certain circumstances be effective as an *acceptance* and not merely as a new offer which has, in turn, to be accepted.¹⁴⁰ This doctrinal distinction will not often, but can sometimes, be practically significant.

Finally, the French text is also characterized by additions that seem to be dispensable. That is true, for instance, for Article 2:301 PCC according to which a contract is concluded, in principle, by the meeting of an offer and an acceptance ('par la rencontre d'une offre et d'une acceptation'), or also of the explanation in Article 2:305(2) PCC that silence or inaction may constitute an acceptance if the parties have so determined in their contract, or if statutory provisions or usages applicable to the contract envision this. The addition of a second sentence to Article 2:208(1) PECL (Modified Acceptance) which is intended to make the rule more precise¹⁴¹ takes the reader no further since, in essence, the concept of a 'material' alteration (*altérer* 'substantiellement') is merely explained through the expression: modification of a 'fundamental' element of the contract (*modifier un élément 'essentiel' du contrat*).¹⁴² Again and again the great rush in which the French text was apparently produced becomes obvious. Thus it is wrongly alleged that the provision on promises which are binding without acceptance (Article 2:107 PECL) has simply been excised from the DCFR;¹⁴³ the discussion of this provision is based on an inaccurate text;¹⁴⁴ a substantial part of the revised Article 2:204 PECL (ie Article 2:305 PCC) appears to be missing in the French volume;¹⁴⁵ and although the English version of Article 2:308(2) PCC corresponds with the French text given in the summary, it does not do so with the version in the main part of the volume.¹⁴⁶

5. Mistake

'The subject of mistake belongs to the matters which still appear to be very confused *in iure communi*.' This assertion, a commonplace of the early modern

¹³⁹ PCC 255.

¹⁴⁰ See Kötz, *Contract Law* (n 31) 33–4.

¹⁴¹ PCC 257.

¹⁴² In addition, two illustrations of a substantial change of the offer are provided.

¹⁴³ PCC 236. cf, however, n 102.

¹⁴⁴ 'La promesse qui veut être juridiquement obligatoire sans acceptation lie son auteur.' However, the official French version of the PECL is: 'La promesse qui tend à être juridiquement obligatoire sans acceptation lie son auteur.'

¹⁴⁵ PCC 247; it has been added in the summary on page 794 and in the English version on page 578.

¹⁴⁶ PCC 794 as against 255.

discussion,¹⁴⁷ is still today as true as it was in the days of Wigulaeus Xaverius Aloysius von Kreittmayr, the author of the *Codex Maximilianeus Bavaricus Civilis*.¹⁴⁸ The law concerning defects of intention has remained particularly tricky.¹⁴⁹ The Romans had, in this respect, left behind a difficult legacy to European legal science. In Roman law, the *consensus* of the parties was only exceptionally the sole ground of a contractual obligation: in the case of *stipulatio*, for instance, the obligation was based on strict compliance with oral form requirements. Consequently, the Romans did not need to distinguish clearly between intention and declaration of intention and they did not, therefore, differentiate between ‘dissent’ (lack of agreement) and ‘mistake’ in the modern sense.¹⁵⁰ Also, they did not develop a general mistake doctrine that would have been independent of the particular type of transaction at issue—for example sale, *stipulatio*, or (last) will; furthermore, they limited the relevant types of mistake to narrowly circumscribed categories which proved difficult to conceptualize in later centuries.¹⁵¹

However, in the course of later discussions among the authors of the *ius commune*, the will of the parties came to be considered, increasingly abstractly, as a cornerstone of any contractual obligation. Consequently, mistake was understood, more and more, as a ground of invalidity, or as providing a ground of avoidance, which was conceptually independent of the particular type of transaction at issue. The Roman sources were thus read against a background of completely different doctrinal assumptions than the ones present in the Roman lawyers’ minds.¹⁵² At the same time, errors in motivation had to be considered relevant, in principle, if the obligatory effect of the contract was viewed as emanating from the will of the contracting parties. The *ius commune* lawyers therefore had to create entirely new ideas in order to rationalize the Roman sources and to keep rights of avoidance for mistake within practicable limits. One example, in this regard, is the relevance of the parties’ fault (§ 876 ABGB [1811]).¹⁵³ Often such principles can be traced back to the Natural lawyers who were the first to address the normative questions of the law of

¹⁴⁷ H Grotius, *De iure belli ac pacis libri tres, cum notis Jo. Fr. Gronovii et Joannis Barbeyracii* (Leipzig 1758) liber II, caput XI, § 6 [1].

¹⁴⁸ *Anmerkungen über den Codicem Maximilianeum Bavaricum Civilem* (4. Theil, München 1765) caput I, § XXV [3].

¹⁴⁹ EA Kramer, ‘Bausteine für einen “Common Frame of Reference” des europäischen Irrtumsrechts’ (2007) 15 ZEuP 247; J Gordley, *Foundations of Private Law* (OUP 2006) 308.

¹⁵⁰ cf Ulpian, D 18, 1, 9; Pomponius, D 44, 7, 57.

¹⁵¹ Further, see Zimmermann (n 64) 587ff; W Ernst, ‘Irrtum: Ein Streifzug durch die Dogmengeschichte’ in R Zimmermann (ed), *Störungen der Willensbildung bei Vertragsschluss* (Mohr 2007) 3ff.

¹⁵² See, in particular, M Schermaier, ‘Europäische Geistesgeschichte am Beispiel des Irrtumsrechts’ (1998) 6 ZEuP 60; M Schermaier in Schmoeckel, Rückert and Zimmermann (n 40) §§ 116–124 [51]ff; Ernst, *ibid* 11ff; Gordley (n 149) 307ff; Zimmermann (n 64) 609ff.

¹⁵³ ‘If the promising party alone is responsible for his mistake, the contract exists, unless it was obvious from the circumstances to the accepting party that the other party was labouring under a mistake’; on the discussion under the *ius commune*, see H Coing, *Europäisches Privatrecht vol I, 1500–1800* (Beck 1985) 417ff.

mistake on the basis of a modern contractual theory.¹⁵⁴ Emerging from these discussions, *inter alia*, were flexible compensation mechanisms, an example being the idea of ‘cushioning’ the consequences of the right of avoidance by duties to pay damages (§ 122 BGB).¹⁵⁵

The English common law remained focused, for a long time, on the legal interests of merchants. Here the basis of the contractual obligation was neither the promise nor the consent of the parties, but rather the bargain (consideration). Common law jurists, therefore, never formulated a genuine law of mistake in the continental European sense. Mistakes were, in principle, considered relevant only when they were attributable to the other party (misrepresentation, undue influence). Apart from that, appropriate solutions could in most cases be found by means of interpretation (implied terms).¹⁵⁶

It is hardly surprising, therefore, that a comparative analysis today yields a thoroughly disparate picture. Roughly it may be said that the will-theoretical model of most continental European countries, according to which a contract should be based upon the real intentions of the contracting parties, stands in contrast to the significantly more contract-friendly conceptions of the common law, Austrian law and the Scandinavian legal systems. These legal systems emphasize the protection of reliance and the security of transactions and so essentially concern themselves with the question of whether the mistake is attributable to the other party.¹⁵⁷ Of course, a detailed picture would be substantially more complex;¹⁵⁸ and central issues are often disputed also within individual national legal systems.¹⁵⁹ But in any case there is widespread agreement¹⁶⁰ that a common core of legal rules relating to avoidance for mistake, which could serve as the basis of a common European regulation, cannot be found at present.

A. PECL

Against this background the draftsmen of the PECL adopted an approach that is strongly inspired by the common law and Austrian Law, and also by modern

¹⁵⁴ cf Schermaier, ‘Europäische Geistesgeschichte’ (n 152) 71ff; particularly on Grotius, R Zimmermann, ‘Heard melodies are sweet, but those unheard are sweeter...’ (1993) 193 AcP 121, 146ff.

¹⁵⁵ Grotius (n 147) *liber II, caput XI*, § 6 [3]; for comparative remarks, see EA Kramer and T Probst, ‘Defects in the Contracting Process’ in *International Encyclopedia of Comparative Law vol VII* (Mohr & Nijhoff 2001) ch 11 [37]ff; Wittwer (n 72) 266ff.

¹⁵⁶ cf SA Smith, *Contract Theory* (OUP 2004) 365; Zimmermann (n 154) 149ff.

¹⁵⁷ Kötz, *Contract Law* (n 31) 172ff; Kramer, ‘Bausteine’ (n 149) 253; Wittwer (n 72) 242ff.

¹⁵⁸ See, eg Kramer and Probst (n 155) [49]ff; Kramer (n 149) 247ff, 251ff; Ranieri (n 26) 953ff; Wittwer (n 72) 244–68.

¹⁵⁹ The German discussion in the 20th century provides a telling example; see Schermaier (n 152)

§§ 116–124, [58]ff, [62]ff, [69]ff.

¹⁶⁰ Kramer (n 149) 248; M Fabre-Magnan and R Sefton-Green, ‘Defects on Consent in Contract Law’ in Hartkamp, Hesselink, Hondius, Joustra, du Perron and Veldman (n 108) 399, 400ff, 411; cf also Ranieri (n 26) 955; Kötz, *Contract Law* (n 31) 172–3.

Dutch law,¹⁶¹ and that can be traced back to Christian Thomasius.¹⁶² In principle, the consequences of a mistake have to be borne by the party labouring under the mistake. A mistake can, therefore, only be of legal significance if the other party to the contract can, exceptionally, be held responsible for it, or if he made the same mistake (Article 4:103(1)(a) PECL). In contemporary academic discussion, this basic principle has generally met with approval.¹⁶³ Furthermore, the right to avoid the contract is limited to cases of obviously fundamental mistakes (Article 4:103(1)(b) PECL), and it is excluded if the mistake was inexcusable or otherwise fell within the scope of responsibility of the mistaken party (Article 4:103(2) PECL). In conformity with the general *favor contractus*, adaptation of the contract is given precedence over avoidance (Article 4:105 PECL). From a doctrinal perspective it is noteworthy that a rule concerning mistakes as to facts, or law, constitutes the intellectual navel of the law of mistake (Article 4:103 PECL); this rule is to be applied also to inaccuracies in the expression or transmission of statements (Article 4:104 PECL).¹⁶⁴

Article 4:103 PECL (Fundamental Mistake as to Facts or Law) reads:

- (1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - (a) (i) the mistake was caused by information given by the other party; or
 - (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or
 - (iii) the other party made the same mistake
 and
- (b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.
- (2) However a party may not avoid the contract if:
 - (a) in the circumstances its mistake was inexcusable, or
 - (b) the risk of the mistake was assumed, or in the circumstances should be borne, by it.

¹⁶¹ Kramer (n 149) 255ff; Ranieri (n 26) 1037; Wittwer (n 72) 253ff, 259ff; see also H Fleischer, *Informationsasymmetrie im Vertragsrecht* (Beck 2001) 951ff, 962ff; P Huber in *PICC-Commentary* (n 76) Art 3.5 [3]f on the similar provision in the PICC.

¹⁶² *Institutionum Jurisprudentiae Divinae Libri Tres* (7th edn, Halle & Magdeburg 1720) liber II, caput VII, §§ 39ff.

¹⁶³ Kramer (n 149) 257–58; Kötz, *Contract Law* (n 31) 192ff; Fleischer (n 161) 341. For criticism, however, see Gordley (n 149) 313, arguing that such a distribution of risk normally requires fault. But the issue at stake here is not the responsibility for damage done to another person, but rather reliance in contractual negotiations. Here, as a matter of legal principle, a person is normally responsible for his representations in contractual negotiations and will be held to his word.

¹⁶⁴ ‘An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person who made or sent the statement and Article 4:103 applies’.

This, on the whole, restrictive provision is balanced by a relatively generous rule on compensation for damages on account of *culpa in contrahendo*: Article 4:106 PECL (Incorrect Information):

A party who has concluded a contract relying on incorrect information given it by the other party may recover damages in accordance with Article 4:117 (2) and (3) even if the information does not give rise to a fundamental mistake under Article 4:103, unless the party who gave the information had reason to believe that the information was correct.

These provisions of the PECL have been criticized but also emphatically been approved of, with experts in the field even speaking of ‘light on the horizon’.¹⁶⁵ Criticism has mostly been concerned with technical details of the provisions.¹⁶⁶ Thus, the draftsmen of the PICC have formulated the requirement of a ‘fundamental’ mistake (paragraph (1)(b)) more felicitously¹⁶⁷ than those of the PECL;¹⁶⁸ paragraph (2) excluding the right of avoidance may need re-thinking;¹⁶⁹ and many commentators are not convinced by the PECL (as well as the PICC) taking the difficult and contentious issue of the flawed formation of a party’s contractual intention as a model to be applied also to inaccuracies in communication.¹⁷⁰ In the latter type of situation, induced mistakes will be rare; and in the case of common mistakes of this type an application of the rules of interpretation (Article 5:101(1) and (2) PECL) will lead to the conclusion that the contract is either valid in accordance with what both parties intended, or has not been concluded at all.

In contrast, the generally restrictive approach, aiming at the protection of the other party’s reliance, as well as the primacy of monetary compensation and an adaptation of the contract, is widely considered to be appropriate.¹⁷¹ In this regard, the PECL correspond to Articles 3.4ff PICC and can be taken to represent an emerging international trend. The only aspect considered to be problematic in this regard is the perhaps too narrow formulation of paragraph

¹⁶⁵ Kramer (n 149) 255.

¹⁶⁶ A substantive criticism is that the distinction between intentional deception and negligent misrepresentation (mistake) should be abolished: HC Grigoleit, ‘Irrtum, Täuschung und Informationspflichten in den European Principles und in den Unidroit-Principles’ in Schulze, Ebers and Grigoleit (n 52) 208ff, 215; cf also Ernst (n 151) 30–1.

¹⁶⁷ Art 3.5(1) PICC: ‘...if...the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known...’.

¹⁶⁸ Grigoleit (n 166) 217: the requirement of fault has no real place in the norm.

¹⁶⁹ U Huber, ‘Irrtum und anfängliche Unmöglichkeit im Entwurf eines Gemeinsamen Referenzrahmens für das Europäische Privatrecht’ in *Festschrift für Dieter Medicus* (Heymanns 2009) 205, 208, 220ff; Kramer (n 149) 258–9. It is indeed difficult to imagine how a party that has caused a mistake or has taken advantage of a mistake contrary to the precepts of good faith should be able to defend himself by pointing out that his mistake was inexcusable. Conversely, with common mistake the question of risk allocation is decisive; however, this question is not answered by such a provision.

¹⁷⁰ Ernst (n 151) 31–32; W Ernst, ‘Mistake’ in *MaxEuP* (n 6); Grigoleit (n 166) 218, 220; JD Harke, ‘Irrtum und culpa in contrahendo in den Grundregeln des Europäischen Vertragsrechts: Eine Kritik’ (2006) 14 ZEuP 326, 328; cf also Huber (n 169) 208–09, 222. But see Kramer (n 149) 256, n 65.

¹⁷¹ Fleischer (n 161) 950ff, 963; Kramer (n 149) 256ff; Wittwer (n 72) 259ff, 284.

(1)(a)(i) creating the impression that breaches of duties of information would only give rise to a right of avoidance under the restrictive conditions of paragraph (1)(a)(ii). The PICC, on the other hand, chose a misleadingly wide formulation ('caused the mistake') (Article 3.5(1)(a)); however, the *Official Comment* clarifies that only misleading representations are intended to be covered.¹⁷²

On the whole, the PECL may therefore be viewed as establishing an adequate balance between the protection of reasonable reliance and the will principle, according to which parties should not be bound to something which they did not intend. Without unduly confining the discussion by setting up unnecessarily doctrinal categories, the PECL provide an internationally useful framework identifying the essential normative aspects of the law of mistake. Thus, the PECL dispense not only with doctrinal definitions but they also do not specify under which circumstances the risk of mistake ought to lie with the party labouring under it (Article 4:103(2)(b)). And even though misrepresentation is a cornerstone of the regulation, the PECL refrain from determining the relationship between pre-contractual duties of information and avoidance for mistake. The PECL leave such issues—which have not, as yet, been properly clarified—to international legal scholarship.¹⁷³ It is precisely this feature that makes the PECL a suitable reference text and starting point for further discussion on a European level. As part of a statutory instrument, however, one would consider such a rule to be convincing only if one has a high degree of trust in the judiciary. Legislation must be measured by different standards. Its draftsmen must place greater importance on clarity and certainty than a group of legal academics attempting to establish an international reference text which is to be, by and large, acceptable throughout Europe and comprehensible independently of any particular legal system.

B. PCC

The French reform group stayed close to the basic conception of the PECL but it has, none the less, revised the provision and, above all, complemented it by new rules. While Article 4:203 PCC reproduces Article 4:104 PECL in unchanged form, the core provision of Article 4:202 PCC, which modifies Article 4:103 PECL, reads as follows (in the official English translation):

- (1) A mistake of fact or law existing when the contract was concluded may be invoked by a party only if:
 - (a) the other party caused the mistake,
 - (b) the other party knew or ought to have known of the mistake and it was contrary to the principles of good faith and fair dealing to leave the mistaken party in error; or
 - (c) the other party made the same mistake.

¹⁷² Art 3.5 PICC, *Official Comment* 2; cf also Huber (n 161) Art 3.5 [13].

¹⁷³ cf Huber (n 161) Art 3.5 [20]ff.

- (2) However a party may not invoke the mistake if
 - (a) its own mistake was inexcusable in the circumstances, or
 - (b) the risk of the mistake was assumed, or should have been borne by such party, having regard to the circumstances and the position of the parties,
 - (c) or that, subject to the requirements of good faith and fair dealing, the mistake only affects the value of the property.
- (3) A party may only avoid a contract on the basis of mistake if the other party knew or ought to have known that the mistaken party, if it had known the truth, would not have contracted or only done so under fundamentally different conditions.
- (4) When the mistake does not concern a fundamental element of the contract, the mistaken party must prove that the other party knew or ought to have known of the mistake in question.

This rule has been complemented by a provision on pre-contractual duties of information which, as such, finds no parallel in the PECL. Article 2:102 PCC (Duty of Information) states:

- (1) In principle, each of the parties to a contract must inform itself of the conditions of the conclusion of the contract.
- (2) During pre-contractual negotiations, each of the parties is obliged to answer with loyalty any questions put to it, and to reveal any information that may influence the conclusion of the contract.
- (3) A party which has a particular technical competence regarding the subject matter of the contract bears a more onerous duty of information as regards the other party.
- (4) A party who fails to comply with its duty of information, as defined in the preceding paragraphs, or who supplies inaccurate information shall be held liable unless such party had legitimate reasons to believe such information was accurate.

Paragraph (4) of this rule is also meant to absorb the PECL's rule on liability for incorrect information (Article 4:106).¹⁷⁴

Article 2:102 PCC, however, throws up more problems than it solves, and not only because it is systematically and conceptually unconnected to the law of mistake. Though paragraph (1) convincingly assigns the responsibility regarding information,¹⁷⁵ and though the fact that liability for pre-contractual misrepresentation and failure to inform has been brought together in one general provision also deserves to be approved, the lack of a reference to this provision in the law of mistake threatens to undermine the gist of the PECL's approach: namely to balance a restrictive approach to avoidance for mistake with a generous liability rule.

Even more problematic, however, is the regulation on duties of information as such. Thus, even the apparently obvious rule in paragraph (2) occasionally leads astray. Private and expensively acquired information may deserve legal

¹⁷⁴ PCC 355.

¹⁷⁵ cf Grigoleit (n 166) 214.

protection, and, indeed, the need for such protection is especially recognized by the PECL.¹⁷⁶ If one does not want to leave contracting parties unprotected against impermissibly intrusive questions, one has to allow them to lie in certain (narrowly defined) circumstances. The German case law concerning questions relating to a woman's pregnancy provides a telling example for such situations.¹⁷⁷ Similarly, the second part of paragraph (2) as well as paragraphs (3) and (4) have been formulated too broadly; these rules are not in accordance with internationally recognized principles. Especially where a piece of information was acquired with substantial expense, as will frequently be the case in the context of paragraph (3), the investor may deserve protection, because otherwise socially desirable investments would not be made. The American case law on natural resources demonstrates this very clearly. Here investors had, at great cost, discovered oil and ore sources. They then acquired plots of land without making the owners of the land aware of their special knowledge. Were one to deny them this possibility, the motivation for such investment would fall away.¹⁷⁸

In the attempt to revise Article 4:103 PECL (Article 4:202 PCC) substantial amendments are combined with reformulations of a more editorial nature which do not require full discussion here. Article 4:202(1)(a) PCC ('caused the mistake') modifies the corresponding text of the PECL ('mistake... caused by information given'). This is stated to be a mere textual 'clarification',¹⁷⁹ — perhaps because the *Comments* to Article 4:103 PECL do not address this point. In actual fact, however, this revision amounts to an extension. Such extension is plausible as far as misleading representations (including the concealing of information) are concerned;¹⁸⁰ it is questionable, however, in so far as the mistake relates to non-communicative conduct of the other party. Even if the PECL are not entirely unambiguous in this respect,¹⁸¹ the *Comment* to Article 4:107 clarifies that only fraud can be committed also by means of merely non-communicative conduct misleading the other party: a person, who has the walls of his house painted before its sale, in order to conceal the damp, commits a fraud.¹⁸² If, however, the owner had renovated his house without being aware that he was concealing such damage, which would otherwise possibly have been apparent to the buyer, this is not a 'mistake... caused by information given' in the sense of Article 4:103 PECL. This extension of the right of avoidance for mistake, however, is not really convincing. For while

¹⁷⁶ *Comment E* on Art 4:103 PECL; similarly *Comment E* on Art II.-7:201 DCFR.

¹⁷⁷ See G Wagner, 'Lügen im Vertragsrecht' in Zimmermann, *Störungen* (n 151) 59, 93ff.

¹⁷⁸ *Comment E* on Art 4:103 PECL; for comment see H Fleischer, 'Zum Verkäuferirrtum über werterhöhende Eigenschaften im Spiegel der Rechtsvergleichung' in Zimmermann, *Störungen* (n 151) 35, 51ff; cf also Wagner (n 177) 76ff.

¹⁷⁹ PCC 346: 'précisions'.

¹⁸⁰ See text before n 172.

¹⁸¹ Particularly misleading is *Comment F* on Art 4:104 PECL. The illustration may be (mis-)understood as indicating that the rule also covers non-communicative conduct.

¹⁸² *Comment C* on Art 4:107 PECL.

participants to a transaction must, according to general legal principles, bear the responsibility for their representations, a responsibility for non-communicative conduct not based on fault appears to be too wide; the illustration to Article 4:107 PECL just mentioned makes that clear. At any rate, this extension cannot be justified as a mere ‘clarification’. This is demonstrated by the PICC that also contain the wide formulation of the PCC, but make clear in their *Official Comments* that only communicative representations are intended to be covered.¹⁸³ The PCC lack such a statement; if one looks at the identical formulation in the DCFR (Article II.–7:201(1)(b)(i)), it must be feared that non-communicative conduct is, in fact, supposed to be covered.¹⁸⁴

A further problematic change is the new rule excluding avoidance for mistakes concerning the value of the property in question (Article 4:103(2)(c) PCC). This rule, which is justified only by a reference to the French reform project on the law of obligations,¹⁸⁵ re-introduces a distinction between different types of mistake (mistakes as to substance; mistakes as to quality) which, for centuries, had burdened civilian scholarship with unnecessary difficulties.¹⁸⁶ The PECL, aware of these difficulties, rejected any such distinction and merely noted in the *Comments* that a mistake concerning value will normally not be fundamental in the sense of paragraph (1)(b).¹⁸⁷ Admittedly, this remark is misleading, as the illustration given by the PECL demonstrates. There, an expensive antique desk is sold at a price reflecting the object’s value a few years ago; in the meantime, that value has declined dramatically. If the buyer concludes the contract because he is only aware of the earlier price, but not of the subsequent decline, the wording of Article 4:103(1)(b) PECL is clearly satisfied. If one does not wish to allow the avoidance of the contract in such a case, this is due to other considerations¹⁸⁸ that have found a clear expression in the PECL. On the one hand, none of the categories of Article 4:103(1)(a) PECL applies; on the other hand it must be said that, in a market economy, each party normally has to bear the risk of mistaking the value of the object of the contract himself (paragraph (2) (b)).¹⁸⁹ Of course, this does not always have to be the case; hence, the PCC subject the rule on mistakes concerning the value to the object of the contract to a good faith *proviso*. But such an open-ended provision brings no advantage over the regulation in the PECL and entails an unnecessary conflict with their, overall coherent, basic approach. One ought to abstain from such a ‘clarification’; the

¹⁸³ See n 172.

¹⁸⁴ See *Comment D* on Art II.–7:201 DCFR. The example chosen there of a badly designed website is difficult to understand, however, because in this case there would also be a breach of provisions of the *acquis communautaire*; hence also para (1)(b)(iii) applies.

¹⁸⁵ PCC 342, 346.

¹⁸⁶ Zimmermann (n 64) 609ff.

¹⁸⁷ *Comment G* on Art 4:103 PECL.

¹⁸⁸ cf Huber (n 161) Art 3.5 [8], on the parallel problem in the PICC.

¹⁸⁹ Kötz, *Contract Law* (n 31) 184; Fleischer (n 161) 954ff; Kramer and Probst (n 155) [85].

only thing in need of revision in that regard are the *Comments* to Article 4:103 PECL.

With the third modification, the new paragraph (4), the PCC appear to be partially retracting the PECL's decision against a right of avoidance in cases of non-fundamental mistakes.¹⁹⁰ Avoidance is to be permissible for mistakes not concerning a fundamental element of the contract, if the person seeking to avoid the contract proves that the other party knew or ought to have known of the former's mistake. Such a modification, which is based, apparently, on old French case law,¹⁹¹ would signify an unfortunate step backwards. The requirement of a fundamental mistake has met with widespread approval because the unwinding of contracts usually involves substantial expense and therefore ought to be avoided if the disadvantage suffered by the mistaken party can be compensated financially.¹⁹²

C. DCFR

The most recent textual layer concerning the rule on mistake is now found in Article II.–7.201 DCFR which reads:

- (1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and
 - (b) the other party
 - (i) caused the mistake;
 - (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;
 - (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or
 - (iv) made the same mistake.
- (2) However a party may not avoid the contract for mistake if:
 - (a) the mistake was inexcusable in the circumstances; or
 - (b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

In view of the disparate comparative picture of the law of mistake, the authors of the DCFR present their rule not as a representative restatement but

¹⁹⁰ But see PCC 346, 403, arguing that para (4) provides only a burden-of-proof rule. However, if Art 4:103 PECL is read in the light of the very restrictive *Comment C*, it becomes clear that the modification entails a significant attenuation of the requirement of a fundamental mistake.

¹⁹¹ H Beale, A Hartkamp, H Kötz and D Tallon, *Cases, Materials and Text on Contract Law* (Hart 2002) 371.

¹⁹² Wittwer (n 72) 259ff, 284; Grigoleit (n 166) 215ff.

as an expression of a ‘fair balance’ between the ‘voluntary nature of contract and protecting reasonable reliance by the other party’.¹⁹³ The authors of the DCFR, in that respect, fully accept the basic approach adopted by the PECL. However, the new provision is differently structured and, largely, also re-formulated. Thus, one finds a number of changes for which, however, no explanations are given in the *Comments*. The *Comments*—unlike the rules themselves—appear not to have been subject to a revision; they have only been abbreviated and exceptionally also been expanded upon. Thus, even the manifestly misleading comment on the supposedly non-fundamental nature of mistakes concerning the value of the object sold have been taken over by the DCFR.¹⁹⁴ This juxtaposition of newly formulated rules and old comments is bound to lead to difficulties of interpretation. At the same time, it demonstrates that the modifications to the rules are intended to have a primarily technical, or doctrinal, character. However, some changes also have substantive consequences.

One example is the new formulation of the requirement of a fundamental mistake. While Article 4:103(1)(b) PECL looks at the knowledge or negligent lack of knowledge of the other party (‘ought to have known’), the DCFR does not focus on a fault-based criterion but on whether the other party ‘could reasonably be expected to have known’ about the fundamental nature of the relevant term;¹⁹⁵ this is a change to the PECL that can be found throughout the DCFR. The reason for it is not entirely clear given the lack of an explanation by the DCFR’s draftsmen. In substance, the new formulation appears to entail no change since what one party may expect the other party to know depends on what the law requires the other party to know. It would, however, have been simpler to have based the criterion of fundamentality upon a neutral third party’s perspective, as the PICC had already done.¹⁹⁶ For if, ultimately, the judge will have to make an assessment according to very similar criteria,¹⁹⁷ the rule should directly refer to such assessment. In addition, the focus on the perspective of the recipient of the mistaken party’s declaration occasionally leads to difficult, and ultimately unnecessary, problems, in particular with inaccuracies in the expression or transmission of statements.¹⁹⁸

In so far as the individual grounds for avoidance are concerned, it is to be welcomed that the DCFR has now expressly included the breach of pre-contractual duties of information (paragraph (1)(b)(iii) first alternative). The PECL may in that regard indeed appear to be too narrow.¹⁹⁹ However,

¹⁹³ *Comment A* on Art II.–7:201 DCFR.

¹⁹⁴ *Comment H* on Art II.–7:201 DCFR.

¹⁹⁵ Art II.–7:201(1)(a) DCFR with *Comment C*.

¹⁹⁶ See n 167.

¹⁹⁷ cf Fleischer (n 161) 963; Harke (n 170) 327; Huber (n 161) Art 3.5 [6].

¹⁹⁸ Text to nn 206ff.

¹⁹⁹ Text before n 172.

the DCFR thus seems at the same time²⁰⁰—at least partly—to have adopted the inappropriately wide approach towards duties of information contained in Articles 2:201ff ACQP I²⁰¹ (Articles II.–3:101ff DCFR)²⁰² which has already been criticized elsewhere.²⁰³ Thus a car dealer is supposed to inform even a professional buyer about the fact—normally generally known—that in the course of the next year a new model will be produced (Article II.–3:101 DCFR).²⁰⁴ If he does not do so, the buyer may avoid the contract under Article II.–7:201(1)(b)(iii) DCFR. No basis for such right of avoidance can be found in either the national legal systems or the *acquis communautaire*;²⁰⁵ and it moves away very far from the restrictive approach of the PECL. Such consequences in the context of the law of mistake have to be kept in mind when new duties of information are introduced. However, the mistake rule as such remains untouched by such criticism.

The second alternative of paragraph (1)(b)(iii) in Article II.–7:201 DCFR, in contrast, appears to be less felicitous. Clearly this ground of avoidance is intended to implement Article 11(2) of the E-commerce Directive. However, it gives rise to a number of problems, even if the fundamental concern is left aside whether it makes sense to adopt such a specific provision within a set of highly abstract general rules. Systematically, such rule should find its place in the context of inaccuracy in communication (Article II.–7:202 DCFR) for the Directive is concerned with ‘input errors’ rather than with the possibility of reconsidering an order during the process of placing an order. When revising Article 4:104 PECL/Article II.–7:202 DCFR one should therefore consolidate the situation envisaged in Article 11(2) E-commerce Directive with similar problems, such as the one arising from an unnecessarily complicated booking form (such problems had already been contemplated by the authors of PECL).²⁰⁶ But it is also questionable whether the Directive’s provision on input errors can be integrated at all into a system of rules limited to fundamental mistakes. Here, already the focus on the perspective of the recipient of the mistaken party’s declaration leads to problems. The recipient cannot, typically, recognize input errors; he can hardly do more than take account of the *possibility* of an input error, and he can also, normally, not know whether the mistaken party would have concluded the contract only on

²⁰⁰ Surprisingly, Art II.–7:205(3) DCFR (the rule on fraud) does not make reference to the general rule on duties of information but, quite independently, lays down a list of criteria which should be considered in determining whether a duty of disclosure exists. In principle, the same criteria should also be relevant in the context of Art II.–7:201 DCFR; cf Huber (n 169) 204.

²⁰¹ Although Arts 2:202–2:203 ACQP II were reformulated in questions of detail, the essentials remained unchanged.

²⁰² cf also Jud (n 11) 71, 81ff; F Faust, ‘Informationspflichten’ in Schulze, von Bar and Schulte-Nölke (n 43) 115–16. The basic duty in Art II.–3:101 DCFR corresponds to Art 2:201 ACQP I/II which is much too wide; also the *Comments* on the DCFR have been adopted from this rule.

²⁰³ Jansen and Zimmermann (n 23) 532ff; see also Faust (n 202) 123ff, 127ff.

²⁰⁴ *Comment B Illustration 4* on Art II.–3:101 DCFR.

²⁰⁵ cf *Notes* no 1 on Art II.–3:101 DCFR; Jansen and Zimmermann (n 23) 532ff.

²⁰⁶ *Comment F* on Art 4:104 PECL.

‘fundamentally different terms’. Less difficulty would arise with the wording of Article 3.5(1) PICC,²⁰⁷ according to which the point of view of ‘a reasonable person in the same situation as the party in error’ is relevant. Above all, however, it must be doubted whether the fundamentality requirement of paragraph (1)(a) is compatible with the Directive which, after all, recognizes no such restriction. Conversely, it is not clear whether such right of avoidance is really necessary under the Directive. From the EU’s point of view, the right of withdrawal and a claim for damages which also exempts the buyer from the cost of returning the goods should be sufficient. On the whole, the rule fails in the way in which it formulates the fundamentality requirement, and it is in its substance either too narrow or superfluous. At any rate, the DCFR does not succeed, in this instance, in either integrating the political programme of the *acquis communautaire* into the intellectual framework of the PECL, or cutting down the *acquis* to a teleologically plausible size.²⁰⁸

Above all, however, it is the re-formulation of Article 4:103(1)(a)(i) PECL by Article II.–7:201(1)(b)(i) DCFR that is obviously infelicitous. The new wording corresponds to Article 4:202(1)(a) PCC; in that regard, our previous criticism applies.²⁰⁹ In the DCFR, however, the only convincing reason for the new wording, namely the aim to encompass misrepresentations by silence in breach of a duty of information, is lacking since these cases are already governed by paragraphs (1)(b)(ii) and (iii). Thus, the DCFR with its paragraph (1)(b)(i) also apparently aims at including non-communicative conduct. But that is not explained and, above all, is unconvincing in substance.

The rule concerning the mistakes caused by the other party (paragraph (1)(b)(i)) has become part of a comprehensive ‘doctrinalization’ of the grounds of avoidance in paragraph (1)(b). While the PECL recognize three distinct grounds for avoidance side by side, the DCFR now specifically distinguishes between causation of the mistake (paragraph (1)(b)(i)) and causation of the mistaken contract (paragraphs (1)(b)(ii) and (iii)). Ernst A Kramer, who in general has endeavoured to defend the basic conception of the DCFR against criticism, considers this to be ‘conceptually not very transparent’.²¹⁰ Indeed, such doctrinalization is unnecessary in a (draft of a) legislative text and creates only additional problems. Thus, it is unclear, what the causation requirement in paragraph (1)(b)(ii) is supposed to mean (the *Comments* are silent on this point): for the rule presupposes that the party in error has already been subject to a mistake and that the other party knew or could reasonably be expected to have known that. Hence, the mistake must already have occurred before, and therefore independently of, the other party’s breach of its duty of information.

²⁰⁷ See n 167.

²⁰⁸ Generally, see Jansen and Zimmermann (n 23) 505ff.

²⁰⁹ Text to nn 179ff.

²¹⁰ EA Kramer, ‘Ein Blick auf neue europäische und aussereuropäische Zivilgesetzbücher oder Entwürfe zu solchen’ in *Festschrift für Eugen Bucher* (Stämpfli 2009) 450.

The normative substance of this amendment ultimately only consists in allowing the other party to argue that the mistaken party would also have concluded the contract had it been properly informed. Such cases will be rare. But if they do arise, perhaps because the mistaken party has been coerced into concluding the contract by a third party, or because the mistaken party considered itself otherwise bound to conclude the contract, it is unwise to exclude a right of avoidance *a priori*. This is all the more true if the mistaken party would have concluded the contract even if the information had been provided, because it would have relied upon a right of withdrawal which now, due to the lack of information, it did not exercise in time. Here it is clear that the lack of information did not cause the contract to be concluded. Nonetheless, it is obvious that a right of avoidance should be granted. Now, such cases are clearly contrived. But one cannot conceive of anything other than contrived cases for the application of such a requirement; and it is hardly imaginable that it should not be possible to solve such cases on the basis of the requirement of a fundamental mistake (paragraph (1)(a)). The general causation requirement thus proves to be unnecessarily doctrinal in character, difficult to understand and also occasionally misleading.

Generally it is remarkable that those aspects of the PECL's rules on mistake with regard to which observers have noted the need for a certain revision, ie the rule on inaccuracy in communication (Article 4:104), or the exclusion of a right of avoidance (Article 4:103(2)),²¹¹ have been left largely unchanged. Regarding paragraph (1) of Article 4:103, it would have been both much simpler and more convincing had the first ground for avoidance been replaced by the following text:²¹²

- (i) the mistake was caused by misrepresentation, or by the other party's failure to comply with a pre-contractual information duty; or

...

In contrast, the other substantial alterations by the authors of the DCFR to the text of the PECL were steps in the wrong direction.

Finally, the provision on liability for damages (Article 4:106 PECL) has also been re-formulated. Article II.-7:204 DCFR (Liability for loss caused by reliance upon incorrect information) reads:

- (1) A party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information:
 - (a) believed the information to be incorrect or had no reasonable grounds for believing it to be correct; and

²¹¹ Text to nn 169ff.

²¹² cf Kramer (n 210) 450, with the suggestion: 'caused the mistake by not fraudulent misrepresentation or non-disclosure of pre-contractual information'. 'Not fraudulent', however, is not necessary in this context, as mistake and fraud should not be understood as mutually exclusive grounds for avoidance: fraud is a special instance of the former. Furthermore, the non-disclosure of information must be in breach of a duty.

- (b) knew or could reasonably be expected to have known that the recipient would rely on the information in deciding whether or not to conclude the contract on the agreed terms.
- (2) This Article applies even if there is no right to avoid the contract.

Here, the new paragraph (1)(b) is particularly problematic. It is not further elucidated in the *Comments*, although these *Comments* have generally been subject to substantial revision. Again, the revision seems to be concerned with doctrinal rather than with practical considerations. It is unclear under which circumstances it may be assumed that information given in the course of contractual negotiations is irrelevant to the other party. Apparently, the revision aims at applying the subjective requirement also to the reasonable reliance of the other party. Thereby, the provider of the information would be free from liability if he incorrectly assumed that the other party would check up on the information, provided he did not know and could ‘not reasonably be expected to know that this assumption was incorrect’.²¹³ However, it is doubtful whether such a subjective element makes sense in this context since it is not a question of fact, but rather a question of law whether a party may rely upon information given by the other party, ie whether reliance is reasonable. Thus, there can normally be no excusable lack of knowledge. In other words: whoever may reasonably rely, may always also assume that the other party is aware of this. The new requirement is therefore idle. Perhaps, that is why the PECL relegated the requirement of reasonable reliance to the *Comments*. At any rate, the additional requirement can be justified only on doctrinal grounds but is, in substance, implausible and, without further explanation, misleading.

6. Conclusions

The article demonstrates, by way of example, the ‘new complexity’ (*Unübersichtlichkeit*) of European private law; and it attempts to show how its texts should be analysed in future discussions. In essence, this primarily requires a comparison of all the relevant texts, and a detailed assessment of their similarities and differences. In the present article, particularly in the part concerning contract formation, this could only be broadly sketched due to the great number of rules involved. The changes made by the authors of the PCC and the DCFR to the texts of the PECL, and also those which the authors of the PECL made with regard to the PICC and the CISG, make it clear that they were always also concerned with the details of the wording of the rules. At least on a hermeneutic level the PECL—sometimes also the PICC—must therefore form the starting point: the text of the more recent rules is always intellectually related to the text of the older ones; it can only properly be

²¹³ cf *Comment C* on Art 4:106 PECL; *Comment C* on Art II.-7:204 DCFR.

understood with reference to its correspondence with, and deviation from, the older texts. That holds true also when explanations for deviations from the older texts are not provided, as is often the case. At least in the area of contract formation and mistake, such differences frequently amount to more than merely technical refinements.

A second *desideratum* for the future assessment of these European model rules, which the present study makes clear, is the need for a more thorough consideration of the extensive literature on European private law. A serious shortcoming of the DCFR, in particular, is that this literature hardly appears to have been taken into consideration. This is demonstrated not only in the references: the *Comments* do not include references to literature, and the *Notes* are limited, largely, to (often dated) national literature. It is also brought out by the fact that, in terms of substance, the more recent model rules sometimes differ from the PECL and the PICC where the latter have met with approval, and, conversely, leave unchanged problematic rules that have been widely criticized. It would be unwise, however, to continue to engage in an 'academic' rule-making exercise that is divorced from the academic discourse.

A substantive analysis demonstrates a significant European consensus concerning the law of contract formation and of mistake. This consensus manifests itself not only in the PECL, the PICC, the DCFR and—at least to some extent—the PCC, but also in the European and international comparative literature. A contract is based solely in the private autonomy of the parties to it. At the same time, contract law has to protect the parties' reliance upon each other's statements; this can be seen in the law of contract formation (Article 2:102 PECL) as much as in the law of mistake. One cannot, however, particularly in the case of the law of mistake, conclude from that consensus that there would be a common core of national legal rules. These national rules, in fact, are very disparate.

Despite this consensus as to the substance of the model rules analysed in the present paper, none of them would provide a suitable draft for legislation in the field of European private law. With regard to the PECL, that was not their authors' goal—predominantly, they intended to create a suitable reference-text for European legal scholarship (as well as basic normative propositions for international arbitration) rather than directly applicable rules. The PCC are marked by a certain distance from the international consensus, and an attempt to give contract law a specifically French flavour, without being able to base this shift on good reasons. Many of the deficiencies of the PCC, however, are simply due to the immense time-pressure under which the French working group conducted its revision project. By and large, the PECL clearly deserve preference over the PCC.

A prominent feature of the DCFR, compared with the PECL, but also with the PCC, is its attempt to achieve a more thorough systematization of the model rules—something that, though to a significantly lesser degree, the PECL

had already aimed for in comparison with the PICC. This is evident in the general organization of the text, in the higher level of abstraction—exemplified by the infelicitous introduction of the concept of ‘juridical act’ as the fundamental category of contract law—and also in the internal re-structuring of individual provisions, eg in the law of mistake. Above all, however, it manifests itself in the attempt to obtain greater conceptual precision, as is apparent in the ubiquity of definitions. Even if precision is, of course, to be regarded as a virtue in any attempt to compile a set of rules, the definitions provided in the DCFR are highly problematic. First, they are mostly unnecessary: a legislative document does not need to clarify that the term ‘contract’ refers only to the agreement, rather than to the document (practical lawyers will probably not be impressed by such a definition); and it may also leave open how the concept of ‘juridical act’ ought to be defined. What alone is crucial are the requirements for the formation of a contract, how the parties’ declarations forming the contract are to be interpreted, and at which moment they become binding. This is true also in the European context: if it is clear under which conditions an agreement becomes binding upon the parties, it does no harm if the English use the word ‘contract’ also to denote the physical document. Also, these definitions sometimes create more problems than they solve. This has been observed throughout the present article: the definitions often do not facilitate the application of the law, but rather irritate their addressees.

Equally problematic are the substantive deviations of the DCFR and the PCC from the PECL. On the one hand, they have demonstrated, once again,²¹⁴ that the integration of the *acquis communautaire* cannot simply be achieved by inserting its rules somewhere in between the rules of the PECL. On the other hand, it has also become apparent that the PECL suffer from a number of weaknesses if one chooses to read them as if they were a set of directly applicable rules: not only where the DCFR and the PCC suggest modifications, but also where the DCFR and the PCC have left the PECL unchanged. Occasionally, of course, a rule appears to be more convincing in the DCFR version than in that of the PECL. But this is not always, and not even predominantly, the case. In most of the instances analysed here, no advantage of the DCFR over the PECL was apparent. This may sometimes be due to the fact that the *Comments* only rarely give reasons for the deviation: they provide no more than very general policy considerations. A reader is bound to be irritated if he is confronted with identical *Comments* to—also substantively—divergent formulations of a rule; in any case, he will fail to understand why a different conceptual or doctrinal approach has been chosen.

In summary then, the DCFR constitutes no significant improvement on the PECL. Even if, here and there, a text found in the DCFR is to be preferred

²¹⁴ Generally, see Jansen and Zimmermann (n 23) 505ff.

over its predecessor in the PECL, and even if the PECL have proved to be in need of revision in a number of points, the *Lando*-Commission's original text should not only be treated as the starting point on a hermeneutical level: also in terms of substance, the PECL—and sometimes the PICC—should continue to occupy the position of the primary reference-text of European contract law.