

## REPORT OF THE SPECIAL COMMITTEE ON UNIFORM INTERNATIONAL SALES OF GOODS ACT

This Committee was created by action of the Executive Committee at the 1963 Annual Meeting in Chicago.

The Uniform International Sales of Goods Act was initially produced by the International Institute for the Unification of Private Law (known as The Rome Institute and sometimes referred to as UNIDROIT) and the final draft was completed in 1962.

At the request of The Rome Institute the Netherlands Government called a Diplomatic Conference to be convened at The Hague on April 2, 1964 to consider putting this draft as finally approved at the Diplomatic Conference to the participating nations for governmental action.

The United States was invited to send an official delegation to the Conference at The Hague to participate in the deliberations, and to submit any comments or suggestions concerning the draft to The Netherlands Government by January 1, 1964 for transmission to and consideration by the nations invited to participate in the Conference.

When the Secretary of State received the invitation from The Netherlands Government, the State Department, on the recommendation of several groups<sup>1</sup> had already sponsored the adoption of a joint resolution by the Congress, which if adopted would authorize the President of the United States to accept membership for the Government of the United States in both The Hague Conference on Private International Law and The Rome Institute, and to appoint United States delegates to meetings of the two organizations.

In anticipation of the passage of this joint resolution the Secretary of State contacted the Conference and requested that a representative of the Conference be designated to serve on an Advisory Committee on Private International Law under the chairmanship of the Legal Adviser of the Department of State, to assist and advise the Secretary of State in formulating official positions pertaining to United States membership in these two groups.

The joint resolution was passed by the House on November 4, and by the Senate on December 17, and was signed and approved by the President on December 30, 1963.<sup>2</sup>

<sup>1</sup> See the reports on the Ninth Session of The Hague Conference in the 1961 Handbook at pages 71 to 74 and 178 to 185.

<sup>2</sup> Public Law 88-244, 88th Congress H.J. Res. 778, 77 Stat. 775.

Even before this Committee was appointed contact was established with John P. Bracken the representative of the American Bar Association on the International Bar Association's Committee to review the draft of the Uniform International Sales of Goods Act and with Professor John Honnold of the University of Pennsylvania Law School who had been following the progress of the Uniform Act<sup>a</sup> and the legal adviser requested Professor Honnold to prepare observations on the Uniform International Sales of Goods Act looking toward correlation of its provisions with the Sales Article of the Uniform Commercial Code.

Professor Honnold's report was submitted to this Committee and to the State Department on December 16, 1963, and the State Department's official report based thereon was transmitted to The Netherlands Government in January, 1964 for circulation among the other nations invited to participate in the Diplomatic Conference.

On March 9, 1964 a meeting of the Advisory Committee on Private International Law was held at the State Department in Washington, D. C., and Commissioners Joe C. Barrett of Arkansas and James C. Dezendorf of Oregon were appointed by the Secretary of State as members of the Advisory Committee as representatives of the Conference. Executive Director Dunham was also invited to attend the meeting.

Based upon recommendations made at the Advisory Committee Meeting and immediately thereafter the official United States delegation to the Diplomatic Conference to be held in The Hague commencing April 2, 1964 was named consisting of Richard D. Kearney, Deputy Legal Adviser, Chairman; John N. Washburn of the Legal Adviser's Office; Professor John Honnold of the University of Pennsylvania Law School; Professor Soia Mentschikoff of the University of Chicago Law School; and Commissioners Barrett and Dezendorf.

The Diplomatic Conference at The Hague duly convened on April 2, 1964 and adjourned on April 25, 1964.

The official report of the delegation to the Secretary of State is as follows:

**Report of the Delegation of the United States of America to  
The Diplomatic Conference on the Unification of Law  
Governing the International Sale of Goods  
The Hague, April 2-25, 1964**

**I. BACKGROUND**

***I. Initial Problems in Connection with United States Participation***

An invitation to attend the Diplomatic Conference to be held April 2-24, 1964, at The Hague, Netherlands, was extended to the Government of the

<sup>a</sup> See 107 University of Pennsylvania Law Review 299.

United States by diplomatic note No. 6958 dated May 20, 1963, from the Netherlands Ambassador to the United States of America, Dr. van Roijen, acting upon instructions from his Government. In his note he indicated that the conference was being convened by the Government of the Netherlands at the request of the International (Rome) Institute for the Unification of Private Law and stated that the agenda of the conference would include two draft Conventions involving Uniform Laws concerning the international sale of goods and formation of contracts for such sales.

The Government of the United States was not in a position to reply to this official invitation to be represented at the conference until after it had actually been authorized to become a Member of the Rome Institute. Authorization for the United States Government to participate in the Rome Institute was granted in Public Law 88-244, a joint resolution approved by the President on December 30, 1963.

With Congressional authorization for United States participation in the Rome Institute coming a mere three months prior to the opening of the Sales Conference at The Hague, and coming somewhat sooner than even the most optimistic proponents of the legislation had expected, there was no possibility of arranging for a comprehensive review of the legal issues involved with a view to formulating positions to be taken by the United States Government at the Conference. These legal issues were both complex and numerous as a result of the broad scope of the subjects on the agenda of the conference. There had been no direct United States participation in any phase of the preparatory work, which had been proceeding under the auspices of the Rome Institute since before World War II. There was no organization in the United States of America, either public or private, which had, during the preparatory work on the unification of the law of sales, made an effort to provide for United States participation in the conference.

The lengthy history of the formulation of the Draft Law on sale of goods illustrates a variety of the problems connected with United States participation. The first draft was formulated in 1935 by a Special Commission established in 1931. The second draft was prepared in 1939. The First Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, held at The Hague, November 1-10, 1951, while approving the essential provisions of the second draft of 1939, suggested significant modifications. The Commission nominated at the 1951 Conference to resume work on the draft in the light of the resolutions adopted by the conference and contained in its Final Act took until 1956 to produce a new draft. By that time the guiding spirit behind the draft, Ernest Rabel, had died, and the text of 1962-1963, which was actually the one to be considered at the April 1964 Conference, reflected his views to an even lesser extent.

## *II. Organization of the United States Delegation*

In response to Public Law 88-244 the Secretary of State on February 14, 1964 established an Advisory Committee on Private International Law under the chairmanship of the Legal Adviser of the Department and invited the leading law associations in this field to designate representatives to serve on the Committee. Nine of these organizations, representing the judiciary, practicing attorneys and legal scholars, have individuals serving on the Committee. The Department of Justice is also represented.

In his letter of February 14, 1964 to these organizations and the Department of Justice, Secretary Rusk indicated that the most urgent matter with which the Committee would be required to deal in the immediate future would be

preparations for the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods at The Hague, April 2-24, 1964. In view of the imminence of the April Conference, it was decided to move forward on the selection of the United States delegation in advance of the first meeting of the Advisory Committee. After some informal consultations, six individuals were designated to comprise our delegation: Joe C. Barrett and James C. Desendorf, Commissioners on Uniform State Laws; Professors John Honnold and Soia Mentschikoff; Richard D. Kearney, Deputy Legal Adviser of the Department of State; John N. Washburn, Attorney, Office of the Assistant Legal Adviser for Treaty Affairs.

Selecting the members of the United States delegation prior to the first meeting of the Advisory Committee on March 9, 1964, and in particular designating the two individuals among them to begin immediately the essential preparatory work on the two uniform laws on the agenda of the April Conference, enabled the Committee to hold a fruitful discussion on March 9 on the legal issues singled out in reports presented by Professor Honnold (on the draft Convention concerning a uniform law on international sale of goods) and Professor Mentschikoff (on the draft Convention concerning a uniform law on the formation of contracts for the international sale of goods). The initial selection of the individual rapporteurs was made with the assistance of the National Conference of Commissioners on Uniform State Laws, which had been represented in the past at various meetings of the Rome Institute with respect to the unification of private law.

The Advisory Committee discussion of the legal and related issues facing the United States delegation at the April conference lead to the following conclusions: (a) the United States delegation undoubtedly ran the risk of making itself obnoxious if it proposed at this late stage a large number of changes in the two draft conventions and the uniform laws incorporated in those conventions, especially if such instruments were generally acceptable to the other delegations at the conference; (b) bearing in mind the somewhat unlikely possibility of instruments satisfactory from the United States standpoint being adopted by the conference, the question of whether or not it would be appropriate to adhere to the convention or conventions adopted by the conference should be left open; (c) our Constitutional provision on foreign commerce was deemed to show conclusively that the subject matter of the April Conference was eminently qualified for Federal action and thereby to obviate the necessity for inclusion of any Federal clause in the draft conventions before the conference.

## II. THE CONFERENCE

### I. Organization

The Diplomatic Conference on the Unification of Law governing the International Sale of Goods, which met at The Hague April 2-25, was attended by representatives of twenty-eight States, with four States being represented by observers. After electing Mr. C.W.A. Schurmann of the Netherlands as President, the Conference established three principal committees—the Committee on the draft uniform law governing the international sale of goods, chaired by Mr. Schurmann; the Committee on the draft uniform law governing the formation of contracts for the international sale of goods, of which Mr. Mario Matteucci of Italy was the chairman; and the Committee on the draft Convention relating to a Uniform Law on the International Sale of Goods, chaired by Professor B. A. Wortley of the United Kingdom. All the States

represented at the Conference were members of these committees. The Sales Committee held 25 sessions between April 2 and 21; the Formation Committee held 13 meetings between April 2 and 13; and the Convention Committee held 7 meetings between April 14 and 21.

Operating as part of and under the aegis of each of the three main committees were working groups or working parties, described as "groupes de travail" at the Conference, which were called into action to produce a consensus when difficult and complex problems and issues brought the work of the full committee to a temporary impasse. Members of each of these working groups were designated by the Committee chairmen, with such designations being informal enough to permit delegations wishing to be represented on a particular working group to volunteer for such duty with a good chance of being allowed to do so. The texts of the various articles which the working groups brought back to the main committees for adoption by the latter formed amendments which were distributed as were ordinary amendments submitted by individual delegations, but with the identifying label "WORKING GROUP" ("GROUPE DE TRAVAIL"). The texts of such articles hammered out in the working groups were very difficult to upset, let alone change, in the committees and usually were adopted as they were reported out by the working groups. The working groups of the Sales Committee reported out at least 21 amendments; the working groups of the Formation Committee reported out at least 19 amendments; and the working groups of the Convention reported out 7 amendments.

In addition to the three main committees there were two other important Committees with major roles at the April Conference—the Coordination Committee, chaired by the President of the Conference, and the Drafting Committee, chaired by Baron F. van der Felts of the Netherlands. Members of the Coordination Committee in addition to Mr. Schurmann were the four Vice-Presidents of the Conference and the Chairmen of the Conference Committees. The task of the Coordination Committee was to keep the work of the conference proceeding in an orderly and sensible manner although at a fast tempo. The Drafting Committee was theoretically charged with the task of comparing languages, but in fact served as a major means for eliminating both textual and substantive differences. It had six members, including Professor Honnold from the United States delegation. The task of tidying up the various rough spots in the French and English texts of the instruments proved to be onerous and extremely time-consuming.

The adoption of the final version of the French and English texts of each of the conventions formulated at the April Conference took place in the course of plenary sessions between April 23 and April 25. These seven plenary sessions were presided over in a very able fashion by Mr. Schurmann, the Dutch Ambassador-designate to the United States of America. At the final session on Saturday afternoon after the final proposals of the Drafting Committee had been adopted, the Chairman addressed the Conference, not in French as had been the case at the first plenary session on April 2 but in English, thus continuing his alternate use of French and English during the entire Conference. Shortly thereafter the Final Act was signed by all delegations present, 27 in number, and then the President declared the Conference closed.

## II. *Draft Uniform Law Governing the International Sale of Goods*

The problems in connection with this Uniform Law that were judged to be important from the United States Government's standpoint were: (a) the

necessity for realism in all of its conceptual aspects and for consistency with international commercial practice; (b) its scope and the extent to which exclusions and exemptions would be permitted, for example, i) by limiting the application of the uniform law to contracts by parties in "different contracting States," ii) by allowing persons in States which apply the uniform law to contract out or otherwise avoid coverage by the uniform law if they wished to do so either explicitly or through the use of standard contract or trade terms, iii) by exclusions based on conflict of law conventions, similarity of the applicable law in two or more countries, and the like; (c) the failure of the drafters of the text of the Uniform Law to take into account many of the problems connected with the usages and practices of seaborne commerce, with the result that the final product was definitely not an international sales act from the standpoint of overseas transactions, but an international act on sales. On April 23 in a plenary meeting the Conference had failed to adopt an amendment supported by the United States that would have limited application of the Uniform Law to contracts by parties in different contracting States; consequently, if litigation were now to be commenced in a contracting State, that State's courts could apply the Uniform Law to an international transaction irrespective of whether the parties to the contract have their place of business, or their habitual residence, in a contracting State.

The head of the United States delegation, Mr. Kearney, spotlighted these problems in his plenary statement made Saturday morning April 25 at the outset of the seventh plenary meeting of the Conference. Mr. Kearney pointed to four specific weaknesses in the Uniform Law on Sales:

- (1) the Uniform Law was conceived primarily in the light of external trade between common boundary nations geographically near to each other;
- (2) insufficient attention had been given to international trade problems involving overseas shipments;
- (3) reciprocal rights and obligations as between seller and buyer, viewed in the light of practical realities of trade practices, were not well balanced;
- (4) the Uniform Law would not be understood by individuals in the commercial field.

The major objections of the other countries represented at the April Conference were generally limited to muted echoes of the sentiments expressed by the United States and like-minded delegations in raising the aforementioned troublesome questions. However, the leaders of delegations from the Western European countries adhered to a policy of "let us finish the job now," causing them to submerge troublesome points of theory and approach to the more mundane matters of minor editorial changes in the draft texts of the uniform laws already before the Conference. In this connection, all delegations cognizant of the serious defects in the instruments as they emerged from the Conference were equally cognizant of the need to take into account the position of the Government of the Netherlands, which had expended time, money and effort on a substantial scale to convene and carry through this April Conference.

The principal efforts to change the draft Uniform Laws were concentrated in the Committee on the draft uniform law governing the international sale of goods and in its working groups. Since working group decisions on matters of both substance and style were hard to dislodge, virtually all efforts to make substantial changes in the Sales law through floor amendments failed. On occasion the vote was very close, as in the case of the amendment limiting application of the uniform law to contracts by parties in "different contracting States," which failed to pass when put to the vote at the beginning of the

second plenary session on April 23rd having received 11 votes for, 11 against, with two abstentions. The one major change which was successfully inserted in the text of the uniform law on Sales was engineered by the British delegation which obtained overwhelming support (17 votes to 2, with 6 abstentions) at the seventh plenary meeting on April 25th for its unprecedented proposal for an additional article providing that any State could, when ratifying or acceding to the Sales Convention, declare that it would only apply the Convention to contracts in which the parties thereto had chosen that law as the law of the contract.

The Uniform Law on Sales suffered from substantial difficulties, generally acknowledged, in its structure, drafting and internal coherence, yet only very limited success was achieved by efforts to change it. This was due in large measure to the feeling shared by many delegations at the Conference that the basic misgivings of a substantial number of delegations regarding the Uniform Law were not fundamental and, even if they were, there persisted an irrational fear which the U.S. delegation was unable to dispel, that all of the work of the past three decades would go for naught unless final action was taken before the close of the April 1964 Conference. Those delegations resisting major changes in the text of the Uniform Law preferred to blink the fact that in order to meet a variety of national preoccupations minor amendment after minor amendment was incorporated into the Uniform Law with great haste, which might well have unforeseen consequences.

### III. *Short Summary of Major Aspects of the Uniform Law on the International Sale of Goods Adopted by the Conference*

The specific scope of application of the Uniform Law is set forth in its first eight articles comprising Chapter I. In paragraph 1 of Article 1 the application of the Uniform Law is stated to be "to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

- a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;
- b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;
- c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected."

In other paragraphs of Article 1 the application of the Law is not made to depend upon the nationality of the parties and reference shall be made to habitual residence where a party to the contract does not have a place of business; and "for the purpose of determining whether the parties have their places of business or habitual residences in 'different States,' any two or more States shall not be considered to be 'different States' if a valid declaration to that effect made under Article II of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods is in force in respect to them." In accordance with Articles 5 and 8, the Uniform Law governs only the obligations of the seller and the buyer arising from a contract of sale, does not affect the application of any mandatory provision

of national law for the protection of a buyer under an installment contract, and is inapplicable "to sales:

- a) of stocks, shares, investment securities, negotiable instruments or money;
- b) of any ship, vessel or aircraft, which is or will be subject to registration;
- c) of electricity;
- d) by authority of law or on execution or distress."

Definitions and clarifications of expressions like "current price" and concepts like fundamental breach of contract as well as the binding effect of usages and commercial practice appear in the nine articles comprising Chapter II.

Chapter III, Obligations of the Seller, sets forth at the outset the seller's obligation to effect delivery of the goods, hand over any document relating thereto and transfer the property in the goods, as required by the contract and the Uniform Law. It then traces the step-by-step process that begins with delivery of the goods, continues with the handing over of documents and the transfer of property, and ends with certain other obligations of the seller. In the many important articles concerned with delivery of the goods, there are provisions covering the obligations of the seller as regards the date and place of delivery, together with remedies of the buyer for the seller's failure to perform such obligations. Similarly, there are provisions covering the seller's obligations as regards the conformity of the goods in which there are set forth the considerations bearing upon lack of conformity, the ascertainment and notification of lack of conformity, and the remedies available to the buyer for lack of conformity.

In corresponding fashion, Chapter IV lays down the obligations of the buyer. Chapter IV begins with an article stating that the buyer shall pay the price for the goods and take delivery of them as required by the contract and the Uniform Law. A section on payment of the price follows, concerned specifically with fixing the price, the place and date of payment, and with the seller's remedies for non-payment. Then comes the section on taking delivery, which is defined as consisting of the buyer's doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over. At the end of Chapter IV is a short section on other obligations of the buyer.

Chapter V is concerned with provisions common to the obligations of the seller and of the buyer. Its six sections deal in turn with: concurrence between delivery of the goods and payment of the price; exemptions; supplementary rules concerning the avoidance of the contract; supplementary rules concerning damages; expenses (the expenses of delivery shall be borne by the seller, whereas all expenses after delivery shall be borne by the buyer); preservation of the goods.

The final six articles of the Uniform Law comprise Chapter VI which contains crucial provisions on passing of the risk. The first and basic provision of Chapter VI states that where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible.

The major differences between the provisions of the Uniform Law on Sales adopted by the April 1964 Conference and the provisions of the United States Uniform Commercial Code, currently the law of 29 States and the District of Columbia, are underscored by the fact that the Uniform Law is characterized by brevity and generality when compared with the language in which the comparable rules of the Code has been cast. The most noteworthy of

these major differences is the practice of our Code of stating rules on risk of loss directly in terms of observable and universal commercial events like "shipment" and "receipt" of goods, whereas the Uniform Law in its corresponding provisions is couched more in terms of abstract comments. By and large, the provisions of the Uniform Law are rooted to an inordinate degree in general principles that do not reflect clearly enough commercial realities of international traffic in the world of today.

Although the delegations at the April Conference tended to preserve in favor of the seller the imbalance between the rights and obligations of the seller on the one hand and of the buyer on the other, in the final days the plight of the buyer received consideration, some of it hastily conceived. All things considered, it would appear unlikely that the Uniform Act will prove acceptable to America's governmental, commercial, and legal organizations because its many unclear and unworkable provisions do not meet the current needs of commerce and because it varies so markedly in its approach and content from our Uniform Commercial Code. However, this is not to say that the Conference failed to provide positive results. The Conference demonstrated the ability of many countries to work together in trying to unify the law of international sales. Their serious cooperative efforts and mutual understanding at the Conference are reflected in the dual official texts, in French and English, embodying the same concepts rather than literal language translation. These are and will continue to be an important means of harmonizing the differences between the civil and common law systems.

#### IV. *Uniform Law on the Formation of Contracts for the International Sale of Goods*

From the standpoint of the Government of the United States, the text of this Uniform Law as presented to the April 1964 Conference left much to be desired. In the first place, it did not place sufficient emphasis on the fact that agreements in the area of sales are not always formed by the matching of an offer and an acceptance, and failed to appreciate the role of conduct of the parties in establishing agreement sufficient to constitute a contract for sale even though the moment of its making is undetermined. Second, its provisions showed a lack of adequate cognizance of the importance of course of dealing and usage of trade with respect to a contract for sale. Third, it did not contain any provisions with respect to the problems of modification and waiver of an agreement nor with respect to the problems of the delegation of performance and the assignment of rights of an agreement.

In the sessions of the Formation Committee, the United States representatives were partially successful in: (1) convincing that Committee of the desirability of giving the proper significance to a course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware, as giving particular meaning to and supplementing or qualifying terms of an agreement and thus of an offer or an acceptance; (2) adopting the principle with respect to the problem of acceptances which contain additions, limitations or other modifications, that normally an acceptance should be operative as an acceptance even though it states terms additional to or different from those offered or agreed upon in a prior conversation, unless the acceptance is expressly made conditional on assent to the additional or different terms or unless the offer has expressly limited acceptance to the terms of the offer or unless the additional terms materially alter the original offer; (3) while no particular form is necessary

for an offer or an acceptance or indeed for the contract itself, it would be useful to have some small note or memorandum to indicate at least that a contract had been made, and the language ultimately adopted should not preclude the operation of a relevant statute of frauds in a common law jurisdiction.

However, in plenary sessions, these points were blunted and to a certain degree undermined on the pretext that corresponding or related provisions adopted in the Sales Committee would be at variance with what the Formation Committee was about to adopt. For example, the definition of usage in Article 13 of the Uniform Law on the Formation of Contracts for the International Sale of Goods as finally adopted by the Conference lost its American flavor and became a replica of the provision on usage worked out in the Sales Committee for the paragraphs of Article 9 of the Uniform Law on the International Sale of Goods.

One of the major aspects of the Uniform Law on Formation adopted by the Conference which is of particular interest to the United States concerns the statute of frauds question, as handled in Article 3, which states, in the French text: "Aucune forme n'est prescrite pour l'offre et l'acceptation . . .", but which is slightly amplified in the English text, which reads: "An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form . . ." Another of its major aspects, of perhaps more significance as far as United States interests are concerned, involves Article 7, which establishes the rule that an acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer, but sets up, as an exception to the rule, that 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 and that, if he does not so object, the contract's terms shall be the terms of the offer with the modifications contained in the acceptance.

As set forth below, in the paragraph of our CONCLUSIONS AND RECOMMENDATIONS dealing with the features differentiating provisions of our Uniform Commercial Code from the corresponding provisions of the Uniform Law on Formation, the chances that this Uniform Law will prove acceptable to legal organizations of the United States are deemed to be slight. While the four differences are not so substantial individually, they are relatively numerous in view of the fact that here is a Uniform Law containing only thirteen articles.

#### V. Conventions

It was not a foregone conclusion that there would be two uniform laws emerging from the Conference until after the Conference had opened. In fact, the tentative United States observations on the draft Uniform Law on Sales had pointed out that it would be wise, in view of the close interrelationship of the Uniform Law on Formation and the one on Sales, that further consideration be given at the Conference to the feasibility of merging the draft on Formation with the Sales draft. Accordingly, the idea of having two uniform laws and incorporating them in two separate conventions did not jell until after the mid-way point in the Conference. A basic reason for devising and maintaining this system of preparing two Conventions was the desire to give States a greater amount of choice in adopting the output of the April Conference--if one of the Conventions was acceptable, then a particular State could ratify or accede to it without prejudice to its position vis-a-vis the other Convention, and thus the task of obtaining the maximum number of Parties possible to these legal instruments would be facilitated.

The final provisions of the two conventions—the Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods—are substantially identical. They provide, *inter alia*, for the Conventions to be open for signature by all States represented at the April 1964 Conference and open to accession by all States members of the United Nations or any of its Specialized Agencies, and for the conventions to come into force six months after the date of deposit of the fifth instrument of ratification or accession. In Article I of both Conventions each Contracting State agrees to incorporate into its own legislation, in accordance with its constitutional procedure, not later than the date of the entry into force of the respective Convention in respect of that State, the Uniform Law on Sales or on Formation, as the case may be.

The Final Act of the April 1964 Conference has a unique link to one of the two aforementioned Conventions—the Sales Convention—and the provisions for revision of the Uniform Law incorporated therein. This link is found in Recommendation II in the Annex to the Final Act. In the two paragraphs comprising this Recommendation, proposed by the delegation of the United States of America at the conclusion of the Conference, provision is made for the appointment by the Rome Institute of a special committee to take action designed to enhance and improve the operation of that Uniform Law and to promote the unification of law on the international sale of goods.

### III. CONCLUSIONS AND RECOMMENDATIONS

Many of the problems that worried the United States delegation in the course of the April 1964 conference grew out of the preference shown in the 1962-1963 draft uniform law on Sales for abstract concepts rather than concrete procedures central to international commercial practice. The United States initial written observations on the Sales draft, issued as a conference document by the secretariat at The Hague shortly before the opening of the conference, concerned themselves in large measure with the basic problems of realism and consistency with actual commercial practice in the world today. These observations, as well as a number of formal amendments and informal suggestions made later, were treated with some measure of respect by most delegations at the conference but they had no impact whatsoever on the fundamental structure of the draft uniform law on Sales. Failure to make any great impression on the text of this, the most important of the two instruments formulated at the conference, was because certain Western European delegations were really in control of the Working Group for the Committee on Sales and they were not receptive to any new ideas that might hinder the timely completion of the text of the uniform law on Sales and its adoption by the conference. Because of the long history of the draft uniform law on Sales, these delegations had developed vested interests in its basic format and naturally tended to resist changes, particularly those proposed by the delegation of a country that had shown an official interest in the work only at the eleventh hour. This consideration was far less prominent with respect to the draft uniform law on the formation of contracts of sale. Numerous suggestions proffered by our delegation in Formation committee sessions were accepted in whole or in part, although the effect of these changes we were able to make in the Rome Institute text being considered by the conference was diluted to some extent in the final plenary sessions primarily through the efforts of certain Western European delegations.

In essence, it was the lateness of the hour at which we decided to participate in the April 1964 Conference and the long period of years over which the other participants had been working on the draft Uniform Law for the International Sale of Goods which made it impossible for us to accomplish our first objective of bringing this uniform law into harmony with the sales article of the Uniform Commercial Code of the United States of America.

The fact that only five instruments of ratification or accession are required to bring into force the Convention relating to a Uniform Law on the International Sale of Goods, under Article X thereof, would seem to indicate that the Uniform Law on the International Sale of Goods which forms the Annex thereto has a good chance of obtaining a sufficient measure of acceptance to become a viable instrument. However, many governments which participated in the formulation of this instrument and its companion-piece, the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, the Uniform Law which forms Annex I of the aforementioned Convention, may upon reflection discover that during the hectic closing hours too many errors and shortcomings found their way into the complex statutory structure of both these instruments to enable them to become Parties to such instruments in the absence of further work on those texts.

Regardless of whether the Convention relating to a Uniform Law on the International Sale of Goods wins any measure of substantial acceptance or not, the American proposal currently embodied in Recommendation II of the Final Act of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods will have a profound effect. That proposal, as adopted by the Conference on the final day, April 25, 1964, provides that: (a) in the event the aforementioned Convention enters into force by May 1, 1968, the Rome Institute will establish a committee composed of representatives of Governments of interested States to review the operation of the Uniform Law with a view to initiating a revision of it; and (b) in the event that the Convention does not enter into force by this date, the Rome Institute will establish a committee composed of representatives of Governments of interested States to consider further appropriate action to promote the unification of law on the international sale of goods.

On the basis of this popular proposal alone one can state confidently that the role of the Government of the United States in the Rome Institute, as well as in the Hague Conference, has been enhanced by our participation in the April 1964 Conference and that the relationships which individual members of the delegation have developed with the representatives of the other nations attending the Conference will be useful to us in connection with the work of these organizations in the future.

As for the Uniform Law on the Formation of Contracts for the International Sale of Goods, it can in our view be of little usefulness to us as a nation if the Government of the United States does not accept the much more significant Uniform Law on the International Sale of Goods as well. Moreover, there are four distinct differences between the Uniform Law on Formation and similar provisions of our Uniform Commercial Code. These differences render questionable from our standpoint full acceptability of that Uniform Law: (a) it makes acceptance, other than by shipment or act, effective upon receipt of a declaration by the offeror rather than upon the sending of a declaration to the offeror; (b) it contains no statute of frauds provision and in plenary sessions the language of Article 3 prescribing no requirement as to form for the offer and acceptance was deliberately tightened in order to undermine the

effect of the rejection in a Formation committee session of a proposal to state specifically that writing was not required; (c) it expands the concept of a firm offer somewhat beyond that set forth in our Uniform Commercial Code, as a concession for the general revocability of offers; (d) it contains no provision similar to the Uniform Commercial Code's Section 2-207 on the role of the conduct of the parties in establishing a contract of sale not otherwise established by the writings of the parties; and it leaves out any mention of written confirmations sent after the contract is concluded.

In short, while the United States delegation at the April 1964 Conference was unsuccessful in realizing its first objective—to obtain formulation by the Conference of a uniform law or laws acceptable for use in the United States, it made known its position on the major aspects of the instruments formulated at the Conference in an effective and timely fashion, with the result that the delegation accomplished more than had been anticipated but less than we had hoped. An achievement of the Conference not to be underestimated was the emergence of an English-language text of these instruments on a par with the original French texts. It is recommended that United States delegations to future conferences and meetings of the Rome Institute and the Hague Conference on Private International Law be instructed to seek to consolidate this important gain for the English-speaking community. In this connection the fact that about half of the delegation spokesmen at the April Conference used English rather than French in making their interventions gives ground for optimism in our efforts to provide genuine English-French conceptual equivalents and equality in the drafting of international legal instruments.

Submitted to the Secretary of State  
RICHARD D. KEARNEY,  
Chairman of the Delegation  
December 1, 1964

The Secretary of State has authorized the publication of the above as a part of your Committee's report.

Respectfully submitted,  
JAMES C. DEZENDORF, *Chairman*  
JOE C. BARRETT

**REPORT ON CONFERENCE PARTICIPATION IN  
ACTIVITIES RELATING TO UNIFICATION OF  
PRIVATE INTERNATIONAL LAW**

It is our information that a substantial number of the Commissioners, answering the questionnaire of the Chairman of the Executive Committee respecting the authority of the Conference to participate in activities relating to unification of private international law, were of the opinion that this activity is not within the power of this Conference. We believe such feeling may have been the result of the form in which the questionnaire was submitted to the Commissioners.

We submit that participation, to the extent that the Conference will be requested to participate, is not only within its power, but is essential to the most efficient performance of the duties of this Conference to the several States.

In this connection, the following points should be kept in mind:

- (1) The United States, under authority of a joint resolution of the Congress, is now, or shortly will be, a member of both The Hague Conference on Private International Law and The International Institute for the Unification of Private Law, generally referred to as The Rome Institute. Establishment of United States policy for participation in these international organizations is and will be the official responsibility of the Department of State.
- (2) The Department of State heretofore has been concerned only with public international law and, therefore, lacks history, background and experience in the field of private law. Officials of the Department of State prefer to and will look to the private Bar for advice and assistance in performing the task falling upon the Department by reason of adoption of this joint resolution.
- (3) Officials of the Department desire that this advice and assistance be furnished primarily by a representative cross-section of the private Bar, rather than by the legal staff of the Department or of private business interests.
- (4) The officials of the Department recognize that most, if not all, areas in which international unification of private law is likely to be undertaken fall generally within the law-making

function of the States whether this be the result of tradition or of constitutional limitations.

- (5) It is only the United States that has constitutional power to negotiate with other nations. The individual States in the absence of Congressional authority do not possess such power, yet citizens of the several States are vitally affected by rules of private international law that govern trade, investments and social intercourse. Citizens of the United States living, or even traveling, beyond its borders carry their law problems with them, but not necessarily their law. The same is likewise true of nationals of other countries traveling or residing in the United States. Today, in point of travel time, London, Paris and Amsterdam are as near to New York as are Los Angeles and San Francisco.
- (6) Latest available figures indicate that United States capital invested abroad is in the neighborhood of \$50 billion. Foreign trade, including imports and exports, amounts to a total of more than half that sum annually. Every citizen of the United States engaged in commerce, travel or the production of goods that enter into foreign commerce has a stake in the rules of law applicable in the geographical areas in which he travels, trades or invests. The same is likewise true of citizens of other nations traveling, trading or investing in the United States. In the latter case this means the rules of law applicable in each of the jurisdictions represented in this Conference.
- (7) Unifying or harmonizing the rules of law between nations presents the same problem as drafting uniform or model acts for adoption by the several States. This Conference is the only law group in the United States that has background and experience qualifying it to advise the government of the United States in this area.
- (8) Heretofore organizations undertaking to unify or harmonize rules of private law on an international basis primarily have used the Convention device but this need not be the only method. Indeed, serious consideration is now being given to devising drafting techniques similar to those used by this Conference. For example, desirable rules have been put into effect in the United Kingdom by Parliamentary enactment into the internal law of Great Britain, rather than by ratification of multi-lateral conventions. This was done for exactly the same reason that this Conference promotes uniformity of State laws by voluntary cooperation among States. Legislative drafting by this Conference always involves re-

search into, and comparative study of, the law of the several States in order that existing differences may be unified or harmonized and sound results attained. Indeed, similar studies of the law of other countries have been made by the technicians and drafting committees of this Conference as an aid to the drafting of sound legislation for the States. As an example, we can point to our draft on enforcement of foreign judgments. During the drafting stages of this act the Committee drew heavily upon the experience in the Dominion of Canada whose central and provincial governmental structure has some characteristics common to our Federal-State relationship. To some extent at least, most nations as well as sub-divisions thereof, borrowed from or modeled after the rules of law of other States and nations in setting up their rules of private law. Upon admission to Statehood, each of our States drew heavily upon the experience of other States in fashioning its own constitutional structure and legislative pattern. The very beginning of all rules of law in the United States was the importation of the civil law of France for Louisiana and the common law of England for the rest of the country. The birth of an idea is not and should not be restricted by geographical lines.

- (10) This Conference is and will remain a State body having for its primary objective the attainment of substantial uniformity in State law. Knowledge of the concept prevailing elsewhere will be helpful to this attainment. If rules formulated elsewhere are good ones our States should feel free to use them. The extent to which they are used furthers the unification of private international law.
- (11) This Conference, therefore, not only has power and authority, but it also has a duty to inform itself on rules and practices, having force of law, that prevail within and beyond the borders of the United States. Doing this will produce a by-product that can be utilized effectively by the Department of State in formulating governmental policy for discharging duties cast upon the United States as a responsible member of the family of nations.
- (12) This Conference, although concerned with the uniformity of law among the sister States, has nevertheless made valuable contributions to the unification of private international law without our being aware of having done so at the time drafts were under consideration. We can point to three instances that will serve as illustrations. Others might well be suggested.

- (a) Our Model Execution of Wills Act was the inspiration for, and the pattern of, a multi-lateral convention on the same subject, which was approved by The Hague Conference in 1960. The provisions of this convention were carried into effect in the United Kingdom by the Wills Act of 1963.
  - (b) The Uniform Commercial Code is well and favorably known to legal scholars, at least in Western Europe. The Offer and Acceptance Provisions of Article II furnished the inspiration for, and the basic pattern of the draft of the Uniform Law on Formation of Contracts for International Sale of Goods, which was approved at a diplomatic conference held under the sponsorship of the Government of The Netherlands in April, 1964.
  - (c) The Model Water Use Act approved by this Conference, is under consideration for enactment in at least two foreign countries.
- (13) Finally, many of the subjects taken up for the drafting of uniform legislation in the international area are subjects which under our Federal system have been traditionally in the jurisdiction and domain of the States. Some, or a major portion, of acts so drafted, under our Federal system may ultimately be considered for enactment into law solely by legislatures of the several States. It is fully as proper for this Conference to consider and participate in the development and drafting of proposed legislation for ultimate enactment by the States through the international channels discussed in this Report as it has been in the past through the channels and under the procedures followed by the Conference since 1892.

Such activities as this Conference may undertake in the field of unification of private international law are and will be indirect in character and will be designed primarily to enable this Conference to do a better job for our States.

Respectfully submitted,  
JAMES C. DEZENDORF  
JOE C. BARRETT