

ANNEX XI

COMMENTS BY THE REPRESENTATIVE OF THE UNITED KINGDOM ON THE USSR PROPOSAL FOR THE AMENDMENT OF ARTICLE 15 OF ULIS

1. The proposal of the USSR for the amendment of Article 15 relates to a situation where the law of one of the countries in whose territories the parties to a contract have their place of business requires that international contracts of sale be in writing.
2. It is thought that the laws of many states include provisions designed to limit the use, validity or enforceability of unwritten contracts. The scope and nature of such provisions may vary greatly. For example, the law of one state may require that all the persons subject to its jurisdiction (including its nationals when abroad) should contract in writing; that of another may require that all contracts made locally (or certain classes of contracts so made) should be in writing. The law of a third state may quite conceivably provide that oral contracts should be unenforceable in its courts or that contracts should be enforceable only if there is written evidence of their terms. It is obvious that the effect of provisions as various as those described may differ: eg one law may make an unwritten contract void, another may provide that oral contracts are perfectly valid and may be lawfully carried out but may not be enforced by legal action in the event of a breach.
3. Obviously the character of "the writing" which is called for may also vary. In one case it may be required that the actual contract itself is in writing, signed and witnessed; in another it may be enough that there is some written record of the existence of the contract and its relevant terms (which may post-date the contract). There are further obvious variations possible, eg requirements as to signature etc.
4. Examples of such variations are available in English law. Before 1953, all contracts for the sale of goods to the value of £10 and upwards were required by English law to be supported by a note or memorandum in writing signed by the party charged (ie the defendant) or by his agent. This requirement was abolished because it was an undesirable impediment to trade. While it was still operative, it was characterised by English courts as an evidentiary requirement, and even applied where the law applicable to the

contract was a foreign law - a situation which attracted considerable criticism. At the present moment, only certain instalment contracts for the sale of goods are required (for the purposes of consumer protection) to be in writing and made in a certain form. This is a substantive requirement, and not merely evidentiary, but the effect of non-compliance is to render the contract unenforceable by one party, ie the seller, although it is still enforceable by the other, ie the buyer.

5. Where a contract is of an international character, the position of national laws as respects writing is peculiarly delicate. There is obviously a strong possibility that legal proceedings will be brought in relation to such a contract in a foreign court, possibly a court in a country where neither of the parties carry on business but which they have agreed to accept as a "neutral" forum. In this situation, the relevance of the rule requiring writing will depend:

- (i) upon the manner in which it is characterised under the conflict of law rules of the forum; and
- (ii) its relevance as a rule of that character.

For example, if the court formed the view that the requirement of the foreign national law was of an evidentiary character (like the English rule), it would presumably ignore it because matters of evidence and procedure are normally regulated by the law of the forum. Were the court to decide that the foreign provision related to the validity of the contract, it still does not follow that it would necessarily apply the rule and declare an oral contract invalid. Such authority as there is in English law indicates that English courts consider a contract valid if it fulfils the requirements as to form either of the law of the place of contracting or of the proper law.

6. It is probable that the existence of private international law problems of this type led to the inclusion of Article 15 in the Uniform Law. And the Article, as drafted, does have the merit of eliminating some of these problems even where proceedings are brought in the courts of a non-contracting state. For example, if the United Kingdom were not a contracting state and proceedings were brought in England in respect of a contract whose proper law was that of a contracting state, an English court would probably ignore arguments that

the contract was invalid because it did not comply with a provision of the national law of one of the parties and hold it formally valid by reference to Article 15.

7. The proposal of the USSR appears intended to qualify the Uniform Law so as to ensure that contracting parties cannot escape complying with the requirements of their national laws as to writing. One must obviously test the proposal by asking what happens if the parties fail to comply with the relevant provision of the national law. It is thought that a court would be bound to answer the question whether any relevant national provision applies by reference to its conflict of law rules in the manner described above. It is not thought that the effect of the USSR proposal is to make the relevant provisions of the national law automatically applicable.

8. It is appreciated that the proposals of the USSR do not seek to affect the position in a case where none of the parties to the contract carry on business in a state whose laws include requirements as to writing. Experience in the United Kingdom would suggest that traders often contract internationally over the telephone, particularly where goods are needed urgently or the amount is small or there is a long history of satisfactory trading. Sellers usually confirm such contracts by sending invoices: but it is frequently the case that the buyer does not communicate in writing until he acknowledges receipt of the goods or pays for them.

9. Should the Working Group and, ultimately, the Commission consider that some modification should be made to the Law to accommodate the wishes of the USSR, consideration might be given to revising Article 15 or to making Article 15 subject to Article 5(2) and expanding that Article so as to refer to mandatory provisions of national law involving requirements that international contracts of sale should be in writing.

10. In the opinion of the UK, however, if any amendment is to be made, it will be necessary to introduce further provisions as follows:

- (1) some definition of "writing" will be essential in order to clarify the position eg of telegrams, telex communications, tapes and other permanent records of oral agreements;

- (ii) it will be necessary to draw a distinction between evidentiary requirements and substantive requirements of form;
 - (iii) it will be necessary to specify the consequences of a non-compliance with this requirement (eg is the contract to be void? is it to be unenforceable? can any performance made under the contract be recovered?) or to specify the system of law with reference to which the consequences of such non-compliance may be determined.
11. The UK would hope that it may be possible to avoid any amendment of Article 15.