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COMPARATIVE STUDY OF THE PRINCIPLES OF CONTRACT FORMATION OF INDIA, CHINA, USA AND FRANCE

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Comparative Study of the Principles of Contract Formation of India, China, USA and France

National Law University, Delhi

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## Table of Contents

Table of Cases ........................................... i  
List of Statutes ........................................... ii  
List of Abbreviations ..................................... iii

CHAPTER-I
Introduction ............................................. 1-3  
1.1 Basic Contract Principles  
1.2 Research methodology  
1.3 Research Questions

CHAPTER-II
Principles of Contract Formation in India, China, USA and France ............................................. 4-24  
2.1 India  
2.2 China  
2.3 USA  
2.4 France

CHAPTER-III
Comparative Study ...................................... 25-33  
3.1 China and India  
3.2 USA and India  
3.4 France and Anglo-American Countries

CHAPTER-IV
Contract Formation through Electronic Medium ............................................. 34-39  
4.1 Introduction  
4.2 Do we need new rules of contraction in the electronic environment?  
4.3 Consumer Protection and Globalization of the Net  
4.4 Conclusion
CHAPTER-V

Conclusion 40

Bibliography iv-vii
CHAPTER-I
INTRODUCTION

1.1 BASIC CONTRACT PRINCIPLES

A basic study of the contract law of any country begins with the study of the principles of contract formation. In order to have a Contract, there must first be an Offer. The “Offer” can be an offer for goods or a service or almost anything else for that matter. In Example 1, A offers to buy a car from B for $1,000. In example 2, X says to Z “If you pay me $50 I will paint that room”. Clearly both of those statements are Offers. For the most part, the Offer will be along the lines of someone promising to do something, buy something or give up something.

The next step in Contract formation is called an Acceptance. The Acceptance regarding the above scenarios would be B’s reply “Yes, I will sell you my car for $1,000” or Z’s reply “Yes, I will pay you $50 to paint the room”. Take note that a Counter-Offer will not act as an Acceptance, but rather as a Rejection. Referring to the above scenarios, B says “I will sell you my car for $1,200 instead of $1,000”. This is a rejection of the initial offer, and becomes a Counter-Offer to A. A must now choose to Accept or Reject B’s Counter-Offer. If A rejects the Counter-Offer, the Original Offer is no longer on the table. The process must begin again.

The third aspect of Contract formation is called Consideration. Consideration means that something of value must be exchanged. The Consideration in the car scenario for A would be receiving the car. The Consideration for B would be receiving the $1,000. Consideration in a Contract must be mutual, that is, both parties must receive something of value. Take note, that the value need not be equal or necessarily fair. A can offer to buy B’s new Corvette for $1,000. If B Accepts, then a Contract will be made, even though it should be obvious that this is not a fair deal. That sums up Basic Contract Principles.

1.2 RESEARCH METHODOLOGY:

The Research card method has been adopted for this research under the supervision of Professor (Dr.) Amar Singh. The group members have consulted Bare
Act, books, websites, cases, articles and journals for conducting the research attained from National Law University Library and resources from the World Wide Web.

1.3 RESEARCH PROPOSAL

The principles behind the contract formation, according to the researchers basic understanding is that it would obviously be different in common law and civil law countries as the basic concepts that are inculcated in these legal systems essentially differ. Hence the prime objective of this research is to highlight the differences in these legal systems taking into account the laws prevalent in India, China, USA and France. Hence this research project would involve a comparative study between these four countries.

The researchers further propose that the consideration requirement is an essential element in almost all the countries. Therefore, one of the prime focus is to delve into this aspect of contract formation to bring out the truth value in the aforementioned hypothesis. The contract formation through electronic medium has gained importance in this fast changing world. The use of the world wide web as an instrument to connect with the entire world has increased its importance manifold. Therefore the researchers also propose to research in this topic to bring out the electronic contract formation principles of various countries which shall also be useful to draw a conclusion as to which principles are best suited to meet the demands of the contemporary scenario. The researchers also propose to differentiate between the principles of subjective theory and objective theory in the light of the laws followed in India, China, USA and France. These important questions have provoked the researchers to research and analyze these aspects in detail.

1.4 RESEARCH QUESTIONS

- Do all the countries follow the “mirror image” rule?
- Should consideration be an important requirement of contract formation?
- Is there a trend observed while comparing the principles of contract formation in countries following the civil law and common law respectively?
• Does the French subjective theory, while conceptually distinct from objective theory, produce significantly different outcomes in actual disputes?

• Are the approaches followed by the common law countries and civil law countries, to regulate contract formation through the electronic medium, the same?

• Are there different factors that affect the approach followed by these countries relating regulating electronic contract formation?

1.5 HYPOTHESIS

• YES
• YES
• YES
• YES
• NO
• YES.
CHAPTER-II

PRINCIPLES OF CONTRACT FORMATION IN INDIA, CHINA, USA, FRANCE

2.1 PRINCIPLES OF CONTRACT FORMATION IN INDIA

Essentials of a valid contract

1. Competent Parties
2. Offer
3. Acceptance
4. Consent
5. Consideration

The common intention of the parties to contract which is an essential requirement under the English Law to create a contract is not so under the Indian Law. There is no specific provision in the Indian Contract Act requiring that an offer or its acceptance be made with the intention of creating a legal relation.

Parties to a contract must be competent. A person is competent to contract if at the time of making it, he is of sound mind (s.12, Economic Rational Behaviour Test), major and not disqualified from contracting under law. Where he has not attained the age of 18 years or if he is already under a court of wards then of 21 years, he is a minor. Minors and persons of unsound mind do not possess the necessary capacity to enter into valid contracts. So agreements made by them is void.

Offer (also known as proposal) and acceptance are necessary ingredients in the formation of a contract in India. An offer is defined in s.2(a) of the Indian Contract Act as ‘when one person signifies to another his willingness to do or abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal’. This is distinguished to an invitation to

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1. s.10, The Indian Contract Act, 1872.
2. s.11, The Indian Contract Act, 1872.
3. s.2(a),3,4,5,6, The Indian Contract Act, 1872.
4. s.2(b),3,4,5,6,7,8, The Indian Contract Act, 1872.
10. s.11, The Indian Contract Act, 1872.
11. s.3, The Indian Majority Act XI, 1875(9 of 1875).
offer where a party, without expressing his final willingness, proposes certain terms on which he is willing to negotiate. An offer becomes complete only when it comes to the knowledge of the offeree. The offeree may accept or reject the offer, expressly or impliedly. Any change by him in terms of offer is tantamount to its rejection and is called a counter-offer, which the original offeror may or may not accept. An offeror may also withdraw his offer before its acceptance is complete as against the proposer.

Acceptance is defined in s.2(b) of the Indian Contract Act as ‘when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.’ An acceptance should be absolute and unqualified according to section 7 of the Indian Contract Act and not introduce a condition (unless it is implied by law in the offer). Nor should it be made in ignorance of the terms of the offer. The communication of the acceptance is complete, as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer. An offeror may prescribe a positive mode of acceptance for the offeree to follow but he cannot require him to indicate acceptance by mere silence, which is the absence of an act. Where the proposal does not prescribe the method of acceptance, the offeree may express his acceptance in some usual and reasonable manner.

The acceptance of an offer/proposal according to the principles laid down in the aforementioned sections of the Indian Contract Act results in the formation of a promise.

Consideration forms a very vital part in the process of contract formation in India. Section 2(d) of the Indian Contract Act defines consideration as: ‘When, at the
desire of the promisor\textsuperscript{22}, the promisee\textsuperscript{23} has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise’. A mere promise without consideration is not recognised by law since it takes into account the human element that a person should be bound by his promise only when the other party at his request has either done or abstained from doing an act or does or promises to do an act. Money is not the only form of consideration for this purpose. A consideration may consist sometimes in the doing of a requested act, sometimes in the making of a promise by the offeree. Although it need not be adequate, it must amount to something which is of some value in the eyes of the law\textsuperscript{24}. There must be a return or \textit{quid pro qua}, something of value received by the promise as inducement of the promise\textsuperscript{25}.

Every promise and every set of promises, forming the consideration for each other, is an agreement\textsuperscript{26}. An agreement enforceable by law is a contract\textsuperscript{27}. All agreements are contracts if they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void\textsuperscript{28}.

Consent is the foundation of a contract. Law requires the meeting of minds (\textit{aggregatio mentium}) between parties\textsuperscript{29}. The consent given by the parties should be ‘free consent’. Consent is said to be free when it is not caused by coercion\textsuperscript{30} or undue influence\textsuperscript{31} or fraud\textsuperscript{32} or misrepresentation\textsuperscript{33} or mistake\textsuperscript{34}. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake\textsuperscript{35}. When consent to a transaction is caused by coercion, undue influence, fraud or misrepresentation the agreement is

\textsuperscript{22} Promisor is a person making the proposal as defined in s.2(c) of the Indian Contract Act, 1872.
\textsuperscript{23} Promisee is a person accepting the proposal as defined in s.2(c) of the Indian Contract Act, 1872.
\textsuperscript{24} Forbearance to sue at the promisor’s desire constitutes consideration. Similarly, restoration of family peace is a good example of a valid consideration.
\textsuperscript{26} s.2(e), The Indian Contract Act, 1872.
\textsuperscript{27} s.2(h), The Indian Contract Act, 1872.
\textsuperscript{28} s.10, The Indian Contract Act, 1872.
\textsuperscript{29} s.13, The Indian Contract Act, 1872.
\textsuperscript{30} s.15, The Indian Contract Act, 1872.
\textsuperscript{31} s.16, The Indian Contract Act, 1872.
\textsuperscript{32} s.17, The Indian Contract Act, 1872.
\textsuperscript{33} s.18, The Indian Contract Act, 1872.
\textsuperscript{34} s.14, The Indian Contract Act, 1872.
\textsuperscript{35} Subject to the provisions of s.20-22 of the Indian Contract Act, 1872.
voidable at the option of the party whose consent was so caused for there is no free consent here. Similarly, mistake renders a contract voidable subject to sections 21 and 22 of the Indian Contract Act. These factors do not overlap except that their effect may be common\textsuperscript{36}.

The last requirement in the process of contract formation in India is that the consideration or object of an agreement is lawful unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy\textsuperscript{37}. Every agreement of which the object or consideration is unlawful is void\textsuperscript{38}.

\begin{footnotesize}
\begin{enumerate}
\item s.23, The Indian Contract Act, 1872.
\item Agreement to stifle criminal prosecutions and marriage brokerage agreements are hit by the above provisions. Maintenance and champertous agreements are not per se void on ground of public policy. A contract vesting jurisdiction in a court, which cannot exercise it under section 20 of the Code of Civil Procedure, is void and hit by section 23 of the Indian Contract Act because of being against public policy (Ranjana Malik v. Devi Ram and Others AIR 2002 HP 166). Similarly, a contract providing for obtaining the deed of exchange of properties from registration office only after criminal cases were compromised, is held to be against public policy and thus void. Monopolistic agreements are void. Agreements in restraint of marriage, trade and legal proceedings are void. Similarly unmeaning agreements, wagering agreements and agreements to do impossible acts are void.
\end{enumerate}
\end{footnotesize}
2.2 PRINCIPLES OF CONTRACT FORMATION IN CHINA

China has been following a Civil Legal system. Since the establishment of the People’s Republic of China until the 1990’s, three contract laws have promulgated in China. However, after entering the 1990’s, three former contract laws could no longer adapt to the need for legal reforms as required by social life. With the penetration of reforms, open door policy and the establishment of the market economy systems, there were demand for the market transaction regulations to be unified, legal regulations and old civil law theories that reflected essential and special traits of the command economy system needed to be abolished and common regulations reflecting the objective principles of the modern market economy needed to be adapted. Thus, the Uniform Contract Law of the People’s Republic of China came into effect in 1999 as a part of China’s continued efforts to join the WTO. In drafting the new regulation, the legislators referred to the principles of international commercial contracts, the UN convention for International Sale of Goods and other foreign legal standards. The uniform contract law is based on China’s actual conditions; it draws from experiences of other countries. The Chinese contract law also acknowledges modern means such as the electronic means. The contract act aims to facilitate the transition from a planned economy to a market economy while integrating the Chinese economy into the world economy.

FREEDOM OF CONTRACT

Freedom of contract is perhaps one of the most cherished aspects of individual liberty and it is therefore unfortunate that its ambivalent nature has resulted in its abuse.

For the present purpose, freedom of contract has two distinct meanings:
(1) The freedom to enter into agreements
(2) The freedom from interference with a contract once made

However in the present context it means that parties to a contract can agree upon any terms and conditions of their choice. These terms supersede the law of the

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39 Zheng Yunrui, PERSPECTIVES ON CONTEMPORARY LEGAL DEVELOPMENTS IN CHINESE LAW, Singapore Journal of International and Comparative Law.
40 John H Matheson, CONVERGENCE, CULTURE AND CONTRACT LAW IN CHINA, 15 Minn. J. Int’l. 329.
land. Where there is ambiguity as to these terms, the Court will look to the intent of
the contracting parties.

Article 4 of the Contract Law of the People’s Republic of China provides
contracting parties with the freedom to contract without any unlawful interference.
This would mean that the State can curb this freedom which would be lawful
interference. However, what constitutes illegal interference for non-governmental
entities or individuals remain undefined. As per articles 5, 6 and 7, parties have to
follow fairness, good faith and abide by the administrative regulation while
contracting.

CAPACITY

In the Contract Law of the People’s Republic of China, article 9 talks about
the requirement of capacity of the parties to enter into a contract. Legal persons
having civil capacity are competent to perform civil acts and according to law,
independently enjoy civil rights and assume civil responsibilities.42

Capacity under the Code of Contract Law may be discussed from three
perspectives: capacity of a natural person, capacity of a legal person, and capacity of
other organizations.

First, a natural person of at least eighteen years of age who does not suffer any
mental disability is capable of entering into a contractual relationship in his own free
will. The threshold age may be, in certain circumstances, be reduced to sixteen years
and even be as low as ten years old. People possessing civil capacity have been talked
about in General Principles of Civil Law of the People’s Republic of China under
Chapter II Citizens.43 As per section 11, a citizen aged over 18 is recognized as an
adult with full capacity for civil conduct. Further a citizen who has reached the age of
16 but not 18 and whose source of income is his own labour is also recognized as a
person with full capacity for civil conduct. Hence such citizen are competent to
contract. As per section 12, a minor above 10 years of age is deemed to have limited
capacity for civil conduct and can be represented by his agent or can participate with
the consent of his agent in civil activities. Thus minors above 10 years of age can
contract when represented by an agent. People under ten years have no civil conduct
capacity.

42 Ralph Haughwout Folsom, John H Minan, LAW IN THE PEOPLE’S REPUBLIC OF CHINA,
43 General Principles of the Civil Law of the People’s Republic of China, <http://www.law-
bridge.net/english/LAW/20065/1322572053247.shtml>
As per section 13, a mentally ill person who is unable to account for his own conduct shall be a person having no capacity for civil conduct shall be represented in civil activities by an agent.

A similar rule is present in the common law principles of contract relating to purchase of necessaries by a minor. Children under 10 years are deemed, however, to have no capacity to enter into contracts. The fixed threshold of ten years old differentiates the Chinese law governing the capacity of a minor from the comparable common law rules where such a definite threshold is not found. A natural who is represented by an agent in the making of the contract is not liable for any act of the agent that exceeds the agent’s authority, unless the act is supported by an ostensible authority that was reasonably relied upon by a bona fide third party.

Secondly, a legal person under Chinese law is an organization that is capable of enjoying and exercising civil rights, as well understanding and performing civil duties independently. In fact, the earlier laws governing in China only recognized contracts between State enterprises and not individuals. Such agreements came under administrative laws.

A legal person must be established pursuant to the law, have the necessary property or funds, have its own name and be capable of undertaking civil liability independently.

Thirdly, the code recognizes the right of an organization, which is not a legal person to conclude a contract. Article 2 of the Code suggests that a government organization or department engaged in a commercial activity may be liable to the other contracting party.

**OFFER AND ACCEPTANCE**

Formation of a contract requires an agreement upon a particular subject matter. The contract law of the People Republic of China requires that an exchange of offer and acceptance support a contract. As per article 14 of the contract law of the Public Republic of China, an offer would mean the manifestation of the party’s intention to enter into a contract with another party. For this reason, the terms of the offer should be definite and specific and should indicate the party’s willingness to be bound by a contract on acceptance of the offer.

Chinese law generally considers “offers” made to unspecified persons, that is, to the public at large, to be invitations to offer, rather than offers per se. However, some commercial advertisement are capable of becoming offers when their content
conforms to the provisions for offers, i.e. the advertisement is specific in its content and the advertiser has the intent to be contractually bound on acceptance. A proposal to supply goods or services at stated prices made by professional suppliers in an advertisement or by a display of goods, is presumed to be an offer to sell or supply at that price until the stock of goods, or the supplier’s capacity to supply the services becomes exhausted. Different intentions communicated in the proposal prevent the presumption.

The offer becomes effective when it reaches the offeree. This is the rule of arrival. When a contract is concluded by the exchange of electronic messages, if the recipient of an electronic message has designated a specific system to receive it, the time when the electronic message enters into such specific system is deemed its time of arrival; if no specific system has been designated, the time when the electronic message first enters into any of the recipient systems is deemed its time of arrival. So, an offer becomes effective when it’s in the offeree’s zone of influence, rather than when it leaves the offeror’s zone of influence.

The offeror is free to withdraw his offer before the offer is communicated to the recipient and free to revoke the offer before the acceptance is dispatched. This is however limited under two circumstances: 1) if it expressly indicates whether by stating a fixed time for acceptance or otherwise, that it is irrevocable, or 2) the offeree has ‘reason to believe that the offer is irrevocable and has already made preparation to perform. The second instance, may bind the offeree against his intentions. However, the law gives scope for criticism as it would be subjective evaluation on the offeree’s part which would determine whether the offer is irrevocable and the law does not mention any level of preparation that could render the offer irrevocable. The second clause, due to its subjective nature can amount to equitable estoppel under the common law system, even followed in India only when the inquiry standards advocate objective analysis and don’t depend on the offeree’s responsibility.

An acceptance is the offeree’s manifestation of intention to assent to an

44 John H Matheson, CONVERGENCE, CULTURE AND CONTRACT LAW IN CHINA, 15 Minn. J. Int’L 329.
46 Article 16, Contract Law of the People’s Republic of China.
When an offer gives specific direction as to the manifestation of acceptance, the time limit within which acceptance should be communicated and when it shall become effective, the specifications ought to be followed by the offeree/acceptor. In normal circumstances however, acceptance should be manifested by notification except where it may be manifested by conduct in accordance with the relevant usage. This clause of the law could accommodate silence to mean a mode of acceptance if relevantly used. Where a contract is concluded by the exchange of electronic messages, the acceptance is communicated when it reaches the offeror’s domain of influence. Further the acceptance should also be communicated in a reasonable time.

A contract is formed once the acceptance becomes effective, i.e. once it reaches the offeror. An acceptance constitutes a new offer only where it materially modifies any of the offer’s essential terms to deem the acceptance as a counter offer. In other words, the mirror image rule requiring the acceptance to be absolute is not followed under Chinese Law.

CONSENT

Meeting of minds in the contract parlance is popularly called consensus ad idem when two parties to an agreement, both have the same understanding of the terms of the agreement. Such mutual comprehension is essential to a valid contract. Acceptance given to an offer with consensus ad idem is called consent.

The Chinese contract law has no mention of consent as a requirement of contract formation. In china, a contract is not an exchange of promises. They do not refer it as an agreement. The basic principles of Chinese contract law are codified are equality, freedom to enter into a contract without duress or interference, fairness and good faith. Besides, Courts or arbitration are empowered are empowered to modify or revoke a contract which was obviously unfair at the time it was made. Therefore, although free consent is not an essential to the formation of a contract, the consent to contract caused by duress shall be invalidated by the courts.

Chinese contract law only mentions in article 52 (1) that a contract concluded through the use of coercion by one party to damage the interests of the State is null and void. Coercion is not defined anywhere in the statute. Also, this is restricted to

48 Article 21, Contract Law of the People’s Republic of China.
49 Article 22, Contract Law of the People’s Republic of China.
when it is damaging the interests of the State. Under article 54 (2), a contract concluded by coercion can be modified or revoked by request.

CONSIDERATION

Chinese contract law being civil in nature has no provision exemplifying cause or consideration. This shows that consideration is not required before a contract becomes legally binding and mutual exchange of consideration is not required. Therefore, a mutual assent through offer and acceptance need not be supported by a consideration in order for a contract to be valid. Be that as it may, on a closer look, an implied requirement of consideration may be inferred from a few provisions. For instance, Article 12 of the Contract Law of the People’s Republic of China there are requirements of a contract object, quality, quantity and price for the conclusion of a contract, all of which would constitute consideration. Also for instance article 60 requires that the parties must perform their obligations thoroughly which obligations is nothing but the consideration for the other party. But, these are only proposed instances to show implied consideration and as other civil law systems have no strict requirements of consideration, even Chinese law does not. Also, gifts are regarded as contract in China and thus, this shows that no consideration is required.

53 CLIC-Business and Commerce:Making a business contract in Mainland China.
54 Zhang, MO, FREEDOM OF CONTRACT WITH CHINESE LEGAL CHARACTERISTICS: A CLOSER LOOK AT CHINA’S NEW CONTRACT LAW.
2.3 PRINCIPLES OF CONTRACT FORMATION IN USA

The Sources of U.S Contract law may be Primary and Secondary.

The Primary Authorities consist of the Statutes, which are mainly the Universal Commercial Code (UCC). The CISG apply when the parties do not agree that the law so some particular jurisdiction apply. 55 The primary Authorities also consist of the Precedents of the Courts.

The Secondary Authorities consist of the Restatements which are not the law but have persuasive power. Treatises are also a part of the Secondary Authorities. Murray on Contracts and Calamari & Perillo on Contracts are such examples.

The UCC was adopted by Penn in 1953 and is followed by all the states of the US other than Los Angelos. Every jurisdiction has the freedom to make its own jurisdiction.

Contract can be defined as:
A promise or a set of promises the law will enforce.
One or both parties make a legally enforceable promise.
A promise is legally enforceable where it:
Was made as part of a bargain for valid consideration;
Reasonably induced the promisee to rely on the promise to his detriment; or
Is deemed enforceable by a statute despite the lack of consideration.

Contracts Require:
Offer
Acceptance
Consideration (or a consideration substitute)
Legal Capacity to Contract
“Legal” purpose, not barred by law or policy.56

Formation in General.
(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of a contract, the interaction of electronic agents, and the interaction of

56 ibid, visited on 21.2.09.
an electronic agent and an individual.

(2) An agreement sufficient to constitute a contract for sale may be found even if the moment of its making is undetermined.

(3) Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

(4) Except as otherwise provided in Sections 2-211 through 2-213, the following rules apply:

(a) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement, and the individual has reason to know that the actions or statement will:

(i) cause the electronic agent to complete the transaction or performance; or
(ii) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agents cannot react.57

(c) 7(b) of the Uniform Electronic Transaction Act provides that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.58

**Offer and Acceptance in Formation of Contract**

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances:

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but the shipment of nonconforming goods is not an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

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57 [http://www.law.cornell.edu/ucc/2/article2.html#c2-204](http://www.law.cornell.edu/ucc/2/article2.html#c2-204), visited on 21.2.09.
(c) An offer has also been defined as a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his or her assent to that bargain is invited and will conclude it.\textsuperscript{59}

(2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror that is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

(3) A definite and seasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.\textsuperscript{60}

A contract is formed when the last step of formation of contract is over. It is usually completed at the same place where the offer has been accepted. Therefore, if the acceptance of the offer is through the telephone, the contract is formed where the acceptor speaks.

Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.\textsuperscript{61}

Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.\textsuperscript{62}

\begin{footnotes}
\item\textsuperscript{59} Ibid, p.82.
\item\textsuperscript{60} http://www.law.comell.edu/ucc/2/article2.html#s2-206, visited on 21.2.09.
\item\textsuperscript{61} http://www.law.comell.edu/ucc/2/article2.html#s2-106, visited on 21.2.09.
\item\textsuperscript{62} http://www.law.comell.edu/ucc/2/article2.html#s2-106, visited on 21.2.09.
\end{footnotes}
2.4 PRINCIPLES OF CONTRACT FORMATION IN FRANCE

French law belongs to the family of ‘Civil law’. This family embraces the systems of continental Europe, and also of Latin America and many other countries which drive their legal systems from continental Europe.

“The French Code civil was a product of the natural law school of jurisprudence associated with the eighteenth-century Enlightenment. The view of society upheld by the thinkers of that school was based upon the concept of the social contract, which regarded society as based upon an agreement made by individuals. Contract therefore was seen as central to human social existence and the individual freedom to enter into contractual arrangements as a basic social good.”

The first source of contract law in France is, of course, the Civil Code itself. However, the writings of the French jurist Pothier were highly influential in the thinking behind the French Civil Code sections governing contracts. According to Article 1101 of the Civil Code, the Contract is ‘an agreement whereby one or more persons obligate themselves towards one or more others to give, to do or not to do something’

The contract is a legal technique of acquiring or transferring rights. Thus, from a strictly theoretical point of view, the contract belongs to an ensemble of rights held by a person. A more pragmatic approach sees the contract as a legal instrument of economic exchange.

The place of the Contract among a Person’s Rights:

The French approach to individual rights is dominated by the notion of patrimony.

I. The Notion of Patrimony

French law divides individual rights into two categories:

64 Ronald J. Scalise, Jr., WHY NO “EFFICIENT BREACH” IN THE CIVIL LAW?: A COMPARATIVE ASSESSMENT OF THE DOCTRINE OF EFFICIENT BREACH OF CONTRACT, 55 AM. J. COMP. L. 721, 741 (2007);
a) The first category includes ‘extra-patrimonial rights’, i.e. those regarded as not appreciable in money
b) The second category includes the so-called ‘patrimonial rights’ which are regarded as capable of valuation in cash and thus belong to a person’s patrimony and are assignable and transferable.

II. The Consequences of the Notion of Patrimony

The existence of the notion of patrimony at the very centre of the French civil law produces immediate positive consequences which consist of a specific classification of rights. It also entails more remote negative consequences

A. The Immediate Consequences of the Notion of Patrimony

Patrimony consists of two categories of rights: The first category covers rights in rem, or real rights, which establish a direct relation between a person and an object, whether material, of immaterial.

The right in rem is absolute in that in may be enforced against anyone; third persons must let the holder of a right in rem exercise his powers on the object.

The right in rem implies the power to follow the object in the hands of a third person and to be preferred in conflicts with holders of other rights.

The second category encompasses rights in personam, or obligations, which consist of a legal power given to a person to claim from another person (the debtor) a certain service (according to Art.1101 and 1126 C.C.: ‘to give, to do, or not to do something’). Reciprocally, the debtor has the duty to perform that service.

B. The Remote consequence of the Notion of Patrimony

The concept of patrimony as unique and indivisible entails many practical inconveniences. Especially, a person may not separate some of his assets and allocate them to his professional activity (the practical solution to that difficulty consists of creating a corporation, often fictitious, which possesses its own patrimony).

The presence of that concept at the intersection of persons and rights explains
the absence of trusts in French law: such an institution would contradict the unity of a person’s patrimony since the rights transferred in trust form a kind of ‘sub patrimony’ distinct from the personal trustee’s patrimony.\(^{71}\)

The rights *in personam* are unlimited in number and may be freely created, under the condition they are not contrary to the public order or good morals.\(^{72}\)

**PLACE OF THE CONTRACT AS AN INSTRUMENT OF EXCHANGE**

According to the Civil Code, the obligations have two sources: they may be created either by agreement (Art. 1101 to 1369), or without an agreement (Art. 1370 to 1386). Thus, the contract is one of the sources of the obligations.

The contract is an agreement, a ‘bilateral juridical act’, as opposed to a ‘unilateral juridical act’ (e.g. the renunciation to a right, a will, an offer to contract, the exercise of an option, etc.) which is not a source of obligations under French law.\(^{73}\)

Article 1108 of the Civil Code lists four ‘essential’ conditions of validity of a contract: parties’ consent and capacity; an object and a consideration (‘cause’) which must exist and be lawful. Because they express the legislator’s idea of the interests protected by law, those conditions reflect the French notion of contract.\(^{74}\)

**The Parties’ Consent to the Contract**

One can be bound by a contractual obligation only if one has so intended. French law favors and controls, in principle, the actual subjective intention; it does, however, also take into account the declaration of intention, in an attempt to protect legal security.

Mutual Consent is at the heart of contract law, and this is no different in France than in the other nations of the world. The Civil Code does not provide for any rules as to the mechanism of formation of consent. In the classical theory, consent is reached by a ‘meeting of minds’ More and more often, this classical scheme is not quite perfectly performed in practice; existence of consent must therefore be inferred.

\(^{71}\) Ibid.p.30.
\(^{72}\) Ibid.p.31.
\(^{73}\) Supra.n.4.
\(^{74}\) Art. 1108 C. Civ.
from other unclassical reasoning\textsuperscript{75}.

**Offer**

An offer is a proposal to contract which has precise characteristic and produces specific consequences. A proposal to make a contract is an offer only if it is firm and definite enough to be accepted as such immediately. The form of the offer is not material\textsuperscript{76}.

An offer is a unilateral act and may not, therefore, be binding upon the offeror, since under French law unilateral acts may not create obligations. As a consequence, an offer may be withdrawn by the offeror until it has been accepted by the offeree. The withdrawal prevents the formation of a contract, but the offeror may be liable for damages he caused to the offeree. As long as no contract has been concluded, damages may be compensated only in torts\textsuperscript{77}.

**Acceptance**

The answer to an offer may be an acceptance only if it complies with some characteristics; such an answer produces specific consequences.

The offeree’s answer is an acceptance only if it expresses agreement on the data mentioned in the offer. If the offeree changes an essential element of the proposed contract, his answer is not an acceptance, but a counter-offer, which must, in turn, be accepted by the initial offeror\textsuperscript{78}.

Acceptance may be expressed by any means, provided that it is not ambiguous. Acceptance may not therefore be implied from the offeree’s silence, since such behaviour does not have a clear meaning. Under some specific circumstances, the meaning of silence may however be explicit and it is therefore possible to admit that it expresses intention to contract.

Obviously, acceptance may create a ‘meeting of minds’ only if it takes place at a time when the offer is still in force: late acceptance is ineffective\textsuperscript{79}.

The ‘meeting’ of an offer and an acceptance builds up the consent, which remains the criterion of existence of a contract and of its content.

Consent is always necessary and in principle sufficient for the existence of the

\textsuperscript{75} Supra.n.1.
\textsuperscript{76} Supra.n.4.pp.62-63.
\textsuperscript{77} Supra n.4 p.72.
\textsuperscript{78} Supra n.4. p.72.
\textsuperscript{79} Supra n.4. p.73.
contract. In some exceptional instances consent must, however, be completed by another condition.

In French law, a contract enters into force between the parties at the very moment of consent. This rule implies that the contract is concluded at the time when and in the place where the ‘meeting of the minds’ takes place.

If offer and acceptance take place between ‘absents’, the ‘meeting of minds’ is supposed to be made at the time and place where the offeree dispatched his acceptance unless otherwise provided for by the parties. Once consent is given, the contractual obligations are binding and may be revoked only by a new mutual agreement (Art. 1134 §2 C.C.). The parties may, however, provide for a possibility of unilateral retraction under Article 1590 of the Civil Code.

Although an agreement expressed orally is a valid contract, it may be difficult to evidence, since Article 1341 C.C. requires written proof of juridical acts.

Nowadays, the ‘meeting of minds’ metaphor does not cover all the practical mechanisms through which a contractual obligation is created. In some instances, precontractual discussions are more elaborate; in some other, pre contractual discussions are absent.

The Parties’ Capacity to the Contract

In order to be engaged in contractual obligations, a person must be capable to contract, i.e. be able to participate efficiently in legal transactions. Any natural person is in principle capable to contract; incapacity is exceptional (Art. 1123 C.C.). Traditionally, the law protects persons who cannot guard their interests themselves, because of their immaturity or mental deficiency. Lack of capacity is sanctioned by the avoidance of the contract under action of the incapable person.

Legal persons are on the contrary capable only for the transactions entering within their charter. This solution is motivated by the protection of third persons’ interests, rather than of those of the legal person itself.

Aside from prohibitions affecting some specific contracts (Art. 1595-1597 C.C.), incapacity to contract is a consequence of an incapacity affecting the whole personality which is to be protected. French law considers in this scope two categories

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80 Supra n. 4 p. 74.
81 Supra n. 4 p. 75.
82 Art.1123 C. Civ.
of persons: minors and protected adults.\textsuperscript{83}

A. Minors

Minors under the age of 18 and not emancipated are in a state of general incapacity which covers virtually all the contracts. An emancipated minor (i.e. married or emancipated by a judiciary decision at the parents’ request) is fully capable, except for commercial activities (Art. 487 C.C.)\textsuperscript{84}.

Protection of the minor’s interests appears as well in the grounds as in the consequences of the avoidance.

Protection of the minor’s interests does not allow the courts to limit avoidance only the burdensome part of the contract: avoidance strikes the whole contract.\textsuperscript{85}

Protection appears in the rules relating to restitutions following avoidance. The minor restitutes to the other party only the profit he made on the avoided contract and not the goods or money he received and wasted.\textsuperscript{86}

B. Protected Adults

Whatever his real aptitude to defend his own interests, an adult is presumed to be capable to contract. Nevertheless, the law protects those whose will is impaired, by allowing them to claim unenforceability (nullity) of the contract. Adults of over 18 are in principle capable to pass any act of civil life: they may be incapable only exceptionally. Incapacity measures striking an adult are published in a register and are mentioned on the person’s birth certificate.

Protective measures are necessary whenever a person is the victim of an impairment of his intellectual faculties. Protection varies depending on whether impairment is temporary or permanent.\textsuperscript{87}

1. Temporary Mental Impairment

A contract may be avoided if one of the parties shows that at the time of the conclusion, he or she suffered a mental defect (Art. 489 C.C.). Mental defects which partially impair a person’s thought process may be a ground for avoidance of the contract. The origin of the trouble is irrelevant.

2. Permanent Mental Impairment

French law provides for three types of protective systems, according to the

\textsuperscript{83} http://works.bepress.com/context/wayne_barnes/article/1000/type/native/viewcontent/.
\textsuperscript{84} Art. 487 C. Civ.
\textsuperscript{85} Supra n. 4 p.79.
\textsuperscript{86} Supra n.4 p. 90.
\textsuperscript{87} Supra n.4 p.89.
seriousness of the mental defect:\footnote{88}{Supra n.4 p.90.}:

a. Persons under Justice protection  
b. Persons under Trusteeship  
c. Persons under Tutorship  

3. Aliens

An alien’s ability to contract is defined by the law of his citizenship. French law does not provide for any general restrictions in that matter. In order to exercise a business activity, non EEC citizens must however obtain a ‘foreign merchant card’ granted at discretion by the Prefets. Contracts concluded by an unauthorized foreign merchant are voidable.\footnote{89}{Supra n.4 p.90.}

The Contract’s Object

The Civil Code refers either to the object of the obligation (Art. 1129), or to the object of the contract (Art. 1110, §1; 1126-1128). The obligation are the object of the contract, and goods or services are the object of the obligations. The notion of object, which remained peaceful for a long time, gave recently way to much discussions and litigation.\footnote{90}{http://www.legifrance.gouv.fr/}

In order to be Valid, a contract must have an object which complies with four conditions: it must be:\footnote{91}{Supra n.4 p.114.}:

I. The Object must exist
II. The Object must be useful
III. The Object must be determinable
IV. The Object must be lawful

The Contract’s ‘Cause’ (Consideration)

The requirement of the cause, provided for by Article 1108 C.C. is clarified by Article 1131, prohibiting obligations without a cause, under a ‘false’, or an illicit cause. Unfortunately, the Code did not define the notion, giving way to inexhaustible doctrinal discussions. Although the legal authors seem nowadays to have reached an
agreement on the meaning of the notion of cause, its practical evidence remains still ambiguous.\(^{92}\)

I. The Notion of ‘Cause’

The drafter of the Civil Code conferred a double role to the notion of cause: in an objective meaning, the cause of an obligation indicates the compensation which is expected by the debtor in return for his own promise. In a subjective meaning, the cause designates the motives which explain the debtor’s engagement.\(^ {93}\)

A. The Objective Notion of ‘Cause’

The objective meaning is used whenever the existence of the counter-value is questioned. That is why from this point of view it is very important to distinguish between bilateral and unilateral contracts.\(^ {94}\)

B. The Subjective Notion of ‘Cause’

In its subjective meaning, the cause designates the personal motives in consideration of which the debtor undertook his obligations. Among all the psychological motives, only the impulsive and determining ones may be considered as the cause of the obligation. This subjective notion of cause is applied in order to sanction the false cause and the illicit one.

1. The False ‘Cause’

Article 1131 C.C. declares that the obligation undertaken on a false cause is void. This notion covers two situations.\(^ {95}\):

   a. The Erroneous ‘Cause’
   b. The Simulated ‘Cause’

2. The Illicit ‘Cause’

Avoidance is often claimed on the basis of Article 1131 C.C. which sanctions illicit or immoral cause, the ‘impulsive and determinant motives’ of the consent known and accepted by both parties. This rule allows the judiciary control of public order and good morals, which is mainly used to enforce socially acceptable sexual behavior, and economic speculation. The notion is used as well in onerous contracts, as in gratuitous ones.

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\(^{92}\) Supra. n. 4 p. 119.
\(^{93}\) Supra. n. 4 p. 120.
\(^{94}\) Supra n. 4 p. 122.
\(^{95}\) Supra n.4. p. 124
II. The Evidence of the ‘Cause’

As any condition of validity, the cause has to be evidenced at the time of the conclusion of the contract. The subsequent disappearance of the cause has no influence on validity.  

Evidence of absence of the cause in its objective meaning of counter-value is probably easier than the proof of illicit or immoral cause in the subjective sense.

A. Evidence of Absent ‘Cause’

Ordinary rules of evidence apply in the case where the cause of an obligation is expressed in the contract, but the Civil Code provides for specific rules in the opposite situation where the cause is not expressed (‘abstracts acts’)\(^\text{[97]}\).

1. The ‘Cause’ is expressed

According to the general rule of Article 1315, ‘The one who claims enforcement of an obligation has to prove it’. Such a proof must in principle be in writing, according to Article 1341 C.C.

2. The ‘Cause’ is not expressed

The factual situation is the one where a person underwriters a promise for the benefit of another person, without specifying the cause of the obligation. The legal effects of such an obligation are defined by Article 1132 C.C.: the Convention is nevertheless valid, although its cause is not expressed’.

B. Evidence of Immoral or Illicit ‘Cause’

Evidence of the illicit or immoral character of the cause implies the analysis of the parties’ psychological intention. Nowadays, the illicit or immoral cause may be shown by all means of proof, especially by witness, or presumptions.\(^\text{[98]}\) The enforcement of the subjective notion of cause is however difficult, as the contract seldom expresses the parties’ motives, the illicit or immoral results appearing outside of the contract itself\(^\text{[99]}\).

\(^{96}\) Supra. n.4 p. 123
\(^{97}\) Supra. n.4 p. 123-132
\(^{98}\) Supra n. 4 p.131.
\(^{99}\) Supra n. 4 p. 133
CHAPTER-III
COMPARITIVELY STUDY

3.1 COMPARATIVE STUDY OF THE CONTRACT FORMATION IN CHINA AND INDIA

Generally one of the most noticeable distinction between the laws of a civil law system and a common law system is that in the former case laws are basically found in the statutes and codes, while in the latter’s case laws are generally based on the decision of the courts.

Under the Indian Contract Law, ‘when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal’\(^1\) in comparison Article 14 of the Contract Law of the People’s Republic of China states that, an offer means the manifestation of the party’s intention to enter into a contract with another party. Under Chinese Contract Law ‘offers’ made to the public at large is considered as invitation to offer rather that an offer, as under the Indian Contract Act, 1872. Secondly an ‘offer’ becomes effective only when it reaches the offeree and not when it leaves the offeror as in Indian Law.\(^2\) Under Indian Contract Act, a contract is not a mere exchange of an offer and acceptance as under Chinese Law. It is an exchange of promises which has to be supported by a ‘consideration’, a feature which is again absent in the Contract law of China.

Another distinctive feature between the two contract laws\(^3\) in that under the Indian law, communication of the acceptance is only complete when it is dispatched and no more under the control of the acceptor, however under Chinese Law an acceptance is complete only when it comes to the knowledge of the offeror, unless otherwise specified in the offer. Under Chinese Law revocation of an offer can be done even before the acceptance is dispatched and the revocation of an acceptance can be done before it comes to the knowledge of the offeror, however there is a variation in the Indian law, as the revocation of a proposal can be done before the proposal comes to the knowledge of the acceptor and the revocation of an acceptance

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1 Article 2(a) of the Indian Contract Act, 1872.
2 Rule of Arrival, Article 16, Contract Law of People’s Republic of China.
can be done before the acceptance comes to the knowledge of the proposer.\textsuperscript{4}

Another distinctive feature in the revocation of an acceptance in the two countries is something which is known as the ‘mirror image rule’ in France. Accordingly, acceptance must be absolute, not qualified and must be in keeping with the specifications if any, given in the proposal\textsuperscript{5} and if it is not not abided by, the proposer must defy when the acceptance is communicated failing which it would be deemed to be accepted and a promise would be formed, however under the Contract Law of the People’s Republic of China, it is stated that an offeror is not bound by an acceptance which is a mirror image.

Further, Consent does not form an essential requirement for the contract formation in China as a contract is not considered as an exchange of promises but is based on principles of good faith, fairness, etc.\textsuperscript{6} In comparison, the Indian Contract Act states that free consent of parties is essential for an agreement to be considered as a contract\textsuperscript{7}, while the term consent is defined as ‘two parties are said to be in consent when they agree upon the same thing in the same sense’\textsuperscript{8}. In relation to the use of Coercion in obtaining the Consent, the Chinese law mentions under article 52(1) that a contract concluded though the use of coercion by one party is null and void and under article 54(2) that a contract concluded by coercion can be modified or revoked by request, while under Indian law it is stated that all agreements in which consent is caused by coercion, fraud, misrepresentation and undue influence are voidable contracts\textsuperscript{9} and a contract formed under a mistake is void\textsuperscript{10}.

Lastly, Consideration under Chinese law does not form an integral part for the formation of a contract\textsuperscript{11} while under the Indian Contracts Act, Consideration forms an important part as a contract is considered an exchange of reciprocal promises of which consideration forms an integral part.

\textsuperscript{5} Section 7 of the Indian Contract Act, 1872.
\textsuperscript{6} http://www.cbbc.org/the_review/sic/7.html.
\textsuperscript{7} Section 10 of the Indian Contract Act, 1872.
\textsuperscript{8} Section 13 of the Indian Contract Act, 1872.
\textsuperscript{9} Section 19 of the Indian Contract Act, 1872.
\textsuperscript{10} Section 20 of the Indian Contract Act, 1872.
\textsuperscript{11} http://www.qis.net/chinalaw/prccontracts.htm.
2.2 COMPARITIVE STUDY BETWEEN THE CONTRACT FORMATION IN U.S. AND INDIA

The U.S contract law is based on civil law and is mainly derived from the UCC unlike the Indian Contract Act which is derived from the common law. The US law permits unilateral contracts which are formed as a result of acceptance by promise. In such contracts, the offeree’s failure to perform does not constitute a breach since no contract is formed until the offerer renders full performance. There is no provision of the formation of a unilateral contract in Indian Contract Act.

In Common law, when there is an acceptance by performance, then there is no obligation on the part of the offeree to notify the offeror about the acceptance unless the offeror has no adequate means to know about the performance with reasonable promptness and certainty. However, in the case of US law, the acceptance is deemed to have been lapsed if the offeror is not notified of acceptance within a reasonable time. Notification is necessary because mutual assent must be manifested by each party to the other. The apparent mutual assent of the parties must be gathered from their outward expression and acts, and not from their unexpressed intentions.

The U.S Law of Contract and the Indian Law both hold that when the acceptance of the offer is communicated through post or mail the contract is completed at the moment the acceptor deposits in the mail a letter of acceptance. The letter should however be directed to the proper address, just like the e-mail should be sent to the proper e-mail id. In case of post, the postage prepaid should also be paid. Most importantly, the e-mail or post should be sent within the proper time and before receiving any intimation of the revocation of the offer. This is called the “mail box rule” or the “deposited acceptance rule” under §.99 of the Restatement.

Option Contracts are contracts which may be defined “as an agreement by which a person promises to perform a certain act (usually to transfer property) for a stipulated price within a designated time, leaving it to the discretion of the person to whom the option is given to accept upon the terms specified.” Generally it is provided by §.70 of the Restatement that the option is deemed to be a complete contract as soon as it is accepted by the optionee. However, the Restatement has also

13 ibid.
provided that unless the offer provides for the contract to be enforced as soon as the
optionee accepts the offer, an acceptance under an option contract is not operative
until it is received by the offeror or the optionor.

Both the Indian Law and the U.S. Law hold that silence and inaction does not
generally constitute an acceptance of the offer. However, silence and inaction
operates as an acceptance if, under the circumstances and inference of assent is
warranted or necessary.

In the Indian law of Contracts, the offer can be accepted by the offeree or an
authorized agent. However, in case of U.S contract law, an offer can be accepted only
by the person to whom the offer has been made. According to the Restatement, the
offer can be accepted only by a person whom it invites to furnish the consideration.15

The Indian Contract Act rigidly upholds the “mirror image”16 rule. Hence, the
terms of acceptance have to be exactly identical to the terms of offer. No contract is
formed if the acceptance contains terms that are different from or additional to those
set forth in the offer. For a valid acceptance it is also essential that the acceptance be
absolute and unqualified. When the letter of acceptance contemplates further
negotiations for finalization of the terms of contract, there arises no contract.17 Such
an acceptance merely constitutes a counter-offer.

The U.S. Law of Contract also stringently upholds the “mirror image rule”.
§.81 of the Restatement provides that an acceptance must strictly comply with the
terms of the offer and there should be no material variance between the terms of offer
and acceptance. §.30 of the Restatement provides that the omission of a material
element from the acceptance renders a contract void as there is no mutual assent in
such a case.

An acceptance should be unequivocal and unconditional. It should not contain
any terms and conditions which are not found in the offer. In the case of Podany v.
Erickson18 it was held that in an acceptance of offer to sell land, the insertion of an
abstract and stating the place of payment, (neither of which were present in the offer)
rendered the contract ineffective and unenforceable. Such insertions in the acceptance
are counteroffers. A counteroffer implies rejection of the offer under §.83 of the

15 ibid, p 99.
Restatement which puts an end to the negotiation unless the party who made the original offer renews the original offer or assents to the counteroffer.

It should be however borne in mind that although a request for a modification of a proposed offer made before an acceptance is a rejection, a mere inquiry as to whether one proposing a contract will alter or modify its terms, made before acceptance or rejection does not amount to a rejection.\textsuperscript{19}

There is no need for consideration in US law. A consideration substitute such as Promissory Estoppel or moral obligation is also deemed to complete the contract formation. Consideration may be a benefit to the promisor or a loss or detriment to the promise. It may take the form of a right, interest, or profit accruing to one party, or some forbearance, detriment or responsibility given, suffered, or undertaken by the other. It may also consist of the creation, modification, or destruction of a legal relation. Consideration is, in effect, the price bargained and paid for a promise.\textsuperscript{20} Performance of a non obligatory act is also consideration under §.118 of the Restatement. The rendition of services by one who is not legally bound to so is also deemed to be consideration unless it is performed gratuitously. §.121 of the Restatement provides that furnishing of valuable information is also consideration. In such a case, the information must be new or novel. Relinquishment or waiver of a legal or contract right or privilege, or forgoing any advantage or benefit, is generally sufficient consideration for a promise\textsuperscript{21} under §.142 of the Restatement.

§.102 of the Restatement provides that a mutuality of obligation may be consideration for a contract. Mutual obligations are required to form a bilateral contract and generally, promises that are sufficient considerations for each other give rise to mutual enforceable obligations.\textsuperscript{22} §.128 of the Restatement provides that mutual promises are sufficient consideration for each other. This rule applies in cases of plainly expressed promises, of promises implied from conduct, and of promises ascertained only by a proper interpretation of the contract.\textsuperscript{23} The doctrine of mutuality is inapplicable to unilateral contracts. In an already executed contract, this doctrine of mutuality again does not apply. If one party has already performed his or her part of the contract, even though he or she could not have been legally compelled to do so,

\textsuperscript{19} AMERICAN JURISPRUDENCE, Vol.17A, 2\textsuperscript{nd} ed.2004, p.112.
\textsuperscript{20} ibid., pp.124-125.
\textsuperscript{21} Ibid., p.155.
\textsuperscript{22} ibid., pp.59-59.
\textsuperscript{23} Ibid., pp.147-148.
the defendant cannot avoid liability for a breach of the contract on the ground of lack of mutuality.\textsuperscript{24}

In case of option contracts, the contract can be enforceable without any consideration if the optionee accepts the option (which is without consideration) before it has been withdrawn. The traditional view as a matter of fact, option regards an option contract as a unilateral contract. The optionee is bound to no promises. He or she however, has the right to accept or reject the offer within a specified time period. An option therefore, lacks mutuality of obligation.

In Common law, there is a need for consideration in the form of money. It is necessary for the Consideration to be sufficient, even though it is not adequate. This is the reason why there is always a bilateral contract formation in Common law. There always has to be two or more promises, no matter how absurd the promise is. On the other hand, Civil law systems take the approach that an exchange of promises, or a concurrence of wills alone, rather than an exchange in valuable rights is the correct basis.\textsuperscript{25} The consideration need not be a thing of pecuniary value or reducible to such value. Moreover, §.115 of the Restatement provides that the consideration need not be adequate just like the provisions of the Indian Contract Act. The courts attempt to prevent the enforcement of gratuitous promises which have been distinguished under §.103 of the Restatement.

In U.S law, in the absence of a statute validating past consideration, it is a general rule that past consideration is not sufficient consideration. This is also been followed by the Indian Contract Act. The past consideration is not regarded as consideration generally. However, it may arise in two ways. It may consist of services rendered at request but without any promise at the time or it may consist of voluntary services.\textsuperscript{26}

In common law, a gift is not considered to be a contract as there is no consideration involved. On the other hand, a gift is considered to be a contract in US contract law. If the offeror communicates a proposal to the offeree his intention to gift the offeree a book, and acceptance is communicated thereof, then the offeror is under legal obligation to give the book to the offeree. The offeror cannot change his mind regarding the gift thereafter.

\textsuperscript{25} http://www.bookrags.com/wiki/Contract#Contractual_formation ,visited on 17.1.09.
\textsuperscript{26} Avtar Singh, CONTRACT & SPECIFIC RELIEF, 10\textsuperscript{th} ed. 2008, 1\textsuperscript{st} rep. 2006, p.125.
3.3 COMPARITIVE STUDY BETWEEN THE CONTRACT FORMATION IN FRANCE AND ANGLO-AMERICAN COUNTRIES

France has a law of contracts which is dominated rhetorically, at least by subjectivist thinking and much of the rest of the world has a law of contracts which is dominated by objectivist thinking. Though in France a revocation of an offer can theoretically operate without reference to whether it is ever sent to and received by the offeree, a rule which is at odds with the common law objective rule that such revocations must be received in order to be effective, the outcome in France is tempered by the fact that French doctrine provides that most offers are irrevocable for a reasonable period, and if prematurely revoked a dialectal obligation is owed to the offeree. Further, the rules on communication of acceptance, death of offerors, mistake, and contract interpretation, are all quite similar to each other, regardless of which system from which they originate. What emerges from the analysis is a striking similarity in the ultimate effect of rules in each of the two systems, notwithstanding the different theoretical underpinnings. France, as it turns out, has components of its contract law that resemble our “objectivist” common law system. Perhaps even more so, our supposedly “objectivist” common law system is not really purely objectivist in nature, but rather has many subjective components, many of them obviously borrowed from France.

And, on reflection, this does not turn out to be very surprising. It has been said that in truth, there is neither an existing pure “objective” theory of contract, nor a pure “subjective theory of contract. Rather, there are elements of both ideas in both systems. Therefore, neither of the theories can be “carried too far.” As Professor Litvinoff, (an academic of Louisiana civil law and thus closely aligned to the French Civil Code) has observed:

“The dispute between the subjective will and the declared will theories---the subjective and objective approaches to contract---is no longer realistic. A will that is purely subjective, meaning that it was never expressed, is irrelevant in the eyes of the law. Only the will that is declared or manifested, that which materializes in an

27 Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 760-69 (2d Cir. 1946)
objective act, may start the operation of the legal mechanism. Once this occurs, an act of human conduct has taken place, and every person called to evaluate its meaning, for instance, a judge, will have to take the act as one single phenomenon, wherein a certain intention, a subjective element, is thoroughly blended with a certain utterance, an objective element. Either of those two elements, although susceptible of being analytically isolated, is incomplete and insufficient when not taken in the context of the whole. The intention illuminates the declaration, in the same manner as the declaration purports to express the intention."

French contract law, while filled with the rhetoric of subjective intent and concern for the “pure” autonomy of wills, in the end, comes close to achieving the same or similar results as its objective-theory brethren around the globe:

The influence of the principle ‘autonomy of will’ on the French Civil Code and French law in general was such that to this day there is, in theory, no clear cut distinction between the “real” intention and its manifestation. Clearly the necessities of commercial life demanded that some value should be placed on outward behavior. It is not surprising that French writers were compelled to devise a theory which gives effect to outward behavior while appearing to adhere to the principle that only the “real” intention of the parties count. This theory maintains that there is no conflict between “real” and apparent intention inasmuch as outward behaviour is a means whereby the “real” intention may be deduced. The argument, no doubt, appears artificial for it ignores a possible clash between real and apparent intention by assuming that the former must necessarily correspond with the latter. But in practice, the test adopted by French law is not very different from the objective test of English law.

The difference between the French subjective system versus the more objective system espoused by most of the rest of the world, “is only a matter of emphasis, since all legal systems have to work with exteriorized indications of inner psychological elements in order to appraise and evaluate their legal effects.”

It is indeed interesting to note that, though the French law and the remainder of the objectivist world come at contract law from different perspectives on contractual intent, the result of actual cases in France tends to be similar to those

achieved in other, more objectivist, jurisdictions. 30

The fact, therefore, that French contract law is subjectivist in its philosophical origins and underpinnings, whereas Anglo-American contract law along with that of most of the rest of the world, is more pragmatically objective in its philosophy, turns out not to present any significant impediment to any contemplated participation between the two legal systems, whether towards future globalization of the law or otherwise. The different objective and subjective systems “come, in their functioning, strikingly close to each other but through a labyrinthine maze of theoretically varied routes.” After the comparison of the details of rules in the two systems on contract formation and interpretation, “the impression that remains is that of the similarity of the attitude of courts to legal problems----an attitude which transcends historical differences and differences between codified and case-law systems.” There is, in other words, much that unites the French law of contract with that of the rest of the world’s contract law, and much less divides it than what may be thought based on the theoretically distinct underpinnings. The commonalities appear to transcend the differences, and this is all to the good for future harmonization of the law.

CHAPTER- IV

CONTRACT FORMATION THROUGH THE ELECTRONIC MEDIUM: A COMPARATIVE STUDY BETWEEN COMMON LAW AND CIVIL LAW COUNTRIES

INTRODUCTION

The emergence of the internet as a medium for forming commercial contracts has put legislatures around the world in a dilemma. In respect to electronic contracting rules, legislatures face a primary question in whether they need a new set of rules in the electronic setting or the substantial traditional rules are capable to accommodate the new environment taking into account the main goal of facilitating electronic commerce and removing obstacles that face its growth. Although the aim of the legislations around the world has been the unification between contracting rules in the electronic environment and in the traditional world, but the goal of this policy didn't meet the success. This is because that, any legislature will face two main conflicting factors in regulating electronic contracting rules. One is the emphasis on consumer protection; the other is the increasing need for global regulation to mirror the increasing globalisation of trade. There is a conflict between the two factors in which taken one of the above factors as a basis for enacting electronic commerce rules will create rules aim to achieve that factor. For example, on one side, if the legislature aims to achieve the consumer protection factor, this will create rules conflict with the globalisation of the net and the need for harmonisation rules through the globe in which it becomes difficult to harmony these rules. On the other hand, enacting international standards rules without consumer protection aspects will affect the development of electronic commerce in which consumers feel that there is no appropriate protection for them in the electronic setting\(^1\).

A brief comparative study between the two legal systems tells us that in the common law countries (specially in UK and India), the electronic contracting rules are consumer friendly rules especially the rules regarding electronic contract

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formation. While in civilian law countries like US and France, electronic contracting rules are neutral and do not take consumer protection aspects seriously into account. This can be concluded for example from UETA or UCC where there is no single provision regarding consumer protection in the US. This is due to the trend in each country to achieve one of the above factors.²

DO WE NEED NEW RULES OF CONTRACTING IN THE ELECTRONIC ENVIRONMENT?

Governments around the world, use more than one approach to answer this question. The first approach is to enact facilitative laws that extend or adapt existing regulation of transactions to cover electronic transactions. This approach is called the “functional equivalent” approach. This approach attempts to fit electronic transactions within the ambit of familiar legal rules through an examination of the role currently played by a particular legal rule in the non-digital commercial world, identification of the way in which the same function can be achieved in electronic transactions and extending the existing rule by analogy to electronic transactions.³

The second approach would be through establishing a new set of rules that is better suited to the nature of the new environment. Although this approach aims to set new rules in the electronic contracting, it stresses the need for identifying the fundamental principles that govern non-digital transactions and re-examines how those principles could be best placed in the uniquely different sphere of electronic transactions. This approach conceivably has the merit of leading to a much more healthy development of the law in the long term. This is because taking a deeper consideration of principles would probably lead to the discovery of sui generis rules for electronic transactions that take into account the unique features and potential of computer-based communications systems.⁴

While both approaches have been used in developing regulatory regimes for

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electronic transactions, it is noteworthy that the functional equivalency approach has dominated proposals for regulating electronic commerce. One familiar example is the model law prepared by the United Nations Commission on International Trade Law (UNCITRAL), adopted by a United Nations resolution in 1996.

With respect to the Common Law Countries, for example in the UK, by the implementation of the Electronic Signature Directive\(^5\) and Distance Selling Directive\(^6\), the UK has made some unification between online and traditional transactions. The Electronic Communications Act 2000, legal recognition and enforceability can be achieved especially for contracts that need writing and signature requirements. Also, although the Electronic Commerce Regulations 2002 stop short of declaring that all contracts may be concluded on line. Similarly in India, many steps have been taken towards applying the same rules on the electronic environment\(^7\).

In the USA (civil law country), even unification of the rules is the main goal of electronic legislations acts but different approach has been taken than that in common law countries. The US approach is considered as a simplest and minimalist approach. This is due to the influence of the UNCITRAL in electronic commerce legislations in US. Many examples in UETA and UCC show the trend towards unification of the rules in US. Providing details provisions for electronic contracting rules will affect the main goal for that unification. Simplest and minimisation of the rules achieve that trend. Therefore, the electronic agreements should be given the same legal effect as traditional paper based contracts. This principle gives effect to the legitimate expectations of the parties to form online contracts. Thus the validity of an electronic communication has been considered through the enactment of the Uniform Electronic Transactions act (UETA) where Article 7 provides for legal recognition of electronic records, electronic signature and electronic contracts. Furthermore the Electronic Signature in Global and National Commerce Act (E-sign) clarifies the legal status of electronic records and electronic signature in the context of writing and signing requirements imposed by law.\(^8\) This approach comes as a


\(^8\)Christopher William Pappas, “Comparative U.S & EU approaches to E-commerce regulation:
reflection of the apparent capitalist economic policy in this country. This policy, which depends on the notion of free market economy and laissez-faire philosophy, has affected US legislation efforts in regulating electronic commerce through its role as “the world’s economic hegemony”.

Even if there is a common success in the two types of countries following common law and civil law respectively regarding recognition and validation of electronic contracts, but the legislatures in the two type of countries have not met with full success to achieve the harmonisation of electronic contracting rules. This is because the legislative approach of these countries is different which brings us to the following factors.

4.3 CONSUMER PROTECTION AND GLOBALISATION OF THE NET

Any legislature which aims to provide clarity and trust to the actors in the electronic setting will try to reframe the actors’ rights in the electronic environment especially the consumers. This goal embodies a kind of rules that can protect consumers within the electronic medium. The trend towards providing such kind of protection rules has its own reasons. Firstly, the transaction in the electronic setting is carried in distance, and there is no physical presence of the parties’. This absence of physical presence has given rise to concerns that policy makers must protect the actors engaging in such activities. So, in order for e-commerce to achieve its full potential, consumers must feel that online transactions are safe, trustworthy and fair. Secondly, online sales often involve increased risk and uncertainty than similar transactions in a traditional medium, thereby requiring increased protection. In order to achieve this protection; legislatures should ensure that consumer should feel that online contracting is fair and safe as the traditional contracting through enacting consumer friendly rules in the electronic environment.

The second aspect for regulating electronic commerce, which brings to some extent conflict with the consumer protection factor, is the global impact of the net, and the need for uniform rules to facilitate online commerce. This is according to the


reason that “electronic commerce dramatically reduces the economic distance between producers and consumers”\textsuperscript{11} This forces the legislatures to enact acceptable international rules in respect to consumers and providers to flourish the global electronic commerce.\textsuperscript{12} Thus because electronic commerce, by its nature is transnational and encourages cross border transactions of goods and services, national governments, international organizations and private sector businesses have been keenly aware of its development. Many of these institutions hope to harness the economic potential of electronic commerce, to fully take advantage of these economic opportunities businesses, government and organizations have taken the position that any regulation for electronic commerce, must take its potential impact on trade globalisation of electronic commerce.\textsuperscript{13}

In the Common Law countries, most of the provisions regarding electronic contracting have an obvious goal to protect consumers in the electronic setting. The Distance Selling Regulations in the United Kingdom and the Electronic Commerce Regulation Act in India are the best examples of this trend. The goal of these procedures is of course to provide more transparency and protection to the consumer while forming electronic contracts.\textsuperscript{14}

On the other hand, harmonisation of the rules in the US has been successful through the enactment of UETA. Consumer issues have not being given special attention in this act. This is because of two main reasons. First, on the one hand, UETA is a uniform act, and it will not be adopted from other states if there are provisions regarding consumer protection in the electronic setting. Secondly, UETA doesn’t aim to provide substantial contracting rules because many of its rules are influenced by UNCITRAL.\textsuperscript{15}

As a result, the Federal Government that aims to harmony the law governing electronic contracting rules, at least in United States has met mixed success. From one side the UETA rules in electronic contracting have addressed only a narrow range of all the issues raised by technological innovation in contracting practices, and from another side the Act does not provide or stipulate any provision regarding

\textsuperscript{11}OECD policy brief, electronic commerce, No. 1-1997 at 2.
\textsuperscript{14} Hisham Tahat, “Factors Affecting E-Commerce Contract Law”, April 2008, p.5.
consumer protection rules in the electronic setting in which the act gives a push for any state to adopt the uniform act without entering into the nature of consumer protection in any state.\textsuperscript{16}

4.4 CONCLUSION: THE SOLUTION

The starting point of the solution is found at the national level. National governments on one side must act to ensure that contractual obligations processed through the Internet are uniform to the extent possible and desirable and that consumer rights are protected at every stage, especially regarding contractual rights. On the other side, national governments also have a responsibility to consider the global harmonisation of their actions in this arena. Not only "The idea of borders", between countries but also between countries and some international or supranational bodies are questioned by the globalization of economic and socio-cultural interactions, a globalization which is fostered by network technologies.\textsuperscript{17} Nations must take into account these considerations when crafting their responses to electronic commerce. Furthermore, nations should realize that bilateral and multilateral negotiations would absolutely be necessary to ensure that every nation's citizens (both natural and corporate) will enjoy uniform rights and benefits from electronic commerce, no matter where they reside. At the international level, a need for a convention regarding electronic commerce law is needed to take the opportunity of developing the economic opportunity and worldwide sales through a uniform international convention like UNIDROIT and UNCITRAL in which arrangements for these kinds of rules has already taken place.

\textsuperscript{17} Hisham Tahat, “Factors Affecting E-Commerce Contract Law”, April 2008, p.6.
Chapter-V

CONCLUSION

After a detailed analysis of the principles of contract formation in India, China, USA and France, the researchers have made an attempt to answer to the research questions.

The first research question was whether all the countries follow the “mirror image” rule. The answer to this question is NO. This rule originated in France and has been strictly followed by India and USA. However, China, and France do not follow it. Hypothesis thus disproved.

The second question was whether the consideration should be an important requirement of contract formation. The countries of China and US do not take consideration to be very important and a consideration substitute can be used instead. However, Indian contract law puts consideration on a very high pedestal where it becomes an important principle of contract law. The researchers are of the opinion that consideration should NOT be an important requirement. It is truly absurd that the Indian Contract law requires consideration to be sufficient and not adequate. Another researcher is of the opinion that there should be consideration. However, the requirement of consideration should be that it needs to be adequate and not just sufficient. Hypothesis thus disproved.

The third question is that whether there is a trend observed while comparing the principles of contract formation in countries following the civil law and common law respectively. The answer to that is NO. We observe a great deal of similarities between the principles of contract formation of India and U.S. Thus, hypothesis is disproved.

The fourth question is whether outcomes in actual disputes are same or not when the French subjective theory and the objective theory are applied. The hypothesis is in the affirmative. Hypothesis proved.

The fifth question is that whether the approaches followed by the common law countries and civil law countries, to regulate contract formation through the electronic medium, the same. The answer to this question is NO. Hypothesis proved.

The sixth question is that whether the different factors of the countries affect the approach followed by these countries. The answer to that question is YES.
Hypothesis Proved.
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