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ANALYSIS OF COMMENTS AND PROPOSALS BY GOVERNMENTS RELATING TO ARTICLES 71 to 101 of ULIS

Note by the Secretary-General

Addendum

In his note A/CN.9/WG.2/WP.17 the Secretary-General analysed the comments and proposals by representatives of States members of the UNCITRAL Working Group on the International Sale of Goods, relating to articles 71 to 101 of ULIS and addendum 1 to that note reproduced the text of those comments and proposals.

The present addendum reproduces the comments of the representative of Hungary on article 74 of ULIS, which was received after the above-mentioned documents were prepared.

Comments of the representative of Hungary on article 74 of ULIS

/Original: English/

1. United Kingdom, comments and proposals, Form, paragraph 1 (a):* It is indeed clear from article 35.2 and 36 ULIS that the word "liable" embraces subjection to any remedy. In this case, however, it might be superfluous or even misleading to use other words in article 74. This might create the impression that articles 35.2 and 36 do not cover the same field covered by the proposed text of paragraph 1 in comment (a). It might be asked why do articles 35.2 and 36 not use the same words. The extensive meaning of the word "liable" can also be deduced from paragraph 3, article 74.

2. Ibid., paragraph 1 (b): I wonder whether the proposed text under the heading "Substance" eliminates the evils which the proposal strives to eliminate.

(a) An "absence of clear understanding" is also present in respect of "radically changed" or "an obligation quite different", not to speak of the fact that the proposed text also contains the incriminated expressions (in fine).

(b) "Impossibility" is also subject to "doubt and divergence between national jurisdictions".

(c) The difficult problem of cause and effect is not eliminated by the proposed text, only transferred to another level ("impossibility owing to such circumstances").

(d) The proposed text is much more complicated than the original. As it is one of the aims of the Working Group to simplify the ULIS, I wonder whether it brings such improvements as to warrant such a result.

3. Ibid., paragraph 2:

(a) The original rule in ULIS applies also while the temporary impediment has not yet come to an end, the proposed rule does not. Under this latter rule a radical change becomes relevant only when the temporary impediment has ceased to exist. I believe that a "radical change" should be relevant also before the temporary impediment has been removed.

(b) This indicates a short-coming of ULIS. Why should the "radical change" be relevant only where there is a temporary impediment? Moreover: what is the reason for concentrating in paragraph 1 on the causes of breach and in paragraph 2 on the results thereof? From this point of view the text of paragraph 1 as suggested by the representative of the United Kingdom is far better than that of the ULIS, provided that it would apply to paragraph 2 as well because it combines the cause and the result of the breach and provided that the word "impossibility" is omitted (see No. 5 below). But if such a distinction should nevertheless be

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* A/CN.9/WG.2/WP.17/Add.1, annex I.

maintained for different sets of breach, the division line should not run between temporary impediment and other cases of breach but perhaps between delay and other cases of breach. This needs further consideration. Consequently we should either have the "either ... or" construction of the text suggested by the representative of the United Kingdom or use "due to" (or any other expression) in paragraph 1 and "radical change" in paragraph 2 for all cases of delay.

4. Ibid., paragraph 3: I wonder whether "the contract avoided" should be inserted. This would, to a great extent, reduce the meaning of "liability" in paragraph 1 to damages. Exemption would then mean only exemption from paying damages and from requiring specific performance which is anyway heavily restricted (see article 41, ULIS).

5. "Restriction" to frustration: Both the representative of the United Kingdom and the representative of Ghana advocate the "restriction" of the field of application of article 74 to frustration. I have the impression that the provisions of ULIS do not provide for a broader scope for exemptions than it would provide for if based on frustration. Frustration is after all a common law term and concept and ULIS tries to find words equally workable under many civil law systems as well.

As it seems, the two distinguished delegates feel uneasy in respect of the very Continental brevity of the expression "was due to". Perhaps their doubts and misgivings might be reduced by supplementing the expressions in paragraph 1: "he was not bound to take into account or avoid or overcome" by the following words (subject to a linguistic improvement): "or did not fall within his sphere of risk". This might be about as vague as any wording we can find in this field but would at least cover the case of an unforeseen rise in prices mentioned under Form, paragraph 1 (b) by the representative of the United Kingdom. In that case the word "impossibility" might not appear in the text. This concept is namely much narrower in many civil law systems than the "impossibility" of frustration. It usually covers only physical and legal impossibility, although the Germans frequently used the term "economic impossibility" also (particularly before the doctrine of "Wegfall der Geschäftsgrundlage" was generally accepted) in which case impossibility would by and large cover the "impossibility" of frustration.
