

ANNEX IV

Articles 24 to 32 of ULIS

Comments and proposals of the representative of Japan

Original: English

I. Proposed text:

Article 24

1. Where the seller fails to perform his obligations as regards the date or place of delivery, the buyer may, as provided in Articles 25-~~28~~:

- (a) require performance of the contract by the seller
  - (b) declare the contract avoided;
  - (c) purchase the goods, after the declaration of avoidance of the contract, to replace those to which the contract relates.
2. (No change)
3. (No change)

Article 25

The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates.

Article 26

1. Where the failure to deliver the goods at the date or place agreed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He may grant the seller an additional period of time. If the seller fails to deliver within this period, the buyer may declare the contract avoided or require performance.
2. Where the buyer requires performance without specifying length of time, the seller may effect delivery within a reasonable time. To avoid the contract, the buyer shall give a warning to the avoidance of contract. If the seller still fails to deliver, the buyer may declare the contract avoided.

3. If the buyer does not inform the seller of his decision in the case of paragraph 1 of this article and the seller requests the buyer to make known his decision, the seller may effect delivery unless the buyer does not reply promptly from the moment when the request has arrived and the contract cannot be avoided.

4. Where the buyer does not specify the period of time for performance under paragraph 2 of this article and the seller requests the buyer to make known his date, the seller shall be entitled to effect delivery unless the buyer does not reply promptly from the moment when the request has arrived and the contract cannot be avoided.

Article 27

1. Where failure to deliver the goods at the date or place agreed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to require performance of the contract by the seller.

2. The buyer may grant the seller additional period of time. If the seller fails to deliver within this period, the buyer may declare the contract avoided.

3. Where the buyer does not specify the period of time for performance under paragraph 2 of this article, the delivery and the avoidance of contract shall be governed by the provisions of paragraphs 2 and 3 of Article 26.

Article 28

[Deleted]

Article 29

[No change]

Article 30-32

[Deleted]

Article 10

[Subject to later examination]

Article 39 (3)

[Shall be considered as the rule which will govern communication problems of the buyer's notice to the seller of cancellation of the contract. Subject to later amendments.]

II. Comments on revision of text:

1. The basic distinction between a fundamental breach and a non-fundamental breach is kept, although the definition of "fundamental breach" in Article 10 is open to later improvements. However, the ipso facto avoidance of the contract is deleted. First, the moment of ipso facto avoidance provided in Article 26 (1) is uncertain, because it depends upon determination of "reasonable time" of which the parties could always dispute. It may encourage disagreements or disputes between the parties. This may be true especially where the price for goods goes down. The proposed deletion of ipso facto avoidance should be evaluated in terms of the avoidance of unnecessary claims or fictitious claims based upon the market situations.
2. For the purposes of calculation of the amount of damages, as provided in Article 84, the moment of the avoidance or cancellation of the contract must be certain. The prices of agricultural commodities indicate a good deal of fluctuation. For instance, the price of beans quoted at the Rotterdam Exchanges fluctuated <sup>in</sup> between \$180 and \$260 per a long ton between September and November/1969. If the ipso facto avoidance is kept, a big difference may come up between the buyer's calculation and the seller's calculation of damages.
3. The case where "a restauranteur orders a certain number of turkeys to be delivered on the morning of 24th December" (Commentary by Professor Tunc, page 26) seems to be rather doubtful illustration for a defense on the ipso facto avoidance, because the case is quite exceptional in international settings. A prudent or reasonable restauranteur will make arrangements with the foreign seller in getting delivery of turkeys sometime before the morning of 24th December, taking account of time and procedures to get cross the border and customs. If he does so, he will have some time for communication with the seller.
4. Under the proposed text, the parties would be encouraged to communicate each other in good faith. The basic assumption is this: the right of cancellation of the contract on the seller's breach is basically the buyer's right. However, if the buyer requires performance without indicating the date after the seller's breach, thus leaving the seller in uncertain situation, the buyer is required to send a warning to the cancellation of contract. If the seller requests the buyer to

to make known his decision or date, the buyer shall reply promptly. This is conceived in terms of the requirement of good faith.

5. The parties enter into contracts with the agreement that the goods shall be delivered in March but the price shall be payable at the end of April under the quotation at some Exchanges. Article 28 imposes upon the parties a very rigid and unreasonable rule where they never intended their contract in that way. The quotation of price at the exchanges are used as merely a price indicator and the seller's breach would probably be regarded as non-fundamental. This is the reason for deletion of Article 28.

6. To slice the breach on delivery into (1) the breach on date and (2) the breach on place is proposed to be abolished. "If the goods arrive late, one could either say that at the right time they were at the wrong place (en route); or that they got to the right place, but too late. Indeed for most situations it is difficult to think of breach arising simply from the presence of goods at the wrong place, unless the time for their delivery has also expired. Certainly it is not surprising that separate development of remedies for these two aspects of performance led to duplication and unnecessary bulk. It is this approach that accounts for the fact that a uniform law laying down only a handful of important policy choices nevertheless runs on to 101 articles of statutory text. It is just possible that admirers of Descartes overlooked that fact that breaking a problem into small pieces for close scrutiny was only one step in the Method, which includes also a synthesis of the separate parts." (John Honnold, *The Uniform Law for the International Sale of Goods: A Constructive Critique*, 30 *Law and Contemporary Problems* (No. 2) 326. at 343 (Spring, 1965).) Thus, Articles 30-32 are deleted and are taken care of in Articles 26 and 27.

7. Attention is drawn to Article 39 (3) in order to deal with the problems on the buyer's notice to the seller of cancellation of the contract. The text of Article 39 (3) is subject to later amendments.