

ANNEX VII

Articles 38 to 40 of ULIS

Comments and proposals of the representative of Austria

/Original: French/

1. The solutions appearing in the above-mentioned articles were adopted at the 1964 Conference by solid majorities (see Records and Documents of the Conference, Vol. I, pages 130-132). The only exception to this was in connexion with the time-limit specified in article 39, paragraph 1, when a period of two years instead of one was adopted by 10 votes to 8, with 6 abstentions. Personally, I should prefer the shorter period, but the discussions at the fourth session of UNCITRAL relating to prescription have shown that in international trade there is a clear trend towards longer time-limits; it would therefore not seem appropriate to propose any change.

With regard to article 40, however, the Committee on Sale of the 1964 Conference had decided, by a large majority, to substitute the words "which, he knew or ought to have known and which..." for the words "...which in bad faith...". The Drafting Committee, no doubt for reasons of elegance of style, changed the part "ought to have known" into "of which he could not have been unaware" and changed the last part of the French text from "et qu'il n'a pas fait connaître" into "et qu'il n'a pas révélés". It would be advisable to restore the original text which conforms more closely to the language of ULIS (cf. article 13, the deletion of which, it is true, has been requested) and which is also somewhat broader.

2. In their comments on ULIS, the Governments of Japan and Norway drew attention to difficulties arising, on the one hand, from some lack of precision in article 38, paragraph 2, and, on the other, from the fact that paragraph 3 still does not take into account the use of containers. These criticisms seem to me to be justified. With regard to the first, it could be remedied by specifying that in case of carriage of the goods, the buyer's obligation shall only commence from the time the goods arrive at their place of destination. It is true that this would mean that the emphasis on the idea of the "place",

which appears in paragraph 2 and which is repeated at the end of paragraph 4, would be lost. But this idea should not be very important in the context since it is not included in the general rule set out in paragraph 1. The "place" mentioned in paragraph 4 is therefore quite simply the place where the goods are at the time when the obligation to examine the goods exists.

Even when the goods are in a container, they are transhipped if the container is placed on another means of transport since, as the preparatory work for the TCM Convention adequately showed, a container is, legally speaking, only a packaging and not a means of transport. Economically, however, such a situation is somewhat similar to redespach without transhipment. I would suggest that this should be stated in a sentence to be added to article 38, paragraph 3. I do not think that it would be advisable to make this assimilation subject to the condition proposed by the Norwegian Government (that this examination would constitute too great an inconvenience for the buyer). There are already enough subjective appreciations in this law which could be transformed into sources of litigation; moreover, this condition could just as well have been added to the principal rule: often the examination of goods, even of goods which have not been transhipped, would not be a very heavy burden for the buyer.

The only three amendments which I would propose to articles 38-40 would therefore be the following:

Article 38 2. "In case of carriage of the goods the buyer shall examine them promptly after their arrival at the place of destination."

Article 38 3. (Unchanged) "The redespach of the goods by another means of transport without the goods being removed from a container shall be considered to be redespach without transhipment".

Article 40 "The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew or ought to have known and of which he did not inform the buyer".