ANNEX VI

Report of Working Party V: Article 49 of ULIS

1. There was a considerable doubt as to the correct interpretation of article 49 of ULIS. The Working Party has given the following explanation of the meaning of this article:

Explanation in English:

The right of the buyer to rely on lack of conformity with the contract shall lapse upon the expiration of a period of one year after he has given notice as provided in article 39, unless he continues to manifest an unequivocal intention to maintain the existence of this right whether by the commencement of legal proceedings or otherwise (except where he has been prevented from so doing by the fraud of the seller).

Explanation in French:

L'acheteur est déchu de ses droits s'il ne les fait pas valoir par une action en justice ou de toute autre manière manifestant sa volonté continue d'obtenir leur respect, un an au plus tard après la dénonciation prévue à l'article 39 (à moins qu'il n'en ait été empêché par suite de la fraude du vendeur).

2. In the light of the above explanation the Working Party was of the opinion that article 49 does not constitute a case of prescription and recommends its deletion. It is thought that the notice required under article 39 and the term of prescription whatever it may be provides for a sufficient technique to enforce the rights of the buyer and protect the interests of the seller. A third term as provided by the present article 49 seems to be unnecessary and may lead to difficulties in respect of its application to the individual cases.

3. If article 49 is regarded as providing for a term of prescription, it should be co-ordinated with the findings of the Working Group on prescription and its further consideration should be postponed. It is, however, thought that even in that case there might be no need for its conservation, for

(*a*) If the buyer goes to court or to arbitration, this case would be covered by the general rules on prescription,

(*b*) If the buyer manifests its intention otherwise, then a term of prescription is needed for the enforcement before the courts or arbitration.

4. If article 49 is maintained, the reference to fraud should be deleted.

B. Uniform rules on choice of law

Analysis of replies and comments by Governments on the Hague Convention of 1955: report of the Secretary-General

CONTENTS

I. INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its second session requested the Secretary-General to prepare an analysis of observations, outlined below, regarding the Hague Convention of 1955 on the Law Applicable to the International Sale of Goods (corporeal movables) and to submit the analysis to the Working Group on the International Sale of Goods set up by the Commission.[1]

2. Part of these observations resulted from the request made by the Commission at its first session that States be invited to indicate whether they intended to

* A/CN.9/33.

[1] Report of the Commission on the work of its second session, (A/7618), para. 2.

adhere to the 1955 Hague Convention, and to state the reasons for their position.[2] The replies to this invitation have been reproduced in documents A/CN.9/12 and Add. 1, 2, 3 and 4. At its first session, the Commission also requested the Secretary-General to transmit such replies to the Hague Conference on Private International Law for comments; the comments by the Secretary-General of the Hague Conference were reproduced in document A/CN.9/12/Add.2.

3. At the second session of the Commission there was a general discussion of the 1955 Hague Convention; a summary of the comments made in the course of this discussion is given in annex II to the Commission's report.[3]

4. The following analysis of the written replies (para. 2 *supra*) and of the comments made during the second session of the Commission (para. 3 *supra*) considers separately these questions: A. Ratification of or accession to the Convention; B. Observations of a general character with respect to the Convention; C. Observations on specific articles of the Convention.[4]

II. Analysis of the replies and comments

A. *Ratification of or accession to the Convention*

5. As of the date of this report, the Hague Convention of 1955 on the Law Applicable to the International Sale of Goods (corporeal movables) had been ratified by Belgium, Denmark, Finland, France, Italy, Norway and Sweden.

6. The position of the other States that have submitted studies may be summarized as follows:

(i) *States which have expressed the intention to ratify or to accede to the Convention:* Colombia,[5] Cambodia,[6] Hungary,[7] Mexico,[8] and Switzerland;[9]

(ii) *States in which the Convention and/or the question of whether to ratify or accede is under consideration:* Czechoslovakia,[10] Greece,[11] Iraq,[12] Ireland,[13] Japan,[14] Romania,[15] and Spain;[16]

(iii) *States which do not intend to ratify or accede:* Austria,[17] Botswana,[18] Chile,[19] China,[20] Federal Republic of Germany,[21] Guyana,[22] Iran,[23] Israel,[24] Laos,[25] Luxembourg,[26] Maldives,[27] Netherlands,[28] Sierra Leone,[29] Singapore,[30] Trinidad and Tobago,[31] United Kingdom,[32] and the United States.[33]

7. In the reply by Luxembourg it was stated that the six member States of the European Economic Community (Belgium, Federal Republic of Germany, France, Italy, Luxembourg, Netherlands) had decided that those which had not yet ratified the Convention would not continue the procedure for obtaining parliamentary approval, while those which had already ratified that Convention would denounce it as soon as they had the option of doing so.[34]

B. *Observations of a general character*

(a) *Need for uniform conflict rules: coexistence of uniform substantive rules and conflict rules*

8. Several States held the view that the existence of uniform substantive rules obviated the necessity for uniform conflict rules. Thus, Austria considered that unification of the substantive law of the sale of goods and unification of conflict rules were incompatible.[35] The Netherlands was of the opinion that the removal of differences in various legal systems could be more fully realized by the application of the 1964 Hague Uniform Law than by the application of rules governing conflict of laws.[36] Israel stressed that ratification of the 1964 Convention would obviate the necessity to accede to the

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[2] Report of the Commission on the work of its first session (A/7216), para. 17 A.

[3] Report of the Commission on the work of its second session (A/7618). The discussion includes comments by representatives of States that are members of the Commission and by the representatives of international organizations who attended the session as observers.

[4] The setting of these various observations may be identified by the foot-note references. The written replies (para. 2 *supra*) bear foot-note references to documents other than A/7618 (see foot-note [1]). The comments made during the second session of the Commission bear the foot-note reference A/7618. As a further aid in identifying the source, the written replies are identified as the statement of the Government; statements made during the second session of the Commission are identified as a statement by the representative of the Government in question.

[5] A/CN.9/12, p. 3.

[6] Note of 12 May 1969 by the Permanent Representative of Cambodia to the Secretary-General.

[7] A/CN.9/12, p. 8.

[8] A/CN.9/12/Add. 1, p. 5.

[9] A/CN.9/12, p. 10.

[10] A/CN.9/12/Add.1, p. 4.

[11] A/CN.9/12/Add.4, p. 3.

[12] A/CN.9/12/Add.3, p. 3.

[13] A/CN.9/12, p. 8.

[14] A/CN.9/12/Add.4, p. 4 and A/7618, annex II, para. 4.

[15] A/CN.9/12/Add.1, p. 11.

[16] *Ibid.*, p. 12.

[17] A/CN.9/12/Add.4, p. 2.

[18] A/CN.9/12/Add.1, p. 3.

[19] A/CN.9/12, p. 3.

[20] A/CN.9/12/Add.3, p. 2.

[21] A/CN.9/12, p. 7.

[22] A/CN.9/12/Add.4, p. 3.

[23] A/CN.9/12/Add.1, p. 4.

[24] A/CN.9/12, p. 8.

[25] A/CN.9/12/Add.2, p. 3.

[26] A/CN.9/12, p. 9.

[27] *Ibid.*

[28] A/CN.9/12/Add.1, p. 10.

[29] *Ibid.*, p. 11.

[30] *Ibid.*, p. 11.

[31] A/CN.9/12, p. 10.

[32] A/CN.9/12/Add.1, p. 13.

[33] A/CN.9/12/Add.2, p. 3 and A/7618, annex II, para. 4.

[34] A/CN.9/12, p. 9.

[35] A/CN.9/12/Add.4, p. 2.

[36] A/CN.9/12/Add.1, p. 10.

1955 Convention.[37] Belgium stressed that its decision to ratify the Hague Conventions of 1964 was determined, among other reasons, by the desire to put an end to the uncertainties involved in the application of the rules of private international law.[38] Hungary, on the other hand, held the view that a greater degree of security could be derived from international unification of the conflict of laws than from the Hague Conventions of 1964.[39]

9. The Federal Republic of Germany pointed out that it was an essential aim of the standardization of substantive sales law to do away with any stipulation as to which national law should be applicable; moreover, the coexistence of the 1955 and 1964 Hague Conventions would lead to considerable difficulties of interpretation since the provisions of those two Conventions differed quite considerably on a number of points. The Federal Republic was therefore of the opinion that the declaration under article IV of the Convention on Sales would result in largely eliminating the benefits afforded by the Uniform Law through the standardization of substantive law.[40]

10. The representative of the United Arab Republic observed that the field of application of the 1955 Hague Convention would become very limited if a uniform law on the international sale of goods were adopted by all countries of the world.[41] Similar views were expressed by the Secretary-General of the Hague Conference: if the Uniform Law of 1964 should be adopted by all countries of the world, the rules of conflict would become almost entirely pointless. At the same time, however, the Secretary-General of the Hague Conference emphasized that this was not now the case and that it could not be hoped that the Uniform Law would be accepted without subsequent alteration by the great majority of countries. He further pointed out that several aspects of the sales of goods were not covered by the Uniform Law and that, therefore, rules of conflict would in any event continue to be of importance in all such matters.[42]

11. The representative of Norway shared the opinion expressed by the Secretary-General of the Hague Conference: unified conflict rules would be needed even in the event of world-wide adoption of the 1964 Hague Conventions as the latter did not cover every aspect of international sale.[43] It was suggested therefore by Norway that article 2 of the Uniform Law on Sales be deleted or amended, so as to make the application of the Uniform Law dependent on the rules of private international law of the State of the *forum*. As an alternative solution Norway suggested that article IV of the Convention on Sales be amended in such a way that it should make it permissible also for a contracting State to accede in the future to conventions on conflict of laws in the field of the law on sale.[44] The United States noted that provisions such as article 2 of the Uniform Law on Sales had been the subject of considerable controversy at the Hague Conference of 1964 and might be deterring States from becoming parties to the convention on Sales.[45]

12. The need for unified conflict rules was voiced also by the representative of the Union of Soviet Socialist Republics, who suggested the deletion of article 2 of the Uniform Law on Sales.[46] The observer of the International Chamber of Commerce made a similar suggestion, and noted that the 1964 Hague Uniform Law on Sales, in accordance with article 8 of that Law, was not concerned with several aspects of the contract of sale, such as the formation and the validity of the contract or any of its provisions.[47] The observer of UNIDROIT pointed out that several matters (e.g. prescription) which were not dealt with in the Uniform Law of Sales could not be settled in conformity with the general principles of that Law as provided for in article 17 of the Uniform Law; in such cases recourse should be had to rules of private international law.[48]

13. Czechoslovakia stated that unification of substantive norms reduced the conflicts of national laws but did not wholly remove them; therefore it was also necessary to strive for the unification of conflict rules.[49] It further expressed the view that uniform rules should only be applied if the conflict norms of the *forum* referred to the substantive law of a State which had enacted those uniform rules. Unification of conflict rules should therefore precede unification of substantive rules.[50] The representative of Romania observed that conflict rules were complementary to substantive rules and consequently stressed the need for a convention on conflict rules.[51]

14. Mexico considered it advisable to ratify both the Hague Convention of 1955 and the Hague Conventions of 1964. In support of this view attention was directed to contracts involving parties whose countries have not ratified the 1964 Conventions and contracts which excluded the application of those Conventions. In both cases, problems of conflicts of law would be solved by the rules of the 1955 Convention. At the same time, however, Mexico noted specific points on which the 1955 and 1964 Conventions were inconsistent.[52] Spain noted that the 1955 Convention should be brought in line with the 1964 Convention on Sales once the latter Convention is finalized.[53]

(b) *General approval and disapproval of the Convention*

15. Colombia stated that its intention to adhere to

[37] A/CN.9/12, p. 8.
[38] A/CN.9/11, p. 12.
[39] A/CN.9/11/Add.3, p. 6.
[40] A/CN.9/12, p. 7.
[41] A/7618, annex II, para. 5.
[42] A/CN.9/12/Add.2, p. 5.
[43] A/7618, annex II, para. 6.
[44] A/CN.9/11, p. 22.
[45] A/CN.9/11/Add.1, p. 35.
[46] A/7618, annex I, para. 38.
[47] A/7618, annex II, para. 6.
[48] A/7618, annex I, para. 39.
[49] A/CN.9/12/Add.1, p. 4.
[50] A/CN.9/11/Add.1, pp. 4-5.
[51] A/7618, annex II, para. 5.
[52] A/CN.9/12/Add.1 p. 7.
[53] *Ibid.*, p. 13.

the 1955 Convention followed the recommendation of the Inter-American Juridical Committee that there was no need to adopt a regional instrument in the matter, since the Convention satisfactorily met the requirements of the countries of the American continent.[54]

16. The representatives of Argentina, Italy, Mexico, Tunisia and the United Arab Republic and the observer of the International Chamber of Commerce expressed the view that while some of the provisions of the Convention might be improved, it was, in general, a satisfactory instrument.[55]

17. Spain approved of the Convention in principle.[56]

18. Czechoslovakia pointed out that in preparing the Czechoslovak law of 1963 on private international law and law of procedure, the Czechoslovak legislature had adopted the fundamental principles of the Convention.[57]

19. Sierra Leone expressed general agreement with articles 1, 2, 5, 8, 9, 10, 11 and 12 of the Convention. Because of the wording of other articles, however, Sierra Leone could not express agreement with the Convention as a whole.[58]

20. Noting that the 1955 Hague Conference was attended by only sixteen States, none of which was a socialist or developing State, the USSR expressed the opinion that the text of the Convention could not be used for the elaboration of a universal international agreement on the law applicable to the international sale of goods.[59]

21. Chile,[60] the Federal Republic of Germany,[61] and the United Kingdom[62] disapproved of the Convention, noting differences between the provisions of the Convention and those of their own legal systems.

22. The United Kingdom stressed, *inter alia*, that its courts ordinarily applied the rules of a single legal system in determining the rights and obligations arising out of a contract. Although there were exceptions to this principle, the application of more than one system of law to the same contract was unusual.[63]

(c) *Equal protection of the interests of seller and buyer*[64]

23. The United States doubted whether an adequate solution had been worked out in the Convention with respect to the balancing of interests as between buyer and seller.[65] On the other hand, the representative of Mexico expressed the opinion that the provisions of the Conventions were objective and protected the rights of both buyer and seller.[66]

24. The representative of Hungary, admitting that the time was not yet ripe to restrict or abolish the autonomy of the parties, noted that the unrestricted autonomy of the parties to designate the law of the contract, favoured the stronger party.[67]

C. *Observations on specific articles of the Convention*

(a) *Article 1*

25. The representative of the USSR expressed the view that the term "international sale of goods" should be defined in order to make it clear what relationships the Convention sought to regulate.[68] A similar view was expressed by the representative of the United Arab Republic who raised the question whether the definition contained in the 1964 Uniform Law on the International Sale of Goods could be applied.[69]

26. The representative of Italy expressed the view that a definition of the term had been omitted because the objective criteria contained in the Convention, such as the receipt of an offer or the existence of an establishment, clearly defined the cases in which the Convention was to be applied.[70] The Secretary-General of the Hague Conference informed the Commission that a definition of the International sale of goods had deliberately been omitted from the text because other provisions of the Convention clearly defined its field of application.[71]

27. Mexico suggested that sales of money and of electricity should be excluded from the field of application of the Hague Convention of 1955, since the Hague Conventions of 1964 did not apply to those sales and the reasons invoked for excluding them from the field of application of those Conventions were also valid in respect of the Hague Convention of 1955.[72]

(b) *Article 2*

(i) *Paragraph 1 of article 2*

28. The use of the expression "domestic law" instead of "substantive domestic law" was regretted by the representative of Czechoslovakia on the ground that the terminology used in the Convention did not exclude the application of the conflict rules of the law designated by the parties and, consequently, did not exclude the question of *renvoi*.[73] The representative of Hungary disagreed with that view; in his opinion the application of the conflict rules was excluded in cases where the parties designated the law applicable to their contract.[74]

29. The Secretary-General of the Hague Conference stated that the term "domestic law", in contrast with

[54] A/CN.9/12, p. 3.

[55] A/7618, annex II, paras. 1 and 4.

[56] A/CN.9/12/Add.1, p. 12.

[57] *Ibid.*, p. 4.

[58] *Ibid.*, p. 11.

[59] A/CN.9/12/Add.1, p. 12.

[60] A/CN.9/12, p. 3.

[61] *Ibid.*, pp. 4-7. Objections with respect to the practicality of specific provisions (art. 3, para. 2) are noted *infra*.

[62] A/CN.9/12/Add.1, p. 13.

[63] *Ibid.*

[64] See also paragraphs 34-35 below concerning comments on the second paragraph of article 3 of the Convention.

[65] A/CN.9/12/Add.2, p. 3.

[66] A/7618, annex II, para. 3.

[67] *Ibid.*, para. 12.

[68] *Ibid.*, para. 10.

[69] *Ibid.*, para. 10.

[70] *Ibid.*, para. 11.

[71] *Ibid.*, para 11..

[72] A/CN.9/12/Add.1, p. 8.

[73] A/7618, annex II, para. 13.

[74] *Ibid.*, para. 15.

the term "law" that included conflict rules also, was chosen precisely in order to exclude *renvoi*, since it meant substantive law, excluding rules of conflict.[75] This distinction between the two terms was objected to by the representative of Italy who observed that the equivalent Italian words do not make that distinction.[76]

(ii) *Paragraph 2 of article 2*

30. The representative of Czechoslovakia pointed out that the provisions of paragraph 2 of article 2 of the Convention were not in harmony with those of Article 3 of the 1964 Hague Uniform Law. Paragraph 2 of the 1955 Convention excluded the implied choice of law or a partial choice. On the other hand, under the 1964 Hague Uniform Law the parties to a contract were free to exclude the application of a law[77] not only expressly but also implicitly, and not only entirely but also partially.

31. The United Kingdom and the Federal Republic of Germany also commented on the provision contained in paragraph 2 of article 2. The Federal Republic of Germany opposed that provision on the ground that it did not permit the interpretation that agreement on a national institutional arbitral tribunal was at the same time considered to constitute an agreement on the application of the law prevailing at the seat of that tribunal.[78] The United Kingdom, although it was not expressly opposed to the provision of that paragraph, raised the same objection.[79]

(c) *Article 3*

(i) *General comments on article 3*

32. The United Kingdom noted that the provisions of article 3 would involve a change in its national law. Where there was no express choice of law clause the rule of English law was that the applicable law was to be inferred by seeking to determine the intention of the parties by an examination of the terms and nature of the contract and the surrounding circumstances. The United Kingdom further observed that the application of the rule set out in article 3 would tend to produce legal consequences which the parties had not contemplated and might produce anomalous results, e.g. in cases where the parties had not designated an applicable law so as to make the provisions of article 2 applicable but nevertheless had contracted in terms which made it clear that they did not contemplate the application of the law of the seller's country.[80]

33. Chile noted that the provisions of article 3 were based on principles totally different from those obtaining in the Chilean system; in cases where the parties had not indicated the law applicable to their contract, Chilean law applied not the law of the seller's country or that of the buyer's country, but the *lex loci contractus* and the *lex rei sitae*.[81]

(ii) *Paragraph 1 of article 3*

34. Sierra Leone suggested the need for a more precise expression than the term "habitual residence" which, in Sierra Leone's opinion, may not be easily ascertainable.[82]

35. The Federal Republic of Germany objected to the scope of exceptions to the basic principle expressed in the first sentence that the seller's law shall govern the contract. One of these exceptions was contained in the second sentence of paragraph 1 which points to the law of the place where a seller's "establishment" (such as a branch office) is situated if the order is received there, rather than at the principal office in another country. The comments made by the Federal Republic of Germany referred to proposals which were submitted to the Eighth and Ninth Hague Conferences suggesting that the provision contained in the second sentence of article 3, paragraph 1, should be confined to cases in which the seller maintained an establishment with a delivery stock of goods of the type in question.[83]

(iii) *Paragraph 2 of article 3*

36. Opinions regarding paragraph 2 of article 3 differed as to whether this paragraph favoured the stronger party. Iran stressed that the Convention suited the economically developed countries which were essentially exporting countries. It was for that reason that stress had been laid on the law of the seller, i.e. on the law of the economically stronger party. Article 3, paragraph 2, assigned only a very modest role to the law of the buyer.[84] At the second session of the Commission, the representative of Iran stated that the application of the law of the country of the seller by the judge of the buyer's country might cause practical difficulties, which would not be the case if he had to apply the *lex fori*.[85] The representative of France expressed however the opinion that the application of the law of the buyer did not necessarily favour the buyer and, similarly, the application of the law of the seller did not necessarily favour the seller, since the laws of all countries sought to give equal rights to seller and buyer.[86] The opinion of the representative of France was also shared by the Secretary-General of the Hague Conference.[87]

37. The representative of the USSR considered that the terms "order" and "given the order" should be clarified and the point at which an order was to be deemed to be given should be specified.[88]

38. The Federal Republic of Germany objected to the exception to the principle applying the law of the seller's country whereby the law of the buyer's habitual residence was applicable if the order has been received in such country "whether by the vendor or his representative, agent or commercial traveller". This provision

[75] *Ibid.*, para. 14.

[76] *Ibid.*, para. 14.

[77] *Ibid.*, para. 15.

[78] A/CN.9/12, pp. 4-5.

[79] A/CN.9/12/Add.1, p. 14.

[80] *Ibid.*, pp. 13-14.

[81] A/CN.9/12, p. 3.

[82] A/CN.9/12/Add.1, p. 11.

[83] A/CN.9/12, p. 6. For a related objection by the Federal Republic of Germany see the discussion under paragraph 2 of article 3, *infra*.

[84] A/CN.9/12/Add.1, p. 5.

[85] A/7618, annex II, para. 17.

[86] *Ibid.*, para. 18.

[87] A/CN.9/12/Add.2, p. 9.

[88] A/7618, annex II, para. 20.

was said to be unsystematic and without material justification, since, pursuant to an obsolete theory, it declared the *lex contractus* to be applicable, and made the applicable law contingent upon arbitrary and frequently unforeseeable incidental circumstances.[89]

39. According to other views, however, the place where the order was given and received was different from that where the contract was concluded. Thus, the representative of Iran expressed the opinion that it would be preferable if the applicable law were the *lex loci contractus* instead of that of the place where the order was given.[90] The Secretary-General of the Hague Conference noted that the *lex loci contractus* was one of the most controversial questions and that it was for that reason that the law of the place where the order was given was chosen in the Convention.[91] The representative of Italy pointed out the usefulness of eliminating the criterion of the place where the contract was concluded.[92]

(d) *Article 4*

40. In the opinion of the United Kingdom, one of the disadvantages of the Convention was that article 4 of the Convention involved a more frequent application of more than one law to a single contract, which tended to complicate rather than to simplify the legal rules affecting international transaction.[93]

41. The representative of the USSR suggested that since inspection of goods might take place in two stages, namely a preliminary inspection in the country of the seller and a final one in the country of the buyer, it should be made clear in article 4 which inspection is intended.[94]

(e) *Article 5*

42. The representative of the USSR proposed the inclusion in sub-paragraph 2 of the words "and procedures for their signing", noting that the law of the USSR provided for a special procedure for signing international sale contracts.[95]

43. Mexico considered that the relationship established in sub-paragraph 3 of article 5 between the transfer of ownership and the transfer of risk was a defect resulting from the rule *res perit domino*, for which it submitted there was no justification.[96]

(f) *Articles 10 and 12*

44. The representative of the USSR considered that article 10 and paragraph 4 of article 12 were contrary to the 1960 Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV) of 14 December 1960) and that the provisions of the said articles, therefore, could not be included in a new international convention.[97]

[89] A/CN.9/12, pp. 6-7.
[90] A/7618, annex II, para. 19.
[91] *Ibid.*, para. 19.
[92] *Ibid.*, para. 19.
[93] A/CN.9/12/Add.1, p. 14.
[94] A/7618, annex II, para. 21.
[95] *Ibid.*, para. 22.
[96] A/CN.9/12/Add.1, p. 8.
[97] A/7618, annex II, para. 23.

C. General conditions of sale and standard contracts, incoterms and other trade terms:

1. *Promotion of wider use of existing general conditions of sale and standard contracts: report of the Secretary-General**

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* A/CN.9/18.