

Article 2 (Final draft)

- (1) For the purposes of this Convention, a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.]
- (2) Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph (1) of this article and of article 3 shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract.
- (3) Where a party does not have a place of business, reference shall be made to his habitual residence.
- (4) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 3 (Final draft)

- (1) This Convention shall apply only when at the time of the conclusion of the contract, the seller and buyer have their places of business in different contracting States.
- (2) Unless otherwise provided herein, this Convention shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.
- (3) This Convention shall not apply when the parties have validly chosen the law of a non-contracting State.

Commentary

These two articles also raise the important question of the sphere of application of the Convention, which will be discussed separately.

One major controversy is whether the definition of the class of case to which the Convention applies (2.1) should only be finalized after the corresponding class has been finalized for the purposes of the revised Uniform Law on International Sale of Goods. There was unanimity in the view that identical applications of the two Conventions would be very desirable.

The difference of view arose from the fact that it was generally felt that finalization of the revised Uniform Law on International Sales (revised ULIS) would not take place for many years to come. To wait for that final definition, it was argued, would be to delay this Convention also for many years. As against this, it was argued that the delay was not too high a price to pay for the advantages of an identical application of both laws. The latest draft of Article 1 of revised ULIS is as follows :—

Article 1

1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States :
 - (a) when the States are both contracting States; or
 - (b) when the rules of private international law lead to the application of the law of a contracting State.
2. [The fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.]

3. The present law shall also apply where it has been chosen as the law of the contract by the parties.
(A/C N. 9/62/Add. 2)

It will be seen that whereas an international contract of sale will be governed by both texts in certain cases, this will not be so in other cases. The condition that the place of business of each of the parties must be in a contracting State is a necessary condition for the application of this draft Convention, but is only a sufficient condition for the application of revised ULIS. Revised ULIS can also apply through the rules of private international law. e.g.

(i) 'A' having his place of business in State 'X', contracts with 'B' having his place of business in State 'Y'. Both States 'X' and 'Y' are contracting parties to both Conventions. Both Conventions will apply to the contract, provided an action is brought in the forum of a contracting State;

(ii) Suppose that in the above case State 'Y' is not a contracting party. Then the Convention on Prescription will not apply. But if the rules of private international law of the forum specify the application of the law of State 'X', the Convention on Uniform Law of Sales will apply;

(iii) 'A' and 'B', neither having places of business in States parties to either Conventions, choose revised ULIS and this Convention to govern their contract. Revised ULIS will apply, but not this Convention.

The classes of exempted sales (Article 4 of this draft and Article 2 of revised ULIS) are identical, but this draft has a set of exempted claims which has no correspondence in revised ULIS.

The decision as to whether to defer finalization of the draft Convention on Prescription depends on balancing the advantage of having a Convention on Prescription finalized and in force early, but with the disadvantage that its scope may not completely harmonize with the scheme of revised ULIS, as against the advantage of waiting until both texts achieve

harmony but with the disadvantage that the Convention on Prescription on which there is major agreement will be delayed. Another suggestion has been that the Convention on Prescription should contain a revision clause under which its scope would be automatically harmonized with the scope of revised ULIS when the latter came into force. It is presumably because of this division of opinion that 2.2 has been placed within square brackets to indicate a lack of consensus in regard to it.

The clause in 2.2 "unless the contract" is intended to prevent the application of the law to a case which is really municipal in character, i. e. the case where the principal places of business of the parties are in different States, but the contract in question has a closer connection with the place of business of a party which is situated in the same State as the place of business of a party of the other party. For example, 'A' and 'B' conclude a contract for the supply of manufactured articles to be supplied by 'A' to 'B'. The principal place of business of 'A' is in State 'X', and of 'B' in State 'Y'. But all the negotiations are conducted from a branch office which 'A' has in State 'Y'. The goods also are to be delivered from this branch office. The Convention would not apply as there are no elements here of an international sale.

2.2 may also deal with the case of a contract entered into under the common law system by an agent on behalf of an undisclosed principal. A, the agent, and B, the other contracting party, may both have their place of business in State X, but C, the undisclosed principal may have his place of business in State Y. Although the contract may ultimately be held to be between C and B, yet by reason of this article it could be argued that the draft Convention did not apply, as the place of business of the agent must be taken to be the place of business of the principal. Such a result is eminently desirable, as C would not have contemplated the application of this Convention.

Having regard to the importance of the clause (for it may determine whether the Convention or municipal law applies) it appears to leave room for some uncertainty.

(a) Two or more places of business of a party may have a relationship to a contract and its performance, and deciding which has the closer relationship may be a difficult matter.

(b) It is not beyond doubt whether individual knowledge or contemplation or only joint knowledge or contemplation is in issue. Individual knowledge may be private knowledge and while to one party a particular place of business of the other party seems to have the closer connection, the full circumstances which are only known to the other may clearly show another place of business as having the closer connection. If joint knowledge or contemplation is in issue this could be made clearer. Joint knowledge seems to be intended (A/C N. 9/70/Add. 1, p. 21), and the formulation in Article 1.2 of revised ULIS seems to be preferable.

(c) The phrase 'principal place of business' may require clarification. It can sometimes be understood in a technical sense (e. g. the place where a limited liability company has its registered office) or in a non-technical sense (where the trading of a company is actually carried on). It would appear that the latter is what is intended (A/C N. 9/52 p. 11).

(d) In deciding the 'closer relationship to the contract and its performance' it is intended to take into account all the incidents of the contract and its performance. The evaluation of this may often be a matter of opinion. Since parties would like to know at the time of the conclusion of the contract whether or not the Convention is to apply, it may be considered whether a more easily identifiable object of relationship could be substituted.

Article 5 (A/CN.9/70. Annex. I)

This Law shall not apply to sales :

- (a) of goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use, unless the seller at the time of conclusion of contract knows that the goods are bought for a different use;

- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels or aircraft;
- (f) of electricity.

Article 4 (Final draft)

This Convention shall not apply to sales :

- (a) of goods of a kind and in a quantity ordinarily bought by an individual for personal, family or household use, unless the fact that the goods are bought for a different use appears from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels or aircraft;
- (f) of electricity.

Commentary

These types of excluded sales have been brought into conformity with the corresponding excluded sales in revised ULIS. These various types of sales are excluded from the sphere of the draft Convention for various reasons, which can be shortly stated as follows :

- 4(a) These are what are sometimes called 'consumer sales'. Many national laws have special provisions protecting the consumer, and placing such sales in a special category. For this reason these sales were excluded.

They are also excluded for the purpose of maintaining uniformity with revised ULIS.

- 4(b) These are excluded mainly in the interests of uniformity with revised ULIS. It is excluded in revised ULIS because at the time of commencement of the auction the seller would not know which person would eventually become the buyer, and so whether ULIS would apply or not.
- 4(c) These sales are usually governed by special rules of the State, and form a separate category.
- 4(d) The articles in question are of a special character, and are often subject to special rules in municipal legislation.
- 4(e) The articles in question are of a special character. The corresponding Article 2(2) (b) of revised ULIS is as follows :

"Of any ship, vessel or aircraft [which is registered or is required to be registered]" (A/CN. 9/62/Add. 2).

There are divided opinions on whether the words in brackets should or should not be retained in revised ULIS. The arguments in favour of deleting these words are that an element which might be cause of uncertainty is eliminated (e.g. what is 'registration'? When is it required?). The argument in favour of retaining these words is apparently that it is considered desirable that sales of small boats should fall within the ambit of revised ULIS, and small boats generally do not require registration. But it would appear that in some countries even small boats require registration. If this is the object, some other criterion such as tonnage may be adopted to distinguish small boats.

- 4(f) The substance in question is of a special character.

Article 6 (A/CN. 9/70. Annex I)

This Law shall not apply to claims based upon :

- (a) liability for the death of, or injury to the person of, the buyer [or other person];

- (b) liability for nuclear damage caused by the goods sold;
- (c) a lien, mortgage or other security interest in property;
- (d) a judgement or award made in legal proceedings;
- (e) a document on which direct enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought;
- (f) a bill of exchange, cheque, or promissory note;
- (g) a documentary letter of credit.

Article 5 (Final draft)

This Convention shall not apply to claims based upon :

- (a) Death of, or personal injury to, any person;
- (b) Nuclear damage caused by the goods sold;
- (c) A lien, mortgage or other security interest in property;
- (d) A judgement or award made in legal proceedings;
- (e) A document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;
- (f) A bill of exchange, cheque or promissory note.

Commentary

The purpose of this article is to exempt claims which are of such a special character that the period of limitation specified in the draft Convention is not appropriate. The following is a short account of this special character.

1. 5(a) The loss caused in this case is not primarily pecuniary loss, which is the usual type of loss in an international sales transaction.
2. 5(b) Such damage may only manifest itself after a long period. Further, special periods in regard to such actions are contained in the Vienna Convention on Civil Liability for Nuclear Damage of 21.5.1963.

3. 5(c) The rights included here may be rights *in rem*, whereas a sales transaction normally creates rights *in personam*.

4. 5(d) It is felt when a judgement is sought to be enforced it may not be clear whether the judgement in question adjudicated upon a transaction falling within the scope of the draft Convention. Further, the *ex post facto* investigation of whether an action which was the basis of a judgement was barred by limitation is a different matter, particularly when the investigation may have to be carried out by a forum different from the one which delivered the judgement. In certain legal systems the rights and obligations of parties to an action which conclude in a judgement are merged in the judgement, which thereafter is the sole source of rights and obligations. It may thereafter be difficult to classify an action on such a judgement as one relating to a contract of international sale. The enforcement would also involve local procedural rules of the forum, and it would be difficult to subject a judgement to a uniform rule limited to contracts of international sale of goods.

5. 5(e) Such documents, as are evident, stand in a special category.

6. 5(f) (i) Such instruments are often governed by international conventions.
 (ii) Such instruments pass into the hands of third parties, who may be ignorant of the sales transaction, and would have no means of knowing that the period of limitation prescribed by the draft Convention was applicable.
 (iii) The obligations under these instruments are often independent of the sales transaction.

Article 4 (A/CN. 9/70 Annex I)

1. This Law shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.
2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the

meaning of this Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

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Article 6 (Final draft)

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2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of this Convention, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

* * *

Commentary

Article 3 of the Revised ULIS is as follows :-

- “1. [The present law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods.]
2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.” (A/CN. 9/62/Add. 2).

There was a uniform consensus at the debates at the fifth Session that these corresponding articles in the two Conventions should be identical. The deletion in the final draft of the word ‘essential’ found in the second half of 4.2 of the first draft slightly narrows the cases to which the first sentence of 6.2 applies.

This article deals with what are called 'mixed' contracts in that the sole elements are not the buying and selling of goods. In the case dealt with in 6.1, the additional element present is the supply of labour or other services (e.g. insurance of the goods in a C.I.F. contract) by the seller. The contract cases to be one of sale to which the Convention applies when these other elements become 'preponderant'. The article is meant to apply to a single contract containing the other elements. It will not of course apply where the other elements are the subject-matter of a contemporaneous but independent contract.

In the case dealt with in 6.2, the additional element present is that the 'buyer' undertakes to supply a substantial part of the materials necessary for the manufacture of the goods. Since the most important activity of the 'seller' in such a case is turning the materials into the manufactured product, the contract is more akin to the supply of skill or labour, and is thus excluded from the scope of the draft Convention.

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Article 7 (A/CN. 9/70. Annex I)

In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application.

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Article 7 (Final draft)

In interpreting and applying the provisions of this convention, regard shall be had to its international character and to the need to promote uniformity in its interpretations and application.

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Commentary

This is a directive to tribunals which have to interpret and apply the Convention. It is intended to prevent tribunals from adopting an insular outlook, and to encourage them to seek

assistance from the decisions of foreign tribunals on corresponding provisions. It is also intended to indicate that tribunals should consider *travaux préparatoires* where under normal circumstances they would consider themselves precluded from doing so.

The intention of the framers of the Convention has been to provide a code of law which will deal with all aspects of limitation. History has shown, however, that owing to various reasons, cases arise for which the most elaborately drafted code contains no provision. Two approaches are possible in such a situation. The first is to apply municipal law. The second is to apply this Convention by a process of judicial legislation, extending it "by analogy" or on the basis of "inherent principles". Both approaches have the disadvantage that different forums may reach divergent results. The second approach, however, seems to be preferable in principle as judicial decisions will not proceed beyond the framework of the Convention. If this be so, the question which merits consideration is whether Article 7 in its present form gives the tribunal a sufficiently clear indication of this desired approach. The phrase "In interpreting and applying the provisions of this Convention ..." may be construed as applying to a case which already falls within the Convention, and not one for which no provision is made. This is, therefore, a question which deserves consideration.

The Scope of Application of the Convention

In its latest form, the draft Convention will only apply if the following conditions are satisfied :-

1. The question at issue must be the limitation of legal proceedings and the prescription of rights (Article 1.1).
2. There must be a concluded contract of international sale of goods (Article 1.1).
3. Such limitation or prescription must be of the rights of the buyer and seller against each other relating to the said contract (Article 1.1).
4. At the time of the conclusion of the contract, the buyer and seller must have their places of business in different contracting States (Article 3.1).

5. The parties must not have validly chosen the law of a non-contracting State to govern the contract (Article 3.3).
6. The sale must not be an excluded sale (Articles 4 and 6).
7. The claim must not be based upon an excluded subject matter (Article 5).
8. The forum must belong to a contracting State.

Some of these conditions can be further sub-divided, but the above classification is convenient. No account has been taken of the possibility of reservations under Articles 33 to 38.

Judging by the debates at the fifth session, it would appear that the limitations contained in conditions 1, 2, 3, 6, 7 and 8 are in principle acceptable to most governments.

This comment will therefore relate to :

- (a) The principles at stake in conditions 4 and 5.
- (b) The language in which some of the conditions are expressed.

(A) Article 3.1 states that the Convention shall only apply when at the time of the conclusion of the contract, the seller and buyer have their places of business in different contracting states. This constitutes an extensive limitation on its applicability. Nor are parties given the choice to expressly make the law applicable where by reason of this article it would not apply. The insertion of this condition, which was not present in the first draft, appears to be for the following reasons :—

i) It secures greater uniformity between the sphere of application of this Convention and of revised ULIS. The latest draft of Article 1.1 of revised ULIS reads as follows :

“1.1 the present law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States :”

- (a) When the States are both Contracting States :
- or

- (b) when the rules of private international law lead to the application of the law of a Contracting State.

ii) When the parties both have their places of business in contracting States, it is almost certain that they will then decide, within the limits permitted to them whether or not to exclude the application of the law. The likelihood of the Convention becoming applicable contrary to the expectations of the parties is minimized.

The deletion of this provision, on the other hand, will lead to a wider application of the Convention. Being a model Convention reached after international consultation, this is regarded as a desirable result, and is the object sought to be achieved by Article 3.2.

If giving parties freedom to choose not to apply the Convention is desirable, because it gives effect to the autonomy of the will of the parties, it may act as a balance, while preserving this provision, also to give parties the freedom to expressly make the Convention applicable, even if they do not each have their places of business in contracting States. This freedom of choice is given by Article 1.3 of revised ULIS. Such a provision would enable a party in a weak bargaining position to suggest to the other party in a strong bargaining position, that the Convention should be made applicable as a fair and equitable law, even though one or both of the parties do not have places of business in contracting States. Such a suggestion cannot be made under the present draft.

Article 3.3 permits the parties to exclude the operation of the Convention by choosing the law of a non-contracting State. This, coupled with 3.1 referred to above, permits parties, each of whom has his place of business in a contracting State, nevertheless to exclude the operation of the law. There was a division of opinion on the desirability of this provision during the debates. The argument in favour of maintaining the provision is that the choice it gives to the parties is valuable and desirable. This choice is also preserved in revised ULIS. (Article 5 of revised ULIS). This is often expressed by saying that the autonomy of the parties should be safeguarded. The argument for deleting the clause is that, while the parties have a legitimate interest

in being allowed to choose the law which governs the incidence of performance (the choice permitted by revised ULIS being thus justifiable), they have no such interest with regard to the law governing limitation, and the widest application of a model Convention is desirable.

One consideration that applies to countries of Asian-African region is that where they are (as they sometimes are) in a weaker bargaining position, freedom of choice generally leads to dictation of the choice by the party with the stronger bargaining power. This can be used to impose on the weaker party a complex municipal law of limitation of which he is totally unfamiliar.

The majority of governments which expressed their views at the debate were in favour of deleting this provision.

It is suggested that, apart from the question of the principle at issue, that draft may require clarification in the following respect. Where the parties have validly chosen the prescription or limitation laws of a non-contracting State, the Convention clearly cannot apply. If, however, they make no express mention of limitation but merely choose the law of a non-contracting State to govern the contract, is the Convention excluded? Apparently it is intended that the Convention is not to apply only where the parties have selected the law of a non-contracting State, not merely in general terms, but specifically including its law of limitation. (A/CN.9/70. Add. 1, p. 16). This may be made clear by inserting the words 'of limitation or prescription' after the word 'law' and before the word 'of' in Article 3.3.

(B) There is no definition of a contract of sale of goods though from Article 1.3 (a) an agreement for sale comes within the definition. Article 6 expressly deals with two cases which may otherwise be in dispute. The remaining case which requires consideration is exchange, or barter, where the consideration does not consist of money, which is not unknown in international trade. Article 1.3 (b) ("Creditor means a party who asserts a claim, *whether or not such a claim is for a sum of money*") would include a party to a barter agreement within the meaning

of 'creditor'. But it may be desirable to put the matter beyond dispute.

The Draft Convention and the Conflict of Laws

It has been noted that Article 3.2 of the final draft provides that :—

"Unless otherwise provided herein, this Convention shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law".

The result is that when the forum of a contracting State deals with a contract falling within the ambit of the Convention, this Convention is applied in the sphere of limitation irrespective of any legal system indicated by its system of conflict of laws. However, the conflict of laws remains relevant in certain matters. Many Articles refer to "the applicable law" (vide Articles 11, 13, 16, 21) and the applicable law will have to be determined by applying the rules of the conflict of laws. Further, the conflict of laws will determine which legal system governs the substance of the obligations *inter se* between buyer and seller. In the Anglo-American system, for instance, this will be "the proper law of the contract." If, however, the 'proper law of the contract contains a rule which extinguishes the right of action after the passage of a certain period of time, and the rules of the conflict of law classifies this as a "substantive" and not a "procedural" rule, the right of the creditor would be extinguished, and there would be nothing left for him to enforce. In such a case this Convention cannot operate. (Rabel, *The Conflict of Laws, a Comparative Study*, 2 Ed, p. 516; Dicey and Morris, *Conflict of Laws*, 8th Ed, p. 1095).

THE LIMITATION PERIOD

Article (A/CN. 9/70, Annex I)

The limitation period shall be four years.

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THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8 (Final draft)

Subject to the provisions of Article 10, the limitation period shall be four years.

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Commentary

There now appears to be a consensus on this period.

COMMENCEMENT OF THE LIMITATION PERIOD

Article 9 (1), 9 (2) (A/CN. 9/70, Annex I)

- (1) Subject to the provisions of paragraphs 3 to 6 of this article and to the provisions of Article 2, the limitation period in respect of a breach of the contract of sale shall commence on the date on which such breach of contract occurred;
- (2) Where one party is required as a condition for the acquisition or exercise of a claim to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice;

Article 9 (1), 9 (2), 9 (3) (Final draft)

1. Subject to the provisions of Articles 10 and 11, the limitation period shall commence on the date on which the claim becomes due.
2. In respect of a claim based on fraud committed before or at the time of the conclusion of the contract, the claim shall, for the purpose of paragraph

(1) of this article, be deemed to become due on the date on which the fraud was or reasonably could have been discovered.

3. In respect of a claim arising from a breach of the contract the claim shall, for the purpose of paragraph (1) of this article be deemed to become due on the date on which such breach occurs. Where one party is required, as a condition for the acquisition or exercise of such a claim, to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

Commentary

The description of the event which was to give rise to the commencement of the period of limitation had earlier been the subject of much controversy. The first draft provided that the two events were to be "breach of contract", or (where no allegation of breach was made) "the date when the claim could first be exercised". In the present draft, the event is "the date on which the claim becomes due", breach of contract being merely one of the events which could make a claim become due (9.3). The concept of breach of contract was criticised as being foreign to some legal systems, and this has resulted in a definition of it being inserted (1.3d). The date on which a claim becomes due will depend on the particular claim asserted, in the light of the contract, supervening events, and the applicable law. This general solution, however, leaves out of account certain special cases, for which Articles 10 and 11 provide.

Article 9.2 deals with a case where there has been fraud committed before or at the time of the conclusion of the contract, which has not been discovered at the time of conclusion. The nature of the subsequent claim based on fraud, however, needs clarification. Tortious or delictual claims based on fraud are in any event outside the scope of the Convention.

For this article to apply, two conditions must be satisfied :—