

### Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) In other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

#### OVERVIEW

1. The article specifies the place of performance of the seller's duty of delivery. The provision fixes where the seller has to deliver the goods and what the seller has to do for that purpose. Article 31 addresses three different cases for which different rules apply. The general rule, however, appears to be that the seller's place of business is the presumed place of delivery.<sup>1</sup>

#### GENERAL REMARKS

2. Under some procedural rules, such as the ones based upon article 5 (1) of the (former) 1968 Brussels and 1988 Lugano Conventions,<sup>2</sup> article 31 could be the basis for jurisdiction.<sup>3</sup> Such jurisdiction extended to claims concerning breach of the duty to deliver, as well as claims relating to the delivery of non-conforming goods.<sup>4</sup> Since 1 March 2002 when the Brussels I Regulation entered into force its new article 5 (1) (b) first indent introduced an autonomous definition of the place of performance (place “where, under the contract, the goods were delivered or should have been delivered”). Under this provision, it has been held that article 31 CISG can no longer serve as basis for jurisdiction.<sup>5</sup> Unless the place of performance can be inferred from the contract, the place of performance has been deemed to be “where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.”<sup>6</sup>

3. The rules formulated in article 31 apply only when the parties have not agreed otherwise, as party autonomy prevails over article 31.<sup>7</sup> Many court decisions applying article 31 deal with the construction of contract terms in order to decide whether those terms fix a place of performance or merely allocate the costs of transportation.<sup>8</sup> If a price-delivery term (such as a term defined in the Incoterms) is included in the contract, it defines the place of performance and excludes the Convention's rule.<sup>9</sup>

4. Article 31 has also been used to determine the place of delivery when the buyer must return goods after the contract has been avoided (article 81 (2)).<sup>10</sup> This has led to the result that, if not otherwise provided for in the contract, the buyer must re-deliver the goods at the buyer's place of business.<sup>11</sup>

#### SALES INVOLVING CARRIAGE (ARTICLE 31 (a))

5. The first alternative of article 31 applies only if the contract involves carriage of the goods. For sales at a distance it has been held that article 31 (a) ordinarily is applicable.<sup>12</sup> Carriage of the goods is presumed to be involved if the parties have envisaged (or if it is clear from the circumstances)<sup>13</sup> that the goods will be transported by independent carrier(s) from the seller to the buyer. Therefore, shipment contracts (e.g., contracts that include price-delivery terms such as FOB, CIF or other F- or C-terms as defined in the Incoterms) as well as destination contracts (e.g., contracts that include DES—under Incoterms 2010 now DAP—or other D-terms as defined in the Incoterms) involve carriage of the goods.<sup>14</sup>

6. Article 31 (a) only applies if it is neither the seller's nor the buyer's own obligation under the contract to transport the goods from the seller's place of business (or from where they are located) to the buyer's place of business (or wherever specified by the buyer).<sup>15</sup> When applicable, article 31 (a) does not imply that the seller itself must deliver the goods to the destination; it has been stated that the provision does not create such a duty.<sup>16</sup> On the contrary, the seller has duly performed its duty of delivery under article 31 (a) when the goods are handed over to the carrier.<sup>17</sup> If several carriers are involved in delivering the goods, handing over to the first carrier constitutes delivery under article 31 (a).<sup>18</sup>

7. “Handing over,” as the phrase is used in article 31 (a), means that the carrier is given possession of the goods.<sup>19</sup> The handing over of documents relating to the goods does not appear to constitute handing over the goods themselves, and does not constitute delivery of the goods unless otherwise agreed by the parties.<sup>20</sup>

### SALE OF GOODS LOCATED AT A PARTICULAR PLACE (ARTICLE 31 (b))

8. The second alternative of article 31 applies when three requirements are met: first, delivery as per the contract must not involve carriage of the goods in the sense of article 31 (a)—so that it is the buyer's task to get possession of the goods; second, the goods sold must be specific goods, goods of a specific stock, or goods to be manufactured or produced; third, both parties must have known when the contract was concluded that the goods were located at (or were to be manufactured or produced at) a particular place. If those conditions are met, article 31 (b) requires the seller to place the goods at the buyer's disposal at that particular place.<sup>21</sup>

9. Placing the goods at the buyer's disposal means that "the seller has done that which is necessary for the buyer to be able to take possession."<sup>22</sup> The seller must therefore arrange everything necessary for delivery in the circumstances, so that the buyer need do nothing other than take over the goods at the place of delivery.<sup>23</sup>

### OTHER CASES (ARTICLE 31 (c))

10. Article 31 (c) is a "residual rule".<sup>24</sup> The provision covers those cases which do not fall under paragraph (a) or (b) and for which the contract does not provide a particular place of performance. Where article 31 (c) applies, the seller must put the goods at the buyer's disposal at the place where the seller had its place of business when the contract was concluded.<sup>25</sup>

### CONTRACTUAL PROVISIONS FOR THE PLACE OF PERFORMANCE

11. Many decisions involve the construction of contract clauses that may or may not modify the place of performance as provided in article 31. In interpreting such clauses, the courts generally look at all the circumstances of the case. The meaning of certain formulations can therefore vary with the circumstances. With respect to the term EXW ("ex works"), it has been stated that it does not vary the place of performance provided for in article 31 (a) or (c).<sup>26</sup> Under the term DDP ("delivered, duty paid"), it has been held that the place of delivery is the buyer's place of business.<sup>27</sup> For the interpretation of the INCOTERMS, the respective Guiding

Notes of the ICC should be used.<sup>28</sup> However, the parties can agree upon a different place of delivery at any time. If the buyer requests that the goods be delivered to another firm that will process them for the buyer, the place of business of that other firm is then the place to which the goods must be delivered.<sup>29</sup> The clause "free delivery (buyer's place of business)" has been interpreted in different ways. Several courts considered that clause to be a mere allocation of costs that under the circumstances of the case did not address the place of performance.<sup>30</sup> Other courts have stated the contrary.<sup>31</sup> In a case where the order provided for "franco Skanderborg" and the acceptance for "F.CO DOMIC. NON SDOG." (meaning "Franco domicilio non sdoganato" = free domicile without customs) the court found that no place of delivery was agreed upon.<sup>32</sup> A contract clause "pricing ex work Rimini/Italy" has been held not to change the place of performance provided for in article 31 where an Italian seller was to deliver a facility to manufacture windows to a German buyer.<sup>33</sup> An additional contract provision requiring the seller to erect and run the plant for a certain period at the buyer's place of business, however, led to the conclusion that the place of delivery was that place.<sup>34</sup> If the seller is obliged to install the delivered goods at a particular place or to erect at a particular place a facility that it sold, that place has been regarded as the place of delivery.<sup>35</sup>

### CONSEQUENCES OF DELIVERY

12. When the seller has delivered the goods it has fulfilled its duty of delivery and is no longer responsible for the goods. Courts regularly conclude that the risk of subsequent damage to or loss of the goods passes to the buyer, unless such damage or loss is intentionally or negligently caused by the seller.<sup>36</sup> Therefore if the seller has handed over the goods to the first carrier, any delay in the transmission of the goods is at the risk of the buyer, who may or may not have a claim against the carrier.<sup>37</sup> Similarly, if goods are loaded on board a vessel in the designated port the seller has performed its duty of delivery.<sup>38</sup>

### BURDEN OF PROOF

13. A party asserting that the contract provides for a place of delivery other than the place provided for in article 31 must prove such agreement.<sup>39</sup>

### Notes

<sup>1</sup>In Italy the constitutionality of the corresponding domestic rule has been attacked, but has been upheld, based—among other reasons—on its correspondence to the rule of CISG article 31 (a). CLOUT case No. 91 [Corte Costituzionale, Italy, 19 November 1992].

<sup>2</sup>Under that article, jurisdiction existed at the place of performance. Under this provision, the place where the obligation should have been performed had to be determined according to the applicable law, whether that law was domestic or uniform international law. See thereto CLOUT case No. 298 [European Court of Justice, Luxembourg, 29 June 1994 (C-288/92)].

<sup>3</sup>For example, CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; CLOUT case No. 834 [Hoge Raad, the Netherlands, 26 September 1997]; CLOUT case No. 207 [Cour de cassation, France, 2 December 1997]; CLOUT case No. 242 [Cour de cassation, France, 16 July 1998]; Oberster Gerichtshof, Austria, 10 September 1998, Unilex; Bundesgericht, Switzerland, 26 June 2009, *Internationales Handelsrecht* 2010, 112 (under the former Lugano Convention, which was changed in 2007 and adapted to the Brussels I Regulation).

<sup>4</sup>Applying the former law that was changed on 1 March 2002: CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996] (see full text of the decision); Gerechthof 's-Hertogenbosch, the Netherlands, 9 October 1995, Unilex; CLOUT case No. 244 [Cour d'appel, Paris, France, 4 March 1998]; CLOUT case No. 245 [Cour d'appel, Paris, France, 18 March 1998]; CLOUT case No. 832 [Hoge Raad, the Netherlands, 21 May 1999]; CLOUT case No. 940 [Gerechthof Arnhem, the Netherlands, 15 August 2006].

<sup>5</sup> See European Court of Justice, Luxembourg, 25 February 2010 (C-381/08), *Internationales Handelsrecht* 2010, 170; Bundesgerichtshof, Germany, 23 June 2010, *Internationales Handelsrecht* 2010, 217.

<sup>6</sup> European Court of Justice, Luxembourg, 25 February 2010 (C-381/08), *Internationales Handelsrecht* 2010, 170; see also Bundesgerichtshof, Germany, 23 June 2010, *Internationales Handelsrecht* 2010, 217 (the final national decision in the proceedings referred to the ECJ); see also Corte di Cassazione, Italy, 5 October 2009, CISG-online No. 2105.

<sup>7</sup> CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], also in *Recht der Internationalen Wirtschaft* 2000, 712; CLOUT case No. 829 [Court of Appeals of the Hague, the Netherlands, 29 September 2006] (delivery address on invoices regarded as agreed place of delivery).

<sup>8</sup> See, for example, CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992] (“free delivery” in conjunction with further circumstances means buyer’s place of business); CLOUT case No. 398 [Cour d’appel d’Orléans, France, 29 March 2001] (“ex-works Ancona” = place of performance); CLOUT case No. 607 [Oberlandesgericht Köln, Germany, 16 July 2001] (delivery “free farm” under the circumstances of the case deemed only an allocation of the transport costs); CLOUT case No. 998 [Højesteret, Denmark, 15 February 2001] (“franko Skanderborg” = place of delivery at that town).

<sup>9</sup> CLOUT case No. 244 [Cour d’appel, Paris, France, 4 March 1998] (see full text of the decision); CLOUT case No. 245 [Cour d’appel, Paris, France, 18 March 1998].

<sup>10</sup> Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht—Internationales Handelsrecht* 1999, 48. See also CLOUT case No. 594 [Oberlandesgericht Karlsruhe, Germany 19 December 2002] (principle of article 31 (c) applied to determine when buyer fulfilled its obligations under agreement to return non-conforming goods to the seller; because seller was responsible for carriage of the goods, damage to goods that occurred during transport back to the seller was seller’s responsibility).

<sup>11</sup> Ibid.

<sup>12</sup> See CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000]; see also the references *supra* n. 6.

<sup>13</sup> CLOUT Case No. 834 [Hoge Raad, the Netherlands, 26 September 1997].

<sup>14</sup> See the Secretariat Commentary to (then) article 29; Commentary on the draft Convention on Contracts for the International Sale of Goods, A/CONF.97/5, reproduced in United Nations Conference on Contracts for the International Sale of Goods: Official Records, at p. 29, paragraph 5.

<sup>15</sup> See also the Secretariat Commentary to (then) article 29, at p. 29, paragraphs 5 and 8.

<sup>16</sup> See CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; CLOUT case No. 1019 [Appellate Court of Montenegro, Montenegro, 20 February 2007].

<sup>17</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]. This is consistent with the Convention’s rules on passing of risk in this situation. See article 67 (1).

<sup>18</sup> Ibid. The Convention’s rules on passing of risk confirm this point. See article 67 (1).

<sup>19</sup> CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997] (loading on board).

<sup>20</sup> Secretariat Commentary to (then) article 29, at p. 29, paragraph 9. Specifics of the seller’s obligation to hand over documents are provided by article 34.

<sup>21</sup> See, for example, CLOUT case No. 47 [Landgericht Aachen, Germany, 14 May 1993] (place of manufacture of ear devices corresponds to the place of delivery under article 31 (b)). See also CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (no delivery where the seller did not place the goods at the buyer’s disposal).

<sup>22</sup> Secretariat Commentary to (then) article 29, at p. 30, paragraph 16.

<sup>23</sup> CLOUT case no. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

<sup>24</sup> Secretariat Commentary to (then) article 29, at p. 30, paragraph 15.

<sup>25</sup> See CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

<sup>26</sup> CLOUT case No. 244 [Cour d’appel, Paris, France, 4 March 1998] (see full text of the decision); CLOUT case No. 245 [Cour d’appel, Paris, France, 18 March 1998]. For the same result in contracts that included the German clause “ex works”, see CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997], and Oberster Gerichtshof, Austria, 29 June 1999, *Transportrecht—Internationales Handelsrecht* 1999, 48.

<sup>27</sup> Bundesgerichtshof, Germany, 7 November 2012, *Internationales Handelsrecht* 2013, 15 = CISG-online No. 2374; CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998].

<sup>28</sup> Bundesgerichtshof, Germany, 7 November 2012, *Internationales Handelsrecht* 2013, 15 = CISG-online No. 2374.

<sup>29</sup> CLOUT case No. 340 [Oberlandesgericht Oldenburg, Germany, 22 September 1998].

<sup>30</sup> CLOUT case No. 268 [Bundesgerichtshof, Germany, 11 December 1996]; Oberster Gerichtshof, Austria, 10 September 1998, Unilex; Oberlandesgericht Koblenz, Germany, 4 October 2002, *Internationales Handelsrecht* 2003, 66 (delivery “frei Baustelle” [free construction site]); see also the references *supra* nn. 5 and 6.

<sup>31</sup> CLOUT case No. 317 [Oberlandesgericht Karlsruhe, Germany, 20 November 1992]; CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997]; Bundesgericht, Switzerland, 26 June 2009, *Internationales Handelsrecht* 2010, 112 (“Lieferadresse: Magazin (Käufer)” [“delivery address: store (buyer)”] = place of delivery).

<sup>32</sup> CLOUT case No. 998 [Højesteret, Denmark, 15 February 2001].

<sup>33</sup> CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999], also in *Recht der Internationalen Wirtschaft* 2000, 712.

<sup>34</sup> Ibid.

<sup>35</sup> CLOUT case No. 430 [Oberlandesgericht München, Germany, 3 December 1999] (place of assembly of window manufacturing unit = place of performance); CLOUT case No. 646 [Corte di Cassazione, Italy, 10 March 2000], see also *Recht der Internationalen Wirtschaft* 2001, 308; CLOUT case No. 647 [Corte di Cassazione, Sezioni Unite, Italy, 19 June 2000] (sale, assembly and installation of a plant for steel production = place of delivery there); CLOUT case No. 652 [Tribunale di Padova, Italy, 10 January 2006] (sale and installation of two merry-go-rounds; delivery place deemed there).

<sup>36</sup> See the Convention's rules on passing of risk (Part III, Chapter IV, articles 66-70).

<sup>37</sup> CLOUT case No. 331 [Handelsgericht des Kantons Zürich, Switzerland, 10 February 1999]; similarly CLOUT case No. 377 [Landgericht Flensburg, Germany, 24 March 1999].

<sup>38</sup> CLOUT case No. 247 [Audiencia Provincial de Córdoba, Spain, 31 October 1997].

<sup>39</sup> CLOUT case No. 360 [Amtsgericht Duisburg, Germany, 13 April 2000].