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REPLIES BY STATES CONCERNING THE HAGUE CONVENTION OF 1955 ON THE LAW APPLICABLE TO INTERNATIONAL SALE OF GOODS

Note by the Secretary-General

Addendum

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INTRODUCTION

1. In his notes A/CN.9/12 and Add.1 the Secretary-General reproduced the substantive portions of twenty-one replies received from Governments of States Members of the United Nations or members of the specialized agencies to his communication of 3 May 1968 concerning the Hague Convention of 1955 on the Law Applicable to International Sale of Goods. The present addendum reproduces the substantive portions of two additional replies which have been received since the circulation of document A/CN.9/12/Add.1.

2. Pursuant to the request of the Commission[1/] the Secretary-General transmitted the text of the above-mentioned replies to the Hague Conference on Private International Law for comments. The comments received from the Secretary-General of the Hague Conference are reproduced in the present addendum.

1/ Report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 17 C, p. 20.

TEXT OF REPLIES BY STATES

LAOS

/Original: French/
31 December 1968

Laos does not intend to accede to the Convention on the Law Applicable to International Sales of Goods, formulated by the Hague Conference on Private International Law in 1955.

UNITED STATES OF AMERICA

/Original: English/
2 January 1969

The United States did not participate in the Conference which drafted the Convention on the Law Applicable to the International Sale of Goods of 1955. The Convention is designed to serve the useful purpose of clarifying choice of law problems with respect to international sales.

Our review of the Convention resulted in the conclusion that it has certain aspects which detract from its over-all acceptability. For example, it is questionable whether an adequate solution has been worked out with respect to the balancing of interests as between buyer and seller.

The United States recognizes that the rules contained in the Convention have become law in a number of States in Europe. On the other hand, there is opposition to the Convention in other States, which has undoubtedly contributed to the nine-year period that passed before sufficient ratifications were received to bring it into force.

Since the entry into force of the Convention there has not been sufficient experience accumulated with respect to the effects of its operation to permit a judgement on its over-all efficacy. The United States, therefore, has no present intention of adhering to the Convention and reserves its position as to the course of action which it may ultimately adopt.

COMMENTS BY THE SECRETARY-GENERAL OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Comments of 3 January 1969

[Original: French]

1. Preliminary comment:

By letter dated 27 December 1968, certain comments relating to the positions taken by fourteen Governments were transmitted to the Permanent Bureau of the Conference; the Bureau was given ten days in which to formulate its comments; of those ten days, five were not working days. Consequently, the following review is necessarily very limited in scope and can offer only a simplified outline of some of the main considerations. The discussions which may take place at the second session of UNCITRAL should, if they are to deal with the matter thoroughly, cover a number of points not mentioned below.

2. General comment:

The Permanent Bureau notes with satisfaction the favourable attitude shown by Colombia, Hungary and Spain towards the Hague Convention of 1955 on the Law Applicable to International Sales of Goods (hereinafter referred to as the Conflict of Laws Convention). It believes that it can perform a useful service by examining more closely here some of the arguments against the Convention put forward by other countries.

First of all, it should be emphasized that any multilateral or, as in the case of the Conflict of Laws Convention universal rule of conflict must be of a neutral character. The rules of conflict are based on the theory that all legal systems have equal status and that, in cases where the interests of two parties are at variance, each party being subject to a different code of law, justice requires that the law which is to govern their legal relations should be determined.*

Another reason for this neutrality is that, if in certain cases the rule of conflict prescribes the application of a foreign law, the reverse will automatically hold good for the other party in comparable cases, where the same rule will result in the application of lex fori.

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* Sometimes even the authority of the law of a third State will be recognized.

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The main justification for a multilateral rule of conflict, however, is the certainty of the law which it provides. Whether a case is brought before the courts of one Contracting Party to the Conflict of Laws Convention, or before those of the other, the rights and obligations of the Parties will be governed by the same national law. Thus, any reason for engaging in "forum shopping" - seeking a sympathetic jurisdiction - ceases to exist.

3. Relationship to the Uniform Law regarding the sale of goods:

Some Governments have expressed the opinion that the Hague Conflict of Laws Convention is incompatible with their signing the Convention relating to a Uniform Law, of 1964, (hereinafter referred to as the Uniform Law Convention), article 2 of which purports to abolish "private international law".

It is necessary for this reason to draw attention to a disturbing aspect of the aforementioned article 2, namely, that - unless its effect is mitigated by recourse to one of the reservations contained in articles III, IV and V of the 1964 Convention (to which the Uniform Law itself is an annex) - it will intensify the antagonism between States which adhere to the Uniform Law and those which, for whatever reason, reject the Uniform Law Convention.

If, or course, the Uniform Law was adopted in all countries of the world, the rules of conflict - and the Hague Convention of 1955 - would become almost entirely pointless.* This is not the case, however, and it cannot be hoped that the Uniform Law will be accepted without subsequent alteration in the great majority of countries. At best - and we shall limit ourselves to considering this optimum, since the arguments that have been put forward will apply even more strongly if some major States continue to be categorically opposed to the Uniform Law - it is to be expected, judging from what experience has taught us with regard to unification, that several decades will elapse before virtually all States have ratified or acceded to the Uniform Law Convention.

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* For the sake of brevity I am omitting any mention of those aspects of the sales of goods which are not covered by the Uniform Law, and also conflicts of interpretation, which will still need to be settled (cf. the judgement in the Hocke case, where the Court of Cassation, Paris, ruled that the German interpretation of the text of a convention was applicable; 4 March 1963, Revue critique, p. 264). It seems that the rules of conflict will in any event continue to be of importance in all such matters.

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During that period the world will be divided into two camps, one applying the Uniform Law to all international sales, the other applying it as foreign law only if its rules of conflict so prescribe. The rigidity imposed by article 2 on the courts of the first group of countries means that those courts will never - except in cases where the parties to the contract have expressly or implicitly agreed to exclude it - be able to apply any law other than the Uniform Law.

Article 2 will have the effect of imposing this Uniform Law on the business people of countries that have not adopted it, even though it had been rejected or not yet adopted by their legislators. All trade between States which have adopted the Uniform Law and those which have not adopted it will be subject to an undesirable legal dichotomy: if, in the event of a dispute, one of the parties brings its action in the Uniform Law country, that law will apply. If, on the other hand, it has recourse to the court of the country which is not a Party to the Convention, the law indicated by the rule of conflict of that State will apply. In these circumstances, "forum shopping" can flourish unchecked.

This conclusion shows how peculiar the proposed article 2 is. It appears that the philosophy underlying it is hindering the entry into force of the Convention. It is significant that the Convention itself offers no less than three opportunities - articles III, IV and V - of destroying the very foundations of article 2. This suggests to us that any revision of the Uniform Law should be aimed first and foremost at that article. If it was abolished, the happy result would be that, during the transitional decades - in the course of which, incidentally, some amendments to the Uniform Law might cause a considerable expansion of the group of States adhering to the Uniform Law - there would be continued recognition of the fact that an alien, brought up and living under foreign laws, is entitled to have his own laws respected - within the bounds of the rules of conflict - when he enters into relations with business people subject to other legal systems.

The problem that has been pointed out above remains the same if the Uniform Law is viewed as an expression of the former _jus mercatorum_. Here, as in the matter of interpretation, the point at issue is whether the conclusions adopted in 1964 on the substance of the _jus mercatorum_ are really true to the principle of it, and that is a question which each State has the right to answer for itself.

The foregoing analysis was necessary in order to demonstrate the unsound reasoning behind the argument that States - even those which adopt the Uniform Law - would no longer need a unification of the rules of conflict, either now or for decades to come.

It has been said on other occasions that outright ratification of the Uniform Convention without limiting the effects of article 2 by any of the reservations provided for in article III, IV or V of the parent Convention, was necessary if the successful application of the Uniform Law throughout the world was to be accelerated. We continue to believe that the result described above - namely, the negation of the rules designed to achieve a just apportionment of legislative competence - will have the opposite effect. It is our view that the needs of the world of commerce will, on the contrary, be best served by a system of regulations combining the merits of both the Uniform Law and the Conflict of Laws Convention.

4. Future prospects:

It may nevertheless be wondered whether the Conflict of Laws Convention is the best possible reflection of the state of positive law and doctrine as they exist at the present time. In this connexion, it should be pointed out that the 1951 Conference, which adopted this Convention, took as the basis of its work a preliminary draft dating from 1931, and that its main concern was not to undo what had been arduously built up since studies had begun in 1924. Subsequently, the Conference displayed great caution - entirely for the same reasons of prudence - with regard to proposals for revision based on some very exhaustive studies made by one member Government.

A future revision of this Convention by the Hague Conference, if approved by the States Parties to the Convention, could undoubtedly take account of new trends in private international law with respect, for example, to the role of commercial agents in the matter of determining applicable law and the effect of the whereabouts of the goods; it could also draw a distinction, for the purpose of evaluating the effect of an arbitration clause, between those branches of trade where the courts decide questions of substance solely on the basis of their domestic law and those where it has already become the practice of the arbitral courts, as of the judicial tribunals, to decide which rule of conflict to follow and then to apply the law thus designated - i.e., either their own law or foreign law,

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depending on the particular case. To complete the picture, mention may be made here of the possible benefits of co-ordinating such updating with any revision of the Uniform Law that may be undertaken.

5. Final comments:

One final comment is necessary to put the foregoing observations in perspective. The Hague Conference is not, and does not wish to be, anything more than an expression of the will of its member States. Its members include a number of States which are already bound by the Conflict of Laws Convention; in addition, other member States and non-members are preparing to become parties to that international instrument. The membership also includes supporters of the Uniform Law who want that text to enter into force at the earliest possible date. That is why the foregoing observations cannot claim to be an expression of the will of the members of the Conference; moreover, opinions sometimes differ even within one and the same State.

The Permanent Bureau nevertheless felt obliged to draw attention to the effect that the system on which article 2 of the Uniform Law is based would have on the contract most typical of international trade, which is the prime responsibility of UNCITRAL. The Bureau, realizing the importance to international trade of achieving unification of private law, deplores the fact that the school of thought opposed to solutions of conflicts of laws, even for the transitional period, may jeopardize the success of a work to which generations of outstanding jurists have devoted their best efforts.

Comments of 27 January 1969

[Original: French]

One Government made a very general adverse comment on the Hague Convention - cf. the reply by Iran. Its comment was that the Hague Convention of 1955, in adopting as its main rule the application of the law of the vendor (that is, except in cases where the option to designate one domestic law acceptable to both parties to the contract (art. 2) is exercised), allegedly favoured exporting countries. We believe that this comment could usefully be given closer consideration, since it seems to us to call for clarification.

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When, in this context, the words "exporting countries" are used, they can mean only that the volume of exports of such a country exceeds its volume of imports. Even if, in relations between developing and industrialized countries, imports of industrial products are not offset by exports of primary commodities and agricultural products, the effect a fear of which is expressed in the comment mentioned above could occur only with respect to the margin representing the difference between those two volumes.

Moreover, in the matter of unification of law, the first essential is to seek rules which are equitable in themselves, and it would be dangerous to make the solutions to questions of private international law dependent on transient economic conditions in the respective nations.

It should be added that every one of the domestic codes of law which become applicable under the 1955 Convention establishes a balance between the rights and obligations of the vendor on one hand and those of the buyer on the other. There is nothing to justify the contention - which is the heart of the argument - that the domestic laws of the States Parties to the Hague Conflict of Laws Convention would generally favour the vendor more than the buyer.

Nevertheless, we agree that such a rule making international sales subject to the domestic law of the vendor will, if applied to the economy of a country as a whole, give some advantage to those who do not have to take account of a foreign code of law - in other words, to exporters - while the import trade of the country in question would suffer the disadvantage of having to take account of a foreign code of law, that of their contracting partner. In view of the equivalence of domestic legislations, however, this disadvantage is largely offset by the certainty of the law, which is the inevitable result of adherence to the 1955 Convention, in that the same rules of law will govern any given commercial transaction in the countries primarily concerned and "forum shopping" will not bring any advantage to the party engaging in it.

We would reiterate, finally, that the same result could have been achieved through the general adoption of a uniform law (see our comments of 3 January 1969), provided, however, that such adoption was truly general and took place within a reasonable time. It was because of the Conference's virtual certainty that such a result was not to be expected - in other words, that the general adoption of a uniform law would not be achieved until the relatively distant future - that it felt that the first essential was to unify the rules of conflict.
