

D. COMMENTARY ON THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, PREPARED BY THE SECRETARIAT

Document A/CONF.97/5

*[Original: English]
[14 March 1979]*

**PART I. SPHERE OF APPLICATION AND
GENERAL PROVISIONS**

CHAPTER I. SPHERE OF APPLICATION

Article 1

[Sphere of application]¹

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or
(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

¹ The titles to the articles have been prepared by the Secretariat at the request of the United Nations Commission on International Trade Law

but have not been approved by the Commission (United Nations Commission on International Trade Law, summary record of the 208th meeting, A/CN.9/SR.208, para 47).

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

PRIOR UNIFORM LAW

Uniform Law on the International Sale of Goods (ULIS), articles 1, 2 and 7.

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 1.

Convention on the Limitation Period in the International Sale of Goods (Prescription Convention), articles 2 and 3.

Commentary

1. This article provides the general rules for determining whether this Convention is applicable to a contract of sale of goods as well as to its formation.

Basic criterion, paragraph (1)

2. Article 1 (1) provides that the basic criterion for the application of this Convention to a contract of sale of goods as well as to its formation is that the places of business of the parties are in different States.²

3. This Convention is not concerned with the law governing contracts of sale or their formation where the parties have their places of business within one and the same State. These matters will normally be governed by the domestic law of that State.

4. By focusing on the sale of goods between parties whose places of business are in different States, the Convention will serve its three major purposes:

- (1) to reduce the search for a forum with the most favourable law;
- (2) to reduce the necessity of resorting to rules of private international law;
- (3) to provide a modern law of sales appropriate for transactions of an international character.

Additional criteria, subparagraphs (1) (a) and (1) (b)

5. Even though the parties have their places of business in different States, this Convention applies only if:

- (1) the States in which the parties have their places of business are Contracting States; or
- (2) the rules of private international law lead to the application of the law of a Contracting State.

6. If the two States in which the parties have their places of business are Contracting States this Convention applies even if the rules of private international law of the forum would normally designate the law of a third country, such as the law of the State in which the contract was concluded. This result could be defeated only if the litigation took place in a third non-Contracting State, and the rules of private international law of that State would apply the law of the forum, i.e., its own law, or the law of a fourth non-Contracting State to the contract.

7. Even if one or both of the parties to the contract have their places of business in a State which is not a Contracting State, the Convention is applicable if the rules of private international law of the forum lead to the application of the law of a Contracting State. In such a situation the question is then which law of sales of that State shall apply. If the parties to the contract are from different States, the appropriate law of sales is this Convention.

8. A further application of this principle is that if two parties from different States have designated the law of a Contracting State as the law of the contract, this Convention is applicable even though the parties have not specifically mentioned the Convention.

² If a party has places of business in more than one State, the relevant place of business is determined by article 9 (a).

Awareness of situation, paragraph (2)

9. Under paragraph (2), the Convention does not apply if "the fact that the parties have their places of business in different States . . . does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract". One example of such a situation is where the parties appeared to have their places of business in the same State but one of the parties was acting as the agent for an undisclosed foreign principal. In such a situation paragraph (2) provides that the sale, which appears to be between parties whose places of business are in the same State, is not governed by this Convention.

Nationality of the parties, civil or commercial character of the transaction, paragraph (3)

10. International conventions which affect the rights of individuals are often intended to protect the rights of the nationals of the Contracting States in their dealings in or with the other Contracting State or States. Therefore, it is typical that these conventions apply only to relations between "nationals" of the Contracting States.

11. However, the question whether this Convention is applicable to a contract of sale of goods is determined primarily by whether the relevant "places of business" of the parties are in different Contracting States. The relevant "place of business" of a party is determined by application of article 9 (a) without reference to his nationality, place of incorporation, or place of head office. This paragraph reinforces that rule by making it clear that the nationality of the parties is not to be taken into consideration.

12. In some legal systems the law relating to contracts of sale of goods is different depending on whether the parties or the contract are characterized as civil or commercial. In other legal systems this distinction is not known. In order to ensure that the scope of application provisions of this Convention are not interpreted to apply only to contracts of sale characterized as "commercial" or between parties characterized as "commercial" under the law of a Contracting State, article 1 (3) provides that the civil or commercial character of the parties or of the contract is not to be taken into consideration.

13. It should be noted, however, that article 2 excludes from the sphere of application of this Convention certain contracts for the sale of goods which are likely to be characterized as "civil" contracts by a legal system which recognizes the distinction between civil and commercial contracts. Most notably, article 2 (a) excludes from the sphere of application of this Convention sales "of goods bought for personal, family or household use."

14. Paragraph (3) applies only to the scope of application provisions of this Convention. It does not mean that the civil or commercial character of the parties may not be taken into consideration for the purposes of determining such matters as the period of time which is to be regarded as a reasonable period of time for giving notice of lack of conformity of the goods under article 37 (1).