ANNEX XVI

Articles 54 and 55 of ULIS

Comments and proposals of the representative of India

/Original: English/

1. Articles 54 and 55 of ULIS state as follows:

Article 54

1. If the seller is bound to despatch the goods to the buyer, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed.

2. If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.

Article 55

1. If the seller fails to perform any obligation other than those referred to in Articles 20 to 53, the buyer may:

a) where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with Articles 84 to 87, or

b) in any other case, claim damages in accordance with Article 82.

2. The buyer may also require performance by the seller of his obligation, unless the contract is avoided.

2. These two Articles under Section IV of Chapter III of ULIS dealing with "other obligations of the seller" relate to despatch and insurance and specify remedies for default. Article 54 contains rules for two special obligations which devolve on the seller when goods are to be despatched by him to the buyer:

(i) to make in the usual way and on the usual terms such contracts as are necessary for the carriage of the goods to the place fixed, and

(ii) to provide the buyer, at his request, with all information necessary to enable him to effect insurance in respect of the carriage of the goods in cases where the seller is not bound by the contract to effect such insurance himself.

3. It is a well recognised position in all legal systems that where under the contract of sale of goods, the seller is required or authorised to despatch goods to the buyer, unless it is otherwise

agreed between the parties, delivery of the goods by the seller to to the carrier for the purpose of transmission of the goods to the buyer is deemed to be delivery to the buyer himself. But this rule also carries its own corollary that in such circumstances the buyer has a right to require that in making the dleivery to the carrier the seller must exercise due care and diligence and take the usual precautions for insuring the safe delivery of the goods to the buyer, so that in case of default by the carrier the buyer may have his remedy against the carrier. Hence, the seller must make a reasonable contract with the carrier; otherwise the buyer may decline to treat delivery to the carrier as delivery to himself.

4. The rule contained in Article 54, paragraph 1, in respect of the first special obligation of the seller mentioned above seeks to express this well recognised position in the legitimate interest of the buyer. The underlying idea seems to be that the seller shall make such contracts with the carrier which are normal in the trade so as to provide the buyer with a remedy against the carrier in case of default. But the language of the rule contained in Article 54, paragraph 1, needs some examination.

5. In common law countries like India, the yardstick used to require the seller to make a contract with the carrier is one of what is a "reasonable" contract, having regard to the nature of the goods and circumstances of the case, rather than what is "necessary" for the carriage of the goods to the place fixed. When disputes arise between the buyer and the seller for non-performance of this obligation by the seller, the question which generally calls for a decision by the courts is whether it was a reasonable and proper contract which the seller had concluded with the carrier under which the buyer could hold liable the carrier for the damage which may occur, and not whether the damage to the goods was caused by the despatch in the manner chosen by the seller or whether negligence occurred. As the seller is only required to act reasonably in the circumstances to provide against loss or damage in transit, he is under no liability to enter into such

a contract with the carrier as will insure an indemnity to the buyer in all events as e.g. against loss or damage by act of God or other perils excepted in the case of carrier.

The concept of a "reasonable" contract is also embodied in the Uniform Commercial Code which provides inter alia in section 2-504 that "where the seller is required or authorised to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must--put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case".

Moreover, the rule in common law systems also provides that the seller shall make such contract with the carrier "on behalf of the buyer". The seller has an implied authority to make, on behalf of the buyer, the choice of a person or agent to carry the goods. It is not clear whether the simple rule stated in Article 54, paragraph 1, of ULIS would cover all these nuisances under the corresponding rule under common law systems.

6. The rule with regard to the second special obligation of the seller embodied in paragraph 2 of Article 54 which states that the

seller shall provide the buyer with all information necessary to enable him to effect insurance in cases where the contract does not require the seller himself to effect insurance in respect of the carriage of the goods also has a corresponding provision in common law systems. For example, section 39(3) of the Sale of Goods Act in India and Section 32(3) of the Sale of Goods Act in U.K. provide that "unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea-transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea-transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea-transit." It may be noted that by its express

terms this rule in common law countries only applies to carriage of goods involving sea-transit either exclusively or in combination with land-transit. It seems that this statutory rule was originally borrowed from Scottish law. Thus it was in some Scottish cases that it was first decided that in delivering goods on ship-board the seller is bound not only to charge the ship-master or shipping company with the goods effectually, but though not bound to insure, he must give such notice as to enable the buyer to insure. It is possible that by analogy the same rule applies in common law countries to air carriage of goods when goods are consigned by air to an overseas destination and it is usual in mercantile practice to insure in such cases. By contrast, the rule in paragraph 2 of Article 54 of ULIS omits any reference to sea-transit and is, therefore, wider in its scope.

7. The statutory rule in common law countries referred to above is rather too general and its exact scope is not very clear. It obviously does not apply to c.i.f. contracts (as in such contracts the seller is bound to insure) nor to an ex-ship contract as in that case the buyer has no insurable interest in the goods while at sea. The question whether this rule applies to f.o.b. contracts, where shipment is to be made on a ship nominated by the buyer, is also not free from controversy because in such cases no notice to insure is necessary for the buyer or the seller is not really "authorised or required to send" the goods to the buyer. The seller performs his duty when he puts the goods on board. Significantly enough the Uniform Commercial Code only contains a rule in section 2-504 which provides inter alia that where the seller is required or authorised to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must "promptly notify the buyer of the shipment". The language of Article 54 paragraph 2 of ULIS is also somewhat general in its scope, but the clear words used "If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods" seem to constitute an improvement over the language of the statutory rule in common law countries like India.

8. The words "at his request" (meaning the buyer's request) in Article 54, paragraph 2, may considerably limit the scope of the seller's special obligation under this paragraph to furnish information to the buyer to enable the latter to effect insurance, as these words would imply that there is no general obligation on the seller to do so unless there is a specific request made to him by the buyer. The rule in common law countries, referred to above, contains no such requirement.

9. The remedies provided in Article 55 for breach of the two special obligations of the seller in Article 54 appear to be similar to the remedies open to him for breach of the seller's other obligations under ULIS. In other words the same general scheme of remedies as provided for in the Uniform Law applies. The buyer is always entitled to performance of the obligation and to damages. Where the breach of the obligation by the seller amounts to a fundamental breach of the contract as defined in Article 10, he can also declare the contract avoided provided he does so promptly. The remedies provided for the buyer by Article 55 seem to be stronger than those provided for in common law countries for breach of similar obligations by the seller, where the buyer can normally sue the seller only for damages in such circumstances.

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

(i) Whether the language of the two rules in Article 54 on seller's obligations could be improved.

(ii) Whether the remedies provided for the buyer under Article 55 should not be recast in a more appropriate way.