

ANNEX III

Articles 20-23 of ULIS

Comments and proposals of the representative of the United States

[Original: English]

Introduction. The UNCITRAL Working Group on the International Sale of Goods, at its meetings held during the Commission's fourth session, entrusted the representatives of its members with the examination of articles 18-55 of ULIS. Articles 20-23 of ULIS, which deal with Date of Delivery (Arts. 20-22) and Place of Delivery (Art. 23), were assigned to the United States, in cooperation with France and Ghana. This report is submitted in response to that assignment.

Scope and Related Questions. The scope of this report is limited to the four articles just cited. There are, however, some important related questions which ought to be mentioned, although they are not explored here. The articles that precede those covered by this report, Articles 18 and 19, deal with the concept of "délivrance" ("delivery"), a general concept in ULIS. It has long been the subject of critical discussion. These articles will be dealt with in a separate report by Hungary, in cooperation with the United Kingdom and Mexico, and the general concept of délivrance itself is being examined by the Secretariat. The articles that follow those covered by this report, Articles 24-32, deal with remedies for the seller's failure to perform his obligations as regards the date and place of delivery. As to these articles, serious questions have also been raised with regard, for example, to the notion of ipso facto avoidance, to the impact of the notion of fundamental breach (see Art.10), and to the complexity of the remedial provisions which require nine relatively complex articles to implement the four relatively simple substantive articles that are the subject of this report. These questions will be explored in a report by Japan, in cooperation with India and Brazil. Two other questions may, however, be obscured by the fragmentation of the work into separate reports. One of these is whether it is desirable to make the sharp distinctions that ULIS does between the remedies as to date and place on the one hand

and conformity on the other. The Working Group should take care in constructing its agenda to make sure that this point is not lost sight of. Date and place are the subject of two separate reports and conformity, dealt with in Articles 33-49, is the subject of three different reports, and none of these may explore this more general question as to remedies. Similar problems are posed by the separate treatment of the handing over of documents (as opposed to goods) which is dealt with in Articles 50 and 51 and is the subject of another report, and of the seller's other obligations, which are dealt with in Articles 54 and 55 and are the subject of yet another report.

Present text. The present text of the four articles that are the subject of this report is set out below:

Article 20

Where the parties have agreed upon a date for delivery or where such date is fixed by usage, the seller shall, without the need for any other formality, be bound to deliver the goods at that date, provided that the date thus fixed is determined or determinable by the calendar or is fixed in relation to a definite event, the date of which can be ascertained by the parties.

Article 21

Where by agreement of the parties or by usage delivery shall be effected within a certain period (such as a particular month or season), the seller may fix the precise date of delivery, unless the circumstances indicate that the fixing of the date was reserved to the buyer.

Article 22

Where the date of delivery has not been determined in accordance with the provisions of Articles 20 or 21, the seller shall be bound to deliver the goods within a reasonable time after the conclusion of the contract, regard being had to the nature of the goods and to the circumstances.

B. Place of delivery

Article 23

1. Where the contract of sale does not involve carriage of the goods, the seller shall deliver the goods at the place where he carried on business at the time of the conclusion of the contract, or, in the absence of a place of business, at his habitual residence.

2. If the sale relates to specific goods and the parties knew that the goods were at a certain place at the time of the conclusion of the contract, the seller shall deliver the goods at that place. The same rule shall apply if the goods sold are unascertained goods to be taken from a specified stock or if they are to be manufactured or produced at a place known to the parties at the time of the conclusion of the contract.

The commentary by Professor Tunc states that "Articles 20 to 22 . . . scarcely seem to call for any comment," since it "seems clear that the buyer should not have to take any formal steps to summon the seller to fulfil his obligations." He goes on to say that "Article 23

settling the place where the goods should be delivered is also self-evidently clear and does not call for any remarks." (See I:372)*

Previous text and history. It may be useful, as a means of at least shedding light on questions that have already been disposed of by previous groups, to set out the text that went before the Hague Conference in 1964 and to trace its history.

* Citations are, by volume and page number, to the records of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, the Hague, 2-25 April 1964. Comments recorded in volume I were made on the 1963 text of the uniform law while those recorded in volume II were made on the similar 1956 text.

A) Date of delivery

Article 22

Where the parties have agreed upon a certain date of delivery or where such date is fixed by usage, such agreement or usage shall conclusively and without any other formality fix the date on which the seller is bound to deliver the goods, provided that the date thus fixed is determined or determinable by the calendar, or is fixed in relation to a definite event the exact day of which can be ascertained by the parties.

Article 23

Where the parties have agreed upon a period of time within which delivery must take place (e.g. a particular month or season), the seller may fix the precise date of delivery unless the circumstances indicate that such choice was reserved to the buyer.

Article 24

Where the date of delivery has not been fixed in accordance with the provisions of Articles 22 and 23, the seller shall be bound to deliver the goods within a reasonable time after the conclusion of the contract, regard being had to the nature of the goods and to the circumstances.

B) Place of delivery

Article 25

Where the contract of sale does not imply the carriage of the goods, the seller must, in the absence of any express or implied term or of any usage to the contrary, deliver the goods at the place where he carried on business at the time of the conclusion of the contract, or, in default thereof, at his habitual residence.

In a sale of specific goods which, to the knowledge of the parties at the time of the conclusion of the contract are at a certain place, such goods are to be delivered by the seller at that place. The same rule shall apply to unspecified goods to be taken from a given stock or bulk, or to goods to be manufactured or produced at a place known to the parties at the time of the conclusion of the contract.

Article 26

Where the contract implies the carriage of the goods, unless it is stated that delivery shall be effected at the place of destination, the handing over to constitute delivery as defined in Article 21, first paragraph, must occur at that place where, in the circumstances, the carriage with a view to the despatch of the goods to the buyer should begin.

Only minor changes were made as to date. The Special Commission had reported that these articles "scarcely call for comment" (II:53). Present Article 20 can be seen to be but a slight rewording of previous Article 22. Present Article 21 involves only a slight revision of previous Article 23, with the addition of a reference to usage to correspond to that in the preceding article. Present Article 22 is virtually identical with previous Article 24, except that "determined" was substituted for "fixed" and the article numbers changed.

Although the Special Commission had reported that the articles dealing with place "seem clear by themselves" (II:53), the changes made in these articles were slightly more substantial. Present Article 23 involves minor rewording of previous Article 25, with elimination of contrary agreement or usage. Previous Article 26 was dropped, so that the reference to délivrance where the contract involves carriage is now only in present Article 19.

Some proposals were rejected. It was, for example, suggested that the words "or is fixed by usage" be deleted from what is now Article 20. This was rejected and a comparable reference to usage was inserted in what is now Article 21 (I:50). The vote on the former was 22 to 1 with 4 abstentions (I:82-83). It had been the view of the Special Commission that it was "clearer to mention usages here" although the "reservation is in reality useless." It was also suggested that in what is now Article 21, the words "unless the circumstances indicate that such choice was reserved to the buyer" be revised to make it clear that the contract itself might be dispositive and that the circumstances are those at the time of the conclusion of the contract. The Special Commission agreed with the substance, but thought no amendment necessary (II:185). It may be worthy of mention that it was asserted, without dissent, that it should be understood, in connexion with what is now Article 21, "that in F.O.B. contracts the right to fix the date of delivery was reserved to the buyer, without any need for a formal provision being made in the Uniform Law" (I:50). With regard to what is now Article 22, it was suggested that "it should be clearly understood

that in the case, for example, where the period was of one month's duration, there should be no additional period granted after the expiration of the month" (I:50). It was also suggested that that Article begin, "In cases other than those provided for in Articles 20 and 21, the seller . . ." (II:286)

Suggestions for Consideration by the Working Group. It is scarcely surprising, in view of the uneventful history of these articles, that no major changes are here proposed. A few suggestions, however, seem worthy of consideration by the working group.

First, as was suggested at the Hague Conference, these provisions "seem to include unnecessary detail" and "could usefully be consolidated and simplified" (II:286). Second, since Articles 18 and 19 speak of délivrance in terms of "handing over of goods which conform with the contract," it seems to me that it is wrong to use "délivrance" in Articles 20-32. As the law reads now, the handing over, at the proper date and time, of non-conforming goods is a breach of the obligation to make délivrance at the proper date and time under Articles 20-32, and this conflicts with Articles 41-49. Whether the concept of délivrance and the distinct system of remedies for date and place and for non-conformity are to be retained is beyond the scope of this report. Assuming that they are to be retained, I believe that the words "handing over" should be used instead of "delivery" in Articles 20-32. Professor Tunc, the Representative of France, dissents from this view and feels that délivrance should be used. For similar reasons, I think that Articles 19(2), (3) which do not deal with the definition of délivrance but with the handing over of the goods, should go in Article 23. Professor Tunc also dissents from this proposal. A simplification of Articles 20-23, incorporating my suggestions, appears below.

Article 20 (including 21 and 22)

The seller shall* hand the goods over, without any formality:

* The words "be bound to" are omitted in conformity with Article 23(1).

(a) if a date is fixed or determinable by agreement or usage, on that date; or

(b) if a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

(c) in any other case, within a reasonable time* after the conclusion of the contract.

Article 23

1. Where the contract of sale involves the carriage of goods and no other place has been agreed upon, the seller shall hand the goods over to the carrier for transmission to the buyer and shall, where they are not clearly marked with an address or otherwise appropriated to the contract, send the buyer notice of the consignment and, if necessary, some document specifying the goods.

[Taken from present Article 19(2), (3).]

2. Where the sale relates to specific goods and the parties knew that the goods were at a particular place at the time of the conclusion of the contract, the seller shall hand over the goods at that place. The same rule shall apply to unascertained goods to be taken from a specified stock or to be manufactured or produced at a place known to the parties at that time.

* The words "regard being had to the nature of the goods and to the circumstances" have been omitted in conformity with, e.g., Articles 26 (1) and 30 (1).

(3) In all other cases, the seller shall hand over the goods at the appropriate* place where he carried on business at the time of the conclusion of the contract, or, in the absence of a place of business, at his habitual residence.

* Inserted to take care of the place where the seller has several places of business.