



UNITED NATIONS
GENERAL
ASSEMBLY



Distr.
LIMITED

A/CN.9/WG.2/WP.25
10 November 1975

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on the International
Sale of Goods
Seventh session
Geneva, 5 January 1976

UNIFORM RULES GOVERNING THE INTERNATIONAL SALE OF GOODS

Comments and proposals by the representative of Norway on the draft
convention on the international sale of goods as approved or
deferred by the Working Group at its first six sessions

Article 20 (Article 35)

Paragraph 1 should read:

"1. The seller shall be responsible in accordance with the contract and the present Convention for any lack of conformity which exists at the time when, according to the provisions of articles 67 and 68, the risk passes to the buyer, even though such lack of conformity becomes apparent only after that time."

Comment: The present passage in brackets should be deleted and substituted by a reference to the pertinent articles in chapter VI on passing of the risk, i.e., present articles 67 and 68 but not present 69.

Article 30 (Article 44)

Paragraph 1 should be initiated as follows:

"The buyer may by notice to the seller declare the contract avoided:"

In paragraph 1 (b) there should be a reference to article 28 instead of 29.

Add a new paragraph 2 to be worded as follows:

"2. However, in cases where the seller has effected delivery, the buyer shall lose his right to declare the contract avoided, if he has not done so within a reasonable time:

(a) In respect of late delivery, after the buyer has become aware that delivery has been effected;

(b) In respect of lack of conformity or any other breach not covered by subparagraph (a), after the buyer has discovered or ought to have discovered such breach."

Comment: The requirement of giving notice of avoidance within a reasonable time has become acute, partly because the ipso facto avoidance under 1964 ULIS has been abolished (see ULIS article 26), partly because UNCITRAL has decided to delete ULIS article 49 which provided for a time-limit of one year. The other party has a need for certainty, and the possibility of speculation in market developments ought to be reduced.

The simple consolidation of the remedy system in cases of delay and lack of conformity, as adopted by the Working Group, cannot reasonably be fully carried out in respect of time-limits for giving notice of avoidance. Certain distinctions have to be made between cases of non-delivery, late delivery (cp. 1964 ULIS article 26) and lack of conformity (cp. 1964 ULIS articles 43 and 49).

The text proposed is a simplified version of the proposal of Working Party VIII during the sixth session of the Working Group, February 1975 (document A/CN.9/WG.2/VI/CRP.13).

Article 45 (Article 72 bis)

The first sentence should be initiated as follows:

"The seller may by notice to the buyer declare the contract avoided:"

The provision of subparagraph (b) seems to have been given too wide a scope. Cp. ULIS articles 62 (2) and 66 (2) and revised article 30 subparagraph (b). It is proposed to draft the present subparagraph (b) as follows:

"(b) Where the buyer has not paid the price or taken delivery within an additional period of time fixed by the seller in accordance with article 44."

Add a new paragraph 2 to be worded as follows:

"2. However, in cases where the buyer has taken delivery or paid the price /in whole or in part/, the seller shall lose his right to declare the contract avoided if he has not done so within a reasonable time:

/...

(a) In respect of late performance of the buyer's obligations, after the seller has become aware that performance has been rendered;

(b) In respect of any breach not covered by subparagraph (a), after the seller has discovered or ought to have discovered such breach."

Comment: See comment supra to article 30 (new para. 2).

Article 57 (Article 84)

Norway can accept the alternative in the first brackets, but drafted as follows:

"... on which delivery at the latest should have been effected /or, in case of earlier delivery, on the previous date on which delivery was effected/.

Article 58 (Article 85)

The provisions of articles 56 and 58 should change places, and the new article 56 should read as follows:

"If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, as part of the damages referred to in article 55, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale."

Article 59 (Article 88)

Substitute the words "as may be reasonable" by: "as are reasonable". The fourth line should read: "may claim a reduction in the damages equal to the amount by which the loss should have been mitigated".

Add the following at the end as a new paragraph 2:

"2. Where it is reasonably possible for the buyer to buy goods in replacement of the goods to which the contract relates, or for the seller to resell the goods, and he nevertheless neglects to do so within a reasonable time after the breach of the contract by the other party, the damage shall not include any loss which could have been avoided or mitigated thereby."

Chapter VI. Passing of the risk

Article 66 (Article 96)

Substitute "damage to" for "deterioration of".

/...

Article 67 (Article 97)

This article shall read:

"1. Where the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk shall pass to the buyer when the goods are handed over to the first carrier for transmission to the buyer.

"2. The provision of paragraph 1 shall also apply if at the time of the conclusion of the contract the goods are already in transit. If, however, the seller at that time knew or ought to have known that the goods or part thereof had been lost or damaged, the risk of such loss or damage shall remain with him, unless he discloses such fact to the buyer.

"3. Nevertheless, if the goods are not marked with an address or otherwise clearly identified for delivery to the buyer, the risk shall not pass until the seller has given notice of the consignment and, if necessary, sent some document specifying the goods."

Comment: To meet practical situations paragraph 1 should be made more elaborate than the provision adopted by the Working Group at the fifth session. Cp. US Uniform Commercial Code, section 2-509.

If the seller is required to hand over the goods at a particular destination, the provisions of article 68 will apply according to the proposed version (but not according to the version previously adopted by the Working Group).

The new paragraph 3 corresponds to ULIS article 100, cp. revised article 16 paragraph 1, second sentence.

Article 68 (article 98)

It is proposed that this article should read as follows:

"1. In cases not within article 67 the risk shall pass to the buyer when the goods are taken over by him, or where he has not done so in due time, already from the /earlier/ moment when the goods have been placed at his disposal and he has committed a breach of contract by failing to take delivery /in due time/.

"2. If, however, the buyer is required to collect /take over/ the goods at a place other than any place of the seller, the risk shall pass when time for delivery has come and the buyer is aware, or has been given notice, of the fact that the goods are placed at his disposal at such place.

/...

"3. Where the contract relates to sale of goods not then identified, the goods shall not be deemed to be placed at the disposal of the buyer until they have been marked with an address, separated or otherwise clearly identified to the contract and the buyer has been given notice of such identification.

Comment: Paragraph 1 amalgamates the present paragraphs 1 and 2 first sentence.

Paragraph 2 is new and takes care inter alia of situations where delivery is effected in accordance with present article 15. Subparagraph (b), e.g., where the goods are held by a bailee. Cp. ULIS articles 23 (2) and 97 (1). See also the report of the Working Group from its fifth session (A/CN.9/87) under paragraphs 236-238. Even if the time (period) for delivery has come, this does not necessarily imply that it is a breach of contract by the buyer to omit to collect the goods without delay. If the place for collection (delivery) is a place of the buyer or of a third person, it seems reasonable that the risk passes immediately when the goods have been placed at the buyer's disposal (tendered) at such place (and this is made known to him). If, however, the place of delivery is a place of the seller, it may be more reasonable or rational (insurance etc.) that the risk does not pass until the delay amounts to a breach of contract.

Paragraph 3 corresponds to present paragraph 2 second sentence (in brackets).

Article 69 (Article 98 bis)

This article may read:

"Alternative I: If the seller has committed a fundamental breach of contract, the provisions of articles 67-68 shall not impair the remedies afforded the buyer on account of such breach.

Alternative II: If the buyer avoids the contract or requires substitute goods /in the case of a fundamental breach of contract by the seller/, the seller shall bear the risk of loss of or damage to the goods occurring even after the moment when the risk would otherwise, according to the provisions of articles 67-68, have passed to the buyer."

Alternative III: Delete the whole article 69, cp. article 52 subparagraph 2 (a).

Comment: Alternative II corresponds quite closely to the present article 69. Alternative I treats the same problem in a different way, which is principally recommended. However, the whole provision of this article could well be deleted since the problem virtually is solved by the provisions of article 52 paragraph 2, in particular subparagraph (a).
