

ANNEX XIII

Articles 52 and 53 of ULIS

Comments and proposals of the representative of United Kingdom

[Original: English]

1. It is somewhat surprising that the title of Section III of ULIS (Articles 52 and 53) is "Transfer of Property" (Transfert de la Propriété). This title suggests that the Section deals with the time, place, etc. of the transfer of property from the seller to the buyer. But this matter is not dealt with in the Law. A better title would be "Guarantee of Title".
2. Article 52 in effect adopts the rule that there is an obligation on the seller to transfer the property in the goods to the buyer, and not merely to guarantee the buyer against eviction. This approach is in accord with the common law. The obligation to confer a good title might, however, with advantage be expressly set out in the law.
3. Article 52 provides that the buyer must notify the seller of the adverse claim of the third person (unless the seller already knows of it), and request that the goods be freed from the claim within a reasonable time or that other goods free from all rights and claims of third persons be delivered to him by the seller. It is in accordance with the general structure of ULIS that the buyer should give notice to the seller so that there may be a speedy clarification of the legal situation, (see the Commentary by M. Tunc, at p. 68). But it is arguable that any breach of the guarantee of title ought to be treated as a fundamental breach and entitle the buyer to declare the contract avoided, and to claim damages. This is the approach adopted by English and Scots law. It is true that, under para. 2 of Article 52, if the seller complies with the buyer's request and the buyer nevertheless suffers a loss, the buyer may claim damages in accordance with Article 82. But it may be doubted whether, in practice, the buyer ought thus to be compelled to wait until the seller frees the goods from the adverse claim or delivers other goods. Since the transfer of property in the goods lies at the root of a contract of sale, the buyer ought immediately to be able to treat the contract as at an end.

4. Further, if the seller fails to comply with the request, the buyer can only declare the contract avoided if a fundamental breach results therefrom. It is suggested that, unless the buyer has accepted the goods with knowledge of the adverse claim, he should in all cases be entitled to treat the contract as avoided.

5. Article 53 appears satisfactory in this context.

6. I append the relevant provisions of the Sale of Goods Act 1893 (section 12) and of the Uniform Commercial Code (section 2 - 312). I also append the current proposal by the English and Scottish Law Commissions for the amendment of section 12 of the Sale of Goods Act 1893.

DRAFT CLAUSE

1. For section 12 of the principal Act (implied conditions as to title and implied warranties as to quiet possession and freedom from encumbrances) there shall be substituted the following section:-

"12. - (1) In every contract of sale, other than one to which subsection (2) of this section applies, there is -

- (a) an implied condition on the part of the seller that in the case of a sale, he has the right to sell the goods, and in the case of an agreement to sell, he will have the right to sell the goods at the time when the property is to pass; and
- (b) an implied warranty that the goods shall be free from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer shall enjoy quiet possession of the goods except so far as it may be disturbed by the owner of any charge or encumbrance so disclosed or known.

(2) In a contract of sale in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller should not transfer the property in the goods, but only such title as he or a third person may have, there is -

- (a) an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made; and
- (b) an implied warranty that neither -
 - (i) the seller; nor
 - (ii) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person; nor
 - (iii) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made;

will disturb the buyer's quiet possession of the goods."

APPENDIX

SALE OF GOODS ACT 1893, s.12

12. Implied undertaking as to title, etc. - In a contract of sale, unless the circumstances of the contract are such as to show a different intention there is -

- (1) An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass:
- (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:
- (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

UNIFORM COMMERCIAL CODE (SECTION 2 - 312)

Section 2 - 312. Warranty of Title and Against Infringement;
Buyer's Obligation Against Infringement:

- (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that
 - (a) the title conveyed shall be good, and its transfer rightful; and
 - (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
- (2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
- (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement

or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.