

ANNEX VI

Articles 33-37 of ULIS

Comments and proposals of the representative of United Kingdom

[Original: English]

1. Articles 33 to 37 of the Uniform Law deal with the question whether goods supplied in pursuance of a contract of sale to which the Law applies are adequate and the remedies available to the buyer in cases where the goods are inadequate.

Article 33, paragraph 2

2. This Article sets out the cases in which goods are not to be treated as adequate.

3. In a separate note on Article 19 I have questioned whether delivery should be defined in a manner which limits the concept to a situation in which the goods are adequate to discharge the seller's obligations. English law deals with the question of non-conformity quite distinctly from the question of non-delivery. Some provisions of the Uniform Law eg Articles 35 and 97, could be <sup>such</sup> simplified if conformity and delivery were dealt with quite separately. This proposal would not involve any major revision of Article 33. For example, the Article might start "The seller shall not have fulfilled his obligations towards the buyer where he delivers" [continue with heads (a) to (f) of the present draft].

4. I would offer no comment on heads (a), (b), (c) or (f) of Article 33.

5. As to head (d), I wonder what distinction is intended by the differentiation between "ordinary use" and "commercial use". Would it be enough to refer to "the qualities necessary for ordinary use"?

6. As to head (e), there seems to be a considerable overlap with head (f) because if the use of the goods for some particular purpose is expressly or impliedly contemplated by the contract, it would seem to follow that the contract impliedly contemplates that the goods passes the relevant qualities. The comparable provision of English law dealing with fitness for purpose applies where the buyer makes known a purpose to the seller. Obviously head (e) is dealing with an unusual purpose because head (d) already makes adequate provision

as respects fitness for ordinary use. Would head (e) not be more valuable if it referred to some unusual purpose which the buyer had made known to the seller? There would, of course, be a consequent obligation upon a seller who wished to give no undertaking as to the fitness of the goods for the unusual purpose communicated by the buyer to indicate that he was undertaking no contractual commitment as to their fitness for this purpose.

7. I have no comment to make on Article 33.2.

Article 34

8. I find this Article puzzling. What is the source of the other remedies referred to? If they flow from the contract, surely the relevant provisions effect an implied exclusion of Article 34. If they do not flow from the contract, are they obligations arising under the lex fori or the proper law? If no adequate justification can be given for this Article, there is a case for omitting it.

Article 35

9. This Article fixes the time for determining whether goods conform with the contract.

10. Paragraph 1 is complex. The reason for this is that delivery is defined in Article 19 as the handing over of goods which conform with the contract. This definition precludes the use of the time of delivery as the point in time for deciding whether the goods conform. The definition also raises problems in connexion with the passing of risk in cases where the goods do not conform. Article 35 fixes the passing of risk as the time for determining whether the goods conform to take advantage of the rules set out in Articles 97 to 100 for fixing the time at which risk passes. The second sentence of Article 35.1 picks up the rather obscure provision made in the last two lines of Article 97.2.

11. I see no objection to the test in Article 35 but wonder whether or not simplification of the definition of delivery might not pave the way for the simplification of Article 35 and Chapter VI of the Law. It will be noted that Article 35 does not cover what might be described as "ex post facto non-conformity" eg the case where goods disintegrate during a period when they are under guarantee.

Article 36

12. I have no comment to make upon this Article.

Article 37

13. I make no comment of substance upon this Article but wonder whether the drafting might not be improved by substituting the following:-

"If the seller has handed over goods before the date fixed for delivery but the goods which have been handed over are inadequate (either in quality or quantity) to fulfil the contract, he may at any time up to that date deliver further goods or substitute other goods or remedy defects in the goods already handed over unless he thereby causes unreasonable inconvenience or unreasonable expense to the buyer."