

97th meeting (12 April 1972)

Article 5

Mr. HONNOLD (Secretary of the Commission) stated that the only differences between article 5 of the draft Convention and article 2 of the latest version of the revised Uniform Law on the International Sale of Goods (ULIS) related to article 5 (a) and (e). At its third session, the Working Group on Sales had decided to replace the subjective test in the earlier version of revised ULIS, which had been reproduced in article 5 (a), by a more objective one, as stated in paragraph 11 of the addendum to its report (A/CN.9/62/Add.1). With regard to article 5 (e), the Working Group on Prescription had decided to delete the phrase within brackets in article 2, paragraph 2 (b), of revised ULIS. Those seemed to be the two points on which the Commission should concentrate.

Mr. POLLARD (Guyana) expressed surprise that the argument in favour of adopting an objective test for the definition of international sales (see A/CN.9/70/Add.1, commentary on article 3 (9)) had had no effect on article 5 (a). For the sake of consistency, the same objective test should be applied in both cases.

Mr. MICHIDA (Japan) recalled that article 5 (a) had been drafted in September, before the Working Group on Sales decided to amend the text of revised ULIS. His delegation felt that the latest version of revised ULIS was an improvement and should be taken into account in the draft Convention. He proposed that the words "or similar use" should be deleted from the present text of article 5 (a) and that the rest of the text should be replaced by the formula evolved by the Working Group on Sales at its third session.

Mr. DEI-ANANG (Ghana) strongly supported the Japanese proposal and even suggested that the Commission should take a decision on the matter right away. If the text amended by the Working Group on Sales was accepted it should be included immediately in the draft Convention.

Mr. ROGNLIEN (Norway) had no objection to replacing the present text of article 5 (a) by the new wording adopted by the Working Group on Sales. With regard to article 5 (e), the Working Group on Prescription had deleted all reference to the registration of ships and aircraft, while the Working Group on Sales, feeling that it called for further consideration, had placed the reference in brackets. The Working Group on Prescription had felt that the reference was superfluous and was actually a hindrance since the scope of the Law should not be limited by the place where the ship or aircraft was registered or used. The reference to registration created an unnecessary uncertainty for the seller, who might have difficulty in ascertaining where the ship or aircraft would finally have to be registered. The phrasing of the two texts should be harmonized on that point also. It was for the Commission to take a decision on the matter.

Mr. MUDHO (Kenya) associated himself with the delegations which had expressed their preference for the latest version of revised ULIS. However, the problem still remained of the words that the Working Group on Sales had kept within brackets, implying that opinion had been divided. He would prefer to delete the words.

Mr. KHOO (Singapore) felt that there was a tendency to exaggerate the difference between subjective and objective tests. In his country, the question whether or not the parties knew what use would be made of the goods would be decided by the judge on the basis not only of the parties' own statements but also of the facts and objective circumstances of the transaction. His delegation had no strong preference for either formula for, in practice, they amounted to the same thing.

Mr. MICHIDA (Japan), supported by Mr. DEI-ANANG (Ghana), wanted the opposite of what the representative of Kenya wished; the phrase within brackets in article 2, paragraph 1 (a), of revised ULIS should be kept. The phrase had been left in brackets not because opinion in the Working Group on Sales had been divided but because there had been no time for a detailed consideration of the proposed text. It would be unfortunate to delete the phrase when no argument of substance had been put forward against it.

Mr. LEMONTEY (France) associated himself with the position taken by Japan and Ghana. The new definition drafted by the Working Group on Sales was preferable to the earlier version in so far as it introduced objective elements based on the content of the contract and the parties' objective behaviour.

Mr. POLLARD (Guyana) pointed out that the text of revised ULIS did not take account of cases where the seller might have other information than that given by the buyer. In order to remedy that omission, he proposed that in article 5 (a) the word "knows" should be replaced by the words "has reason to know". Such a formulation would preserve the objectivity which everyone wanted in that provision.

Mr. GUEIROS (Brazil) was in favour of the text drafted by the Working Group on Sales, including the passage in brackets.

Mr. COLOMBRES (Argentina) noted that there seemed to be a consensus in favour of replacing the present text of article 5 (a) by the latest version drafted by the Working Group on Sales. However, the text should be simplified, for example, by saying "unless it appears from the contract or the parties' behaviour...".

Mr. ELLICOTT (Australia) also wished to see the present article 5 (a) replaced by article 2, paragraph 1 (a), of revised ULIS. His delegation was not in favour of the Guyanese proposal that reference should be made to information from another source than the parties, for that would upset the balance of the present text which placed seller and buyer on an equal footing.

Article 5 (e) did not cover small boats as presently phrased. Although the exclusion of vessels subject to registration was perfectly justifiable, the exclusion of small boats was less so. If they were to be covered by the Law, it must be stated that the ships and vessels referred to in article 5 (e) were those above a certain tonnage, to be established. Otherwise the reference to registration contained in article 2, paragraph 2 (b), of revised ULIS must be kept.

Mr. LOEWE (Austria) felt that the new version drafted by the Working Group on Sales was an improvement. It would be unwise to add a reference to information from sources other than the parties, for the text concerned an evaluation prior to the application of a rule of law, which should remain as objective as possible.

With regard to article 5 (e), the provisions of national laws regulating the registration of vessels were far from uniform and it would be almost impossible to establish a tonnage or size above which ships or vessels would be excluded from the sphere of application of the Law. If a distinction was to be made between ships and vessels, on the one hand, and small boats, on the other, it would be better to exclude registered ships only, as in revised ULIS.

Mr. LASALVIA (Chile) pointed out a difficulty raised by the term "bought for a different use". It appeared that all the members of the Commission felt that any use other than personal or household was commercial. However, a buyer might acquire the goods not for his own personal use but as a gift for a third party. In order to avoid any ambiguity, the term "commercial use" should be substituted for "a different use".

Mr. MICHIDA (Japan) recalled that, in the text drafted by the Working Group on Sales, the reference to the registration of ships and aircraft was put in brackets. The question was highly complex and there had been lengthy discussions. In fact there were two systems of registration: national registration for maritime shipping purposes and local registration essentially for tax purposes. The members of the Working Group on Sales had felt that vessels subject only to the system of local registration should not be excluded from the sphere of application of the Law, but they had had great difficulty in finding a test which would make it possible to distinguish between the two kinds of registration. They had therefore felt that the point should be examined in greater detail.

The Working Group on Prescription had for its part decided to delete all reference to registration. The representatives of Australia and Austria wished to reintroduce it, for perfectly justified reasons, but their proposal would in practice raise problems of apparently insuperable complexity.

Mr. SZASZ (Hungary) said that article 5 (a) referred to a rather special case, and reflected above all a desire to be explicit. Nevertheless, he preferred the revised ULIS wording.

With regard to article 5 (e), he noted that in Hungary all ships, vessels and aircraft were indeed registered, but that the registration was different from

that practised in the United States, for example. The Commission might perhaps request experts to indicate the differences between the various types of registration.

Mr. JENARD (Belgium) said that, where sales to consumers were concerned, his delegation preferred the revised ULIS text, for the reasons already stated by the delegations of Austria and France. On the question of ships, vessels and aircraft, it shared the view of the Australian delegation, and thought that the Working Group might provide the necessary clarifications.

Mr. ELLICOTT (Australia) pointed out that registration was bound up with the right to fly a flag; it was the latter concept which was used in the Convention on the High Seas. Accordingly, he suggested that the phrase between brackets in revised ULIS should be supplemented by a reference to the flag.

Mr. DEI-ANANG (Ghana) said that his delegation had no strong views on the matter. Nevertheless, he suggested that the Commission should follow up the Hungarian suggestion, and consult the International Maritime Consultative Organization (IMCO).

The CHAIRMAN noted that a consensus had emerged in favour of replacing article 5 (a) of the draft Convention on prescription by article 2, paragraph 1 (a), of revised ULIS.

Moreover, there appeared to be a clear majority in favour of maintaining the passage between brackets in that provision of revised ULIS.

On the other hand, opinions differed on article 5 (e) of the draft Convention on prescription. He accordingly suggested that the question should be referred to the Working Group with a request that it should consult IMCO or any other appropriate organization.

Mr. LOEWE (Austria) said that his delegation understood the concern expressed by Australia and Ghana, countries whose shipping was essentially maritime. However, vessels engaged in inland navigation and aircraft did not have the right to a flag. For them, registration was comparable to the registration of real estate rights, and those vessels and aircraft were, in practice, movable property treated as fixed property. He was therefore afraid that IMCO might not be able

to give an authoritative opinion on the subject. Perhaps the International Civil Aviation Organization (ICAO) could be consulted with regard to aircraft. Where vessels used in inland navigation were concerned, since there was no international organization, the Economic Commission for Europe (ECE) could be contacted.

The point was one of detail, but nevertheless risked giving rise to litigation.

Mr. OGUNDERE (Nigeria) said that he, too, supported the wording used in article 2, paragraph 1 (a), of revised ULIS, including the passage between brackets. On the question of ships, vessels and aircraft, he suggested that the present wording of the draft Convention on prescription should be retained, for the sake of simplicity.

Mr. ROGNLIEN (Norway) said that in fact the question raised with regard to vessels was not a problem of shipping, but a problem of sales law, especially since vessels could be registered and treated as fixed property. The question was relatively unimportant, but clarity was necessary. At the time when a contract was concluded, the seller did not always know whether the vessel would be subject to registration. All doubts would be removed by deleting the words placed between brackets in article 2, paragraph 2 (b), of revised ULIS.

Mr. CHAFIK (Egypt) also supported the formula used in article 2, paragraph 1 (a), of revised ULIS, including the words between brackets. Nevertheless, even in that version, there was a drafting problem. The text referred to a purchase made by "an individual", in other words by a physical person. However, a legal entity could also buy and sell for purposes of consumption. The difficulty could be resolved simply by deleting the words "by an individual".

Mr. OLIVENCIA (Spain) said that where sales to consumers were concerned, his delegation, too, preferred the revised ULIS wording, whose adoption would also have the merit of bringing the two texts in line with each other. As to the phrases between brackets, more strictly objective criteria would be preferable. His delegation would, however, accept the inclusion of those phrases if the majority wished that to be done, but in that case it would like the wording of the provision improved as suggested by the delegation of Argentina.

The wording of article 2, paragraph 2 (b), of revised ULIS, gave rise to problems of interpretation, since it could refer to several types of registration, and even to the right to the flag. Moreover, the text did not make it clear whether the ships, vessels and aircraft in question had to be registered under the law of the buyer of the seller, of the place of the transaction or under any other law which might be applicable. His delegation felt that, if registration was referred to, objective criteria should be given. If not, it would be preferable to delete the words between brackets.

Mr. MICHIDA (Japan) proposed that the Secretariat should obtain information from the competent organizations on the differences between the various types of registration.

Mr. POLLARD (Guyana) said that the problem raised by article 2, paragraph 2 (b), of revised ULIS was not simply one of interpretation. The sale of registered aircraft was governed by the Geneva Convention of 1948. Perhaps the Secretariat could obtain information on that point.

Mr. ELLICOTT (Australia) said he was afraid the Commission might not arrive at a satisfactory wording, and proposed that it should keep to the present wording of article 5 (e) of the draft Convention on prescription.

The CHAIRMAN pointed out that the Australian delegation, which had raised the problem of article 2, paragraph 2 (b), of revised ULIS, had by its last statement removed that problem. He suggested that the Commission should adopt that provision, without the words appearing between brackets. In any case, the question was of secondary importance.

Mr. MANTILLA-MOLINA (Mexico) said that his delegation, too, preferred article 2, paragraph 1 (a), of revised ULIS to article 5 (a) of the draft Convention on prescription.

With regard to article 5 (e), the problem was indeed solved by the Australian representative's last statement. As the latter had said, the régime governing ships was different from that for other movable property. It would accordingly be wise to exclude them from the sphere of application of a Uniform Law on prescription.

Mr. LILAR (Belgium) said that the problem of article 5 (e), which was of relatively minor importance, could have only one solution, namely that suggested by the Chairman: the wording of article 2, paragraph 2 (b), of revised ULIS should be adopted, without the words appearing between brackets. Otherwise, the Commission might become bogged down. Not only was the concept of registration interpreted differently in different countries; even the definition of a "ship" could give rise to endless discussion, since a ship which was neither fully movable nor fully immovable property, presented features of both.

The CHAIRMAN suggested that the Commission should replace article 5 (e) of the draft Convention on prescription by article 2, paragraph 2 (b), of revised ULIS, omitting the words between brackets.

Mr. POLLARD (Guyana) asked for it to be indicated in the summary record of the meeting that his delegation was not in favour of the deletion of the words between brackets since that might give rise to a conflict between the Uniform Law on prescription and the 1948 Geneva Convention.

Mr. ROGNLIEN (Norway) expressed regret at the position taken by the delegation of Guyana and pointed out that, if the words between brackets were deleted, all sales of vessels and aircraft of any kind would be excluded from the Law's application; there would then be no possibility of conflict with other instruments.

Mr. SMIT (United States of America) proposed that, in article 5 (f), the words "of gas and" should be added before "of electricity".

Mr. GUEST (United Kingdom) associated himself with the proposal made by the representative of the United States and pointed out that, at the time when the Uniform Law had been drafted at The Hague, sales of natural gas had been less important than they now were.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) supported the United States proposal.

Mr. MUDHO (Kenya) also supported that proposal, and he suggested that article 5 (f) should include a reference to petroleum.



Mr. ELLICOTT (Australia) said that he wished to know whether the intention was to exclude from the scope of the Law all sales of gas, including for example sales of gas in cylinders, or merely sales by pipeline between one country and another.

Mr. SMIT (United States of America) replied that he had in mind only sales in large quantities.

Mr. MANTILLA-MOLINA (Mexico) asked whether the term "gas" was intended to cover only butane or hydrocarbons. In its scientific sense, the word had a wider meaning, and could, for example, refer to oxygen. A more specific reference was desirable.

Mr. ROGNLIEN (Norway) associated himself with the requests for clarification made by the representatives of Australia and Mexico. He thought it would be going too far to exclude sales of gas in cylinders from the scope of the Law. He proposed that article 5 (f) should be simply deleted since electricity could not be described as "goods" in any event.

Mr. DEI-ANANG (Ghana) said that the proposed deletion had rather taken the Commission by surprise; however, his delegation was in principle in favour of retaining article 5 (f).

Mr. LEMONTEY (France) said that he shared the view of the representative of Norway. In fact, electricity had been excluded from the Convention on Sales for a very definite reason, namely, that the sale of electricity was covered by special clauses. Nevertheless, that argument was no longer valid for questions of prescription: article 5 (f) should therefore be deleted, and it should be left to the courts to decide whether certain forms of energy, such as electricity, were or were not goods.

Mr. SMIT (United States of America) supported the proposal made by the representative of Norway.

Mr. LASALVIA (Chile) said that he had no position of principle on the matter; nevertheless, he thought that it would be advisable to maintain the exclusion of electricity, which required a special mode of transport.

Mr. OGUNDERE (Nigeria) reminded the Commission that it was essential to harmonize the conventions on prescription and on sales. Article 5 (f) should therefore be retained: electricity could be sold on the same basis as other products, and the Convention on Prescription, by omitting any reference to it, might create difficulties both in law and in business.

Mr. SZASZ (Hungary) said that the question of deciding whether to exclude electricity, gas and possibly other products was connected with the question of their delivery. The exclusion of such products should therefore be linked to the manner in which they were supplied.

Mr. DEI-ANANG (Ghana) supported the suggestion made by the representative of Hungary, and proposed that the wording of article 5 (f) should be amended specifically to exclude petroleum and natural gas, in addition to electricity, if they were sold through pipelines or in bulk.

Mr. MICHIDA (Japan) pointed out that, in contrast to electricity, petroleum was certainly tangible: for that reason, he was against mentioning petroleum in article 5 (f).

Mr. LOEWE (Austria) said that the 1964 Conference had decided to exclude electricity not because it was subject to special contracts - since that would have led to other products being excluded also - but because electricity had not been considered to be goods. In his opinion, the physical characteristics or the special mode of transport of certain products should not lead to a multiplicity of exclusions; it would therefore be advisable to retain article 5 (f) as it stood.

Mr. GUEIROS (Brazil) said that he supported the representative of Austria.

Mr. SMIT (United States of America) said that, in his view, article 5 (f) should be deleted or, if it were kept, it should mention gas also.

Mr. HONNOLD (Secretary of the Commission) thought that the mere deletion of article 5 (f) would create a problem of interpretation. Electricity was excluded specifically from the scope of ULIS; since the provisions of ULIS and of the draft Convention were similar in other respects, the deletion of this exclusion from the draft Convention might lead to the conclusion that electricity was to be governed, whereas the opposite was intended.

The CHAIRMAN observed that there seemed to be no agreement on article 5 (f). Some members favoured deleting it, others wished to retain it unchanged, while still others proposed that a specific reference should be made to gas and possibly other products as well as to electricity. He requested the members of the Commission to indicate which solution they favoured by raising their hands as he put the alternatives to them.

Mr. OGUNDERE (Nigeria) said that, according to its mandate, the Commission should make every effort to take its decisions on the basis of a consensus; a vote by a show of hands on article 5 (f) would establish an unfortunate precedent, since that procedure could equally well be applied to all the articles of the draft. He suggested that the Commission should keep to its usual method of consultation and reflection so that, where there was disagreement, a decision acceptable to all could be reached. It was for the majority to persuade the sponsor of a draft amendment, if necessary, to withdraw it if it was not favourably received.

The CHAIRMAN said that the point of order raised by the representative of Nigeria was very pertinent. He had wished merely to determine how much support there was for the various views before referring the question to the Working Group.

Mr. ELLICOTT (Australia) stressed the importance of reaching a consensus. If that was to be achieved it seemed that a clear distinction should be made between, first, cases where electricity, oil or natural gas were supplied regularly through a special mode of transport, by cable or pipeline or any similar mode of transport and, secondly, cases where those same products could be considered as goods when they were sold in the form of electric batteries or in containers of a specific capacity.

Mr. ROGNLIEN (Norway), referring to the observations made by the representative of Nigeria, said that he thought that during a debate it might not always be a good procedure to require each delegation to set out its position, and that sometimes it was desirable, if only to expedite the work, to ask members to indicate their views by a show of hands.

The suggestion made by the representative of Australia was interesting, but it should be submitted in a more detailed form so as to avoid any ambiguity, it was possible to imagine various products that might be transported by cable or by pipeline.

Mr. SMIT (United States of America) announced that, in a spirit of conciliation, he withdrew his draft amendment.

Mr. NESTOR (Romania) said that he had interpreted the Chairman's initiative in requesting members to express their views by a show of hands, as a way of reaching a consensus.

Although like the representative of France he personally would prefer that article 5 (f) should be deleted, in a spirit of compromise, he would not oppose its retention. At the same time, he wondered whether the means of transporting a product was of any importance from the legal point of view as far as prescription was concerned. Rules of prescription should be applicable as soon as the parties were bound by mutual obligations, and there was therefore no reason to exclude from their application specific items, even ships. In articles 5 (b) and 5 (c), which referred to sales by auction and on execution, the position was different, since in that case it was a matter of taking special legal action. Another special case was that referred to in article 6 of the draft Convention, which, in excluding from the scope of the law claims based upon liability for nuclear damage caused by goods sold, was based on the fact that, as far as prescription was concerned, no satisfactory solution could be proposed as long as it was not known how long the effects of such damage might persist.

Mr. OGUNDERE (Nigeria) pointed out that the subamendment he had proposed had become pointless since the draft amendments to which it referred had been withdrawn.

The CHAIRMAN said that retaining the present article 5 (f) unchanged seemed to be a generally acceptable compromise solution. A consensus had therefore been reached to the effect that the text of article 5 should be replaced by that of article 2 of revised ULIS (A/CN.9/62/Add.2), the words in brackets in paragraph 1 (a) being retained and the words in brackets in paragraph 2 (b) being deleted.

Mr. ROGNLIEN (Norway) observed that the consensus which the Commission had just reached constituted a decision of substance and that the task of the Working Group would be to consider matters of drafting, taking into account, in particular, the suggestions made by the representatives of Egypt and Spain.