

Janvier 1934

OBSERVATIONS BY MR. GUTTERIDGE

ON THE PROJET DE LA LOI INTERNATIONALE SUR LA VENTE  
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I.- General Observations.  
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I propose to refrain from submitting a separate draft as I think this would unduly complicate and delay matters, but I would like to make the following observations of a general nature, in addition to the comments which follow on the individual articles.

- (a) I would like to urge that every effort be made to shorten the draft law as much as possible, and also to avoid detail wherever this can be done without obscuring any question of principle. I am afraid that the draft law will appear to English lawyers to be unduly long and complicated. It will moreover have to be perused by men of business and I fear that its present length and meticulousness may produce an unfavourable impression on them.
- (b) I find myself in entire agreement with Mr. Bage when he suggests the omission of the articles dealing with the formation of the contract. This will not only curtail the length of the draft but what is more important it will avoid opposition which will be based on grounds which have nothing to do with the law of sale, and may well prove fatal to our proposals. In any event this part of the draft is incomplete, and much valuable time will be saved if it is excluded.

- (c) I suggest that the "Dispositions Générales" should also be omitted from the draft. They could be replaced where necessary in a condensed form by "Dispositions Communes" relating to the obligation both of the seller and the buyer. These, for instance, might include the rules relating to impossibility, which are repeated several times over in the draft. This expedient will avoid the repetition of a rule in a slightly different form in two or even three different places, and thus help to reduce the length and complication of the draft.
- (d) So far as is possible cross-references should be avoided.
- (e) In conclusion; the draft seems to me to be in certain respects unduly favourable to sellers. I have dealt with this question in the comments which follow.

II.- Observations on the Draft.  
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Art. 1.- The expression "corporeal moveables" may cause some difficulty as it is not one which is used in this connection by English lawyers. It will be desirable therefore to frame this article in the English text in the following way:  
 "The present law applies to all chattels personal other than:

- 1) Things in action
- 2) Money
- 3) Ships
- 4) Vessels used in inland navigation
- 5) Aircraft

It will not be necessary to mention stocks or shares as they are included in the term "things in action".

I would also like to call attention to the fact that the article is silent on the question of industrial growing crops.

Art. 2.- No observations.

Art. 3.- I agree with the proposal of MM. Capitant and Hamel.

Art. 4.- The concluding sentence seems to me to be unnecessary.

Art. 5.- No observations.

Art. 6-9.- The criticism of MM. Capitant and Hamel seem to me to be wellfounded. I would like to add the following observations:

- a) What is to be the position if a trader has several establishments in different countries?
- b) A difficulty is created by the fact that in English law a partnership is not a "personne morale". What is to happen if the partners reside in different countries?
- c) The term "domicile" is dangerous because it has different meanings in Continental and in Anglo-American law.

If the proposed redraft of Act 6 by MM. Capitant and Hamel is adopted I suggest the addition of the word "principal" before establishment.

Their proposed redraft of Art. 7 leaves the position of a partnership uncertain. If "personne morale" is translated by "corporation" there will be a divergence between the French and the English texts.

As regards their redraft of Art. 8 I am very doubtful whether it would be possible to apply the international rule to subsidiary contracts without causing difficult situations to arise in practice. I am of the opinion that it will be desirable to limit the international rule to international sales as defined in the original draft together with sales in which it is an express or implied term of the contract that the seller must import the goods from abroad.

As regards Article 6 of the original draft I do not see the necessity for a statement that a principal is bound by a contract entered into on his behalf by a duly authorised agent.

Art. 10.- I think that the concluding sentence of this article (alinea 3) may invite disputes as to whether a trade formula has been employed or not. I would prefer to say quite generally that expressions in a contract which by custom have a special meaning must receive the customary interpretation. I am in general agreement with the views of Mr. Bagge on this question.

Art. 11.- I agree with the observations of Mr. Bagge, and I would prefer that Arts. 10 and 11 should read to the following effect:

"The provisions of this law may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract". Subject to this I am in general agreement with Mr. Bagge's draft Art. 11.

Art. 12.- I agree with MM. Capitant and Hamel that this article should be suppressed. I have never appreciated its objet.

Art. 12(a).- Why are communications by word of mouth excluded?

Art. 12(b).- No observations.

Art. 12(c).- I am not in favour of the suppression of alinea 1, as the term "loi nationale" is used frequently in the draft. I think that alinea 2 serves no useful purpose and might be omitted.

Alinea 3 is not clear to me. What is the precise meaning of "Conditions générales"? I propose that alineas 2 and 3 should be cancelled for the reasons given by Mr. Bagge.

Art. 12(d).- Is this article intended to include a "concordat preventif"?

Art. 13.- I do not understand the meaning of "proof to the contrary". Surely the question is one of the meaning of a written offer and not of evidence? The words in brackets should in my opinion be excluded.

Art. 14.- Does communication of a revocation include the fact that the offeror has to the knowledge of the offeree acted in such a way as to show that he no longer regards the offer as open, e.g., where he makes an offer to sell specific goods but sells them to someone else before the receipt of the offeree's reply?

As regards alinea 2 see my observations on Article 13.

Art. 15.- No observations.

Art. 16.- No observations.

Art. 17.- I do not understand the object of this article. A principal ought not to be liable if the agent exceeds his ostensible authority or to the knowledge of the third party exceeds his actual authority.

Art. 18.- No observations.

Art. 19.- No observations.

Art. 20.- No observations.

Art. 21.- I would prefer a formula which made no reference to "silence", e.g. "An acceptance may be express or may be inferred from the conduct of the parties". It is the conduct of a party and not his silence which is material.

Art. 22.- I propose that this article should be omitted. The question in such cases will be whether there is a custom to employ standard trade clauses or not.

Art. 23.- I do not agree with the conclusions expressed in this article. If accessory or ancillary terms are essential to the commercial efficacy of the contract they should be read into it whether they are expressly mentioned or not.

Art. 24.- No observations, except that the translation into English of this article will require careful consideration.

Art. 25.- See my observations on Article 24.

Art. 26.- No observations.

Art. 27.- I am not clear how this article would function in practice.

Is it certain that Government Telegraph Offices or Private Telegraph Companies will consent to give certified copies?

- Art. 28.- I agree with the remark of MM. Capitant and Hamel that this article overlaps Article 43. The definition of delivery should be retained as proposed by Mr. Bagge. The formula in Mr. Bagge's draft (Art. 28 A) " et par l'envoi des documents à l'acheteur etc." is appropriate in the case of C.I.F. contracts, but it does not follow in the case of F.O.B. contracts that it is the duty of the seller to obtain the bill of lading and marine policy, though that is sometimes the case.
- Art. 29.- No observations.
- Art. 30.- No observations.
- Art. 30(a).- I find myself unable to accept alinea 2. If the sale is not on credit terms the seller ought not to be compelled to despatch the goods until he has received the price.
- Art. 30(b).- No observations, except that I do not like the expression "économique" and would prefer some other term.
- Art. 30(c).- The word "sans qu'il soit dérogé en rien aux règles concernant le contrat de transport" are not clear. Does this mean without prejudice to the right of the shipowner to deliver the goods if he is compelled to do so by the contract of carriage? If so the effect of this article will be restricted very considerably since the shipowner must deliver the goods to a buyer who is the holder of the bill of lading. In English law there is a right of stoppage as against the buyer in case of insolvency so

long as the goods have not passed into the possession of the buyer. The words I have referred to would destroy this right of stoppage in certain cases and seem to me to be inadmissible for this reason.

There are certain documents which may be documents of title in one country and not in another, e.g. delivery orders. How is this conflict to be determined?

Art. 30(d).- See my observations as to the word "économique".

Art. 30(e).- A buyer ought not to be entitled to anything more than a reasonable opportunity of examination. The article as drafted does not make this clear.

Art. 30(f).- No observations. I am unable to accept Article 30 (g) in Mr. Bagge's draft. General clauses of this nature are of very doubtful value in practice. In some cases they may be very embarrassing to the parties.

Arts. 31 to 35.- I would prefer to see these articles omitted, or very much condensed for the following reasons:

- a) I think that they are unnecessarily detailed.
- b) To a certain extent they refer to matters which, in my opinion, are best left to be determined by the law of the place of delivery.

I suggest that the same ground could be covered adequately by two articles:

Art. 31.- If delivery is tendered to the buyer and he wrongfully refuses to receive the goods the seller may adopt such measures as are reasonably required for the



preservation of the goods and shall be entitled to recover expenses incurred for that purpose in addition to any other damages for which the buyer may be liable.

Art. 32.- If the buyer has received the goods and is entitled to avoid the contract and to reject the goods he shall not be bound to return them to seller. He must nevertheless adopt all reasonable measures for their preservation and shall be entitled to recover any expense incurred by him for that purpose in addition to any other damages for which the seller may be liable.

Art. 36-38.- No observations.

Art. 39.- There is no reference here to the difficult position which arises where the buyer has only resold a portion of the goods.

Art. 40.- I am not sure whether I understand what is meant by "En cas contraire".

Art. 41.- I think that any alteration by the buyer of the goods which is not de minimis should deprive him of his right of avoidance of the contract. In such cases the buyer should be confined to his right to sue for damages and must keep the goods.

Art. 42.- No observations.

Art. 43.- The word "acheteur" in the concluding paragraph appears to be an error. Should it not be "armateur"?

Art. 44.- I am not sure that the meaning is clear of the words "les mêmes conditions" in the concluding paragraph.

Arts. 45-50.- No observations, except tha I agree with Mr. Bagge that Articles 46 and 47 might be omitted.

Arts. 53-56.- No observations.

Art. 56(a).- I agree with the remarks of Mr. Bagge on this article.

Art. 57.- I agree with Mr. Bagge.

Art. 58.- It is not stated whether the communications referred to must be in writing or not.

Art. 59.- No observations.

Art. 60.- No observations.

Art. 61.- No observations.

Art. 62.- No observations.

Art. 63.- Omit reference to Article 30 b).

Arts. 64-66.- The question of the prevention of performance by reason of an insurmountable obstacle should be a Disposition Commune, thus avoiding unnecessary repetition.

Arts. 67 & 68.- I prefer the wording of Article 68 in the Resumé to that suggested by MM. Capitant and Hamel.

Art. 69.- No observations.

Art. 70.- As Mr. Bagge points out it is the duty of the buyer to mitigate damages in this case as well as in the others. The best method of securing that this duty is always observed would in my opinion be to have a "Disposition Commune" as follows:

"It shall be the duty of a party complaining of a breach of contract to take all reasonable steps to mitigate the loss which he has suffered, provided that he can do so without serious inconvenience or expense. If he fails to do so the party guilty of the breach of contract may plead such failure in mitigation of the damages".

If this is done there will be no need to refer to this duty in each individual case.

Arts. 71 & 72.- These articles appear to be unnecessary in view of the provisions of Article 31.

Art. 73.- No observations.

Art. 74.- See my observations on Article 30 (g) of Mr. Bagge's draft.

Arts. 75 & 76.- No observations.

Art. 77.- This article might well be one of the "Dispositions Communes" and would then run as follows:

"Non performance of any duties incumbent on the parties by virtue of the contract shall entitle the aggrieved party to damages unless performance has been prevented by an insurmountable obstacle which could not have been foreseen at the time when the contract was concluded.

Except in such cases as are otherwise specially provided for in this law the damages shall be equal to the loss which the aggrieved party has sustained by reason of the breach of duty.

If the said duty is of the essence of the contract the aggrieved party may also avoid the contract. A duty shall be deemed to be of the essence of the contract if it

appears from the terms of the contract and the surrounding circumstances that the aggrieved party would not have entered into the contract unless the other party or parties had undertaken to perform such duty.

Art. 79.- I think that it would be preferable to provide that a reasonable price is payable in all cases in which the parties have not agreed on the price beforehand. In the case of goods imported from abroad it may be difficult or costly to prove the price usually demanded by the seller.

Art. 80.- No observations.

Art. 82.- I accept the amendment of MM. Capitant and Hamel.

Art. 83.- This article seems to be unnecessary. It merely states that the price is payable as provided in the contract.

Art. 84.- I do not appreciate the object of this article.

Art. 85.- No observations, except that this article does not seem to be necessary.

Art. 85(a).- No observations, except that I suggest that the examples might be omitted. I do not personally regard this article as necessary.

Art. 85(b).- I submit that this article requires re-consideration. I feel that objections will be raised to a rule which allows the seller to prepare the specification if the buyer fails to do so. It is an indirect method of obtaining specific performance of the contract, and may be unacceptable on that ground.

Art. 87.- No observations.

Art. 88.- I presume that this article refers to payment in advance of delivery: otherwise I fail to see how it will operate in practice. In any case the object of this article is not clear.

Art. 90.- No observations.

Art. 91.- Payment on an agreed date may be of the essence of the contract (e.g. cash against documents) and in such a case this article is inappropriate.

Art. 91(a).- No observations.

Art. 91(b).- No observations.

Art. 92.- No observations.

Art. 95.- No observations.

Arts. 95(a) & 95(b).- No observations except that this seems to be one of the instances in which the repetition of the rule relating to "unsurmountable objects" could be avoided by a "Disposition Commune".

Art. 95(c).- I am not sure that I understand the purport of this article. The date for the assessment of abstract damages in this case should be the date of the breach entitling the seller to avoid the contract and not the date at which he actually avoids it. This is the principle adopted in the case of avoidance by the buyer, (See Article 67) and I am unable to appreciate the reason for the distinction between the two cases.

The article as redrafted by MM. Capitant and Hamel seems to require careful consideration. The reason why the party is liable for special damage is not because he foresaw the amount (le montant) of the damage because this will often be beyond his powers of estimation. He is liable because he knew or ought to have known of facts which would cause damage of a special character.

Arts. 95(d) and 95(e).- Some observations as to the criterion of special damage.

Art. 96.- No observations.

Art. 97.- No observations.

Art. 98.- This article seems to be out of order and should come first.

Art. 99.- No observations.

Art. 100.- I do not understand the reference to No. 117.

Art. 101.- No observations.

Art. 1902.- I cannot agree with MM. Capitant and Hamel that the term Vices should be retained. It cannot be translated into English except by "defects".

Art. 103.- No observations.

Art. 104.- No observations.

Art. 105.- No observations.

Art. 106.- No observations except that this article is very favourable to the seller, and I think it will meet with opposition on that ground.

Art. 107.- No observations.

Art. 108.- I am somewhat doubtful whether the term "gross negligence" will be acceptable to English lawyers.

Art. 109.- I feel that alinea 3 may be oppressive to buyers in certain instances as it will lead to delay. It may also work badly in practice as there may be difficulty in deciding what is reasonable notice in certain circumstances.

Art. 110.- No observations: except that "en bonne foi" should read "reasonably" in the English text.

Art. 111.- No observations.

Art. 112.- No observations.

Art. 113.- I think that this article is too favourable to the seller. If the buyer elects to ask for a second delivery there is no reason why he should not do so, but I do not think that he ought to be compelled to wait for a second delivery against his will.

Art. 114.- This article is too favourable to the seller. I think it would inflict hardship on the buyer in the case of the purchase of such goods as textiles etc. It would create difficulties where such goods are bought for resale, and I do not think that it would work well in practice.

Art. 115.- No observations.

Art. 116.- No observations on alinea 1.

As regards alinea 2 I do not think that the buyer should be permitted to avoid the contract after he has resold the goods. This may lead to collusion between him and

the sub-purchaser. The case of a partial resale, however, calls for consideration.

Art. 117.- If the seller is to benefit from a period of prescription, why is this right denied to the buyer?

Art. 118.- No observations.

Art. 119.- No observations, except that I am not sure how this rule would work in practice.

Art. 120.- No observations.

Art. 121.- See observations on Article 119.

Art. 122.- No observations.

Art. 123.- No observations.

Art. 124.- This is another of the cases in which a "disposition commune" would avoid repetition.

Arts.- 125-128.- Should be omitted. This question requires more study than it has been possible to give to it. See the Report on Letters of Trust.