

## ANNEX II

### OBSERVATIONS AND PROPOSALS BY MR. G.S. BURGUCHEV, THE REPRESENTATIVE OF THE USSR, RELATING TO THE DEFINITION OF THE SPHERE OF APPLICATION OF THE UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS

1. According to the existing text of the ULIS the sphere of application of its norms subject to the character of the international sale is determined mainly in three articles, viz in Article 1 in a positive manner, in Article 5 in a negative manner and in Article 6 in a combined manner.

Apparently it might be advisable to get together the provisions of this kind and to formulate them in one article.

II. According to Article I of the ULIS the character of the international sale which invokes application of its norms is made dependent upon the existence, firstly, of a general controlling criterion (places of business of the parties to a contract are in different States) and, secondly, of one of the three subsidiary criteria: (a) the goods be carried from the territory of one State to the territory of another; (b) the offer and the acceptance have been effected in the territories of different States; (c) the offer and acceptance have been effected in the territory of one State, but the goods are delivered in the territory of another.

To avoid unnecessary complicatedness connected with the use of different criteria it seems to be worth of attention the proposal made by the Norwegian representative regarding simplification of Article I of the ULIS (Document A/CN.9/35, Annex V, pp. 5-6 - Alternative I), although, in our opinion, it would be advisable to give somewhat a more precise wording of the proposed text taking into account the following considerations:

1. First of all in this connection it is necessary to dwell on the sale of goods which have been already brought by the Seller to the buyer's country, but remained unsold prior to the conclusion of the contract (for instance, sales at international exhibitions or fairs; goods sold from the demonstration halls or from Seller's warehouses, the goods which had been delivered by the seller to the territory of the original buyer's country but were not accepted by the original buyer, in consequence of which the Seller is selling them to the third persons in the same country etc.).

(a) As it was noted in the Report of the Working Party II (Document A/CN.9/35, Annex I, paragraph 6), Article I, paragraph Ia of the ULIS in its present wording does not cover the above-mentioned sales, i.e. does not consider such sales as "international" ones only for one reason: the carriage of the

goods have been effected before the conclusion of the contract.

At the same time such sales may acquire "international" character and turn out to be subject to the operation of the ULIS (on the basis of paragraph I (b) or paragraph I (c)) owing to such factors as a place where the offer or acceptance is effected although for the sake of objectivity these factors, if compared with the international carriage, have obviously far less importance and sometimes are merely fortuitous, not to say of the difficulties which may arise in consequence of different interpretations of such notions as the offer and acceptance.

In other words, the transactions covering the goods which have been imported before the conclusion of the contract to the territory of the buyer's State and which are being sold there may nonetheless be regulated by the norms of the ULIS provided the offer and acceptance or even one of these acts are made in the territory of another State. Failing this precondition, however, a contract of sale, although concluded between the parties whose places of business are in the territories of different States, is not subject to the ULIS, which result can hardly be recognized as reasonable.

(b) It is not out of place to mention in this connection also of the cases already discussed (see Document A/CN.9/35, Annex V, paragraph 7), when it is not specified in the contract and therefore depends on the discretion of the seller, whether the goods will be delivered to the buyer from the seller's stocks available in the territory of the buyer's State or from those quantities which are carried at the time of the conclusion of the contract or will be carried thereto from abroad.

(c) Finally one would not disregard certain doubts capable to arise as to a possibility of application of the ULIS to the cases under discussion on the basis of Article 4 of the ULIS, i.e. by virtue of the parties agreement. In accordance with this Article the ULIS may be "chosen as the law of the contract by the parties, whether or not their places of business are in different States" etc., i.e. independently on the presence or the absence of the controlling criterion stipulated in the preamble of paragraph I Article I of the ULIS. It remains, however, not fully clear, whether this right of the parties covers those cases where one of three subsidiary criteria stipulated in the same paragraph is missing.

(d) For the considerations above stated it is suggested to explicitly stipulate in Article I of the ULIS the application of its norms in the case of a sale of goods whose international carriage has been effected before the conclusion of the contract and to exclude from this Article, as it was proposed by the Norwegian representative, paragraph I (b) and paragraph I (c) as well as paragraph 4, since they may but give a rise to additional complications connected with an interpretation of such notions as offer and acceptance.

III. The wordings describing the "international" carriage or transport of the goods ("from the territory of one State to the territory of the another") in Article I of the ULIS could be replaced eventually by the words "to the territory of a given State from abroad" in order to avoid the doubts already expressed (Document A/CN.9/35, page 12) regarding the applicability of the ULIS to these cases where the goods are transported to a given State not from the territory of another State, but from the areas beyond the jurisdiction of the any State (which occurs for instance, in connection with the production and the processing of sea products, or mineral resources etc. of the open sea etc.).

IV. Taking into consideration the remarks made by a number of representatives regarding the initial words of paragraph I (a) Article I of the ULIS ("where the contract involves (contemplates)", "lorsque le contrat implique") it might be advisable to use a more precise wording. As evidenced by the Report of the Working Group (Document A/CN.9/35, page 10, paragraph 33 and the following) the mentioned words, in any case in the French text, are understood in the sense that "at the time of contracting it may be objectively believe that the parties expect that the goods are ... or will be subject to international transport, this expectation or understanding needing not to be expressed in the contract". It was noted also (the same Document, paragraph 35) that "events occurring after the making of the contract would not affect the applicability of the Uniform Law, thus, unanticipated shipment of the goods from one State to another should not bring the contract within the Law's coverage".

In other words, the application of the Law seems to be dependent not on an objective factor (actual transport of the goods), but on subjective factor, i.e. on the supposition, expectation, understanding etc. of the parties regarding such a transport, whether or not it has been explicitly provided for in the contract.

Under these circumstances and for avoiding any eventual discrepancies in the interpretation of the wording under discussion, as a variant for consideration it

could be proposed to use in the given case a more accurate criterion providing for that the ULIS is applied not in the case "where the contract involves (contemplates) ... but where the parties at the time of the conclusion of the contract "knew or ought to have known" about the international transport of the goods. The criterion proposed being in essence very close to the existing wording has that advantage over it that its content is expressly defined in Article 13 of the ULIS.

Taking into account the aforesaid, paragraph 1, Article 1 of the ULIS could be worded as follows:

Alternative I. "The present Law shall apply to contracts of sale of goods entered into by the 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 the 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.

V. A serious attention both in essence and in connection with the structure of the ULIS should be paid also <sup>to</sup> the matter of contracts of supply of complete works and installation, which matter has a direct relation to the determination of the sphere of application of this Law and was discussed by the Commission principally in connection with Article 1 of the ULIS (See in particular Working Paper No. 1 dated November 10, 1969, section III, sub-section B, paragraph 21, Document A/CN.9/35, Annex V, paragraph 10 etc.). In the opinion expressed by several representatives, including the Soviet representative, the inclusion of the mentioned contracts into the sphere of application of the ULIS, could involve considerable complications. As the experience of the elaboration of the General conditions of deliveries of goods of the COMECON as well as of the ECE General Conditions on supply of machinery and equipment has shown, the regulation of such kind of operations cannot be covered by the framework of general provisions

pertaining to the purchase and sale. The subordination of the contracts of supply of complete works and installation to the rules of the ULIS, would have made it necessary to effect a considerable expansion and supplementing of the norms of this Law with the purpose to take into consideration the specific character of such operations. This in its turn would have resulted in the increase of the volume of the ULIS, which can hardly be regarded advisable.

Taking into consideration the aforesaid as well as the considerations expressed earlier in paragraphs I and paragraph (c) II of this paper, it is suggested to provide for in the ULIS that its norms shall apply to the contracts of supply of complete works and installations only by agreement of the contracting parties. The corresponding provision could be worded as follows:

"The present Law shall not apply to contracts of supply of the complete Works and installations, unless otherwise agreed upon by the parties in a contract".