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OBLIGATIONS OF THE SELLER IN AN INTERNATIONAL SALE OF GOODS: CONSOLIDATION OF WORK DONE BY THE WORKING GROUP AND SUGGESTED SOLUTIONS FOR UNRESOLVED PROBLEMS

Report of the Secretary-General

Addendum

CONTENTS

Annexes

ANNEX I

Study by the representative of the USSR on seller's liability for breach of guarantee in respect of goods

/Original: Russian/English/

Pursuant to the request expressed at the third session of the Working Group on the International Sale of Goods and inviting the Soviet delegation to "submit for future consideration a text on the seller's liability for breach of a guarantee in respect of the goods" (document A/CN.9/62/Add.1, para. 66) the present paper incorporates some views and suggestions on the above matter.

At earlier stages, and particularly in its comments with regard to article 35 of ULIS this delegation has had the chance to underline the practical importance of the problem of contractual guarantees relating to quality of goods, which guarantees have by now become rather widespread in the trade of all sorts of different commodities but are not dealt with in the ULIS except one indirect reference to be found in article 39 (document A/CN.9/WG.2/WP.10/Add 1, annex V, para. 4).

I. The latter document was concerned primarily with grounds of the seller's liability for defects discovered after the goods have been delivered to the buyer but within the period of guarantee given by the seller under the contract and providing, in a typical case, proper performances of a machine or equipment during such guarantee period. In this connexion the Soviet delegation raised its concern that in the said situation, unless otherwise agreed between the parties, a rule contained in article 35, paragraph 2 of ULIS might apply, according to which after the risk has passed to the buyer the seller is liable for a defect only if it "was due to an act of the seller or of a person for whose conduct he is responsible". With regard to the so-called "guaranteed" sales the quoted rule seemed questionable, first and most of all, because it would impose upon the buyer the burden of proving that the defect "is due" to improper conduct, negligence etc. on the side of the seller. However, not only in contract forms but also in rules and regulations dealing with this point it is settled on a different basis, namely: the seller shall not be liable for a defect in goods discovered within the guarantee period only if he has established that the defect is not due to his fault, but is caused, as the most typical case, by improper acts (handling of the goods, etc.) of the buyer himself. For instance, by virtue of the Soviet civil legislation the seller shall be liable for defects in the sold goods appearing during the guarantee period

> "unless he proves that a defect is caused by non-compliance of the buyer with the conditions of use or preservation of the goods" (See, for example, article 248 of the RSFSR Civil Code).

According to paragraph 34 of General Conditions of Delivery of Goods between organizations of the member countries of the Council for Mutual Economic Assistance (General Conditions of Delivery, 1968)

"The seller shall not bear responsibility for the guarantee, if he proves that the disclosed defects arose through no fault of his, but result, in particular, from the buyer's improper handling of the erection or repair of the plant or machinery, failure to observe operating and maintenance instructions, or changes in the plant or machinery made by the buyer" (See Register of Texts, vol. I, p. 83).

For these reasons the Soviet delegation in its comments with regard to article 35 of ULIS suggested to amend the article in order to take into account the peculiarities of those situations where a defect is found after delivery of goods to the buyer but within the period of guarantee given by the seller.

It is noted however that in the course of deliberations at the third session of the Working Group it has been already decided to delete from article 35, paragraph 2 the quoted provision on the seller's liability which did cause the concern of this delegation (document A/CN.9/62, para. 14). Such being the case, the seller's liability under a guarantee undertaking would seem now to be subject to the general rules on exemptions which are contained in chapter V, section II of ULIS and which are based on the presumption of fault of the party who "has not performed one of his obligations" (article 74). Since however the said rules are not yet on the immediate agenda of the Working Group it would seem premature at this stage to formulate any specific amendments which might, if necessary, be made to provisions of chapter V, section II of ULIS.

II. Nevertheless, in the opinion of the Soviet delegation, some aspects of the seller's liability under a guarantee, other than grounds of the same, may well be accommodated in those provisions of the Uniform Law which are under consideration of the Working Group at the present time.

(1) Firstly, it seems appropriate to introduce in the Uniform Law a general notion of such guarantee undertaking. Apparently this might be done in article 35 by rewording its paragraph 2 as follows (regard having been made, in particular, to article 10, paragraph 3 of the draft convention on prescription, elaborated at the last session of UNCITRAL):

"The seller shall be liable for any lack of conformity occurring after the time fixed in paragraph 1 of this article, if it constitutes a breach of an express undertaking of the seller whereby the goods have been guaranteed to remain fit for ordinary or particular purposes or to retain its specified qualities or characteristics for a certain period of time whether expressed in terms of a specific period of time or otherwise."

(2) Secondly, it cannot be helped noting that the ultimate phrase of the present paragraph 1 of article 39 of ULIS relating to the time of notification of lack of conformity, deals with the so-called "guaranteed" sales only indirectly. However, it would be appropriate to make the formulations more specific and, in particular, to fix the time limits for notifying the buyer's claims to the seller in respect of defects found within the guarantee period, as it has been provided,

for instance, in paragraph 72 of the General Conditions of Delivery, 1968. For this purpose the ultimate phrase of paragraph 1 of article 39 ("unless the lack of conformity constituted a breach of a guarantee covering a longer period") might be replaced by a separate sentence of the following contents:

> "If a lack of conformity of the goods constituted a breach of a guarantee referred to in paragraph 2 of article 35, the buyer shall lose the right to rely on such lack of conformity if he has not given notice thereof to the seller within /30/ days upon expiration of the period of guarantee /provided the lack of conformity was discovered during that period/."

The last part of the proposed text, put into brackets, may appear to be self-evident, since the whole text has been already qualified in the very beginning by the term "a breach" of a guarantee which is obviously limited to a specific period of time. None the less, in order to avoid any confusion the retaining of such clarification may be practically justified.

(3) Thirdly, it would be desirable to specify in the Uniform Law at least some consequences which occur where the seller replaces or remedies defects in the goods pursuant to his guarantee undertaking. In such a case, should the guarantee period be extended or start to run anew or be left unaffected, etc.? Here again a reference might be made to the experience of elaborating General Conditions of Delivery, 1968 (paragraph 35) and the following paragraph might be suggested to supplement article 43 of the Uniform Law:

> "In case of replacement or remedying of the defective goods or defective parts of the goods pursuant to the guarantee referred to in paragraph 2 of article 35 the period of guarantee shall be extended for the time during which the goods have not been used due to the discovered defect."

ANNEX II

Proposals by the representative of Japan on articles 50-55 of ULIS

/Original: English/

Article 50

1. Where the contract or usage requires the seller to deliver documents relating to the goods, he shall tender such documents at the time and place required by the contract or by usage.

2. If the seller fails to tender documents without which the buyer cannot in course of business receive, hold and dispose of the goods at the time and place required or if he tenders the documents which are not in conformity with those which he was required to tender, 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.

3. If the seller fails to tender any documents other than those described in paragraph 2 at the time and place required or if he tenders the documents which are not in conformity with those which he was required to tender, the buyer shall have the same rights as those provided under article 55.

Article 51. Deleted.

Article 54. Transferred to new article 21.

Article 55. No change.

ANNEX III

Comments by the representative of Austria on the proposal of the representative of Japan on articles 50-55 of ULIS

/Original: French/

I can support your proposals; I would simply like to draw your attention to the fact that it is not clear from the text you propose that the second alternative in paragraphs 2 and 3 of article 50 ("... or if he tenders the documents which...") refers, in each case, to documents of the kind described at the beginning of the paragraph. I am not sufficiently familiar with the English language to suggest a valid text, but it might be possible to say in each case: "... or if he tenders such documents which...", or something to that effect.
