

ANNEX III

COMMENTS BY THE REPRESENTATIVE OF THE UNITED KINGDOM ON ARTICLE 1  
OF ULIS

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1. Article 1 of the Uniform Law, which is concerned with defining its application, has already been the subject of certain discussions in the Commission which involve its possible amendment. For example the proposed revision of Article 2 set out in paragraph 19 of A/CN 9/35 would subsume the opening words of Article 1.1 and a revision of head (a) of paragraph 1.1 has also been proposed.

2. These discussions and certain other difficulties mentioned below suggest that it may be preferable to examine the question of application generally and not to limit study to the actual wording of Article 1 or any particular part of the Article. It is thought that the principles which should govern the application of the Law are the following:-

- (a) Its applicability should be defined as certainly as possible so it can easily be ascertained whether the Uniform Law does or does not apply to a particular contract.
- (b) Its applicability should be so defined that the courts of signatory states reach consistent decisions as to the cases in which it is or is not applicable.
- (c) Its application must be restricted so as to exclude purely domestic contracts.

3. The existing rules of the Law which regulate its application conform in general to these principles and are on the whole not unsatisfactory in relation to underlying basic principle. Nevertheless, it is clear that the actual formulation of the rules of the Uniform Law is not perfect and that improvement may be possible.

4. The following possible difficulties have been noted as likely to arise directly or indirectly in connection with the existing provisions of the Law governing its application:-

- (i) It is not clear whether the reference in Article 1.1 to the place of business of the parties is a reference to their principal places of business or to any place of business and, if the latter, whether it is necessary that the transaction must have been conducted between places of business in different contracting states before the Law applies automatically.
- (ii) The omission of the word "contracting" between "different" and "States" in Article 1.1 results in the Law being applicable in the courts of a Contracting State to contracts between persons who have no connection with Contracting States and will almost certainly result in courts in Contracting States applying the Law in cases where courts in non-contracting states would not. (This point has already been much discussed in the Commission).
- (iii) The insertion of the word "Contracting" between "different" and "States" by some adhering states, but not by all, would result in a similar inconsistency in the application of the law by the courts of different Contracting States. (This is only a variant of (ii) above.)
- (iv) There is an apparent divergence in the applicability of the Law in the courts of a state which has made a reservation under Article III of the Convention and one which has made a reservation under Article V (irrespective of the question whether the latter state has made a reservation under Article III). The courts of the former state will apply the Law in relation to a contract if eg the persons making it have places of business in the respective countries; the courts of the latter will only apply it if it is the chosen law by virtue of Article 4.
- (v) It is not altogether clear whether application by choice under Article 4 is intended to be limited to cases where the Law does not apply ipso facto because the parties do not have places of business in different States or different Contracting States or whether it is applicable by choice where it is inapplicable

automatically for other reasons eg because neither head (a) nor head (b) nor Head (c) of Article 1.1 is satisfied.

(vi) It is suggested that the Law does not apply automatically where a visiting trade mission buys goods in the seller's country ex works as the contract does not fall within head (a), (b) or (c) of Article 1.1

(vii) Doubts can arise as to the applicability of the Law where goods may be supplied at the seller's option either from stock held in the buyer's country or by shipment from abroad.

(viii) There may be some divergence in the effect of application by choice and automatic application by virtue of the difference in wording between the last three lines of Article 4 and Article 5.2

(ix) Head (a) of Article 1.1 (application where the contract "involves" the sale of goods which are the subject of contemplated international transport) is vague.

(x) Article 1.5 (substitution of habitual residence for place of business) should not apply in the case where a party has no place of business, but where he contracts in a non-commercial capacity ie as a private consumer.

Relationship of application by choice and ipso facto application

5. While this Note is concerned with the question of the automatic application of the Law by virtue of Article 1, it is important to keep constantly in mind the relative practical importance of application by choice and automatic application. Choice of law clauses are generally recognized in most legal systems and the parties to any major international contract almost invariably insert a choice of law clause in the contract. Accordingly, there may be something to be said for revising Article 1 in such a way as to incorporate what is now Article 4 so as to direct attention initially to application by

choice. The provisions relating to automatic application would then be seen as what they probably will turn out in practice to be, namely, purely ancillary.

6. It is thought, incidentally, that no restriction upon application by choice is feasible. Whatever provision might be made courts will clearly be faced with cases where the Law has been inappropriately chosen eg where the contract is not one of sale for the purposes of the Law in consequence of Article 6. Provisions to the effect that the Law is not to apply in such a situation are only likely to cause more difficulties for courts in determining what national law should be applied.

#### Automatic application

7. In principle the revised draft of Article 2 prepared by the Working Group at its last Session eradicates some of the difficulties about application arising from the inclusion or omission of the word "Contracting" in relation to the reference to States in Article 1.1. It also overcomes the anomaly flowing from reservations under Article V of the Convention. But it does not overcome all the other difficulties described above. It may be appropriate to consider the various criteria of Article 1 separately.

#### The "place of business" or "habitual residence" requirement

8. The introductory words of Article 1.1 require that before the law applies automatically to any contract the parties thereto shall have places of business ..... in the territories of different [Contracting] States. This is what may be termed a "master" requirement and is applicable in addition to the requirement that head (a), (b) or (c) of Article 1.1 must be satisfied. In the case of a party who "does not have a place of business" Article 1.2 states that "reference shall be made to the habitual residence" ie one is required to read Article 1.1 as though in relation to such a party it mentioned his habitual residence instead of his place of business.

9. This test is not well formulated and it may be difficult in practice to determine whether it is satisfied where a commercial concern has places of business in more than one country. As has been said above, it is not

clear in such a case whether Article 1.1 refers to any place of business or to the principal places of business or the relevant places of business ie to the particular establishment which negotiated the contract. Moreover many international concerns are today organised as a corporate group conducting activity in different countries through local subsidiaries. This may make it difficult for a local trader contracting with an international group to discover whether his contract will be subject to ULIS. For example, if the group is represented locally by a subsidiary which only carries on business locally, ULIS would not be applicable automatically to any contract made locally with the subsidiary by a local trader who only trades locally because both parties will have their places of business in the same state. But if the subsidiary is contracting as agent for its foreign principal (a fact which need not be revealed under common law rules which permit an agent to contract for an undisclosed principal) apparently the law will apply if head (a) or (c) of article 1.1 is satisfied. Again, if the local trader has a foreign branch it would appear the law may be applicable; and the same situation would prevail if the local representation of the international group was effected through a branch which had no independent corporate existence.

10. It has already been suggested that Article 1.2 is somewhat misconceived. The text of habitual residence, if it is to be applied, should apply not in relation to any party who has no place of business but in relation to any party who contracts in a private capacity. It is anomalous that the question whether ULIS applies to the purchase of a shirt should be answered differently when the customer has a steel manufacturing business and when he is an author.

11. In any event it seems wrong that a trader supplying eg a tourist with goods for delivery to a cruise ship should have to find out the habitual residence of the tourist in order to know whether the law will apply automatically to the contract.

12. To criticize is easy: to propose improvements is more difficult. But one obvious solution would be to drop the "place of business" and "residence" tests in relation to cases where contracts are effected by

negotiations across frontiers. The very fact that negotiations are conducted across frontiers suggests that the parties have some substantial Nexus with different states. It might be adequate to provide that the law applies automatically where offer and acceptance are effected in different contracting states. This is, of course, the text already applied by Article 1.1(b).

13. One might summarise these comments on the previous comments on application by choice in the form of a simple Article on the following lines:-

#### Article 1

1. This law shall apply

- (i) to the extent that is is appropriate to any contract if the parties thereto have chosen it as the law of the contract; and
- (ii) to any contract for the sale of goods (irrespective of the nationality or places of business of the parties) if the acts constituting the offer and the acceptance have been effected in the territories of different contracting states neither of which has adhered to the Convention governing this law subject to a reservation under Article V.

14. It would of course be necessary to repeat the provisions of paragraphs 4 and 5 of Article 1 and possibly take account of the last three lines of Article 4 in relating to an Article in this form.

15. It is open to question whether the law could be applicable by reference to private international law rules in the manner envisaged in the Working Group's revision of Article 2 if this formulation were accepted.

16. It is clear that any attempt to extend the scope of the draft Article set out above so as to extend its coverage to cover cases of the type now brought within the ambit of the law by heads (a) and (c) of Article 1.1 involves either:-

- (i) a very wide extension of the law eg to cover a contract between two local traders if it includes a sufficient foreign element; or

- (ii) the maintenance of a test based upon the place of business of the parties or a substitute test based upon nationality or some other criterion.

17. It must be emphasised that the test of "negotiation across frontiers" cover most normal international transactions and that there is nothing to stop the parties applying ULIS in any other case by express choice and it is only eg where both parties negotiate locally and both have their places of business/habitual residence in different contracting states that the law is at present applicable automatically by virtue of head (a). What case is there to consider then? In practical terms, it is the case where an agent is sent abroad to sell or where a buying mission goes out to purchase abroad or where a local branch is established in a foreign country. The problems involved in the branch situation have been discussed already.

18. The case of the non-business contract should, it is thought, be ignored. Tourists travelling abroad and others must be assumed normally to buy locally subject to the local domestic law. Most of their contracts will fail to satisfy head (a) or (c) of Article 1.1 in any event. The anomaly lies not here but in the fact that if eg they ask for their purchase to be sent direct to their home abroad they do under the Law as drafted import ULIS into the contract. Accordingly, it is thought that any additional case to be covered by any new draft should be limited to transactions between persons who are contracting commercially.

19. The UK delegation is prepared to consider any proposal for the extension of the automatic application of the law which fulfils the principles described at the beginning of this Note: but it is thought that it will be very difficult to produce any formulation extending the Law's ambit with certainty. The concept should, it is thought, be that the parties who effected their contract within the territory of a single contracting state each did so in the clear knowledge that their contract was of an international character in that it was a contract between business concerns in different contracting states. It might be possible to make this the only other alternative test and to abandon the tests of heads (a) and (c) of Article 1.1. Should it be desired to retain these

two provisions the UK would not think that it would be possible to improve further upon them: a revision of the English text of Article 1.1(a) (which the UK regard as an improvement) has already been agreed within the commission (A/CN.9/35, para. 40).

20. As to the proposal of the USSR to extend the Law to cover sales at exhibitions and fairs and sales from imported stocks, it is not thought that it would be possible to reproduce any reformulation of Article 1.1(a) which would accommodate their proposal without leaving one of the parties in doubt as to whether ULIS applied to the contract.

21. It is also thought that the formulation described above would extend the Law to cover sales of fish imported directly after taking which fall outside the heads (a), (b) and (c) of the existing Article 1, if the contract was negotiated "across frontiers".