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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

In his note (A/CN.9/12) the Secretary-General reproduced the substantive portions of ten replies received as of 25 November 1968 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 eleven additional replies which have been received since the circulation of document A/CN.9/12.

TEXT OF REPLIES BY STATES

BOTSWANA

[Original: English]
19 December 1968

... as Botswana is a developing country with a small population it is important that she should keep in step with her main trading partners in these matters.

At present our rules of conflict in the field of private international law are similar to those of our main trading partners. The result of this is that whether an action on a disputed contract is brought in our courts, or in the courts of one of our main trading partners, the result ought, in theory, to be the same.

If this country were to introduce legislation to enable the provisions of the Convention to be applied in Botswana we would, in effect, be introducing new conflict rules based on entirely different principles.

Article 3 for example, would seem to create a situation whereby the result of an action would depend on the court on which the action is brought.

It is therefore, regretted that at this stage, the Government of Botswana is of the opinion that it would not be in the country's best interests to adhere to the Convention.

CZECHOSLOVAKIA*

[Original: English]
27 December 1968

The Czechoslovak Socialist Republic supports the unification efforts undertaken so far in the sphere of the unification of conflicts of laws. The importance attached by the Czechoslovak Government to the question of unification of conflicts of laws is also shown by the fact that the Czechoslovak Socialist Republic has become this year a member of the Hague Conference on Private International Law.

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* Member of the Commission.

The Convention on the Law Applicable to International Sale of Corporeal Moveables of 15 June 1955, is of primary importance in the area of conflicts of laws in connexion with the international sale of goods. When the Czechoslovak law on private international law and law of procedure of 1963 was being prepared, note was taken of the Convention's provisions and its fundamental principles were adopted by the Czechoslovak legislation.

The Czechoslovak Government believes that the unification of substantive norms reduces the conflicts of national laws but does not remove them in full, and that, therefore, besides the unification of substantive norms it is also necessary to simultaneously strive for the unification of conflict norms. That is why the Government welcomes the inclusion of the question into the programme of work of the UNCITRAL and will support the Commission's efforts within its possibilities. It considers it expedient for the Commission to proceed in its further work from the aforementioned Convention. The idea is now under consideration to propose to the competent Czechoslovak constitutional organs that Czechoslovakia accede to the Convention.

IRAN*

[Original: French]
31 December 1968

For the reasons explained below, the Government of Iran is unable to accede to the Hague Convention on the Law Applicable to International Sale of Goods.

1. The basic purpose of the Hague Convention is to determine the law applicable in case of litigation. In other words, the Convention merely regulates a question of "conflict" and is not concerned with the international principles governing the law of sales. This is clearly contrary to the aim of the United Nations Commission on International Trade Law, which is surely to prepare texts of laws governing all sales which traverse the frontiers of a given country.

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* Member of the Commission.

The scope of these international texts will, of course, be limited, at least by the rules concerning the status and capacity of the contracting parties and the form of the contract and even, perhaps, the transfer of ownership, but it is nevertheless true that they will constitute basic rules for all international contracts of sale, so that there will be one single law of sale and not dozens or even hundreds of laws according to the differences in the nationality of the contracting parties.

It is clearly much easier for the judge who deals with the case to be familiar with one law, even if there are some exceptions to it, than with dozens or hundreds of different laws.

2. Even if the laudable aim of the United Nations is disregarded, and attention is focused on a field which is much more limited than the codification of international trade law, the Hague Convention should suit the economically developed countries, which are essentially exporting countries. It is for that reason that stress has been laid on the law of the vendor, in other words, on the law of the economically stronger party.

It is true that article 3 (2) of the Convention assigns, on the whole, a very modest role to the law of the purchaser. Even here, however, the stronger party is not defenceless and can always impose his law by virtue of the escape clause in article 2 of the Convention.

In these circumstances it is hardly surprising that the Hague Convention has been ratified only by seven exporting States, although its scope is limited to the determination of the law applicable in case of litigation.

MEXICO*

[Original: Spanish]
4 December 1968

The Permanent Representative wishes to inform the Secretary-General that, in principle, his Government considers it advisable to ratify the Hague Convention

* Member of the Commission.

of 1955 on the Law Applicable to International Sale of Goods, the Hague Convention of 1964 relating to a Uniform Law on the International Sale of Goods and the Hague Convention of 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.

IV. The Convention on the Law Applicable to International Sales of Goods (C)*

Prior to the two Hague Conventions of 1964 (A and B), another Convention, on the law applicable to international sales of goods, was drawn up at The Hague on 15 June 1955. As stated above (chapter II-7), the United Nations has invited the Mexican Government to indicate whether it intends to adhere to the 1955 Convention and the reasons for its position.

1. Ratification of the three Conventions

It would seem that ratification of the two 1964 Conventions would make it redundant to ratify the 1955 Convention for the following reason. If a country (specifically, Mexico) accedes to 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 and adopts the two Uniform Laws, it will incorporate those laws into its own legislation, and will thus establish the law applicable to international contracts of sale, which is precisely the subject and purpose of the 1955 Convention.

Furthermore, ratification of the 1955 Convention would apparently constitute at least a technical impediment to the ratification of the two 1964 Conventions and the Uniform Laws annexed to them, for a country accepting the 1955 Convention would be admitting that international sales are governed by the domestic law of the country designated by the Contracting Parties (article 2) and, in default of a law declared applicable by the parties, by the domestic law of the country of the vendor or the purchaser (article 3) or of the country in which inspection of the goods delivered takes place (article 4), but never by international law.

In principle, it should suffice to ratify either the 1964 Conventions or the 1955 Convention, and we venture to think that, although the question was not given

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* Chapter IV of the Study submitted by the Government of Mexico on the Hague Conventions of 1964 and 1955. Chapters I-III are reproduced in document A/CN.9/11/Add.1.

special consideration at the first session of UNCITRAL, held in New York in February 1968, the Commission took the view that it would be enough to ratify either the two 1964 Conventions or the 1955 Convention, and not all three. However, both the Convention relating to a Uniform Law on the International Sale of Goods (A) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (B) provide that each Contracting State undertakes to incorporate the relevant Uniform Law into its own legislation (article I of the two Conventions), so that the Uniform Laws will automatically be converted into domestic or national laws. Furthermore, each of the 1964 Conventions provides expressly in its article IV that "any State which has previously ratified or acceded to one or more Conventions on conflict of laws in respect of the international sale of goods (which would include Convention C) may, at the time of the deposit of its instrument of ratification or accession to the present Convention (A and/or B) declare... that it will apply the Uniform Law (A and/or B) in cases governed by one of those previous Conventions (C, in the present case) only if that Convention itself (C) requires the application of the Uniform Law".

In the present case, the 1955 Convention does require the application of the Uniform Laws (A and/or B) if the latter have already been ratified and have thus been converted into municipal or domestic laws for the purposes of articles 2, 3 and 4 of the 1955 Convention quoted above.

Furthermore, it may so happen that the Uniform Laws do not apply in the countries of the contracting parties to an international sale, because neither country has ratified them. Furthermore, even when Conventions A and B have been ratified by the purchaser's country and the vendor's country, the parties to a contract of sale may entirely or partially exclude the application of the Uniform Law on the International Sale of Goods, as provided in article 3 of that Law; the application of the Uniform Law on the Formation of Contracts for the International Sale of Goods may even be excluded either by a decision of the parties or as a result of commercial usage, as provided in article 2 of that Law. In such cases, the rules of the 1955 Convention, which refer to domestic law, will apply.

Consequently, it is in principle desirable and expedient for Mexico to ratify all three Conventions; Conventions A and B because, when incorporated into domestic

law, they effectively govern international sales of goods and the formation of the relevant contracts; and the 1955 Convention (C), because it can be applied in conflicts of laws arising in connexion with such sales.

2. Sphere of application of the 1955 Convention

(a) With regard to the subject-matter of the contracts of sale, the 1955 Convention, like Conventions A and B, does not apply to sales of securities, to sales of registered ships, boats or aircraft or to sales upon judicial order or by way of execution (article 1); however, unlike Conventions A and B, Convention C does not exclude sales of money or sales of electricity. We consider that the three Conventions should be harmonized, and that the reasons invoked for excluding sales of money and electricity from Conventions A and B are also valid in the case of Convention C.

Like the Uniform Laws annexed to Conventions A and B (articles 6 and 1 (7) respectively), the 1955 Convention applies to contracts to deliver goods to be manufactured or produced.

Lastly, the 1955 Convention expressly includes sales based on documents (article 1) to which the Uniform Law annexed to Convention A also applies (articles 50 et seq.).

(b) It is expressly stated that Convention C shall not apply to the capacity of the parties and the form of the contract (article 5 (1) and (2)).

(c) Similarly, article 5 (3) stipulates that the 1955 Convention shall not apply to the transfer of ownership (as is also the case in the Uniform Law annexed to Convention A (article 8)), provided that the various obligations of the parties, and especially those relating to risks, are subject to the application of the Convention. The relationship thus established between the transfer of ownership and the transfer of risk is a defect resulting from the rule res perit domino, which has been criticized and for which we feel there is no justification.

(d) Lastly, article 5 (4) provides that Convention C shall not apply to the effects of the sale as regards all persons other than the parties.

3. Rules for the application of the 1955 Convention

The Convention lays down the following main rules for its application:

(a) A sale shall be governed by the domestic law of the country designated by the contracting parties. Such designation must be contained in an express clause,

or unambiguously result from the provisions of the contract (article 2). This very clear and explicit rule is preferable to that set forth in the Uniform Law annexed to Convention A (article 3), which we have already criticized.

(b) In default of a law designated by the parties, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale shall be governed by the domestic law of the country in which the establishment is situated (article 3).

(c) A sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the vendor or by his representative.

In short, the sale is governed first, by the principle that the parties are free to designate the law which is to apply; in default of such designation, the sale is governed by the domestic law of the party who receives the order.

4. Other principles laid down in the 1955 Convention

(a) With regard to the inspection of goods delivered pursuant to a sale, the Convention provides that, in the absence of an express clause to the contrary, the domestic law of the country in which the inspection takes place shall apply in respect of the form in which and the periods in which the inspection must take place, the notifications concerning the inspection and the measures to be taken in case of refusal of the goods (article 4).

(b) The application of the Convention may be excluded in any Contracting State for reasons of public policy (article 6).

(c) Lastly, article 7 provides that a State which ratifies the Convention shall incorporate the provisions of articles 1-6 in its national law.

The 1955 Convention, which has already been ratified by seven countries - Belgium, Denmark, Finland, France, Italy, Norway and Sweden - remains open for ratification by other countries through the deposit of instruments of ratification with the Ministry of Foreign Affairs of the Netherlands. Since the Convention had already been ratified by more than five States, it came into force on the sixtieth day following the deposit of the fifth instrument of ratification.

NETHERLANDS

[Original: English]
29 November 1968

Given the successful conclusion of the Conventions of 1964, the Netherlands Government does not intend to ratify the Hague Convention of 1955 on the Law applicable to International Sale of Goods. In its opinion, the removal of differences in various legal systems can be more fully realized by application of the Uniform Law on the International Sale of Goods than by application of rules governing conflicts of law.

ROMANIA*

[Original: English]
16 December 1968

The adherence of Romania to the three Conventions mentioned in the letters is under consideration by the Romanian competent authorities.

SIERRA LEONE

[Original: English]
2 January 1969

The Government of Sierra Leone is in general agreement with articles 1, 2, 5, 8, 9, 10, 11 and 12. Complications can, however, result from the present form of articles 3 and 4. As an example, the term "habitual residence" may not be easily ascertainable. A more precise wording should help.

In view of the comments made on articles 3 and 4, the Sierra Leone Government would find it difficult to adhere to the Convention as it now stands.

SINGAPORE*

[Original: English]
4 December 1968

The Singapore Government does not intend to adhere to the Convention on the Law Applicable to the International Sale of Goods, formulated by the Hague Conference on Private International Law in 1955.

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* Member of the Commission.

SPAIN*

/Original: Spanish/
3 November 1968

The Spanish Government is at present considering the possibility of signing the Convention on the Law Applicable to International Sale of Goods. It approves of the Convention in principle. Although the Convention has some defects, they are outweighed by its advantages and on balance it seems acceptable. Briefly, we feel that the signature and ratification of the Convention would clarify the system of private international law now in force in Spain, improve its operation and ensure more effectively that what was agreed upon by the contracting parties will be carried out. At the same time, the courts may invoke the concept of public policy when basic elements of a nation's juridical order are affected.

Nevertheless, the Spanish Government feels that the above-mentioned Convention should be brought into line with the Convention relating to a Uniform Law on the International Sale of Goods, once the latter is finalized.

UNION OF SOVIET SOCIALIST REPUBLICS*

/Original: Russian/
27 December 1968

This Convention was adopted at the 1955 Hague Conference, which was attended by only sixteen States, none of which were socialist or developing States.

In the opinion of the competent Soviet organs, the text of this Convention cannot be used for the elaboration of a universal international agreement on the law applicable to international sales of goods. It should also be noted that the Convention contains provisions which are at variance with the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the United Nations General Assembly in 1960.

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* Member of the Commission.

UNITED KINGDOM*

/Original: English/
24 December 1968

The United Kingdom has interested itself in the work of the Hague Conference in connexion with the formulation of this Convention and the question of adopting as part of the law of the United Kingdom rules such as those formulated in articles 1 to 6 of the Convention was the subject of study by a Committee of United Kingdom experts some time ago.

The United Kingdom considers that the main principle in article 2 of the Convention, namely, that Courts should recognize and give effect to contractual clauses which specify the domestic law which is to apply to an international contract of sale, represents a valuable contribution to the development of international trade. This principle is already recognized in the law of the United Kingdom. But, acceptance by the United Kingdom of the Convention would involve a change in the law of the United Kingdom in cases where the parties to a contract have not chosen the applicable law or have framed their contract in such a way that no designation of an applicable law unambiguously results from its provisions. For the rule of United Kingdom law in cases where there is no express choice of law clause is that the applicable law is 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.

Furthermore, United Kingdom Courts ordinarily apply a single law in determining the rights and obligations which arise out of a contract. There are, of course, certain exceptions to this rule; but these are recognized as such. The application of more than one system of law to the same contract is, therefore, unusual.

On balance the United Kingdom does not think that the uniformity which might result from its adherence to the Convention would outweigh the disadvantages which would be occasioned by the necessary changes in the law of United Kingdom and, accordingly, is not prepared to adhere to the Convention.

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* Member of the Commission.

The disadvantages which are thought to flow from the changes in the United Kingdom law which would be necessary to give effect to the Convention are:

(a) that the change would, per se, prejudice the uniformity which at present exists in the rules of common law countries on the matters covered by the Convention;

(b) that the substitution for the existing United Kingdom rules of the rules of the Convention in determining the applicable law where there is no expressed choice of law clause would lead to uncertainty and litigation. (For example, it would be necessary to determine whether a clause providing for arbitration in a particular country, which is at present treated as indicating the law of that country as the applicable law, constituted a designation of that law within article 2);

(c) that the application of the rule set out in article 3 of the Convention would tend to produce legal consequences which the parties had not contemplated and might produce anomalous results, for example, in cases where although the parties have not designated an applicable law so as to make the provisions of article 2 applicable, they have contracted in terms which make it clear that they did not contemplate the application of the law of the seller's country;

(d) that article 4 of the Convention would involve a more frequent application of more than one law to a single contract - a tendency which would, in the view of the United Kingdom, tend to complicate rather than to simplify the legal rules affecting international transactions.
