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Sales involving Carriage of the Goods

The CISG often addresses contracts of sale that involve carriage of the goods. If a contract involves carriage of the goods

- special provisions regarding the place of performance and the act the seller has to perform in order to deliver apply, Article 31(1)(a) CISG,
- Article 32(2) CISG regulates details of the contract of carriage whenever the seller is bound to arrange it,
- Article 38(2) CISG defers examination of the goods the buyer is responsible for,
- Article 58(2) CISG offers the seller an additional option to secure the payment of the price and
- special provisions regarding the passing of risk are to be observed, Article 67(1) CISG.

However, the CISG does not afford a definition of what qualifies as a contract that ‘involves carriage of the goods’. The legal literature covering this topic offers a wide array of different interpretations¹ so that almost every conceivable option is displayed. The prevailing – although not undisputed – view seems to be that a contract involves carriage of the goods whenever an independent carrier is involved.² The courts have dealt with the question of what qualifies as a contract involving carriage of the goods in a few cases only and with no in-depth elaboration.³

All the articles of the CISG enumerated above referring to carriage of the goods presuppose that the contract of sale involves carriage of the goods, but do not explicate when this precondition is met. However, Article 31 CISG, specifying the place of delivery and the kind of act the seller has to perform in order to fulfil his obligation to deliver, presents three alternatives of how the delivery obligation can be performed. According to Article 31(b),(c) CISG, the buyer has to collect the goods and thus has to take care of their transportation.⁴ In contrast, Article 31(a) CISG governs sales which involve carriage of the goods, but still does not oblige the seller to take responsibility for transporting the goods at his own ex-

pense, as would be the case if the delivery obligation had to be performed at the buyer’s place of business (*‘brengschuld’*).⁵ The seller only has to conclude the contract necessary for the carriage of the goods, Article 32(2) CISG. The costs of carriage are to be borne by the buyer⁶ and the risk passes to him as soon as the goods are handed over to the carrier, Article 67(1) CISG. Considering these provisions, four conclusions can be drawn:

- Corroborated by Article 31(c) CISG, collection of the goods by the buyer (*‘haalschuld’*) at the seller’s place of business is not a sale which involves carriage of the goods even if the buyer subsequently transports the goods.⁷
- Consequently, a sale involving carriage of the goods does not comprise any possible scenario in which – this being typical in international contracts of sale – goods are transported.⁸
- On the other hand, taking into account the bearing of costs and the passing of risk, a sale which involves carriage of the goods cannot be qualified as a contract where the seller must transport the goods or have them transported at his own expenses and risk to the place of business of the buyer (*‘brengschuld’*).⁹
- Therefore, a sale involving carriage of the goods in the meaning of Article 31(a) CISG seems to be restricted to situations where the buyer does not have to take delivery at the seller’s place of business (*‘haalschuld’*) neither does the seller have to deliver at the buyer’s place of business (*‘brengschuld’*).

A typical, common feature of those scenarios where taking delivery is to be performed at the seller’s place of business (*‘haalschuld’*) or the delivery takes place at the buyer’s place of business (*‘brengschuld’*), is that the place where the seller delivers and the place where the buyer takes delivery coincide. However, there are also scenarios where the place of delivery and the place of taking delivery are not identical. In these situations, the transport of the goods must be arranged somehow from the place

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1. See the compilation by Piltz, ‘UN-Kaufrecht und internationaler Gütertransport’, in: Czerwenka/Paschke, *Ad multos annos: Seehandelsrecht und internationales Kaufrecht, Festgabe zum 80. Geburtstag von Rolf Herber*, 2010, p. 7 (8 et seq.).
2. Honnold/Flechtner, *Uniform Law for International Sales under the 1980 United Sales Convention*, 2009, par. 208.
3. Cour d’Appel de Paris (France) 19 November 2010, CISG-online No. 2206; Oberlandesgericht Koblenz (Germany) 30 September 2008, IHR 2011, 145 (148); Landgericht Bamberg (Germany) 23 October 2006, CISG-online No. 1400; Oberlandesgericht Hamm (Germany) 12 November 2001, CISG-online No. 1430; Landgericht Flensburg (Germany) 24 March 1999, CISG-online No. 719; Obergericht des Kantons Zürich (Switzerland) 06 February 2009, CISG-online No. 2000.
4. Cf. Gruber, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 3, 2012, Art. 31 para. 5.
5. Ernst/Lauko, in: Honsell, *Kommentar zum UN-Kaufrecht*, 2010, Art. 31 para. 15.
6. Gruber, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 3, 2012, Art. 31 para. 24.
7. Widmer, in: Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2010, Art. 31 para. 15.
8. In contrast Grunewald, *Kaufrecht*, 2006, § 5 para. 26; Sierralta Rios/Baptista, *Aspectos Jurídicos del Comercio Internacional*, 1992, p. 102.
9. Widmer, in: Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2010, Art. 31 para. 2. Cf. Obergericht des Kantons Zürich (Switzerland) 6 February 2009, CISG-online No. 2000.

where the seller has to perform the act he is required to undertake in order to deliver the goods to the place where the buyer takes them over. The need to bridge the geographical distance between the place of delivery and the place of taking delivery justifies calling these scenarios 'sales involving carriage of the goods'. Like many national laws,¹⁰ Article 32(2) CISG obliges the seller in this situation to make necessary contracts for carriage, and Article 31(a) CISG prescribes that he has to hand over the goods to the first carrier for transmission to the buyer. These obligations are appropriate since the seller is generally closer to the goods than the buyer. However, it must be emphasised that the carriage as such is not an obligation of the seller.¹¹ The seller has only to arrange the carriage of the goods to the place where delivery has to be taken.

Pursuant to Article 6 CISG, the parties are not bound by this concept and are free to agree otherwise, for example that the buyer arranges the transportation. For qualification as a sale involving carriage of the goods, it is irrelevant which party arranges carriage.¹² The seller's obligation to arrange the transmission of the goods to the buyer addressed in Articles 31(a) and 32(2) CISG is a dispositive consequence and not a prerequisite for a sale involving carriage of the goods.¹³ The decisive requirement for a sale to qualify as a sale involving carriage of the goods is that the place of delivery and the place of taking delivery are not identical.

Looked at from a different point of view, in the meaning of Article 31(a) CISG, there is no sale involving carriage of the goods if the seller, pursuant to an agreement with the buyer or other relevant circumstances, is obliged to perform the act he is required to undertake in order to deliver the goods at the buyer's place of business and the buyer must take them over only at that place.¹⁴ In this situation, the place of delivery and the place of taking delivery will be the buyer's place of business. It is irrelevant whether the seller himself transports the goods to the buyer or instructs an independent carrier to do so in his place.¹⁵ Neither is there a sale involving carriage of the goods if the buyer, pursuant to an agreement with the seller or other relevant circumstances, is obliged to

take delivery of the goods at the seller's place of business.¹⁶ This latter situation will frequently – but not in all cases¹⁷ – apply if the buyer contacts the carrier and concludes the contract for carriage.¹⁸ In this case the place of delivery will be the seller's place of business and the buyer has to take over the goods at that place. Again, it is irrelevant whether the buyer himself removes the goods or orders an independent carrier to do it for him.¹⁹ In both cases described above, the place where the seller – either by himself or through a mandated third party – has to deliver (place of delivery) and the place where the buyer – either by himself or through a mandated third party – has to take delivery (place of taking delivery) coincide. As the place of delivery and the place of taking delivery are identical, in the meaning of Article 31(a) CISG, no carriage of the goods is necessary in order to fulfil the contract of sale irrespective of the fact that the goods are transported.

However, if the place of delivery and the place of taking delivery are not identical, the sale involves carriage of the goods and Article 31(a) CISG applies. The fact that the transport of the goods is carried out by an independent carrier is a typical feature of a sale involving carriage of the goods,²⁰ but does not amount to the decisive criterion which characterises sales involving carriage of the goods in the meaning of Article 31(a) CISG.²¹ Independent carriers may also be involved in situations that do not qualify as sales involving carriage of the goods.²² Furthermore, for qualification as a sale involving carriage of the goods, it is irrelevant whether the delivery of the goods has to be performed at the seller's place of business or at a different place or whether the place of taking delivery is identical to the buyer's place of business. If the seller is obliged to perform the act he is required to undertake in order to deliver at a particular place agreed upon by the parties, it does not mean that the sale does not involve carriage of the goods pursuant to Article 31(a) CISG.²³

10. For example, Section 32 British Sale of Goods Act, Art. 1510 Codice Civile (Italian Civil Code), § 2-504 U.C.C. Cf. § 447 BGB (German Civil Code), Section 524 Greek Civil Code, Art. 544 ZGB (Polish Civil Code) and Art. 189(1) OR (Swiss Code of Obligations).

11. Cf. Ernst/Lauko, in: Honsell, *Kommentar zum UN-Kaufrecht*, 2010, Art. 31 para. 15 and Art. 32 para. 16.

12. Magnus, in: *Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht (CISG)*, 2005, Art. 31 para. 16. In contrast, Mullis, in: Huber/Mullis, *The CISG*, 2007, p. 111.

13. Arts 30(a) and 32(2) CISG read '... if ... carriage of the goods ...'

14. Cf. Obergericht Zurich (Switzerland) 6 February 2009, CISG-online No. 2000 and Ernst/Lauko, in: Honsell, *Kommentar zum UN-Kaufrecht*, 2010, Art. 31 para. 15. In contrast Kritzer/Vanto/Vanto/Eiselen, *International Contract Manual*, 4, § 88:18 para. 5.

15. Ernst/Lauko, in: Honsell, *Kommentar zum UN-Kaufrecht*, 2010, Art. 31 para. 7.

16. Widmer, in: Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, (2010), Art. 31 para. 15.

17. See *supra* text related to footnote 12.

18. Cf. Widmer, in: Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2010, Art. 31 para. 15.

19. Ernst/Lauko, in: Honsell, *Kommentar zum UN-Kaufrecht*, 2010, Art. 31 para. 7 and Widmer, in: Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2010, Art. 31 para. 15.

20. See *supra* text related to footnote 6 and after footnote 10.

21. In contrast, Oberlandesgericht Koblenz (Germany) 30 September 2008, IHR 2011, 145 (148); Lögering, *CISG und international Handelsklauseln* (2008), p. 98; not clear: Magnus, in: *Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht (CISG)*, 2005, Art. 31 para. 13.

22. See *supra* text related to footnote 15 and 19.

23. In contrast, Magnus, in: *Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Wiener UN-Kaufrecht (CISG)*, 2005, Art. 31 para. 13; Neumayer/Ming, *Convention de Vienne sur les Contrats de Vente Internationale de Marchandises*, 1993, p. 244.

The introductory wording of Article 31 CISG²⁴ only relates to a differing determination of the place of delivery but not to the further delivery modalities regulated in the article. Corroborated by Article 67(1) CISG, a sale which involves carriage of the goods does not preclude the seller from having to deliver the goods at a third place, different from his own place of business.²⁵ The same reasoning applies if a place different from the buyer's place of business has been stipulated for taking over the goods.²⁶ If the agreed place of delivery is situated somewhere between the seller's and the buyer's place of business, a thorough examination has to be undertaken as to whether, according to the contract of sale and the relevant circumstances, the buyer is obliged to take delivery of the goods at the same place or if the buyer does not have to take delivery of the goods at the agreed upon place of delivery. Only in the latter case does the sale involve carriage of the goods.

According to the explanations under headings A4 – B4 of the rules of interpretation of the Incoterms,²⁷ the place of delivery and the place of taking delivery are generally identical.²⁸ This rule applies regarding the E and the D clauses and is in particular true with regard to the F clauses of the Incoterms.²⁹ Only if a C clause is agreed do the place of delivery and the place of taking delivery diverge, leading to a sale involving carriage of the goods in the meaning of Article 31(a) CISG.³⁰

Article 31(c) CISG constitutes a subordinate gap rule.³¹ Article 31(b) CISG is applicable only to cases not within the scope of Article 31(a) CISG. Therefore, in case of doubt, delivery transactions governed by the CISG are sales involving carriage of the goods pursuant to Article 31(a).³² This rule is appropriate. International sales are characterised by a geographical distance between the seller's place of business on the one hand and the buyer's place of business on the other. With no further indications, it cannot be assumed that the seller will bring the goods to the buyer or the buyer will collect them from the seller. This assumption may, however, be disproved if the contractual agreement or other relevant circumstances indicate that the seller has to perform the act he is required to undertake in order to deliver at the same place where the buyer has to take delivery of the goods.

However, the seller's obligation to pay for the carriage does not suffice in shifting the place of delivery to the place of destination.³³ The party relying on such circumstances claiming that the sale at hand is not a sale which involves carriage of the goods bears the burden of proof. Otherwise, the rule of Article 31(a) CISG applies.

24. 'If the seller is not bound to deliver the goods at any particular place...'

25. Cf. Fernández de la Gándara, in: Díez-Picazo, *La Compraventa Internacional de Mercaderías*, 1998, p. 261; Ernst/Lauko, in: Honsell, *Kommentar zum UN-Kaufrecht*, 2010, Art. 31 para. 14.

26. Cf. Ernst/Lauko, in: Honsell, *Kommentar zum UN-Kaufrecht*, 2010, Art. 31 para. 24.

27. For the new Incoterms 2010 see Piltz, *EJCCL* 2011, p. 1 et seq. and Alink, *NTHR* 2011, p. 33 et seq.

28. For more details see Piltz, in: Kröll/Mistelis/Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, 2011, Art. 31 paras 58 et seq.

29. In contrast Oberlandesgericht Hamm (Germany) 12 November 2001, CISG-online No. 1430 and most of the literature covering this issue, for more details see Piltz, in: Kröll/Mistelis/Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)*, (2011), Art. 31 para. 59.

30. Cf. Cour d'Appel de Paris (France) 19 November 2010, CISG-online No. 2206, Renck, *Der Einfluß der INCOTERMS auf das UN-Kaufrecht*, 1995, p. 176 and Leible, *EuZW* 2011, p. 604 (606).

31. Widmer, in: Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2010, Art. 31 para. 17

32. Landgericht Bamberg (Germany) 23 October 2006, CISG-online No. 1400; Landgericht Flensburg (Germany) 24 March 1999, CISG-online No. 719; Widmer, in: Schlechtriem/Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, 2010, Art. 31 para. 18; Ernst/Lauko, in: Honsell, *Kommentar zum UN-Kaufrecht*, 2010, Art. 31 para. 11. In contrast, Gruber, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 3, 2012, Art. 31 para. 2.

33. Ramberg, *ICC Guide to Incoterms 2010*, 2011, ICC publication No. 720, p. 48.