

ANNEX XVII

Comprehensive study of  
Articles 18 to 49, 65 and 97 of ULIS

Comments and proposals of the representative of Mexico

[Original: English]

1. We must respect the system outlined by ULIS, which imposes the obligation to deliver the goods upon the seller (article 18) and the obligation to take delivery (prendre livraison) upon the buyer (article 56). This solution prevents ULIS from taking any side in the discussions as to whether the delivery is a bilateral obligation (deliver-take delivery), or whether a unilateral obligation is imposed on each one of the parties.
2. As a consequence of the foregoing, we proposed that the present text of articles 18 and 56 be respected, as well as the regulation contained under sub-section I of Chapter III (articles 20 to 32) which refers to the delivery, and of Section II of Chapter IV (articles 65 to 68), relative to taking delivery. On the other hand, we think that even if no change is introduced in the present "definition" of delivery in article 19, paragraph 1, an appropriate system and uniform terminology should be adopted and used in the different provisions of ULIS. In other words, we should avoid speaking of "delivery" in some cases (e.g. articles 31, 42, 43, 44 and 45, par. 2) and of "handing over" in other cases (e.g. articles 37, 39 and 45, par. 1) except for reasons of terminology or mere clarity (e.g. articles 32, par. 1 and 33, par. 1). We shall refer to this point later on in para. 12 below.
3. With respect to the definition of "delivery" (article 19), there are two possible solutions: maintain the definition (as contained in article 19 or by use of another), or dispense with the definition, in which case the definition of taking delivery of the goods by the buyer (article 65) would also be suppressed for the same reason.
4. In my opinion, a definition would be of great assistance in international trade. On the contrary, not to have one may cause problems in view of the close relationship between delivery and other effects of sale contracts, such as transfer of property, transportation of goods, transfer of risks, period of time to demand fulfilment or rescission, etc. To establish that delivery is effected when the buyer has the

juridical possibility to dispose of the goods would be of great assistance in the solution of the foregoing problems.

5. The present definition of article 19 is not satisfactory since, in fact, it does not define anything but limits itself to the use of two synonymous or equivalent expressions: delivery and handing over in the English version, delivrance and remise in the French version. In view of the foregoing, this Delegation supports the proposal, submitted opportunely to UNCITRAL by the Mexican Government (A/CN.9/31, of 12 September 1969, paragraph No. 107), to return substantially to the definition offered by the 1939 Draft of a Uniform Law, relative to the international sales of corporeal movable goods.

6. The text of the first paragraph of article 19 which this Delegation proposes in lieu of the present text is as follows:

"The delivery consists in placing the goods at the disposal of the buyer in the terms of the contract."

7. To place the goods at the disposal of the buyer means a general and ample formula which permits the delivery to the buyer, his representative or a third party, as agreed upon in the contract. In the second place, the above expression is a juridical form which specifies the right or power granted to the buyer by virtue of the delivery, i.e. the power to dispose of the goods within the terms of the contract (i.e. the contract would indicate the extent and limitations of such right). In the third place, the expression is a technical formula which does not require the disposal or physical dispossession of the goods by the seller, nor their reception or material seizure by the buyer, but does indicate that the goods are not and must not be any longer at the disposal of the seller.

8. The reference to "the contract" may seem superfluous. However, we think such terms of reference are necessary since the terms and object of the contract, or the uses and practices controlling it, determine whether, for example, delivery is made by means of documents, a specification of the goods is necessary, prior quality examinations are required, goods should be placed on board or alongside the ship which will carry them, etc.

9. The amendment we propose to the first paragraph of article 19 also requires the modification of the second paragraph of the same provision in order that the same definitional formula be used instead of referring to the "handing over the goods to the carrier" (remise de la chose au transporteur). The text we propose would read:

"Where the contract of sale involves carriage of the goods and no other place of delivery has been agreed upon, delivery shall be effected by placing the goods at the disposal of the carrier for transmission to the buyer."

10. With respect to the third paragraph of article 19, we also think that its text should be modified by substituting expressions in which the technical term "delivery" is used for the expressions "where the goods handed over to the carrier" (lorsque la chose remis au transporteur) and "in addition to handing over the goods" (non seulement remettre la chose).

The text we propose for this third paragraph is as follows:

"Where the goods delivered to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall, in addition to delivering the goods, send to the buyer notice of the consignment and, if necessary, some document specifying the goods".

11. Articles 37, 39, par. 1, 45, par. 1 must be modified in order that they refer to delivery, instead of handed over. On the contrary, articles 32, par. 1, 33, par. 1, and 48 must maintain their present texts, since the words "handing" and "handed over" are used as equivalent expressions (articles 32 and 48) or as a substitute for the delivery in the terms of the contract (article 33).

We propose the following texts for articles 37, 39, par. 1, and 45, par. 1:

"Article 37.- If the seller has delivered goods before the date fixed, he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract, or remedy any defects in the goods delivered, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense".

"Article 39.-

"1. The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof, promptly, after he has discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in Article 38 is found later, the buyer may nonetheless rely on that defect, provided that he gives the seller notice thereof promptly after its discovery. In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were delivered, unless the lack of conformity constituted a breach of a guarantee covering a longer period."

"Article 45.-

"1. Where the seller has delivered only a part of the goods, or an insufficient quantity, or where only part of the goods delivered is in conformity with the contract, the provisions of Articles 43 and 44 shall apply in respect of the part or quantity which is missing, or which does not conform with the contract".

12. Article 65, which defines the obligation of taking delivery on part of the buyer, should also be modified inasmuch as the definition of article 19 has been changed.

Accordingly, we propose the following text:

"Article 65. Taking delivery consists in the buyer's doing all such acts as are necessary in order to enable the seller to deliver the goods and actually take them over".

13. Finally, articles 97, par. 2, 98, par. 1 and 99, par. 1, should also be modified with respect to the transfer of risks, in order to substitute the expression "handing over" by adopting the technical term, as well as the concept of delivery, as defined in article 19, par. 1. Besides facilitating the understanding and interpretation of these three rules, the adoption of this concept would be in agreement with the principle of the transfer of the risks, which is established by article 97, paragraph 1.

The proposed new texts with respect to the foregoing articles

are as follows:

"Article 97.

"1. ...

"2. **In** the case of the delivery of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the delivery has, apart from the lack of conformity, been effected in accordance with the provisions of the contract and of the present Law, where the buyer has neither declared the contract avoided nor required goods in replacement".

"Article 98.

"1. Where the delivery of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, the delivery could have been made in accordance with the contract.

"2. ...

"3. ...

"Article 99.

"1. Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were delivered to the carrier".

"2. ..."