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THE CONCEPT OF "DELIVERY" ("DELIVRANCE") IN THE DRAFTING
OF THE UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS

Note by the secretariat of the International Institute
for the Unification of Private Law (UNIDROIT)

Note by the Secretariat: This note is submitted to the Working Group by
the Secretary-General in pursuance of the decision taken by the Commission at
its third session (Report of the United Nations Commission on International
Trade Law on the work of its third session, Official Records of the General
Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), para. 59).

Foreword

At the request of the United Nations Commission on International Trade Law, the secretariat of UNIDROIT has prepared a historical study on the concept of "delivery" ("délivrance"), as it emerges from the travaux préparatoires for the Uniform Law on the International Sale of Goods approved at the Hague Diplomatic Conference of 1964.

In preparing this paper, which it has the honour to submit for the consideration of the Commission, the secretariat of UNIDROIT, in accordance with the mandate given to it, simply analysed the reports and records of the various bodies which were involved in the drafting of the Uniform Law, without adding any comments on the substance of the problem.

1. Article 18 of the Uniform Law on the International Sale of Goods, approved by the Hague Conference of 1964, states that one of the obligations of the seller is to effect "delivery" (in the French version: "délivrance"). Delivery, according to article 19, paragraph 1, "consists in the handing over of goods which conform with the contract" (in the French version: "consiste dans la remise d'une chose conforme au contrat"), and article 19, paragraph 2, provides that, where the contract of sale involves carriage of the goods concerned, delivery shall be effected "by handing over the goods to the carrier for transmission to the buyer" (in the French version: "remise de la chose au transporteur pour transmission à l'acheteur").

The concept of "delivery" is also to be found in a number of other provisions of the Uniform Law, such as articles 20 to 49 and articles 97 to 99, its counterpart being the concept of "taking delivery" (in the French version: "prise de livraison") as a reciprocal obligation imposed on the buyer (articles 65 to 68). This concept has given rise to difficulties of interpretation.

An analysis of the historical evolution of this concept during the formulation of the various drafts of uniform law which led up to the present text clearly shows that the drafters themselves discussed this concept at great length and in great detail.

2. The report on comparative law relating to the sale of goods, prepared in 1929 by the Institut für ausländisches und internationales Privatrecht at Berlin (U.D.P. Etudes IV S.d.N. 1929 - C.D. 1929), states that "the principal obligation of the seller is to deliver the goods ..., i.e., to transfer possession so that the buyer may dispose of the goods as an owner" (p. 48).

In December 1931, some of the members of the Committee for the Unification of the Law of Sale met in London. Professors Rabel and Hamel submitted to them drafts on the obligations of the seller (S.d.N. - U.D.P. 1932 - Etudes IV: Vente - Doc. 30, Annexes I c and II c). The first draft (para. 1) provides that the seller must give the buyer property in "and possession of the goods", while the second (article 1) simply states that the obligations of the seller consist in a principal obligation and accessory obligations: "The principal obligation consists in the delivery (livraison) of the goods to the buyer".

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In a preliminary draft text on the obligation to deliver the goods (S.d.N. - U.D.P. 1932 - Etudes IV: Vente, Doc. 33), Mr. Bagge considered two different cases:

- (a) Where the goods are to be dispatched by the seller to a specified place;
- (b) Where the seller is to transmit the goods without making arrangements for carriage.

With regard to the first case, the text in question (article 2) provides that "the goods shall be deemed to have been delivered when they are in the custody of the forwarding agent or carrier", while in the second case "delivery shall be deemed to have been effected only when the goods have been handed over to the buyer".

After further meetings in Paris (October 1930), Berlin (February 1931), Rome (April 1931), Stockholm (September 1931), London (December 1931) and Rome (March 1932), the only stumbling-block seemed to be the question whether the draft should cover all the obligations of the seller or confine itself to the obligation to deliver the goods (S.d.N. - U.D.P. 1932 - Etudes IV: Vente, Doc. 39, No. 53).

A draft of international law on the obligations of the seller was prepared by Mr. Hamel and revised by Mr. Rabel (S.d.N. - U.D.P. 1932 - Etudes IV: Vente Doc. 43). Title I ("Obligation to deliver the goods") included the following provision (article 1): "The seller assumes towards the buyer an obligation to deliver the goods sold as required by the contract, by commercial usage and by the present Law." In sub-title A ("Place of delivery"), article 2 stated: "The seller shall deliver the goods sold at the place where he carries on business at the time of the formation of the contract or, in the absence of a place of business, at his habitual residence". Article 3 dealt with what was termed "sale with obligation to dispatch the goods" and stated that, in the case of that kind of sale, "the seller shall have performed his obligation to deliver when he has handed over the goods sold to the first carrier or to the forwarding agent responsible for carriage." If carriage is by sea, he shall have performed his obligation "if the goods have been placed on board; if, however, according to the terms of the contract or commercial usage, the seller may present to the buyer a 'received for shipment' bill of lading, it shall be sufficient for him to

deliver the goods to the shipowner". Lastly, article 4 provided that "the sale shall be termed 'sale with delivery to destination' when the seller has undertaken to effect delivery of the goods sold at a place other than the place specified in article 2". Mr. Bagge and Mr. Fehr also reviewed the draft but had nothing to add on the points under discussion.

Mr. Bagge subsequently prepared a preliminary draft of an international convention on the sale of goods (S.d.N. - U.D.P. 1933 - Etudes IV: Vente, Doc. 51) containing (p. 28) a number of definitions of expressions which were employed in the draft and are commonly used in commercial practice. On the subject of "delivery", it states that this means "the handing over of the goods into the custody of the buyer, except in the case of a 'sale with obligation to dispatch the goods', where delivery means the handing over of the goods into the custody of the carrier or of the forwarding agent responsible for carriage".

Finally, at the meeting held in July 1933 at Copenhagen, the Committee decided to hold a special debate on the concept of delivery. However, although the members of the Committee had agreed that the draft must include a general article defining the obligation to deliver the goods, they did not succeed in clarifying the concept to any great extent. In the definition proposed by Mr. Bagge (S.d.N. - U.D.P. 1933 - Etudes IV: Vente, Doc. 58: "The term 'delivery' means the performance of those acts which the seller must perform in order for the goods to be handed over into the custody of the buyer."), all they did was to discard the phrase "into the custody of the buyer" and replace it by the words "to the buyer". Yet the wording proposed by Mr. Bagge was much closer to a new and more precise definition of the seller's obligation to deliver the goods.

A new draft prepared in October 1933 (S.d.N. - U.D.P. 1933, Etudes IV: Vente, Doc. 64) persisted in the wording proposed by Mr. Bagge. Article 28 of this draft stated: "The term 'delivery' means the performance of those acts which the seller must perform in order for the goods to be handed over to the buyer. What those acts are depends on the nature of the contract. In the case of a sale with obligation to dispatch the goods, delivery consists in the handing over of the goods into the custody of the first carrier or forwarding agent ... or, if consignment begins with shipment by ocean vessel, in the placing on board of the goods and the dispatch to the buyer of the documents required to obtain the

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handing over of the goods; if, according to the terms of the contract or commercial usage, the seller may present to the buyer a 'received for shipment' bill of lading, it shall be sufficient for him to deliver the goods to the shipowner."

In June 1934, the Institute prepared a draft uniform law on the sale of goods (S.d.N. - U.D.P. 1934 Etudes: IV, Vente - Doc. 72), which took into account the various proposals and comments made in the Committee. Article 24 ("Obligation to deliver the goods") states: "The seller undertakes to deliver the goods, that is to say, to place them at the disposal of the buyer." (This is followed by exactly the same wording as was contained in the October 1933 draft: "In the case of a sale with obligation to dispatch the goods ...").

In July 1934, after the Committee's session at The Hague (18-26 June), the Institute prepared another preliminary draft of a uniform law on sales (S.d.N. - U.D.P. 1934 - Etudes IV: Vente - Doc. 74). In chapter III ("Obligations of the seller"), the first section concerns "Delivery". In that section, article 16 states: "The seller undertakes to effect delivery of the goods to the buyer ..." and article 17 states: "The term 'delivery' means the performance of those acts which the seller must perform in order for the goods to be handed over to the buyer. What those acts are depends on the nature of the contract. In the case ...".

The Council of the Institute adopted this draft in September 1934 and transmitted it to the Council of the League of Nations, together with an explanatory report. The report contains the following commentary on the concept of "delivery": "The French expression 'délivrance' and the corresponding English and German expressions 'delivery' and 'Lieferung' are used, notwithstanding the variable meaning attached to them in present-day speech, to denote the purely material act whereby the seller divests himself of the goods in favour of the buyer. The conception is therefore quite independent of any legal system of transfer of movables. By virtue of this fact, it was possible to regulate in the Draft the modalities of the main obligation of the seller without touching even the purely terminological problems relating to the passing of the property and the transfer of possession."

The explanatory report on the draft, as revised in the light of the comments of Governments, to which it had been transmitted by the Secretary-General of the League of Nations, contains the same commentary on articles 18 and 19, which replaced the old articles 16 and 17 of the original text.

This commentary also accompanies the text of the draft submitted by the Netherlands Government, at the request of the Institute, to the first Hague Diplomatic Conference on the unification of the law of sale, held in 1951.

3. Chapter III of the new "Draft Uniform Law on the International Sale of Goods", prepared by the Special Commission appointed by the 1951 Hague Diplomatic Conference and submitted in 1956 (Document V/Prep/1), deals with "Obligations of the seller", and section I of that chapter concerns "Delivery of the goods". Article 20 states: "Delivery consists in the handing over of goods which conform with the contract and their accessories; the seller undertakes to effect delivery according to the terms of the contract and of the present law." Article 21 then sets out the juridical concept of sale with obligation to dispatch the goods and provides that delivery shall be deemed to take place "when the goods are handed over to the carrier" or, if carriage is by water, shall be effected "either by placing the goods on board ship or by placing them alongside ...". The explanatory report on the draft explains that the new definition of "delivery" ("délivrance") as "the handing over of goods which conform with the contract and their accessories" ("la remise d'une chose conforme au contrat et de ses accessoires") refers to a purely physical act, the unilateral or bilateral character of which it would in future be pointless to discuss.

This draft was submitted for the consideration of Governments. Various States criticized the concept of delivery. For example, the Netherlands raised the question whether the concept also included delivery constituto possessorio and delivery brevi manu; Norway proposed the deletion of the phrase "which conform with the contract", and Italy criticized the definition of "handing over of goods".

However, the Special Commission adhered to its own version, which reappeared in the new draft submitted in 1963 (Document V/Prep/4).

The United States Government observed (Document V/Prep/8) that the concept of "délivrance" did not correspond to the commercial act of relinquishing possession but was an artificial concept; according to article 20, "délivrance" consists in "the handing over of goods which conform with the contract", so that it is not always effected simply by the "handing over" of the goods.

The Spanish Government proposed (Conf/V/Amend/15) that article 20 should be worded as follows: "It shall be understood that the obligation of delivery devolved upon the seller is fulfilled as soon as he will have performed all acts incumbent on him to make the sold goods available to the buyer". With this wording, the Spanish Government reverts to the earlier drafts, which in its view were rightly based on the premise that delivery depends not only on the seller's intention, but also on the buyer's intention of receiving the goods: consequently, it must be accepted that the seller can perform the obligation imposed on him by performing the act or acts that are necessary in order to place the goods at the disposal of the buyer. This concept of delivery not only fully reflects commercial practice but is in conformity with the opinion of Almen and with the provisions contained in articles 337 to 339 of the Spanish Commercial Code, on which South American legislation is mostly based. On the other hand, the Spanish Government concludes, the existing definition of delivery leads to tautology or to a vicious circle.

4. At the 1964 Hague Conference, the Drafting Committee submitted to the plenary session a "Text for a Uniform Law on the International Sale of Goods" (Documents V/Red/3-4). As usual, chapter III deals with "Obligations of the seller" (article 20 reads: "The seller shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods as required by the contract and the present Law"), and under the heading "Delivery of the goods" (section I) article 21, paragraph 1, states: "Delivery consists in the handing over of goods which conform with the contract". These provisions are still to be found in the final text, although the numbering is different; article 20 has become article 18, and article 21 is now article 19.

In his commentary on the Uniform Law, Tunc states that the definition of delivery given in article 19 is "clear, simple and can be grasped by any businessman". He adds that it renders superfluous any discussion of the actual nature of the act and that difficulties of ascertaining whether, in a specific case, delivery in conformity with the contract has taken place would arise in any system.