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THE ROLE OF PARTIES TO THE CONTRACT OF SALE IN THE CONTRACT OF CARRIAGE OF GOODS BY ROAD AND VICE VERSA

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1. INTRODUCTION

Both in international and domestic trade, the sale of goods is commonly associated with the transport of goods from the seller to the buyer. Parties to a contract of sale may transport the goods on their own or arrange for an independent third-party carrier to transport the goods.[1] In the latter case, the carrier enters the legal relationship arising from the contract of sale and enables the performance of the contract of sale on grounds of a concluded contract of carriage. Hence, rights and obligations of the seller and buyer arising from the contract of sale are joined by rights and obligations of all parties to the contract of carriage which arise from the latter. Despite the contract of sale and contract of carriage having direct impact only on parties to each respective contract, certain entities appear as parties to both contracts, whereas their rights and obligations arising from each contract combine to form a series of intercon-

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[1] Parties to the contract of sale may also arrange the transport of goods by commissioning the carriage to a freight forwarder, who subsequently concludes adequate contracts of carriage and other contracts required for the carriage of goods. This scenario is not covered by the article.

nected legal relations. A material element in defining rights and obligations of the parties is the definition of roles the parties of one contractual relationship represent in the second contractual relationship.

The following article deals with the role of parties to a contract of sale and parties to a contract of carriage of goods by road in terms of Slovene law and international commercial law, focusing mostly on the fulfilment of obligations of the seller, carrier and buyer related to the delivery of goods and the enforcement of legal remedies in the event of failure to perform. The analysis is based on the assumption that the contract of carriage is concluded directly between one of the parties to the contract of sale and the carrier, the assumption that the carrier takes over the goods from the seller or his servant, and the assumption that the delivery of goods is taken by the buyer or his servant.

2. PARTIES TO THE CONTRACT OF SALE AND CONTRACT OF CARRIAGE

In order to best define the role of parties to one contract in the relationship arising from the second contract, it is first important to determine and define the parties to each respective contract. Only two entities appear as parties to the contract of sale: the seller and the buyer. There are, however, more parties to the contract of carriage: the sender, carrier and consignee.

Definitions of the parties to the contract of sale, i.e. the seller as the person obligated to deliver the goods to the buyer and transfer the property in the goods, and the buyer as the person obligated to pay the contractually-agreed price for the goods and take delivery of the goods, are generally not problematic, and shall therefore not be addressed in any detail.

Unlike with the contract of sale, the definition of parties to a contract of carriage needs to be regarded separately, especially with regard to the delineation between definitions of the terms consignor[2], sender and consignee, which re-

[2] In international commercial law governing contracts of carriage of goods by road (CMR), the party contracting for carriage with a carrier is referred to as sender. In commercial practice (e. g. in general conditions of carriage of transporting companies), this party is also referred to as consignor, shipper, customer or client. However, it needs to be noted that the meaning of these terms is not unanimous and varies from case to case. To distinguish between the terms "*naročnik*" and "*pošiljatelj*" used in ZPPCP-1, for the purpose of this article the term "*naročnik*" is translated as "consignor", whereas the term "*pošiljatelj*" is translated as "sender". The term "consignor" used in this article should therefore be understood in the meaning of the Slovene term "*naročnik*", as defined by the fifth indent of Article 3 ZPPCP-1. However, as explained further below, both the notion of consignor and the notion of sender used in ZPPCP-1 correspond with the meaning of the notion of sender used in CMR.

present several dilemmas under Slovene law. Special emphasis will therefore be given to the definition of parties to the contract of carriage.

2.1. Parties to the contract of carriage in detail

In comparison with other types of contracts, parties to the contract of carriage are associated with certain specifics that originate from the nature of the carriage service.[3] As a result, the parties who originally conclude the contract of carriage (i.e. sender and carrier) are not the only contracting parties, as they are subsequently joined by a third party (consignee), who commonly enters the contract at a later stage.

2.1.1. Sender and consignor

In transport law, the term "sender" usually refers to the person who concludes a contract of carriage with the carrier (i.e. consignor of the carriage), irrespective of whether the same person hands over to the carrier the goods to be transported. Hence, the sender is a party to the contract of carriage and the contracting partner of the carrier.[4]

The latter is clearly provided for by Article 666(1) of the Code of Obligations (OZ),[5] which defines the notion of contract of carriage by referring to the obligations of parties to the contract – the carrier, who undertakes to transport certain goods to a certain location, and the sender, who undertakes to pay a reward to the carrier. OZ does not distinguish between the person who concludes the contract of carriage with the carrier and the person who hands over to the carrier the goods to be transported, as the definition is based on the assumption that both are the same person. If a situation involves two different persons, this element needs to be adequately accounted for by applying rights and obligations the law imposes on the sender, as the party to the contract of carriage, to the person who contracted with the carrier, not to the person who hands over (on behalf of the sender) to the carrier the goods to be transported.[6]

Neither the notion of sender nor the notion of contract of carriage are expressly defined by the Convention on the Contract for the International Carriage of Goods by Road (CMR).[7] However, the opinion generally accepted in theory is

[3] V. Kranjc, *op. cit.*, p. 13.

[4] S. Cigoj, *op. cit.* (1987), p. 33.

[5] Official Journal of the Republic of Slovenia (OJ RS), Nos. 83/01, 32/04, 28/06, 40/07 and 97/07.

[6] V. Kranjc, in: M. Juhart and N. Plavšak (eds.), *op. cit.*, p. 1138.

[7] Geneva, 16 May 1956.

that the sender shall be understood as the person who concludes the contract of carriage with the carrier, irrespective of whether the carrier takes over the goods from him or another person.[8] Thus a forwarding agent, who concludes a contract of carriage on his own behalf (and for the account of his client), or another carrier when the transport is commissioned to a sub-carrier, can also be understood as senders. If the contract of carriage is concluded as a means of performing the contract of sale, the seller may act as the sender who undertakes to deliver the goods to the buyer. Likewise, the buyer may act as the sender, if he arranged for a carrier to take over the goods from the seller.[9] However, in the latter case, the seller does not have the rights of a sender, despite the fact that he hands over to the carrier the goods to be transported. As a result, he is not entitled to dispose of the goods during carriage or give instructions the carrier. The latter also applies if, per contract of sale, the seller has the right to stop the goods in transit (s. c. *stoppage in transitu*).[10]

A similar conclusion may be taken on grounds of Article 24 of the Road Transport Contracts Act (ZPPCP-1),[11] which, similarly to Article 666 OZ, defines the subject matter of the contract of carriage by road by referring to basic contractual obligations of parties to the contract of carriage – the carrier who undertakes to ship the goods to the agreed-upon place of destination and hand them over to the consignee or other person authorized by the consignee to accept the goods, and the sender who undertakes to pay the carrier a contractually agreed freight rate. The conclusion to be taken is that the sender shall be understood as the person who concludes the contract of carriage with the carrier. However, with regard to the definition of terms "consignor" and "sender" as referred to in Article 3 ZPPCP-1, the meaning of the term "sender" as defined by ZPPCP-1 is not completely clear and calls for additional interpretation.

The fifth indent of Article 3 ZPPCP-1 defines the consignor as a "person who concludes on his own behalf, for his account or for the account of another person the contract of carriage with the carrier". The eighth indent of Article 3 ZPPCP-1 defines the sender as the "consignor or person who hands over the goods for carriage on grounds of a contract of carriage concluded with the carrier".

By accounting only for definitions referred to in Article 3 ZPPCP-1, the conclusion could be taken that per ZPPCP-1 the status of contracting party is at all times awarded only to the consignor, whereas the same status is not necessarily

[8] I. Koller, *op. cit.*, p. 965; J. Basedow, *op. cit.*, p. 937; K. Otte, in: F. Ferrari et al., *op. cit.*, p. 789; Teutsch, in: K.-H. Thume, *op. cit.*, p. 211; M. Clarke, *op. cit.*, p. 137.

[9] J. Basedow, *ibidem*; K. Otte, *ibidem*.

[10] J. Basedow, *op. cit.*, pp. 981–982.

[11] OJ RS, Nos. 126/03, 102/07 and 49/11.

awarded to the sender. In line with this interpretation, the notion of sender as referred to by CMR would correspond only with the ZPPCP-1 definition of consignor, however, not the notion of sender, for which ZPPCP-1 prescribes the defining element of handover of goods for carriage. However, Chapter IV of ZPPCP-1, which governs the transport of goods, does not attach the rights and obligations that are, per CMR, attached to the sender, to the consignor, but rather to the sender.[12] This poses the question of whether cases where the goods are not handed over to the carrier by the person who concluded the contract of carriage (i.e. consignor) demand that the status of sender (unlike per CMR) be awarded to the person who only hands over the goods to be transported, even if the person is not a party to the contract of carriage. With regard to the definition of the sender as the "consignor or person who hands over the goods for carriage on grounds of a contract of carriage concluded with the carrier", the answer to said question may *prima facie* appear affirmative.[13] However, it is imperative to note that the defining elements of the term "sender" do not only encompass the act of handing over goods for carriage, but also that the goods shall be handed over "on grounds of a contract concluded with the carrier". Yet it still remains unclear when and how a person who is not a party to the contract of carriage could hand over goods on grounds of a contract of carriage, as

[12] The term "consignor" referred to in Chapter IV of ZPPCP-1, which governs the transport of goods, was not used in the chapter prior to the amendment ZPPCP-1A (OJ RS, No. 102/2007); the only mention of the term came in the chapter governing passenger transport. Amendment ZPPCP-1A introduced the notion of "consignor" to the new Article 24(2) of ZPPCP-1 and the new Article 83(2) of ZPPCP-1 under provisions on the joint-and-several liability of the consignor and sender with regard to the freight fee in the event of the consignor and sender both concluding a contract of carriage with the carrier. After the enactment of the Act Amending the Road Transport Act – ZPCP-2C (OJ RS, No. 49/2011), Article 24(2) ZPPCP-1 was deleted, whereas the Road Transport Act (ZPCP-2; OJ RS, Nos. 131/06, 5/07, 123/08, 28/10, 49/11, 40/12, 57/12, 39/13 and 92/15) was supplemented with a new Article 110a, stipulating joint-and-several liability of the consignor, sender and consignee with regard to the payment of the freight fee. Amendment ZPPCP-1A was criticised during the legislative procedure, with the majority of criticism directed at the lack of clarity in defining the situation where the contract of carriage is concluded by the carrier on one side and the consignor and sender on the other. Criticism was also related to the fact that the relationship between the consignor (freight forwarder) and the sender, if the sender and consignor are not the same person, is commonly regulated by a side agreement and not subject to the contract of carriage (*see* Report on draft of the Act Amending the Road Transport Contracts Act (ZPPCP-1A), dated 11 October 2007, National Assembly Reports, No. 101/2007, p. 7). Amendment ZPCP-2 was also the subject of heavy criticism and opposition (*see* materials on the adoption of ZPCP-2, available online at the National Assembly website, and Ujčič, *op. cit.*).

[13] This opinion is, in certain respects, corroborated also by case law – *see* Higher Court of Celje ruling No. Cpg 216/2014, 24 October 2014 and Higher Court of Ljubljana ruling No. II Cpg 1118/2014, 4 March 2015; moreover, it appears that the legislator based the adoption of the ZPCP-2C on this very opinion.

a contract concluded by third parties (i.e. the consignor and carrier) does not, in principle, create any obligations for that person.

Nowhere does the statutory definition contain the notion that the term sender is necessarily associated with the person for the account of whom the consignor concluded the contract of carriage with the carrier, and who therefore has commercial interest in the goods being transported. Even if the intent of the legislator were to define the sender, who is not the consignor, as the person (e.g. the seller who is obligated to send the goods to the buyer) for the account of whom the consignor (e.g. freight forwarder) concluded the contract of carriage by providing the interpretation that the sender shall be understood as the person who hands over to the carrier goods for carriage, the aforementioned intent could not be fully realized. If the freight forwarder would conclude the contract of carriage, and thus act as the consignor, and subsequently hand over the goods to the carrier, the freight forwarder would need to be regarded as the sender per the contract of carriage. The person for the account of whom the contract of carriage has been concluded (i.e. the seller) could thus only be regarded as the sender, if he himself would hand over to the carrier the goods for carriage. However, in the latter case, goods would not be handed over on grounds of a contract of carriage, but rather on grounds of the legal relationship with the freight forwarder. A fact to note in the aforementioned case is that the status of freight forwarder, who concludes the contract of carriage on his own behalf and for the account of his client (i.e. the seller), is equal to the status of a commission agent.[14] In the relationship arising from a freight forwarding contract it is understood that the rights and obligations arising from the contract of carriage, which the freight forwarder concluded for the account of his client, are held by the freight forwarder in relation to the carrier. In order for said rights and obligations to have a direct effect in relation to the client, the freight forwarder would need to transfer them to the client. By assuming that the client could take the freight forwarder's status of sender simply by handing over to the carrier the goods for carriage, this assumption would represent a significant departure from basic principles on which the freight forwarding contract is based.

If the contract of carriage were concluded for the purpose of performing the contract of sale, on grounds of which the buyer is obligated to take delivery of goods at the designated place of delivery (e.g. on grounds of the EXW rule), the buyer would act as the consignor of the carriage, whereas the goods would be handed over to the carrier by the seller. However, the buyer, as the consignor, would not enter into the contract of carriage for the account of the seller,

[14] Article 853 OZ in relation to Article 894(1) OZ.

but rather for his own account. The buyer could also arrange the transport of goods by commissioning a freight forwarder to organize the transport. In this case, the freight forwarder would act as the consignor and conclude the contract of carriage (on his own behalf) for the account of the buyer. Neither in the first nor the second scenario would the seller, who would hand over to the carrier goods for carriage, enter any obligational relation with regard to the relationship arising from the contract of carriage, and might not even be aware of the internal relationship between the buyer and carrier. The carrier, acting as the servant of the buyer in relation to the fulfilment of the buyer's obligation to take delivery under the contract of sale, would take over the goods from the seller. The only obligational relation between the seller and the buyer in the example described above would arise only from the contract of sale, whereas the seller would fully fulfil his obligation from the sale by placing the goods at the disposal of the buyer or carrier. The seller would namely hand over the goods to the carrier on grounds of the contract of sale, not contract of carriage. A situation where the contract between the carrier and buyer would automatically bring forth direct effects for the seller, without the seller even having the option of expressing his volition with regard to the acceptance of rights and obligations of the sender arising from the contract of carriage, or without even being aware of the existence and subject matter of the contract of carriage, would contravene the basic principles of the law of obligations. On the other hand, such an automatic transfer of sender's rights to the seller would also represent an encroachment on the rights of the buyer as the party to the contract of carriage. By entering the position of sender, the seller may namely acquire any and all rights ZPPCP-1 grants to the sender – he may claim to be issued a consignment note, enter particulars into the consignment note (on his own behalf and for his own account), and claim the right to dispose of the goods during transit,[15] even though his rights to the goods and his liability for the goods as per the contract of sale would cease already with the fulfilment of the obligation to deliver and the passing of risk to the buyer.

Last but not least, the seller may also perform the contract of sale by having another person who keeps possession of the goods hand over the goods to the carrier (e.g. the storer, if the storage facility is the place of delivery designated in the contract of sale). This person is not a party to either the contract of sale or the contract of carriage, as he keeps a legal relationship only with the seller. The obligation of said person to hand over goods to the buyer or another person who takes over the goods for the buyer (i.e. carrier) does not arise from the contract of sale, but rather from the legal transaction concluded with the seller (contract of storage). If this person were to enter the position of sender, this

[15] Article 57 ZPPCP-1.

would lead to an absurd situation where the rights of the sender arising from the contract of carriage could be exercised by a person who has no obligational relation with the consignor. Moreover, such a situation would assume that this person carries obligations that are, per the contract of carriage, commonly carried by the sender.

It is my opinion that the status of sender and the rights and obligations associated therewith as per Chapter IV of ZPPCP-1 cannot be related solely to the act of handing over the goods for carriage. Moreover, the notion of sender, as defined by the eighth indent of Article 3 ZPPCP-1, cannot be interpreted in that manner either. The latter is clearly suggested by the linguistic interpretation of the cited provision, which entails two defining elements of the term sender: "on grounds of a contract of carriage" and "hands over goods for carriage". If goods are handed over to the carrier by a person who is not a party to the contract of carriage, and the obligation of that person to hand over goods arises from a different legal transaction (e.g. contract of sale, freight forwarding contract, contract of storage), the first defining element is not given. Thus the linguistic interpretation alone disproves the notion that the status of sender per contract of carriage can only be held by the person handing over the goods to the carrier. Such a notion would also represent a significant departure from basic principles of the law of obligations, most notably the principle of relativity of obligational relationship (privity of contract), according to which obligational relationships create legal effects only between contracting parties and do not have any effect on third parties.[16] Moreover, the notion would also represent a significant departure from international transport contract law (CMR).[17]

Hence, even under ZPPCP-1, the sender shall be understood as the person who concluded the contract of carriage with the carrier and handed over goods for

[16] An exception to the rule are contracts for the benefit of third parties (Articles 126 through 129 OZ) and the promise of action by a third party (Article 130 OZ). However, I am of the opinion that contracts of carriage, in relation to a person whose sole action is handing over goods for carriage and who is not a party to the contract of carriage, cannot be regarded as contracts for the benefit of a third party or contracts that impose a burden on a third party in terms of OZ provisions cited above. A person cannot be regarded as having accepted the rights and obligations of the sender arising from the contract of carriage solely based on the fact that this person handed over goods for carriage. Moreover, the fact that the consignor did not hand over to the carrier goods for carriage himself cannot be applied as the basis to consider that the contract of carriage established a right for the benefit of a third party in terms of Article 126 of OZ or that the consignor relinquished his rights as the sender under the contract of carriage.

[17] As referred to in the interpretation of Article 3 of the ZPPCP-1 Draft, one of the reasons ZPPCP-1 was enacted was the intent to harmonize provisions of the former ZPPCP (OJ SFRY, No. 2/74) with CMR. Moreover, the meaning of terms used in ZPPCP-1 was to be harmonized with CMR (*see* Road Transport Contracts Act Draft – ZPPCP-1, 1st reading draft dated 3 July 2003, National Assembly Reports, No. 62/2003, p. 19).

carriage on grounds of covenants taken in the contract of carriage. In line with this interpretation, the meaning of the notion of sender corresponds with the meaning of the notion of consignor. Even if the goods are handed over to the carrier by another person, this person does not acquire the status of sender in relation to the carrier on the basis of the act of handing over goods alone, as it is understood that the goods were handed over on behalf of the sender. In terms of the relationship between the parties to the contract of sale and contract of carriage, the aforementioned interpretation is of material importance in cases where the contract of carriage is concluded by the buyer, whereas the goods to be transported are handed over to the carrier by the seller. In this case, the seller does not appear as the sender, as the buyer is considered both the sender and the consignor in relation to the carrier.

2.1.2. Carrier

A carrier is a person who, on grounds of the contract of carriage, undertakes to transport goods from the place of dispatch to the place of destination for reward and deliver the goods to the consignee at that location.[18] In order for a contract of transport of goods to be regarded as a contract of carriage, it is immaterial whether the carrier provides transport services as part of his regular (commercial) activity, as neither Slovene law nor CMR regard the matter as material in terms of the law of obligations.[19] However, payment of a reward for the services rendered is considered an essential component of the contract.[20]

Both Slovene law and CMR stipulate that the carrier is, in principle, not obligated to perform the carriage himself, but is allowed to commission the carriage to third parties, who are then, in relation to the beneficiary of the contract of carriage, regarded as servants of the carrier. In terms of the law of obligations, it is not even necessary for the person who undertakes to perform the carriage to have available any appropriate means of transport[21] or to perform any part of the carriage himself. The carrier may commission the entire carriage to

[18] Article 666(1) OZ and Article 671 OZ; eleventh indent of Article 3 ZPPCP-1 and Article 24 ZPPCP-1.

[19] M. Clarke, *op. cit.*, p. 23; F. Ferrari, in: F. Ferrari et al., *op. cit.*, p. 759; J. Basedow, *op. cit.*, p. 938. In Slovene law, special terms for services of transport of goods by road are provided for by certain other regulations (*see* Articles 19 and 32a ZPCP-2).

[20] V. Kranjc, in: M. Juhart and N. Plavšak (eds.), *op. cit.*, p. 1136; S. Cigoj, *op. cit.* (1987), p. 25; S. Cigoj, *op. cit.*(1985), p. 1881; J. Basedow, *op. cit.*, p. 892; F. Ferrari, in: F. Ferrari et al., *op. cit.*, p. 759; M. Clarke, *op. cit.*, p. 55; H. de la Motte and J. Temme, in: K.-H. Thume, *op. cit.*, p. 84; R. Herber and H. Piper, *op. cit.*, p. 69.

[21] However, pursuant to Article 20 ZPCP-2, a condition precedent for obtaining a licence to transport goods by road is the ownership or right of use of at least one motorized vehicle for each respective carriage type, registered in the Republic of Slovenia.

another person. Nonetheless, he remains liable as a carrier towards the beneficiary of the contract of carriage.[22]

2.1.3. Consignee

ZPPCP-1 defines the consignee as the person entitled to take delivery of goods, handed over for carriage, in the designated place of delivery.[23]

A similar definition is provided for by Article 671 OZ, which defines the consignee as the person to whom the carrier is obligated to hand over the goods he took on for carriage at a certain location.

CMR does not expressly define the term consignee, however, CMR provisions allow for the conclusion that the consignee shall be understood as the person to whom the carrier is obligated to deliver the goods taken on for carriage in the place designated for delivery.[24]

The contract of carriage may also be concluded by the person entitled to take delivery of the goods in the designated place of delivery (e.g. the buyer for purposes of transporting goods from the seller's place of business to the buyer's place of business). In this case, the consignee also acts as a party to the contract of carriage and holds both the status of sender and consignee. Most commonly, though, the sender and consignee are not the same person.[25] The sender designates the consignee either when concluding the contract of carriage or at a later stage.[26] The consignee is not yet a party to the contract of carriage at the stage of conclusion, but rather enters the contract later. In comparison with parties to other types of contracts, the consignee therefore holds a special status.

The contract of carriage does not create an obligation for the consignee to enter into the contract, but rather confers the right to do so.[27] According to Cigoj, the contract of carriage is, in relation to the consignee, a contract for the benefit of a third party.[28] On grounds of the contract of carriage, the consignee is given the right to accept at a certain time the benefits arising from the contract and thus enter into the contract. However, he may also refuse to accept the benefits. The consignee does not breach his obligations by not entering the contract of carriage, as he is not a party to the contract prior to entering it. The contract of

[22] M. Clarke, *op. cit.*, p. 23; F. Ferrari, in: F. Ferrari et al., *op. cit.*, p. 759.

[23] Tenth indent of Article 3 ZPPCP-1.

[24] Article 13 CMR.

[25] V. Kranjc, *op. cit.*, pp. 38 and 39.

[26] *Ibidem*, p. 38.

[27] *Ibidem*, p. 39.

[28] S. Cigoj, *op. cit.* (1985), p. 1881.

carriage does not create any obligations for the consignee, but only confers a right. However, the refusal to enter the contract (e.g. refusing to take delivery of goods sent by the seller to the buyer through the carrier in a sale involving carriage) denotes a breach of obligations arising from the legal transaction that served as grounds for the conclusion of the contract of carriage for his benefit (i.e. contract of sale, concluded with the sender – seller.)

The right of the consignee to enter into the contract of carriage is generally associated with acquiring the right to dispose of the goods.[29] The consignee commonly acquires the right of disposal when the goods arrive to the designated place of delivery. At arrival, the consignee also acquires the right to claim delivery from the carrier and to claim the second copy of the consignment note.[30] Only after exercising said rights does the consignee formally enter into the contract. In certain cases, the consignee acquires the right to dispose of the goods and, hence, the right to enter into the contract, at an earlier stage. This occurs when this right is expressly entered into the consignment note by the sender,[31] whereas Slovene law also confers said right to the consignee when a bearer negotiable consignment note is issued and the consignee is considered its rightful holder.[32] Under ZPPCP-1, the consignee acquires the right to dispose of the goods also in the event of the sender handing over his copy of the consignment note to the consignee,[33] whereas under CMR, the consignee acquires the right if he is handed the second copy of the consignment note.[34] Pursuant to the second sentence of Article 13(1) CMR, the consignee may also enter into the contract without prior fulfilment of terms required to acquire the right to dispose of the goods as per Article 12 CMR. This occurs if the goods were lost prior to arrival to the designated place of delivery, or if the goods have arrived after the expiry of the period provided for by Article 19 CMR.

The acquisition of rights arising from a contract of carriage is inextricably linked to the assumption of obligations of the consignee which arise from the contract, and which are again linked to rights acquired.[35] Despite the contract of carriage stipulating the commitment of the sender to pay the carriage fee, by entering the contract the consignee commonly assumes the obligation to pay

[29] V. Kranjc, in: M. Juhart and N. Plavšak (eds.), *op. cit.*, p. 1171.

[30] Article 60(3) ZPPCP-1; Article 12(2) CMR in relation to Article 13(1).

[31] Article 60(1) ZPPCP-1; Article 12(3) CMR.

[32] Article 61(1) ZPPCP-1.

[33] Article 60(2) ZPPCP-1.

[34] Article 12(2) CMR.

[35] V. Kranjc, *op. cit.*, p. 39; S. Cigoj, *op. cit.* (1985), p. 1811.

the carriage fee and any and all sums associated with the goods.[36] If the consignee fails to pay, the carrier may refuse to hand over the goods.[37]

Both under ZPPCP-1 and CMR, the consignee bears certain obligations associated with taking delivery of goods, most commonly the obligation to examine the goods upon delivery and the obligation to give timely notice of loss or damage. In relation to the carrier, the consignee is not obligated to fulfil these obligations, however, due fulfilment of said obligations is mostly for his benefit, as well as for the benefit of the sender. In the event of loss of or damage to the goods during transit, the success of the claim or action against the carrier is contingent upon giving timely and correct notice of reservations regarding the loss of or damage to the goods.[38]

3. THE ROLE OF PARTIES TO THE CONTRACT OF SALE IN THE CONTRACT OF CARRIAGE AND VICE VERSA

In order to define the status of the seller, carrier and buyer in respective types of contractual relationships and the rights and obligations associated therewith, it is essential to consider the following circumstances and elements:

- Designated place and manner of performance of the seller's obligation to deliver.
- Which party to the contract of sale concluded the contract of carriage?
- Does the obligation to conclude the contract of carriage arise from the contract of sale itself?
- Time of passing of risk per the contract of sale and contract of carriage.

The following paragraphs provide a breakdown of the role of parties to one contract in relation to the other contract with regard to the designated place of delivery and the subject matter of the seller's obligation to deliver.

3.1. Designated place of delivery is the seller's place of business

This scenario entails situations where the contractually designated place of delivery is the seller's place of business (e.g. Incoterms 2010 EXW rule[39]) and the

[36] Article 41(1)(10) ZPPCP-1 in relation to Articles 677 and 688 OZ; Article 110a(5) ZPCP-2; *see also* Maribor High Court Ruling No. Cpg 163/1996, 4 March 1997, Supreme Court Ruling No. I Cpg 362/1999, 23 March 2000, and Supreme Court Ruling No. I Cpg 1407/2003, 23 June 2005; Article 6(1)(j) CMR, Article 13(2) CMR; *see also* J. Temme, in: K.-H. Thume, *op. cit.*, p. 316 et seq.; R. Herber and H. Piper, *op. cit.*, p. 218 et seq.; I. Koller, *op. cit.*, p. 1011 et seq.; J. Basedow, *op. cit.*, p. 1003 et seq.

[37] Article 85(1) ZPPCP-1, Article 686(3) OZ; Article 13(2) CMR.

[38] Article 70 ZPPCP-1; Article 30 CMR.

[39] ICC Publication No. 715, International Chamber of Commerce, Paris 2010.

contract of sale does not stipulate the obligation of the seller to arrange for the carriage of goods to the buyer, as well as situations where, in the absence of a contractual agreement, the seller's place of business is assumed to be the designated place of delivery on grounds of Article 31(c) of the United Nations Convention on Contracts for the International Sale of Goods (CISG)[40] or Article 451(1) OZ. Unless otherwise agreed in the contract of sale, the buyer is not obligated to take delivery of goods himself, but may authorize a third person (i.e. carrier) to take delivery of goods from the seller and transport the goods to the place designated by the buyer. In the aforementioned case, the conclusion of the contract of carriage is not an obligation that would arise from the contract of sale, whereas the selection of the manner of taking delivery and the carriage of goods to the designated place fall under the scope of the buyer. However, the contract of sale may include the stipulation that the buyer is bound to arrange for the carriage of goods from the seller to the designated place and conclude a contract of carriage to fulfil that obligation (e.g. by incorporating the Incoterms 2010 FCA rule). Even though the carrier takes on and performs the carriage for the buyer, his position is not identical to the position of the carrier per the contract of sale involving carriage in the sense of Article 31(a) CISG or Article 452 OZ.[41] With regard to the buyer's obligation to take delivery per the contract of sale, the carrier arranged by the buyer acts as the servant of the buyer. The buyer is therefore obligated to arrange that the carrier take any and all actions related to the takeover of goods, which the buyer would be bound to take himself per the contract of sale, and make any claims as to potential reservations regarding the lack of conformity of which notice shall be given upon taking over the goods.

With regard to the contract of carriage, the seller, who hands over the goods to the carrier, appears on the side of the sender (i.e. buyer) as his servant in relation to the handover of goods for carriage. In the relationship arising from the contract of carriage, the seller does not act as the sender, as he is not a party to the contract of carriage. The status of sender is held by the buyer, who also acts as the consignee (if he does not designate another person as the consignee in the contract of carriage or at a later stage, under the right to dispose of the goods).

Irrespective of whether the goods are sought with the seller by the buyer or by the carrier, the seller is bound to perform his obligation to deliver in the manner stipulated by the contract of sale. If the designated place of delivery is the seller's place of business, the seller, per CISG, fulfils his obligation by placing

[40] Vienna, 11 April 1980.

[41] *Cf.* U. Huber, in: P. Schlechtriem, *op. cit.*, p. 319; C. Widmer Lüchinger, in: P. Schlechtriem and I. Schwenzer, *op. cit.*, p. 517.

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.[42] However, the risk passes to the buyer only when he has taken over the goods, unless he does not take over the goods in due time and he commits a breach of contract by failing to take delivery.[43] Pursuant to OZ, the seller fulfils his obligation to deliver per the contract of sale by placing the goods at the buyer's disposal (in the presence of the buyer) at his place of business and by taking all actions necessary for the buyer to take over the goods. The risk passes to the buyer when the goods are handed over to the buyer, whereas the goods are considered to be taken over if the buyer has taken control of the goods, despite not taking physical possession. If the buyer does not take over the goods in due time, the risk passes when the buyer becomes delayed.[44] If the parties to the contract of sale name the seller's place of business as the designated place of delivery by incorporating the Incoterms 2010 EXW rule, the seller fulfils his obligation to deliver by placing the goods at the disposal of the buyer at his place of business. The risk passes at the moment when goods are placed at the disposal of the buyer.

In all aforementioned cases, risk passes to the buyer prior to loading the goods onto the means of transport arranged by the buyer. Unless otherwise agreed, and unless a different arrangement arises from standard business usage or practice between the parties, actions necessary for the buyer to take over the goods shall be taken by the buyer. The seller is thus not obligated to take any action for the loading of goods onto the vehicle of the carrier. However, under both CMR and Slovene law, the carrier is not obligated to load the goods onto the vehicle, unless otherwise agreed by the parties, as the loading of goods is the obligation of the sender. If the buyer arranges for the carrier to take over the goods, he is bound to ensure due arrangement regarding the loading of goods. In this case, the conclusion of the contract of carriage is commonly associated with the subject matter of the contract of sale, as the buyer concludes the contract to (*inter alia*) perform his obligation to take delivery of goods as per the contract of sale. If the obligation to load goods is not assumed by the seller on grounds of the contract of sale[45] or other legal transaction, the buyer is bound to arrange that the carrier will take over the goods from the seller and load the goods onto the vehicle, or arrange for another person to fulfil this obligation. In the relationship between the seller and buyer the risk passes to the buyer as soon as a third party takes over the goods for the buyer for the purpose of loading (or, as per the Incoterms 2010 EXW rule, as soon as the goods have

[42] Article 31(c) CISG.

[43] Article 69(1) CISG.

[44] Article 437 OZ.

[45] E.g. by incorporating the Incoterms 2010 FCA clause.

been placed at the disposal of the buyer), regardless of who actually performs the loading and on what grounds. In the relationship arising from the contract of carriage, the time of passing of risk is contingent upon the interpretation of when the carrier took over the goods for carriage.[46] If the carrier assumed the obligation to load as his obligation per the contract of carriage, it is to be understood that he took over the goods for carriage as soon as he took over the goods for the purpose of loading. However, if the carrier assumed the obligation to load on different legal grounds, or if the buyer arranged for a third person to load the goods, it is to be understood that the carrier, under rules governing carrier's liability, is only liable for the goods from the time when the goods were loaded onto the vehicle.

In relation to the seller, the carrier, who actually takes over the goods, acts as the servant of the buyer in relation to the buyer's obligation to take delivery arising from the contract of sale. The carrier should therefore also fulfil the buyer's obligation to examine the goods upon takeover (on behalf of the buyer) and the buyer's obligation to give notice to the seller on the lack of conformity of the goods that need to be noted at takeover. The mere fact that the carrier takes over the goods for the buyer does not impact the obligation of the buyer to examine the goods, as the seller is entitled to expect that the buyer will carry out the examination of goods, which is considered to be practicable to carry out at the time of takeover, at that time.[47] The deadline to give notice on reservations regarding the lack of conformity of the goods is also related to the time considered practicable to carry out the examination. However, if the contract of sale stipulates that the buyer will not take over the goods himself but will rather arrange for the goods to be taken over by an independent carrier, or if such an arrangement arises from standard business usage or business practice between the parties, it shall be understood that, as provided for by both Article 38(2) CISG and Article 461(1) OZ, examination has been deferred until after the goods have arrived at their destination. In the aforementioned case, the situation regarding the examination of goods and the noting of lack of conformity is identical to sale involving carriage.

The examination of goods and giving notice on the lack of conformity of the goods at takeover, performed in the manner and within deadlines stipulated by the contract of sale, are not obligations that burden the carrier on grounds of rules governing the contract of carriage, unless otherwise agreed by the

[46] It is to be understood that the carrier takes over goods for carriage as soon as he has taken command over them or as soon as he has taken over the goods for the purpose of performing the contract of carriage. M. Clarke, *op. cit.*, p. 78; K.-H. Thume, *op. cit.*, p. 368; I. Koller, *op. cit.*, p. 1036; J. Basedow, *op. cit.*, p. 1044; R. Herber and H. Piper, *op. cit.*, p. 277.

[47] Articles 461(1) and 461(2) OZ; Article 38(1) CISG.

parties. However, the omission of said actions may have material effects for the buyer, most notably in the form of the buyer losing his right to rely on lack of conformity of goods.[48] In order to protect his rights arising from the contract of sale, it is advisable for the buyer to expressly agree on the matter with the carrier in the contract of carriage. Despite the fact that the obligation to examine the goods when taking them over for carriage falls on the carrier per rules governing the contract of carriage, the omission of examination and the omission of entering reservations into the consignment note does not impact the rights of the carrier arising from the contract of carriage. The entry of reservations carries only evidentiary effect,[49] however, the carrier has the right to decide against entering any reservations. Hence, the buyer cannot rely on the carrier examining the goods at takeover and noting any reservations simply due to the carrier's intention to fulfil his obligations arising from rules governing the contract of carriage. Moreover, the extent and scope of the examination per rules governing the contract of carriage needn't necessarily comply with the extent and scope of examination which should be carried out by the buyer per rules governing the contract of sale.[50]

The carriage of goods is performed at the risk of the buyer. In the relationship arising from the contract of sale, damage to or loss of goods during transit burden the buyer.[51] However, the buyer can, as the consignee (and sender) per the contract of carriage, bring claim or action against the carrier on grounds of the carrier's liability for loss or damage pursuant to rules governing transport law.

Parties to the contract of carriage may agree to issue a consignment note on the carriage of goods, which is commonly signed by the carrier and sender when goods are handed over for carriage. If the contract of carriage is concluded by the buyer, whereas goods are handed over to the carrier by the seller, the sender (i.e. buyer) is usually not present at the handover of goods, hence the seller is not obligated to fill in the consignment note on grounds of the contract of sale (unless otherwise stipulated by the contract, e.g. by incorporating the Incoterms 2010 FCA rule[52]). If, in the case described, the parties to the contract of carriage agree on the issuance of a consignment note, it is appropriate

[48] Article 461 OZ; Article 39 CISG.

[49] Article 45 ZPPCP-1; Article 9 CMR.

[50] Pursuant to transport law, mandatory examination is limited to examining the apparent condition of the goods and their packaging, the number of packages and their marks and statements (Article 44(1) ZPPCP-1; Article 8(1) CMR).

[51] An exception to this rule applies, if the cause of the loss of or damage to goods originates from the sphere of the seller.

[52] Pursuant to Points A8 and A10 of the Incoterms 2010 FCA rule, the seller must render the buyer every assistance in obtaining a transport document and render the buyer

for the buyer to agree with the seller on filling in the note.[53] In relation to the carrier the seller acts as the representative of the buyer (sender) in filling out and signing the consignment note, and shall receive the first copy of the consignment note, which is intended for the sender. By receiving the consignment note, the seller does not acquire an independent right to dispose of the goods which is associated with the holding of the first copy of the consignment note, but rather holds the consignment note for the buyer (sender). If the seller acts as the representative of the buyer (sender), the situation referred to in Article 59 ZPPCP-1, which stipulates that the handover of the consignment note to another person causes the sender's right to dispose of the goods to cease, does not occur. In certain cases, the right to dispose of goods per CMR is contingent upon producing the first copy of the consignment note, onto which instructions given to the carrier shall be entered as well.[54] In order for the buyer to exercise his right of disposal, he needs to ensure that he receives the original first copy of the consignment note from the seller, or exercise his right of disposal through the seller as his representative.

3.2. Designated place of delivery differs from the seller's place of business

Situations where the parties to the contract of sale name a place that is not the seller's place of business as the designated place of delivery can vary. This scenario entails cases where the contract of sale stipulates a certain destination to which the seller is obligated to transport the goods and said destination is thus regarded as the designated place of delivery at which the buyer will take delivery of goods, as well as cases where the goods shall be delivered at the place of production or other place where goods are held, and delivery therefore does not require any transport.

The former scenario entails situations where the contractually designated place of delivery is a location that is neither the seller's place of business nor a location where the goods are kept (e.g. freight terminal, border crossing, buyer's place of business). In this case, the seller is obligated to arrange for the carriage of goods, either by own means of transport or by concluding a contract of carriage, to the designated place of delivery, and deliver at this location the goods

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any assistance in obtaining any document or information the buyer may require for the transport of goods.

[53] If the parties are in a longer-term business relationship, said contractual obligation of the seller may also arise from standard business practice established between the parties and needn't be expressly agreed on in the contract. The same also applies when said obligation of the seller arises from standard business usage (Article 12 OZ; Article 9 CISG).

[54] Article 12(5)(a) CMR.

to the buyer in the manner stipulated by the contract of sale. If the manner of delivery is not expressly stipulated by the contract and the contract is subject to CISG, delivery is to be regarded as performed when the goods are placed at the disposal of the buyer in the designated place of delivery.[55] Pursuant to Article 69(2) CISG, risk passes to the buyer when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place. The aforementioned situation is comparable to the situation where the parties incorporate Incoterms 2010 rules DAT, DAP or DDP into the contract. Under DAT, the seller is obligated to conclude a contract of carriage for the goods to be transported to the terminal at the agreed place of destination, whereas delivery is performed when the seller unloads the goods from the arriving means of transport and places the goods at the disposal of the buyer at the terminal. This is also the time when risk passes to the buyer. Under DAP and DDP, the seller is obligated to conclude a contract of carriage of goods to the designated place of delivery, whereas the delivery is performed when the seller places the goods at the disposal of the buyer on the arriving means of transport ready for unloading. This is again the time when risk passes to the buyer. A similar situation occurs under the Incoterms 2010 FCA rule, where, if the seller's place of business is not the designated place of delivery, delivery is performed when goods are placed at the disposal of the buyer on the seller's arriving means of transport ready for unloading, with the risk passing at the time of placing goods at disposal. If the contract of sale is interpreted under provisions of OZ, delivery in the designated place of delivery is performed, when the seller makes the goods available to the buyer for unloading, whereas the risk passes at the time when the buyer takes delivery of the goods.

In all instances referenced above, the buyer is obligated, per the contract of sale, to fulfil his obligation to take delivery at the place of delivery. Unless otherwise agreed, the buyer may authorize a third party – carrier – to take delivery of goods, with the carrier subsequently transporting the goods to the designated place of destination. If the seller arranges for the goods to be transported to the place of delivery by a carrier, whereas the buyer also arranges for the delivery to be taken by a carrier, both carriers are considered servants of their clients in relation to the other party of the contract of sale. The senders, who are simultaneously the parties to the contract of sale, shall ensure that, in order to fulfil their respective obligations arising from the contract of sale, the contracts they conclude with respective carriers are of a nature and subject matter which allows the carriers to duly fulfil the clients' obligations to hand over and take over the goods per the contract of sale. The seller should there-

[55] I. Saenger, in: F. Ferrari et al., *op. cit.*, p. 397; U. Huber, in: P. Schlechtriem, *op. cit.,* p. 340; C. Widmer Lüchinger, in: P. Schlechtriem and I. Schwenzer, *op. cit.*, p. 534.

fore ensure that the contract of carriage concluded with the carrier (who, in relation to the buyer, is acting as the servant of the seller) stipulates the obligation of the carrier to take all actions necessary to deliver goods to the buyer in order for the seller's obligation to deliver arising from the contract of sale to be duly fulfilled. Similarly, under the contract of carriage concluded by the buyer, the carrier (who, in relation to the seller, is acting as the servant of the buyer) shall (in order for the buyer's obligation to take delivery to be duly fulfilled) be obligated to take delivery in accordance with the contract of sale.

If the contract of sale alone stipulates that the carrier will take over the goods in the designated place of delivery on behalf of the buyer, and such an arrangement is in compliance with the contract of sale, the seller may, as the sender in the relationship arising from the first contract of carriage, directly name the carrier arranged by the buyer as the consignee of the contract of carriage. Most commonly, however, the seller will name the buyer as the consignee. In the aforementioned case, the carrier arranged by the buyer may take over the goods as a representative of the buyer. The buyer, as the rightful consignee under the right to dispose of the goods, may later name the carrier as the consignee, meaning that the buyer's carrier acts as the direct consignee in the relationship arising from the first contract of carriage. From the viewpoint of the first carrier, it is of material importance that he deliver the goods to the rightful consignee, as erroneous delivery (i.e. delivery to a person who is not the rightful consignee) constitutes a breach of the contract of carriage and may be regarded as a loss of goods for which the carrier is liable under rules governing carrier's liability.[56]

In all instances referenced above, the loading of goods to a means of transport provided by the buyer does not fall under obligations of the seller per the contract of sale, but rather under obligations of the buyer. Any and all actions associated with taking delivery of and loading goods onto the means of transport arranged by the buyer burden the buyer. With regard to loading, the buyer is bound to agree on the matter with the carrier or arrange a third party to carry out the loading. Rules and obligations described in the previous chapter apply to this instance as well.

If the seller is bound to deliver the goods by placing them at the buyer's disposal on his means of transport, the buyer is also bound to unload the goods from the seller's means of transport and thus carries the risk during unloading (e.g. per Incoterms 2010 FCA, DAP and DDP rules). However, if the seller is obligated to deliver the goods unloaded (e.g. per the Incoterms 2010 DAT rule), the seller is obligated to unload the goods at his own risk. In this case, the

[56] I. Koller, *op. cit.*, p. 266; K.-H. Thume, *op. cit.*, p. 392; R. Herber and H. Piper, *op. cit.*, p. 272.

seller is bound to ensure that the carrier unloads the goods from the arriving means of transport or bound to conclude an appropriate contract with a third party for the unloading of goods.

In the relationship arising from the contract of sale, the seller is liable for any lack of conformity of the goods which exists at the time when the risk passes to the buyer.[57] If the seller arranges for a carrier to transport the goods to the place of delivery, the carriage is performed at full risk of the seller. Even though the seller is then entitled to bring claim or action against the carrier, he may do so only under rules governing transport law, pursuant to which the right to bring claim or action may be contingent upon the consignee having duly sent reservations regarding the damage or loss within a reasonable time.[58] It is imperative to note that effective reservation on grounds of damage to or loss of goods may only be given by the consignee, not the sender, unless the sender is acting as the representative of the consignee on grounds of valid power of attorney. When acting as the sender per the contract of carriage, it is thus material for the seller that the consignee (i.e. buyer or buyer-arranged carrier) examines the goods upon delivery and duly sends his reservations to the seller or notes his reservations directly to the carrier.[59] In order to best protect his rights arising from the contract of carriage, it is therefore advisable for the seller to expressly agree on the matter with the buyer.

The place of delivery which is not the seller's place of business may also be designated or assumed as the location where the goods are kept at the time of conclusion of the contract of sale or at the time when the obligation to deliver shall be fulfilled. The latter mostly refers to instances where goods are yet to be produced and the place of delivery is thus designated as the place where goods will be produced or manufactured (e.g. factory, plantation), as well as to instances where goods are kept at a certain location and this location is named as the designated place of delivery (e.g. storage facility, different place of business of the seller). If the place of delivery is not stipulated by the contract, and the parties are aware of the location where the goods are kept or where the goods should be produced, both OZ and CISG refer to the assumption that this location shall be considered the place of delivery.[60] If the contract of sale falls under provisions of CISG, the obligation of the seller in the instances referenced above is fulfilled when he places the goods at the disposal of the buyer at the

[57] Article 458(1) OZ; Article 36(1) CISG.

[58] With regard to damage to goods, this applies in absolute terms under Slovene law per Article 70(3) ZPPCP-1, whereas under CMR, this applies only in instances referred to in Article 30(1) CMR.

[59] Article 70 ZPPCP-1; Article 30 CMR.

[60] Article 31(b) CISG; Article 451(2) OZ.

place of delivery designated as per the aforementioned assumption. Unlike in instances where the designated place of delivery is the seller's place of business, the risk passes to the buyer when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal, on condition that the goods are clearly identified.[61] Similarly, delivery per Incoterms 2010 EXW is performed when the seller places goods at the disposal of the buyer, which also denotes the passing of risk. Under OZ, the fulfilment of the obligation to deliver and the passing of risk are treated identically to instances where the designated place of delivery is the seller's place of business, meaning that the risk passes to the buyer only after the goods have been handed over.[62] The buyer may arrange for a carrier to take over the goods and deliver them to the final destination in these instances as well. As is the case with instances where the designated place of delivery is the seller's place of business, the carrier is acting as the servant of the buyer in relation to the seller.

In the relationship arising from the contract of carriage, concluded by the buyer for purposes of transporting goods from the place of delivery to the place of destination, the buyer is acting as the sender, whereas the goods are handed over to the carrier (for the buyer) by the seller or third person who keeps the goods. In relation to the carrier, the seller is acting on the side of the buyer and does not have the status of sender, as he is not a party to the contract of carriage. The buyer (or a third person designated by the buyer) is acting as the consignee. With regard to the contract of carriage, the carrier, under rules governing carrier's liability, is liable for the loss of or damage to goods only after taking over the goods for carriage in accordance with the contract of carriage. Under CISG, risk passes to the buyer as soon as the goods have been placed at his disposal and he became aware of goods being placed at his disposal, therefore, in terms of the contract of sale, the buyer carries the burden of any loss of or damage to the goods caused prior to the carrier taking over the goods for carriage. Similar consequences apply also when the contract includes an EXW clause. As the seller fulfils his obligation to deliver simply by taking any and all actions that are necessary for the carrier to take over the goods and is commonly not bound to load the goods per the contract of sale, and since the carrier is not bound by rules governing the contract of carriage to load the goods onto the chosen means of transport, the buyer needs to expressly agree on the loading of goods onto the means of transport with the seller or carrier, or arrange for a third party to carry out the loading. Rules and obligations described in the previous chapter apply to this instance as well.

[61] Articles 69(2) and 69(3) a CISG.

[62] *See* Chapter 3.1.

With regard to the obligation of the buyer to examine the goods and give notice of any reservations as to the damage to or lack of conformity of goods, which the carrier (who, in relation to the seller, is acting as the servant of the buyer) should fulfil (on behalf of the buyer) in order to ensure the buyer's right to bring claim or action on grounds of lack of conformity pursuant to rules governing the contract of sale, rules and obligations described in the previous paragraph apply here as well. If goods are not handed over to the buyer-arranged carrier by the seller, but rather by a seller-arranged carrier or a third party who keeps the goods (e.g. storer, lessee, etc.) who is acting as a servant of the seller in the relationship arising from the contract of sale, the obligation to give notice on reservations, which applies at the takeover of goods, is commonly fulfilled by giving notice to the servant.

3.3. Delivery performed by handover to the carrier (sale involving carriage)

This scenario entails situations where the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, as well as situations where the contract of sale stipulates that the goods shall be handed over to the carrier at a particular place and the seller is bound to arrange for the carriage. If the contract falls under CISG and the place of delivery is not given, the seller fulfils his obligation to deliver by handing over the goods to the first carrier with whom he concluded the contract of carriage for the transport of goods to the buyer,[63] or when he hands over the goods to the carrier at a certain location. The risk passes to the buyer when the goods are handed over to the carrier.[64] Even if the contract falls under OZ, delivery to the buyer is performed when the seller hands over the goods to the first carrier (if the place of delivery is not given),[65]or hands over the goods to the carrier at a certain location, if said location is designated in the contract. The risk passes to the buyer when the goods are handed over to the carrier. If the parties incorporate Incoterms 2010 rules into the contract, the situation described in this chapter occurs with clauses CPT and CIP, according to which the seller is bound to conclude a contract of carriage for the transport of goods to a certain place of destination, whereas delivery is performed when the seller hands over the goods to the carrier on the designated date or within the designated time period. The risk passes to the buyer when the goods are handed over to the car-

[63] Article 31(a) CISG.

[64] First sentence of Article 67(1) CISG.

[65] Article 452 OZ.

rier. The situation described also occurs per the FCA rule, if the seller is bound to conclude or does conclude the contract of carriage.[66]

Despite the seller concluding the contract of carriage, the carrier, in cases referenced above, is part of the relationship arising from the contract of sale as an independent entity and is not acting as the servant of the seller in relation to the buyer. By taking over goods for the purpose of transport, the carrier does not fulfil the buyer's obligation to take delivery of the goods, as the buyer fulfils this obligation only after taking over the goods from the carrier at the place of destination. In this case, the taking of delivery per the contract of sale commonly coincides with the handover of goods to the consignee per the contract of carriage. In the relationship arising from the contract of sale, risk passes from the seller to the buyer when goods are handed over to the carrier and is thus borne by the buyer during transit.[67] In this case, the notion of "handover to the carrier" per the contract of sale overlaps with the notion of "takeover of goods for carriage" per the contract of carriage. In order to assess the subject matter of the "handover of goods to the carrier" as a means of fulfilment of the obligation to deliver per the contract of sale, it is material to observe the rules of the contract of carriage on the handover of goods to the carrier (or takeover of goods for carriage). These rules are also material in determining whether the obligation to load goods onto a means of transport falls on the seller as the sender, or whether the obligation to load falls on the carrier per the contract of carriage.

In terms of the contract of carriage, the seller is acting as the sender in relation to the carrier. The buyer, acting as the consignee, enters the relationship arising from the contract of carriage in accordance with rules governing transport law.[68] Pursuant to rules governing carrier's liability, the carrier is liable for the loss of or damage to the goods occurring between the time when he takes over the goods for carriage until he delivers them to the consignee (i.e. buyer).[69]

When the obligation to transport goods arises from the contract of sale alone, examination of goods may be deferred until the moment when the carrier hands over the goods to the buyer in accordance with the contract of carriage and the buyer has had the chance to examine the goods.[70] Performance of the deferred examination triggers the deadline to give notice on lack of conformity of the goods. In case of deferred examination, the examination of goods for the purpose of determining errors in performance of the contract of sale is not

[66] C. Widmer Lüchinger, in: P. Schlechtriem and I. Schwenzer, *op. cit.*, p. 534.

[67] Article 436(1) in relation to Article 452 OZ; Article 67 CISG.

[68] *See* Chapter 2.3.

[69] Article 74 ZPPCP-1; Article 17(1) CMR.

[70] Article 461(1) OZ; and Article 38(2) CISG.

performed by the carrier (as the servant of the buyer) when taking over the goods for carriage, but rather by the buyer when he takes delivery of the goods at the place of destination.

The carrier is, however, obligated to examine the goods when taking over the goods for carriage, as examination is the condition precedent for giving reservations per the rules governing the contract of carriage.[71] As the risk passes to the buyer when goods are taken over for carriage, and as the seller is liable for the lack of conformity of the goods which exists at the time when the risk passes to the buyer,[72] reservations noted by the carrier on grounds of the contract of carriage are material also in terms of the contract of sale. The position of the buyer, who holds the consignment note containing reservations noted by the carrier regarding the condition of the goods at takeover, is hereby made significantly easier. Even though the assumption that reservations regarding the condition of goods to which the sender agreed are accurate[73] and binding for the sender (i.e. seller)[74] applies only in the relationship arising from the contract of carriage, a consignment note containing such reservations has strong evidential value in the relationship arising from the contract of sale as well. Reservations also carry certain weight in the event when the seller did not expressly agree to be bound by them, however, their evidential value is not as strong. In any event, when determining the condition of goods on grounds of information in the consignment note at the takeover of goods for carriage, it is imperative to observe the extent of the examination the carrier is obligated to perform when taking over the goods. As the extent of the examination is limited to checking the apparent condition of the goods, the number of packages and their marks and numbers, the examination does not always allow the carrier to determine all deficiencies or lack of conformity of the goods at takeover. If the lack of conformity of the goods at takeover arises from the consignment note, especially if the seller expressly agreed to the reservations noted by the carrier, the situation, as a rule, falls under provisions of Article 465 OZ or Article 40 CISG, and the seller is not entitled to refer to the obligation of the buyer to give notice regarding the lack of conformity of the goods in due time or the obligation of the buyer to bring claim or action in due time.

In the relationship arising from the contract of sale, damage to goods caused after the goods have been handed over to the carrier is borne by the buyer, unless the underlying reason of the damage originated within the sphere of the seller. It is sometimes unclear whether damage to goods falls under the liability

[71] Article 44(1) ZPPCP-1; Article 8(1) CMR.

[72] Article 458(1) OZ; Article 36(1) CISG.

[73] Article 44(3) ZPPCP-1.

[74] Article 8(2) CMR.

of the carrier or under the liability of the seller and against whom the buyer is able to bring adequate claim or action, either under the contract of sale or as the consignee under the contract of carriage. In order to best protect his rights and interests, it is therefore most advisable for the buyer to give notice on reservations to both the carrier and the seller in due time, and decide at a later stage, after he has been able to collect additional evidence and investigate the underlying cause of damage to the goods, which claim or action to bring against which party. In cases where bringing claim or action against the carrier under the carrier's liability is also in the interest of the seller (as the sender), giving notice on reservations is important for the seller as well, especially because under transport law the capacity to give reservations is exclusive to the consignee.[75]

4. CONCLUSION

The contract of sale and the contract of carriage that the buyer or seller concludes with an independent carrier in order to fulfil his obligations arising from the contract of sale are two separate legal transactions that create separate rights and obligations, pertinent to each type of legal transaction, for the parties to each contract. However, the fact that the contract of carriage is concluded as part of the sale plays a most important role. Rights and obligations of all entities involved in the sale are thus intertwined and create a complex cluster of relationships. As the buyer does not receive the goods directly from the seller, seeing that the goods are handed over with the involvement of the carrier, a clear definition of roles respective parties hold in relation to the contract of sale and contract of carriage is significant both in terms of ensuring (correct) fulfilment of obligations per the contract of sale and contract of carriage, as well as in terms of defining the actions of respective parties which are necessary to ensure that beneficiaries of respective contracts are able to bring (successful) claim or action in the event of breach of contract. In certain cases, parties to one contract can actually be a part of the relationship arising from the second contract without being aware of it, whereas from the viewpoint of the other party to the second contract, they appear as servants of the first party to the second contract. A factor material to the assurance of rights of the parties of the first contractual relationship and to the correct fulfilment of their obligations is that the party on the side of which they appear in this contractual relationship makes them aware of their involvement. Moreover, it is also material that they reach due agreement with said party on the fulfilment of obligations borne by that party on grounds of this particular contractual relationship.

[75] J. Basedow, *op. cit.*, p. 1195; K. Demuth, in: K.-H. Thume, *op. cit.*, p. 760; I. Koller, *op. cit.*, p. 1158; R. Herber and H. Piper, *op. cit.*, p. 451.

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VLOGA SUBJEKTOV PRODAJNE POGODBE V POGODBI O PREVOZU BLAGA PO CESTI IN *VICE VERSA*

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Prodaja blaga je običajno povezana s prevozom blaga od prodajalca do kupca. Stranki prodajne pogodbe lahko prevoz opravita sami ali pa ga zaupata neodvisnemu prevozniku. V zadnjem primeru se v razmerje iz prodajne pogodbe vključi prevoznik, ki na podlagi sklenjene prevozne pogodbe omogoči izpolnitev prodajne pogodbe. Nekatere osebe tako nastopajo kot subjekti obeh pogodb, pravice in obveznosti, ki zanje izhajajo iz vsake posamezne pogodbe, pa tvorijo splet med seboj povezanih razmerij. Za opredelitev teh pravic in obveznosti je bistvena opredelitev vloge, ki jo imajo subjekti enega pogodbenega razmerja v drugem, v zvezi s tem pa je najprej pomembna opredelitev subjektov posamezne pogodbe.

Opredelitev subjektov prodajne pogodbe – prodajalca in kupca – praviloma ni problematična. Drugače pa je s subjekti prevozne pogodbe, za katere veljajo nekatere posebnosti, ki izvirajo iz narave storitve prevoza. Kot subjekt pogodbe poleg strank, ki skleneta prevozno pogodbo (pošiljatelja in prevoznika), nastopa tudi tretji (prejemnik), ki v pogodbo običajno vstopi pozneje, njegov vstop v pogodbo pa je praviloma vezan na uresničitev pravice do razpolaganja z blagom.

V članku je posebna pozornost namenjena opredelitvi pojma pošiljatelja, ki zlasti v slovenskem pravu odpira več vprašanj. V prevoznem pravu se pojem »pošiljatelj« praviloma nanaša na osebo, ki s prevoznikom sklene pogodbo o prevozu blaga (naročnik prevoza), pri tem pa ni bistveno, ali ta oseba prevozniku v odpravnem kraju tudi preda blago za prevoz. To jasno izhaja iz prvega odstavka 666. člena Obligacijskega zakonika (OZ), tako stališče pa je v teoriji

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Daljši povzetek članka The Role of Parties to the Contract of Sale in the Contract of Carriage of Goods by Road and Vice Versa.

sprejeto tudi v zvezi s Konvencijo o pogodbi za mednarodni prevoz tovora po cesti (CMR). Enako bi lahko sklepali tudi na podlagi 24. člena Zakona o prevoznih pogodbah v cestnem prometu (ZPPCP-1). Vendar pa glede na opredelitev pojmov »naročnik prevoza« in »pošiljatelj« v 3. členu ZPPCP-1 pomen pojma »pošiljatelj« v ZPPCP-1 ni povsem jasen. Na prvi pogled bi bilo tako mogoče sklepati, da je treba položaj pošiljatelja priznati tudi osebi, ki le preda blago za prevoz. Tako stališče je v nekaterih primerih sprejela tudi sodna praksa.[1] Avtorica v članku zastopa drugačno stališče. Da je mogoče kot pošiljatelja šteti le osebo, ki je s prevoznikom sklenila prevozno pogodbo, in torej tudi blago predala za prevoz na podlagi zavez, prevzetih s prevozno pogodbo, po mnenju avtorice izhaja že iz jezikovne razlage osme alineje 3. člena ZPPCP-1. Ta določba namreč vsebuje dva opredelilna elementa pojma pošiljatelja: »na osnovi sklenjene pogodbe« in »preda tovor za prevoz«. Če prevozniku blago preda oseba, ki ni stranka prevozne pogodbe (na primer prodajalec v primeru, ko prevozno pogodbo sklene kupec), in obveznost izročitve blaga prevozniku zanjo ne izvira iz prevozne pogodbe, ampak iz drugega pravnega posla (prodajne pogodbe), prvi element ni podan. Drugačno stališče bi pomenilo tudi odstop od temeljnih načel obligacijskega prava, predvsem od načela relativnosti obligacijskih razmerij, prav tako pa tudi od ureditve mednarodnega prava prevoznih pogodb (CMR).

V članku je vloga subjektov ene pogodbe v razmerju iz druge pogodbe z vidika določb OZ, CISG, Incoterms 2010, CMR in ZPPCP-1 obravnavana po sklopih glede na kraj in vsebino prodajalčeve obveznosti dobave.

V okviru prvega sklopa so analizirani položaji, ko je kraj dobave sedež prodajalca. Če kupec v teh primerih dobave pri prodajalcu ne prevzame osebno, ampak za prevzem blaga angažira neodvisnega prevoznika, prevoznik v zvezi s kupčevo obveznostjo prevzema dobave v razmerju do prodajalca nastopa kot izpolnitveni pomočnik kupca. Da bi zagotovil izpolnitev svojih obveznosti iz prodajne pogodbe in zavarovanje svojih pravic, mora kupec zato poskrbeti, da prevoznik opravi vsa dejanja v zvezi s prevzemom dobave, ki bi jih sicer na podlagi prodajne pogodbe moral opraviti sam, in poda ugovore v zvezi z morebitnimi napakami, ki jih je treba grajati že ob prevzemu blaga.

Ne glede na to, ali pride k prodajalcu blago iskat kupec ali prevoznik, je prodajalec svojo obveznost dobave dolžan izpolniti na način, ki izhaja iz prodajne pogodbe, nevarnost pa na kupca preide v skladu s pravili prodajne pogodbe. Če prodajalec svojo obveznost dobave po prodajni pogodbi izpolni že, ko da kupcu blago na razpolago oziroma ko kupcu omogoči, da blago prevzame,

[1] Glej sklep Višjega sodišča v Celju Cpg 216/2014 z dne 24. oktobra 2014 in sodbo Višjega sodišča v Ljubljani II Cpg 1118/2014 z dne 4. marca 2015.

in obveznost nalaganja blaga na vozilo, ki ga priskrbi kupec, bremeni kupca, mora kupec poskrbeti, da bo obveznost nalaganja prevzel prevoznik ali za to angažirati tretjo osebo.

Z vidika prevozne pogodbe prodajalec, ki blago izroči prevozniku, v zvezi s predajo blaga za prevoz nastopa kot izpolnitveni pomočnik pošiljatelja (kupca). Položaj pošiljatelja ima kupec kot naročnik prevoza. Kupec pa ima hkrati tudi položaj prejemnika.

V drugem sklopu so obravnavani položaj, ko je kraj dobave drug kraj kot sedež prodajalca. V ta okvir spadajo primeri, ko mora prodajalec do kraja dobave, v katerem bo blago prevzel kupec, blago prepeljati, in primeri, ko je treba blago dobaviti v kraju, kjer bo izdelano, ali v drugem kraju, kjer je blago, in torej prevoz do kraja dobave ni potreben.

V prvem primeru lahko prodajalec blago do dobavnega kraja prepelje sam ali pa prevoz zaupa neodvisnemu prevozniku, ki v razmerju do kupca v zvezi z izpolnitvijo prodajalčeve obveznosti dobave nastopa kot izpolnitveni pomočnik prodajalca. Če tudi kupec za prevzem dobave angažira prevoznika, oba prevoznika v razmerju do druge stranke prodajne pogodbe nastopata kot izpolnitvena pomočnika svojega naročnika. Naročnika prevoza, ki sta hkrati stranki prodajne pogodbe, pa morata zaradi izpolnitve svojih obveznosti iz prodajne pogodbe s prevoznikoma skleniti tako pogodbo, da bosta prevoznika ustrezno izpolnila tudi njune obveznosti iz prodajne pogodbe v zvezi z dobavo oziroma prevzemom blaga. Za nalaganje na vozilo, ki ga priskrbi kupec, mora praviloma poskrbeti kupec in v ta namen skleniti ustrezno pogodbo s prevoznikom ali angažirati tretjo osebo. Če je s prodajno pogodbo dogovorjena dobava na vozilu prodajalca, kupca v kraju dobave bremeni tudi obveznost razlaganja blaga z vozila. Če pa mora prodajalec blago dobaviti naloženo na vozilo, ki ga priskrbi kupec, mora prodajalec poskrbeti, da bo prevoznik, ki blago prepelje do kraja dobave, ustrezno izpolnil tudi obveznost razkladanja blaga z vozila in nalaganja blaga na vozilo kupca oziroma v ta namen skleniti pogodbo s tretjim.

Z vidika prve prevozne pogodbe kot pošiljatelj nastopa prodajalec, kot prejemnik pa kupec oziroma kupčev prevoznik. Z vidika druge prevozne pogodbe kot pošiljatelj in prejemnik nastopa kupec, prevoznik, ki za prodajalca prepelje blago do kraja dobave in ga preda kupčevemu prevozniku, pa v razmerju do tega prevoznika nastopa kot izpolnitveni pomočnik kupca kot pošiljatelja.

Če je kraj dobave kraj, kjer je blago, osebe, ki kupcu v kraju dobave izročijo blago, nastopajo kot izpolnitveni pomočniki prodajalca. Tudi v teh primerih lahko kupec za prevzem blaga in prevoz do namembnega kraja angažira

prevoznika, ki, enako kot v primerih, ko je kraj dobave sedež prodajalca, v razmerju do prodajalca nastopa kot izpolnitveni pomočnik kupca.

V razmerju iz prevozne pogodbe, ki jo sklene kupec, kot pošiljatelj nastopa kupec, blago pa (za kupca) prevozniku preda prodajalec oziroma druga oseba, pri kateri je blago. Ta v razmerju do prevoznika nastopa na strani kupca in nima položaja pošiljatelja. Kot prejemnik nastopa kupec.

Pri pošiljatveni prodaji prodajalec svojo obveznost dobave izpolni, ko blago izroči prvemu prevozniku, s katerim sklene prevozno pogodbo o prevozu blaga do namembnega kraja, oziroma ko blago izroči prevozniku v določenem kraju. Z izročitvijo prevozniku na kupca preide tudi nevarnost. Prevoznik je v obravnavanih položajih v razmerje iz prodajne pogodbe vključen kot neodvisen subjekt in ne nastopa niti kot izpolnitveni pomočnik prodajalca niti kot izpolnitveni pomočnik kupca. S prevzemom blaga za namen prevoza tako ne izpolni kupčeve obveznosti prevzema dobave, saj kupec to izpolni šele, ko blago v namembnem kraju prevzame od prevoznika. Prevzem dobave po prodajni pogodbi v tem primeru praviloma sovpada z izročitvijo blaga prejemniku po prevozni pogodbi. Izročitev blaga prevozniku, s katero prodajalec po prodajni pogodbi izpolni svojo obveznost dobave, pa se prekriva s prevzemom blaga za prevoz po prevozni pogodbi. Za presojo vsebine pojma izročitve prevozniku kot izpolnitve obveznosti dobave po prodajni pogodbi so zato pomembna tudi pravila prevozne pogodbe o prevzemu blaga za prevoz. Ta pravila so odločilna tudi za presojo, ali obveznost nalaganja na vozilo prevoznika bremeni prodajalca kot pošiljatelja ali pa to obveznost nosi prevoznik in se v razmerju iz prodajne pogodbe opravlja na nevarnost kupca.

Z vidika prevozne pogodbe v razmerju do prevoznika kot naročnik in pošiljatelj nastopa prodajalec. Kot prejemnik nastopa kupec, v razmerje iz prevozne pogodbe pa vstopi v skladu s pravili prevoznega prava.

Avtorica v članku ugotavlja, da sta prodajna pogodba in prevozna pogodba, ki jo prodajalec ali kupec zaradi izpolnitve prodajne pogodbe sklene z neodvisnim prevoznikom, sicer ločena pravna posla in vsak zase za svoje subjekte ustvarjata pravice in obveznosti, imanentne posameznemu pravnemu poslu, vendar pa ima zelo pomembno vlogo dejstvo, da je prevozna pogodba sklenjena v funkciji prodaje. Pravice in obveznosti vseh subjektov, ki sodelujejo pri prodaji, se tako prepletajo in tvorijo zapleten kompleks razmerij. Ker blaga kupcu ne izroči neposredno prodajalec, ampak je izročeno s posredovanjem prevoznika, je jasna opredelitev vlog, ki jih imajo posamezni subjekti v razmerju iz prodajne oziroma prevozne pogodbe, pomembna tako z vidika opredelitve potrebnih ravnanj posameznih subjektov z namenom zagotovitve (pravilne) izpolnitve obveznosti po prodajni oziroma prevozni pogodbi kot

tudi z vidika opredelitve ravnanj posameznih subjektov, ki so potrebna, da bi se upravičencem iz posamezne pogodbe zagotovila možnost (uspešnega) uveljavljanja zahtevkov iz naslova kršitve pogodbe.