

ANNEX XIV

Articles 52 and 53 of ULIS

Comments and proposals of the representative of Mexico

[Original: English]

1. ULIS expressly refers to the problems of transfer of property of goods subject to international sales in its articles 8, 18, 52 and 53.
2. Article 8 excludes from the ULIS regulations "the effect which the contract may have on the property in the goods sold"; however, such exclusion operates only in the event ULIS does not contain a rule to the contrary ("except as otherwise expressly provided therein"). We must consider articles 18 and 52 as exceptions to article 8.
3. Article 18, which enumerates and establishes the obligations of seller with respect to the contract, includes among said obligations the transfer of the property in the goods. Strictly speaking, this article would seem unnecessary since subsequent provisions regulate each one of the obligations on the part of seller (delivery of the goods: articles 19 to 49; handing over (or delivery) of documents: articles 50 and 51; transfer of property: articles 52 and 53). Nevertheless, we consider it useful and advisable to maintain article 18.
4. The concept and scope of the "transfer of property" principle in sale of goods contracts is quite questionable. Pursuant to classic Roman tradition, the transfer of the property, or "transfer of title", can be considered as a transfer of the rights to use and dispose of the thing in accordance with its nature (utendi), obtain and enjoy the products and fruits of the thing (fruendi), consume, sell or transfer the thing without limitation (abutendi).
5. ULIS, as well as the legislative drafts of UNIDROIT (Deuxième Redaction of 1951 - article 52; the 1956 Draft - article 62 and the amended 1963 Draft - article 1962) which preceded it on regulating the right of property, refers only to the jus utendi (i.e., the right to use and dispose of the thing in accordance with its nature).
6. The right of use and disposition is regulated by ULIS under the provisions relative to the guarantee of the rights of buyer (as

established by the aforementioned Deuxième Redaction) granted by the seller, either expressly or tacitly; this guarantee requires that the goods covered by the sale contract not be subject, without the knowledge of buyer, to liens, claims of third parties (eviction guarantee) or administrative or police limitations or restrictions which prevent said use and disposition.

7. The more frequent liens would be those having a real property nature (e.g., pledge); however, others of a personal nature could also be imposed (e.g., the right of the carrier to retain the goods until the freight charges have been paid, or the right to retain goods granted to a previous seller until such time as the purchase price has been paid).

8. Third parties can have several types of claims, such as the following: the goods were given previously in usufruct; the thing is not owned by the seller (alien thing); the thing is subject to a special destination or purpose, as in the case of a thing placed in trust; or, the use of the thing is forbidden by a patent currently in force.

9. Administrative limitations or restrictions can also be of various types. Among them would be prohibitions imposed by the State on the sale (and exportation) of certain goods (e.g., arms, drugs, atomic or radioactive minerals, objects of art). On the other hand, importation restrictions or prohibitions by the buyer's country would usually not be relevant to the obligations of the seller since the buyer, and not the seller, should be charged with knowledge thereof.

10. Keeping in mind these principles which govern ULIS, we must first examine the system and structure of its provisions governing the transfer of property; then, we must determine whether the text of articles 52 and 53 is consistent with the other ULIS provisions, or whether the text should be modified in light of such other provisions.

11. I think that the general provisions established in article 8 are correct and should govern this law. However, it should be stressed that an exception to the principle that the Law shall not be concerned with the effect which the contract may have on the property in the

goods sold, as contained in article 8, is found in articles 52 and 53. 12. On the contrary, I do not think that the text of article 52, paragraph 1, is exempt from criticism. I shall not refer to the expressions "reasonable time" and "fundamental breach of the contract" since their corresponding study and consideration shall not be made now by the Working Group on Sales.

a) Article 52, paragraph 1, should indicate with greater clarity the effects of the transfer of property with respect to the buyer; specifically, it should establish the guarantee of buyer's rights. In other words, said article should indicate that, in principle, the buyer acquires the goods free of liens and limitations.

b) Article 52, paragraph 1, should not only make reference to the rights or claims from third persons, but also to restrictions imposed by public authority.

c) The expression "unless he (the buyer) agrees to take the goods subject to such right or claim", seems to me vague and rather restricted. Vague, since it does not indicate when the buyer "agrees"; too restricted, because I do not think that an express agreement with the buyer should be required. In order that an action for damages does not proceed, it should suffice that the buyer knew or should have known of the existence of the right of a third person or the possibility of a claim or a restriction.

d) The expression "reasonable time" (whatever the extent of the concept which may be finally adopted) to which article 52, paragraph 1, refers, must apply not only to the seller's obligations to free the goods from third party rights or claims (as indicated by the present text), but also to the seller's alternate obligation to deliver other goods to the buyer.

e) Naturally, the English and French texts of this article 52, paragraph 1, must coincide; it should be noted that the English and French versions of ULIS reveal various discrepancies, to wit:

(i) While the English text requires that the buyer must have "agreed to take the goods subject to such right or claim", the

French text only requires that such buyer "n'avait pas accepté de la prendre dans ces conditions".

(ii) The English text, at the end of the first paragraph, indicates that other other goods delivered by the seller to the buyer must be "free from all rights and claims". The French text requires only that such goods be "libres de tout droit". I think that the above French expression, "droit", would not include a mere alleged right or any claim whatsoever.

(iii) I do not know whether the French term "prejudice" is too limited or whether it corresponds to the English expression "loss" in Article 52, para. 2. Pursuant to Mexican law, the concept of loss, as used in the Anglo-American law, corresponds to both "perjuicio" (depriving someone of a legitimate profit, as a consequence of the non-performance of a contract), and "daños" (loss or impairment suffered as a consequence of the non-performance).

13. We propose that article 52, para. 1, be modified to read as follows:

"Article 52. The goods shall not be subject to a right or claim of a third person, nor to restrictions imposed by public authority which prevent their use or acquisition, unless the buyer knows or should have known at the time of the contract that the goods would be acquired under such conditions. In this case the buyer should make known to the seller the right, claim or restriction, unless the seller already knows thereof, and request that, within a reasonable time, the goods should be freed therefrom or that other goods free from all rights and claims of third persons or restrictions imposed by public authority be delivered to him by the seller".

14. Paragraphs 2 and 3 of article 52 are not modified.

15. By virtue of the amendments to paragraph 1, the last part of paragraph 4 of the same article 52 should be expanded so as to include the restrictions imposed by a given authority. The text to be added

would be the following:

"4. The buyer shall lose his right to declare the contract avoided if he fails to act in accordance with paragraph 1 of this Article within a reasonable time from the moment when he became aware or ought to have become aware of the right or claim of the third person or the restriction imposed by public authority in respect to the goods".

16. With respect to article 53 of ULIS, I think its provisions should be maintained, as its text seems to be adequate to prevent the possibility of actions other than those for avoidance or damages, such as an action to invalidate the transaction as would be the case, for example, of nullity actions (especially in the case of the sale of goods not owned by the seller). Nevertheless, this article should also include the addition we proposed for article 52, para. 4.

The text we propose for article 53 is as follows:

"Article 53. The rights conferred on the buyer by article 52 exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person or restrictions imposed by public authority".