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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
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PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

R E P O R T

on the state of research concerning the attempt at unification  
of the General Part of the Law of Contract (within the framework  
of a progressive codification of international trade law)

by

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## I

By virtue of Resolution No. 3 (1971), part 3 (a), of the Governing Council of UNIDROIT approving the provisional plan of study contained in my complementary Report (Doc. 2/1971) and resolving to grant priority, with a view to an attempt at their unification, to the formation of contracts and to the conditions of validity relating to the substance of contracts, in the light of the proposals and suggestions made and views offered by the members of the Governing Council at its April, 1971 session, I had to direct my research in several directions:

1. Participation in the work of certain study committees, committees of experts, conferences, symposiums, etc. directly (or even indirectly) related to the subject of my research:

(a) the work of the Study Committee on the Conditions of Validity relating to the substance of contracts of sale (chaired by Judge B.A. Sture Petré and with, amongst those taking part, Prof. Sauveplanne and the Secretary-General of UNIDROIT, Mr. Mario Matteucci, as well as Prof. Zweigert and Dr. Drobnig of the Max-Planck Institut); this Committee held its last session from the 4th to the 8th October, 1971.

(b) the work of the Committee of Governmental Experts on Agency of an International Character in the Sale and Purchase of Goods, which has held four sessions (and in which I took part as a governmental expert. It will be again in this capacity that I shall take part in its final session from the 12th until the 21st June, 1972).

(c) the international symposium on the harmonisation of private law and private international trade law in the States of West, Central and East Africa which took place at the seat of UNIDROIT from the 24th until the 27th March, 1971 and in which Prof. René David, a member of the Governing Council, played an active part.

It was possible to gauge the interest felt by these countries in codifying international trade law and the consequent need for UNIDROIT to give this subject the necessary attention on account of its statutory duties for "if UNIDROIT fails to take them up, there can be no doubt that others will do so in its place" (page 88 of the Minutes of the 50th session of the Governing Council).

(d) The work of the Conference of Arbitration Tribunals for the foreign trade of the Socialist member countries of COMECON, which met in October, 1971; the chairmen of arbitration tribunals come together every two years to examine the practice of these same arbitration tribunals in applying the "general conditions" of COMECON and to note the principles and also the trends which emerge therefrom, these observations providing the basis for possible proposals for amendments to the "general conditions". It may be recalled that these "general conditions" are in reality Uniform Law and that the arbitration tribunals partake of an institutional nature.

(e) The work of the Commission of the European Communities on the Law applicable in cases of an international character to contractual and non-contractual liability, which held a session at the seat of UNIDROIT; their discussions and, above all, their conclusions demonstrated the need for and urgency of the task of unifying substantial law in this subject.

(f) The UNCITRAL Study Committee on the Preliminary Draft of a Uniform Law on Bills of Exchange, which held one session at the seat of UNIDROIT and which was charged with attempting to unify the provisions dealing with the bill of exchange in the light of both the 1930 Geneva Uniform Law provisions and the provisions of the United States' Uniform Commercial Code as well as the British Bills of Exchange Act, 1882.

(g) The international conference, arranged by the Institut fuer Ostrecht in Munich from the 26th until the 29th March, 1972 to deal with certain questions affecting commercial arbitration.

2. Those organisations that have been sounded:

- The Max-Planck Institut in Hamburg where I followed a course for over a month and where I had discussions not only with the director of this Institute, Prof. K. Zweigert, but also with other members and assistants interested in the unification of law;

- The Max-Planck Institut in Munich where I had discussions with experts from the local Chamber of Commerce interested in working out a set of rules for international trade and with professors of Comparative Law (in particular, Prof. Feret Murad);

- The Institut fuer Ostrecht in Munich (to which I was invited in my capacity as a professor of Private International Law);

- The Europa Institut in Saarbruecken (Prof. L. Constantinescu);

- The Institut fuer Recht, Politik und Gesellschaft der Sozialistischer Staaten in Kiel;

- The Seminary of Comparative Law in Wuerzburg (Prof. Karl Neumayer);

- The International Chamber of Commerce where I carried out initial soundings, as an arbitrator, and where I shall later follow these up;

- The Law Faculties of Strasbourg, where I took part in a symposium on "the codification of international trade law"; also taking part were Professor Jean Marc Bischof, Professor of Commercial Law, Dean Weil and other professors and researchers in the Law Faculties and the Institute of Comparative Law;

- The Institute of Commercial Law in Palermo (Prof. Enzo Lojacono);

- The Faculty of Law in Paris (Prof. Michel de Juglart);

- The Institute of Comparative Law in Paris (of which I am a member);

- The Faculty of Law in Liège (Prof. Léon Dabin and Prof. Graulich).

The soundings on my programme are still a long way from being completed, but objectively it was not possible to carry out any more; in carrying out this programme I had the material support of UNIDROIT, as well as certain facilities granted me by the Academy of Science of the Federal German Republic (D.A.A.D.) and by the bodies which invited me (in particular, the Law Faculties).

3. Studies carried out in this field by UNIDROIT and other sources:

(a) The work of the Study Committee on the Formation of Contracts between Absent Parties (The soundings made upon the recommendation of Prof. Wortley proved to be very useful in so far as they revealed possibilities of extending the scope of application of the Uniform Law on the Formation of Contracts for the International Sale of Goods to all contracts); these comprise the Minutes of the 1935, 1957 and 1958 sessions together with all references to legislation on the subject (some of which are erroneous and some others of which have in the meantime been rendered obsolete) as well as preliminary studies, reports, etc.

(b) The Report on the Conditions of Validity relating to the substance of contracts of sale, submitted by the Max-Planck Institut on behalf of UNIDROIT (U.D.P. 1963 - Etudes XVI/B - Doc. 1/1964).

(c) Formation of Contracts - A study of the Common Code of Legal Systems - directed by Prof. Rudolf B. Schlesinger of Cornell University Law School in 1968.

Reference must also be made to the growing interest in international trade law (1) revealed by the most recent law and legal theory, clearly arguing for a unification of rules in this subject.

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(1) In particular:

- Le droit du Commerce international - by Yvon Loussouarn and Jean Denis Bredin, Paris, 1969.
- La vente internationale - by F. Kahn.
- Notions et rôles de l'offre et de l'acceptation dans la formation des contrats - by Jean Luc Aubert, Paris, 1970.
- La représentation en droit international privé comparé - by Fr. Rigaux, Bruxelles.
- La formation du contrat - by Paul Piotet, Berne.

There are also commentaries on the Uniform Law on International Sale and on the United States' Uniform Commercial Code, etc.

## II

The bodies sounded and persons consulted (professors of commercial law and comparative law, foreign trade arbitrators, experts in chambers of commerce, etc.) were unanimous in acknowledging the usefulness, need and, indeed, the urgency of a codification of the norms governing international trade.

The greater number of these bodies showed themselves willing to offer their cooperation on such a project but only after UNIDROIT had first cleared the way and produced concrete results in the shape of a text which could then be sent to them for their views and criticisms (in line with the suggestion made by Prof. Barrera Graf in the Governing Council).

Thus, in this preliminary phase at least, we shall be alone in working on this project; however, what for other bodies represents an option or a possibility must be seen as a duty for UNIDROIT.

Unifying the rules affecting the formation of contracts in general (and also the conditions of validity relating to the substance of contracts) has been one of UNIDROIT's main preoccupations ever since it began functioning. This work began in 1934 and already in 1936 a Study Committee appointed by the Governing Council of the Institute was submitting a Draft Uniform Law in the Formation of Contracts by Correspondence (a draft that was subsequently dropped).

After examining the draft of a Uniform Law on the International Sale of Goods, drawn up by UNIDROIT, but not containing any rules on the formation of contracts, the Diplomatic Conference convened at the Hague in 1951 expressed the wish that the special Committee charged with revising this Draft should look into the advisability of studying the rules governing the formation of contracts. This same Committee found that it would be advisable to prepare a Draft Uniform Law on the Formation of Contracts. It was then that UNIDROIT appointed a Study Committee charged with drawing up a Draft Uniform Law on the Conclusion and Validity of Contracts. However, after carefully thinking the matter over, the Committee found that it was more appropriate to restrict its study, at least initially, to the special contracts of particular interest to international trade, thus leaving to one side (for research to be carried out later) the question of the extent to which one could apply the Draft on the Formation of Contracts of Sale to other contracts of commercial interest (such as contracts of agency, commission agency, carriage, insurance and forwarding contracts).

As a result, the present study on the formation of contracts and the conditions of validity relating to the substance of contracts is nothing more than the natural result of the studies that UNIDROIT has been making ever since it first started and is a study that it must continue with if it does not wish to give up its statutory duties, all the more so when current circumstances are so much more favourable than they were formerly.

Among these favourable circumstances I would mention the following:

(1) The coming into force of the Uniform Law on the Formation of Contracts for the International Sale of Goods (as well as the Uniform Law on the International Sale of Goods). Beyond doubt this event and the ratifications that will result therefrom are likely to create a current of opinion favouring a wider uniformisation in the field of those contracts of interest to international trade.

(2) The Uniform Law which has been in force among the Socialist member countries of COMECON since 1958, governing not only international sale but also other contracts falling within the sphere of international financial dealings; it contains "general conditions" for the delivery of goods as between the member countries of the Economic Mutual Aid Council, the latest revised edition of which entered into force on 1 January, 1969, "general conditions for assembling" and general conditions for post-sale service (1962).

The provisions laid down in all these "general conditions" have a mandatory force, thereby making them that much more effective and authoritative than in the case of general conditions, the provisions of which have merely a suppletory force.

What is to be remembered, moreover, is the ease with which the basic principles of these "general conditions" can be made compatible with the provisions of the Uniform Laws on Sale, thus furnishing a basis from which to codify international trade law.

The entry into force of the United States' Uniform Commercial Code likewise marks a very significant event for the task of codifying the norms governing international trade. In spite of its being firmly rooted in "common law" concepts and in United States' commercial life practices, its solutions merit being taken into

consideration as much for their intrinsic value as for the essentially practical outlook which guided its realisation. In some of these solutions the Uniform Code diverges from English law to draw closer to continental solutions. Thus, for example, the Uniform Code has, in respect of certain cases, dropped the need for "consideration" (1) and, in particular, has bestowed such legal consequences on the offer that the solution provided in Article 5 of

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- (1) Consideration (the abolition of which was recommended in 1937 by the Law Revision Committee appointed by the British Government) is not necessary in the following cases :

1 - 107 Waiver or Renunciation of Claim or Right after Breach

- Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

Art. 1 - 107. Desistement ou abandon de droits en cas de violation des obligations nées du contrat

Toute prétention ou tout droit né d'une prétendue violation du contrat peut faire l'objet d'une renonciation totale ou partielle sans contrepartie par un acte de désistement écrit, signé et délivré par la partie lésée.

2 - 205 Firm Offers

- An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time; ...

Art. 2 - 205 - Offres fermes

L'offre d'achat ou de vente, faite par un commerçant dans un écrit signé dont les termes affirment qu'elle sera maintenue, ne peut être révoquée, pour défaut de contrepartie pendant le délai fixé ou, si aucun délai n'a été fixé, pendant un délai raisonnable; ...

2 - 209 Modifications, Rescission and Waiver

- 1) An agreement modifying a contract within this Article needs no consideration to be binding.

Art. 2 - 209 - Révision, résolution et renonciation

1) Un accord portant révision d'un contrat n'a pas besoin d'une contrepartie pour obliger les parties aux termes du présent Livre.



the Uniform Law on the Formation of Contracts is acceptable to the Uniform Code's rules on the "firm offer" (Art. 2-205); in other words, at least in this field, American law is becoming more readily compatible with the aforesaid Uniform Law (1).

So as fully to appreciate the importance of the Uniform Commercial Code's entry into force, one has only to recall the air of pessimism prevailing in the sessions of the Committee for the Conclusion and Validity of Contracts for the International Sale of Goods, even at those sessions that took place in 1958 (2), and the very real drawing together of common law, and civil law on this subject of the formation of contracts; it was at that time that it was said: "even if a time has been fixed, the offeror may revoke his offer by giving notice during this time, save where there has already been acceptance, because there would be no consideration" (3).

Reference must finally be made to the active part played by representatives of the American legal system in the work of the unification of law, a factor that was not present in the earlier work carried out by UNIDROIT.

4. The Czechoslovak Law No. 101 of 4 December, 1963 on legal relations in international trade dealings, marking a new stage in the legislative policy of States; in fact, it was the first time that a piece of national legislation - a genuine commercial code - had dealt with international trade dealings. Moreover, its inspiration was derived broadly from the Uniform Law on International Sale.

5. "Incoterms" and the whole work of unification carried out by the International Chamber of Commerce, the prestige of which is recognised in most countries, both in East and West.

6. The "general conditions" drawn up within the E.E.C. and the model-contracts of the large commercial companies, all of which have certainly a role to play in the work of unification, notwithstanding the dispositive nature of their provisions.

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(1) See D. TALLON, Le droit de la vente commerciale dans le Code de commerce uniforme des Etats-Unis, in Mélanges offerts à M. le Prof. Pierre Voirin, 1967, pp. 797 et seq.

(2) See in particular Doc. 11/1958, page 27.

(3) See Doc. 1957, XVI A, Doc. 4, page 14.

7. The new possibilities opened up by the Common Market, particularly after the entry of the new member countries.

8. One must finally turn to the setting up of UNCITRAL, demonstrating, on the one hand, the intolerableness of a situation where international trade is governed by municipal law and, on the other hand, the great interest felt by the international community in the codification of international trade law; that alone should suffice to act as a summons to UNIDROIT to take up its responsibilities in this respect.

It now remains to be seen whether, and to what extent, the results of the work already carried out by UNIDROIT may be used to create a set of uniform rules governing the General Part of the Law of Contract, with a view to progressively unifying the law of "ex contractu" liability.

## THE FORMATION OF CONTRACTS

### I. The Sphere of Application

(1) The set of rules that we have in mind, namely a progressive codification of international trade law, is to be begun by a set of rules on the General Part of Contractual Liability and is only to deal with contracts made by correspondence, thereby excluding contracts made by telephone, as being contracts made between parties present together at the same time.

It in no way seems necessary to supply a definition of a "contract made by correspondence".

(2) Only international contracts shall be subject to the set of rules.

As regards a definition of an international contract, it must be remembered that of all those definitions put forward in this regard, the one to be preferred would be that set out in the Uniform Law on the Formation of Contracts, in a section that could be adapted so as to cover all international trade contracts; a contract would

then be regarded as being "international" where the parties have their place of business or, in the absence of such a place of business, their habitual residence in the territory of different States.

However, in view of the fact that the international rules governing some contracts require other conditions to be fulfilled before the respective contracts have an "international" character, one must therefore also bear in mind those criteria laid down by the respective provisions of uniform law.

Likewise, in respect of those contracts involving a transfer of goods, such as contracts of sale, such contracts cannot be termed "international" without account being taken, in this respect, of the transfer of goods from one country to another. The same holds true for contracts made by agents; before such a contract may be termed "international", account must be taken of the special way in which such a contract is made, with three parties taking part in the formation thereof: a principal, an agent and a third party. And so on.

In other words, on every occasion when some provision of uniform law governing a specific contract expressly lays down which conditions are to determine whether or not this contract has an international character, these conditions will have to be taken into consideration.

It should be noted that the Working Group on Sale set up by UNCITRAL has proposed introducing the idea of the Contracting State as a criterion for the application of ULIS, so that, in the formula proposed by this Working Group, the Uniform Law should apply, as a general rule, where the parties to the contract have their place of business in different Contracting States or where the rules of private international law lead to the application of the law of a Contracting State.

No attempt, therefore, is made to supply a general definition of international sale. Moreover, the proposition whereby the Uniform Law could be applied merely by virtue of the fact that there is an international sale, independently of any reference to private international law and to the existence of any link between the parties and a Contracting State, is dropped.

We do not feel that the solution put forward by the UNCITRAL Working Group is acceptable for the general part of contractual liability, which would fit in better with the "universalist" proposition that it is intended to drop.

The other provisions of Article 1 of the Uniform Law on the Formation of Contracts seem to be consistent with those that would be needed to govern the general part of contractual liability.

However, it would seem desirable, as far as possible, to simplify the wording, taking as a guideline the Working Group's proposals.

In the light of what we have just said, Article 1 of the Uniform Code could be worded as follows:

1. "The present Code shall apply to contracts entered into by parties whose places of business (or, if a party does not have a place of business, whose habitual residences) are in different States.
2. "Where provisions of the present Code or any other uniform law provision in respect of a specific contract require the fulfilment of other conditions before the said contract can possess an international character, those conditions must also be fulfilled before the present Code shall apply.
3. "The provisions of the present Code shall apply regardless of the nationality of the parties and also of the civil or commercial character of the parties or of the contracts to be concluded.
4. "The present Code shall also apply where it has been chosen by the parties as the law of the contract.
5. "Rules of private international law shall be excluded for the purpose of the application of the present Code, subject to any provision to the contrary in the said Code.

There are no objections to be raised in respect of the provisions of Article 2 of the Uniform Law on the Formation of International Contracts of Sale.

Regarding conditions as to form for the offer and acceptance, the provisions of Article 3 of the Uniform Law would seem to be acceptable.

It should be noted that some legal systems require a written form for foreign trade contracts <sup>(1)</sup> and that others require a written form before one may bring an action on one's contract. However, this cannot impede the rule on the freedom of evidence in commercial cases.

## II. The Offer

A great number of points fall to be resolved under this Chapter.

1. First of all, there is the question of whether it is necessary to ascertain the time at which the contract was concluded and to make deductions therefrom as to the revocability of the offer and acceptance, the influence of death and lack of capacity on the validity of the offer or acceptance, or whether it is rather preferable to reach some decision on these problems, by finding the best solutions, while not saying anything about the time when and the place where the contract is concluded.

The first solution would appear to be the more logical, were there not so many differences between the legal systems of different countries. This is why one has to stick to the second solution, as already adopted in the Uniform Law on the Formation of Contracts of International Sale, concerned as the latter is with practical solutions rather than with stating general principles. It was considered, and rightly so, that, even if it is not possible to agree on principles, then one can at least agree on what are the results in practice.

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(1) The general conditions agreed between the Socialist member countries of COMECON stipulate that "the offer and acceptance of the offer shall only be valid when they have been made in writing". (Within this notion are also included telegrams and telex communications). However, this form is only required ad probationem.

2. There is also the question of offers made to unspecified persons, namely the sending of price lists, catalogues, samples, the display of goods with an indication of their price, publicity advertisements, etc.; no decision on this point is to be found in the Uniform Law on the Formation of Contracts of International Sale, under the pretext that it is extremely complicated and is much more concerned with interpreting the will of the parties.

Nevertheless, such a point should be taken into consideration in a Uniform Code dealing with the General Part of Contractual Liability.

3. Concerning the conditions that an offer must fulfil to be considered a valid offer and to enable a contract to be concluded on the basis of its acceptance, it is suggested that one should follow as closely as possible the current text of the Uniform Law on the Formation of Contracts of International Sale (Art. 4), adapted in such a way as to apply to every international trade contract.

4. The revocability of the offer. The wide differences existing on this point have made it very difficult to find a solution that would be acceptable to everyone. However, one's attention should be drawn to the change made in the Common Law by the United States' Uniform Commercial Code. In fact, Art. 2-205 of that Code confers certain legal consequences on an offer where this is made under certain conditions. Thus, an offer made in writing and signed by a merchant which by its terms gives an assurance that it will be held open cannot be revoked for lack of consideration during the time stated on, if no time is stated, for a reasonable time.

This American Commercial Law theory of the "firm offer" draws closer to the solutions of the Uniform Law on the Formation of International Sale Contracts, in particular as regards the solution provided in Art. 5 of that same Law.

As a result, the distinction made between an offer stating a specific period of time for its acceptance and an offer that does not state such a specific period of time must be the point of departure for any solution of this point. Thus, if an offer states a period of time for its acceptance, it must be kept open and is, in fact, irrevocable during this time. The same holds true, of course, regardless of whether the offer itself states that it is fixed or irrevocable. One must finally consider the case of a revocation that

was not made in good faith or that was not made in accordance with commercial fair dealing. The solution adopted by the Uniform Law on the Formation of International Sale Contracts on this point would seem to us to be acceptable.

In any case, revocation of an offer can only be effective where it has been communicated to the offeree before he has despatched his acceptance (or carried out any equivalent act), even though the contract is not yet made.

In other words, it is important not to confuse the making of the contract and the irrevocability of the offer, since these are two separate operations, which occur at two different moments in time.

### III. Acceptance

1. A first point raised with regard to the acceptance of an offer concerns the form in which it may be made, to wit either a declaration communicated to the offeror or else an act that could be considered the equivalent of such a declaration (either required by the offeror or made as a result of practices which the parties have established between themselves or usage). In this respect, the wording of Article 6 of the Uniform Law on the Formation of International Sale Contracts would seem to us to be satisfactory.

2. The force of an acceptance not corresponding exactly to the offer made. Such an acceptance may be regarded either as a rejection of the offer, as a counter-offer or, finally, as a "rejection of the offer", which "shall constitute a counter-offer". This last-mentioned solution is the one chosen in para. 1 of Art. 7 of the Uniform Law on the Formation of International Contracts on Sale and would seem to be acceptable.

Regarding additional or different terms which do not, however, materially alter the contents of the offer, it should be noted that the United States' Uniform Commercial Code incorporates, in Art. 2-207, a solution similar to the one adopted in the Uniform Law on the Formation of Sale Contracts (Art. 7, para. 2), but expressed in greater detail.

3. The effects of acceptance. The question is rather to make clear those conditions which must be fulfilled before an acceptance shall be effective. Such an acceptance must be communicated to the offeror within the time he has fixed or, if no such time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction and usage.

On this point, we find the provisions of the Uniform Law on the Formation of International Sale Contracts to be acceptable.

4. The effects of an acceptance which is late. An acceptance that is late might be regarded as being deprived of any legal effect; such would be the solution indicated by simple logic. However, one is led by the requirements of international trade to seek different solutions; an acceptance that is late constitutes either a fresh offer by its maker or else a genuine acceptance, subject, however, to certain conditions.

In the case of a fresh offer, this will be subject to the general rules on offers.

Therefore, it is only in those cases where one is seeking to give a late acceptance the force of a genuine acceptance that it is necessary to intervene so as to make clear those conditions under which it might have such force. In this respect, the solution of the Uniform Law on the Formation of International Sale Contracts (Art. 9) seems to accord better with the interests of international trade than any other solution: the offeror may consider a late acceptance to have arrived in due time on condition that he promptly so informs the acceptor.

There is another situation that should be considered: the acceptance was sent in such circumstances that if its transmission had been normal it would have been communicated in due time; in such a case, the acceptance shall be considered to have been communicated in due time, save where the offeror has promptly informed the acceptor that he considers his offer as having lapsed. Such is the solution of the Uniform Law on the Formation of International Sale Contracts. However, there is room for greater clarity in its wording.



5. Irrevocability of acceptance. Since it has been decided not to ascertain the moment in time when the contract was concluded, it must be made clear that acceptance is irrevocable, save where its revocation is communicated to the offeror before or at the same time as the acceptance.

This is again the solution offered by the Uniform Law on the Formation of International Sale Contracts (Art. 10): this may very easily be extended to cover all contracts.

6. The effect of the supervening death or loss of capacity of one of the parties. The interests of international trade require that the occurrence of these events, the death or loss of capacity of the offeror or acceptor, before acceptance shall have no effect on the formation of the contract, unless the contrary results from the intention of the parties, usage or the nature of the transaction (for instance, contracts concluded intuitu personae.)

#### CONDITIONS OF VALIDITY RELATING TO THE SUBSTANCE OF CONTRACTS

The very nature of this subject makes it more suitable for an adaptation to a set of rules common to all contracts. Therefore, if one accepts the solution put forward earlier with regard to the Uniform Code's sphere of application - which would result in the deletion of all nine paragraphs of Article 1 of the Preliminary Draft of a law for the unification of certain rules relating to the validity of contracts for the international sale of goods - there would be no problem in extending the remainder of the text to make it apply to all those contracts under consideration. In fact, the only rules dealing specifically with the contract of sale are set out in Articles 9 and 16 of the Preliminary Draft.

(a) Article 9 is worded as follows:

"The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of right of third parties in the goods".

(b) Article 16 runs as follows:

" 1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake (unless the existence of a person or of a particular thing constituted the basis of the contract and that this person or that thing did not exist at the time of the conclusion of the contract).

2. The same rule shall apply in the case of a sale of goods that do not belong to the seller."

It may readily be appreciated how easy it would be to adapt the wording of these two articles so as to make them applicable, not solely to sale, but to any type of contract whatsoever in respect of which the case under consideration might come up.

It thus emerges that the solutions already adopted by UNIDROIT and incorporated in Uniform Law provisions (or drafts of such laws) should give rise to no problems in their being adapted to a set of rules to govern the General Part of the Law of International Trade Contracts, at least as regards the formation of contracts and the conditions of validity relating to the substance of contracts.

While these conclusions are only provisional and subject to further consideration, their immediate value is that they seem such as to enable our work to be carried on against an outlook that is much more propitious than it has ever been before.

#### CONCLUSIONS

1. UNIDROIT should continue to give its attention to a progressive codification of international trade law involving, as this does, its statutory duty. It has the necessary weight of legal scholarship to carry out such a task, a task, moreover, which it first embarked on soon after it was set up.

Should UNIDROIT not wish to take up this scientific duty and thus hold back from its statutory duties, it is certain that there will be other organisations who will do so in its place. It should be

borne in mind, in this respect, that the drawing up of an International Commercial Code is already on UNCITRAL's general programme and that a delegate to the meeting of the sixth Committee of the General Assembly suggested that this task should be carried out by UNCITRAL itself.

2. A certain urgency is, therefore, attached to the work that we have in mind. In fact, a great many countries (and not just developing countries) are currently introducing new legislation or bringing their legislation up to date: it could thus happen that, in the meantime, laws might come into force and practices develop that would subsequently prove very difficult to reconcile with the rules called for by such a uniformisation of international trade law.

It would thus seem necessary that our work in this field, even at this preliminary stage, should be brought to the attention of not just those concerned with the unification of law, but also those concerned in bringing their legislation up to date.

3. Future Work

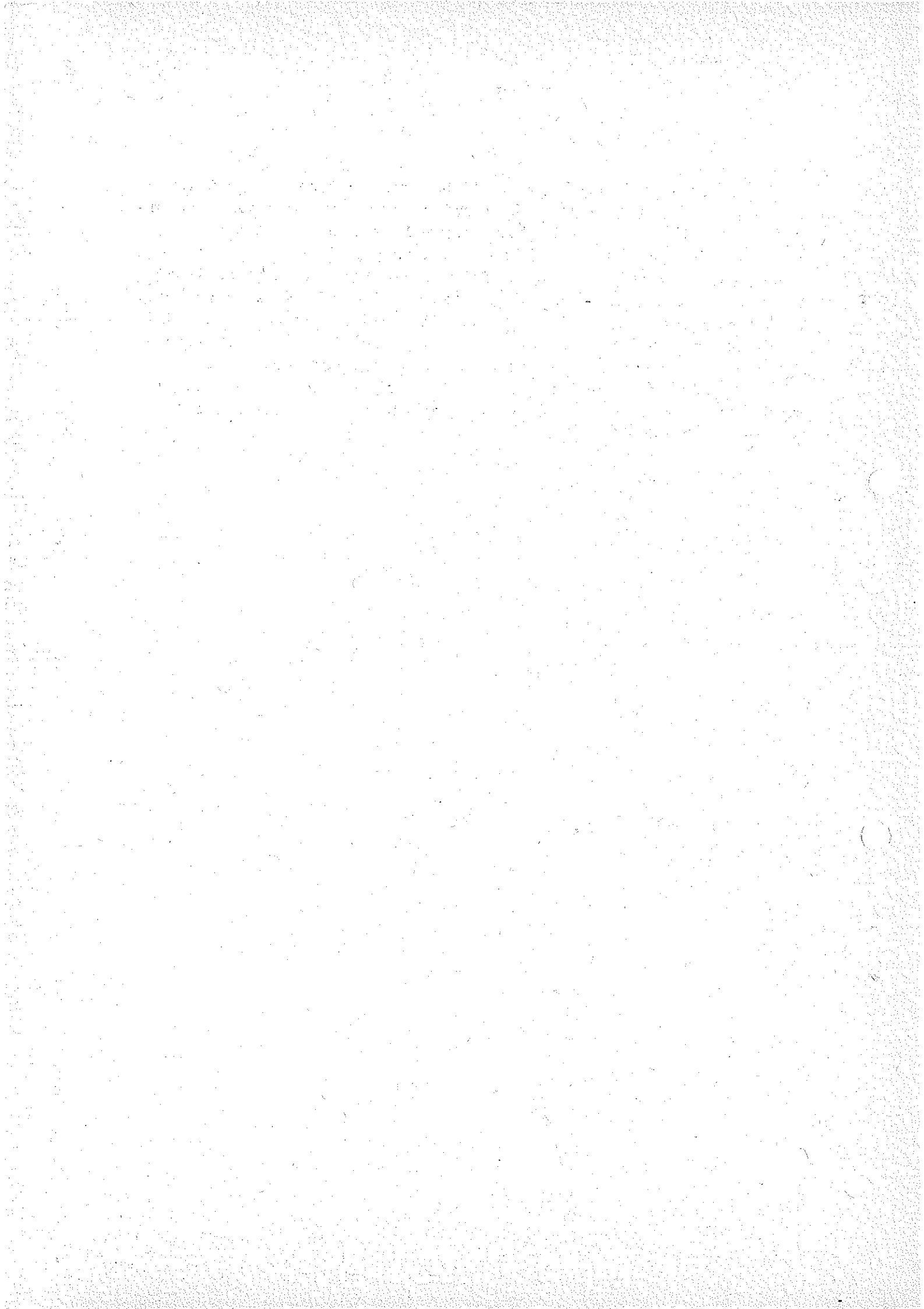
The following ways of carrying on our work in this field are put forward for consideration:

(a) One solution would be to appoint straight away a Study Committee, comprising three members, to carry on with the work on the formation and conditions of validity relating to the substance of contracts, with a view to drawing up a text that, after approval by the Governing Council, might be sent to the various organisations concerned for their opinions and criticisms.

(b) A second solution would be for Prof. Popescu to go on with his work, clearing the way in respect of the non-performance of contracts (breach of contract) and related matters (such as the construction of contractual terms, the method of calculating damages, penalty clauses, exemption clauses, etc.)

A text covering all the General Part of "ex contractu" liability would first have to be drawn up before there could be any question of considering how this work should be followed up.

(c) Besides, both these solutions reveal a perfect consistency with one another; they could be carried out at the same time, particularly in view of the fact that many points relating to the performance of contracts presuppose solutions having been found to some of the problems arising in the field of the formation of contracts and the conditions of validity relating to the substance of contracts, just as the rules governing the formation and conditions of validity of contracts have to be studied from the viewpoint of their effect on the performance of contractual duties. In other words, such a solution would take account of the link existing between the conditions laid down for the making of contracts and the performance of contractual duties.



ANNEX

CHAPTER II

THE FORMATION OF CONTRACTS

Text of a Draft Uniform International  
Commercial Code (U.I.C.C.)

Article 1

1. The present Code shall apply to contracts entered into by parties whose places of business or, if a party does not have a place of business, whose habitual residences are in different States.

2. Where provisions of the present Code or any other uniform law provision in respect of a specific contract require the fulfilment of other conditions before the said contract can possess an international character, these conditions must also be fulfilled before the present Code shall apply.

3. The provisions of the present Code shall apply regardless of the nationality of the parties and also of the civil or commercial character of the parties or of the contracts to be concluded.

4. The present Code shall also apply where it has been chosen by the parties as the law of the contract.

5. Rules of private international law shall be excluded for the purpose of the application of the present Code, subject to any provision to the contrary in the said Code.

Article 2

1. The provisions of the following Articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves and usage, that other rules apply.

2. However, a term of the offer stipulating that silence shall amount to acceptance is invalid.

Article 3

An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. They may be proved by means of witnesses.

Article 4

1. The communication which one person addresses to one or more specific persons with the object of concluding a contract shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.

2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any legal rules applicable to the respective contract.

Article 5

1. The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.

2. After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.

3. An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage.

4. A revocation of an offer shall only have effect if it has been communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under the provisions relating to the respective contract.

#### Article 6

1. Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.

2. Acceptance may also consist of any act which may be considered to be equivalent to the declaration referred to in paragraph 1 of this Article either by virtue of the offer or as a result of practices which the parties have established between themselves or usage.

#### Article 7

1. An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer.

2. However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance.

#### Article 8

1. A declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror, and usage.

2. If a time for acceptance is fixed by an offeror in a letter or in a telegram, it shall be presumed to begin to run from the day the letter was dated or the hour of the day the telegram was handed in for despatch.

3. If an acceptance consists of an act equivalent to the declaration by virtue of Article 6, paragraph 2, the act shall have effect only if it is done within the period laid down in paragraph 1 of the present Article.



Article 9

1. If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by despatch of a notice.

2. If, however, the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not, however, apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed.

Article 10

An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance.

Article 11

The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance, unless the contrary results from the intention of the parties, usage or the nature of the transaction.

Article 12

For the purposes of the present Chapter, the expression "to be communicated" means to be delivered at the address of the person to whom it is directed.

The above text is designed to form a chapter of the Uniform International Commercial Code (U.I.C.C.) and was drawn up, as far as possible, in the light of the provisions of ULFIS, although these have, of course, been adapted to fit the requirements of a set of rules governing the General Part of the Law of Contractual Liability.

The sphere of application and, consequently, the "international" character of those contracts subject to the uniform rules were, therefore, worked out in accordance with a criterion common to all contracts. The criterion chosen was that the places of business of the parties must be in different States, thus, on the one hand, ruling out those criteria which referred specifically to international sale, and, on the other hand, arriving at a text that makes possible the application, in respect of each specific contract governed by the Uniform Code, of those criteria that are proper to such a contract and are specified in each respective chapter.

It was for these reasons that the provisions of paragraph 1, letters (a) and (c), relating to the carriage and delivery of goods, and also paragraphs 6 and 7, referring specifically to sale, of Article 1 of ULFIS were left out.

Letter (b) of the first paragraph of the same Article was also left out, for the reasons set out by the UNCITRAL Working Group.

Article 13 of ULFIS was not included, since its place would seem rather to be in an introductory chapter, setting out the purpose of the uniform rules, defining certain terms, etc.

Other provisions have only been amended so as to make them applicable to all the contracts that it is intended to cover, this is the case in respect of Articles 4, 5 (final paragraph), 6 (second paragraph), 8 (first paragraph, last sentence) and 12.

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The text does not deal with the conditions of validity relating to the substance of contracts, since this subject is currently before the Governing Council of UNIDROIT.

The subject of contracts made by agents will be discussed further at a final session from 12th until 21st June next, in which I shall also take part.

Prof. Tudor R. Popescu

