

# I. INTERNATIONAL SALE OF GOODS

## A. Uniform rules on substantive law

### 1. "Delivery" in the Uniform Law on the International Sale of Goods (ULIS): report of the Secretary-General (A/CN.9/WG.2/WP.8)\*

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#### I. INTRODUCTION; USES OF "DELIVERY" IN ULIS

1. The Uniform Law on the International Sale of Goods (ULIS)<sup>1</sup> uses the concept of "delivery" for the solution of important questions such as these: who bears the risk of loss when the goods are destroyed or damaged? When is the buyer obliged to pay the seller for the goods? The Commission and its Working Group on the International Sale of Goods have given preliminary consideration to the question whether the concept of "delivery", as employed in ULIS, is well suited for the solution of such problems.<sup>2</sup> Similar questions concerning the use of the concept of "delivery" have arisen in drafting a Uniform Law on Prescription (Limitation) in the International Sale of Goods.<sup>3</sup>

<sup>1</sup> The Uniform Law on the International Sale of Goods (referred to as ULIS or the Uniform Law) is annexed to the Convention Relating to a Uniform Law on the International Sale of Goods which was signed at The Hague on 1 July 1964. (The Convention will be referred to as the "1964 Hague Convention on Sales".)

<sup>2</sup> For comments on the use of "delivery" in ULIS, see: report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)* (herein cited UNCITRAL, report on second

2. The Commission has requested the Secretary-General to prepare an analysis of the use in ULIS of the concept of "delivery"; this report has been prepared in response to this request.<sup>4</sup>

session, 1969), annex I, paras. 33, 76-84, 100 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A); report of the Secretary-General (A/CN.9/31) analysing the replies and comments by governments and organizations with respect to "delivery", paras. 98-107 and 140-143 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A); the replies analysed in the report are reproduced in document A/CN.9/11 and addenda 1-4; Working Group on the International Sale of Goods, report on first session (January 1970), A/CN.9/35, paras. 112-117 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A); report of the United Nations Commission on International Trade Law on the work of its third session (1970), *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017)* (herein cited UNCITRAL, report on third session (1970)), paras. 56-58 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A).

<sup>3</sup> Working Group on Prescription, report on second session (August 1970), A/CN.9/50, annex II, commentary on preliminary draft uniform law, article 7, para. 5, UNCITRAL Yearbook, vol. II: 1971, part two, I, C, 2.

<sup>4</sup> UNCITRAL, Report on third session (1970), para. 59, UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A. Working Group on Sales, report on second session (December 1970), A/CN.9/52, para. 139 (a) (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

3. The Uniform Law on the International Sale of Goods (ULIS) was drafted in English and in French; both texts are equally authentic.<sup>5</sup> In the English version, the term "delivery" is used in 33 articles of ULIS; annex I identifies these articles and notes the corresponding term used in the French version. Usually the corresponding term is *délivrance* but in six articles *livraison* and in one article *exécution* is employed—terms which differ from each other and from *délivrance*.<sup>6</sup>

4. Analysis is complicated further by the fact that in ULIS the English word "delivery" usually is not given its normal English meaning. In English, delivery customarily connotes simply the transfer to a second person of possession and control (for this thought, ULIS usually uses the expression "handing over" in English and *remise* in French). "Delivery" (*délivrance*) as used in ULIS is a different and more complex concept. In some situations, goods may be "delivered" to the buyer while the seller retains control over the goods; in other situations, even though possession and control are transferred to the buyer they may not be deemed to be "delivered" to him.<sup>7</sup> To minimize confusion that results from the difference between the meaning of "delivery" as it is used in ULIS and the normal meaning of that word, in this report the word "delivery", in quotation marks, will refer to that term as it is used in ULIS.<sup>8</sup>

5. It will also be important to bear in mind that the single term "delivery" performs different functions in the Uniform Law: (1) In some settings ULIS uses "delivery" as a tool for answering certain difficult and important questions: Who bears the risk of loss when the goods are damaged or destroyed? When is the buyer required to pay the price? (2) In other settings "delivery" is a neutral, non-dispositive means of leading into a specific rule defining some aspect of the seller's duty of performance. As we shall see, in these settings the definition of the concept of "delivery" is of little significance. These two functions of the term "delivery" will be considered in sections II and III, respectively, of this report.

## II. "DELIVERY" AS A TOOL FOR RESOLVING SALES PROBLEMS

6. The principal object of this report will be to consider whether the concept of "delivery" proved to

<sup>5</sup> 1964 Hague Convention on Sales, final clauses following article XV.

<sup>6</sup> The French version of article 44 (2) at one point uses *délivrance* and another point *livraison* in place of the English term "delivery". In annex I and in this discussion no distinction is drawn between "delivery" and "deliver" or between "*délivrance*" and "*délivrer*".

<sup>7</sup> The definition of "delivery" in art. 19 is quoted at para. 12, *infra*. In some (but not all) settings "handing over" the goods to the buyer is one necessary element of "delivery" (*délivrance*), but may not be sufficient to accomplish such "delivery". See section II A 1, *infra*. In other settings (where the contract calls for carriage of the goods from the seller to the buyer) ULIS may provide that "delivery" (*délivrance*) is accomplished even though the seller retains control over the goods. See section II A 2, paras. 21-25, *infra*.

<sup>8</sup> Comparable difficulty has been noted in languages other than English. See Working Group on Sales, report on first session (January 1970) (A/CN.9/35) (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I A 2 (para. 113 *et seq.*)).

be a successful tool to achieve the operative results desired by the draftsmen. This report will not consider whether the operative results desired by the draftsmen were sound; instead, this report is concerned with a basic question of approach to legislative drafting for international unification. Drafting for international use is subject to exacting requirements of clarity and simplicity. The unifying legislation needs to be enacted in different languages and must be construed in the setting of different legal systems; for these reasons the law needs to be cast in language that is sufficiently concrete and elemental so that the law can be translated effectively and will be read with the same meaning in various linguistic and legal settings.

7. The questions that have been posed by the Commission cannot be answered by considering the concept of "delivery" as an abstract or theoretical question separated from the use of that concept in the operative provisions of the Uniform Law. Thus, the relevant question is not what does the concept of "delivery" really "mean"? Instead, this study will consider the following questions: Has the concept of "delivery", as used in ULIS as a tool for stating rules for a wide variety of legal problems, produced the solutions to those problems desired by the draftsmen? Has this concept contributed to clarity and simplicity in the statement of the rules? If difficulties have developed in various settings, will it be possible to solve them all by a redefinition of the concept of "delivery"? If a redefinition of the concept of "delivery" does not prove to be a practicable solution to the various problems that are encountered, what alternative approaches should be considered? For example, can some of the rules of ULIS be stated more clearly without recourse to the concept of "delivery"? The last question is especially important, since narrowing the field for the use of this concept could simplify the problem of devising a definition that would be appropriate for the settings in which this concept must be used.

8. To explore the answers to the above questions, we turn to the use of "delivery" in ULIS for the solution of two problems that most clearly illustrate the use of the concept of "delivery". These problems are the following: A. Risk of loss; B. Payment of the price.

### A. "Delivery" and risk of loss

9. One of the important problems of the law of sales is to determine whether the seller or the buyer bears the loss when the goods are damaged or destroyed. The situations in which the problem arises are varied, and include, *inter alia*, the period after the goods are ready for shipment but before they have been handed over to the carrier; the period during shipment; the period after arrival at the destination before they have been taken over by the buyer; the period during testing by the buyer; the period after rejection of the goods on the ground that they do not conform to the contract. Although most types of loss will be covered by a policy of insurance, the rules allocating the risk of loss to the seller or to the buyer determine which party has the burden of pressing a claim against the insurer, the burden of waiting for a settlement (with its attendant strain on current assets), and the responsibility for salvaging damaged goods. Where insurance coverage is absent or inadequate the

allocation of the risk of loss has even sharper impact. The parties may and often do settle this problem in the contract by an express provision or by the use of a trade term (like f.o.b. or c.i.f.) that carries a settled usage as to the point at which risk passes. But in the absence of a contract stipulation, a statutory rule is needed to settle the problem clearly and in accord with normal commercial expectations.

10. The final chapter of ULIS (chap. VI, articles 96-101) is devoted to rules on passing of the risk. Most of its articles provide specific rules on risk for specific situations; none of these specific provisions employ the concept of "delivery" (*délivrance*).<sup>9</sup> However, the concept of "delivery" (*délivrance*) is employed in the general rule on risk of loss in article 97 (1), which provides:

"1. The risk shall pass to the buyer when *delivery*<sup>10</sup> of the goods is effected in accordance with the provisions of the contract and the present law."

11. It is necessary to use the foregoing general rule to solve problems of risk of loss in the many situations not governed by the specific rules of chapter VI. Since this general rule merely stated that risk of loss passes to the buyer when "delivery" is effected, the definition of "delivery" becomes crucial. Article 19 provides:

"1. Delivery consists in the handing over of goods which conform with the contract.

"2. Where the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer."<sup>11</sup>

12. The usefulness of "delivery", as so defined, in the solution of problems of risk of loss needs to be tested in the setting of concrete situations.

#### 1. *Non-conformity of the goods and other breaches of contract*

13. One of the important practical problems in sales transactions concerns the effect of breach of contract by the seller on the transfer of the risk of loss

<sup>9</sup> Article 97 (2) deals with the handing over of non-conforming goods. Article 98 (1) applies when handing over is delayed through breach by the buyer; articles 98 (2) and 100 govern the sale of goods that are not "ascertained" or "appropriated" to the contract. Article 99 deals with risk of loss when the sale concerns goods that, at the time of the contract, are already in the course of transit by sea. Article 98 (3), dealing with one aspect of the problem of the sale of "unascertained" goods, refers to the "acts necessary to enable the buyer to take *delivery*". But this is one of the instances in which the French version uses the concept of *livraison* rather than *délivrance*. This provision thus probably means to refer to the simple act of taking possession of the goods, rather than the complex legal concept of "delivery" (*délivrance*).

<sup>10</sup> Throughout this report, unless noted otherwise, emphasis has been supplied by the Secretariat.

<sup>11</sup> A third subparagraph deals with the special situation in which "the goods handed over to the carrier are not clearly appropriated to the contract". This provision is supplemented by one of the specific rules of chapter VI (article 100) which by its express terms is applicable in any "case to which paragraph 3 of article 19 applies". See para. 35, *infra*. The term "delivery" is not used in article 19 (3); the provision thus seems to be part of one of the specific rules on risk set forth in chapter VI rather than a part of a general definition of "delivery".

to the buyer. The definition of "delivery" in article 19 (1) addresses itself to the problem by providing that "delivery" consists in "the handing over of goods which conform with the contract". The use of this definition as a test for the passing of risk would mean that non-conformity of the goods prevents the risk of loss from passing to the buyer.

14. This rule presents no difficulty when the buyer exercises his right to reject the goods ("avoid the contract") because of the non-conformity of the goods. But in commercial life, buyers often choose to keep goods in spite of some non-conformity or deficiency; if the non-conformity reduces the value of the goods the buyer may exercise the right to claim damages or reduce the price.

15. The problem can be more clearly examined on the basis of the following example: A contract calls for seller to provide buyer with 1,000 bags of wheat; after receipt of the goods, buyer examines them and finds that 10 of the bags are of No. 2 quality. Buyer nevertheless decides to keep the shipment, but notifies the seller that he will reduce the price by the amount of the deficiency. Thereafter the buyer's warehouse burns and the wheat is destroyed. If the definition of "delivery" were the sole test of risk, ULIS would seem to say that, on the facts of the above example, the risk of loss remained indefinitely with the seller, although the buyer chose to retain and use the goods. This would be impractical, and was not intended. The important questions are, after non-conforming goods are tendered to or received by the buyer, *how long* and in *what circumstances* does risk remain with the seller. To deal with these questions ULIS provides a specific provision in chapter VI on risk of loss. Article 97 (2) reads as follows:

"2. In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over 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."

16. This provision is addressed to the problem posed by the above example. In effect, the provision states that if the buyer does not reject the goods (avoid the contract), the non-conformity of the goods does not affect the transfer to the buyer of the risk of loss. With respect to the problem of structure with which we are concerned, the following observations seem pertinent: (a) the definition of "delivery" in article 19 proved to be inadequate to deal with the problem of risk of loss with respect to non-conforming goods; a specific provision on this question (article 97 (2)) had to be included among the rules on risk of loss in chapter VI; (b) the unsuccessful attempt to deal with the problem by means of the definition of "delivery" led to related provisions that are placed in widely separated parts of the Uniform Law; (c) the need to develop an exception in chapter VI to a general rule in article 19 seems to have contributed to a rule that is needlessly complex and abstract; (d) the specific rule on this problem of risk of loss (article 97 (2)) placed in chapter VI, like the other specific rules on

risk of loss in chapter VI, does not employ the concept of "delivery" (*délivrance*).<sup>12</sup>

17. The definition of delivery in article 19 also proved to be inadequate to cope with the effect of breach of contract on risk of loss in situations where the seller's performance is seriously defective in any one of the following ways: a shipment by an improper type of carrier; shipment under an improper contract of carriage; the failure to take out a policy of insurance required by the agreement or the Law. For all of these problems the provision in article 19 that delivery consists in handing over "goods which conform with the contract" is inadequate.

18. This problem will be explored more fully in section III A at paras. 50 to 51, *infra*. It is sufficient to note here that (as in connexion with the preceding problem on the retention of non-conforming goods) the problem was dealt with more completely in the setting of the specific rules on risk set forth in chapter VI. Thus, article 97 (1) provides that risk passes to the buyer when delivery of the goods is effected "in accordance with the provisions of the contract and the present Law." Indeed, as will be developed more fully in section III A, *infra*, this broad provision of article 97 (1) seems to render redundant the narrower (and inadequate) reference in article 19 (1) to "goods which conform with the contract."

19. Problems of risk of loss arise not only in the context of breach by the seller, but also when breach by the buyer interferes with performance by the seller. The definition of "delivery" in article 19 is also inadequate to deal with the effect of breach by the buyer on risk of loss; this is dealt with by a specific provision in chapter VI on risk of loss—article 98. This article, like the other specific provisions of chapter VI, does not refer to the concept of "delivery".

20. The foregoing examination of the rules on the relationship between breach by both parties and risk of loss suggest the following tentative conclusions with respect to the structural problems presented by the concept of "delivery": (a) the general concept of "delivery" (*délivrance*) need not be employed in dealing with these problems; (b) the attempt in ULIS to relate solutions to such a general concept of "delivery" has made it necessary to develop complex exceptions from the general rules, with the operative provisions divided between the early part of the Law (article 19) and chapter VI on risk; (c) the rules on risk of loss could be simplified and clarified by bringing them together in one place, as in chapter VI, and by dispensing with the use of the concept of "delivery" (*délivrance*) in dealing with problems of risk of loss.

## 2. Risk when seller reserves control over the goods until payment of the price

21. This problem may usefully be discussed in the context of the following common situation: Pursuant to the contract, the seller dispatches goods to the buyer; on delivery of the goods to the carrier the seller

<sup>12</sup> "Delivery" (*délivrance*) is used only in the general rule of art. 97 (1), quoted above. As has been noted above at note 11, delivery in the narrower sense of transfer of possession (*livraison*) is used in article 98 (3).

receives a negotiable bill of lading which the seller will tender to the buyer in exchange for payment of the price.<sup>13</sup>

22. The carrier normally will deliver the goods only in exchange for surrender of the negotiable bill of lading.<sup>14</sup> Consequently, possession of the bill of lading controls the delivery of the goods. A common arrangement for concurrent exchange of the goods for the price is for the seller to draw a sight draft on the buyer (or on the buyer's bank that has issued a letter of credit) and transmit the sight draft, accompanied by the bill of lading and other documents relating to the shipment (policy of insurance; consular invoice) through banking channels for presentation to the buyer (or his bank); the documents will be surrendered to the buyer (or his bank) when the sight draft is honoured.

23. Under commercial practice, and the rules of some legal systems, retention of control over the goods in the above setting, for the sole purpose of securing payment for the goods, does not overturn arrangements and rules concerning the distinct problem of damage to or loss of the goods.<sup>15</sup>

24. The result under ULIS is placed in doubt by relating the complex concept of "delivery" to the rules on risk of loss of the goods. The basic definition of "delivery" in article 19 (1) provides that a necessary part of "delivery" is "handing over" the goods. The term "handing over" (*remise*, in the French text) is not defined in ULIS, but the normal meaning of this expression is the physical surrender of possession and control of the goods. Therefore, if one confined one's attention to the basic definition of "delivery" in article 19 (1), retention of a negotiable bill of lading

<sup>13</sup> Article 72 (1) recognizes the right of the seller to dispatch goods "on terms that reserve to himself the right of disposal of the goods during transit". The relationship between these rules designed to protect the seller's interest in payment and the rules of ULIS on "delivery" will be considered *infra* at section II B, paras. 37-40.

<sup>14</sup> In issuing a negotiable bill of lading the carrier engages to deliver the goods to the person to whom the bill of lading may be endorsed. The carrier will not know who that person may be until the bill of lading is surrendered; hence reasonable protection for the carrier requires surrender of the document in exchange for the goods.

<sup>15</sup> See, e.g., INCOTERMS 1953 (ICC Brochure 166): *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, vol. I (United Nations publication, Sales No.: E.71.V.3.), chap. I-2, page 103 *et seq.* In c. and f. and c.i.f. transactions the seller is required to ship under negotiable bill of lading. Without regard for the time for tender of documents, the buyer shall bear "all risks of the goods from the time they shall have effectively passed the ship's rail at the port of shipment". c. and f.: A-5 and 6; B-3. c.i.f. A-6 and 7; B-3. Accord: Uniform Commercial Code (USA), sec. 2-509(1)(a). Contrast: British Sale of Goods Act, sec. 18, rule 5 (2); sec. 19(1) (2).

Practical considerations support the approach, reflected in INCOTERMS, that the time for the presentation of documents covering goods in the course of shipment should not govern the transfer of the risk of loss. For example, the documents may be surrendered in exchange for the price while the goods are in the course of transit or before or after the goods are unloaded; consequently it is difficult to relate the time the documents were surrendered to the time when damage to the goods occurred. The considerations favouring allocating the risk on the seller while the goods are in his possession (as in his warehouse) do not apply when the goods are in the hands of a carrier. Indeed, since damage is usually discovered only after arrival, the buyer is usually in a better position than the seller to assess transit damage, file and press a claim against the carrier or insurer, and salvage the goods.

could have the consequence of delaying the transfer of risk of loss.

25. On the other hand, paragraph 2 of article 19 provides that where the contract involves carriage of the goods "delivery shall be effected by *handing over the goods to the carrier . . .*". However, this paragraph, by its express terms, is applicable only when "no other place for *delivery* has been agreed upon". The crux of the problem is this: What type of contractual term constitutes an agreement as to another place for "delivery"? Difficulty would be avoided if this provision could be construed as referring only to a contractual term that *risk of loss* would remain with the seller during carriage.<sup>16</sup> However, article 19 (2) is drafted more broadly, and refers to an agreement as to the place of "delivery"; the only definition of "delivery" is that of article 19 (1) which, as we have seen, provides that an essential part of "delivery" is "the *handing over*" of the goods. Whether such a result was intended is difficult to ascertain. For present purposes it is sufficient to note that the use of the concept of "delivery" in article 97 (2) creates serious doubt as to the allocation of risk of loss in one of the most common types of commercial arrangements.

### 3. Alternative approaches to resolving problems of risk of loss in ULIS

26. We have seen that when the definition of "delivery" is applied in the substantive rules that use that term, the impact on important commercial situations seems to be ambiguous or unanticipated. Two alternative approaches to a solution will be considered.

#### (a) Revision of the definition of "delivery"

27. Can the problem of risk of loss that resulted from the application of the "delivery" concept be met by a revision of the definition of that term? Thus, it has been suggested that the definition of "delivery" in article 19 (1) be revised by deleting the phrase "the *handing over* of goods" and substituting the phrase "placing the goods at the disposal of the buyer". Later in this report attention will be given to the appropriateness of this suggestion in relationship to the many articles of ULIS that use "delivery" in defining aspects of the seller's duty of performance under the contract.<sup>17</sup> The current issue, however, is a narrow one: Would this revision solve the specific problems of risk of loss produced by the present definition of "delivery"?

28. The relationship between the alternative definitions of "delivery" and the substantive rules using that term is exceedingly complex; to clarify the impact of a change in the definition on our current problem it may be helpful to insert the proposed revised definition of "delivery" into the substantive rule on risk that appears in article 97 (1) of ULIS. Such a coalescence of this substantive rule and the proposed definition of delivery would produce the following:

"where the contract of sale involves carriage of the goods and no other place for [delivery] *placing the*

*goods at the buyer's disposition* has been agreed upon, [delivery shall be effected] *risk shall pass to the buyer* by handing over the goods to the carrier for transmission to the buyer".

29. Examination of the above indicates that the proposed revision of the term "delivery" (whatever its merit in other settings) does not avoid the difficulty with respect to risk of loss that arises under ULIS when the seller ships goods to the buyer and retains a negotiable bill of lading until payment of the price. Indeed, the language "placing the goods at the buyer's disposition" enhances the likelihood that retention of control over the goods until the price is paid would modify the basic rules governing the risk of loss during transit.<sup>18</sup>

#### (b) Statement of rules on risk of loss by reference to commercial events rather than by reference to the concept of "delivery"

30. The foregoing analysis leads to the question whether the rules on risk of loss could be stated with greater clarity by referring directly to concrete commercial events, such as shipment of the goods. Under this approach it would not be necessary to refer to "delivery" of the goods in stating the rules on risk of loss. One consequence would be that the definition of "delivery" could be relieved of refinements designed (unsuccessfully) to cope with the complexities of risk of loss.

31. To test this approach, it may be useful to see whether the basic rules of ULIS on risk of loss may be stated without recourse to the concept of "delivery". Since the purpose of this exercise is to assist in making a basic decision on drafting technique, the redraft will attempt to preserve the results that were probably intended (although not always clearly expressed) in the current version of ULIS; if changes in substantive results are desired, these can more readily be considered after the approach to drafting has been decided.

32. Under this approach, the rules on risk of loss that are now embodied in articles 19 and 97 of ULIS might be recast as follows:<sup>19</sup>

<sup>18</sup> For future reference, it may be noted here that the proposed revision of the definition of "delivery" when read into the rules on risk would also produce substantive changes where the contract does not involve (or contemplate) carriage. One example is as follows: The contract provides that the goods shall be available for removal by the buyer on any date during the month of May at the buyer's choice; the goods are destroyed on the seller's premises while they were available for the buyer's removal, but before he was required to remove them. Under the present version of ULIS the risk would remain on the seller: under article 19 (1) the goods had not been "handed over" to the buyer and under article 98 the handing over of the goods was not "delayed owing to the breach of an obligation of the buyer". Under the proposed definition the result would probably be different, and risk throughout May would fall on the buyer since the goods would have been placed "at the disposal of the buyer".

The proper resolution of these questions can best be considered after a decision has been reached on the approach to drafting in substantive review of the group of sections (e.g., chapter VI) dealing specifically with risk of loss. The above example, however, provides further illustration of the complexity of attempting to solve rules on various substantive problems by way of the definition of a single concept.

<sup>19</sup> Language now in ULIS that would be deleted is placed in square brackets; language inserted in the place of the bracketed language is italicized.

<sup>16</sup> An agreement as to risk can be evidenced either by an express contract provision or by the use of a trade term such as *Ex Ship* (named port of destination). See INCOTERMS 1953 (ICC Brochure 166), *loc cit*.

<sup>17</sup> Section III B, paras. 52 to 64, *infra*.

*Basic rules on risk under ULIS stated without reference to "delivery"*

1. The risk shall pass to the buyer when [delivery of the goods is effected] *the goods are handed over to him* in accordance with the provisions of the contract and the present Law. (Source: a coalescence of ULIS articles 19 (1) and 97 (1).)

2. Where the contract of sale involves carriage of the goods [and no other place for delivery has been agreed upon, delivery shall be effected], *unless the parties have agreed otherwise, the risk shall pass to the buyer* when the goods are handed over to the carrier for transmission to the buyer. (Source: ULIS article 19 (2).)

33. In this redraft the changes in language are small, but there seems to be a significant gain in clarity when the provisions are applied to important commercial situations. This results, in part, from the fact that the rules on risk of loss during shipment are no longer made ambiguous by unanswered questions concerning the effect of retention of control through a negotiable bill of lading.<sup>20</sup>

34. Under this approach, all of the rules on risk of loss would be placed in a single setting in the Uniform Law: e.g., in chapter VI on risk of loss. In ULIS these rules are now divided between chapter III (article 19) and chapter VI (articles 96-101). For example, article 100 opens as follows: "If, in a case to which paragraph 3 of article 19 applies. . ." It is thus evident that article 19 (3) and article 100 are two parts of the same rule on risk of loss; under the suggested approach they would be combined into a single provision. To illustrate further the effect of this approach, annex II sets forth a structure of chapter VI on risk of loss, that could result from this unified attention to a single problem.

35. It perhaps bears repeating that we are concerned here with a question of structure and approach and not with the final formulation of rules on risk of loss. Thus the provisions set forth in paragraph 34 and in annex II are designed only to aid in the consideration of whether it is feasible to state the rules on risk of loss without recourse to the concept of "delivery". Once this decision is made any issues of policy and clarity presented by the rules of ULIS on risk of loss can be dealt with in the setting of rules that deal with this single problem. Indeed, this unified approach should make it possible further to simplify certain of the rules of ULIS on risk of loss.<sup>21</sup>

36. It may also be emphasized that the unified approach to the question of risk that has been illustrated herein would not interfere with the use of "delivery" in other parts of ULIS. Nor would this approach affect the definition of the term "delivery" other than to reduce the number of problems that must be borne in

mind in deciding on the most appropriate definition of that term.

B. "Delivery" and the time and place for payment of the price

37. The type of difficulty which resulted from using the concept of "delivery" to deal with problems of risk of loss also arises, in a lesser degree, in connexion with the rules on the time and place for payment of the price.

38. Article 71 of ULIS provides that "delivery of the goods and payment of the price" shall be concurrent. Here (as in connexion with risk of loss) difficulty arises when the contract contemplates carriage of the goods—a circumstance that is normal in international commerce. For this situation article 72 (1) provides that the seller may despatch the goods "on terms that reserve to himself the right of disposal"—but this useful rule is only applicable "where *delivery* is, by virtue of paragraph 2 of article 19, *effected by handing over the goods to the carrier . . .*".

39. To test this provision, let us assume that the parties by express agreement (or the use of an appropriate trade term) agree that risk shall pass to the buyer only at the end of the transport. In such a case may the seller reserve the right of disposal of the goods until the price is paid? In commercial practice this would be one of the clearest cases for the seller's right to retain control over the goods. However, the linkage in ULIS between "delivery" and risk means that in the above case "delivery" was *not* effected "by handing over the goods to the carrier"; under article 72 (1), as quoted above, the seller's right of disposal during transit is conferred only when "delivery is . . . effected by handing over the goods to the carrier". Such a result was certainly not intended by the draftsmen and is inconsistent with other provisions in the Law.<sup>22</sup> These surprising consequences result because of the complexities that arise when a single concept (delivery) is employed to deal with too many distinct situations.

40. Our problem at this stage is the following: What approach will most readily avoid such difficulties? Two alternatives may be considered.

(a) One approach would be to modify the definition of "delivery" in article 19. Although, as we shall see, such a modification may be useful, it is doubtful that revision of the definition of "delivery" can solve problems concerning the time for payment of the price. For example, the suggested change in the first paragraph of article 19—to refer to "placing the goods at the buyer's disposition"—does not reach the present prob-

<sup>20</sup> As we have seen, the "delivery" concept, under all proposed definitions, is associated with the question of control over goods; use of "delivery" to determine risk thus injects this issue into the allocation of risk, with doubtful results where the contract calls for carriage of the goods.

<sup>21</sup> Unified treatment of the problem of risk will not disturb the relationship between the effect of damage to the goods and the seller's contractual duty of performance; this relationship is explicitly established by article 35 (1) of ULIS: "Whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes". It will be noted that this clear rule does not use the concept "delivery".

<sup>22</sup> See e.g., article 59. It may be possible to escape from the literal reading of article 72 by arguing that "delivery" in articles 71 and 72 is not used in the same sense as in the articles on risk; this argument is made difficult by the fact that the French equivalent of "delivery" in articles 71 and 72 is *délivrance*, the complex concept used for passage of risk, and not *livraison* or *remise*, the terms usually used when only physical control over the goods is intended. As a second line of defence it may be argued that if the specific rules on payment of the price in article 72 are unavailable, one may use the general rule of article 71. This solution is, however, complicated since article 71 uses "delivery" (*délivrance*); it may also be noted that article 71 speaks less clearly than does article 72 concerning the practical steps required to assure payment of the price.

lem, for the current problem arises in the complex setting of the *second* paragraph of article 19 where the contract involves carriage of the goods. In any event, an attempt to solve the various problems as to when the buyer must pay for the goods by way of a definition of "delivery" would produce a definition of great complexity; the complexity is, of course, enhanced if this definition must also solve the problems of risk of loss.

(b) A second approach would be to state when the price must be paid without reference to the concept of "delivery". The basic rule could state that the price is due when the seller "hands over" the goods to the buyer or when the seller "places the goods at the buyer's disposal". An illustration of this approach appears in annex III. (Of course, the substance of the rules and the drafting style call for re-examination after the basic decision as to approach has been made.)

### III. "DELIVERY" IN OTHER SETTINGS OF THE UNIFORM LAW; ALTERNATIVE DEFINITIONS OF THE TERM

41. As we have seen, in ULIS the term "delivery" serves various and divergent functions. In two situations that have just been discussed—risk of loss and payment of the price—the term "delivery" is used as a dispositive or "key" concept. In various other articles the term "delivery" is simply a neutral non-dispositive means of leading into a specific rule defining some aspect of the seller's duty of performance (see paras. 56-62, below). In these settings it is doubtful whether the definition of "delivery" is of operative significance. However, this definition now set forth in ULIS has encountered criticism in the proceedings of the Commission, and requires analysis.

42. As we have seen, the basic definition of "delivery", set forth in article 19 (1), is as follows:

"1. Delivery consists in the handing over of goods which conform with the contract."

43. This brief provision poses two problems which have been the subject of comment in proceedings of the Commission. [A] It has been suggested that the concluding phrase "goods which conform with the contract" should be deleted. [B] It has also been suggested that in place of the phrase "the handing over of the goods", the Law should return to the approach of an earlier draft<sup>23</sup> and provide that delivery consists in placing the goods "at the disposal of the buyer".

#### A. Conformity of goods as an essential element of "delivery"

44. Concern has been expressed that the definition of "delivery" has been complicated by the concluding phrase of article 19 (1), whereby the handing over of goods does not constitute "delivery" if the goods do not "conform with the contract".<sup>24</sup> Even though the goods do not conform to the contract the buyer may choose to keep and use the goods—subject, of course, to the right to claim damages from the seller or to re-

duce the price to compensate for the deficiency.<sup>25</sup> In such cases ULIS seems to say that goods retained and used by the buyer (and often consumed by him) were never "delivered".

45. It would, of course, be unacceptable for the seller to bear the risk of loss or damage for the goods while the buyer uses and consumes them. As we have seen, ULIS provides in article 97 (2) that where the buyer does not reject non-conforming goods "the risk shall pass to the buyer" retroactively.<sup>26</sup> This provision does not, however, amend the definition of "delivery", so the present text of the Law seems to maintain the approach that goods used and consumed by a buyer have never been "delivered" to him.

46. The provision that goods have not been "delivered" when they do not conform to the contract appears to provide another example of the complications resulting from the attempt to use the concept of delivery to solve problems of risk of loss. For example, when the seller "hands over" defective goods to the buyer, it seems appropriate for the risk of loss to remain with the seller until the buyer has had a full opportunity to reject the goods because of their non-conformity. However, it does not seem necessary to attempt to cope with such specific problems in framing the general definition of "delivery"; indeed, the specific rules on risk of loss in chapter VI deal with this problem more clearly and more comprehensively.<sup>27</sup>

47. The approach, considered in section II of this report, whereby rules on risk of loss would be stated in terms of relevant commercial events (such as shipment), rather than by reference to the concept of "delivery", would probably not only clarify the rules on risk but also permit the simplification of the definition of "delivery" to avoid the anomalous result that goods consumed by a buyer have never been "delivered" to him.

48. Does the provision that conformity of the goods is an element of "delivery" strengthen the buyer's legal protection when the seller supplies defective goods? A negative answer is evident from an examination of other provisions of ULIS on (a) the scope of the seller's obligations and (b) the remedies given the buyer for breach.

(a) The seller's legal obligation to supply conforming goods is stated generally in article 18 and specifically in article 33 (1); the seller's legal duty to supply conforming goods is clearly established by provisions that do not depend on the definition of "delivery". (In examining these provisions it is, of course, necessary to distinguish between (a) the breach of an obligation "to deliver" goods that conform to the contract and (b) the question whether these goods actually handed over and received by the buyer were "de-

<sup>25</sup> ULIS arts. 41 (2), 46, 82. Where the non-conformity of the goods does not amount to a "fundamental breach", the buyer may not declare the contract avoided; ULIS art. 43. In these cases the buyer has no choice but to keep the goods.

<sup>26</sup> Article 97 (2) of ULIS is quoted and discussed at paras. 15 and 16, above. As has been noted in connexion with the rules of ULIS on risk, a unified approach to the question of risk should make it possible to simplify and clarify this provision.

<sup>27</sup> See article 97 (1) quoted in foot-note 30 below, and article 97 (2), quoted above in para. 15, and the specific rule on the effect of buyer's breach on risk of loss in article 98 of ULIS. See also the structure for these rules on risk outlined in annex II to this report.

<sup>23</sup> The provisions of this earlier version are set forth in the study submitted by UNIDROIT; see A/CN.9/WG.2/WP.5.

<sup>24</sup> A/CN.9/WG.2/WP.10, reproduced below, part two, I A 3 (see annexed studies by the representatives of the United Kingdom and Norway).

livered" to him. It is this latter question that is raised by the definition of the concept of "delivery".)

(b) The buyer's remedies for lack of conformity of the goods are set forth in articles 41 to 49 of ULIS. (Related provisions on ascertainment and notification of lack of conformity appear in articles 38 to 40.) These provisions are premised on the *failure* of the seller to deliver *conforming* goods; they would not be disarranged by the concept that when non-conforming goods have been handed over to the buyer, those goods have been "delivered".

49. The provision of article 19 (1) that delivery consists in handing over "goods which conform with the contract" leads to a further technical distinction which may be discussed on the basis of the following typical example: The sales contract (or applicable usage) requires the seller to take out a policy of insurance covering the goods, and to tender the insurance policy with the other documents relating to the goods. The seller ships goods which conform to the contract but fails to take out or tender the policy of insurance. (The current problem would be illustrated by any serious breach by the seller relating to the shipment or tender of the goods.)<sup>28</sup>

50. In the example just stated, article 19 leads to the conclusion that the seller has effected "delivery" in spite of the serious breach. An escape from this result cannot be found in the definition of "delivery" in article 19 (1); the reference to "goods which conform" points so clearly to the conformity of the goods that it is difficult to conclude that conformity as to the time or method of shipment or tender is also required for delivery.<sup>29</sup> The difficulties which this aspect of the definition of "delivery" produces can be alleviated, with respect to risk of loss, by one of the special provisions on risk of loss in chapter VI.<sup>30</sup> This rule on risk of loss, however, does not modify the basic definition of "delivery" in article 19. If "delivery" is to be employed to solve problems other than risk of loss, it will be important to bear in mind the following technical distinction resulting from the definition in article 19. When the seller sends over goods to a carrier for transport to the buyer: (a) *any* non-conformity with respect to the *goods* prevents "delivery"; (b) even the *most serious breach* with respect to the time or manner of shipment, documentation or tender does not prevent "delivery".

51. This anomaly adds further support for the suggestion that the definition of "delivery" in article 19

<sup>28</sup> Other illustrations include: delay in shipment; shipment to the wrong place or by an unsuitable carrier or under improper conditions (on deck rather than below deck); failure to arrange for necessary refrigeration; tender of the goods under conditions that deny the buyer his right to inspect the goods before payment.

<sup>29</sup> This conclusion is supported in Tunc, *Commentary on the Hague Conventions of 1 July 1964* (Ministry of Justice, The Netherlands), part two, chap I, sec. 1, pp. 45-46, which recognizes the above distinction.

<sup>30</sup> Article 97 (1) provides:

"1. The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law."

The emphasized language would seem to include *all* aspects of the seller's performance, and would not be confined to conformity of the *goods* with the contract. This provision, it will be noted, is a rule on when risk passes, and does not constitute a further definition of "delivery".

(1) would usefully be simplified by deleting the final clause "which conform with the contract".

B. *Alternative definitions: "handing over" goods; placing goods "at the buyer's disposal"*

52. Criticism has been directed to the internal consistency of the seller's "delivery" obligation under ULIS. The seller is required, under article 18, to "effect delivery" of the goods. It is suggested that the seller should not be placed under such an unqualified obligation since "delivery" (the "handing over" of goods) requires the co-operation of the buyer in accepting possession.<sup>31</sup>

53. A further criticism is the following: To state that "delivery consists in the *handing over* of goods . . ." is an unhelpful tautology since the normal meaning of "delivery" is "handing over"; in some languages, it is difficult to find a word for "handing over" that is different from "delivery".<sup>32</sup>

54. These reasons have led to the suggestion that ULIS should return to the approach of an earlier draft that stressed the seller's undertaking to place the goods "at the disposal of the buyer."<sup>33</sup>

55. In analysing this question, it may be helpful to note that "delivery" may be used in two very different contexts:

(a) "Delivery" may be used in stating the seller's contractual *duty to perform* the contract. In this context the idea in question is the *duty to deliver*. This duty will arise and will be violated when no goods of any kind are provided or tendered by the seller.

(b) A very different usage of "delivery" concerns not a contractual *duty* but the *actual relationship* between persons and goods. In this sense, "delivery" may be defined as the transfer (or "handing over") of the possession or control over goods. In this sense, delivery can occur quite independently of a contract of sale or the performance of a legal duty—as in the "delivery" of goods by gift. Also, in this sense, goods can be "delivered" by the seller to the buyer when the goods do not conform to the contract.

56. The difference between these two concepts is striking. The *duty* "to deliver" (meaning (a) above) is an obligation that results from the contract and does not depend on the existence or the location or the quality of any particular goods. "Delivery" (meaning (b) above) may occur when there is no contract or when the handing over of the goods does not fulfil all of the obligations of a contract. Each of these ideas is a coherent and useful concept; difficulty arises only when the two are merged or confused.

<sup>31</sup> UNCITRAL, Report on second session (1969), annex I, para. 76; Analysis of studies and comments by Governments on The Hague Conventions of 1964 (A/CN.9/31) (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1), para. 99.

<sup>32</sup> *Ibid.*

<sup>33</sup> The UNIDROIT draft of June 1934 provided (art. 24): "The seller undertakes to deliver the goods, that is to say, to place them at the disposal of the buyer". Earlier drafts, without using the "disposal" phrase, had also emphasized the seller's duty to perform acts that did not require the buyer's co-operation. For example, the draft of October 1933 provided (art. 28): "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 . . ." The background of this aspect of ULIS is presented in the study prepared by UNIDROIT for the Commission, A/CN.9/WG.2/WP.5.

57. In most of the articles of ULIS "delivery" is used in describing the legal obligation "to deliver" (meaning (a) above). Thus, articles 20 to 22 define the time when the seller is obliged to deliver the goods and article 23 states the place at which he is obliged to deliver them; articles 24 to 32 state the sanctions for failure to perform this duty.

58. These two groups of articles thus illustrate the basic structure of the law: The essential ingredients are twofold: (1) To define the legal duty of a party and (2) to specify the sanctions for failure to perform that duty.

59. Of course, the actual physical relationship between a party and the goods may give rise to special obligations and remedies. A clear example is provided by article 92 (1), which provides:

"1. Where the goods have been received by the buyer, he shall take reasonable steps to preserve them if he intends to reject them; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the seller."

Under this provision, the obligation arises when the goods have been "received" (*reçue*) by the buyer; the concept of "delivery" (*délivrance*) is not employed. A similar physical (and clear) concept is employed in paragraph 2 of this same article in which duties to preserve goods arise where goods despatched to the buyer "have been put at his disposal at their place of destination . . .".<sup>34</sup> These provisions do not create the ambiguities that, in some situations, are presented by the use of "delivery" (*délivrance*); provisions of this character illustrate a drafting approach that deals clearly with the effect of the physical situation of goods.

60. In a few situations ULIS has used "delivery" (*délivrance*) in connexion with the physical relationship between a party and the goods.

(a) One of these is in connexion with risk of loss (section II *supra*). In deciding whether the risk of damage or loss should fall on the seller or on the buyer it is useful to consider the physical location of the goods: the party in possession of goods can more readily take care of them and is more likely to have effective insurance protection, as under the customary policies covering a building and its contents. The emphasis in ULIS on delivery as the "handing over" of goods seems to have been influenced by the desirability of allocating the risk of loss to the person who is in possession of the goods. However, as was noted in section II, it is possible to state the rules on risk by reference to physical events rather than the "delivery" concept. (Compare the comparable approach of article 92, quoted in para. 59 above, referring to goods that have been "received" and goods put at the buyer's "disposal".)

(b) The physical relationship between the parties and the goods is also important in connexion with the time for payment: A seller runs a credit risk if he surrenders control of the goods before he receives payment; a buyer runs a similar risk if he pays before he receives the goods. The law normally does not

impose these risks on the parties unless they have agreed to accept them. As we have seen in section II, ULIS uses the concept of "delivery" (*délivrance*) in dealing with the time for payment; as in connexion with risk of loss, "delivery" created ambiguities since the concept mingles the idea of the parties' duties of performance with the concrete situation of control over the goods. The route to a solution here, as in risk of loss, may be to avoid the concept of "delivery" and to speak directly in terms of "handing over" the goods—or any equivalent expression that connotes physical control over the goods.

61. These adjustments would seem to dispose of the situations in which actual physical control over the goods plays a decisive role in the Uniform Law; as a consequence, the many remaining articles of ULIS that use the term "delivery" can be read as defining various aspects of the seller's duty to perform his contract. (Meaning (a) in para. 55 above).

62. Our present concern is the provision in article 19 (1) that "delivery consists in the handing over of goods". The following alternative has been suggested: "Delivery consists in placing the goods at the disposal of the buyer in conformity with the contract."<sup>35</sup> On the assumption that rules on risk and price payment have been dealt with separately, this suggested language has the advantage of being consistent with the remaining provisions of ULIS which refer to delivery, for they speak of various aspects of the seller's contractual obligation to deliver.

63. One stylistic adjustment might be considered in connexion with this suggestion. The "delivery" of goods, at least in some languages, may more customarily refer to the physical act of transfer of possession and control.<sup>36</sup> As we have seen, referring to a seller's contractual duty to deliver may avoid this linguistic embarrassment. Consideration therefore might be given to supplanting the present article 19 with language such as the following:

"The seller's duty to deliver shall include [be performed by] placing the goods at the buyer's disposal in conformity with the contract and the present Law."

64. Regardless of the choice of language, the following questions of rearrangement arise:

(a) If the suggestions made in section II should be accepted, the provisions of articles 19 (2) and 19 (3) would be embodied in the substantive rules on risk in chapter VI. (One possible arrangement appears in annex II. See also subparagraph (c), below.) A brief definition emphasizing the seller's contractual duty to place goods at the buyer's disposition could then be the only provision of article 19.

(b) It may be noted that such a provision would in part duplicate the general language of article 18. (Article 18 seems designed merely to call attention to the structure of chapter III by referring to, in general terms, rules in the first three sections of this chapter;

<sup>34</sup> It is also significant that these duties arise independently of whether the seller has violated his duty to tender conforming goods, and are especially significant to avoid waste where the goods do not conform to the contract.

<sup>35</sup> See A/CN.9/WG.2/WP.10 (annexed study by the representative of Mexico at para. 6). See also foot-note 31 *supra*.

<sup>36</sup> See A/CN.9/WG.2/WP.10 (annexed studies by representatives of the United Kingdom (comment on art. 19) and Norway (introductory note, para. 2)).

the article thus seems without independent effect.) The issue is only stylistic, and perhaps should be deferred until basic questions of approach are decided. At that point consideration might be given to the possible consolidation of articles 18 and 19.

(c) In connexion with this consideration of article 19 (2) (contracts involving carriage of goods) attention could be given to a gap in the structure of chapter III, section 1, subsection 1B (article 23) on place of delivery. The incompleteness of this part is suggested by the opening clause of article 23: "Where the contract of sale does *not* involve carriage of the goods . . .". For contracts that do not involve carriage, specific rules on the place of delivery are provided in paragraphs 1 and 2 of article 23. Nothing is stated as to the place of delivery where the contract *does* involve carriage of the goods; to deal with this important situation the present draft must rely on the portion of the definition of "delivery" that appears in article 19 (2). Indeed, article 19 (2), when analysed, proves to be a rule on the *place* of delivery in the one situation not covered by article 23; paragraph 2 of article 19 could be added, without change, as a third paragraph of article 23.<sup>37</sup>

#### ANNEX I

##### Provisions of ULIS using the term "delivery"

Article	<i>Subject; term in French text where other than <i>délivrance</i></i>
1	Scope: international sale (para. 1 (c)).
18	Summary of seller's obligations.
19	Definitions.
20	Date for delivery.
21	Date for delivery.
22	Date for delivery.
23	Place for delivery.
24	Summary of remedies: failure as to date and place.
26	Remedies: failure as to date.
27	Remedies: failure as to date.
28	Remedies: failure as to date.
29	Remedies: failure as to date.
30	Remedies: failure as to place.
31	Remedies: failure as to place.
32	Remedies: failure as to place.
33	Non-conformity of goods.
37	Delivery of missing part; replacement or repair.
42	Power to require performance.
43	Declaration of avoidance.
44	Late delivery; the <i>French text</i> in paragraph 2 renders "delivery" as <i>livraison</i> at one point and as <i>délivrance</i> at another.
45	Partial delivery; the <i>French text</i> in paragraph 2 renders "effect delivery" as <i>exécution</i> .
48	Remedies before time fixed for delivery.
56	Summary of buyer's obligations; in the <i>French text</i> , "delivery" is rendered as <i>livraison</i> .
65	Definition of "taking delivery"; in the <i>French text</i> , rendered as <i>la prise de livraison</i> .

<sup>37</sup> This use of article 19 (2) would not be inconsistent with the suggestions made in section II *supra* for a unified treatment of risk. Article 19 (2) would state the place of "delivery", but, under the above suggestions, chapter VI would not state that risk or loss passes to the buyer on "delivery". See annex II at art. 97 (2).

Article	<i>Subject; term in French text where other than <i>délivrance</i></i>
66	Failure to "take delivery"; in the <i>French text</i> , rendered as <i>prise de livraison</i> .
68	Failure to "accept delivery"; in the <i>French text</i> , rendered as <i>prise de livraison</i> .
71	Payment of the price.
72	Contracts involving carriage.
75	Delivery by instalments; in the <i>French text</i> , rendered as <i>livraison</i> .
90	Expenses of delivery.
91	Delay in taking delivery; in the <i>French text</i> , rendered as <i>livraison</i> .
97	When risk passes to the buyer.
98	Unascertained goods; in the <i>French text</i> , rendered as <i>livraison</i> .

#### ANNEX II

##### Rules of ULIS on risk of loss stated without use of concept of "delivery" (*délivrance*)

(N.B.: The following is not proposed as a final redraft but is designed solely to aid in considering which approach to drafting is more conducive to clarity.)

#### CHAPTER VI

##### PASSING OF THE RISK

###### Article 96

(As in ULIS art. 96)

###### Article 97

[Basic rules on risk resulting from coalescing ULIS articles 19 and 97 (1).]

1. The risk shall pass to the buyer when [delivery of the goods is effected] *the goods are handed over to him* in accordance with the provisions of the contract and the present law.

2. Where the contract of sale involves carriage of the goods [and no other place for delivery has been agreed upon, delivery shall be effected], *unless the parties have agreed otherwise, the risk shall pass to the buyer* when the goods are handed over to the carrier for transmission to the buyer.

3. Where the goods handed over 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 handing over the goods, send to the buyer notice of the consignment and, if necessary, some document specifying the goods. If [in a case to which paragraph 3 of article 19 applies] the seller, at the time of sending [the] *such notice or other document* [referred to in that paragraph], knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document.

(Source: The first sentence is identical with ULIS article 19 (3). The second sentence, with the modifications noted, is the proviso to ULIS article 19 (3) that appears in ULIS article 100. If the present general approach should be approved, the two sentences in this paragraph could probably be coalesced in the interest of brevity and clarity.)

###### Article 98

(As in ULIS art. 97 (2). If the present basic approach should be accepted, the language of this provision probably could be simplified.)

###### Article 99

(As in ULIS art. 98.)

###### Article 100

(As in ULIS art. 99.)

*Article 101*

(As in ULIS art. 101.)

## ANNEX III

**Rules of ULIS on payment of the price stated without reference to "delivery"***Article 71*

Except as otherwise provided in article 72, [delivery of the goods] *placing the goods at the buyer's disposal* and payment of the price shall be concurrent conditions. (Second sentence as in ULIS.)<sup>1</sup>

*Article 72*

## 1. Where the contract involves carriage of the goods [and

<sup>1</sup> In final redrafting, attention might be given to the phrase "concurrent conditions" in the first sentence above; the expression is a legal idiom that is well-known in some legal systems but may not be understood in others.

where delivery is, by virtue of paragraph 2 of article 19, affected by handing over the goods to the carrier] the seller may either postpone despatch of the goods until he receives payment or proceed to despatch them on terms that reserve to himself the right of disposal of the goods during transit. (Second sentence as in ULIS.)<sup>2</sup>

<sup>2</sup> In the subsequent review of the substance of the rules on payment of the price, consideration might be given to whether the seller should be able to insist on payment before shipment when he bears the risk of loss during transit. In such a case, buyer's claim for recovery of the price when the goods are lost or damaged is subject to the hazards of seller's continued credit—and the burdens of litigation in a distant place. If such hazards are to be incurred perhaps they should be specifically bargained for. If this view is accepted, article 72 (1) might be drafted along these lines:

"1. Where the contract involves carriage of the goods, the seller may proceed to despatch the goods on terms that reserve to himself the right of disposal of the goods during transit. *Unless the risk of loss during transit falls on the seller*, he may postpone despatch of the goods until he receives payment."