

ANNEX VIII

Articles 38 to 40 of ULIS

Comments of the representative of the United States
on the proposals of Austria

[Original: English]

I have reviewed your three suggestions, and they all strike me as improvements. With respect to the second, I wonder if the word "container" ("conteneur") is sufficiently clear since, at least in English, it could be read to include, for example, cans containing fruit or bottles containing milk, and I am not sure that it is your purpose to include these. This is, however, a relatively minor matter.

I am concerned with what seems to me to be more serious objections to the articles. Under the first sentence of Article 39, the consequences for the buyer of his failure to notify promptly are severe. Not only does he lose any right to reject the goods, but he loses any right to claim a price adjustment even if he retains them. The provisions of Article 38 are relatively strict and inflexible. The two articles taken together have, then, two general defects: (1) failure to make any distinction according to the remedy sought by the buyer (rejection or price allowance); (2) lack of flexibility in requirements as to inspection.

The deletion of Article 38 would go a long way toward meeting at least the second of these objections. Article 38 (1) seems an unnecessary duplication of what is clear from the first sentence of Article 39(1); Article 38(4) seems unnecessary in view of Articles 3 and 9; and Article 38(2) and (3) are particularly subject to the objection of inflexibility.

If Article 38 is to be retained, it should be rewritten, together with Article 39(1) to make its purpose clear. It says that the buyer "shall" examine the goods, but gives no indication of the consequences of his failure to examine. Presumably it is to be used to tell when the buyer "ought to have discovered" the defect. If, therefore, the defect is latent, so that it could not have been detected by examination,

the buyer suffers no consequences if he fails to make the examination that ULIS says he "shall" make. The draftsmanship falls considerably short of the ideal.

Attached is a suggested revision of Articles 38-40. The language in brackets I would prefer to omit.

Article 38

1. The buyer shall lose the right to avoid the contract for lack of conformity of the goods if he does not give the seller notice specifying its nature and inviting him to examine them or cause them to be examined promptly after he discovers or ought to have discovered it.

2. In determining whether the buyer ought to have discovered the lack of conformity, he shall not be held to examine them before their place of destination in the case of their carriage, or before the place of their new destination when they are redespached by the buyer without transshipment and the seller knew or ought to have known of the possibility of their redespach.

3. Same as (4) unchanged.

Article 39

1. The buyer shall lose the right to rely on a lack of conformity of the goods for any purpose if he does not notify the seller of it within a reasonable time after he discovers or ought to have discovered it.

2. The buyer shall lose the right to rely on a lack of conformity of the goods for any purpose if he does not notify the seller of it within two years after the goods were handed over unless the lack of conformity constituted a breach of a guarantee covering a longer period.

Article 39 bis

Where any notice referred to in Articles 38 and 39 has been sent by letter, telegram or other appropriate means, a delay or a failure to arrive at its destination shall not deprive the buyer of the right to rely thereon.

Article 40

Unchanged.