

F. Report of the Secretary-General: draft convention on the international sale of goods; draft articles concerning implementation and other final clauses (A/CN.9/135)*

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INTRODUCTION

1. At the seventh session (5-16 January 1976) of the Working Group on the International Sale of Goods, at which the text of the draft Convention on the International Sale of Goods was approved, the Working Group requested the Secretariat to prepare draft provisions relating to implementation of the proposed Convention and draft final clauses for consideration of the Commission at a future session.¹ The present report has been prepared in response to that request.

2. Each draft article is accompanied by a brief commentary to facilitate consideration of the draft articles by the Commission.

DRAFT ARTICLES

Article [1]. Depository

The Secretary-General of the United Nations is hereby designated as the depository of this Convention.

Prior conventions or draft articles

Convention on the Limitation Period in the International Sale of Goods, articles 31(2), 40, 41, 42, 43, 44, 45 and 46.

Draft Convention on the Carriage of Goods by Sea, A/CN.9/115.²

Commentary

1. Throughout the remainder of these draft articles the Secretary-General of the United Nations is referred to as "the depository" without repetition of his title.

2. The general functions of a depository are described in article 77 of the Vienna Convention on the Law of Treaties. Additional functions of the depository of this Convention are set out in article [7] of these draft articles.

* 15 April 1977.

¹ See the report of the Working Group on the International Sale of Goods on the work of its seventh session, A/CN.9/116, para. 11 (Yearbook . . . , 1976, part two, I, 3).

² A revised version of the draft articles concerning application, reservations and other final clauses in respect of the draft Convention on the Carriage of Goods by Sea as found in A/CN.9/115 will be presented to the Conference of Plenipotentiaries which has been convened to adopt the Convention. That revised version is contained in document A/CONF.89/6.

3. This text is identical to that proposed for the draft Convention on the Carriage of Goods by Sea. It differs from some other conventions which state the individual or entity who is to serve as depository in the same article as that which specifies the official languages. In this respect, compare article [9] of these draft articles with article 46 of the Convention on the Limitation Period.

Article [2]. Federal-State clause

Commentary

1. Some conventions for the unification of private law contain a federal-State clause and such a clause may be thought to be desirable for this Convention. Federal-State clauses have been intended either (i) to specify the obligation of the federal government of a contracting State where the subject-matter of the convention was such that the constituent States, provinces or cantons of the federation had legislative jurisdiction, or (ii) to authorize a contracting State in which there are two or more different systems of law in respect of the subject-matter in question to declare that the convention would apply to only a portion of the territory of that State.

2. Appendix I to this article reproduces article 11 of the Convention on the Recovery Abroad of Maintenance concluded at New York on 20 June 1956, which is a federal-State clause of the first type, and appendix II reproduces article 31 of the Convention on the Limitation Period, which is a federal-State clause of the second type.

3. At the Conference on Prescription many States found both of the formulations unacceptable.³ The representative of one federal State insisted that article 31 of the Convention on the Limitation Period should not become a precedent.⁴ Moreover, at the ninth session of

³ Report of the Second Committee, paras. 14-19, summary records of plenary meetings, 9th meeting, paras. 52-61; summary records of Second Committee, 1st meeting, paras. 14-25; 2nd meeting, paras. 8-9; 3rd meeting, paras. 1-3; 4th meeting, paras. 1-43. (*Official Records of the United Nations Commission on Prescription (Limitation) in the International Sale of Goods*; United Nations publication, Sales No. 74.V.8: hereafter referred to as *Official Records*.)

⁴ Summary records of plenary meetings, 9th meeting, para. 53 (Australia).

the Commission, during the consideration of the draft Convention on the Carriage of Goods by Sea, the representative of one State with a federal system of government (United States) expressed the view that a federal-State clause based on article 31 of the Convention on the Limitation Period was unnecessary and the representative of another federal State (Australia) considered that such a provision would cause difficulties under the constitution of his country.⁵

4. In the light of these considerations the Commission may wish to request the Secretary-General to invite federal and non-unitary States to indicate their views on the desirability of a federal-State clause in the Convention on the International Sale of Goods. The Commission may also wish to request the Secretary-General on the basis of these views to prepare a new draft of a federal-State clause.

Appendix I

Convention on the Recovery Abroad of Maintenance

Article 11. Federal State clause

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction to the federal legislative authority, the obligations of the federal government shall to this extent be the same as those of Parties which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the federal government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting Party transmitted through the Secretary-General, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of the Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Appendix II

Convention on the Limitation Period in the International Sale of Goods

Article 31

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Secretary-General of the United Nations and shall state expressly the territorial units to which the Convention applies.

3. If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification or accession, the Convention shall have effect within all territorial units of that State.

⁵ A/31/17, annex I, draft provisions concerning implementation, reservations and other final clauses, para. 5 (Yearbook . . . , 1976, part one, II, (A)).

Article [3]. Declaration of non-application of Convention

Two or more Contracting States may at any time declare [, either jointly or by reciprocal unilateral declarations,] that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be governed by this Convention, because they apply to the matters governed by this Convention the same or closely related legal rules.

Prior conventions or draft articles

Convention on the Limitation Period, article 34.

Convention Relating to a Uniform Law on the International Sale of Goods, done at The Hague, 1 July 1964,⁶ article II, paragraph 1.

Commentary

1. Article [3] enables two or more States to preclude the application of the present Convention to contracts to which it would otherwise have applied "because they apply to the matters governed by this Convention the same or closely related legal rules".

2. It is not clear whether article 31 of the Convention on the Limitation Period requires the declaration to be a joint declaration of the two or more States or whether the States concerned can make unilateral declarations which refer to or anticipate one another. However, it is clear from article 40(2) of that Convention, repeated in article [4(7)] of the present draft articles, that withdrawal of the declaration may be made unilaterally, which would suggest that it should be possible to make the declaration unilaterally. Therefore, the words "either jointly or by reciprocal unilateral declarations" have been inserted in brackets to make it clear that the declarations may be in either form.

Article [4]. Declaration under article [2] or [3]

(1) Declarations made under article [2] or [3] at the time of signature are subject to confirmation upon ratification [, acceptance or approval].

(2) Declarations, and the confirmation of declarations, must be in writing and must be formally notified to the depositary.

[(3) Declarations made under article [2] must state expressly the territorial units to which the Convention applies.]

[(4) If a Contracting State described in article [2] makes no declaration at the time of signature, ratification [, acceptance, approval] or accession, the Convention has effect within all territorial units of that State.]

(5) Declarations take effect simultaneously with the entry into force of this Convention in respect of the State concerned, except for declarations of which the depositary receives formal notification after such entry into force. The latter declarations shall take effect on the first day of the month following the expiration of six months after the date of their receipt by the depositary [except that reciprocal unilateral declarations under article [3] shall take effect on the first day of the month

⁶ Hereafter referred to as the 1964 Hague Convention.

following the expiration of six months after the receipt of the latest declaration by the depositary].

(6) Any State which has made a declaration under this Convention may withdraw it at any time by means of a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(7) In the case of a withdrawal of a declaration made under article [3] of this Convention, such withdrawal also renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Prior conventions and draft articles

Convention on the Limitation Period, articles 31 (2), (3) and 40.

Draft Convention on the Carriage of Goods by Sea, A/CN.9/115.⁷

Commentary

1. Article [4] defines the manner of making declarations under articles 2 or 3 of the present Convention, the manner of their withdrawal⁸ and the time at which a declaration or a withdrawal of a declaration becomes effective.

Declarations and other confirmation, paragraphs (1) and (2)

2. These provisions ensure that all declarations are formally notified to the depositary.⁹

Declarations under article [2] (federal-State clause), paragraphs (3) and (4)

3. Paragraphs (3) and (4) implement a federal-State clause of the type found in appendix II to article [2] of these draft provisions. If no provision similar in nature to that clause is adopted, paragraphs (3) and (4) of this article should be deleted.

Entry into effect of declarations, and withdrawals of declarations, paragraphs (5) and (6)

4. Paragraphs (5) and (6) state the same rules as are found in article 40 of the Convention on the Limitation Period.

Withdrawal pursuant to article [3] (declaration of non-application of Convention), paragraph (7)

5. This provision is based on the last sentence of article 40(2) of the Convention on the Limitation Period.

6. Paragraph (7) provides for unilateral withdrawal of a declaration made under article [3] whether or not article [3] as adopted requires a joint declaration or permits reciprocal unilateral declarations.

7. If no provision similar in nature to that found in appendix II to article [2] of these draft provisions is

⁷ See foot-note 1 above.

⁸ Article 31(1) of the Convention on the Limitation Period and alternative A of article [2] contain a procedure for the amendment of declarations made pursuant to those articles by submitting another declaration.

⁹ Article 77, para. (1) (e) of the Vienna Convention on Treaties provides that the functions of a depositary, unless provided otherwise comprise (*inter alia*) "Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty".

adopted, paragraphs (6) and (7) could easily be consolidated since the only declarations permissible would be those made under article [3].

Article [5]. Date of application

Alternative A. The provisions of this Convention apply to contracts which, at the time they were concluded were subject to this Convention by virtue of article 1 or article 4.

Alternative B. Delete article 4 of this Convention and amend article 1(1) to read as follows:

"(1) This Convention applies to contracts of sale of goods entered into by parties whose places of business are in different States if at the time of the conclusion of the contract:

"(a) the States were Contracting Parties; or

"(b) the rules of private international law led to the application of the law of a Contracting Party; or

"(c) the parties had chosen this Convention as the law of the contract".

Prior conventions or draft articles

Convention on the Limitation Period, articles 2(a), 3 and 33.

Commentary

1. Article [5] defines the point of time from which the provisions of this Convention apply to contracts falling within the sphere of application of the Convention.

2. Alternatives A and B are intended to achieve the same result. Alternative A deals with the question of date of application of the Convention in the context of these final clauses. Alternative B deals with the problem by incorporating the date of application into article 1 of the draft Convention, the article which contains the provisions on the sphere of application of the Convention.

3. Both alternatives are designed to provide for the date of application of the Convention in relation to all three ways in which the Convention is attracted to a contract as set out in articles 1 and 4 of the draft Convention. In order to facilitate the drafting of this provision, in alternative B article 4 was deleted and its substance was combined with article 1.

Article [6]. Signature, ratification, [acceptance, approval,] accession

(1) This Convention is open for signature by all States until . . . inclusive at the Headquarters of the United Nations, New York.

(2) This Convention is subject to ratification [, acceptance or approval] by the signatory States.

(3) This Convention shall be open for accession by all States which are not signatory States.

(4) Instruments of ratification [, acceptance, approval] and accession shall be deposited with the depositary.

Prior conventions and draft articles

Convention on the Limitation Period, articles 41, 42 and 43.

Draft Convention on the Carriage of Goods by Sea, A/CN.9/115.¹⁰

Commentary

1. Article [6] sets out the manner in which States may become parties to the Convention.
2. This article follows articles 41, 42 and 43 of the Convention on the Limitation Period except that:
 - (a) These provisions are gathered together in one article for reasons of ease of reference; and
 - (b) Signatures are subject to ratification, acceptance or approval instead of merely subject to ratification.
3. The addition of acceptance and approval as means whereby the consent of a State to be bound by the Convention accords with modern methods of treaty-making practice as set out in articles 11 to 16 of the Vienna Convention on the Law of Treaties.¹¹

Article [7]. Entry into force

- (1) This Convention enters into force on the first day of the month following the expiration of [thirteen] months after the date of the deposit of the [tenth] instrument of ratification [, acceptance, approval] or accession.
- (2) For each State ratifying or acceding to this Convention after the deposit of the [tenth] instrument of ratification [, acceptance, approval] or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of [thirteen] months after the date of the deposit of its instrument of ratification or accession.
- (3) A State which ratifies [, accepts, approves] or accedes to this Convention and is a Party to the Con-

¹⁰ See foot-note 1 above.

¹¹ The International Law Commission has described the reasons for the introduction of acceptance and approval into treaty-making practice as follows:

"(11) 'Signature subject to acceptance' was introduced into treaty practice principally in order to provide a simplified form of 'ratification' which would allow the government a further opportunity to examine the treaty when it is not necessarily obliged to submit it to the State's constitutional procedure for obtaining ratification. Accordingly, the procedure of 'signature subject to acceptance' is employed more particularly in the case of treaties whose form or subject-matter is not such as would normally bring them under the constitutional requirements of parliamentary 'ratification' in force in many States. In some cases, in order to make it as easy as possible for States with their varying constitutional requirements to enter into the treaty, its terms provide for either ratification or acceptance. Nevertheless, it remains broadly true that 'acceptance' is generally used as a simplified procedure of 'ratification'.

"(12) The observations in the preceding paragraph apply *mutatis mutandis* to 'approval', whose introduction into the terminology of treaty-making is even more recent than that of 'acceptance'. 'Approval', perhaps, appears more often in the form of 'signature subject to approval' than in the form of a treaty which is simply made open to 'approval' without signature. But it appears in both forms. Its introduction into treaty-making practice seems, in fact, to have been inspired by the constitutional procedures or practices of approving treaties which exist in some countries."

(Draft articles on the law of treaties with commentaries, adopted by the International Law Commission at its eighteenth session, commentary on draft article 11; *Official Records of the United Nations Conference on the Law of Treaties*, documents of the Conference, part B (United Nations publication, Sales No. 70.V.5).)

vention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Convention) shall at the same time denounce that Convention by notifying the Government of the Netherlands to that effect, such denunciation to be effective on the date this Convention enters into force in respect of that State.

(4) Upon the deposit of the [tenth] instrument of ratification [, acceptance, approval] or accession, the depositary shall inform the Government of the Netherlands as the depositary of the 1964 Hague Convention of the date on which this Convention will enter into force and of the names of the Contracting States to this Convention as of that date.

Prior conventions and draft articles

Convention on the Limitation Period, article 44.
1964 Hague Convention, article X.

Commentary

1. Article [7] defines the date on which this Convention enters into force and deals with its relationship to the 1964 Hague Convention.

Entry into force of Convention paragraph (1)

2. This provision is almost identical to article 44 of the Convention on the Limitation Period except that this Convention does not enter into force until 13 months after the date of deposit of the [tenth] instrument of ratification [, acceptance, approval] or accession rather than the six-month period selected in the Convention on the Limitation Period. That period of six months was chosen to give Governments which became party to the Convention on the Limitation Period sufficient time to notify all the national organizations and individuals concerned that a Convention which would affect them would soon enter into force.¹²

3. However, the period of 13 months is suggested in respect of the proposed Convention on the International Sale of Goods to allow sufficient time for denunciations of the 1964 Hague Convention to take effect on the same date as this Convention would enter into force in respect of any State which is a Party to the 1964 Hague Convention. That Convention provides that denunciations are effective 12 months after receipt by the Government of the Netherlands.¹³ The additional one month is to allow adequate time for the Government of the Netherlands to be notified of the denunciation, as provided for in paragraph (3) of this article.

4. The number of instruments of ratification required to bring the Convention on the Limitation Period into force is 10.¹⁴

5. However, the Commission may think that it should not be necessary for that number of States to ratify a convention on a private law matter to bring it into force. It might be noted that the 1964 Hague Convention came into force by virtue of five ratifications or accessions and the Inter-American Convention on International Commercial Arbitration done at Panama City on 30 January 1975 requires only two ratifications. Accordingly, the word "tenth" has been placed in square brackets in paragraphs (1), (2) and (4) of this article.

¹² Summary records of Second Committee, 1st meeting, paras. 45-50, (Official Records, part two).

¹³ Article XII, para. 2.

¹⁴ Article 44, para. 1.

Entry into force of Convention in respect of States ratifying or acceding to Convention after it has entered into force, paragraph (2)

6. Paragraph (2) of article [7] is closely modelled on paragraph (2) of article 44 of the Convention on the Limitation Period except that, as in paragraph (1), a 13-month period must elapse before its entry into force with respect to the ratifying or acceding State to permit simultaneous denunciation of the 1964 Hague Convention pursuant to paragraph (3) of article [7].

Denunciation of 1964 Hague Convention, paragraphs (3) and (4)

7. Paragraph (3) provides that the denunciation of the 1964 Hague Convention is to be effective on the date this Convention enters into force with respect to that State. In the case of the first [ten] States to become parties to this Convention, such denunciation would be effective on the date the Convention comes into force. For all subsequent States, the denunciation would be effective [thirteen] months after the date of the deposit of the instrument of ratification [, acceptance, approval] or accession.

8. Should the Commission wish to allow the two Conventions to have a certain amount of concurrent operation then a provision similar to article VII, paragraph 2 of the 1958 Convention of the Recognition and Enforcement of Foreign Arbitral Awards could be used.¹⁵

9. Paragraph (4) of this article is a procedural measure requiring the depositary to notify the Government of the Netherlands of the entry into force of this Convention so that it is aware of the effective date of any denunciations of which it may already have been notified.

Article [8]. Denunciation

(1) A Contracting State may denounce this Convention at any time by means of a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect [on receipt of the formal notification] [twelve months after the formal notification is received] by the depositary. [Where a longer period is specified in the formal notification, the denunciation takes effect upon the expiration of such longer period after the notification has reached the depositary.]

Prior conventions and draft articles

Convention on the Limitation Period, article 45.

1964 Hague Convention, article XII.

Draft Convention on the Carriage of Goods by Sea, A/CN.9/115.¹⁶

Commentary

1. Article [8] prescribes the manner in which this Convention may be denounced.

Mode of denunciation, paragraph (1)

2. Paragraph (1) is in substantially the same terms as paragraph 1 of article 45 of the Convention on the Limitation Period.

¹⁵ This provision reads: "The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention."

¹⁶ See foot-note 1 above.

Time denunciation takes effect, paragraph (2)

3. The first sentence of paragraph (2) is similar to paragraph 2 of article 45 of the Convention on the Limitation Period except that the words in the first set of square brackets enable a denunciation to take effect on receipt of that denunciation by the depositary.

4. The words in the second set of square brackets provide for a 12-month period to elapse before the denunciation takes effect. This accords with paragraph 2 of article 45 of the Convention on the Limitation Period and with paragraph 2 of article XII of the 1964 Hague Convention.

5. The International Law Commission in a commentary on a draft provision which ultimately became article 56 of the Vienna Convention of the Law of Treaties¹⁷ stated:

"The Commission considered it essential that any implied right to denounce or withdraw from a treaty should be subject to the giving of a reasonable period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where the treaty is of the renewable type and is open to denunciation by a notice given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually 12 months, though admittedly in some cases no period of notice is required. In formulating a general rule, the Commission considered it to be desirable to lay down a longer rather than shorter period in order to give adequate protection to the interests of the other parties to the treaty. Accordingly, it preferred in paragraph 2 to specify that not less than 12 months' notice must be given of an intention to denounce or withdraw from a treaty under the present article."¹⁸

6. The second sentence of paragraph (2) is taken from the draft final clauses of the draft Convention on the Carriage of Goods by Sea.

Article [9]. Authentic text

Done at, this day of, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

Prior conventions or draft articles

Convention on the Limitation Period, article 46.

Commentary

This simplification of article 46 of the Convention on the Limitation Period is possible because:

- (i) Article [1] makes the Secretary-General of the United Nations the depositary; and
- (ii) Article 77 (1) (a) of the Vienna Convention on the Law of Treaties provides that, unless otherwise provided in the treaty or agreed by the Contracting States, the depositary shall keep custody of the original text of the treaty.

¹⁷ Article 56 deals with the denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal.

¹⁸ Draft articles on the Law of Treaties with Commentaries, adopted by the International Law Commission at its eighteenth session, comment 6 to draft article 53 (*Official Records of the United Nations Conference on the Law of Treaties*, documents of the Conference, part B (United Nations publication, Sales No. 70.V.5)).