

## Karl Llewellyn in Rome

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I first met Malcolm Evans in April 1982. I was in Rome at the invitation of UNIDROIT to participate in the second study group meeting to discuss the draft Principles on international commercial contracts. During the first coffee break, Malcolm introduced himself. Having been on a sunless sabbatical in Oxford for the 1981-1982 academic year, I stood in the courtyard of Villa Aldobrandini under the April sun. Malcolm stood in the shade, smoking. Was there, he asked, anything he could tell me about the Institute and its work? Were there any other papers he could provide? Was there anything he could do to make my stay in Rome more rewarding? It was my first serious visit to Rome and my first to UNIDROIT. I gratefully accepted Malcolm's help.

What Malcolm did not tell me that sunny April day was that almost exactly fifty years before, another young law professor from the United States had attended a study committee meeting at UNIDROIT – may, indeed, have stood at the very same spot enjoying the hospitality of UNIDROIT. Karl LLEWELLYN<sup>1</sup> was on sabbatical in Leipzig for the 1931-1932 academic year. He, too, came to Rome to attend an early meeting of a study group, in his case the committee of the Governing Council charged with studying the possibility of a uniform sales law. It, too, was his first visit to Rome and to UNIDROIT. Was there, I wonder, an equivalent of a Malcolm Evans to ask if there was any way the Institute could help make his stay in Rome more rewarding?

### I. – RABEL'S INVITATION

Llewellyn's contact with UNIDROIT began modestly. At its meeting on April 7, 1931, the Governing Council of UNIDROIT authorized Ernst RABEL to contact Professor Karl N. Llewellyn ("*américain, spécialiste en matière de vente*") for information about the law of sales in the United States.<sup>2</sup> Rabel acted promptly. Three weeks later he wrote to Llewellyn inviting him to participate in the international sales law project undertaken by UNIDROIT.<sup>3</sup> In the letter, Rabel briefly traced the history of the project, noting that a small committee of the Institute's Governing Council had begun work in 1930. This work had reached the point, he wrote, where it was generally recognized that it would

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<sup>1</sup> For an introduction to Llewellyn and his thought, see W. TWINING, *Karl Llewellyn and the Realist Movement* (1973), and *Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht: Karl N. Llewellyn und seine Bedeutung heute* (U. Drobniig & M. Rehbindler eds., 1994).

<sup>2</sup> Minutes of 5<sup>th</sup> Session of the Governing Council, p. 11 (1931).

<sup>3</sup> Letter of 28 April, 1931 from Rabel to Llewellyn, in *Llewellyn Papers*, D. IX ("*Uniform Sales Law*"). The *Llewellyn Papers* are kept at the University of Chicago Law School.

be desirable to seek the collaboration of an American expert. The expert could not be invited to be a full member of the committee because the United States was not a member of the League of Nations and was therefore not represented on the Institute's Governing Council. In any event, he went on to explain, the Institute did not have sufficient funds to pay for an American expert to attend meetings of the committee. Rabel nevertheless stressed the importance of Llewellyn's participation in the unification project. A copy of Llewellyn's response is not among his surviving papers, but subsequent events show that he accepted Rabel's invitation.

## II. – LLEWELLYN PREPARES

Among Karl Llewellyn's surviving papers is a UNIDROIT report summarizing the decisions taken by the sales committee at its first four meetings convened in various European cities between October 1930 and September 1931.<sup>4</sup> Llewellyn's copy of the report is cluttered with marginal annotations in his handwriting. Virtually every decision is annotated with brief but sharp comments or queries, addressing everything from basic policy to questions of drafting. These comments are then summarized by Llewellyn in two other documents filed in his papers with the UNIDROIT report. One of these documents is an eight-page handwritten summary of the marginal notes, while the other is a nine-page report written in German, in which Llewellyn distills his comments for Rabel.<sup>5</sup> Examination of these documents leaves little doubt that Llewellyn thoroughly and carefully studied the sales committee's decisions through September 1931.

Llewellyn applauds several decisions with the marginal notation, "*Exc*" (i.e., excellent). Most of these deal with contract formation. With respect to the firm offer, the sales committee had decided that the mere statement of a time period during which the offer would remain open ("*offre avec terme*") bound the offeror to keep it open for this period, unless he withdrew the offer before it reached the offeree.

### 5.– (3) Offre avec terme

- (1) L'offre, faite avec fixation d'un terme pour son acceptation, lie l'offrant jusqu'à l'expiration de ce terme. La révocation toutefois en est valide, si elle parvient à l'acceptant avant d'avoir reçu l'offre elle-même ou au moment qu'il la reçoit.
- (2) En cas de doute, l'acceptation doit être non seulement expédiée, mais même parvenue à l'offrant avant l'expiration du terme.<sup>6</sup>

<sup>4</sup> Résumé des décisions prises par le Comité du Conseil pour l'unification de la vente et approuvées pendant les sessions de Paris (octobre 1930), Berlin (février 1931), Rome (mars-avril 1931), Stockholm (septembre 1931). Vente. – Doc. No. 29 [hereinafter "Doc. 29"]. Citations are to the official UNIDROIT document numbers rather than to the document numbers found in the commercially-distributed microfilm of the Harvard Law School collection.

<sup>5</sup> These documents are filed in *Llewellyn Papers*, D. IX ("Uniform Sales Law"). Although the person filing the German-language report has added a cover note stating that the text is "*by an American [Ll?]*", there can be no doubt from its content that Llewellyn wrote the document for Rabel.

<sup>6</sup> Doc. 29, para. 5. Cf. Articles 15(2) and 16(2) of the U.N. Convention on Contracts for the International Sale of Goods [hereinafter "U.N. Sales Convention"]; Section 2-205 of the Uniform Commercial Code [hereinafter "U.C.C."].

Above the first paragraph Llewellyn writes “*Sh[ould] be limited to sales, or to business men*”. By the second sentence of the first paragraph Llewellyn notes “*Exc[ellent]*”, while by the second paragraph he writes “*Question : what is doute? ‘Open 24 hours’ v. Open 30 days*”. His summary of these marginal annotations concludes: “*Exc[ellent], save for need of limitation to commercial dealings. Our law needs it.*” In his report to Rabel, however, he elaborates:

Befristete Offerte. Man sollte vielleicht zwischen der sofort anzunehmenden und der länger befristeten Offerte unterscheiden. Bei ersterer muß es darauf ankommen, daß der Oblat die Annahmeerklärung fristgemäß abgesandt hat, bei letzterer, daß die Erklärung noch innerhalb der Frist beim Offerenten eintrifft.

Im übrigen kann das Risiko des Verlustes der Annahmeerklärung auch willkürlich geregelt werden, es kommt nur darauf an, daß überhaupt eine eindeutige Regelung vorhanden ist.

Widerruf der Annahme nach Absendung und vor Zugehen soll unzulässig sein. Bei bindender Offerte trägt Offerent das Risiko der Preisänderung; es ist billig, das Risiko der Preisänderung für die Zeit der Reise der Annahmeerklärung dem andern Teil aufzuerlegen.

Die Durchsetzung der bindenden Wirkung auch der unbefristeten Offerte wird in Amerika äußerst schwierig sein. Man stößt hier auf Widerstände emotionaler Art.

As for contracting with standard terms, the sales committee had made two decisions. The first explicitly addressed “General Conditions” used by merchants, while the second adopted the rule that when two parties agree that there is a contract but do not agree on the “conditions” of the contract, the contract is deemed to be concluded without the conditions.

17.– Conditions générales d'affaires.

- (1) Si les deux parties appartiennent à une même organisation, les conditions générales d'affaires établies par cette organisation sont en cas de doute applicables.
- (2) Les conditions générales d'affaires qui sont celles d'une seule des parties, ne deviennent stipulation du contrat, que si l'autre partie les a formellement ou tacitement acceptées selon le No 16 [Acceptation tacite].

18.– (15) Les deux parties contractantes ne sont pas d'accord sur des conditions du contrat tout en étant d'accord sur la conclusion de ce contrat. Le contrat doit être réputé conclu sans conditions.<sup>7</sup>

In paragraph 17, Llewellyn underlines the phrase “*en cas de doute*” in subparagraph (1) and writes in the margin “*Why not presumed? Or = unless contrary appears?*” Below the second subparagraph he writes “*Loose. (a) Suppose printed conditions [are] on the back of an offer. (b) Same on back of ‘acceptance.’ Counter-offer? Apparently not. Duty to Condition of negation?*” Against paragraph 18, he queries in the margin, “*To how much must they have agreed[?]*” In his handwritten summary of these annotations, he writes: “*# 17 (1) O.K. But why not presumption? Or is this the same? (2) Loose. Sound in theory. # 18-15. An*

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<sup>7</sup> Doc. 29, para. 15 (underlining in original). Cf. U.N. Sales Convention, Art. 19; U.C.C. Sec. 2-207; Article 2.22 of the UNIDROIT Principles of International Commercial Contracts (1994).

excellent provision. But needs specification of what 'conditions' are essential. Price Quantity Goods ... Cf. # 90 Price [.] Or has 'conditions' a defined technical meaning [?]" To Rabel, however, Llewellyn commented only on paragraph 18, about which he said "*Sehr schön, aber würde sich nicht empfehlen zu sagen, über welche Bestandteile unter allen Umständen Übereinstimmung vorhanden sein muß (Ware und Quantität, nicht auch Preis).*" There is no record of a response to Llewellyn's comment. If, as is likely, the word "conditions" in paragraph 18 refers to "General Conditions" or standard terms as used in paragraph 17, then Llewellyn's queries about the need for terms (price, quantity, goods) that are necessarily tailored for each transaction might appear misplaced to Rabel and the sales committee.

Other contract formation provisions also met with Llewellyn's approval. He particularly likes a provision that requires an offeror to inform the offeree immediately if the offeror receives a timely-sent acceptance which, because of abnormal events, arrives after the time fixed for acceptance. If the offeror fails to inform the offeree, the acceptance is deemed to have arrived on time.<sup>8</sup> Llewellyn writes: "*Excellent. Especially last sentence. I approve it highly. And we [the United States] have the beginnings of persuasive authority.*" He also endorses the committee's decision on offers that do not fix the time within which the offeree must accept. Under this provision, the offeror may withdraw the offer if he does so before the acceptance had been sent and, if not accepted or withdrawn, the offer lapses after a reasonable time for the offeree to decide.<sup>9</sup> Of lesser importance, but explicitly approved by Llewellyn, is the rule of interpretation that proposals made to undetermined persons are not, in the case of doubt, to be considered as offers.<sup>10</sup>

Llewellyn is more sparing with his praise of decisions outside the area of contract formation. He approves with an "*Exc*" in the margin a decision that set a formula for establishing the price when the parties had contracted without an express agreement on the price to be charged.

90.- Lorsque la vente est conclue sans que le prix ait été préalablement fixé, l'acheteur est tenu de payer le prix demandé par le vendeur, à moins que l'acheteur ne puisse démontrer que par rapport aux prix généralement pratiqués par le vendeur, le prix demandé est trop élevé.<sup>11</sup>

As he later reported to Rabel, this rule is "*Nicht das amerikanische Recht, aber ausgezeichnet und vielleicht in Amerika durchzusetzen.*" Similarly, a decision that when a partially conforming tender is made a buyer may accept the conforming goods and reject the rest, is commended as "*Important & good. Partial acceptance. Our law has beginnings.*"<sup>12</sup> With respect to a general remedy rule that would entitle

<sup>8</sup> Doc. 29, para. 14. Cf. U.N. Sales Convention, Art. 21(2).

<sup>9</sup> Doc. 29, para. 6. Cf. U.N. Sales Convention, Arts. 16(1) and 18(2).

<sup>10</sup> Doc. 29, para. 4. Cf. U.N. Sales Convention, Art. 14(2).

<sup>11</sup> Doc. 29, para. 90 (underlining in original). Cf. U.N. Sales Convention, Art. 55; U.C.C. Sec. 2-305.

<sup>12</sup> Doc. 29, para. 79. Cf. U.N. Sales Convention, Arts. 51-52; U.C.C. Sec. 2-601.

a buyer to recover damages in all cases and, when there is breach of “*une obligation essentielle*”, to avoid the contract as well as recover damages for non-performance,<sup>13</sup> Llewellyn writes: “*Good. Substantial pfma [performance]. Not our law.*” He also approved enthusiastically both the content and the phrasing of a decision that allocates risk to the buyer when he takes possession if the risk had not already passed to him.<sup>14</sup>

Llewellyn comments favorably on the rule for the inspection or examination of goods. The committee recorded its decision on the form of “*constatation*” in the following language:

118.– (77) Forme de la constatation des vices: La forme de la constatation des vices est réglée par la convention des parties ou, à défaut de convention, par la loi nationale et les usages locaux. La loi nationale applicable est la loi du lieu où l’acheteur doit examiner la marchandise.<sup>15</sup>

In a marginal note, Llewellyn asks “*inspection or evidence?*” This is further elaborated in his handwritten summary. “*Exc[ellent]. But if this is covered, a number of other things ought to be, too, re Confl[ict] / L[aws]. ‘Forme de la constatation’ = survey, i.e., evidence? Surely. Or inspection manner?*” He does not, however, make any comments on this article in his report to Rabel.<sup>16</sup>

Not that Professor Llewellyn found no blemishes. Most of these, however, were ones of ambiguity, loose drafting and inconsistency rather than substance.<sup>17</sup> His most important general criticism is to question the decision not to require contracts to be in writing. The sales committee had decided that “[*a*]ucune forme n’est prescrite pour le contrat de vente; sa conclusion peut être prouvée aussi par témoins.”<sup>18</sup> Llewellyn’s marginal note says simply, “*I don’t like this.*” His handwritten summary of issues elaborates. “*I’m for the written memo. And doubt whether we could get it thro’ [i.e., get approval of u.s. legislators]. As to policy, I don’t see why writing isn’t proper.*” To Rabel, he reports at greater length:

Zu den Formvorschriften im allgemeinen. Die Beibehaltung einer etwa dem *Statute of Frauds* entsprechenden Formvorschrift für Kaufverträge über 500 \$ wird befürwortet. Gesetz soll erzieherisch wirken; Kaufleute sollen Bestätigungsschreiben dem Gegner schicken. Schwierigkeiten, die sich für telegraphischen Abschluß bei Waren-Arbitrage-Geschäften und ähnlichen Fällen ergeben, wären noch zu überlegen .... Telegramm muß stets genügen.

Llewellyn completed his analysis in late 1931 or early 1932 while on sabbatical in Leipzig. When, therefore, he received a telegram from Rabel in early March inviting

13 Doc. 29, para. 80. Cf. U.N. Sales Convention, Arts. 25, 49.

14 Doc. 29, para. 134. Cf. U.N. Sales Convention, Art. 69(1); U.C.C. Sec. 2-509.

15 Doc. 29, para. 118. Cf. U.N. Sales Convention, Arts. 38, 39; U.C.C. Secs. 2-513, 2-515.

16 See the discussion of the issue of examination at the text accompanying footnote 26 *infra*.

17 On only one issue does Llewellyn clearly state that the committee’s decision is “*Bad*”. This decision states that a seller who retains title may reclaim the goods from the buyer only if the seller gives up its rights under the contract. Doc. 29, para. 135.

18 Doc. 29, para. 22. Cf. U.N. Sales Convention, Arts. 11, 12 and 96; U.C.C. Sec. 2-201.

him to attend the next meeting of the UNIDROIT sales committee later that month in Rome, Llewellyn was well prepared to take up the project in detail.<sup>19</sup>

### III. – LLEWELLYN IN ROME

Karl Llewellyn arrived in Rome on March 18, 1932 and attended his first session with the UNIDROIT sales committee that afternoon. The committee had begun its work the day before, but had made relatively little headway with its very full agenda. At the sessions Llewellyn attended, the committee examined a draft on the obligations of the seller prepared by Joseph HAMEL,<sup>20</sup> propositions on nonconforming goods made by Ernst Rabel,<sup>21</sup> a report on the transfer of property and other related questions by Algot BAGGE,<sup>22</sup> a report on the law of bankers' commercial credits by H.C. GUTTERIDGE,<sup>23</sup> and a review of previous decisions on the scope of the proposed draft text. On all these items, the minutes show that Llewellyn participated fully in the proceedings.<sup>24</sup> This is confirmed by the extensive annotations in Llewellyn's handwriting which appear on his copies of the texts discussed and by the three texts he drafted for the committee.<sup>25</sup>

Llewellyn threw himself into the work of the committee. He explained relevant rules of U.S. law on issues under discussion, warned that certain proposals would be difficult to accept in the United States, successfully urged relatively minor drafting changes, and proposed corrections to the minutes. Only once – on the first afternoon – did he urge the committee to adopt a specific rule of the U.S. Uniform Sales Act. Article 8 of that Act, he suggested, appropriately gives the buyer an option to avoid the contract or to require the seller to transfer the goods when all or part of the goods have perished or deteriorated so that their character has changed.

Some flavor of the scope and nature of the committee's work can be garnered from consideration of Llewellyn's interventions. With respect to the seller's obligations, for example, Llewellyn joined Rabel in urging that time be of the essence only if the parties had agreed to an express term to this effect or if a usage of trade so provided. The committee rejected this approach and adopted a rigorous rule – a time fixed in the contract or by contract would be deemed to be of the essence – which judges could then adjust in particular cases. In the course of the debate, however, Llewellyn did persuade the committee to include a special rule deeming time to be of the essence for

<sup>19</sup> Letter of 14 March, 1932 from Rabel to Llewellyn (referring to telegram sent the previous Saturday), in *Llewellyn Papers*, D. IX ("Uniform Sales Law").

<sup>20</sup> Rapport de M. HAMEL sur la vente commerciale: Des obligations du vendeur, Vente.– Doc. 34. The committee also had before it an earlier draft which appears as Annexe II c to Document 30.

<sup>21</sup> Propositions de M. RABEL: Vices de la chose, Doc. 36, Annexe 1 d.

<sup>22</sup> Rapport de M. BAGGE sur le transfert de la propriété et autres questions connexes, Vente.– Doc. 31.

<sup>23</sup> Report of Mr GUTTERIDGE on the Law of Bankers' Commercial Credits, Vente.– Doc. 32.

<sup>24</sup> Comité du Conseil pour l'unification de la vente, Rome, séances du 17, 18, 19, 21, 22, 23, 24, 26 mars 1932, Vente.– Doc. 36. There is no copy of these minutes in the *Llewellyn Papers*.

<sup>25</sup> Llewellyn's copies of these documents are found in the *Llewellyn Papers*, D. IX ("Uniform Sales Law").

sales in bulk – a rule, he pointed out, that would be consistent with the usages of sellers of primary products. He was also successful when he and Rabel argued that if the buyer proposed to the seller an extension of the time for delivery, the seller should be bound by the proposed date if he did not respond as quickly as possible. The committee also approved Llewellyn's suggested addition to the buyer's general remedy when the seller fails to perform. The draft before the committee gave the buyer the option between specific performance, if this was allowed by the national law of the forum, and rescission of the contract. Llewellyn suggested that if the buyer is not entitled to specific performance or does not request it, the contract should be rescinded.

Llewellyn's success may be attributed in part to his practice of suggesting not only a policy but also specific language for the rule. His shorter suggestions are recorded in the minutes of the meeting. The first of his three written contributions set out a more elaborate revision of a text requiring the buyer to inspect the goods and to notify the seller of defects. In the course of the debate, Llewellyn undertook to draft a substitute text over the lunch break.<sup>26</sup> The text, drafted in French, is longer, more nuanced, and more systematic than the earlier text drafted by Rabel. A buyer is deemed to have accepted goods notwithstanding their nonconformity if the buyer does not "denounce" the defects in the manner and time period provided in the article. If a buyer has not inspected the goods before entering into the contract, the buyer must examine the goods and notify the seller within a reasonable period as determined by usages of trade. For defects not discoverable by that examination, the time period includes the time necessary to discover the defects and notify the seller. The notice must indicate the defects, although the buyer may give a second notice mentioning additional nonconformities. If the seller does not respond in a reasonable time, the buyer must give another notice by registered mail. The examination itself is to be preceded by a notice to the seller giving him a reasonable time to have someone present at the time of the examination. In the absence of an agreement of the parties, the examination procedures are governed by usages and the national law of the place where the buyer has the right to examine the goods.<sup>27</sup> Although Llewellyn worked quickly, the committee postponed discussion until its next meeting.

The committee did, however, have time to review the second of Llewellyn's written drafts, an ambitious synthesis of rules on the buyer's remedies when the seller tenders nonconforming goods.<sup>28</sup> For each suggested remedy for a particular kind of breach, Llewellyn identifies whether the suggested uniform remedy would require a change in the national law of the five legal systems he analyzes (English, French, German, the Scandinavian countries and the United States) and whether this change would benefit buyers or sellers. In his first item under damages, when there is a

<sup>26</sup> Propositions de M. LLEWELLYN, Vente.– Doc. 41, Annexe IV d, p.2.

<sup>27</sup> See the text accompanying footnote 15 *supra*.

<sup>28</sup> Proposition de synthèse et de conciliation de M. LLEWELLYN sur les droits de l'acheteur en cas de vices, Vente.– Doc. 41, Annexe II d. A copy with handwritten annotations by Llewellyn is in the *Llewellyn Papers* (D. IX). The document is reproduced in the Appendix to this essay, not only because of its intrinsic value but also because the document is not reproduced in the collection of UNIDROIT records.

current market price for the goods, he states that a "mercantile" rule calculating damages *in abstracto* (i.e., market price minus contract price) would require no change in the law of England, the Scandinavian countries and the United States but would be a concession to the buyer in France and Germany.

On the whole, Llewellyn's analysis requires French and German law to make more adjustments in favor of the buyer, although no legal system would be immune from significant changes. The United States, for example, would have to make concessions to sellers in the area of both damages and avoidance ("*résolution*") of the contract. Instead of being strictly liable for breach of a warranty, the seller would be presumed to be at fault unless he carried the burden of showing that he was not at fault. The only concession to the U.S. buyer would be to permit him to revoke acceptance of goods upon subsequently discovering a defect.

Committee discussion of Llewellyn's synthesis took place on the afternoon of the last session he attended. Llewellyn outlined the synthesis, noting that he sought to find ways to adapt the continental law of damages to those of the Anglo-Saxon and Scandinavian legal systems. He then focused on paragraph 9, where he distinguishes the purchase for resale from the purchase for use. Under his proposed rules, the buyer for resale could only avoid the contract either if he could not resell or if the seller knew that the goods were to be resold pursuant to a specific contract and that the goods delivered would be nonconforming under that contract. The buyer for use would only be able to avoid the contract if the nonconformity seriously affected their use ("*le vice gêne l'utilisation d'une façon sérieuse*"). As Llewellyn's synthesis shows, all legal systems, with the possible exception of the Scandinavian, would have to adjust. In the course of discussion, M. CAPITANT questioned whether French jurists would accept the Anglo-Saxon idea that a buyer could avoid the contract even when the seller had delivered defective goods in good faith. Debate ended on this inconclusive note, but the committee agreed to take up the subject again at its next meeting.

The committee also agreed to consider the third of Llewellyn's texts – draft rules on letters of trust<sup>29</sup> – at its next meeting. Letters of trust had come up in the course of the committee's review of documentary credits. By use of a letter of trust, a bank which honored its letter of credit and took up the documents of title presented by the holder had a "security interest" in the documents and on releasing them to its customer, the importer, a "security interest" in the goods. Mr Gutteridge reported that English bankers wanted to see the institution of letters of trust generalized and adapted to the needs of international credit. Llewellyn stated that in the United States letters of trust were considered to be attached to the sale of goods. On the apparent principle that those who speak knowledgeably about an issue should be asked to write a report on the issue, the committee asked Gutteridge and Llewellyn each to prepare a draft law for its next meeting.

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<sup>29</sup> Draft Rules on Letters of Trust by M. Llewellyn (mars 1932), Vente.– Doc. 38. Although the document bears the date of March 1932, it is not known whether Llewellyn drafted this text before he left Rome.

Llewellyn's draft gives a bank which honors its letter of credit a security interest in the documents of title received and the goods they represent to secure reimbursement of payments made under the credit. The bank does not lose the security interest when it surrenders the documents to its customer if the customer gives the bank a letter of trust. As long as the goods remain identifiable as covered by the security interest and a simple notice of the trust arrangement is recorded in a public register, the security interest is effective against the customer's creditors and insolvency administrator. A buyer in ordinary course, however, takes free of the interest. Llewellyn's succinct statement of these rules is significantly less complex than the Uniform Trust Receipts Act he drafted for the U.S. Commissioners on Uniform State Laws,<sup>30</sup> but his UNIDROIT draft captures the essence of the institution.

These draft rules on letters of trust, together with the other two draft texts and his numerous interventions in committee discussion, are tangible evidence of Llewellyn's presence at the March 1932 meeting of the sales committee. When Llewellyn took his leave, the chairman thanked him "*pour toute la contribution qu'il a apportée aux travaux du Comité.*" As Rabel reported to the Governing Council, the name of Karl Llewellyn – "*professeur américain qui est un spécialiste très renommé en matière de la vente*" – should be added to the list of consultants to the UNIDROIT sales committee.<sup>31</sup>

#### IV. – THE ROMAN EXPERIENCE AND THE REVISION OF U.S. UNIFORM SALES LAW

Promptly after the UNIDROIT study group meeting, Karl Llewellyn left Rome never to return. The following week he wrote Rabel from Leipzig:

Haben Sie nochmals herzlichen Dank für Ihre große Freundlichkeit vor und während der Sitzung in Rom. Ich kam gleichzeitig ermüdet und erfrischt zurück und möchte Ihnen meine Anerkennung dafür aussprechen, daß Sie es mir ermöglicht haben, das europäische Kaufrecht näher kennen zu lernen.<sup>32</sup>

The same day, however, he wrote a more candid letter to Dr John WOLFF, a graduate student from Germany studying in New York:

Eine Woche lang war ich in Rom mit ihm [Rabel] zusammen und arbeitete an dem Entwurf zur Vereinheitlichung des Rechts des internationalen Kaufs[.] Interessant, anstrengend, unpraktisch. Soweit ich sehen kann, ohne große Bedeutung.<sup>33</sup>

Llewellyn may have been added to the list of consultants, but he never again participated directly in the UNIDROIT project. He did not attend the June meeting of the committee in Cambridge, England, although he was still in Europe. Events, in any

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<sup>30</sup> The National Conference adopted the Uniform Trust Receipts Act in 1933. It ultimately became the law in 38 states before being repealed when these states adopted the Uniform Commercial Code.

<sup>31</sup> Minutes of the 6<sup>th</sup> Session of the Governing Council, p. 3 (1932).

<sup>32</sup> Letter of 31 March, 1932 from Llewellyn to Rabel, in *Llewellyn Papers*, D. IX ("Uniform Sales Law").

<sup>33</sup> Letter of 31 March, 1932 to Dr John Wolff, in *Llewellyn Papers*, D. IX ("Uniform Sales Law").

case, overtook the project and Rabel, his link to the committee. When Germany withdrew from the League of Nations in October 1933, Rabel lost his seat on the Governing Council and, consequently, on its study committee. "Tainted" with Jewish blood, Rabel was ultimately locked out of the Berlin *Institut* he had established and he emigrated with his family to the United States in 1938. Rabel's relations with Llewellyn were now reversed. Llewellyn, by then, had become preoccupied with the revision of the U.S. Uniform Sales Law and ultimately, in the early 1940s, with the preparation of an ambitious uniform commercial code. Rabel offered advice, but Llewellyn kept him at a distance.<sup>34</sup> There is some evidence in his surviving papers that Llewellyn followed the progress of the UNIDROIT text – e.g., handwritten annotations to the 1939 draft –, but his later contributions were indirect, through his Revised Uniform Sales Act as incorporated in the Uniform Commercial Code.

#### V. – CONCLUSION

Ironically, Karl Llewellyn's visit to Rome in 1932 may have had more impact on the development of U.S. law than on international sales law. There is virtually no trace of Llewellyn in the UNIDROIT text as it emerged in the 1935 and 1939 drafts. His study of the UNIDROIT documents and his participation at the Rome meeting may, on the other hand, have been a catalyst for such later provisions of the Uniform Commercial Code as the fixed term (Sec. 2-205), the battle of the forms (Sec. 2-207(3)), inspection (Secs. 2-313, 2-315), revocation of acceptance (Sec. 2-608), etc.

By bringing together legal experts from different legal cultures, UNIDROIT provides a marketplace for the exchange of legal concepts and devices. Its contribution to the development of the law goes well beyond its uniform texts in ways that are not always fully appreciated. Malcolm Evans, who was constantly solicitous about the role of UNIDROIT, was well aware of this. In my conversations with him during the last year of his life, he was particularly concerned about the Institute's educational role through its publications and library. He would have, I think, appreciated the story of Llewellyn's trip to Rome as an illustration of UNIDROIT's indirect influence on the evolution of the law.

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<sup>34</sup> For a brief summary of the relations between Rabel and Llewellyn, see B. GROßFELD & P. WINSHIP, "The Law Professor Refugee", 18 *Syracuse Journal of International Law & Commerce*, 3-20 (1992), and "Der Rechtsgelehrte in der Fremde", in *Der Einfluß deutscher Emigranten auf die Rechtentwicklung in den USA und in Deutschland* 183 (M. Lutter, E.C. Stiefel & M.H. Hoeflich eds., 1993).

## APPENDIX

### PROPOSITION DE SYNTHESE ET DE CONCILIATION DE M. LLEWELLYN SUR LES DROITS DE L'ACHETEUR EN CAS DE VICES.<sup>1</sup>

(S'inspirant des Propositions de M. Rabel, et de la discussion de mercredi).<sup>2</sup>

#### I. – DOMMAGES-INTERETS

- 1.– (a) Dommages-intérêts *in abstracto* (c'est à dire "mercantils") lorsque la marchandise a un prix courant etc.  
(Liquidation facile de la transaction).

Angleterre:	solution actuelle	Allemagne:	concession à l'acheteur
Etats-Unis:	" "	France:	" "
Scand[inave]	" "		

(b) Alinéa (a), ne jouant guère dans le cas de résolution (acheteur pour revendre ne résoud qu'en cas de baisse; l'acheteur pour utiliser ne trouvera guère un prix courant; exceptions: caoutchouc ou blés vendus à un fabricant), les dommages intérêts de l'alinéa (a) sont permis, quoique la marchandise soit retenue.

Angleterre:	solution actuelle	Allemagne:	concession important à
Etats-Unis:	" "	France:	l'acheteur.
Scandinave:	" "		

(c) Peut-être: alinéa (a) ne joue pas dans le cas de résolution.

2. – Dommages-intérêts pour les frais accessoires (examen, conservation, etc.) dans le cas de résolution.

Angleterre:	solution actuelle	Allemagne:	concession légère à l'acheteur?
Etats-Unis:	" "	France:	solution actuelle?
Scandinave:	" "		

3. – 1<sup>o</sup>– Lorsque le vice résulte de la faute du vendeur, ou  
2<sup>o</sup>– lorsque la qualité est expressément garantie [(ci-inclus l'échantillon)], alors:

<sup>1</sup> This Appendix reproduces Karl Llewellyn's copy of this annex to the minutes of the Rome meeting in March 1932. Vente.– Doc. 41, Annexe II d. Llewellyn drafted the annex while attending the March 1932 meeting of the sales committee in Rome and the committee discussed his draft at this March meeting. The text is found in the *Llewellyn Papers*, D. IX; it is not found in the commercially-distributed microfilm of UNIDROIT documents which reproduce the collection in the Harvard Law School. In the text reproduced in this Appendix, Llewellyn's handwritten insertions are placed between brackets. His typographical corrections are incorporated without any indication, but his spelling and grammar is left as is.

<sup>2</sup> At the beginning of the document there are the following three handwritten marginal annotations: "*Germans arrive at damages for warranty if a second delivery doesn't arrive when demanded = non-exécution*"; "*If cover is allowed generally, it reduces differences*"; "*where the Fr[ench] - faute connue - refuse dam[age]s + [reteng ?] they make a choice bad for both B[uyer] & S[eller].*"

a) dommages-intérêts "mercantils" dans le cas de résolution.

Angleterre:	solution actuelle	Allemagne:	solution actuelle?
Etats-Unis:	" "	France:	solution actuelle?
Scandinavie:	" "		

b) dommages-intérêts "mercantils", lorsque la chose est retenue

Angleterre:	solution actuelle	Allemagne:	?
Etats-Unis:	" "	France:	?
Scandinavie:	" "		

c) dommages-intérêts "sur mercantils" (i) contrat de revente ou (ii) utilisation spécifique, qui l'un ou l'autre a été signalé au vendeur au moment de la conclusion du contrat de vente; ou (iii) dommage survenant à cause du vice – la vache qui infecte le troupeau – sur le modèle des dommages-intérêts en cas d'inexécution déjà adoptés.

(c) (i) et (ii)

Angleterre:	solution actuelle	Allemagne:	[s'étend? concession au vendeur?]
Etats-Unis:	" "	France:	[s'étend? solution actuelle?]
Scandinavie:	" "		

(c) (iii)

Angleterre:	solution actuelle	Allemagne:	s'étend?
Etats-Unis:	" "	France:	s'étend?
Scandinavie:	" "		

4. – Hors les cas sus-dits, pas de dommages-intérêts "mercantils".

Mais voir 6.

Angleterre:	Concession importante	Allemagne:	[s'étend? solution actuelle?]
Etats-Unis:	au vendeur	France:	[s'étend? solution actuelle?]
Scandinavie:	" "		

5. – Hors les cas sus-dit, pas de dommages-intérêts sur mercantils.

Mais voir 6.

Angleterre:	Concession importante	Allemagne:	solution actuelle
Etats-Unis:	au vendeur; peut-être.	France:	solution actuelle
Scandinavie:	à défendre pour les ventes internationales [, mais] bouleversante		

6. – En cas de vice, la faute du vendeur [est] presumée: la charge de la preuve contraire incombe alors au vendeur.

Angleterre:	concession au vendeur	Allemagne:	concession à l'acheteur mais
Etats-Unis:	" "	France:	fort raisonnable.
Scandinavie:	" "		

7. – La faute du vendeur (1) est exclue s'il a acheté et revendu sans avoir un moyen d'examiner la chose avant de la livrer à l'acheteur et que l'acheteur connaissait ces circonstances; (2) elle est de même exclue, si l'examen imputable au vendeur ne l'a pas pu révéler.

(1)

Angleterre:	concession au vendeur	Allemagne:	concession à l'acheteur.
Etats-Unis:	Mais fort raisonnable.	France:	mais, une fois la règle connue, le vendeur pourrait régler le cas sans aucune difficulté.
Scandinavie:	" "		

(2)

Angleterre:	Concession importante	Allemagne:	solution actuelle
Etats-Unis:	au vendeur	France:	solution actuelle
Scandinavie:	"		

## II.- LA RESOLUTION<sup>3</sup>

8. – La résolution est permise malgré les acts of dominion (surtout la revente) qui se font jusqu'à la fin du délai indiqué dans l'art 3 Rabel (rédaction nouvelle) alinéa 2, 1°.

Angleterre:	concession forte	Allemagne:	solution actuelle
Etats-Unis:	à l'acheteur	France:	solution actuelle
Scandinavie:	mais nécessaire		

9. – La résolution pour les vices qui ne sont pas à découvrir par le susdit examen est permise:

1°) dans les achats pour revendre seulement où l'acheteur ne peut pas raisonnablement disposer de la chose, ou bien que le vendeur ait connu au moment de conclure le contrat, que la chose fût destinée à un contrat de revente particulier, laquelle elle ne suffit pas.

Angleterre:	Concession forte à l'acheteur	Allemagne:	concession au vendeur
Etats-Unis:	concession au vendeur, mais raisonnable.	France:	mais raisonnable
Scandinavie:	?		

2°) dans les achats pour l'utilisation par l'acheteur, seulement où le vice gêne l'utilisation d'une façon sérieuse, d'après les circonstances connues au vendeur au moment de la conclusion du contrat.

Angleterre:	concession fait à l'acheteur	Allemagne:	Concession au vendeur
Etats-Unis:	concession au vendeur, mais raisonnable	France:	mais raisonnable
Scandinavie:	?		

3 Llewellyn wrote the following text in the margin:

(a) *résolution reste d'intérêt surtout à l'égard de marchandises de genre, achetées d'un non-fabricant, et dont il n'y a pas de garantie expresse, et où il survient un grand dommage - ou pour les dommages mercantile - quand il n'y a pas un prix courant.*

(b) *quanti minoris reste.*

*Remarquez qu'aujourd'hui il faut au vendeur anglais poursuivre le vendeur ailleurs!*

III.- EN OUTRE

10. – La question de calcul du quanti minoris dans les cas non sus-inclus, devrait être laissé à la loi nationale.
11. – D'autres concessions au vendeur, d'importance pour balancer les concessions suggérées pour les droits continentaux en faveur de l'acheteur:
  - a) invitation à l'examen.
  - b) dénonciation, en cas de nécessité, double.
  - c) droit a faire une deuxième livraison dans les délais permis par le contrat.
  - d) devoir de l'acheteur de conserver la marchandise.
12. – Si l'on approuvait les propos ci-indiqués, la question de distinguer plus précisément ce qui constitue une "garantie expresse" deviendrait importante.
13. – Les concessions faites par les droits allemand et français à l'acheteur feraient rejaillir la question s'il ne fallait pas exclure la résolution dans les cas où l'acheteur achate pour revendre et que la marchandise soit à revendre dans ses affaires quoique des vices ne soient pas a nier.

