

ANNEX XII

Articles 50 and 51 of ULIS

Comments and proposals of the representative of India

Original: English

1. Articles 50 and 51 of the Uniform Law on International Sale of Goods (ULIS) state as follows:

Article 50

Where the seller is bound to hand over to the buyer any documents relating to the goods, he shall do so at the time and place fixed by the contract or by usage.

Article 51

If the seller fails to hand over documents as provided in Article 50 at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over, the buyer shall have the same rights as those provided under Articles 24 to 32 or under Articles 41 to 49, as the case may be.

2. These two Articles in Section II of Chapter III of ULIS deal with the second of the three obligations of the seller, viz, to effect delivery, to hand over any documents and to transfer the property in the goods, as required by the contract and by ULIS. These Articles do not themselves lay down what documents relating to the goods should be handed over by the seller to the buyer. The words "where the seller is bound to hand over to the buyer any documents relating to the goods" in Article 50 seem to refer to the contract between the parties (and perhaps also to usage) and all that this Article seems to say is that where the seller is bound to hand over to the buyer documents, by virtue of his contract with the buyer or by usage, he shall do so at the time and place fixed by the contract or by usage. If the contract or usage do not provide for the handing over of documents relating to the goods by the seller to the buyer (this would be a matter which would have to be established by evidence in a particular case) these Articles of ULIS would not seem to have any application.

3. As the commentary on ULIS by Prof. André Tunc rightly states this section (on handing over of documents) is very brief. It explains that it did not seem to be possible to be more precise: (a) because the Law

does not regulate the principal forms of the export and import sales and (b) because there is a wide variety of documents and the consequences which may result from their not being handed over or their being defective in character.

4. In his Article entitled "The Uniform Law on International Sale of Goods: A Constructive Critique" 30 Law and Contemporary Problems (1965) p. 354, H.J. Berman also observes in a somewhat stronger language:

"A great many gaps that exist in the ULIS, though by no means all of them, derive from the decision of its authors to exclude from consideration the various types of documentary sales. Two articles (50 and 51) are devoted to documents but they say almost nothing except that where documents are called for they must be tendered. Documents are also referred to in various other articles, but nowhere is there definition of them and nowhere is there any reference to the obligations of seller and buyer in c.i.f., f.o.b., and other types of documentary sales. These subjects were considered to be too complex to be covered in a Uniform Law on International Sale of Goods. The result is a law that is too simple to be helpful, for the typical international sale of goods is the documentary sale, and from the documentary sale stems a very large section of international sales law."

5. L.A. Ellwood writing on "Some Comparative Aspects of the Law Relating to Sale of Goods" in International and Comparative Law Quarterly Supplementary Publication No. 9, (1964) however observes as follows:

"The next two section headings (on Handing over of Documents and Transfer of Property) might appear an artificial sub-division but the Committee's (Donaldson Committee) 1956 Report (page 31) sees in it some practical advantages, especially where remedies for breach are concerned. Default not amounting to fundamental breach gives rise to damages; in the case of fundamental breach the buyer is given rights resembling those accorded to him on default of delivery of the goods. The 1963 draft Article 60, paragraph 3, made it clear that failure to transfer documents should always be deemed to involve a fundamental breach where the document is a bill of

lading or some other document of title needed to obtain delivery of the goods or to dispose of them, i.e. in a case where the contract or usage require payment against document. The text has been simplified and improved (Section II, Handing over of Documents, Articles 50 and 51)".

Thus it would seem that it is no longer an ipso facto fundamental breach if the seller fails to hand over any particular document to the buyer at the time and place fixed by the contract or by usage. It would depend on the circumstances of the case and a proper application of Article 10 of ULIS which defines what is meant by a fundamental breach of the contract.

6. In common law countries like India the Law on Sale of Goods does not seem to contain exactly corresponding provisions to those in Articles 50-51 of ULIS to say that where the seller is bound to deliver documents to the buyer, he must do so at the time and place fixed by the contract or by usage. This is a matter which is regulated by the terms of the contract and if the contract is silent by trade usage or course of business between the parties. The term "document of title to goods" is of course statutorily defined (for example, in section 2(4) of the Indian Sale of Goods Act, 1930 or section 1(4) of the U.K. Factors Act, 1889) to mean any document which is used in the ordinary course of business as proof of the possession or control of the goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented. Certain documents like a bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, and (in India) a railway receipt are specifically mentioned in such definition as documents of title to goods. The transfer of a document of title to goods operates as a delivery of the goods themselves but all other documents require attornment by the bailee.

7. The same position seems to obtain under the Uniform Commercial Code. There are provisions in the U.C.C. to define what is a "document of title" [subsection 1-201 (15)]. There are also other provisions on

documents for instance, to say that where the contract requires the seller to deliver documents he must tender all such documents in correct form, except as provided in that Article with respect to bills of lading in a set [subsection (2) of Section 2-323]; that in shipment contracts the seller must obtain and tender in due form any documents that the buyer will need to obtain possession of the goods and failure of the seller to tender such a document would give the buyer a right to reject goods without proving material delay or loss [section 2-504]. But there do not seem to be any specific provisions corresponding to Articles 50-51 of ULLS to say that where the seller is bound to hand over to the buyer any documents relating to the goods, he must do so at the time and place fixed by the contract or by usage.

8. Now so far as trade usage is concerned, the tender of documents becomes important mainly under a c.i.f. contract. A c.i.f. contract often specifies in detail the documents to be tendered, and where this is so, all the documents to be tendered, and where this is so, all the documents called for by the contract must be tendered at the place and time specified in the contract. Where the contract does not specify the documents, it is usually sufficient if the seller tenders the bill of lading, policy of insurance, and the invoice. If the contract does not specify the place of tender of documents, the place of tender is prima facie the residence or place of business of the buyer, unless there is evidence of trade usage or a course of business between the parties to rebut this presumption. If the contract does not specify the time for the tender of documents, the seller must tender the documents to the buyer with all reasonable despatch. Most of these propositions are supported by case law in common law countries but there are no statutory provisions in the Law on Sale of Goods.

9. Article 51 of ULLS deals with the remedies open to the buyer for the failure of the seller to carry out his obligation in respect of handing over of documents under Article 50. Under this Article,

documents - meaning the documents which the seller was bound to hand over to the buyer - are equated to the goods in so far as the consequences for the seller for failure to hand over the documents at the time and place fixed or failure of conformity of the documents to those which he was bound to hand over are concerned. The same remedies which are open to the buyer for the non-delivery of the goods at the time and place fixed and for the delivery of goods which do not conform to the contract under the scheme of remedies under Articles 24-32 and 41-49, respectively, are to apply. This raises the question whether the concept of ipso facto avoidance of the contract contained in Article 25 should also apply to the case of non-delivery of documents at the time and place fixed. If the term in Article 50 "documents relating to the goods" is to be understood as what are normally regarded in common law systems as "documents of title to the goods" it would be easier for these countries to accept the provisions of Article 51 which, as pointed out above, seem to equate the documents with the goods.

10. The Working Group on Sales should in our view consider the following issues with regard to these two Articles:

(1) Since the Uniform Law cannot provide a more complete regulation or rules on the question of the handing over of the documents by the seller to the buyer under all the different types of contracts like f.o.b., c.i.f., ex-ship, etc. and it cannot also regulate by any detailed rules the consequences of the seller not handing over documents under these different types of contracts, is there any practical advantage in retaining the provisions of Articles 50 and 51 in their brief but rather too general form in which they exist at present?

(2) Since in any case these provisions of the Uniform Law must be only supplementary to the provisions in the contract or the applicable usage between the parties, what is the practical value of these provisions in the Uniform Law?

(3) Are the laws and practices in different countries as they obtain today on the question of handing over of documents by the seller to the buyer very divergent and would the provisions of Articles 50-51 of ULIS in their present form contribute very much to the unification and harmonization of such laws and practices?