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UNIFORM RULES GOVERNING THE INTERNATIONAL SALE  
OF GOODS: ANALYSIS OF COMMENTS AND PROPOSALS  
RELATING TO ARTICLES 1-17 OF THE UNIFORM LAW ON  
THE INTERNATIONAL SALE OF GOODS (ULIS)

Note by the Secretary-General

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ANNEX I

REPORT BY MR. E. ALLAN FARNSWORTH, THE REPRESENTATIVE OF THE UNITED STATES,  
ON ARTICLE 1 OF ULIS

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Background - Article 1 of ULIS provides:

1. The present Law shall apply 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.
2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.
3. The application of the present Law shall not depend on the nationality of the parties.
4. In the case of contracts by correspondence, offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.
5. 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 of them.

This article was taken up at the January, 1970 meeting of the Working Group on Sales, which referred it to a Working Party, and then based its decision on the recommendations of that Working Party. Although the Working Group considered that, in general, the definition set out in article 1 was satisfactory, some reservations were noted (pars. 41-44 of A/CN.9/35). In addition the following revision of the English text of Article 1(1)(a) was approved, in order to make it clear that the contract must, at the time of its making, contemplate an inter-

national shipment (par. 40 of A/CN.9/35):

- (a) Where the contract contemplates that the goods are, at the time of the conclusion of the contract, or will be the subject of transport from the territory of one State to the territory of another.

At its plenary session in April, 1970, UNCITRAL "approved the report of the Working Group in so far as the Group approved the structure of article 1 of ULIS" and decided to refer to the Working Group recommendations for improvements that had been submitted by several representatives (pars. 31-33 of UNCITRAL/III/CRP.17). The proposals that have been made for the improvement of article 1 can be grouped under three general headings: (I) three proposals considered by the Working Party in January, 1970 and considered by them as worthy of further study; (II) two proposals considered by the Working Party in January, 1970 and not recommended to the Working Group, but which have since been resubmitted by delegates; and (III) a group of proposals not considered by the Working Party in January, 1970, but which have since been submitted by delegates.

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(I) Proposals Recommended for Further Study

(1) Place of Business. - As representative of the United States, I raised the problem in the Working Party in January of the party who has places of business in more than one country. "The Working Party was of the view that this problem should be studied further" (par. 9 at p. 3 of Annex V of A/CN.9/35).

Generally, when some concept of doing business is used, at least in American law, the purpose is to determine whether a particular jurisdiction has sufficient contacts to make it an appropriate one. For example, it may be used to determine whether a party is subject to suit in a particular jurisdiction. Here it is only necessary to determine the minimum level of activity that is required. The fact that a party may carry on activities in more than one jurisdiction poses no difficulty in such cases, for if his activity met the minimum level in several jurisdictions, he would be subject to suit in all of them.

Under article 1 of ULIS, however, the application of the law turns not only on whether a particular jurisdiction has sufficient contacts to make it an appropriate one, but also on whether it is the appropriate one.

Example. Seller's place of business is in Euphoria. Buyer carries on business activity in both Euphoria and Limbo. One must first ask whether Buyer's activity in Euphoria and Limbo is of such a level that he has a "place of business" in either or both, i.e., whether either or both is an appropriate jurisdiction. Then, if he has places of business in both, one must ask which of the two is his "place of business" for the purpose of article 1, i.e., which is the appropriate jurisdiction.

It is presumably not enough merely that Buyer have a place of business in Limbo (a state other than that in which Seller has his), if, for example, his place of business in Euphoria was the only one that took any part in the transaction. What is sought is the place of business of Buyer that is relevant to the transaction. Presumably this is not necessarily the principal place of business. If, for example, Buyer's place of business in Euphoria were the only one that took any part in the transaction, it would make no sense to treat his place of business under article 1 as being in Limbo simply because he had his principal place of business there.

I therefore propose that the word "relevant" be inserted in article 1 and that it be reworded to read:

1. The present Law shall apply to contracts of sale of goods where the relevant place of business of each of the contracting parties is in the territory of a different State, in each of the following cases:

It will then be necessary to insert an additional subparagraph to explain "relevant". I therefore propose a new subparagraph 1 bis; to read:

- 1 bis. Where a party has places of business in the territory of more than one state, the relevant place of business shall be that place of business that has the closest relationship to that aspect of the transaction that is relied upon under (a), (b) or (c) of the preceding subparagraph to make the present Law applicable.

Under this provision, if (a) is relied on, the question would be whether Buyer's place of business is Euphoria or that in Limbo had the closer relationship to the transport of the goods. If (b) is relied upon, it would be which had the closer relationship to the making of the contract. If (c) is relied upon, it would be which had the closer relationship to the delivery of the goods. (A party claiming that ULIS applies has, of course, the option to choose whether he will rely on (a), (b) or (c) where several are applicable).

Finally, three general points should be made concerning this proposal. First, it relates to a part of ULIS in which it is desirable to be as precise and definite as possible, since it goes to the very threshold question of its applicability. Second, even so, it does not attempt to define "place of business" by attempting to describe the minimum level of activity required, but only to provide a criterion for choosing among places of business. Third, if the revised text of article 2 makes reference to "place of business," that text should be coordinated with any revision of article 1 along the lines imposed here.

(2) Duration of Transport. - As representative of the United States, I also raised the problem in the Working Party in January of the duration of transport. "The Working Party agreed. . . that this question calls for further study" (par. 8 on p. 2 of Annex V to A/CN.9/35).

At the outset it should be noted that there is a problem of translation, if not of language itself. Article 1(1)(a) speaks in French of "transport" and in English of "carriage" in the original and of "transport" in the 1970 revision. Yet where the French "transport" is used elsewhere in ULIS (arts. 19(2), 23(1), 38(2), 54(1)(2), 72(L)) it seems clear that what is meant is carriage by an independent "carrier" ("transporteur"). (ULIS also uses "transmission" ("transmission") in article 19(2), "expedition" ("dispatch") in article 72(1), "expédiée" ("despatched") in article 92(2), and "en cours de voyage par mer" ("in transit by sea") in article 99.) Presumably article 1(1)(a) is intended to apply where the movement of the goods is to be accomplished not by an independent carrier but by the seller himself (as where he is to deliver trucks and has his own employees drive them to the buyer's country), or in appropriate circumstances by the buyer himself (as where he expressly contracts for a machine that he will take back with him to his own country.) Therefore a term broader than "transport" ("carriage") must be used. The English "transport" may be clear enough (since "carriage" is used elsewhere), but the French "transport" should not be used here because it is used elsewhere in ULIS in the restricted sense of carriage. Perhaps the easiest solution, since the trouble is in the French text, would be for those delegates who are happy in the French language to supply an appropriate French term, and then to find an English equivalent.

If movement at the hands of the seller, an independent carrier, and the buyer are all, under proper circumstances, to be included, then it is hard to be sure when that movement stops for the purposes of article 1. The difficulties arise under the words ". . . contemplates that the goods are, at the time of the contract . . . the subject of transport . . ." Some members of the Working Party were of the opinion that, even if the goods have come to rest in a bonded warehouse when the contract was made with the buyer, the required movement was still in progress since delivery had not been made to the "addressee" (par. 8 of p. 2 of Annex V of A/CN.9/35). But on this rationale, goods already in storage in the seller's own warehouse at the time of the contract might be regarded as covered by article 1(1)(a), and this was clearly not intended by the Working Party (pars. 6 and 7 of p. 2 of Annex V of A/CN.9/35). What, for example, of the case where seller's employees drive trucks for Euphoria to Limbo and store them in a garage there, from which they deliver them to buyers after servicing them, and the contract is made (1) before they have crossed the border to Limbo; (2) after they have crossed the border into Limbo but before they have reached the garage; or (3) after they have reached the garage.

Although I have no specific proposal of language to remove these uncertainties, I believe that ULIS would be much improved if suitable language could be found since the uncertainties go to the very threshold question of the applicability of ULIS itself. This topic can profitably be discussed along with (III)(L) Goods Sold at Fairs and Exhibitions, and if it is decided to reopen the discussion on that topic, I suggest that the two be taken up together.

(3) Plant and Machinery. - In January the Working Party examined the problem posed in a sale of plant and machinery where there might be an element of services involved in construction or installation that varied from incidental to substantial. It concluded "that the question

is difficult and calls for further study" (see par. 10 at p. 3 of Annex V to A/CN.9/35). Most legal systems have criteria to distinguish contracts for the sale of goods from contracts for services in borderline cases, but no such criteria are now incorporated in ULIS. Since the matter has not been discussed by the Working Group, and since even the Working Party made no suggestions as to the general approach to be followed, it is difficult to make any concrete proposals for change, if change is thought to be necessary. It might be well first to determine whether it is the sense of the Working Group that some such express criterion should be added to ULIS (perhaps as a subparagraph to article 6) and, if so, what that criterion should be. I have a memorandum dated June 23, 1970 from Mr. Burguchev, who as representative of the Soviet Union is a member of the interim Working Party on article 1, in which he proposes the following to exclude sales of plant and machinery in general:

The present law shall not apply to contracts of supply of complete works and installations, unless agreed upon by the parties to the contract.

My own tentative view is that it would be best to leave ULIS as it is and let the courts decide borderline cases where the parties have not made express provision for the governing law. Since most sales of plant and machinery are the subject of detailed contracts, the impact of ULIS, even if it should apply, would probably be slight in such a transaction. It may be of interest that even the Uniform Commercial Code, which is much more detailed than ULIS, contains no provision on this subject.

## (II) Proposals Not Recommended but Resubmitted

1. Simplification. - Several proposals were made by Norway to simplify and clarify article 1 by eliminating one or more of the subparagraphs (1)(a), (b) and (c) (pp. 4-6 of Annex V to A/CN.9/35). None of these proposals was reported favorably by the Working Party to the Working Group in January. A related proposal is, however, made by Mr. Burguchev in his memorandum of June 23, 1970, and is set out below in the discussion of the next proposal.

2. Goods Sold at Exhibitions and Fairs. - The Soviet Union advanced a proposal in January that would have expanded the scope of article 1 to include within ULIS goods already carried into one state from another and then sold at exhibitions and fairs in the latter state (p. 7 of Annex V to A/CN.9/35). This proposal was not reported favorably to the Working Group to the Working Party, which was of the view that ULIS should not govern such sales (par. 6 at p. 2 of Annex V to A/CN.9/35). Mr. Burguchev, in his memorandum of June 23, 1970, suggests that this proposal be combined with the Norwegian proposal and that one of the following two simplified alternatives be adopted:

Alternative I. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business

are in the territories of different States, where the contract contemplates that the goods are at the time of the conclusion of the contract or will be subject to transport to the territory of a given State from abroad or that the goods have been subject to such transport, but remained unsold prior to the conclusion of the contract.

Alternative II. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, where the parties at the time of the conclusion of the contract knew or ought to have known that the goods are at this time or will be subject to transport to the territory of a given State from abroad or that the goods have been subject to such transport but remained unsold prior to the conclusion of the contract.

In addition to the exclusion of present sub-paragraphs (1)(b) and (c), and the inclusion of goods already transported at the time of the contract, both alternatives would cover goods acquired on the high seas and brought into a country and the second alternative eliminates the word "contemplates" and substitutes other language (see infra (III)(1)). However, in view of the fact that the Working Party and the Working Group in January declined to act favorably on either of the two major substantive changes embodied in these alternatives, it would appear appropriate, before further detailed study of them, to put to the Working Group the question of whether it now wishes to take a different position and reopen the discussion of these proposed changes.

### (III) Proposals Not Yet Considered

1. "Contemplates." - At the April session of UNCITRAL, Mr. Michida, the representative of Japan, submitted a proposal (UNCITRAL/III/CRP/5) for revision of article 1(1)(a) which would involve the deletion of the word "contemplates" from the proposed revision (or the word "contemplates" from the original text), and the substitution of the following equivalent for the French word "implique":

. . . it may be objectively believed that the parties expect that . . . and this expectation need not be expressed in the contract.

As has already been mentioned (supra (II)(2)), Mr. Burguchev in his second alternative also suggested deletion of "contemplates" and the use of the words:

. . . where the parties at the time of the conclusion of the contract knew or ought to have known . . .

Judging from the text of the rest of ULIS these objections are well founded. In article 72(1) the French word "implique" is translated as "involves" and in article 74(2) the French word "envisagée" is



translated as "contemplated." It is scarcely consistent to translate "implique" as "contemplates" in article 1(1)(a). Nevertheless, the involved English phrases that have been proposed seem undesirably complex, and I suggest that the word "contemplates" be retained in the English text, with an appropriate note somewhere in the legislative history of the objective sense in which it is used, and that the French word "envisage" be used to conform to article 74(2). It may be of some interest that the Uniform Commercial Code uses "contemplates" (UCC 2-323: "Where the contract contemplates overseas shipment . . ."), although it more commonly uses "required or authorized" (UCC 2-504: "Where the seller is required or authorized to send the goods . . ."; see also UCC 2-310, 2-612).

2. Consolidation of Articles. Several proposals have been made to consolidate one or more articles with article 1. Thus, Mr. Burguchev in his memorandum of June 23, 1970 suggests that it might be desirable to consolidate article 5 (which excludes such transactions as sales of stocks, ships and electricity) and article 6 (which deals with goods to be manufactured or produced) with article 1. And Mr. Graf, the representative of Mexico, in a letter of June 12, 1970 to Mr. Michida suggests a revision of article 2 that would involve incorporation in article 1 of some of the modifications. I suggest that these questions of consolidation be deferred until all of the relevant articles have been considered separately by the Working Group.

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Conclusions. - I suggest that the Working Group address itself first to deciding whether to reopen the discussion of the items under (II) Proposals Not Recommended but Resubmitted. If the decision is in the negative, the agenda on article 1 should consist of the items in (I) Proposals Recommended for Further Study and (III) Proposals Not Yet Considered, in the order in which they are taken up in this memorandum, namely:

- (I)(1) Place of Business
- (I)(2) Duration of Transport
- (I)(3) Plant and Machinery
- (III)(1) "Contemplates"
- (III)(2) Consolidation of Articles (after consideration of all relevant articles)

If the decision is in the affirmative the agenda should be as follows:

- (II)(1) Simplification
- (II)(2) Goods Sold at Exhibitions and Fairs and (I)(2) duration of Transport
- (I)(1) Place of Business
- (I)(3) Plant and Machinery
- (III)(1) "Contemplates"
- (III)(2) Consolidation of Articles (after consideration of all relevant articles)