UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/11/Add.3
18 April 1969
ENGLISH
ORIGINAL: ENGLISH/FRENCH/
SPANISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Second session
Geneva, 3 March 1969
Item 4 (a) of the agenda

REPLIES AND STUDIES BY STATES CONCERNING THE HAGUE CONVENTIONS OF 1964

Note by the Secretary-General

Addendum

CONTENTS

I. INTRODUCTION

In his notes A/CN.9/11 and Add.1 and 2 the Secretary-General reproduced the substantive portions of thirty-four replies and studies received from Governments of States Members of the United Nations or members of the specialized agencies pursuant to his communication of 3 May 1968 concerning The Hague Conventions of 1964 (i.e., the Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods). The present addendum reproduces the substantive portions of the additional replies and studies received since the circulation of document A/CN.9/11/Add.2.

II. TEXT OF THE REPLIES AND STUDIES BY STATES

ARGENTINA*

[Original: Spanish]
3 April 1969

The Argentine Government wishes to state that it is at present contemplating a further general revision of Argentine trade law and that it will take the Hague Conventions into account in that revision.

AUSTRIA

Additional comments

[Original: English]
5 March 1969

The fact that Austria, for the time being, does not intend to sign and ratify the two 1964 Hague Conventions on the Sale of Goods does not imply that either these Conventions or the Uniform Laws contain provisions which would be totally unacceptable for Austria. However, owing to certain deficiencies already mentioned in the observations presented by Austria (A/CN.9/11), Austria is not in a position to accede to the Conventions unless a number of States with which Austria is

* Member of the Commission.

maintaining close and friendly relations, become parties to the Conventions without reservations (including reservations in respect of the field of application). It is, therefore, by no means excluded, that Austria may sign and ratify the Conventions at a later stage.

GREECE

[Original: French]
5 March 1969

Greece proposes to ratify the Convention relating to a Uniform Law on the International Sale of Goods, done at The Hague in 1964.

HUNGARY*

/Original: English/
4 March 1969

I.

MECHANICAL APPLICATION OF THE UNIFORM LAWS[1/]

The forum as a determining factor

1. If the two Uniform Laws enter into force, they shall be applicable also for a party whose State has not ratified them; by way of exception it may even occur that if the State of neither party has ratified the two Conventions, the Uniform Laws shall nevertheless apply to their case. In respect of ratification, therefore, it has also to be kept in mind that the absence of ratification on the part of Hungary does not preclude the applicability of the Laws in the case of Hungarian parties.

We have such a contingency when the rules of private international law require the application of the law of a country which has ratified the Hague Conventions and in which the contract of sale comes under article 1 of the two Uniform Laws. There is nothing specific to this.

The other contingency, which is of more relevance to the matter under discussion, is the following. Article 2 of ULIS and paragraph 9 of article 1 of Formation provide that rules of private international law shall be excluded for the purpose of their application, subject to any of their provisions to the contrary. Ratification or accession makes the two Laws part of the internal legislation of the State concerned. If therefore a contract of sale which actually belongs in the sphere of application of the two Laws is referred to a court whose State is a Party to the Hague Conventions, this court will judge according to these Laws also when the rules of private international law would require the application of the law of a country which has not ratified the Hague Conventions. If thus a legal action is brought in X-State which is a Party

---

* Member of the Commission.

1/ The Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods (hereafter referred to as "ULIS") and to a Uniform Law on the Formation of Contracts for the International Sale of Goods (hereafter referred to as "Formation" for the purpose of this study).

to the Conventions, and the rules of private international law would require the application of Y-State which has not ratified the Conventions, ULIS or Formation shall apply as the domestic law of X-State, for in such a case the rules of private international law are inapplicable in X-State. It follows from this, however, that the two Uniform Laws apply according to whether or not the State of the forum is a Party to the two Conventions, regardless of the fact that the States of the parties to the dispute have perhaps not acceded to the Conventions.

There is only one exception to this, namely where the country of the forum has made a declaration under article III of both Conventions, thereby restricting the application of the two Laws to the case where the countries of both parties are "Contracting States". It must be stressed, however, that even this declaration is effective only when made by the State of the forum. If X-State made it but the legal action takes place in Y-State, which has not exercised its right to make a declaration under article III, then in spite of the reservation of X-State the Laws will apply to the case of the party from X-State even if the State of the other litigant is not a Party to the Conventions. Besides, article III limits the unification of laws and reduces the resulting advantages. So it is hardly worth while to make such a reservation.

Exclusion of the rules of private international law

2. This solution was a very controversial one. The other feasible fundamental solution, which had still been the basis of the 1956 draft, would have been that the two Uniform Laws should apply where the rules of private international law required the forum to apply the law of a State Party to the Conventions. Arguments were advanced for and against both solutions. Finally it was found that the exclusion of private international law would lead to a simpler solution, provide greater safety, and guarantee the advantage derived from the fact that the forum applies no foreign substantive law but a kind of its own law which is equally available to both parties.

Nevertheless this solution is not faultless either. It just misses the aim for the parties to know in advance which law shall apply to their contract. There is no way of knowing beforehand which party will bring an action, nor can i always be known whether he can do so in a third country.

/

In these circumstances, when a large number, but far from a strong majority, of States have acceded to the Conventions, it will occur relatively often that the applicable law is unpredictable, that the Uniform Laws are not applied to the contract of a party from a State Party to the Conventions. As to whether the applicable law is predictable or not, therefore, in certain situations a greater degree of security can be derived from international unification of the conflict of laws than from that of the substantive law set afoot in the way chosen by ULIS and Formation.

3. A further problem concerning the above solution is that, from the point of view of the applicability of the two Uniform Laws, the Convention of 15 June 1955 (Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels) becomes irrelevant because the rules of private international laws are inapplicable. Participants in the 1964 Hague Conference even protested against the just mentioned rule; the concessions made to them will be dealt with in the next paragraph, while the reasons for and against the protest will be discussed in paragraphs 4, 6 and 7. Instead of this Convention, however, we have to face the question of the Convention of 15 April 1958 (Convention sur la compétence du for contractuel en cas de vente à caractère international d'objets mobiliers corporels), under which the parties to a contract of sale can agree on an exclusive jurisdiction - e.g., the parties have designated X-State as the place of the court, but one of them applies to his own court on grounds that his State is a Party to the Conventions, and these exclude the application of the rules of international law, thus even the agreement concerning the forum. Here the question becomes one of qualification, namely whether the 1958 Convention contains rules of "private" or "procedural" international law. If according to the forum it is unequivocally a procedural question of international law, then there is nothing to prevent ULIS from being applicable. It may be, however, that a State makes no distinction between private and procedural international law. It may be also that the question is complicated by the issue of jurisdiction as a problem preliminary to the determination of every kind of competence. And there are States where it is a problem of private international law (e.g., common law and French law). Where such is the case, it may occur that jurisdiction cannot be determined by means of private international law - that is, not even by an

agreement on the forum. Where there is thus no distinction between private and procedural international law, or where the question of jurisdiction is a problem of private international law, there the arising situation is the same as in the conflict between the convention of conflict of laws and the Hague Conventions (paragraph 3): the sources of law designating and ruling out the forum have equal force.

Where, on the other hand, the 1958 Convention is applicable, there it becomes also of practical significance. If, in fact, the party to a contract of sale wants to create security to the effect that the two Uniform Laws will apply to his contract, he can obtain this - in consequence of the above explanation - only if either he stipulates the application of the two Laws or he agrees on a forum whose State is a Party to the Conventions. In the latter case, however, he shall enjoy security only if both his State and the State of the other party have ratified the 1958 Convention: only this can guarantee that the agreement on the forum shall become absolutely effective. It should be noted, however, that if ULIS applies on the basis of an agreement between the parties, then it shall do so not as the domestic law of the forum but as a convention on conflict of laws, and therefore the ULIS provisions which would conflict with the cogent rules of the law applicable for lack of agreement shall not apply. If, on the other hand, the parties have designated only a forum, then ULIS will apply as the forum's own domestic law prohibiting the application of the rules of private international law, that is regardless of the cogent rules of the otherwise applicable law. That is why it is more expedient to agree upon the forum; that is why the 1958 Convention becomes timely.

4. The Hague Conventions have reckoned with the opposition of the countries which had already endorsed the 1955 Convention. Under article IV of the Hague Conventions any State may make a declaration stating that the two Laws can be applied only if their application is required by the convention on conflict of laws. In this case the application of the two Uniform Laws is dependent not on + lex fori but on whether the law applicable to the contract in accordance with + 1955 Convention will be one of a State Party to the two Conventions. Conseque the uncertain lex fori shall be replaced by a law known in advance, designated the 1955 Convention. Yet this solution has its drawbacks as well:

/...

(a) The definition of sale given by the 1955 Convention does not tally with that given by ULIS. The applicable law has therefore to be considered twice. It may be that the contract is governed by the 1955 Convention, while the conflict rule points to a country in which ULIS is the law but is nevertheless inapplicable because the contract does not come under article 1 of ULIS;

(b) Inclusion of the 1955 Convention can, on account of its article 4, lead to a situation where a part of the contract shall be governed by ULIS and another part by a different law. If ULIS is the seller's law but is not the law of the place of performance, then the law applicable to disputes regarding examination, objection, delivery, etc. is that of the place of performance and not that provided for by ULIS;

(c) If a State ratifies the two Uniform Laws, then in accordance with the 1955 Convention they shall be applicable to export, but not to import unless the trade partner's State is also a Party to the two Conventions. That is to say, the accidentalness of the forum shall have no consequence, but the law to be applied to import shall often be different from that applicable to export;

(d) In case of the interposition of the 1955 Convention the two Uniform Laws often must be applied by a forum for which the two Laws constitute foreign law. Still it can hardly be doubted that the forum knows its own law better than the foreign law.

Legal gap, interpretation and self-regulatory character

5. By excluding the application of the rules of private international law the legislator aims, among other things, to take out a link from the process of determining the applicable law, to ensure that decision-making is a direct product of the lex fori and not one of the rules of conflict of the lex fori. But another aim is to give effect to the self-regulatory character: to let ULIS be a self-sufficient source of law. This is a very honourable and even indispensable ambition, because if the law is incorporated into the legislations of the particular States, it may occur that the legal system that has incorporated it will slowly, by way of practice, assimilate and even absorb it, so that the

Uniform Law ceases to be uniform; this kind of assimilation effect is well known in the receptions somewhat similar to the case just discussed ("interprètation belge du Code Civil"). This peril is here much greater than, e.g., in the case of railway switches and transport by rail. At the same time the ambition for self-regulatory character has something of Justinian's and Napoleon's efforts to stop the course of time, to obstruct the evolution of law. It is an extremely difficult proposition to implant an internationally elaborated law in a number of legal systems and yet to preserve its uniform character.

The problem is of importance primarily in respect of filling legal gaps and interpreting laws in general. An express rule exists only for gap-filling, and that in ULIS alone; but Formation contains no such rule. According to article 17 of ULIS, in case of a legal gap the relevant questions shall be settled in conformity with the general principles underlying ULIS.

This provision was much criticized, and a number of proposals were moved to solve the problem.

The filling of the gap and the act of interpretation can in principle take place in one of three ways:

(a) By means of uniform laws;

(b) On the basis of the applicable law resulting from the rules of private international law;

(c) Since the Uniform Laws become the domestic law of the forum, on the basis of the lex fori.

The solution based on conflict of laws - with the exception of the three special contingencies - is ruled out by both Uniform Laws. Furthermore, for the event of legal gaps, ULIS excludes also the lex fori. Neither law has provisions for legal interpretation, they provide only for the interpretation of the contract declaration, and Formation has no provision for the event of legal gaps either.

The consequences of this solution are not altogether fortunate:

(a) It may occur that in one and the same case there come into question the uniform law and the lex fori as well as the law required by the conflict rule. However, this is exceptional; the exclusion of the conflict rule is wholly warranted in respect of gap-filling and interpretation;

/

(b) But private international law can step in by different means, too. If the law provides no answer to a question, the said three variants may develop as follows:

(aa) The issue does not belong in the scope of legal regulation, and so private international law shall apply;

(bb) There is a legal gap, so article 17 of ULIS shall apply; or

(cc) There is a problem of interpretation; in this case, for want of a relevant provision, there is hardly any other expedient than interpretation in accordance with the legal conception of the forum, because the rules of private international law are inapplicable and an express provision exists only for gap-filling.

The boundary lines are everywhere uncertain. This matter is outside the scope of legal regulation and is expressly excluded by law (e.g., property rights, validity of the contract; see ULIS, article 8). But what if we see from the conference records that the matter of "public offer" is deliberately left open by Formation? (See paragraph 11 (a)). Does the "public offer" fall outside the scope of ULIS regulation and is it governed by private international law? Or is it a legal gap? Or is it just an interpretation of a provision concerning the "due definition" of the offer? In certain cases ULIS guarantees damages, but of course it cannot regulate the entire legislation relating to damages. Is contributory negligence a matter outside the scope of ULIS, or is it a legal gap or maybe a matter of interpretation? The same question may be raised in respect of Formation in connexion with the time and place of the conclusion of the contract; it may be asked further whether - beyond the scope of article 49 - prescription is outside the scope of regulation by ULIS or whether it is a legal gap. It is a certain consolation in this complex of problems that the forum shall qualify the situations of this kind and will certainly try to do it so as to make its own legal conception prevail, that is, it will strive to see a problem of interpretation even where one of the parties contests a legal gap or claims that the matter does not belong in the scope of regulation under ULIS. By all means it would have been expedient to do everything possible to make the solution as uniform as possible for the three hardly delimitable types of contingencies. We ought to regard as being outside the scope of legal regulation (as including

private international law, that is) only what is explicitly excluded by the law itself from its scope of regulation; and a uniform solution should have been found to gap-filling and interpretation. Unless the legislator goes this way he will in vain prohibit the rules of private international law from being applied to filling a legal gap: the existence or non-existence of a legal gap remains an essential point to be cleared in any legal dispute.

(c) We have already explained that the gaps of ULIS can hardly be filled on the basis of its own general principles that do not exist. But even if there existed such general principles, the forum's own legal conception would have a part also in their interpretation. In our view the difference of gap-filling according to the "general principles " of ULIS and the forum's own legal conception would be only that in the first case the legal conception of the forum and in the second the law of the forum will apply, and this is practically no great difference. Therefore this detracts from the practical significance of our objection under paragraph (b).

All this leads us to the conclusion that ULIS will not succeed in becoming self-regulatory. The result of both Laws is that what will be applicable, in interpretation and ultimately practically in gap-filling as well, is not the relevant norm of conflict of laws, but the lex fori or at least the legal conception of the forum. In addition to the foregoing we refer in this connexion also to such a question of interpretation par excellence - though this is rather a matter of contract interpretation - as the consideration of the binding character of the offer (see paragraph 11 (b)), the question of the implied exclusion of the application of ULIS (paragraph 6 (a)).

We think that in the case of gap-filling and interpretation it is a better solution to go back to the lex fori and the legal conception of the forum than for the forum to do the gap-filling and interpreting in accordance with a foreign law (required by the conflict norm). This would, as a matter of fact, not only give rise to legal disputes, but it is more difficult for the forum to interpret on the basis of a foreign law than to apply its rules. What, however, ULIS is striving to solve - the self-regulatory character - is insoluble. The Conventions incorporate the sales laws into the national laws, and then article 17 of ULIS tries, at least for the event of gap-filling, to isolate them within the national

law. Most probably this wish comes up also in the matter of interpretation, though it finds no expression there. But this important ambition cannot succeed: the interpreting and gap-filling activity of the forum inevitably will have the effect that the lex fori, the legal conception and in general the judicial practice of the forum will exert a strong attraction on the Uniform Laws which have become domestic law. This process may be slowed down but can by no means be stopped. After a longer time therefore the Uniform Laws may be expected to gain certain national tints in application. This must be stated as a fact without entailing the omission of ratification. Even by the most perfect method, that of uniform laws, legal unification can only be approximated, but this does not reduce the need for efforts at legal unification where the conditions exist.

Subsidiary character

6. At variance with the ambitions for self-regulation is the subsidiary character of the laws in relation both to contract clauses and to usages. The first one, permissiveness, is fully justified. As concerns the preference of usages, it also has a realistic basis: business quarters certainly have good reasons to refrain from a uniform law which would lessen the effect of usages. Yet it is remarkable that when the two Uniform Laws try to the utmost to exclude the influence of the rules and substantive norms of national laws, they none the less throw the doors wide open to the free play of permissiveness and of usages. Since the legislators have made vigorous efforts to protect the laws from impacts of private international law and from the assimilating tendencies of the given national law, by introducing the aforesaid two-way subsidiary character the legislators show indifference towards how far the protected rules will really be effective. And as regards the concrete solutions concerning permissive character and usages, the objections can be made that they lessen the predictability of the applicable law, and thus lead to legal uncertainty.

(a) The reason why the provision making ULIS permissive (article 3) leads to uncertainty is that, at variance with the 1955 Convention and the 1963 draft of ULIS, it allows, in defence of the autonomy of will of the parties, the implied exclusion, in part or in whole, of the application of ULIS. This may give rise to legal disputes, it widely extends the

possibility for the applier of the law to interpret it, and for the forum to increase the practice of interpretation to the detriment of the uniformity of the law;

(b) The problem concerning usages is caused by paragraph 2 of article 9 of ULIS and by article 13 of Formation. Katona points out that the expansion of the territory where a particular usage prevails is often questionable; in one and the same territory several kinds of usages may develop for the same goods; one cannot know whether the usage to be applied is that of the place of contract or that of the place of performance, etc. Furthermore, the said rules lead to a situation where the usage can prevail against the Uniform Laws even if it has not been invoked by the parties, and even if it has been unknown to them. Besides its being conducive to uncertainty and unpleasant surprises, it favours the stronger and old-established party transacting business with a better legal apparatus. This rule seems to be especially harmful to the developing countries. This is why it holds only partially true what Tunc - basically rightly - says of the Uniform Laws being particularly useful to the weaker party because it is sufficient for him to consider only two legal systems. In accordance with the Uniform Laws they have to be well versed also in the complicated questions of usages.

The solution accepted in respect of permissiveness and usages is thus basically right, but it avoidably acts against legal uniformity; it lessens the predictability of the applicable law; it favours the stronger party.

Predictability of the applicable law

7. The predictability of the applicable law is thus lessened by the following facts:

(a) The applicability of ULIS and Formation depends on the lex fori;

(b) Departure from the laws is possible also through "implied" provisions;

(c) A usage may become applicable also without the knowledge of the parties;

(d) In case of a gap the judgement must be based on non-existent general principles.

We emphasize, however, that in the cases (a) and (d) any other solution has its drawbacks, while the solution under (b) and (c) is basically right but is

/

extended to a larger than optimum scope. We think that there is more to speak for the exclusion of the rules of private international law than against it; recourse to private international law would provide greater security only if the 1955 Convention were more widely adopted, but also this would add to the problems; in the field of gap-filling and interpretation it would worsen the situation inasmuch as the forum would often be compelled to do the gap-filling and interpreting on the basis of a foreign law. In the field of permissiveness and usages, however, the Uniform Laws have not chosen the optimum variant within the right fundamental solution.

II.

QUESTIONS OF CONTENT

General description of ULIS

8. Until now we have considered the problem in an abstract way, independently of the content of ULIS and Formation. Nevertheless, it is obvious that much depends upon the questions of content: it may be that the chosen substantial solutions offset the drawbacks of the mechanical application of the Uniform Laws; it may be that they destroy its advantages or strengthen both the advantages and the drawbacks.

On the whole we can state that the solutions, as to their origins, belong in four categories:

(a) solutions essentially accepted in general;

(b) recent solutions (mainly the structure of the breach of contract, the notion of conformity, the exclusion of objection for failure in case of claiming breach of contract for lack of conformity, separation of the passing of risk from the transfer of property, etc.), a good part of which, as will be shown soon, are pretty close to the solutions of the new, socialist Hungarian law;

(c) the reception of a particular institution of some national law (e.g., Hungary also knows the notion of Nachfrist or the French stoppage in transitu);

(d) a very exceptional possibility for the forum to apply a solution suitable to its own law (the forum makes specific performance compulsory only within the limits allowed by its other legislation in case of contracts not subject to regulation under ULIS, article 16; Convention, article VII).

Speaking of the 1956 draft, Katona made the over-all statement that, "besides its numerous faults, it is a work that may become apt to serve, after some changes and polishing in the text, as a basis for a broad unification of international trade law". We feel this is today increasingly true.

In the following we shall survey some of the major solutions of content of the two laws.

Performance

9. In respect of performance the following seems worthy to be stressed:

(a) An even theoretically important provision of ULIS is that it regards as performance only the delivery of goods which conform with the contract (paragraph 1 of article 19); as for conformity, see paragraph 10 (b) below. Late delivery is thus performance, deficient or faulty performance is not. The regulation of the breach of contract and of the passing of risk is fully in conformity with this basic provision;

(b) ULIS rightly draws the conclusions from the fact that transfer of property in trade is made not by a single act but successively. This is why it links passing of the risk not to the transfer of property, nor does it provide for the date of the transfer of property, it only makes an obligation of the seller to transfer the right of property. Under the main provision (article 96) transfer of property is linked to the act of performance. In this there appears an essential dogmatic simplification: from the chain process "delivery - transfer of property - passing of the risk" there is omitted the intermediary link, which is in fact a consequence of the first and the basis of the third but, in most trade transactions, takes place piece by piece with respect to the partial titles and obligations. In this way, when passing of the risk is theoretically based on transfer of property, in practice the passing of the risk appears like one moment in the process of the transfer of property. Even in case of prelimina delivery it is the contracted date of performance that counts; there are special

rules for the regulation of the connexion between breach of contract and passing of the risk, as well as for maritime transport;

(c) In certain cases ULIS permits of the right of retention:

(aa) Such a right is exercised by the party when after the conclusion of the contract the financial situation of the other party has so much deteriorated that there is reason to fear that he will not perform the greater part of his obligations. In this case the party may exercise also the right of stoppage in transitu, except if a third person has the right of disposal on the strength of the documents relating to the goods (article 75). We think such a provision is useful, even if it might give rise to abuses on the part of mala fide parties;

(bb) If performance takes place through handing over the goods to a carrier, the seller may have dispatch or delivery postponed until he receives payment, except if the buyer is not bound to pay before examining the goods (article 72). In this connexion the Bulgarian delegation at the 1964 Hague Conference made a proposal (which we think was wholly warranted but was rejected) to the effect that the seller might not exercise this right of detention when the buyer has provided a banker's guarantee or some other security commonly used in commercial practice. In default of this rule the regulation fails to create the appropriate equilibrium between the equitable interests of the parties and again favours the seller;

(cc) It should be noted here that, very similarly to the practice of responsible preservation known in Hungarian law, ULIS regulates the obligation of the parties to preserve the goods in case of delay in taking delivery and in handing over (articles 91-95). In this sphere the preserver of the goods shall have the right of retention until he is reimbursed his expenses thereby incurred.

Breach of contract

10. Probably the most original part of ULIS is the regulation of the breach of contract.

(a) The law establishes two categories for such cases within every type of breach of contract according to whether or not their existence makes it possible to avoid the contract. Here the basis has originally been the solution

according to condition and warranty in common law. In fact, the 1935 Rome draft, just like the common law, made distinction by the importance of the violated contract clause. Later drafts and article 10 of ULIS, however, went over to distinction by the gravity of the breach. While distinction under the common law and the Rome draft is basically subjective, ULIS uses an objective standard (see paragraph (c) below). Its solution, though not in every respect, resembles in structure the Hungarian solution.

The structure of the solution should therefore be welcomed by Hungary. The 1964 Hague Conference rejected a Hungarian proposal which would have been closer, in content as well, to the Hungarian solution, but the substance of the solution is still acceptable.

Even according to the fundamental solution, avoidance is more widely admissible than in Hungarian law. But ULIS is in favour of declaring the contract avoided in other respects as well. In case of delay and of delivery attempted not at the place of performance, when there is a "fundamental" breach of contract, the contract shall be ipso facto avoided if the buyer remains silent, that is if he fails to make a declaration to the contrary (articles 26, 30). In our view this solution will unnecessarily increase the number of avoided contracts. The relevant Hungarian proposals were rejected by the 1964 Hague Conference, although they pointed also to the inconsistency that ULIS does not provide for ipso facto avoidance if the goods have been handed over by the carrier at a place other than that fixed (article 32). The Conference did not accept the proposal either that the buyer, instead of avoiding the contract, should dispatch the goods to the place of performance at the expense of the seller.

It is to be noted that in case of defective performance there is no ipso facto avoidance. The difference obviously comes from the interconnexion between the changes in market prices and delay, and it is so far understandable. On the othe hand, we think it overstretches the principle of vigilantibus jura, and this again is primarily detrimental to the developing countries, and to the weaker parties in general.

(b) A merit of ULIS is that by introducing the notion of "conformity of the goods" it has created a special category for the delivery of deficient, different and faulty goods, giving a specific list of the cases (article 33). In the ca:

of such performance the seller shall not have fulfilled his obligation to deliver the goods, and certain rights similar to the rights of guaranty known in Hungary can be enforced against him. These rights aim to obtain performance and are wholly independent of the consideration of the conduct of the party in breach.

Remedies based on the lack of conformity exclude any other legal action, e.g., one brought for failure (article 34). This means that the content of the contract is determined by way of interpretation and the service rendered is ascertained in this way; it is also beyond the scope of conformity for one of the parties to claim that he has construed the contract differently from the court. In this sphere invalidation cannot be demanded because of failure instead of claiming breach of the contract. This is a very remarkable and practicable solution, but it is to be feared that, by reducing the sphere of relevance of the failure, in practice it will again favour the better established and economically stronger party.

We value and approve the introduction of the category of the lack of conformity, and the fundamental solution that in relevant cases it refers to the effectuation of a still unrendered performance. We cannot remain silent, however, about the overly stringent time-limits of enforcement; the Preparatory Committee itself stated that the draft in this respect "imposes a harsh and sometimes unjust system". Examination must take place promptly.

Any defect, immediately after its discovery but within a period of two years from the date of delivery at the latest, shall be notified to the seller, and action shall be brought within a period of one year from the date of notification (articles 39, 49).

The expiration of these periods entails loss of right; the Hague Conference rejected the proposals which aimed to change the former period to a time of prescription, and also the Hungarian proposal for the time-limit of bringing an action to be two years. The chosen solution, as was pointed out at the Conference by the Hungarian delegation, reduces the possibility of the settlement of disputes out of court.

(c) One of the most essential questions of the breach of contract is the consideration of the circumstances of non-performance. In this matter ULIS

contains a provision similar to that included in section 339 (1) of the Hungarian Civil Code. It establishes exemptions relieving the party in default of his liability for damages, and this on the basis of an objective standard running through the entire law (paragraph 1 of article 74); as to consideration of the "fundamental" character of the breach of contract, see article 10; and as to consideration of bad faith, see article 13. This standard of conduct is centred on what a reasonable person could do in the same situation.

It should be noted, however, that the aforesaid standard leads to a comparatively grave responsibility which is by and large on the verge of vis major. It favours the buyers; but the sellers can protect themselves with clauses excluding responsibility. In this way the rule is not necessarily disadvantageous to the sellers being in a strong economic position, especially when they do not have to reckon with sharp competition, and it is harmful mostly to the weaker sellers.

Formation of contracts

11. In connexion with Formation we have the following remarks to make:

(a) The offer has to be sufficiently definite and has to express the offerer's intention to be bound by the contract (paragraph 1 of article 4). It appears from the records of the 1964 Hague Conference that the law deliberately contains no provision on "public offers" (displays, erection of automatons, transition between advertisement and offer). In these cases it remains doubtful whether it is an appeal for offer or an offer. Here the uncertainty is complete. For the event where it is a matter of interpreting the definiteness of an offer, Caemmerer thinks that the forum shall interpret on the basis of its own sales law and of the traditions of its own law, but if it is a matter of legal gap, then - again according to Caemmerer - the law must be considered self-regulatory on the model of article 17 of ULIS. This latter thesis seems to us dubious; Formation repeats a number of ULIS rules, and if it does not do so in the case of article 17 of ULIS then it is difficult to transpose to Formation. On the other hand, as we have already explained, it is more advantageous when the same law is applicable to gap-filling and interpretation.

(b) As regards the binding character of the offer, a compromise came about between the common law and the French law groups, on the one hand, and the German-Austro-Swiss and the socialist laws, on the other. According to the former, the definiteness of the offer must be based on express acceptance, while according to the other, it must be based on the law but its exclusion should be admissible.

Finally, it has become the main rule of article 5 that the offer is revocable before its acceptance, but the subsequent system of multistage exceptions makes this rule so empty that Hungary can possibly accept it. The binding character of the offer comes about on the basis of the offerer's declaration to this effect, but such an indication may be inferred from the circumstances, from preliminary negotiations, from any practices which the parties have established between themselves, or from usages; besides, the offer can be revoked only in good faith or in conformity with fair dealing. The exceptions are therefore unlimited in principle for a forum whose law stands on the basis of the definiteness of the offer; here also one may expect great discrepancies in consequence of the difference in the legal conception of the forum. There probably will be marginal cases where the Hungarian court finds the offer binding and the English court does not.

(c) According to paragraph 2 of article 7, if acceptance differs from the offer in immaterial details, the terms of the contract shall be those of the offer as modified by the acceptance, unless the offerer objects to the discrepancy immediately. Against this solution the Hungarian delegation at the Hague Conference stood up energetically but without success; the Conference did not even approve that the accepter be obliged to call attention to the discrepancy. Apart from the merits of the rule, it will be difficult to decide whether the discrepancies contained in the acceptance are essential or not. We have serious considerations against this rule.

(d) The solution accepted in the matter of late acceptance (article 9) is dogmatically right, but is practically unsatisfactory in certain cases. If the acceptance has been sent late, the contract can be upheld by the offerer's declaration in spite of late acceptance. When, on the other hand, the acceptance communicated in due time arrives late, the contract will come about if the offerer does not object in writing. This would have no special disadvantageous consequences if it were always possible to know in what time the offer has to be answered, that is in what time the communication of the acceptance should be declared to be late.

Under the law there are in general three ways of answering "in due time". Well, if the accepter thinks he has sent his answer "in due time", and the offerer thinks it has been done later and the latter keeps silent, then the offerer will believe that the contract has not come about, while the unsuspecting accepter will believe that it has, so it might be that the misunderstanding will come to light only at the time of attempted performance. Therefore at the 1964 Hague Conference the Hungarian delegation proposed that the offerer should in any doubtful case be bound to make a declaration, and his silence should be interpreted as "acceptance" of the (according to him, perhaps, belated) declaration of acceptance. We are of the view that this proposal leads in any case to a satisfactory result; it was recognized in general at the Conference that the solution of the law might result in the said untoward results, yet the proposal was not accepted.

Summary

In conclusion it can be said of the two sales laws that:

(a) They are high-standard, novel pieces of legislation, fortunately amalgamating the solutions of different legal systems and formulated in a circumspect way and with competent inventiveness, and they contain no provision that would be wholly unacceptable to Hungary;

(b) More than one of their solutions is, at least structurally or basically, similar to the Hungarian solution;

(c) Some of their solutions are objectionable, primarily because - though unintentionally - they help the better situated and economically stronger parties to occupy a more favourable position against the less developed parties, and further because in more than one place they contain a larger than unavoidably necessary number of such provisions, which are giving rise to uncertain and unpredictable legal actions and even endangering the future uniform application of the Uniform Laws.

JAPAN*

[Original: English]
4 March 1969

The Hague Convention of 1955 on the Law Applicable to International Sales of Goods and the two Hague Conventions of 1 July 1964 (i.e. the Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods), which are the results of many years of strenuous works by UNIDROIT and the Hague Conference on Private International Law, will no doubt play a significant role in creating favourable conditions for smoother international sales transactions. Therefore, the Government of Japan has studied the provisions of the conventions. However, because of the broad scope covered by these conventions, the Government of Japan has not yet completed detailed examination of these conventions. It considers that further thorough study of them is indispensable in the light of actual practice of international trade transactions and of customary trade terms, taking into account advantages and disadvantages of solutions provided in these conventions and uniform laws, and is studying what adjustments will be required before ratifying these conventions.

TOGO

[Original: French]
13 March 1969

The texts of these Conventions and the authorized commentaries and introductory notes on them are at present being given careful study by the competent Togolese authorities.

---

* Member of the Commission.

UNITED ARAB REPUBLIC*

/Original: French/
4 March 1969

This Convention is an important contribution to the unification of private law in a sphere which is essential to the development of international trade relations. Situated at the crossroads of several continents and possessing the Suez isthmus which is so vital for maritime trade, the United Arab Republic more than any other country feels the need and desirability of such a unification. It cannot, therefore, fail to commend the effort made in the preparation of the Convention and to express satisfaction with the document which has resulted, the Uniform Law.

The principles followed by those drafting the Uniform Law are, on the whole, satisfactory. As an example, we might mention the freedom of contracting parties to substitute for the Uniform Law rules which they consider more appropriate for their transaction, the possibility of regional unification within universal unification, and the nice balance between the obligations of the parties; all these guiding principles are undeniable proof of objectivity and fairness.

In addition, the practical spirit which has governed the choice of solutions, their originality and their suitability to the needs of international trade, have made the Uniform Law a document which can serve as a juridical basis for trade relations among all countries in the world, developed or developing, with a free or with a planned economy. As indications of the high scholarly value of this document, we would mention in particular the very skilful combination of the concept of conformity with that of a hidden defect, the detailed regulation of the effects of avoidance and the wisdom of the rules concerning damages.

Although it is to be commended as a whole, however, the Uniform Law includes certain principles which must cause a developing country such as the United Arab Republic some hesitation. Two articles (and they are not the only ones) seem to us particularly dangerous since they give the parties prerogatives which might give rise to many abuses from which the developing countries, in particular, wou suffer, since in international sale contracts the developing countries are generally the weaker party.

---

* Member of the Commission.

The first of these two articles is article 73, which authorizes each party to suspend the performance of his obligations when, "after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations".

It is, of course, impossible to dispute seriously the wisdom of this principle which is a precautionary measure dictated by a concern to give the party threatened by a disturbance in the other contracting party's economic situation an opportunity to take the necessary steps to avoid the unfortunate consequences of such a situation. But the text's failing is that it leaves it to the party concerned to evaluate both the economic situation of the other party and the extent of the obligations which will not be performed. It goes without saying that to allow such a right would open the door to arbitrary action. Any contracting party wishing to extricate himself from his obligations, or actuated by malice, would only have to make such a claim in order to deprive the other party, even if only for a certain period, of the benefit which he hopes to derive from the contract. For a developing country, that benefit might represent a vital need.

Similarly, paragraph 2 gives the seller who has already dispatched the goods the right to prevent their delivery to the buyer if the economic situation of the latter appears to have become difficult. That is stoppage in transitu, which is permitted under the laws of various countries, including Egypt. It is on the fact that stoppage is authorized in the majority of national laws that the supporters of article 73 base their main argument in its favour. In reality, these national laws only grant that right in the event of a party being adjudged bankrupt by the competent authority or, at least, in the event of a de facto bankruptcy being established by a judgement recognizing that payments have ceased. Unlike the Uniform Law, they by no means give the seller the right to make a subjective evaluation of the economic situation of the buyer.

Article 76 gives rise to even more serious fears. It allows each party, even in the absence of any economic difficulty and prior to the date fixed for performance of the contract, to declare the contract avoided (again, in a unilateral declaration) where "it is clear that (the other party) will commit a fundamental breach of the contract...". Here, the door is wide open for arbitrary action the effect of which would be even more harmful.

Whereas, in fact, article 73 envisages the possibility of an obviously difficult economic situation, article 76 allows a mere suspicion aroused in the mind of one party, as a result of a conjunction of circumstances of which that party is the primary judge, to lead, not merely to the suspension of the performance of obligations, as does article 73, but to the voiding of the contract.

In the mind of those drafting the Uniform Law, article 76 is no doubt a justifiable preventive measure; and, in justification of it, Professor Tunc, that eminent commentator on the Uniform Law, wrote, inter alia: "It is not right that one party should remain bound by the contract when the other has, for instance, deliberately declared that he will not carry out one of his fundamental obligations or when he conducts himself in such a way that it is clear that he will commit a fundamental breach of the contract." The distinguished author only quotes examples which are so naive as to give the text an appearance of ingenuousness; but this ingenuousness does not conceal the fact that the article places at the disposal of any contracting party who is deceitful or in bad faith a weapon by means of which he may, at any time, void a contract which has become too great a burden to him. This weapon is particularly dangerous as far as the developing countries are concerned, because it could deprive them (sometimes for reasons unconnected with the contract) of goods essential for their development or security. Another French author (Bhilippe Kahn, Revue trimestrielle de droit commercial, 1964, p. 727) while approving of the rule contained in article 76, nevertheless makes the reservation that "it is unusual in French law. It may present some danger since, until the term of the contract has expired, it cannot be certain that the party which should perform the contract will commit a fundamental breach. It is therefore difficult to prove. The suspension of a contract is a much easier practice to apply since it involves nothing irrevocable; avoidance, which destroys the contract, is much more serious, particularly since it can be based merely on suspicion of a failure to perform. This practice which originates in United Kingdom law will have to be applied in continental countries for some time before an opinion can be given on it."

* * *

To these fears, the following observations of a technical nature might be added:

I. By not requiring that the parties should have their places of business in the territories of contracting States, article 1 might lead to odd results, as several commentators on the Uniform Law have pointed out. It is, in fact, inadmissible that the Law should apply to a contract which does not fall within its scope because the places of business of the parties are in the territories of non-contracting States. Admittedly, article III of the Convention, by allowing each State to reserve the application of the Uniform Law to Contracting States, to a great extent offsets the anomaly contained in article 1 of the Uniform Law. But it seems to us that the reservation should be the rule and therefore should have a place in the text of the Uniform Law itself.

II. The reservation allowed by article V of the Convention, which was introduced at the request of a single State for its own particular reasons, seems to us superfluous, since the right given to the parties under article III to exclude the application of the Uniform Law either entirely or partially is sufficient to allay the misgivings which underlie the reservation. Furthermore, it is inadmissible that the application or effectiveness of a law should depend solely on the will of those governed by it.

III. Article 16, which was included in the Uniform Law in order to reflect the reservation allowed by article VII of the Convention, makes the right to specific performance dependent on the attitude of national laws towards that right. This leads to inequality, which should be avoided by the complete deletion of any reference to specific performance or by the substitution of regulations which are likely to satisfy the various legal systems.

IV. The concept of a "fundamental breach" requires a measure of evaluation which the Uniform Law entrusts to the party which suffers from the failure to perform an obligation. It is to be feared that this subjective evaluation may, in practice, give rise to difficulties resulting from a natural tendency to exaggerate the importance of any breach, no matter how trivial. An evaluation by a neutral body, a judge or arbitrator, would remedy this failing.

V. Again, because of the danger involved in subjective evaluation article 48 might be criticized for granting the buyer the right to avoid the contract or to reduce the price, even before the date, fixed for delivery, if he considers that it is clear that goods which would be handed over would not be in conformity with

/

the contract. This right, like those granted under articles 73 and 76 quoted above, makes it possible for a contracting party acting in bad faith to extricate himself arbitrarily from a contract which has become unprofitable or, at least, to reduce an obligation which has become too great a burden.

VI. Since the conditions of commercial sale (sale f.o.b., sale c.i.f., and so on) have not been included in the Uniform Law, it would be preferable to delete articles 50 and 51 concerning the obligation to hand over documents. These articles deal only partially with a practice which should be regulated as a whole, independently of the Uniform Law.

VII. Under article 84, paragraph 1, in case of avoidance of the contract, damages are to be calculated on the basis of the difference between the price fixed by the contract and the current price on the date on which the contract is avoided. In the present state of international trade, however, there is no single current price. Paragraph 2, therefore, adds that when there is no such price the current price to be taken into account shall be that "prevailing in the market in which the transaction took place". What exactly does the term "transaction" signify? Does it mean the place where preliminary negotiations take place, the place where the contract is concluded, or the place where it is executed? Whatever the idea of those who drafted the text, it might often be difficult to determine the place, since it is rare for an international sale to be concluded or executed in a single place. Might it not be simpler to take the current price prevailing in the place where the seller has his place of business (or residence) and leave the judge the power to decide in cases where it would be inappropriate to apply that price?

In view of the doubts to which the Uniform Law gives rise, the United Arab Republic considers that it would be preferable to postpone ratification of the Convention relating to that law and to await the results of the work recently undertaken in the same field by the Commission on International Trade Law (UNCITRAL). Furthermore, since the Civil Code and the Commercial Code are at present undergoing revision in the United Arab Republic, the ratification of a Convention which would commit the State to introducing into its legislation the provisions of a Uniform Law would be likely to hinder the work of the committees carrying out the revision.

* * *

For the same reasons, the United Arab Republic will not ratify the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods. It is true that this Law does not contain any provision which is contrary to the fundamental principles recognized in Egyptian law, but its subject and that of the other Uniform Law form a whole which should be dealt with in a single law.
