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FORMATION OF INTERNATIONAL SALES CONTRACTS: THREE ATTEMPTS AT UNIFICATION

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"Every man knoweth, that for Manners and Prescriptions, there is great diversity among all Nations: but for the customes observed in the course of trafficke and commerce, there is that sympathy, concordance, and agreement, which may be said to be of like condition to all people, diffused and spread by right reason, and instinct of nature consisting perpetually."

—MALYNES, *Lex Mercatoria* (1622)

In an age of diversity among legal systems, we can look back with nostalgia to the hegemony of the law merchant, when commercial men could order their affairs according to an international body of custom which was applied with some consistency by the special commercial courts in the principal trading states of Western Europe. But by the time of Malynes in the seventeenth century, the fragmentation of this body of custom had already begun; it was soon absorbed in differing degrees by such developing legal systems as those of England and France, so that little remained of the uniformity which once facilitated foreign trade.

The result has not been a happy one for international commerce, and it is not surprising that in recent years a sustained assault has been mounted to break down the barriers raised by this diversity. The assault is waged on many fronts: through unification of the law,

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through preparation of standard form contracts, through definition of trade terms, through arbitration, and through choice of law and choice of forum. A good part of this effort is concerned with the movement of goods in foreign trade, and of this none is more fundamental and fraught with difficulties than that relating to the very formation of the contract of sale itself. Three recent initiatives are particularly notable: the Draft Uniform Law on the Formation of Contracts for the International Sale of Goods, prepared by the International Institute for the Unification of Private Law in Rome (the Rome Draft);[1] the Preliminary Draft of a Convention on a Uniform Law on the International Sale of Tangible Personal Property, prepared under the Inter-American Council of Jurists (the Inter-American Draft);[2] and the general conditions for sale prepared by the United Nations Economic Commission for Europe (the ECE conditions).

I. Three Attempts at Unification

A. The Rome Draft

The Rome Institute's work on the formation of contracts for the international sale of goods began in 1934, when this subject was separated from the Institute's general work on sales. By 1936 a draft Uniform Law on International Contracts by Correspondence had been prepared.[3] Progress was halted by World War II, and the work was not resumed until 1956. By 1958 a new draft—the Rome Draft—had been prepared by the Council of the Institute.[4] Meanwhile, the general work on sales had culminated in the Draft Uniform Law on the International Sale of Goods (the Hague Sales Draft),[5] which was revised by a special committee named at a conference at The Hague in 1951. In the hope that the Rome Draft might be brought before a diplomatic conference similar to that held on the

[1] This draft, published in 1959, is reprinted, in translation, in Appendix I to this Article. It is hereinafter cited as Rome Draft.

[2] The portions of this draft, published in 1960, which apply to the formation of international sales contracts are reprinted in Appendix II to this article. It is hereinafter cited as Inter-American Draft.

[3] International Institute for the Unification of Private Law, Preliminary Draft of a Uniform Law of International Contracts Made by Correspondence (1937).

[4] The history of the draft is contained in the report, which appears only in the French version. Institut International pour l'Unification du Droit Privé, Projet de Loi Uniforme sur la Formation des Contrats de Vente Internationale des Objets Mobiliers Corporels et Rapport 13-14 (1959).

[5] International Institute for the Unification of Private Law, Draft of a Uniform Law on International Sale of Goods (Corporeal Movables) (1957) [hereinafter cited as Hague Sales Draft]. See generally Donovan, *The Unification of International Commercial Law—Sale and Arbitration*, 2 Melbourne U.L. Rev. 172 (1959); Honnold, *A Uniform Law for International Sales*, 107 U. Pa. L. Rev. 299 (1959).

Hague Sales Draft, the Institute transmitted the product of its work to the Dutch government in 1959.[6] The Dutch government has already solicited and received the opinions of foreign governments in preparation for such a conference.

The Institute has adhered to its original decision to keep the draft law on formation of sales contracts separate from that on sales generally so that the acceptance of the 113 articles of the latter will not be impeded by the difficulty of securing agreement on the fourteen articles of the former.[7] However, the Rome Draft differs in scope from the Institute's 1936 draft in two major respects. First, it is not limited to the formation of contracts by correspondence, as was the earlier draft, but covers the formation of contracts by any means.[8] Second, it does not apply to the formation of all contracts, as did its predecessor, but is limited to the formation of those contracts for the international sale of goods which fall within the purview of the Hague Sales Draft.[9] In general, this limitation restricts its operation to contracts between parties whose places of business or habitual residences are in different countries. There must also be an additional international element, namely, the fact that the goods have been or will be carried from one country to another, that the acts constituting offer and acceptance took place in different countries, or that delivery is to be made in a country other than that in which these acts took place.[10] The Rome Draft, like the Hague Sales Draft, rejects the distinction found in many civil law countries, yet unfamiliar to American lawyers,[11] between commercial and noncommercial sales.[12]

B. The Inter-American Draft

The second recent initiative, the Inter-American Draft, grew out of a resolution of the Inter-American Council of Jurists, an organ of

[6] A study of the rules relating to contract formation had been recommended by the 1951 conference. ACTES DE LA CONFÉRENCE CONVOQUÉE PAR LE GOUVERNMENT ROYAL DES PAYS-BAS SUR UN PROJET DE CONVENTION RELATIF À UNE LOI UNIFORME SUR LA VENTE D'OBJETS MOBILIERS CORPORELS 277 (1952).

[7] INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVÉ, PROJET D'UNE LOI UNIFORME SUR LA VENTE INTERNATIONALE DES OBJETS MOBILIERS CORPORELS, NOUVEAU TEXTE ÉLABORÉ PAR LA COMMISSION ET RAPPORT DE LA COMMISSION 29 (1956).

[8] *Compare* ROME DRAFT art. 2, *with* the PRELIMINARY DRAFT OF A UNIFORM LAW ON INTERNATIONAL CONTRACTS BY CORRESPONDENCE art. 1 (1937).

[9] ROME DRAFT art. 2.

[10] HAGUE SALES DRAFT art. 2. This provision is discussed in more detail in Honnold, *supra* note 5, at 304-06. A few minor exceptions are set out in HAGUE SALES DRAFT art. 8.

[11] The Sales article of the Uniform Commercial Code does contain a few special rules applicable only where one or both parties are "merchants." But there is no general division of transactions into commercial and noncommercial sales. See UNIFORM COMMERCIAL CODE § 2-104 and Comments.

[12] ROME DRAFT art. 2; HAGUE SALES DRAFT art. 11.

the Council of the Organization of American States, which at its first meeting in 1950 entrusted to its permanent committee, the Inter-American Juridical Committee, a study of uniformity of legislation on the sale of personal property.[13] This study resulted in a first draft,[14] which was succeeded by a second draft prepared by the Council of Jurists at its second meeting in Buenos Aires in 1953.[15] A preliminary study of the second draft, together with a revised version—the Inter-American Draft—were discussed at the Committee's meeting in 1959. Since publication in 1960 they have been circulated by the Department of Legal Affairs of the Pan American Union for comments. The draft is intended for adoption throughout the Americas. Unlike the Hague Sales Draft, it includes the four articles on formation of sales contracts within its fifty-three articles on sales in general. However, it, too, is limited to international sales, which are defined generally as those between parties whose places of business or habitual residences are in different countries, and then only if the goods or the price must be transferred from one country to another.[16] And it, too, rejects any distinction between commercial and noncommercial sales.[17]

C. The ECE Conditions

The third initiative, which has resulted in the ECE conditions, has been along different lines and has been the most productive of concrete results. Rather than attempt unification of the law itself, it has sought to minimize the practical effects of diversity by the use of uniform standard contract forms. During the last decade, such general conditions have been prepared for the international sale of a number of commodities under the auspices of the United Nations Economic Commission for Europe.[18] Each document has been the product of a group of experts representing most of the European nations on both sides of the Iron Curtain and speaking for the interests of both sellers and buyers in the trade or industry involved. The

[13] INTER-AMERICAN COUNCIL OF JURISTS, FINAL ACT OF THE FIRST MEETING 14, 18 (1950). On the Inter-American Juridical Committee in general, see Murdock & Gobbi, *The Inter-American Juridical Committee*, 9 AM. J. COMP. L. 596 (1960).

[14] INTER-AMERICAN JURIDICAL COMMITTEE, DRAFT UNIFORM LAW ON THE INTERNATIONAL SALE OF PERSONAL PROPERTY (1953).

[15] INTER-AMERICAN COUNCIL OF JURISTS, FINAL ACT OF THE SECOND MEETING 31-43 (1953).

[16] INTER-AMERICAN DRAFT art. 2. In art. 3 there are certain minor exceptions, as in the ROME DRAFT art. 2.

[17] INTER-AMERICAN DRAFT art. 1.

[18] On the history of the ECE conditions, see Benjamin, *E.C.E. General Conditions of Sale and Standard Forms of Contract*, 1961 BUS. L.J. 113. Contracts have been drawn up for such trades as plant and machinery, solid fuels, timber, citrus fruits, and cereals.

eventual use of the conditions, however, is a matter for contracting parties to decide for themselves. The ECE conditions have met with acceptance for several reasons: they are specially designed to give definitive answers to those questions which might be answered differently under different legal systems; they avoid the overreaching found in many form contracts because they have been prepared under the auspices of an impartial body after discussion by representatives of both sellers and buyers;[19] and once they become familiar through use, they avoid the need for detailed examination of fine print and facilitate comparison of offers. The ECE conditions affect not only the obligations of the parties under the contract of sale, but the formation of the contract as well, since they contain provisions on contract formation which become operative through their incorporation in the offer.

D. Some Basic Considerations

The Rome and Inter-American drafts are alternative legislative solutions to the problem of diversity. Although the former has been under study for a longer time, neither has been subjected to extensive review by independent legal and business experts, and neither is in final form. Both are deserving of attention in the United States. There is, of course, the rather remote chance that one or the other might be adopted by this country. Beyond this, there is the more real possibility that, if adopted by other nations, they would apply to contracts involving American business, either under the rules of the draft itself, under general conflict of laws rules, or under choice of law clauses. It should be remembered that neither draft requires that either party have his place of business or habitual residence in one of the countries that have adopted the draft, provided the draft has been adopted by the forum.[20] Furthermore, both drafts are worthy of attention as the considered and contemporary work of distinguished legal scholars in Europe and the Western Hemisphere[21] and as evidence of a strong current toward unification which has gone largely unnoticed in this country.

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[19] See LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 362 (1960).

[20] INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVÉ, PROJET D'UNE LOI UNIFORME SUR LA VENTE INTERNATIONALE DES OBJETS MOBILIERS CORPORELS, NOUVEAU TEXTE ÉLABORÉ PAR LA COMMISSION ET RAPPORT DE LA COMMISSION 28 (1956).

[21] Those who participated in the Rome Draft include Judge Algot Bagge, President (Sweden), Professor Tullio Ascarelli (Italy), Professor Frederico de Castro y Bravo (Spain), Professor Max Gutzwiller (Switzerland), Dean Joseph Hamel (France), Dr. Georg Petersen (Germany), Judge Otto Riese (Germany), and Professor Benjamin Atkinson Wortley (Great Britain). The Inter-American Draft was revised from the earlier versions by Mr. Hugo Juan Gobbi of Argentina.

Although the two drafts are mutually exclusive alternatives, neither ought to preclude the concurrent use of standard form contracts, such as the ECE conditions, as a legitimate exercise of the autonomy of the parties. It is therefore unsettling to find that neither the Rome Draft nor the Inter-American Draft provides that the offeror may vary the rules of formation by incorporating different rules into his offer.[22] Since the most suitable rules for contract formation—as well as for sales generally—may differ from one trade or industry to another, it is inconceivable that a satisfactory and acceptable uniform law should contain mandatory rules on this subject.[23] It is imperative that both drafts be amended to include express provisions allowing variation by incorporation of different rules in the offer. The discussion which follows is based on the assumption that this will be done.

Because both drafts are tentative versions and will undergo further changes, this article will examine only the basic rules and not the details of draftsmanship. These rules will be compared with those embodied in the ECE conditions and with those which we know in the United States. To the American lawyer, however, the form and the approach in drafting of both of the proposed uniform laws may be even more striking than the differences of substance. It will be well to dispose of these problems before turning to those of substance.

II. Approach and Form

Both the Rome Draft and the Inter-American Draft are characterized by brevity and generality, particularly when their language on contract formation is compared with that in which comparable rules have been cast in the Uniform Commercial Code and the *Restatement of Contracts*.[24] In part this is the result of the draftsmen's desire to limit the number of points upon which there could be disagreement by omitting subjects or details which might stir controversy. In part it is the result of a different and more concise style of draftsmanship

22 The Inter-American Draft contains several sections which expressly allow variation by agreement, leaving the implication that other sections may not be varied by agreement. See Inter-American Draft arts. 32 ("Warranties of the buyer [*sic*]"), 38 ("Simultaneous delivery and payment").

23 The Uniform Commercial Code generally allows variations by agreement except in such matters as good faith, due diligence, and commercial reasonableness, Uniform Commercial Code § 1-102(3), and the Hague Sales Draft allows the parties complete freedom to vary its provisions by specific agreement, Hague Sales Draft art. 3.

24 For the benefit of foreign readers, it should be explained that the Uniform Commercial Code is the joint product of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. It was proposed in its present form in 1957 and has already been adopted in more than a dozen states. The *Restatement of Contracts*, sponsored by the American Law Institute, is an attempt by a group of distinguished scholars to state the prevailing rules in this field as found largely in the decisions of American courts. It was published in 1932 and is now being revised. It does not, of course, have the force of law.

traditionally found in civil law codes. These characteristics would be less of an obstacle to acceptance among American lawyers were it not for the fact that both drafts purport to be complete and sufficient in themselves. Each completely excludes application of national law "in matters covered by it," according to the language of the Inter-American Draft,[25] and "in cases to which it is applicable," according to the formulation of the Rome Draft.[26] The basic approach thus differs sharply from the uniform laws in the United States, which are regarded less as complete replacements for prior law than as codifications of existing law. The American uniform laws provide that they shall be supplemented by the principles of law and equity, insofar as these are not displaced by express provisions.[27] They do not attempt to replace state law entirely, even on matters within their scope. There is, however, considerably less uniformity, even among the nations of Western Europe or Latin America, than among the states of the United States. For this reason it would be no easy task to follow the American pattern by preserving a body of basic principles to supplement the brief rules of the drafts, without at the same time opening the door to a variety of different national rules in the hands of different national tribunals.

Perhaps the choice which has been made of completely excluding national law is the only one feasible for a statute which aims at complete codification of the subject. But if this is so, something should be done to fill out the bare skeleton of rules erected in the drafts. For example, neither contains any provision on the effect of a rejection to terminate an offer,[28] nor does either address itself adequately to the problem of an offer which is delayed in transmission.[29] The further provision of the Rome Draft that matters not "expressly settled by the present law . . . shall be regulated in accordance with the general principles on which it is based" [30] seems especially difficult of application, since the source from which these principles might be deduced comprises only fourteen relatively short articles. The separation of the Rome Draft from the longer Hague Sales Draft aggravates this problem; it might be preferable to make the Rome Draft an optional addition to the longer and presumably less controversial sales draft, rather than an independent statute. Several examples should suffice to illustrate these difficulties.

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25 INTER-AMERICAN DRAFT art. 4.
26 ROME DRAFT art. 1.
27 See, *e.g.*, UNIFORM SALES ACT § 73; UNIFORM COMMERCIAL CODE § 1-103.
28 See note 60 *infra.*
29 See pp. 318-19 *infra.*
30 ROME DRAFT art. 1.

A. Generality—Definition of Offer

The definition of an offer in the Rome Draft shows the generality of some of the provisions. It provides that a communication "shall not constitute an offer . . . unless the terms of the contract are sufficiently detailed to permit its conclusion by acceptance and unless the person who makes the communication must be considered as having the intention to bind himself." [31] Not only is this language too vague to be of much help in the kinds of situations which cause trouble but the test for determining whether a communication is sufficiently definite to constitute an offer is circular. It can hardly be regarded as an adequate substitute for the more detailed rules found in most legal systems and would merely invite any tribunal to fill in the lacunae by application of its own domestic law, contrary to the stated purpose of the draft.[32]

B. Brevity—Requirement of a Writing

The articles of both drafts dealing with the requirement of a writing evidence the problems raised by brevity. Since England's repeal of the Statute of Frauds as applied to the sale of goods in 1954,[33] the United States has been the world's leading exponent of such a requirement and has retained it, with some amelioration, even under the Uniform Commercial Code.[34] It is therefore distressing to an American lawyer that both drafts mishandle the problem of the Statute. The Rome Draft provides merely that "no set form shall be prescribed for an offer or for an acceptance," [35] and the Inter-American Draft that "a contract of international sale does not require any special form. It may be proved by witnesses." [36] Even if one gives both drafts the most charitable interpretation and admits that their apparent objective of abolishing the Statute may be desirable in international sales, it must be conceded that they miss the mark. Perhaps the difficulty is due in part to an insufficient understanding by the draftsmen of the nature of the Statute as distinguished from its civil law analogues. For

31 ROME DRAFT art. 3. Compare UNIFORM COMMERCIAL CODE § 2-204.

32 Neither draft contains a provision comparable to those of the Uniform Acts in the United States which require that the act be interpreted to effectuate its general purpose of making uniform the law. See, *e.g.*, UNIFORM SALES ACT § 74; UNIFORM COMMERCIAL CODE § 1-102(2)(c). Such a provision would probably be repugnant to jurists of countries such as France, where the courts, ostensibly at least, do not rely upon prior decisions, even when they are from the same jurisdiction, as precedents.

33 Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34.

34 UNIFORM COMMERCIAL CODE § 2-201.

35 ROME DRAFT art. 14. The word "set" does not appear in the original French: "Aucune forme n'est prescrite."

36 INTER-AMERICAN DRAFT art. 8.

it does not require a "set form," "special form," or indeed any form, for an offer, for an acceptance, or even for a contract. None of these need be in writing at all. The Statute as it appears in the Uniform Commercial Code merely requires for *enforcement* of a contract, in the absence of other evidence such as payment or delivery, that there be "some writing sufficient to indicate that a contract for sale has been made . . . ." [37] The making of the writing may be subsequent to the making of the contract, as by a letter of confirmation, and the contract itself may be "proved by witnesses," if written evidence of its making is available. Thus neither provision, in its present succinct form, is adequate expressly to repeal the Statute of Frauds.[38]

The form of the drafts thus poses an initial stumbling block to their acceptance in the United States. While both would completely replace domestic law in international transactions, neither offers a formula which is an adequate substitute for domestic law from the standpoint of either completeness or clarity. Beyond this, there are important problems of substance. The most interesting can be grouped under two headings: first, revocation of communications and time of formation and, second, sufficiency of acceptance.

III. Revocation of Communications and Time of Formation

Although neither of the drafts is restricted to contracts by correspondence, both draft laws as well as the ECE conditions show primary concern with the problems raised by this method of contracting, because international sales contracts are so often concluded in this way, rather than face to face or by telephone. The difficulty is that due to delays in the transmission of correspondence, neither party can be aware of the other's current state of mind. To protect their justifiable expectations and terminate the correspondence at some point, a contract must be found even in many cases where one party has had a change of mind which he did not or could not communicate to the

37 Uniform Commercial Code § 2-202.

38 It is true that the general provisions of both drafts which displace domestic laws in "matters" or "cases" where they apply may appear broad enough to displace the Statute without explicit repeal. Yet if the drafts' provisions as to formation should displace the Statute of Frauds, which, strictly speaking, applies to enforceability rather than to formation, one may ask what effect they might have on the rule regarding the use of parol or extrinsic evidence to vary the terms of an agreement—the so-called "parol evidence rule." See Uniform Commercial Code § 2-202. Some of the ECE conditions have clauses invoking a similar rule. The following is found under "Formation of Contract" in ECE, General Conditions for Export and Import of Sawn Softwood para. 2.7 (U.N. Doc. No. ME/410/56) (1956): "After formation of the contract, all previous negotiations, oral or in writing, contrary to the contract shall cease to have effect." Both drafts are silent on this matter, and it is certainly arguable that it is as closely related to the general subject of "formation" as is the Statute of Frauds and thus might be part of the domestic law to be replaced.

other—where there is no actual mutual assent at any one moment. Because the issues are complex, some preliminary analysis of a simple but standard transaction may be helpful.

A. Events Capable of Legal Significance

The conclusion of a contract by correspondence usually involves at least four events which may be given legal significance: (1) the offeror dispatches his offer to the offeree; (2) the offer reaches the offeree; (3) the offeree dispatches his acceptance to the offeror; and (4) the acceptance reaches the offeror. There are two views on when a communication has "reached" one of the parties, one taking the time when it is delivered at the recipient's address and the other the time when it actually comes to his attention.[39] Although the latter has appeal in the context of consensual transactions, the former is the more practical solution, mainly because it permits greater ease of proof. It has been used in the Rome Draft, under which a communication has "reached" (*parvenu*) a party when it has been "delivered at [his] . . . address."[40] The *Restatement of Contracts* and the Uniform Commercial Code make the same choice.[41] The Inter-American Draft contains no provision on the point since, as will be seen, the time when a communication reaches the parties is not made material under any of its sections. And the ECE conditions do not define when a communication "reaches" one of the parties, even when this fact is crucial.

B. Basic Questions Involved

In the analysis of a legal problem arising out of an attempt to conclude a contract by correspondence, four common questions may arise which can be answered in terms of the four events listed above. (1) How long does the offeror retain the power to revoke his offer? (2) How long does the offeree retain the power to bind the offeror by his acceptance? (3) Who bears the risk of loss or delay in transmission of the acceptance? (4) How long does the offeree retain the power to revoke his acceptance? Each of these should be clearly and satisfactorily answered by any set of rules governing the formation of contracts.

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[39] See generally AVANT-PROJECT D'UNE LOI UNIFORME SUR LA FORMATION DES CONTRACTS INTERNATIONAUX PAR CORRESPONDANCE 21-23 (1937).

[40] ROME DRAFT art. 10. The English translation of the French text of the draft renders "*parvenir*" as "to communicate" rather than "to reach." The latter seems both more literal and more correct.

[41] RESTATEMENT, CONTRACTS § 69 (1932); UNIFORM COMMERCIAL CODE §§ 1-201 (25), (26), (27).

How long does the offeror retain the power to revoke his offer? The question of the revocability of an offer is one of the most challenging that must be faced by the draft laws, both because of its considerable practical importance and because of the variety of answers given in various legal systems. Under the common-law rule as applied in the United States, an offer usually may be revoked until an acceptance is dispatched.[42] The most serious problem to have arisen under this rule is that of the firm offer. At common law, a simple promise by the offeror not to revoke the offer is insufficient to bind the offeror and create a firm offer, because such a promise is unsupported by consideration. But the offeror's broad power of revocation is limited somewhat by the corollary that the act of acceptance occurs when an acceptance is dispatched, not when it is received, if the means of transmission is that customarily used or is the same as that used by the offeror or is that specifically authorized by the offeror.[43] More important than this mollifying corollary is the fact that the rule itself has been changed in New York by special statute[44] and in a substantial number of other states by the Uniform Commercial Code.[45] In these states an offeror may, at least under certain circumstances, make a firm offer if the offer is put in writing. The Code rule is limited to offers by a "merchant," who must generally be one who deals in the kind of goods involved in the transaction.[46] While the bulk of international trade is probably carried on by those who meet the Code's definition of merchant, this restriction is bound to be frequently troublesome and confusing to foreigners. Nevertheless, the trend toward recognition of firm offers is clear in the United States.

It is surprising that no attempt has been made in the Inter-American Draft to deal with the problem. The draft provides only that "the offer may be withdrawn . . . up to the moment of the dispatch of the acceptance," [47] which is essentially the rule that has caused difficulty in this country. The Rome Draft comes closer to current thinking in the United States. It provides that if an offer is not a firm offer, it may be revoked if the revocation reaches the offeree before he sends an acceptance; but if it is a firm offer it may not be so revoked, although it may be withdrawn if the communication

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42 See RESTATEMENT, CONTRACTS § 41 (1932).

43 See RESTATEMENT, CONTRACTS §§ 64, 66 (1932).

44 N.Y. PERS. PROP. LAW § 33(5).

45 UNIFORM COMMERCIAL CODE § 2-205.

46 UNIFORM COMMERCIAL CODE § 2-104(1). The Code also limits the duration of firm offers to three months and requires that the offeror sign separately the terms of a firm offer if they appear on a form supplied by the offeree. UNIFORM COMMERCIAL CODE § 2-205.

47 INTER-AMERICAN DRAFT art. 7.

of withdrawal reaches the offeree before or at the same time as the offer.[48] The statutes in the United States have no provisions on the point of withdrawal, but the rule would presumably be the same.[49] It is difficult to conceive how a modern statute on the formation of contracts, particularly in international trade, could do an effective job without solving the firm offer problem. In this respect, the Rome Draft is adequate and in keeping with modern day commercial needs. But the Inter-American Draft fails completely and should be revised to take account of this problem.

The Rome Draft and the firm offer statutes in the United States differ as to how to determine whether or not an offeror has made a firm offer. Under the Uniform Commercial Code and the New York statute, the offer is not a firm offer unless the offeror has so stated in the offer, which must be in writing and signed.[50] Under the Rome Draft, any offer is a firm offer and irrevocable for at least a reasonable time "unless the offeror has reserved to himself the right of revocation in the offer." [51] Thus in the case of silence as to revocability, an offer is revocable under the American statutes, but firm under the Rome Draft. There is a practical reason to prefer the American rule; the rule of the Rome Draft will more often give rise to uncertainty as to the duration of the period of irrevocability, for the question of what is a "reasonable" time may arise in any case where the offer is silent as to revocability. Under the American statutes the question of what is a "reasonable" time can only come up in the rare case in which the offeror states that his offer is irrevocable without setting a period of irrevocability. Furthermore, the ECE conditions indicate that the American view prevails in the industries and trades in which they have considered the problem. The conditions for sawn softwood, citrus fruit, and solid fuels all provide that an offer is revocable if not described as a firm offer.[52] The conditions for plant and machinery are silent on this point.[53]

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[48] ROME DRAFT art. 4.

[49] See RESTATEMENT, CONTRACTS § 23 (1932).

[50] N.Y. PERS. PROP. LAW § 33(5); UNIFORM COMMERCIAL CODE § 2-205.

[51] ROME DRAFT art. 4.

[52] ECE, GENERAL CONDITIONS FOR EXPORT AND IMPORT OF SAWN SOFTWOOD para. 2.3 (U.N. Doc. No. ME/410/56) (1956); ECE, GENERAL CONDITIONS FOR THE EXPORT AND IMPORT OF SOLID FUELS para. B.3 (slip note) (U.N. Pub. Sales No. 59.II.E/Mim.1) (1958); ECE, GENERAL CONDITIONS FOR THE INTERNATIONAL SALE OF CITRUS FRUITS para. 2.2 (U.N. Pub. Sales No. 58.II.E/Mim.12) (1958).

[53] ECE, GENERAL CONDITIONS FOR THE SUPPLY OF PLANT AND MACHINERY FOR IMPORT AND EXPORT (U.N. Doc. No. ME/188 bis/53) (1953), (U.N. Doc. No. ME/574/55) (1955); ECE, GENERAL CONDITIONS FOR THE SUPPLY AND ERECTION OF THE PLANT AND MACHINERY FOR IMPORT AND EXPORT, (U.N. Pub. Sales No. 1957.II.E/Mim.3), (U.N. Pub. Sales No. 1957.II.E/Mim.4). None of these documents disposes of the question whether a specification by the offeror of a time limit operates also as an undertaking that the offer will be kept open for that length of

This much is certain: outside of the diminishing number of jurisdictions where a firm offer is impossible, the offeror has the power to determine the revocability of his offer if he does so explicitly and in a signed writing. Where he has not been explicit, his own intention, as well as the understanding of the offeree, may depend both on the legal systems and the trade or industry with which the parties are familiar. There is at present little evidence to support any general rule of interpretation for international sales contracts as a whole. It is therefore unfortunate that neither the Rome nor Inter-American projects has included a study of existing business practices and understandings in this matter in international sales. But regardless of existing practices and irrespective of any statutory rule of construction, as long as a firm offer is possible, a standard form contract can effectively control the outcome in any particular case. And regardless of what general rule might be chosen for a statute on formation of international sales contracts, the need would remain for standard form contracts to meet the special needs of different commodities.[54]

How long does the offeree retain the power to bind the offeror by his acceptance? This question is often stated in terms of when does the offer lapse. In the United States, if a time for acceptance has been fixed, it is usually sufficient if the acceptance has been dispatched before the end of the period, even if it reaches the offeror after the expiration of the period. If no time has been fixed, it is sufficient if it has been dispatched within a reasonable time.[55] Under the Rome Draft, however, if the offeror has fixed a time for acceptance, the offer lapses if the acceptance does not reach the offeror within the time fixed.[56] If no time has been fixed by the offeror, the acceptance must reach the offeror within the time fixed by any applicable usage, or, if

time. The 1936 Rome Draft took the awkward position that the offer was *not* a firm offer *unless* the offeror had set a time limit for acceptance. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRELIMINARY DRAFT OF A UNIFORM LAW OF INTERNATIONAL CONTRACTS MADE BY CORRESPONDENCE art. 3 (1937).

54 At least two other solutions to the problem of revocation have gained some acceptance. One is based on the doctrine of *culpa-in-contrahendo* under which the offeror who revokes may be held liable in damages if the offeree has in reliance on the offer prepared to perform. See Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, 36 COLUM. L. REV. 920, 924 (1936). The other is the offer *"sans engagement,"* under which an offer which does not have the form of a firm offer is merely an invitation for a firm offer. One who issues such an invitation and receives an offer in return is deemed to have accepted it if he does not reject the offer within a reasonable time. *Id.* at 927.

55 See RESTATEMENT, CONTRACTS § 40(1) (1932). Of course the offeror may stipulate that the acceptance must reach him within the prescribed time. Lewis v. Browning, 130 Mass. 173 (1881).

56 ROME DRAFT art. 7. The draft does not, however, settle the question of whether a period of time fixed by the offeror begins to run at the time the offer was sent, at the time it was received, or at some other time. Nor is there any disposition of the case of an offer which arrives late either when a period of irrevocability has been set or not.

there is none, "without undue delay." [57] This last phrase is defined to mean "as short a time as possible in the circumstances, calculating from the moment when the act may reasonably be performed." [58] The Inter-American Draft gives no answer to when an offer lapses, an omission which should be corrected. When an offer fixes a period within which it must be accepted, the difference between the rule in this country and that of the Rome Draft may be crucial, for under the Rome Draft the offeree must count within the fixed period the time for transmittal of the acceptance. But if no time is fixed, the difference is less important, since even under the Rome Draft the offeree is entitled to allow time for transmission in determining a reasonable time for acceptance.

Human nature being as it is, it may well be that the time of receipt is more often the understanding of the offeror and the time of dispatch more often that of the offeree. Here too a study of practices and understanding in international sales would be useful. But the question need not arise if the offeror, in fixing the period for acceptance, states whether dispatch or receipt of the acceptance is required before its expiration; the most effective way to ensure that this is done is through the use of a standard form contract with an appropriate provision. The ECE conditions contain such provisions, some choosing the time of dispatch and others the time of receipt, to suit the needs of various trades or industries.[59] This is another example of a point on which there may be no general agreement but which can be covered, in any particular case, as effectively by a standard form contract as by legislation.[60]

Who bears the risk of loss or delay in transmission of the acceptance? This question is usually subsumed under the broader question of when is the contract "concluded." Before the "conclusion" of the contract, the risk of loss or delay in transmission of the acceptance is on the offeree; afterwards it is on the offeror. In the United States

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[57] ROME DRAFT art. 7.

[58] ROME DRAFT art. 11.

[59] *Dispatch*: ECE, GENERAL CONDITIONS FOR THE SUPPLY OF PLANT AND MACHINERY FOR IMPORT AND EXPORT para. 2.1 (U.N. Doc. No. ME/188 bis/53) (1953), (U.N. Doc. No. ME/574/55) (1955); ECE, GENERAL CONDITIONS FOR THE SUPPLY AND ERECTION OF THE PLANT AND MACHINERY FOR IMPORT AND EXPORT, para. 2.1 (U.N. Pub. Sales No. 1957.II.E/Mim.3), (U.N. Pub. Sales No. 1957.II.E/Mim.4). *Receipt*: ECE, GENERAL CONDITIONS FOR EXPORT AND IMPORT OF SAWN SOFTWOOD para. 2.1 (U.N. Doc. No. ME/410/56) (1956); ECE, GENERAL CONDITIONS FOR THE EXPORT AND IMPORT OF SOLID FUELS para. B.2(a) (slip note) (U.N. Pub. Sales No. 59.II.E/Mim.1) (1958); ECE, GENERAL CONDITIONS FOR THE INTERNATIONAL SALE OF CITRUS FRUITS para. 2.2 (U.N. Pub. Sales No. 58.II.E/Mim.12) (1958).

[60] It should be noted that none of the documents discussed here explicitly provides that a rejection by the offeree terminates the offer. Compare RESTATEMENT, CONTRACTS § 35(1)(a).

the contract is concluded upon dispatch of the acceptance, and the risk of loss or delay falls on the offeror, provided the means of transmission was authorized by the offeror.[61] The most common ground for finding such authorization is that the offeror himself used the same means of transmission in making the offer.[62] Under the Inter-American Draft a contract by letter or telegram is concluded at the moment the letter or telegram is dispatched,[63] a similar rule but without the qualification made in this country. The rationale of both rules is that the offeror, by initiating the correspondence, takes the risk of deficiencies in the means of communication which he has chosen. This loses sight of the possibility that since other means of communication may not have been practical, the offeror in reality may have had no choice, or that the offeree himself may have initiated the correspondence by the chosen means. It also puts on the offeror the difficult burden of rebutting the offeree's evidence that he dispatched the acceptance in time. The Rome Draft avoids this objection by providing that the contract is not concluded until the acceptance reaches the offeror; the risks of transmission therefore remain on the offeree.[64] Under this rule the offeree must prove that the offeror received the acceptance in time, an especially difficult task in the absence of any provision in the draft that a properly dispatched communication is presumed to have been received in due course.[65] As between the rule of the Rome Draft, which may leave the offeree to assume that he has made a contract which in law he has not, and the rule in the Inter-American Draft and in the United States, which may leave the offeror to assume that he has not made a contract when in law he has, the choice is certainly not a clear one.

The ECE conditions display an ingenious variety of solutions to the problem. Those for plant and machinery adopt the rule that the contract is concluded when an acceptance is dispatched, but provide that if the offeror has specified a time limit for acceptance, there shall be no contract unless the acceptance reaches the offeror within one week after the expiration of the time limit, thus placing most of the risk on the offeree.[66] Those for sawn softwood, solid fuels, and citrus fruit adopt the rule of the Rome Draft when the offer is a firm

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[61] See RESTATEMENT, CONTRACTS § 64 (1932).

[62] See RESTATEMENT, CONTRACTS § 66 (1932).

[63] INTER-AMERICAN DRAFT art. 6.

[64] ROME DRAFT art. 12.

[65] Article 8 does bar an offeror from making a late objection to a delayed acceptance.

[66] ECE, GENERAL CONDITIONS FOR THE SUPPLY OF PLANT AND MACHINERY FOR IMPORT AND EXPORT para. 2.2 (U.N. Doc. No. ME/188 bis/53) (1953), (U.N. Doc. No. ME/574/55) (1955); ECE, GENERAL CONDITIONS FOR THE SUPPLY AND ERECTION OF PLANT AND MACHINERY FOR IMPORT AND EXPORT para. 2.2, (U.N. Pub. Sales No. 1957.II.E/Mim.3) (U.N. Pub. Sales No. 1957.II.E/Mim.4).

offer, so that the contract is concluded only upon receipt of the acceptance, thus placing the risk squarely on the offeree.[67] For other offers, however, the contract is concluded neither upon the mailing of the acceptance by the offeree nor upon its receipt by the offeror, but only upon a further event—receipt of an acknowledgment or confirmation sent by the offeror to the offeree.[68] Once more, this diversity shows both the difficulty of reaching accord on a single rule for all international sales and the possibility of resolving the problem by standard form contracts.

The time when the contract is concluded has a number of effects not directly related to the existence of the contract. Under the Hague Sales Draft, it may be important in deciding whether there has been a fundamental breach,[69] in fixing the time[70] and place[71] for delivery, in determining the right to examination[72] and security,[73] and in computing the price[74] and damages.[75] Under the Inter-American Draft it may determine when the seller must hold the goods at the disposal of the buyer.[76] And it may also locate the place where the contract was concluded and thus be relevant under applicable conflict of laws rules. These issues too can be settled by proper counselling in advance and by the use of standard form contracts, as well as by the adoption of a uniform law.

How long does the offeree retain the power to revoke his acceptance? This may seem a peculiar question to the American lawyer since, in general in this country, an acceptance is irrevocable from the same moment that the risk of transmission passes to the offeror upon the dispatch of the acceptance.[77] Even the offeree's power to withdraw his letter from the mails does not prevent its mailing from op-

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[67] ECE, GENERAL CONDITIONS FOR EXPORT AND IMPORT OF SAWN SOFTWOOD para. 2.1 (U.N. Doc. No. ME/410/56) (1956); ECE, GENERAL CONDITIONS FOR THE EXPORT AND IMPORT OF SOLID FUELS para. B.2(a) (slip note) (U.N. Pub. Sales No. 59.II.E/Mim.1) (1958); ECE, GENERAL CONDITIONS FOR THE INTERNATIONAL SALE OF CITRUS FRUITS para. 2.1 (U.N. Pub. Sales No. 58.II.E/Mim.12) (1958).

[68] ECE, GENERAL CONDITIONS FOR EXPORT AND IMPORT OF SAWN SOFTWOOD para. 2.4 (U.N. Doc. No. ME/410/56) (1956); ECE, GENERAL CONDITIONS FOR THE EXPORT AND IMPORT OF SOLID FUELS para. B.2(b) (slip note) (U.N. Pub. Sales No. 59.II.E/Mim.1) (1958); ECE, GENERAL CONDITIONS FOR THE INTERNATIONAL SALE OF CITRUS FRUITS para. 2.2 (U.N. Pub. Sales No. 58.II.E/Mim.12) (1958).

[69] See HAGUE SALES DRAFT art. 15.

[70] See HAGUE SALES DRAFT art. 24.

[71] See HAGUE SALES DRAFT art. 25.

[72] See HAGUE SALES DRAFT art. 47.

[73] See HAGUE SALES DRAFT arts. 82, 84.

[74] See HAGUE SALES DRAFT arts. 67, 69.

[75] See HAGUE SALES DRAFT arts. 50, 94, 98, 99.

[76] See INTER-AMERICAN DRAFT art. 14.

[77] RESTATEMENT, CONTRACTS §§ 64, 66 (1932).

erating as an irrevocable acceptance.[78] Presumably the provision of the Inter-American Draft that a contract by letter or telegram is concluded at the moment the acceptance is dispatched [79] has the same effect. Yet there is no reason in logic why the acceptance must be irrevocable as of the moment that the risk of transmission passes to the offeror. It was not so under the earlier draft prepared by the Council of Jurists at Buenos Aires in 1953, which contained an additional section, since deleted, providing that "the acceptance is revoked if the offeree's retraction reaches the offeror before or simultaneously with the acceptance." [80] A similar rule is applied in most cases under the 1936 draft of the Rome Institute.[81] Under the current Rome Draft, the same rule for revocation of acceptance is retained,[82] but the risk of transmission, as already mentioned, has been shifted to the offeree. The rule allowing revocation of acceptance up to the time of receipt is an appealing one, since the offeror can suffer no prejudice by the revocation of an acceptance of which he is unaware. But again, there is no reason why the offeror cannot settle this question by express provision in his offer, so that the offeree, by sending his acceptance, will be bound by whichever rule the offeror has selected. The rule of the Rome Draft appears to be implicit in some of the ECE conditions,[83] but not in others.

In sum, both the Rome Draft and the Inter-American Draft have had to make difficult choices among conflicting rules of various legal systems on the four questions raised above. Although the rules of the Inter-American Draft are generally less in conflict with those applied in the United States, they are much less complete and explicit than those of the Rome Draft. Two conclusions apply equally to both drafts. First, if amended to allow variation by agreement, neither should prevent the parties from adopting any other rules in this matter, including those now applied in the United States. Second, neither draft need be en-

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78 1 CORBIN, CONTRACTS § 80 (1950).

79 INTER-AMERICAN DRAFT art. 6.

80 See art. 2.4 of the DRAFT UNIFORM LAW ON THE INTERNATIONAL SALE OF PERSONAL PROPERTY, in INTER-AMERICAN COUNCIL OF JURISTS, FINAL ACT OF THE SECOND MEETING 34 (1953).

81 INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRELIMINARY DRAFT OF A UNIFORM LAW ON INTERNATIONAL CONTRACTS MADE BY CORRESPONDENCE arts. 7, 8 (1937).

82 ROME DRAFT art. 9. This should probably allow revocation "before *or at the same time as* the acceptance" to be consistent with art. 4 on withdrawal of an offer.

83 ECE, GENERAL CONDITIONS OF EXPORT AND IMPORT OF SAWN SOFTWOOD para. 2.1 (U.N. Doc. No. ME/410/56) (1956); ECE, GENERAL CONDITIONS FOR THE EXPORT AND IMPORT OF SOLID FUELS para. B.2(a) (slip note) (U.N. Pub. Sales No. 59.II.E/Mim.1) (1958); ECE, GENERAL CONDITIONS FOR THE INTERNATIONAL SALE OF CITRUS FRUITS para. 2.1 (U.N. Pub. Sales No. 58.II.E/Mim.12) (1958), all of which provide that the contract is formed upon the receipt of the acceptance in the case of a firm offer.

acted in order to have its provisions on all but one of the questions discussed above made applicable by the choice of the parties, for revocation of communications and time of formation are, with the exception of firm offers in most of the United States, within the control of the parties through the express terms of the offer itself.

IV. Sufficiency of Acceptance

The legal sufficiency of a communication to constitute an acceptance and to conclude a contract may be challenged in a variety of ways. It may be contended that the terms of the offeree's assent modified the terms of the offer, that the communication of the offeree's assent arrived too late, or that the offeree's assent was not expressly communicated to the offeror. The common-law view has been that there is no contract in any of these situations. Too often the result has been that a contracting party whom both parties had originally assumed to be under a legally enforceable obligation can escape from his supposed obligation when the turn of events makes his performance more difficult, more expensive, or otherwise less desirable. As a result, there has been a tendency to relax the strict common-law rules.

A. Assent Modifying the Offer

The classic example of the first situation, in which it is contended that the acceptance modifies the terms of the offer, is the "battle of the forms," in which the offeror makes his offer on his printed form and the offeree manifests his assent by sending a form of his own. When the two forms contain slightly different terms, it is open to either party to claim that there was not an acceptance but a counteroffer because of the variation.[84] To avoid the harsh results of the common-law rule in such cases, the Uniform Commercial Code contains an elaborate and perhaps extreme set of rules which gives the offeree's assent effect as an acceptance, in spite of additional or different terms, "unless acceptance is expressly made conditional on assent to the additional or different terms." [85] New York has recently adopted a more limited statute with a similar purpose.[86] Unfortunately, this trend towards liberalization is not evidenced by either draft. The Inter-American Draft is silent on the subject and the Rome Draft expressly reaffirms that, "any acceptance containing additions, limitations or other modifications shall be considered as a rejection of the offer received coupled

[84] See Restatement, Contracts §§ 60, 62 (1932).
[85] Uniform Commercial Code § 2-207.
[86] N.Y. Pers. Prop. Law § 84-a.

with a new offer." [87] It contains the further curious rule that if the original offeror should promptly accept the modifications contained in the offeree's counteroffer, this shall have the same effect as an acceptance by the offeree of the original offer with the modifications, rather than as an acceptance by the offeror of the counteroffer.[88] No explanation accompanies this rule, which would result in an earlier time for conclusion of the contract and would give rise to uncertainty as to the offeree's power to revoke his counteroffer before the offeror's final acceptance of the modifications.

The problem of variation between offer and acceptance is perhaps even more important in international transactions, where it is often complicated by a language barrier, than in domestic transactions, and neither draft contains adequate provisions in this respect. While the general use of a single set of standard forms such as the ECE conditions will help to prevent the problem from arising by reducing the likelihood of minor variations, a standard form of offer can not effectively resolve the problem which is raised when a variation has in fact occurred.

B. Late Acceptance

The second problem, that of late acceptance, has not been the subject of legislation in the United States, and the strict common-law rule prevails. While the Inter-American Draft does not treat the subject at all, the Rome Draft has a questionable provision giving the offeror the option of treating the acceptance as timely if he promptly notifies the offeree to this effect.[89] The objection to this rule is that it enables the offeror to speculate on fluctuations in the market and on changes in other conditions between the time when the offeree sent the acceptance and the time when the offeror must decide whether to consider it as an acceptance. This rule has been expressly rejected by the *Restatement of Contracts*.[90] Beyond the fact that the offeror can, as has already been pointed out, make clear the time limit for acceptance, there is probably little which the parties can do—or would wish to do—through the use of standard forms to deal with the case of late acceptance.

C. Failure To Communicate Assent to Offeror

The third problem, that of the offeree's failure expressly to communicate his assent to the offeror, arises when acceptance is claimed

87 ROME DRAFT art. 6.
88 *Ibid.*
89 ROME DRAFT art. 8.
90 RESTATEMENT, CONTRACTS § 73 (1932).

by virtue of an act or of mere silence. Both means of acceptance are possible in the United States under certain conditions.[91] Again the Inter-American Draft is the less explicit of the two proposed statutes and merely states that the contract is concluded when the offeree "gives his acceptance, express or implied, to the offer. . . ." [92] The Rome Draft provides that acceptance may consist "of any act which may be considered to be equivalent to an acceptance either by virtue of the offer or as a result of earlier dealings between the parties." [93] The Rome Draft therefore comes closer to the Uniform Commercial Code, under which "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances" [94] and "conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract." [95] No specific mention is made of acceptance by silence in the Code or in either of the two drafts. However, the Code, as was mentioned earlier, is to be read against the background of case law which has recognized acceptance by silence in exceptional cases,[96] while the two drafts purport to stand by themselves. Furthermore, the requirement of an "act" in the Rome Draft seems to preclude acceptance by silence, while the language of the Code does not.

In the case of acceptance by conduct, both the Rome Draft and the Code require confirmation, a requirement which would be called into play in the common case of a seller's acceptance by shipment of goods. Under the Rome Draft the offeree must "without undue delay . . . send to the offeror a notice informing him of the performance of the act which amounts to acceptance." [97] Under the Code the offeror must be "notified of acceptance within a reasonable time." [98] The difference is in the consequences of the offeree's failure to comply. Under the Rome Draft he must merely "make good any damage caused by his omission," [99] while under the Code the offeror "may treat the offer as having lapsed before acceptance." [100] The less severe sanction of the Rome Draft seems adequate and, although it raises the problem of proof of damages, it does not give the offeror the oppor-

91 See text accompanying notes 95, 96 *infra*.
92 INTER-AMERICAN DRAFT art. 5.
93 ROME DRAFT art. 5.
94 UNIFORM COMMERCIAL CODE § 2-206(1)(a).
95 UNIFORM COMMERCIAL CODE § 2-207(3).
96 RESTATEMENT, CONTRACTS § 72 (1932).
97 ROME DRAFT art. 5.
98 UNIFORM COMMERCIAL CODE § 2-206(2).
99 ROME DRAFT art. 5.
100 UNIFORM COMMERCIAL CODE § 2-206(2).

tunity to speculate on a change in the market or other conditions, as he may under the Code. This is a problem which can be dealt with effectively by standard contract forms, and the ECE conditions resolve it by requiring acceptance by means of the sending or receipt of communications rather than by other acts of the parties.[101] Even where shipment of the goods or other conduct is a recognized and desirable means of acceptance, appropriate rules for acceptance and confirmation can be provided by standard clauses in the offer.

So even in the matter of the sufficiency of a communication to constitute an acceptance, the will of the parties, implemented by careful drafting, can avoid most problems. It is curious that the most intractable of these, that of variation between offer and acceptance, where legislation is particularly needed, has been ignored in one draft and scorned in the other.

V. Conclusions

While the preceding has not exhausted the subject of formation of international sales contracts, even as reflected in the Rome and Inter-American drafts, it may have been sufficient to indicate the difficulties of either draft's being received warmly in the United States. These difficulties stem both from differences in the approach to the drafting of legislation and from differences in substance—no doubt also from the bar's conservatism and suspicion of such efforts and from the reluctance of Congress to exercise its constitutional power in this area of international or even interstate commerce. In contrast, the example of the ECE conditions offers a more immediate and practical means of unification; the problems which cannot be resolved in this way are indeed few. Rather than risk the continued failure of the United States to participate in attempts at international unification, it would be desirable to explore two avenues of approach to this goal in which the promise of fruition is not entirely illusory as far as this country is concerned.

A. Standard Contracts

The first approach would be to follow the lead of the ECE conditions in an attempt to find agreement on standard contract terms, including those relating to formation, in those fields of international trade which are of especial interest to the United States. There is no reason why such an attempt, perhaps limited at first to trade among the Americas, should not succeed as it has in Europe. In any event,

[101] *E.g.*, ECE, General Conditions of Export and Import of Sawn Softwood para. 2.1 (U.N. Doc. No. ME/410/56) (1956).

an inquiry into business practice would be a logical first step toward unification by means of legislation. Even in the heyday of the law merchant, uniformity was bottomed on "that sympathy, concordance, and agreement" as to custom which must be restored on the level of practice before unification through comprehensive legislation can be truly effective.[102]

B. Elimination of Impediments in National Law

The second approach would be to identify and examine, in the course of such an effort, those impediments raised by national law to legitimate attempts toward unification by standard contract forms. Two examples of such impediments are the difficulty of making firm offers and the problems posed by variation between offer and acceptance. Neither of these can be successfully attacked by a well-drafted standard form. Specific legislative proposals, restricted to international transactions and limited to identifiable obstacles to the resolution of problems by contract, would be easier to justify and would stand a better chance of enactment than any comprehensive scheme such as those of the Rome and Inter-American drafts.

Neither of these proposals is intended to disrupt the progress toward unification exemplified by these two drafts. They are suggested merely as less ambitious steps toward the same goal, in the hope that the United States, with its rich experience in unification of its domestic law, may be able to take a more active and constructive part in the work of unification on an international scale.

[102] It should be mentioned in this connection that the International Chamber of Commerce, in which the United States does play an active role, has made very substantial contributions toward the unification of customs. Its work has not, however, been directed at contract formation.

APPENDIX I

"THE ROME DRAFT" *

ARTICLE 1. The present law shall replace the national laws of signatory States in cases to which it is applicable in matters that it governs; if certain questions relating to those matters have not been expressly settled by the present law, they shall be regulated in accordance with the general principles on which it is based.

ARTICLE 2. The present law shall apply to the formation of contracts which are regulated by the Uniform Law on International Sales of Goods (Corporeal Movables).

ARTICLE 3. The communication which one person addresses to another with the object of concluding a contract shall not constitute an offer within the meaning of the present law unless the terms of the contract are sufficiently detailed to permit its conclusion by acceptance and unless the person who makes the communication must be considered as having the intention to bind himself.

ARTICLE 4. The maker of an offer shall not be bound by it before it has been communicated to the offeree; the offer shall be considered as not having been made if the withdrawal of it shall be communicated to the offeree before the offer or at the same time as the offer.

An offer which has arrived may not be revoked unless the offeror has reserved to himself the right of revocation in the offer. Tacit intention in this matter shall only be taken into account by reason of the nature of the transaction or the usages to which the offeror has made reference or which persons finding themselves in the situation of the offeror and the offeree consider to be generally applicable.

If the death of the offeror or his incapacity to contract results in the cessation of the activity to which the offer was attached the offer may be revoked without undue delay. The death or incapacity of the offeree before acceptance shall make the offer lapse.

In all cases the revocation of an offer shall only have effect if it has been communicated to the offeree before he has sent off his acceptance or has done acts treated as acceptance by virtue of Article 5.

ARTICLE 5. Acceptance of an offer consists of a declaration communicated by the offeror either verbally, by telephone, by Telex or any other method of direct communication whether by post, telegraph or any messenger employed by the acceptor.

Acceptance may also consist of the delivery of a note or the payment of a price according to the conditions of the offer, or of any act which may be considered to be equivalent to an acceptance either by virtue of the offer or as a result of earlier dealings between the parties. In such cases the acceptor without undue delay should send to the offeror a notice informing him of the performance of the act which amounts to acceptance; he must make good any damage caused by his omission (to do this).

ARTICLE 6. Any acceptance containing additions, limitations or other modifications shall be considered as a rejection of the offer received coupled with a new offer. If the author of the (original) offer without undue delay informs the other side that he agrees to the modifications proposed by the other side the declaration of the other side shall be equivalent to acceptance of the offer received with the proposed modifications.

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* INTERNATIONAL INST. FOR THE UNIFICATION OF PRIVATE LAW, DRAFT UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CORPOREAL MOVABLES) (1959). Translated by Professor Benjamin Atkinson Wortley, O.B.E., LL.D., Manchester University.

ARTICLE 7. When an offer is made verbally, by telephone, by Telex or any other method of direct communication, acceptance shall only have effect if it is declared immediately or if it is communicated to the offeror in the time he has fixed.

When an offer is made by post, telegraph or any messenger employed by the offeror, acceptance shall only have effect if it is communicated to the offeror in the time he has fixed.

When it is not necessary for an acceptance to be immediate and if the period has not been fixed, acceptance shall only have effect if it is communicated to the offeror in the time settled by the usages to which the offeror has made reference or which persons finding themselves in the situation of the offeror and the offeree consider to be generally applicable or, in the absence of such usages, without undue delay.

If an acceptance consists in some act other than the declaration referred to in paragraph 2 of Article 5, the act shall only have effect if it is accomplished in the periods laid down in the preceding paragraphs.

ARTICLE 8. If an acceptance arrives after the expiration of the periods laid down in the preceding article, the offeror may nevertheless consider it to have arrived in due time on condition that, without undue delay, he so informs the acceptor by direct communication or sends him notice of this.

Nevertheless if it follows from indications carried on the acceptance itself that the acceptance, although communicated late to the offeror, has been sent in such circumstances that if the means of communication had been normal, it would have arrived within the periods laid down, the acceptance shall be considered as having arrived in due time unless the offeror shall without undue delay have informed the acceptor, by direct communication or by the expedition of a notice, that he considers his offer as lapsed.

ARTICLE 9. An acceptance cannot be revoked unless the revocation is communicated to the offeror before the acceptance.

ARTICLE 10. "To communicate" within the meaning of the present law shall mean delivered at the address of the person to whom the communication is directed.

ARTICLE 11. By the term "without undue delay" in respect of an act to be performed, the present law means as short a time as possible in the circumstances, calculating from the moment when the act may reasonably be performed.

Communications required by the present law shall be made by the means usual in such cases. If the offeror makes use of a rapid means of communication an equally rapid method shall be used for the reply.

ARTICLE 12. If an acceptance consists of a declaration, the contract shall be concluded by the fact of the acceptance being communicated to the offeror in the conditions laid down in the present law. The moment of the conclusion of a contract shall be the moment when an acceptance is communicated to the offeror; nevertheless if the acceptance is not communicated in the time fixed, but must, according to Article 8, be considered as having arrived in due time, the contract shall be deemed to have been concluded on the expiration of the period in which the acceptance should have been communicated to the offeror.

If the acceptance consists of an act other than a declaration the contract shall be concluded by the performance of such act, according to the conditions laid down in the present law and at the moment of such performance.

ARTICLE 13. If the offeror has expressly laid down particular forms or the accomplishment of certain acts, for the validity of the acceptance, acceptance shall only have effect if those conditions have been complied with.

ARTICLE 14. No set form shall be prescribed for an offer or for an acceptance.

APPENDIX II

"THE INTER-AMERICAN DRAFT" *

CHAPTER ONE—CHARACTERISTICS AND ELEMENTS OF THE CONTRACT

I. "LIMITS OF APPLICATION"

Scope of the contract

ARTICLE 1. The provisions of the present law apply to international sales, irrespective of the civil or commercial character of the parties and the contract.

Characterization

ARTICLE 2. An international sale is any contract concluded between parties that have their places of business or habitual residence in the territory of different states, in which the goods sold or the price whereof must be transferred from the territory of the state where they are located to the territory of another state.

Purpose

ARTICLE 3. The present law governs the sale of tangible property, movable in nature, with the exception of ships, vessels for use on inland waterways, aircraft and currency.

Jurisdiction

ARTICLE 4. In matters covered by it, the present law excludes the application of national laws, unless their application is provided for herein.

II. FORMATION OF THE CONTRACT

Conclusion

ARTICLE 5. An international sale is considered concluded at the moment when one of the parties gives his acceptance, express or implied, to the offer made to him by the other party.

ARTICLE 6. If the contract was entered into by letter or telegram, it shall be considered concluded at the moment the offeree has dispatched his acceptance.

Withdrawal and lapse

ARTICLE 7. The offer may be withdrawn, or may lapse upon the death or legal incapacity of the offeror, up to the moment of the dispatch of the acceptance.

Form and proof

ARTICLE 8. A contract of international sale does not require any special form. It may be proved by witnesses.

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* INTER-AMERICAN COUNCIL OF JURISTS, PRELIMINARY DRAFT OF CONVENTION ON A UNIFORM LAW ON THE INTERNATIONAL SALE OF TANGIBLE PERSONAL PROPERTY (1960). Only those portions of the draft which apply to the formation of international sales contracts are reprinted here.