

ANNEX IV

REPORT BY PROFESSOR S. MICHIDA, THE REPRESENTATIVE OF JAPAN, ON ARTICLE 2
OF THE UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS

1. Views expressed on Article 2 of ULIS of the Hague
Conference of 1964

The Uniform Law on the International Sale of Goods (hereinafter referred to as ULIS) annexed to the Hague Convention of 1964 provides in Article 1 (1) that ULIS shall apply to contracts of international sale of goods between "different States". Article 2 of ULIS provides that "rules of private international law shall be excluded for the purpose of the application of the present Law," Thus, ULIS will apply to sale of goods between a non-Contracting State and another non-Contracting State, if the court in a Contracting State has jurisdiction over the case. This rule of the universal application of the uniform law was subject to controversy before and during the Hague Diplomatic Conference of 1964. The Conference was held from April 2 to April 25, 1964. On April 23, the provision of Article 1 (1) was adopted at the plenary meeting by a equally-devided-vote of 11 states in favor, 11 states against and 2 states abstaining. (See, Ministry of Justice of the Netherlands, Diplomatic Conference on Unification of Law Governing the International Sale of Goods, the Hague, 2 - 25 April, 1964, Records and Documents of the Conference, Vol. I, p. 275)

2. Criticisms at the U.N.

Recommendation II (2), annexed to the Final Act of the Hague Diplomatic Conference, provides that in the event ULIS has not come into force by May 1, 1968, a special committee shall be established to "consider what further actions should be taken to promote the unification of law on the international sale of goods." ULIS did not come into force by 1968, nor was the special committee established. On the other hand, UNCITRAL established by the unanimous resolution of the General Assembly started its work in 1968, deciding that the international sale of goods was one of the priority topics. A number of States replied to the Secretary-General of the United Nations indicating its position with respect to ULIS. Some States expressed criticisms against Article 2 and Article 1 (1) of ULIS: United States of America (A/CN.9/11, Add. 1, 10 January 1969, p. 35); Czechoslovakia (A/CN.9/11, Add. 1, p. 5); Norway (A/CN.9/11, 26 November 1968, p. 22); Sweden (A/CN.9/11, Add. 5, 11 July 1969, pp. 2-3.) At the second session of UNCITRAL convened in March, 1969, the distinguished representative of the Union of Soviet Socialist Republics criticized Article 2 of ULIS (Report of the second session, A/7618, p. 76, para. 38) and the distinguished representative of the United States of America objected to the "coercive effect" of Articles 1 and 2 of ULIS (Report, supra, p. 77, para. 40).

3. Recommended revision

The second session of UNCITRAL established the Working Group on the International Sale of Goods, consisting of the following fourteen members: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America. At the first meeting of the Working Group held from 5 to 16 January, 1970, a Working Party consisting of the representatives of Ghana, Hungary, Norway and the United Kingdom recommended a revision of Article 2 of ULIS and the

majority of the Working Group approved the recommended revision (Report of the Working Group, A/CN.9/35, 27 January 1970, p. 8, paras. 19, 23). According to the recommended revision, the applicable law to international sale of goods between a non-Contracting State and a Contracting State or between a non-Contracting State and another non-Contracting State will be determined through the rules of private international law, and the uniform law on sale will not apply universally to all cases. (As to the details of applications, see the illustrations set forth in the Report by Working Party, A/CN.9/35, Annex III, pp. 1-3). At the third session of UNCITRAL of April, 1970, this recommendation on the revision of Article 2 of ULIS was approved in principle by most representatives (Draft Report of the third session, UNCITRAL/III/CRP/16/Add. 1, 28 April 1970, p. 4, para. 13).

4. Proposed revision (No. 1) by the Working Party

The third session of UNCITRAL established a Working Party consisting of the representatives of Argentina, India together with the four members of the Working Party formed at the first meeting of the Working Group. Although the Working Party of six representatives recommended deletion of the reservation under Article III of the Hague Convention and retention of the reservations under Article II of the Hague Convention, it recommended revision of Article 2 of ULIS in two parts.

The Working Party reported the following revision of Article 2 of ULIS:

"The present Law is applicable (a) irrespective of any rules of private international law when the place of business of each of the contracting parties is in the territory of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contracts; (b) when the rules of private international law indicate that

the applicable law is the law of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract." (Draft Report of the third Session, supra, pp. 3-4, para. 10).

5. Suggestions for modifications of the proposed revision (No. 1)

In the course of the discussion on the above proposed revision of Article 2 of ULIS, suggestions for modifications were made. One suggestion was to reverse the positions of Articles 1 and 2, together with the conversion of the present article 1 of ULIS into a definition of the term "international sale" (See, Draft Report of the third session, supra, p. 5, para. 14 (a)). Redrafting of paragraph (b) of the above proposed revision was also suggested in order to make it clear that it only applies to cases not covered by paragraph (a) (Draft Report of the third session, supra, p. 5, para. 14 (c)). Then, the Working Group consisting of fourteen states requested the representative of Japan to examine the revision of Article 2 of ULIS and to submit the result to the Secretary-General. It also asked the distinguished representatives of Mexico, Tunisia and the United States of America to co-operate as consultants in the work to be done by the representative of Japan. The distinguished representative of Mexico, Professor Barrera Graf, has indicated his opinion as consultant that both Articles 1 and 2 of ULIS should be revised as follows, without substantially changing the proposals made by the Working Party:

"Article 1. - The present Law shall apply to the contracts of sale of goods entered into by parties whose place of business are located in a territory of different Contracting States, which have accepted the law without submitting a reserve which excludes its application to the contract, in any one of the following cases:

- a) same
- b) same
- c) same
- 2. - same
- 3. - same
- 4. - same
- 5. - same

Article 2. - In the absence of the requisite set forth under paragraph first of the foregoing article, the present Law shall also apply when the provisions of private international law indicate that the applicable legislation is the one of a Contracting State which has adopted this Law without submitting a reserve which excludes its application to the contract."

6. Proposal (No. 1)

The proposed revision (No. 1) of the Working Party (4, supra) changes not only Article 2 but also Article 1 (1) of ULIS. Article 1 (1) speaks in terms of "different States" but does not speak of different "Contracting" States. Now the proposed revision limits the application of the uniform law to the sale between a Contracting State and another Contracting State, unless private international law indicates that the law applicable to the sale between a non-Contracting State and a Contracting State or between a non-Contracting State and another non-Contracting State is the law of a Contracting State. The proposed revision touches the substance of Article 1 (1) of ULIS. In this respect, there seems to be merit in the suggestions that the proposed revision of Article 2 of ULIS should be redrafted as the revision of Article 1 of ULIS.

It is, therefore, proposed that Article 1 of a Uniform Law on international sale of goods should be as follows:

"Article 1

(1) The present Law shall apply to contracts of international sale of goods entered into by parties whose places of business are in the territories of different Contracting States which have adopted the present Law without any reservation which would preclude its application to the contract, in each of the international sales defined in Article 2.

(2) When the place of business of any of the parties to a contract of international sale of goods is not in the territory of any Contracting State, the rules of private international law shall apply in determination of the applicable law. When the rules of private international law indicate that the law applicable to the contract is the law of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract, or when the law of such a Contracting State or the national legislation enacting the present Law, is chosen by the parties as the law applicable to the contract, the present Law shall apply to the contract.

(3) Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

(4) The application of the present Law shall not depend on the nationality of the parties.

(5) For the purpose of determining whether the parties have their places of business or habitual residence in "different Contracting States", any two or more States shall not be

considered to be "different Contracting States" if a valid declaration to that effect made under Article II of the Convention dated is in force in respect of them."

Notes: 1. The above article is proposed in order to indicate clearly in the text the cases in which the uniform law shall apply and the cases in which the uniform law shall not apply in terms of Contracting and non-Contracting States. A uniform law may be adopted by a number of states but not by all states in the near future. Under such circumstances the first legal concern for international traders is a list of Contracting States. If the place of business of the other party is not in the territory of a Contracting State, the inquiry whether the sale is one of "international sale" as defined in the present text of Article 1 (1) (a), (b) and (c) would have rather remote significance. In such a case, attention of the parties should be directed to the rules of private international law of the forum. Thus, article 1 of a uniform law should start, in conformity with the principles recommended by the Working Party and approved in principle by most of the representatives, with the formulation in terms of Contracting and non-Contracting States.

2. The term "the law of such a Contracting State" in the second sentence of paragraph (2) is intended to cover designations by the parties such as "the law applicable to this contract is the International Sale of Goods Act of 1974 (name of a Contracting State)". The term "the national legislation enacting the present Law" is intended to cover designations by the parties such as "the law applicable

to this contract is the law of (name of a Contracting State)". The case in which the parties have chosen the uniform law as the law applicable to the contract, stating that the law applicable to the contract is the Uniform Law on International Sale of Goods of 1974", is to be covered by Article 4 of ULIS. It is suggested that Article 4 of ULIS should be redrafted in view of the first two cases of the illustrations mentioned above.

3. The text of (3) follows article 1 (2) of ULIS, The text of (4) follows after Article 1 (3) of ULIS.

4. A new article 2 of a uniform law on sale should deal with the definition of "international sale" as distinguished from domestic sale of goods, taking into the provisions set forth in Article 1 (1), (a), (b) and (c), and (4) of ULIS.

5. The present text of Article 2 of ULIS is to be replaced by (1) and (2) above.

7. Proposed revision (No. 2) of the Working Party

The Working Party of six representatives established at the third session reported that the Convention providing for a uniform law should include the following:

"Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention or, having become a party to the Convention, at any time after the Convention has entered into force, declare, by a notification addressed to the Government of that, notwithstanding the provisions contained in article 2 of the Uniform Law, it will apply the Uniform Law to all contracts of sale of goods covered by the Uniform Law.

If the declaration has been made at the time of the deposit of its instrument of ratification of or accession to the present Convention, it shall be effective from the date from which the Convention enters into force for that State.

If the declaration has been made at any time after the Convention has entered into force, it shall be effective six months after the date of notification of such declaration." (Draft Report, supra, p. 4, para. 11)

The purpose of the proposal is to allow States to adhere to the Convention in the manner provided by the present text of Article 1 (1) and Article 2 of ULIS. It had been drafted in order to satisfy certain States wishing to apply ULIS universally.

8. Suggestions not to provide for the declaration

The proposed revision relating to Article 2 of ULIS by the Working Party was discussed by UNCITRAL on 14 and 15 April. Representatives of the Union of Soviet Socialist Republics, Norway, Czechoslovakia, Brazil, Romania, Tunisia, Ghana, Hungary and the Hague Conference (observer) expressed general supports for the proposed revision. (See, A/CN.9/C.1/SR.11, pp. 12-14, SR. 12, pp. 2-10)

The distinguished representative of France, Professor David, "proposed the deletion of article 2 and the retention of the present article 1", but stated if "the majority of the members of the Committee were to opt for a different solution, his delegation would not stand in the way of a unanimous decision." (A/CN.9/C.1/SR. 12, p. 5). The distinguished representative of Belgium, Mr. Jenard, stated that it would be "preferable either to preserve the existing system or to delete article 2 and allow each State the option of applying the system it considered most appropriate". The distinguished representative of Italy, Professor Bernini, "supported the views of the Belgian representative." (A/CN.9/C.1/SR. 11, p. 14). The discussions were mainly directed to the proposed revision (No. 1) of the Working Party and not specifically to the proposed declaration itself.

After the third session, the distinguished representative of Tunisia, Mr. Ben Messaouda, indicated his opinion as consultant in the work to be submitted by the representative of Japan, stating that the proposed declaration by the Working Party may become an obstacle in wide adoption of a uniform law on international sale of goods and therefore it would be better not to include the proposed declaration into the Convention.

9. Proposal (No. 2)

In substance, the proposed declaration reflects the principle of Article 1 (1) and Article 2 of ULIS. It had been drafted in order to satisfy certain states wishing to apply ULIS universally. It should be recalled, however, that some strong criticisms and oppositions against this principle have been expressed. The question is whether there will no longer be objection to this principle as contained in the proposal referred to in paragraph 7 above. The answer is not certain, but, in the light of the past controversies over the question, one may reasonably assume that there may be another wave of criticism against the proposed declaration.

Attention is directed to the legal advice given by Professor Kurt H. Nadelmann at Harvard Law School to the effect that the party to a contract of international sale of goods should insert in the contract a standard clause to exclude the application of ULIS as far as ULIS retains the principle of Article 1 (1) and Article 2. (See, Kurt H. Nadelmann, the Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia, 74 Yale L. J. 449 (1965).)

The possibility that the proposed declaration may become an obstacle to achieving a wider unification of laws of international sale of goods is twofold: one is at the level of States' adherence, the other is at the level of contracting process by the parties.

Furthermore, the possibility will largely depend upon the substance of the provisions of a uniform law on which the work of UNCITRAL has not made any substantial progress yet. If the provisions on delivery, inspection, cancellation, risk or other aspects turn out to be unsatisfactory to any State or any international trader, the proposed declaration may become another reason for non-adherence or for use of the exclusion clause on the uniform law.

On the other hand, the proposed declaration is based upon the power within the domain of State sovereignty. If a State decides to change its rules of private international law in order to effect the proposed declaration as the matter of domestic legislation, it could do so without having recourse to the Convention. On the other hand, if the Convention were to spell out this declaration, it might cause obstacles to a wider acceptance of the Convention on uniform law.

Thus, the following is proposed for the consideration of the Working Group:

- (1) the Working Group should discuss the above question very carefully;

(2) unless the Working Group can, beyond a reasonable doubt and not by a mere preponderance of opinions, prove that the Declaration will not cause obstacles to wider unification at the states' level and at the parties' level, the Working Group should decide that the proposed declaration shall not be included in the Convention;

(3) the decision referred to in the above paragraph may be postponed until UNCITRAL completes its work on the substantive parts of a uniform law such as delivery, inspection, cancellation, risk and other aspects, in order to have more accurate pictures of the acceptability of a uniform law and, in the meantime, UNCITRAL will continue its work on the assumption that the proposed declaration will not be included into the Convention.