

ANNEX V

REPORT BY PROFESSOR A.G. CUEST, THE REPRESENTATIVE OF THE UNITED KINGDOM,
ON ARTICLE 3 OF THE UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS

1. Article 3 of the Hague Uniform Law on the International Sale of Goods provides, in the English text -

"The parties to a contract of sale shall be free to exclude the application thereto of the present law either entirely or partially. Such exclusion may be express or implied."

and in the French text -

"Les parties à un contrat de vente sont libres d'exclure totalement ou partiellement l'application de la présente loi. Cet exclusion peut être expresse ou tacite."

2. This article clearly stems from the principle of autonomy of will of the parties, and raises two questions:

Should the parties be free to exclude the application of the Law by express agreement?

Should an implied exclusion be permitted?

Express exclusion

3. The following arguments have been advanced by the delegate of the Republic of Tunisia against the exclusion of the Law by express agreement:

(i) "Le principe de l'autonomie de la volonté des parties qui était admis en général dans le passé, a perdu ostensiblement de sa valeur ces derniers temps. Dans tous les systèmes économiques l'Etat intervient plus ou moins directement dans les relations des particuliers, car il ne peut plus se permettre de laisser les particuliers agir toujours comme ils l'entendent et bouleverser l'ordre public, économique et social établi."

(ii) "Les particuliers peuvent conclure en appliquant ledit article, une vente qui porte atteinte aux règles impératives d'ordre économique et financier de leurs Etats par exemple, en décidant que le contrat de vente impliquera un transfert de devises de la part du pays de l'acheteur sans contre partie en marchandises. Cela est possible d'après cet article et un Etat, surtout en voie de développement ne peut se permettre d'autoriser un transfert de devises sans contre partie en matière commerciale."

(iii) "Cet article 3 risque de permettre au contractant le plus fort d'imposer toujours sa volonté au plus faible, et de battre ainsi en brèche tout le système qui a été recherché par la loi uniforme pour rendre équitables et équilibrés les relations entre vendeur et acheteur."

(iv) "Du point de vue juridique la loi uniforme risque d'être affaiblie considérablement dans son application, si l'on maintient cet article 3, car la loi uniforme, comme son nom indique, cherche à appliquer entre États un règlement uniforme, dans les ventes internationales. L'article I de la Convention dispose même que chaque État s'engage à introduire la loi uniforme dans sa législation et ce, afin d'arriver rapidement à des règles uniformes entre tous les États et à un mode unique et général de réaliser les ventes et régler les litiges qui pourraient se produire. Or ledit article permet d'introduire, conformément à la volonté des parties, un nombre infini des lois qui les lient et chaque État est obligé de les admettre et de les appliquer, s'il ratifie ou adhère à la loi uniforme comprenant cet article."

4. The following arguments may be advanced in favour of the exclusion of the Law by express agreement:

(i) It is admitted that the principle of autonomy of the will of the parties is, at the present time, subject to considerable governmental control and regulation for reasons of social, economic and fiscal policy. The extent of such control varies from state to state, but intervention by the state is a distinct and separate issue from that of the express exclusion of the Law by the parties under Article 3. This article would not, either in its terms or intention, permit the parties to the contract of sale from complying with the mandatory or imperative rules of public policy (ordre public) imposed by the state. If a state wishes, e.g. for fiscal reasons, to prohibit the transfer of funds from that state, either absolutely or unless certain conditions are fulfilled, it can do so, and no agreement of the parties could prevent the courts of that state from giving effect to its own fiscal laws. It is questionable whether, in any event, intervention by the state generally affects the freedom of traders to negotiate upon many of the matters governed by the Uniform Law.

(ii) Objection has been taken in UNCITRAL by many delegates to the "imperative" nature of the Law, and to the fact that it may be applied as the law of the forum irrespective of the rules of conflict of laws and irrespective of any connection of the parties to the contract with that forum. Article 3 enables the parties to the contract to contract out of the Law if they wish to do so. This article may therefore be of considerable benefit to those

states who have not ratified, and do not intend to ratify, the Law, as their merchants can expressly exclude the applicability of the Law to their contracts.

(iii) The argument that the stronger party can thereby impose its will on the weaker party has in theory a certain validity, but in practice the substitution of the law of the stronger party's country will not necessarily lead to an unjust result. If, for example, it is agreed that the contract shall be subject to the law e.g. of France, that law (which by its very nature attempts to strike an equitable balance between the rights of the buyer and those of the seller) will not produce a result more favourable to the interests of the stronger party than those of the weaker party.

(iv) In the majority of the cases where the parties totally exclude the provisions of the Law, they will do so by mutual and free agreement and substitute therefore, for example, the rules of the ECE standard conditions of sale for that commodity, or the rules of a legal system with which each party is familiar and which he wishes to be applied.

(v) The Law would be an inflexible and over-rigid instrument if the parties could not exclude its provisions in part. What is appropriate law for a contract of sale of sardines is not necessarily appropriate for a contract of sale of coffee or jute. The Law lays down a paradigm set of rules, but the parties must be free to modify these in the light of the particular commodity sold and their particular circumstances.

(vi) Free negotiation is still the basis upon which international trade is conducted, although national laws may for reasons of public policy restrict the rights of traders to contract or restrict the terms on which they are allowed to contract. It is thought that to prohibit free negotiation over a wide part of the contractual field would be a revolutionary step requiring such stronger justification than that contained in the arguments in Paragraph 3 above. There is a risk that abolition of freedom of contract would frustrate the natural evolution of commercial practice to meet changing situations and new demands, and thereby impede the development of international trade. Although many codes, e.g. the English Sale of Goods Act 1893, appear at first sight to lay down imperative rules, in fact they lay down a series of presumptive rules which, in the sphere covered by the Uniform Law, apply in the absence of agreement by the parties to the contrary.

Implied exclusion

5. The delegate of the Republic of Tunisia considered that the arguments mentioned in Paragraph 3 of this memorandum apply equally to the exclusion of the Law by implication.

6. In favour of the exclusion of the law by implication, the following arguments may be advanced:

(i) The parties to the contract of sale would probably only insert an express clause excluding the provisions of the Law if they wished totally to exclude it. So far as partial exclusion is concerned, this is more likely to occur by implication, as where the parties introduce into their contract for their mutual benefit and convenience terms which are at variance with the provisions of the Law. If they could not thus derogate impliedly from the Law, no variation of this sort would be upheld, and (a) the parties might be bound to a contract of which the terms are substantially different from those of their agreement, and (b) their intentions as expressed in their agreement would be frustrated.

(ii) The contract might vary in its terms according to whether legal action was brought in a "Uniform law" forum or a "Non-uniform law" forum.

(iii) The Law makes very little provision for the well recognised contract of sale used in international trade, e.g. C.i.f., f.o.b., f.o.r., ex ship, franco quay, f.a.s., or free delivered contracts, each of which has its own recognised incidents and rules which are at variance sometimes with the Law. The Law also does not deal in any detail with the very common case of sales by documents, and payment of bills of exchange or banker's commercial credits. The rules applied generally in international transactions in these forms are not consistent with some of the provisions of the Law. Allowance must be made in the Law for the exclusion of its provisions by implications where these well-known terms or transactions are employed by the parties to the contract.

Conclusion

7. The Government of the Republic of Kenya is of the opinion that Article 3 should be retained in its present form as it gives parties to an international contract of sale absolute freedom to exclude the application of the Law either entirely or partially. This expression of opinion does not imply that the Government of Kenya concurs in all the arguments advanced in Paragraphs 4 and 6 of this memorandum.

8. The delegate of the United Kingdom of Great Britain and Northern Ireland is also of the opinion that Article 3 should be retained in its present form.

9. The delegate of the Republic of Tunisia is of the opinion that it would be preferable to delete this Article, or to modify it in such a manner that the parties would not have the right to modify the essential elements of the contract which would be set out explicitly in the Uniform Law.