

## ANNEX XII

### COMMENTS BY THE REPRESENTATIVE OF THE UNITED KINGDOM ON ARTICLES 10 TO 13 OF ULIS

#### A. COMMENT ON ARTICLE 10

1. In approaching the question whether or not one party to a contract of sale ("the innocent party") is entitled to treat himself as discharged from further performance of the contract by reason of a breach by the other party ("the party in default"), a legal system can adopt one of two alternative approaches - or a mixture of both of them.

The first is to single out certain obligations under the contract (e.g. delivery of the goods at the date fixed, delivery of the goods at the place fixed, delivery of goods which conform with the contract etc.), and to provide that any breach (however slight) of such an obligation by the party in default shall entitle the innocent party to treat himself as discharged.

The second approach is to concentrate on the seriousness of the breach, and to provide that the innocent party is only entitled to treat himself as discharged if the breach can be regarded as sufficiently serious to justify this step.

#### ENGLISH LAW

2. The nineteenth century approach in the English law of contract was, as a general rule, to adopt the first of these two alternatives. A distinction was drawn between terms, express or implied, which were classified as conditions and those which were classified as warranties. Any breach of a condition (however slight) entitled the innocent party both to treat himself as discharged from further performance and to sue for damages for the breach. But a breach of a warranty did not entitle him to treat himself as discharged, although it did entitle him to claim damages. This classification was not invariably adopted in contracts of sale of goods, but normally the remedies of the innocent party depended upon whether the breach of a particular obligation was a breach of a condition or merely a breach of warranty. And this dichotomy is reflected in the English Sale of Goods Act 1893, which is the statute which applies in England at the present day to contracts of Sale of Goods.

3. Elsewhere in the English law of contract, however, there has recently been a move away from the condition/warranty distinction, and the courts tend now more and more to ask whether or not a particular breach of contract is a "fundamental breach" (Hongkong Fir Shipping Co. Ltd. v Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26). That is to say, they have moved away from the first approach mentioned in Paragraph 1 above to the second approach.

4. The first approach has the great merit of certainty, for the innocent party knows that, if a particular term of the contract is not fulfilled, then he will definitely have the right to treat the contract as discharged. But the second approach, which concentrates on the seriousness of the breach, is more likely to produce an equitable result, even if there is some sacrifice of certainty. For example, if the seller is one day late in delivery, it might be unjust if the buyer was always entitled to treat the contract as cancelled, irrespective of whether or not the delay in delivery was serious in the circumstances of the particular contract.

5. It is nevertheless open to the parties expressly or impliedly to stipulate in their contract what shall be the consequences of a breach of a particular obligation (i.e. whether or not the innocent party is entitled to treat himself as discharged), and the English courts will then give effect to this expression of their will.

ULIS. Article 10.

6. The concept of "fundamental breach" in Article 10 of ULIS is defined in terms which attempt to establish an objective criterion by which the seriousness of the breach may be assessed. As I understand it, the first task of the court or arbitrator in applying Article 10 would be to establish the actual facts of the case submitted for decision. To this extent, the enquiry would (so to speak) be a subjective enquiry, for it would be necessary to examine the terms of the particular contract of sale, the actual position of the particular parties, the trade or business actually carried on by each of them, the knowledge which each possessed or might reasonably be presumed to possess of each other's trade or business, and the actual circumstances surrounding the particular transaction.

After these facts have been determined, then, as a matter of law, the court or arbitrator would apply an objective test to determine whether or not the breach was fundamental. The words "ought to have known", "reasonable person", "would not have entered into the contract" and "foreseen" have all an objective connotation. Thus, if, as will normally be the case, the parties are merchants, then an English court would ask:

"Did the party in breach know, or ought he (as a merchant) to have known, at the time of the conclusion of the contract, that a reasonable person (merchant) in the same situation as the other party (ie about to enter into a contract of an international character in the course of his business) would not (having regard to the normal reaction of a merchant) have entered into the contract if he had foreseen (to the extent that a merchant would reasonably foresee) the breach and its effects?".

7. Further, in my opinion, by virtue of Article 3 of ULIS, it is open to the parties to exclude the provisions of Article 10, either expressly or impliedly. Thus they could stipulate that the breach of a particular term or terms was to be regarded in any event as a fundamental breach; or they could provide that the breach of a particular term was not to be considered a fundamental breach. They could, for example, say that a delay in delivery up to four weeks was not to be a fundamental breach; or that the slightest delay in delivery was to be a fundamental breach.

#### CONCLUSION

8. From the point of view of English law, there is no difficulty whatsoever about the interpretation of application of Article 10 of ULIS. It may, however, be that its wording would cause difficulty in non-common-law systems, and, if that is so, the Working Group might wish to try to "improve the language in which it is expressed, in order that difficulties might be alleviated. I would, however, attach great importance to the actual ideas which are contained in Article 10, and would not wish to see these changed, whatever the changes in language might be. I would also attach great importance to the following -

- (a) the maintenance of the concept of "fundamental breach";

- (b) the maintenance of an objective test to determine whether or not the breach was fundamental;
- (c) the maintenance of the freedom of the parties, expressly or impliedly, to stipulate that certain breaches, which would not otherwise be fundamental, should be treated as fundamental, or that certain breaches, which would otherwise be fundamental, should not be treated as fundamental.

9. In my opinion, therefore, Article 10 is satisfactory as it stands; but consideration could be given by the Working Group to the draft text submitted by the U.S.S.R. It will be noted that the U.S.S.R. text requires the court or arbitrator to consider what "a merchant engaged in international commerce" would have done irrespective of the fact "the other party" may not have contracted in a commercial capacity; but this may be no more than a minor drafting point.

#### B. COMMENT ON ARTICLE 11

1. The definition of the word "promptly" in Article 11 of ULIS would cause no real difficulty in English law. Our judges are accustomed to deal with such phrases as "within as short a time as possible in the circumstances" and such concepts as "could reasonably be performed". Similarly, the phrase "within a reasonable time", which occurs frequently in ULIS, is one which is very common indeed in English statutes and jurisprudence. When applied in the sphere of international trade, such words as these would be interpreted from the point of view of a merchant engaged in international commerce, having regard to the terms of the contract, the nature of the goods sold, the customary strictness or indulgence encountered in the particular trade or business in question, and all the surrounding circumstances.

2. I would not, therefore, find it necessary - from the standpoint of English law - to effect any change in Article 11, or to define the concept of "within a reasonable time". But if difficulty is encountered with these expressions in other legal systems, the amended draft Article 11, paras. 1 and 2, suggested by the USSR merits careful consideration.

C. COMMENT ON ARTICLE 12

See separate note on this matter.

D. COMMENT ON ARTICLE 13

My comments on Article 11 apply equally to this article.

COMMENTS ON ARTICLE 12

The memorandum of the U.S.S.R. draws attention to the fact that the term "current price" is employed only in Articles 84.1, 84.2 and 87 of the Uniform Laws on International Sales.

The term is not employed in a substantive sense in Article 87. The Article says in effect that where Article 84 cannot be applied damages shall be calculated on the same basis as that provided in Article 82. Article 84.2 is really a gloss on the definition in Article 12. The United Kingdom would suggest, therefore, that if any amendment is to be made, Article 12 should be omitted and the amendment effect by inserting a definition of "current price" in Article 84.2.

Article 84.1 determines the measure of damages in the case where the contract is avoided. It embodies the obvious and sensible rule that the measure of damages is the difference between the contract price and the price which the buyer would have to pay or the seller obtain if he bought or sold on the day on which the contract was avoided. The criterion must be a sale of the like quality of "identical" goods for delivery at the same date on the same terms and conditions as the contract.

Clearly where the notional contract might be concluded in an international commodity market which quotes prices, the best evidence of the prices prevailing at the time of avoidance is the official market quotation. But the quotation may not itself reflect an identical contract e.g. the standard prices in a grain market may be ex-elevator for 3 month delivery: the contract may be c.i.f. and for delivery 2 months later. For this reason it is thought that one can use no more precise a term than "based on".

It is thought that the expression "current market price" would be far more informative and less confusing than "current price".

Some of the wording of Article 84.2 seems somewhat inappropriate. The idea that sale in a different commodity market may involve a difference in transportation costs seems to be geared to the idea that goods are normally transported to international commodity markets.

The United Kingdom would suggest that the Working Group agree

- (i) that Article 12 be omitted and such definition of current price as may be thought necessary be included in Article 84; and
- (ii) consideration be given to the question whether Article 84.2 does not require amendment to ensure that the comparison to be made is effectively a comparison between the contract price and the price which the buyer would have to pay or the seller receive if, on the date on which the contract was avoided, he bought or sold like quantities of like goods for delivery on the same date on identical terms and conditions, being a price based wherever possible upon a market quotation.