

ANNEX VI

REPORT BY MR. STEIN ROGNLIEN, THE REPRESENTATIVE OF NORWAY, ON ARTICLES 5  
AND 7 OF THE UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS

Int. Sales to Consumers and Distinction between Civil and Commercial Sales  
(Articles 5 and 7 of ULIS)

1. A civil sale may be defined as a sale which is not a commercial sale. A commercial sale is - roughly indicated - a contract of sale between merchants or certain other businessmen in the exercise of their trade (commerce) or otherwise for business (commercial) purposes. A more accurate definition will depend partly on the delimitation of what types of businessmen are to be included in the term merchant or assimilated to merchants, partly on the business purposes to be covered. This is regulated differently in national laws. Some legal systems do not distinguish between commercial and civil sales.
2. Article 7 of ULIS provides that the Law applies to sales regardless of the commercial or civil character of the parties or of the contract.

The Tunc Commentary to this Article states:

"Of course the Law will in fact essentially apply to commercial sales, and it has been drafted with these fundamentally in view. There is no difficulty, however, in extending it to civil sales, and it seemed this had to be done to escape problems arising either from divergencies between legal systems as to the scope of the commercial field or, in some cases the absence of any distinction between the commercial or civil character of the sales or the parties."

During the diplomatic conference at the Hague in 1964 it was proposed to exclude from the scope of the Convention purchases "directly effected for private consumption", but this proposal was rejected (see Records and Documents of the Conference Volume I p. 33 and 48 as regards art. 11).

3. A consumer sale may be defined as a sale which contemplates the purchase of goods (primarily) for personal, family or household purposes. Cp. the definition in U.S.A. Uniform Commercial Code Section 2-318 (Alternative A).

This is a slightly more narrow concept than the term "civil sale". Partly because the expression "personal, family or household purposes" may be somewhat narrower than the term "non-commercial purposes". For instance, a sale may be civil when it contemplates purchases for the common benefit of the public in general, a community or any group other than the family. Likewise, some sales between merchants for the benefit of employees etc. may be deemed to be civil sales, but not consumer sales. Further, even sales for business purposes

between certain businessmen other than merchants may be deemed to be civil sales, but not consumer sales.

4. A consumer sale will usually be a national sale as distinct from an international sale. But sometimes a sale directly to a consumer for private consumption will be an international sale according to the definition in ULIS art. 1. For instance: When the consumer buyer orders or buys the goods during his visit abroad in the seller's country, either for delivery directly to his home country (para. 1(c)) or for contemplated carriage to that country after delivery (para. 1(a)); when the consumer buyer in his State orders the goods from a seller in another State by mail order or otherwise (para. 1(b)); when a foreign seller personally or by agents engages in business in the home State of the consumer, making offers directly to consumers as regards goods to be imported (para. 1(a)). Such sales may include almost everything from ordinary articles, such as magazines, books, cameras and cars, to special varieties in kind or quality, e.g. articles of art, antiques, drugs, medicines,

It is to be expected that international consumer sales will be of more practical significance in the future as a result of improved means of communication and various customs unions and extended economic communities.

5. The growth in modern society of production and trade entities, the integration of economic enterprises and the increasing efficiency in the methods of salesmanship have had a profound influence on the situation of consumers. The shortcomings of the individual consumer in economic power and regarding the techniques of organisation, commercial expertise and professional assistance have placed him in a weak negotiating position in relation to the professional seller. Because of the dominating position of the commercial profession in dealings with private consumers, there is often not the necessary balance between the parties to justify an application of the principle of the freedom of contract.

In many States the legislators have under consideration or have already enacted rules of law and other measures for the protection of consumers to ensure that the modern sales promotion techniques and commercial practices do not operate to the prejudice of the legitimate interests of consumers.

Of particular interest in relation to the law on sale are rules which limit the freedom of contract by invalidating or regulating contractual clauses that

may tend to weaken the right of the buyer to declare the contract avoided in cases where there is such a failure of the goods or of their delivery in time as amounts to a fundamental breach of the contract. This applies to the right itself as well as to the time limit for exercising the right to rely on a lack of conformity. Of practical interest also are rules concerning the cost of transportation of such carriage of the goods which is necessary to fulfil the obligations of the seller in connection with the buyer's remedies for lack of conformity, in particular the right to require repairs or redelivery.

Another category to be mentioned is rules on informative labelling of consumer goods.

For States which adopt protective rules to the benefit of consumers, such protection is a matter of public policy. Of course, the rules are primarily concerned with domestic sales, but it would seem difficult to dispense with the same protection in cases where a foreign seller is involved in a consumer sale most closely connected with the State of the consumer buyer, in particular where delivery is effected in that State. A distinction between domestic and foreign sellers in this respect might easily give possibilities for evasion of the national public policy and lead to distortion of the terms of trade.

6. Apart from provisions specifically referring to consumer protection, if any, there are in all legal systems various mandatory (imperative) rules generally applicable to contracts of sale, including purchases directly effected for private consumption.

One category of such rules relates primarily to the validity of the contract or of contractual clauses. They may be connected either with the formation or conclusion of the contract or with the content of the contract. As examples of the latter type could be mentioned contracts subject to moral reproach or otherwise inconsistent with public policy (ordre public), unconscionable or clearly unfair/contractual clauses, unfair prices and terms of trade.

Another category is police and safety regulations prescribing the trade and the standards to be observed in dealings with certain articles of goods. Some transactions in special fields are even dependent on licensing or similar regulations. Also to be mentioned are regulations with regard to

foreign trade and currency, export and import.

A third category relates to sale by instalments, regulating and limiting the right of the seller to recover goods in the case of non-payment of instalments.

For further information on mandatory rules I refer to the material in Annex I heretofore presented by Norway in response to para. 122 of doc. A/CN.9/35. It should be noted that the question as to what extent mandatory rules will apply as imperative rules, also in relation to international or foreign transactions, is a matter of public policy (ordre public) and must rest with national law, unless regulated by international conventions.

7. It seems to be an uncertain and disputable question to what extent the Uniform Law (ULIS) will override mandatory or regulatory rules of national (municipal) law.

ULIS is based on the principle of the freedom of contract, see Article 3. Is it to be concluded from this principle that the parties can derogate by contract not only from ULIS itself but also from mandatory rules which would otherwise be applied by the court seized with the case?

Further, to what extent, if at all, is ULIS to be supplemented by regulatory, imperative rules amounting to (international) public policy in the municipal law applied by the court seized?

8. Article 8 states that ULIS "in particular" "shall not, except as otherwise expressly provided therein, be concerned with ..., nor with the validity of the contract or of any of its provisions or of any usage".

Questions of the validity of the contract or contractual clauses are therefore left to municipal laws, except where ULIS expressly provides otherwise (see for instance art. 15 on requirements as to form and art. 34 on the remedies, i.e. that of nullity, based on lack of conformity of the goods).

It would seem clearly to follow from art. 8 that ULIS, with the exception mentioned, does not override mandatory rules in municipal law which relate to the validity of the contract or contractual clauses.

As far as I know, this interpretation is undisputed in respect of special contractual clauses regulating the rights and obligations of the parties on particular points.

However, as regards the basic sales contract itself, it has been asserted that one should distinguish between the strictly contractual validity and the validity of the provisions of ULIS applicable to the contract. The interpretation mentioned above is also here undisputed in respect of the traditional principles on validity or nullity in the general law on contracts, in particular rules concerning the formation of the contract. But the dissenting contention is that art. 8 could not imply that mandatory rules of national law, even those invalidating contravening sales contracts, should override the provisions of ULIS itself. Therefore, the view is asserted that provisions of national law regulating the validity of the content of a sales contract, cannot be applied if they deviate from the applicable provisions of ULIS. The extent to which this will be deemed to be the case, seems unclear. For instance, are rules prohibiting unfair prices and terms of trade in conflict with ULIS, *cp.* art. 57?

The distinction here mentioned may have some merits, but it has not been adopted in the text of ULIS and will depend on the interpretation by national courts. Neither has the contended distinction support in the preparatory papers to the conventions. On the contrary, in the Report of the Special Commission it is stated that ULIS "does not in any way effect the imperative rules of municipal law". The complete text of the relevant passage of the Report reads as follows (see Records and Documents of the Conference Volume II p. 30 column 2):

"The Draft, in short, is not concerned with the validity of the contract nor with that of the clauses which it contains considered separately. These are, once again, very delicate matters where the traditions of different States would have rendered difficult either the adoption of a uniform law, or, at the least, its uniform interpretation. It follows from this restriction that the Uniform Law does not in any way effect the imperative rules of municipal law; if municipal law has established certain police regulations concerning the sale of goods, for example poisons or pharmaceutical substances, these rules will be applicable in accordance with the law in force; similarly it will be for municipal law to provide the legal rules concerning the validity of certain clauses, as for instance exemption or partial exemption clauses which can be found especially in standard form contracts. Neither does the Draft relate to the validity of usages which can be invoked by the parties; a judge

therefore retains the possibility of setting aside as contrary to the public policy of his country a usage which may seem to him to disregard a fundamental right of one of the parties."

9. There also seem to be uncertainties connected with the question whether ULIS will override mandatory rules of national law which do not pertain to the validity of the sales contract, but which grant one of the parties other remedies not expressly excluded by ULIS. The question will only arise in respect of such national rules which themselves are applicable even to international transactions.

In this connection it is again referred to the statement in the Report of the Special Commission (cited under para. 8 supra), to the effect that ULIS does not in any way affect the imperative rules of municipal law.

Apart from art. 8 there are two special provisions in ULIS which expressly uphold mandatory provisions of national law within their particular and limited field of application. The first one is Article 4 regulating the case where ULIS has been chosen as the law of the contract by the parties. The other one is Article 5 para. 2 on sales by instalments.

Mandatory rules of national law may also be taken into consideration pursuant to article 74 on force majeure etc.

Should these special provisions be construed as being parts of a general principle? Or should it, on the contrary, be concluded e contrario that the implication is that other mandatory rules will be overridden by ULIS. The prevalent view seems to incline towards the latter opinion (despite the statement of the Special Commission cited supra).

10. In the opinion of the Norwegian delegate the provisions of Articles 5 (Para. 2) and 8 are not sufficient to protect the buyer in a consumer sale (see the definition under para. 3 supra). Firstly, there is, also outside the sphere of validity, a certain need for extending the protection given by imperative national law to sales within the scope of ULIS, e.g. the remedy of reduction of illegally unfair prices. The provision in art. 5 para. 2 is too narrow in scope. Secondly, in the sphere of validity, it is disputable and uncertain how far the exception of art. 8 goes. It is not clear, partly what provisions in national law are to be regarded as pertaining to validity in the sense of art. 8, partly whether all national rules on validity can

override contrary provisions of ULIS and, if not, what type of rules are of a yielding character and in what circumstances and according to what criteria there should be deemed to be a conflict between the imperative provision of national law and ULIS.

On the background of the shortcomings mentioned it seems necessary to insert a new provision in ULIS which unambiguously can give consumer buyers sufficient protection.

It has been objected to such suggested amendments that a general exception for national mandatory or imperative rules would undermine the uniformity of ULIS. Different legal systems follow differing approaches in deciding what rules are mandatory or imperative, and these concepts have no generally understood meaning (see doc. A/CN.9/35 para. 121). It would be difficult to find out and ascertain fully which municipal rules have such character and to what extent they would be applicable to the contract in question.

However, exceptions restricted to defined categories of consumer purchases seem to be of rather limited importance for the application of ULIS, which primarily is concerned with sales to other categories of buyers. The need for uniformity in consumer sales is hardly of vital importance for a law regulating international sales. On the other hand, consumer protection without distinction between domestic and foreign sellers may be a matter of imperative national public policy.

11. There may be three main alternatives for amending ULIS in order to secure consumer protection.

The most extreme approach would be to make a full and categorical exception in ULIS for consumer sales or all civil sales and thus leave the regulation of such sales totally to national (municipal) law, cp. para. 2 supra.

A second approach is to extend the exception in Article 5 para. 2 concerning sales by instalments to cover all applicable mandatory rules of national law for the protection of a consumer buyer. This is the principal alternative proposed in Annex II as Alternative A. Cp. para. 3 supra.

Such a provision would leave unaffected mandatory rules of national law for the protection of consumers, to the extent that such rules are

themselves applicable to the parties of the international transaction. But in other respects the sale would be regulated by ULIS. The questions of qualification etc. would be left to the court seized with the case and the law to be applied in that jurisdiction.

A third approach is to make certain provisions of ULIS itself mandatory, i.e. not subject to derogatory clauses in the contract. This approach, which would meet the objections mentioned under para. 10 supra, is contained in Annex II as a subsidiary Alternative B. (Another version might be to leave it optional for Contracting States to make certain provisions of ULIS mandatory.)

This alternative would be an exception to the principle of the freedom of contract and thus call for a corresponding exception in Article 3 (see the annexed draft). It would further call for a definition of the term "consumer sale", see the suggested draft of a new para. 2 in Article 7.

The provisions which would be mandatory under this Alternative B are those concerning the right of the consumer buyer to declare the contract avoided pursuant to Articles 26 para. 1, 27 para. 2, 43 and 44 para. 2. In order that such right may not be made illusory or curtailed, it is further proposed to make the time limit for notice in Article 39 para. 1 mandatory to the benefit of the consumer buyer. Finally it is suggested to insert as a new para. 3 in Article 41 a mandatory provision obligating the seller to pay the expenses connected with such transportation of the goods that is necessary to fulfil his obligations concerning remedies claimed by the buyer pursuant to para. 1 of the same article. This provision might be applicable in the case of avoidance (cp. art. 73 and 86), but would presumably be more practical in cases where redelivery or repairs are required (cp. art. 82). Cost of transportation which are not necessary to fulfil the relevant obligations of the seller, would not be covered, cp. Articles 92-95.



ANNEX I

UNCITRAL Memorandum

Mandatory rules in Norwegian law in the field of sale of goods.

(Examples given with reference to para. 122 of doc. A/CN.9/35).

I Important national rules of a mandatory or imperative character relate primarily to the validity of contract or contractual clauses and so far seem to be protected by ULIS Article 8.

(1) Many such rules are connected with the formation or the conclusion of the contract, including rules based on traditional grounds of invalidity. Here shall only be mentioned that the adoption of a mandatory period of reflexion in certain door-to-door sales is in consideration.

(2) Other rules relating primarily to the validity have connection with the content of the contract. As examples of such rules may be mentioned the following:

(a) The principle embodied in the old Norwegian Code of 1687 chapter 5-1-2 invalidating contracts inconsistent with "law and morality" (public policy). This principle will invalidate contracts regarded as immoral or otherwise reproached by the law because of the nature of the goods (e.g. sale of pornography), the purpose of the contract (e.g. perceptible criminal purpose) or the nature of the contract (e.g. unlimited alienation by a person of all his future acquisitions).

(b) The principle invalidating unconscionable or clearly unfair contractual clauses, expressly codified only in some statutes in particular fields (such as the Act of 17 February 1939 on Promissory Notes § 8) but recognized as a more general principle of law.

(c) The prohibition of unreasonable (unfair) prices and terms of trade in the Price Regulation Act of 26 June 1953 § 18, cp. § 59. This provision may lead either to invalidation of the contract, to reduction of the unlawful price or to cancellation (avoidance) of the contract.

(d) Under consideration is the adoption of mandatory rules invalidating contractual clauses which are aiming at depriving the consumer-buyer of his privileges under the national Sales Act to exercise all his statutory rights

(especially the right of cancellation) arising out of a lack of conformity.

II (1) Some transactions in special fields are dependent on licensing and similar regulations, making unlicensed sale illegal and possibly invalid. This applies i.a. to sale of certain poisonous substances, drugs, medicaments or pharmaceutical products, explosives, combustible or flammable substances, nuclear materials, weapons and war materials etc. Such regulations may lead to invalidation of an unlicensed sale or to a right of cancellation by the other party. They will therefore presumably only partly be upheld by ULIS Article 8.

(2) As an example of mandatory rules only partly protected by ULIS Article 8 may furthermore be referred to the Price Regulation Act, mentioned under part I 2 (c) supra.

III Regulations with regard to foreign trade and currency, export and import. Such regulations may have an impact on the validity of certain sales. They may also influence other aspects of the contractual relationships between sellers and buyers.

IV (1) In many fields there are police or safety regulations prescribing not only the trade but also the standards to be observed in dealing with certain articles of goods. As examples may be mentioned medical and pharmaceutical products and equipments, foodstuffs, electrical and other technical articles, motor vehicles, aircrafts, ships and other means of transport, explosives and combustible substances and nuclear industry etc.

(2) An Act of 24 May 1968 on Marking (Labelling) of Consumer Goods prohibits the sale of such goods which are not marked (with informative labelling) in accordance with the rules of the Act.

V The Act on Sale by Instalments, dated 21 July 1916, contains mandatory rules regulating and limiting the right of the seller to recover the goods in the case of non-payment of instalments.

VI It should be noted that the question as to what extent the mandatory rules mentioned will apply as imperative rules also in relation to international or foreign transactions is often not expressly settled in the statutes and accordingly is left to the discretion of the courts.

ANNEX II  
UNCITRAL  
Consumer sales

Amendments to ULIS proposed by the Norwegian delegate

Alternative A

Article 5 paragraph 2

shall read:

"The present Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of /consumer/ goods by that party /primarily/ for personal, family or household purposes."

Alternative B

The following provisions of ULIS shall read:

Article 3

"Except when otherwise expressly provided in the present Law, the parties to a contract of sale shall be free to exclude the application thereto of the Law, either entirely or partly. Such exclusion may be express or implied."

Article 7, new paragraph 2

"2. For the purposes of the present Law, the expression "consumer sale" means a sales contract which contemplates the purchase of /consumer/ goods by the contracting buyer /primarily/ for personal, family or household use."

Article 26 paragraph 1, new third full stop sentence

"In a consumer sale the buyer cannot in advance validly renounce the right to declare the contract avoided pursuant to this paragraph."

Article 27 paragraph 2, new third full stop sentence

"In a consumer sale the buyer cannot in advance validly renounce his right pursuant to this paragraph."

Article 39 paragraph 1, new fourth full stop sentence

"In a consumer sale the provisions of this paragraph cannot validly be derogated from in advance by contract to the detriment of the consumer buyer."

Article 41, new paragraph 3

"3. The seller shall /in a consumer sale/ pay / bear / the costs of transportation by such carriage of the goods /or their substitutes/ that is necessary to fulfil his obligations regarding remedies claimed by the buyer pursuant to paragraph 1 of this Article. In a consumer sale the provision of the present paragraph cannot validly by contract be derogated from in advance to the detriment of the consumer buyer."

Article 43, new third full stop sentence.

"In a consumer sale the buyer cannot in advance validly renounce the right to declare the contract avoided pursuant to this Article."

Article 44 paragraph 2, new third full stop sentence

"In a consumer sale the buyer cannot in advance validly renounce the right to declare the contract avoided pursuant to this paragraph."