

CISG Advisory Council Opinion No. 11

Issues Raised by Documents under the CISG Focusing on the Buyer's Payment Duty

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Article 58 CISG:

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

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OPINION

1. Under Articles 30 and 34 CISG, the seller must hand over any document relating to the goods. Examples of documents relating to the goods include documents controlling their disposition and also other documents relating to the goods, such as commercial invoices, insurance policies or certificates, survey reports, packing lists, certificates of origin, certificates of quality, and sanitary or phytosanitary certificates.
2. The parties may agree expressly or impliedly on the documents that must be handed over by the seller to the buyer before the buyer must pay the price.
3. If the parties have agreed that the buyer shall procure payment by letter of credit, the letter of credit identifies the documents that must be presented before payment is to be made.
4. If the parties have not agreed on the documents that must be presented before the buyer is required to pay the purchase price, Article 58 CISG

applies. The buyer is then bound to pay the purchase price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and the Convention.

5. The words "documents controlling their disposition" in Article 58 CISG should be interpreted as referring to any document (electronic or paper) that entitles the buyer to take possession of the goods or, once in the hands of the buyer, establishes that the seller no longer has the right to control disposition of the goods.
6. Documents that control the disposition of the goods in this sense generally include the following:
 - 6.1 Negotiable bills of lading, whether issued by an ocean carrier or an intermediary such as a freight forwarder, multimodal transport operator (MTO) or non-vessel-operating common carrier (NVOCC);
 - 6.2 Straight (non-negotiable) bills of lading;
 - 6.3 The consignor's copy of an air waybill;
 - 6.4 The consignor's duplicate copy of a rail consignment note;
 - 6.5 The consignor's duplicate or first copy of a road consignment note;
 - 6.6 Road and rail bills of lading in North America;
 - 6.7 Warehouse receipts or warehouse warrants;
 - 6.8 Ship's delivery orders.
7. Documents that do not control the disposition of the goods in this sense include the following, unless there is a practice established between the parties or usage that governs the parties' contract under Article 9 CISG, requiring presentation of such a document:
 - 7.1 Sea waybills;
 - 7.2 Dock receipts, quai receipts or mate's receipts;
 - 7.3 Commercial invoices;
 - 7.4 Insurance policies or certificates;
 - 7.5 Survey reports, certificates of origin, certificates of quality, and sanitary or phytosanitary certificates.

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COMMENTS

1. Introduction

1.1 Article 30 CISG imposes the seller's primary obligations to deliver the goods, transfer property in them and to "hand over documents relating to them". Article 34 CISG supplements the seller's obligation in relation to documents by providing that the seller must hand over "documents relating to the goods...at the time and place and in the form required by the contract". In contrast, Article 58(1) CISG imposes on the buyer the obligation to pay only when it has received the goods or "documents controlling their disposition". Only some of the documents "relating to the goods" are "documents controlling their disposition", so there is broad (but not universal) agreement among scholars that the phrase in Article 58 CISG is narrower in meaning than that in Articles 30 and 34 CISG.¹ For example, a document such as a surveyor's report on the pre-shipment condition of the goods *relates* to the goods (and so must be "handed over" under Article 30 CISG) but it does not control their disposition.

1.2 Because the first sentence of Article 34 CISG refers to the requirements of the contract, it is generally regarded as being merely declaratory of the obligations that the seller would have under the contract in any event.² Thus, the seller must hand over any documents required by the terms of the contract, or by any usages that govern the parties' contract by operation of Article 9 CISG, or by the general principles underlying the Convention or the applicable national law, by operation of Article 7(2) CISG.³ However, Article 58(2) CISG qualifies that obligation by providing that the seller may dispatch the goods on terms that "documents controlling...disposition" of the goods may be withheld from the buyer until the seller receives payment of the purchase price. Thus, some types of document must be handed over to the buyer in all circumstances, whereas the seller may withhold other types of document until the buyer pays the price.

2. Legislative history of Articles 30 and 34

2.1 Articles 30 and 34 CISG are very similar to their predecessors in the Uniform Law on the International Sale of Goods (ULIS). Article 30 CISG is similar to Article 18 ULIS; Article 34 is similar to Article 50 ULIS, although the latter provision does not specifically provide that the seller has the right to cure any lack of conformity in the documents if they have been handed over prior to the time for delivery.

2.2 Article 30 CISG is almost identical to the first draft produced by the Working Group on the International Sale of Goods (as Article 14), which was adopted without comment by Committee of the Whole I in 1977.⁴ The text adopted by the Committee of the Whole was incorporated in the Draft Convention of 1978 (then as Article 28).⁵ The only change made at the Diplomatic Conference in Vienna in 1980 before the article was adopted was the minor drafting change from "thereto" to "to them".⁶

2.3 The first sentence in Article 34 is identical to the first draft produced by the Working Group on the International Sale of Goods (as Article 18), which was adopted without comment by Committee of the Whole I in 1977.⁷ The text adopted by the Committee of the Whole was incorporated in the Draft Convention of 1978 (then as Article 32).⁸ The second and third sentences of Article 34 CISG, relating to cure of non-conforming documents and the buyer's right to damages, were added by the Drafting Committee to make the provision correspond to what became Article 37 CISG, relating to the goods themselves.⁹ The text was adopted without further debate by the plenary Conference.¹⁰

2.4 The UNCITRAL Secretariat Commentary on Article 32 of the 1978 Draft notes that the article does not list which documents the seller must hand over to the buyer, but it states that: "In addition to documents of title, such as bills of lading, dock receipts and warehouse receipts, the seller may be required by the contract to hand over certificates of insurance, commercial or consular invoices, certificates of origin, weight or quality and the like."¹¹ This reinforces the view that Article 34 CISG is merely declaratory of the seller's obligation to deliver the documents required by the contract.

3. Interpretation of Articles 30 and 34 CISG: The parties may agree on the documents that must be handed over by the seller to the buyer before the buyer becomes bound to pay the purchase price

3.1 Article 30 CISG states that the seller must hand over any documents relating to the goods "as required by the contract and this Convention". Because the CISG nowhere stipulates what documents must be handed over, it is to the contract that one must look, as well as any usages that would govern the parties' contract by operation of Article 9 CISG and, possibly, the applicable domestic law.¹² The contract may, and often does, stipulate that the seller must present more documents than those that control the disposition of the goods for purposes of Article 58 CISG. As stated in CISG Advisory Council Opinion No. 5, the buyer may withhold the purchase price until it receives the documents stipulated in the contract, if it would be reasonable to do so.¹³

3.2 Thus, if the buyer wants to have the right to withhold payment of the price until it receives a particular document or documents from the seller, it must ensure that that document is identified in the contract as one that the seller must present. For example, as stated in black letter para. 7.4, insurance policies or certificates are not "documents controlling the[] disposition" of the goods for purposes of Article 58 CISG, so in the absence of explicit agreement by the parties, the buyer would not be entitled to withhold payment if the seller presented the "documents controlling the[] disposition" of the goods, such as a bill of lading, but not the insurance policy or certificate. A buyer on

CIF or CIP terms is entitled to withhold payment of the purchase price until it receives a conforming insurance policy or certificate, not because of Article 58 CISG, but because the contract identifies the insurance policy or certificate as a document that must be presented by the seller.¹⁴

3.3 Article 34 CISG is merely declaratory of the seller's obligation to hand over the goods "at the time and place and in the form required by the contract". Because of the central role played by the contract itself, no generalizations about what documents must be handed over will be uniformly true. When the buyer agrees to pay by letter of credit, the presentment deadline under the letter of credit is the date by which documents must be handed over under Article 34 CISG, if no other date has been agreed.¹⁵

3.4 The seller breaches its obligation under Articles 30 and 34 CISG if it hands over documents that do not adequately establish what they are required to represent. For example, one arbitral tribunal held the seller in breach for handing over a digital copy of an airway bill that did not bear the carrier's seal, rather than the original airway bill or a copy of the original, because the digital copy did not adequately establish that the seller had delivered the goods to the air carrier.¹⁶ In contrast, another arbitral tribunal held that the seller had not breached its obligation by handing over a bill of lading dated the year after the carriage actually took place, because this obvious typographical error would not affect the buyer's ability to take delivery of the goods.¹⁷ The seller is in breach if it hands over a certificate of origin showing the wrong country.¹⁸

3.5 As stated in CISG Advisory Council Opinion No. 5, the question whether a failure to deliver conforming documents amounts to a fundamental breach is to be determined according to the general mechanisms of the Convention, analogously to a failure to deliver conforming goods.¹⁹ Non-delivery of documents by the agreed time amounts to a fundamental breach if non-delivery of documents means that the buyer cannot take delivery of the goods.²⁰ Non-delivery of documents does not amount to a fundamental breach if the buyer may take delivery of the goods and use them, notwithstanding the absence of the document. There may be no fundamental breach, for example, if there is non-delivery of a document such as a survey certificate or insurance certificate (provided the goods are not damaged or lost),²¹ but the same may be true in relation to documents giving the right to possession, such as a bill of lading, if the buyer can still get delivery of the goods from the carrier in return for a letter of indemnity or bank guarantee.²² Delivery of defective documents only amounts to a fundamental breach if the defect in the documents limits the buyer in using the goods according to its plans.²³ The second sentence of Article 34 CISG provides that the seller has the right to cure any defect in the documents up to the time required for delivery of them under the contract.

4. Legislative history of Article 58 CISG

4.1 The phrase “documents controlling their disposition” does not appear in the Uniform Law on the International Sale of Goods (ULIS). Article 71 ULIS makes the buyer’s obligation to pay concurrent with the delivery of the goods themselves. Article 72(1) ULIS provides that where the contract involves carriage of the goods, the seller may postpone dispatch of the goods until it receives payment for them. The latter rule was abandoned when the CISG was drafted because it conflicted with the sales law practice in many countries.²⁴ Article 72(2) ULIS provides that when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that it has not had the opportunity to examine the goods.

4.2 The principle that the buyer’s obligation to pay is triggered either by placing the goods or “documents controlling their disposition” at the disposal of the buyer was introduced in the first draft of Article 58(1) CISG produced by the Working Group on the International Sale of Goods (as part of what was then Article 39) and was adopted without comment by Committee of the Whole I in 1977.²⁵ The text proposed by the Working Group and adopted by the Committee of the Whole was identical to Article 58(1), except for the opening words up to the first comma.

4.3 The text adopted by the Committee of the Whole was incorporated in the Draft Convention of 1978 (then as Article 54)²⁶ and was adopted, again without comment, as Article 58 at the Diplomatic Conference in Vienna in 1980.²⁷ The only change made at the Diplomatic Conference was to introduce at the beginning of the article the words, “If the buyer is not bound to pay the price at any other specific time”, a proposal made in the First Committee by Argentina, Spain and Portugal.²⁸ At no time was there any discussion of what kind of documents would trigger the buyer’s obligation to pay.

4.4 The final form of Article 58 CISG is virtually identical to Article 54 of the 1978 Draft. The UNCITRAL Secretariat Commentary on Article 54 of the 1978 Draft also simply repeats the phrase “documents controlling their disposition” without elaboration.²⁹

4.5 Although there was no discussion of the scope of the phrase “documents controlling their disposition” during deliberations on Article 58 CISG, the same phrase was discussed during deliberations on what became Article 68 CISG. Article 80 of the 1978 Draft (which became Article 68 CISG) used the same phrase, “documents controlling their disposition”. At the Diplomatic Conference in Vienna, the First Committee approved an amendment proposed by the United States to substitute the words “documents embodying the contract of carriage” for “documents controlling their disposition”.³⁰ Proposing the amendment, John Honnold said that the expression “documents controlling the disposition of the goods” was likely to be understood as

being limited to negotiable bills of lading, whereas the rule about passing of risk in what became Article 68 CISG should apply whether the document was negotiable or not.³¹ The Chairman, Roland Loewe, agreed, saying that the phrase “documents controlling the disposition of the goods” did indeed mean only negotiable documents.³²

5. General comments regarding interpretation of Article 58 CISG

5.1 Unless the parties agree on some other time for payment, the buyer’s obligation to pay the purchase price is triggered under Article 58(1) CISG only when the goods or “documents controlling their disposition” are placed at its disposal. If the buyer has agreed to pay the purchase price by providing a letter of credit, the seller must present all of the documents stipulated in the letter of credit, whether or not they control the disposition of the goods, and those documents must be accepted by the nominated or confirming bank as conforming to the credit before the seller gets paid.³³ As applicant under the letter of credit, the buyer often makes payment conditional upon presentation of many kinds of document that do not control the disposition of the goods, such as commercial invoices, survey certificates, certificates of origin, packing lists, and so on. By agreeing to payment under a letter of credit, the seller therefore accepts that it must present all of these documents before it is entitled to be paid. Thus, Article 58(1) CISG only has practical significance when payment is to be made other than by letter of credit.

5.2 The Chinese and Russian texts of Article 58 CISG, “控制货物处置权的单据” and “либо товарораспорядительные документы” are equivalent in meaning to the English text “documents controlling their disposition”. However, in the Arabic, French and Spanish texts, Article 58 CISG speaks literally of documents *representing* the goods, although in Spanish, at least, the phrase is understood in the narrower sense to mean documents entitling the holder to possession.³⁴ In French, the relevant phrase is: “des documents représentatifs des marchandises”. In Spanish, relevant phrase is: “los correspondientes documentos representativos”. In Arabic, the relevant phrase is:

5.3 Strictly speaking, a document only controls the disposition of the goods if it controls the right to possession of them, as does a negotiable bill of lading. As a result, Article 58(1) CISG does not apply to any of the following transport documents: sea waybills, air waybills and other non-negotiable documents, despite the fact that these are all documents that are commonly used in modern international transportation. A broader view of acceptable transport documents is found in the provisions of the Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600), which contains provisions relating to several types of non-negotiable transport documents that do not represent the goods in the strict sense of controlling the right to

possession.³⁵ If the buyer is to pay by letter of credit, it can ask for presentation of any of these types of document as a condition for payment under the letter of credit.

6. Documents that control the disposition of the goods for purposes of Article 58 CISG

(a) *Negotiable bills of lading, whether issued by an ocean carrier or an intermediary such as a freight forwarder, multimodal transport operator (MTO) or non-vessel-operating common carrier (NVOCC)*

6.1 A negotiable bill of lading is undoubtedly a document controlling the disposition of the goods, under Article 58 CISG.³⁶ The carrier is entitled and obliged to deliver the goods to the holder of the original bill of lading, without inquiring about whether it is the true owner of the goods.³⁷ The document controls the right to possession of the goods, so it would qualify as a “document[] controlling...disposition” for purposes of Article 58 CISG.

6.2 Increasingly often, negotiable bills of lading are issued not by an ocean carrier but by an intermediary. Such intermediaries are called different things in different countries, often indicating slight differences in their function: freight forwarders, non-vessel-operating common carriers (NVOCCs), logistics operators, multimodal transport operators (MTOs), etc. Intermediaries of this kind undertake to arrange transportation from one country to another but very often, they undertake little or none of the carriage themselves, instead sub-contracting with road, rail, ocean and sometimes air carriers who perform the actual carriage.³⁸ The intermediary usually issues a bill of lading to the seller when the seller hands the goods over to the first sub-contracting carrier. The intermediary in turn usually receives some kind of transport document from each of its sub-contracting carriers pursuant to the sub-contracts between it and them. The document that passes from the seller’s hands to the buyer’s hands under the sale contract is the intermediary’s bill of lading, not the sub-contracting carriers’ transport documents. Because the intermediary does not have (and may never have had) possession of the goods itself, the intermediary can only fulfill its promise to deliver to the holder of its bill of lading if the sub-contracting carriers fulfill their promise to deliver the goods to the intermediary. As a result, the intermediary’s bill of lading does not in itself control the disposition of the goods, in the narrow sense of giving the holder the right to possession of the goods. The intermediary’s bill of lading only gives the holder the right to possession in combination with the transport document issued to the intermediary by the ocean carrier (or other sub-contracting carrier). Under a strict, narrow, interpretation of Article 58 CISG, it should probably therefore not qualify as a “document[] controlling...disposition” of the goods. Such a document should, however,

be regarded as a document controlling the disposition of the goods at least as between the holder of the document and the intermediary who issued it. It constitutes a receipt for the goods and an undertaking by the intermediary to arrange for transportation of them to the agreed destination, even if the intermediary can only give the buyer possession of them at the destination once it has taken possession from the actual sub-contracting carrier.

(b) *Straight (non-negotiable) bills of lading*

6.3 “Straight” bills of lading name the consignee. They are not negotiable but they must be transferred to the named consignee and presented to the carrier in order for the consignee to be entitled to take possession of the goods.³⁹ Because the carrier is entitled to demand surrender of the original straight bill of lading before handing over the goods, a straight bill of lading is clearly be a “document[] controlling...disposition” for purposes of Article 58 CISG, as the buyer cannot take possession of the goods without the original document.

(c) *The consignor’s copy of an air waybill*

6.4 Air waybills are non-negotiable transport documents for carriage of goods by air. The intended consignee is named on the waybill. The consignee is entitled to demand delivery of the goods after arrival of the goods at the place designated for delivery. That is the position under the international conventions governing international carriage of goods by air.

6.5 When the country of departure and the country of arrival are both party to the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (the Montreal Convention), the Convention governs the carriage.⁴⁰ Article 13.1 Montreal Convention requires an air carrier of cargo to deliver the cargo to the consignee on arrival at the place of destination, unless the consignor has exercised a right of disposal. The consignor may stop the cargo in transit or may require the carrier to deliver it to a consignee other than the one originally designated, but it can only do so upon presentation of the consignor’s copy of the air waybill.⁴¹ The Montreal Convention does not confer a similar right of disposal on the consignee. Although the buyer/consignee does not need to get the seller/consignor’s copy of the waybill to take delivery from the carrier, the buyer/consignee cannot be sure that the seller/consignor will not exercise its right to redirect the cargo to another consignee unless and until it receives the consignor’s copy. Thus, although the consignor’s copy of the air waybill plays no part in establishing the consignee’s right to delivery of the goods from the carrier, the

consignor's copy should still be regarded as a "document controlling...disposition" of the goods for purposes of Article 58 CISG because the buyer/consignee cannot be sure that it can take possession of the goods until it receives that document. As a result, the buyer is entitled to withhold payment until the document is produced.

6.6 The position is the same when the country of departure and the country of arrival are both party to the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 (the Warsaw Convention),⁴² or if both countries are party to the Warsaw Convention as amended at the Hague 1955,⁴³ or if both countries are party to the Warsaw Convention as amended at the Hague 1955 and by Protocol No. 4 of Montreal 1975.⁴⁴ In each case, the Convention and/or Protocol provides that the consignor may stop the cargo in transit or may require the carrier to deliver it to a consignee other than the one originally designated, but only on production of the consignor's copy of the air waybill.⁴⁵ Thus, the consignor's copy should be regarded as a "document controlling...disposition" of the goods for purposes of Article 58 CISG.

6.7 Where either the country of departure or the country of arrival is not party to the Montreal Convention or the Warsaw Convention (or any of its Protocols), the consignor's right to stop the goods in transit or to redirect them depends upon the terms of the air waybill and the relevant national law.

6.8 The Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600) makes provision for presentation of an air waybill for payment under a letter of credit, despite the fact that such a document is non-negotiable.⁴⁶

(d) *The consignor's copy of a road or rail consignment note*

6.9 International road and rail carriage is usually done under non-negotiable transport documents known as consignment notes. Consignment notes do not control possession of the goods but merely provide evidence of the contract and the condition of the goods received for carriage. The consignee is entitled to demand delivery of both the goods and the consignment note after arrival of the goods at the place designated for delivery. That is the position under the international conventions governing international carriage of goods by road and rail.

6.10 When the country of departure and the country of arrival are both party to the Convention Concerning International Carriage by Rail 1980 (COTIF), rail carriage is governed by the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), which is Appendix B to COTIF.⁴⁷ When either the country of departure or the country of arrival is party to the Convention on the Contract for the International Carriage of Goods by Road (CMR), road carriage is governed by CMR.⁴⁸

Under both conventions, the consignee is entitled to demand delivery of both the goods and the consignment note after arrival of the goods at the place designated for delivery.⁴⁹

6.11 Because the consignee takes delivery of the goods and the consignment note from the road or rail carrier at the same time, the consignment note itself does not constitute a “document controlling...disposition” of the goods under a literal interpretation of Article 58 CISG.

6.12 Both CIM and CMR give the consignor the right to modify the contract of carriage by giving subsequent orders to the carrier including, in particular, the right to deliver the goods to a consignee different from the one entered on the consignment note.⁵⁰ The consignee has that right under CIM unless the consignor indicates to the contrary on the consignment note; under CMR, the consignee has a right of disposal only if the sender makes an entry to that effect on the consignment note.⁵¹ In order to exercise the right of disposal, the consignor or consignee must produce to the carrier the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR).⁵² Thus, the consignor is no longer entitled to redirect the goods if it has sent the duplicate or first copy to the consignee.⁵³ Conversely, the consignee cannot exercise the right of disposal until it has received the duplicate or first copy from the consignor.⁵⁴ As a result, it has been suggested, albeit tentatively, that the provisions in CIM and CMR about the right of disposal have the effect that the duplicate consignment note (in the case of CIM) or the sender’s copy⁵⁵ of the consignment note (in the case of CMR) is a document controlling the disposition of the goods for purposes of Article 58 CISG.⁵⁶ Although the document itself does not control the right to take possession of the goods, the duplicate or sender’s copy does give the sender the right to redirect delivery. Thus, the sender/seller should not be entitled to payment under Article 58 CISG until it has presented the buyer with the document.

6.13 When either the country of departure or the country of arrival is not party to COTIF, or when neither country is party to CIM, the consignor’s right to stop the goods in transit or to redirect them depends upon the terms of the road or rail consignment note and the relevant national law.

6.14 The Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600) makes provision for presentation of road and rail consignment notes for payment under a letter of credit, despite the fact that such a document is non-negotiable.⁵⁷

(e) Road and rail bills of lading in North America

6.15 In North America, transport documents for carriage by road and rail are called bills of lading. In the United States, for example, a road or rail carrier receiving goods for transportation from the United States to another country must issue a receipt or bill of lading.⁵⁸ All bills of lading, including road and rail bills, may be either negotiable or non-negotiable.⁵⁹ Because road and rail bills of lading issued in the United States are subject to the same provisions as those governing bills of lading for carriage of goods by sea,⁶⁰ they are “documents controlling [the] disposition” of the goods for purposes of Article 58 CISG, unlike their counterparts under CIM and CMR.

7. Other documents giving the holder the right to possession

(a) *Warehouse receipts or warehouse warrants*

7.1 The document known in some countries as a warehouse receipt and in others as a warehouse warrant functions in much the same way as a bill of lading, but for the fact that the goods are not in transit in the possession of a carrier but rather are static in the possession of a warehouse keeper. When goods are deposited with it, the warehouse keeper issues a warehouse receipt, which may be negotiable or non-negotiable. A non-negotiable warehouse receipt is made out to a particular person, promising return of the goods to that person. A warehouse receipt is negotiable if it provides that the goods in the warehouse are to be delivered to bearer or to the order of a named person. The holder of a negotiable warehouse receipt may sell or pledge the goods in the warehouse by dealing with the document.

7.2 Because it functions much like a bill of lading, a warehouse receipt or warrant is clearly a “document[] controlling...disposition” of the goods in the warehouse for purposes of Article 58 CISG. The fact that the goods remain in the warehouse until delivered to the holder of the document is immaterial, as they may still be the subject of a sale contract governed by the CISG if the seller and the buyer are in different Contracting States.⁶¹ The German Bundesgerichtshof has described a warehouse receipt (in German, *Lagerschein*) as a “true transfer document” (“echten Traditionspapiere”), listing it as an example of the kind of document to which Article 58(1) CISG clearly applies.⁶² Similarly, the Kantonsgericht St. Gallen in Switzerland described a negotiable warehouse receipt (“*Orderlagerschein*”) as the kind of document to which Article 58 CISG clearly applies.⁶³

(b) Ship's delivery orders

7.3 When goods are carried in bulk, a document known as a ship's delivery order is often generated by the carrier. The shipper of goods carried in an undifferentiated bulk⁶⁴ may sell parts of the cargo to different buyers. The seller, who holds a single bill of lading for the whole cargo, must be able to split the cargo if it is to sell parts of it to different buyers. That is achieved by the seller-shipper surrendering the bill of lading to the carrier in return for several ship's delivery orders corresponding to the amounts to be delivered to each of the buyers. The seller-shipper tenders a delivery order to each buyer, who takes delivery from the carrier of the quantity of cargo corresponding to its delivery order.

7.4 Standard form contracts for the sale of bulk cargoes often expressly exclude the CISG,⁶⁵ so the question whether a ship's delivery order is a "document[] controlling...disposition" for purposes of Article 58 CISG will seldom arise in practice. If the question does arise, it seems clear that a ship's delivery order should qualify as a "document[] controlling...disposition" of the goods, under Article 58 CISG, if tender of such a document is permitted under the sale contract. For all practical purposes, a ship's delivery order functions in the same way as a bill of lading, except that it applies to an undifferentiated portion of the cargo on the ship.⁶⁶ Each buyer needs the ship's delivery order to take possession of its portion of the goods on the ship.

8. Documents that do not control disposition of the goods for purposes of Article 58 CISG

(a) Sea waybills

8.1 Sea waybills are non-negotiable transport documents for carriage of goods by sea. The intended consignee is named on the waybill. The carrier undertakes to deliver to the named consignee. There is no "surrender clause" on a sea waybill as there typically is on bills of lading, requiring one of the original bills of lading to be surrendered to the carrier in return for the cargo or a delivery order. Thus, the named consignee does not have to present the original sea waybill to the carrier in order to take delivery. The named consignee simply identifies itself to the carrier as the person to whom delivery must be made.⁶⁷ Because there is no longer any need to present an original document to take delivery from the carrier, sea waybills are very often made in electronic form and are simply e-mailed from consignor to consignee.

8.2 Given these qualities, a sea waybill is not a "document[] controlling...disposition" of the goods for purposes of Article 58 CISG. The document merely reflects the delivery instruction given by the shipper to the carrier. Unlike a bill of lading, the

document itself has no impact on the disposition of the goods, which will be delivered by the carrier to the consignee no matter what happens to the waybill document. The consignee would be entitled to possession of the goods on arrival even if it never received a copy of the sea waybill, because the carrier's obligation is simply to deliver to the named consignee upon proper identification.

8.3 Some sea waybills reserve to the shipper the right to change the consignee after the goods have been shipped. Others provide that the shipper is entitled to transfer the "right of control" to the consignee, provided that option is noted on the sea waybill and exercised before the carrier receives the cargo. These variants allow one or other party, either the shipper or the consignee, to change the delivery instructions by substituting a new person to whom the carrier must make delivery.⁶⁸ So long as the shipper/seller retains the right to instruct the carrier to deliver to someone other than the named consignee, the consignee/buyer cannot be sure that the shipper/seller will not exercise its right to redirect the cargo to another consignee. However, unlike the similar situation in relation to air waybills governed by the Montreal Convention or the Warsaw Convention (or its Protocols) (see paras 6.5 and 6.6) and road and rail consignment notes governed by COTIF and CIM (see para. 6.12), the shipper may do this simply by giving written instructions to the carrier, without the need to present any copy of the sea waybill. Thus, even when the option to change the identity of the consignee is exercised, the document itself plays no part in the disposition of the goods. It merely reflects the fact that the shipper has reserved to itself a right, or has transferred a right to the consignee. The substituted consignee is entitled to take delivery if it can identify itself as the substituted consignee, not by virtue of the sea waybill document itself, and receiving a copy of the sea waybill would not verify to the consignee that the shipper has not exercised its right to name a new consignee. Thus, unlike the consignor's copy of an air waybill, or the duplicate copy of a rail consignment note, or the duplicate or first copy of a road consignment note, a sea waybill is never a "document controlling the[] disposition" of the goods for purposes of Article 58 CISG.

8.4 The Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600) makes provision for presentation of a sea waybill for payment under a letter of credit, despite the fact that such a document is non-negotiable.⁶⁹

(b) Dock receipts, quai receipts or mate's receipts

8.5 Sometimes, a sea-carrier or dock or terminal operator issues a document known variously as a dock receipt, dock warrant or quai receipt, which acknowledges receipt of the goods at the port for later shipment on a ship.⁷⁰ Later, the carrier issues a bill of lading in return for the dock receipt, based on the information contained in the dock

receipt. This practice is much less common than it used to be because of the increased use of multimodal bills of lading, under which the multimodal carrier acknowledges receipt of the goods long before they even arrive at the port for shipment onto a vessel, and also the use of “received for shipment” bills of lading issued by the carrier acknowledging receipt of the goods at the dock or container terminal, which are later simply indorsed with the words “shipped on board”. Dock receipts may, however, still be issued for goods not carried in containers (break-bulk cargo), or goods to be consolidated with other cargoes into containers at the port (LCL or Less than Container Load cargo).

8.6 Similarly, for bulk cargoes, a document known as a mate’s receipt is sometimes issued when the cargo is first delivered to the ship, acknowledging receipt of the goods and stating their apparent condition. The bill of lading is later issued in conformity with, and in return for, the mate’s receipt.

8.7 Some writers have suggested that documents such as dock receipts should be regarded as falling within Article 58 CISG if transferred to the buyer.⁷¹ That is undesirable. The carrier’s obligation is to issue a bill of lading to the shipper named on the dock receipt or mate’s receipt, regardless of who is actually in possession of the receipt.⁷² If the buyer’s obligation to pay were to be triggered by Article 58(1) CISG on presentation by the seller of the dock receipt or mate’s receipt, the buyer might be left in the position of having to pay for the goods when the carrier could still, quite properly, issue a bill of lading to the seller, who could then sell the right to possession to someone else by indorsing the bill of lading to them.⁷³ Because the dock receipt or mate’s receipt is not enough in itself to give the holder the right to possession of the goods, it should not qualify as a “document[] controlling...disposition” of the goods for purposes of Article 58 CISG.

(c) *Commercial invoices, survey reports, packing lists, certificates of origin or quality unless required by Customs or quarantine authorities*

8.8 Many other documents about the quality or condition of the goods may be generated before the goods leave the seller’s country. They are all “documents relating to the goods” for purposes of Articles 30 and 34 CISG, and so must be handed over from seller to buyer, but they are not “documents controlling...disposition” of the goods for purposes of Article 58 CISG, with one possible exception.

8.9 When the buyer pays by letter of credit, it will often require, via stipulation in the letter of credit issued by its bank, that the seller (the beneficiary under the letter of credit) should present such documents as a pre-shipment survey report, a packing list (in the case of goods in containers), a certificate of origin showing in which country the

goods were produced, sanitary or phytosanitary certificates (in the case of food or plant products), commercial invoices, etc. As noted above, Article 58(1) CISG has no practical application in such a case, because it is the letter of credit that governs which documents trigger the right to payment and when they must be presented.

8.10 If, however, the buyer has not undertaken to pay by letter of credit, the question may arise whether documents of this kind fall within Article 58(1) CISG, so that the buyer's obligation to pay does not arise until it receives them.

8.11 Some scholars have argued that any documents relating to the goods, including certificates of origin, are "part of the seller's performance" under Articles 30 and 34 CISG, and so must be presented before the buyer's obligation to pay is triggered under Article 58(1) CISG.⁷⁴ The German Bundesgerichtshof disagreed, stating that certificates of origin or quality ("Ursprungszeugnisse oder Qualitätszertifikate") are neither necessary nor sufficient to require payment of the purchase price by the buyer.⁷⁵ In ordinary circumstances, documents like certificates of origin or quality and survey reports about the quality or condition of the goods do not control the disposition of the goods for purposes of Article 58 CISG. They are plainly documents *relating* to the goods, and so must be presented by the seller under Articles 30 and 34 CISG, but a buyer who has received a bill of lading or other document entitling it to possession of the goods should not be able to withhold payment simply because it has not received something like a certificate of origin or survey report.⁷⁶

8.12 Other writers have argued that documents such as certificates of origin should fall within Article 58 CISG, if the buyer is required by the Customs authorities of its country to present those documents before taking delivery.⁷⁷ The same might be said of commercial invoices if required by Customs authorities, or sanitary or phytosanitary certificates if required by the quarantine authorities in the importing country. If the document must be presented to government authorities before the buyer can take physical possession of the goods,⁷⁸ it controls disposition of the goods under Article 58 CISG. However, the Kantonsgericht St. Gallen in Switzerland has stated that Article 58 CISG applies to documents such as bills of lading or warehouse receipts but not to Customs documents ("ein Konossement oder ein Orderlagerschein, nicht um die Zollpapiere").⁷⁹ "Customs documents" ("Zollpapiere") could refer to any documents required by the Customs authorities in the buyer's country, such as a commercial invoice, a certificate of origin, a phytosanitary certificate, an export declaration or export permit from the authorities in the seller's country, import permits from the authorities in the buyer's country and so on.

CASES CITED

State courts

Germany

Bundesgerichtshof, BGH VIII ZR 51/95 (3 April 1996), CLOUT Case 171 – paras 7.2, 8.11; notes 18, 23, 58, 71.

Netherlands

Bevaplast B.V. v. Tetra Medical S.A., Gerechsthof's Arnhem, No. 96/449, 17 June 1997, Unilex – notes 3, 12.

Singapore

APL Co. Pte Ltd v. Voss Peer [2002] 4 S.L.R. 481; [2002] 2 Lloyd's Rep. 707 (Sin. C.A.) – note 39.

Spain

Comercial San Antonio, S.A. v. Grupo Blocnesa, S.L., Audiencia Provincial de Barcelona, sección 14^a, 12 February 2002 – notes 74.

Switzerland

Kantonsgericht St. Gallen, 3 ZK 96-145 (12 August 1997), CLOUT Case 216; CISG-online No. 330 – paras 7.2, 8.12; notes 59, 75.

United Kingdom

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J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co. S.A. (The Rafaela S) [2005] 2 A.C. 423 (H.L.) – note 39.

Nippon Yusen Kaisha v. Ramjiban Serowgee [1938] A.C. 429 (P.C.) – notes 68, 69.

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United States of America

Ferrex Int'l, Inc. v. M/V Rico Chone, 718 F.Supp. 451, 1989 AMC 1109 (D.Md. 1988) – note 66.

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Arbitration awards

People's Republic of China

Chinese Seller v. German Buyer (Fluorite Case), China International Economic and Trade Arbitration Commission (CIETAC) Award, February 2006 – notes 15, 22.

Chinese Seller v. U.S. Buyer (Industrial Raw Material Case), China International Economic and Trade Arbitration Commission (CIETAC) Award, 4 June 1999 – note 17.

U.S. Seller v. Chinese Buyer (Spare Parts Case), China International Economic and Trade Arbitration Commission (CIETAC) Award, September 2006 – note 16.

Russian Federation

Swiss Buyer v. Russian Seller, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No. 2/1995, 11 May 1997 – note 20.

FOOTNOTES

* *The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.*

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Professor Ingeborg Schwenzer, University of Basel; Prof. John Y. Gotanda, Villanova University; and Prof. Michael G. Bridge, London School of Economics; Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa

was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenzer of the University of Basel was elected Chair of the CISG-AC.

¹ Henry Gabriel, *The Buyer's Performance Under the CISG: Articles 53-60 Trends in the Decisions*, 25 J.L. & Com. 273, 280-81 (2005); Dietrich Maskow, *Article 58*, in COMMENTARY ON THE INTERNATIONAL SALES LAW, THE 1980 VIENNA SALES CONVENTION p. 427 para. 3.1 (eds C.M. Bianca & M.J. Bonell, 1987)(hereafter Bianca/Bonell); Manuel Alba Fernández, *Documentary Duties of the Seller in Contracts for the International Sale of Goods: A Case for an Autonomous Interpretation of Article 58 of the Vienna Sales Convention*, in SCRITTI IN ONORE DE FRANCESCO BERLINGIERI, 1-2010 Il Diritto Maritimo 3 (2010). Compare Florian Mohs, *Article 58*, in SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) p. 849 para. 16 (Ingeborg Schwenzer ed., 3d ed. 2010)(hereafter Schlechtriem/Schwenzer) arguing (following Peter Schlechtriem, UNIFORM SALES LAW – THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS p. 82, n. 327 (1986)) that maturity of the buyer's obligation to pay under Article 58(1) is dependent on the seller's presentation of "all documents as required by the contract", including "insurance documents, certificates of origin or quality and/or customs documents".

² Schlechtriem/Schwenzer Art. 34, para. 1, p. 561; John Honnold & Harry Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, Art. 34, para. 219 (4th ed. 2009)("This sentence merely states that the seller must perform the contract").

³ In *Bevaplast B.V. v. Tetra Medical S.A.*, Gerechsthof's Arnhem, No. 96/449, 17 June 1997, Unilex, the lower courts discussed whether the seller was obliged under the applicable domestic law to hand over documents relating to the manufacturing process of a gas compressor, even in the absence of a contractual agreement to do so. The issue did not arise on appeal because the court held that the buyer had lost its right to complain of the missing documents because it had not given notice within a reasonable time.

⁴ *UNCITRAL Yearbook VIII: 1977* (1978); A/CN.9/SER.A/1977; E.78.V.7, p. 35, para. 149.

⁵ UNCITRAL, *Report on Eleventh Session* (1978), A/33/17, p. 16.

⁶ This minor change appears to have been made by the Drafting Committee, as it appeared between approval of the Draft Convention by UNCITRAL and submission of the draft Articles by the First Committee to the plenary Conference, without debate at the First Committee: see A/CONF/F.97/19, pp. 8, 101, 158. It was adopted by the plenary Conference without debate: see A/CONF/F.97/19, p. 207.

⁷ *UNCITRAL Yearbook VIII: 1977* (1978); A/CN.9/SER.A/1977; E.78.V.7, p. 36, para. 163.

⁸ UNCITRAL, *Report on Eleventh Session* (1978), A/33/17, p. 17.

⁹ A/CONF.97/C.1/L.248/Add.2.

¹⁰ A/CONF/F.97/19, p. 207.

¹¹ Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), *Secretariat Commentary*, A/CONF. 97/5, Commentary to Article 32 of the 1978 Draft Convention.

¹² *Bevaplast B.V. v. Tetra Medical S.A.*, Gerechsthof's Arnhem, No. 96/449, 17 June 1997, Unilex. See note 3 above.

¹³ CISG-AC Opinion No. 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, 7 May 2005, Rapporteur Ingeborg Schwenzer, Opinion para. 8.

¹⁴ International Chamber of Commerce, INCOTERMS 2010®, CIF, para. A3, CIP, para. A3, both state that: "The seller must provide the buyer with the insurance policy or other evidence of insurance cover". For goods bought on any of the F terms or CFR or CPT, the buyer buys its own insurance and so would already have the relevant insurance certificate or policy. International Chamber of Commerce, INCOTERMS 2010, FCA, FAS, FOB, CFR, CPT, para. B3 states that the buyer has no obligation *to the seller* to buy insurance. That does not mean that it is not in the buyer's own interest to buy insurance.

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- ¹⁵ *Chinese Seller v. German Buyer* (Fluorite Case), China International Economic and Trade Arbitration Commission (CIETAC) Award, February 2006. English translation available at <http://cisgw3.law.pace.edu/cases/060200c1.html>.
- ¹⁶ *U.S. Seller v. Chinese Buyer* (Spare Parts Case), China International Economic and Trade Arbitration Commission (CIETAC) Award, September 2006. English translation available at <http://cisgw3.law.pace.edu/cases/060900c4.html>.
- ¹⁷ *Chinese Seller v. U.S. Buyer* (Industrial Raw Material Case), China International Economic and Trade Arbitration Commission (CIETAC) Award, 4 June 1999. English translation available at <http://cisgw3.law.pace.edu/cases/990604c1.html>.
- ¹⁸ Bundesgerichtshof, BGH VIII ZR 51/95 (3 April 1996).
- ¹⁹ CISG-AC Opinion No. 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, 7 May 2005, Rapporteur Ingeborg Schwenzer, Opinion para. 5.
- ²⁰ *Swiss Buyer v. Russian Seller*, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, No. 2/1995, 11 May 1997. English translation available at <http://cisgw3.law.pace.edu/cases/970511r1.html>.
- ²¹ Schlechtriem/Schwenzer, Art. 49, para. 11, p. 751.
- ²² *Chinese Seller v. German Buyer* (Fluorite Case), China International Economic and Trade Arbitration Commission (CIETAC) Award, February 2006 (seller's failure to hand over bill of lading by agreed date not a fundamental breach because seller agreed that buyer could take delivery without presentation of original bill of lading by giving bank guarantee to carrier). English translation available at <http://cisgw3.law.pace.edu/cases/060200c1.html>.
- ²³ CISG-AC Opinion No. 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, 7 May 2005, Rapporteur Ingeborg Schwenzer, para. 4.9. See, e.g., Bundesgerichtshof, BGH VIII ZR 51/95 (3 April 1996) (delivery of inaccurate certificates of origin and quality held not to be a fundamental breach since buyer could obtain correct documents from other sources).
- ²⁴ Schlechtriem/Schwenzer, Art. 58, para. 3, p. 843.
- ²⁵ *UNCITRAL Yearbook VIII: 1977* (1978); A/CN.9/SER.A/1977; E.78.V.7, p. 49, para. 348.
- ²⁶ *UNCITRAL, Report on Eleventh Session* (1978), A/33/17, p. 19.
- ²⁷ A/CONF/F.97/19, p. 212.
- ²⁸ A/CONF.97/C.1/L.189.
- ²⁹ Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), *Secretariat Commentary*, A/CONF. 97/5, Commentary to Article 54 of the 1978 Draft Convention.
- ³⁰ A/CONF.97/C.1/L.231.
- ³¹ Report of the First Committee, A/CONF.97/11, 32nd meeting, para. 13 (1980).
- ³² *Id.*, para. 17.
- ³³ *Uniform Customs and Practice for Documentary Credits*, 2007 revision (UCP 600), Articles 7, 8, 15.
- ³⁴ Manuel Alba Fernández, *Documentary Duties of the Seller in Contracts for the International Sale of Goods: A Case for an Autonomous Interpretation of Article 58 of the Vienna Sales Convention*, in SCRITTI IN ONORE DE FRANCESCO BERLINGIERI, 1-2010 *Il Diritto Marittimo* 3 at 15 (2010).
- ³⁵ UCP 600, Articles 21 (non-negotiable sea waybills), 23 (air transport documents), 24 (road, rail or inland waterway transport documents).
- ³⁶ A bill of lading is made negotiable by inserting the words "To Order" in the box where the consignee is to be identified. This operates as a promise by the carrier to deliver the goods at the named

port of discharge to the order of the shipper (the person putting the goods on the ship, usually the seller or its representative) or other identified person.

³⁷ The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules), Article 47(1)(a)(i) adds the requirement that the holder of a “negotiable transport document” must properly identify itself as well as surrendering the original document *if* it is the shipper, consignee or person to whom the document has been indorsed. The requirement that the holder identify itself does not apply when the document has been indorsed in blank, which is what is usually done in practice: Articles 1(10)(a)(ii), 47(1)(a)(i) Rotterdam Rules. Article 47(1)(b) Rotterdam Rules provides that the carrier shall refuse delivery if the original document is not surrendered or the holder does not properly identify itself (if required to do so).

³⁸ The Rotterdam Rules are drafted to make provision for this kind of arrangement as well as the traditional form of carriage by sea, where the ocean carrier contracts directly with the shipper. Article 1(6)(a) Rotterdam Rules defines “performing party” as a person other than the carrier that performs any part of the carrier’s obligations. “Carrier” is defined as a person who enters into a contract of carriage with a shipper: Article 1(6) Rotterdam Rules. Thus, the Rules provide for the situation where the contracting “carrier” does not perform itself, but sub-contracts with “performing parties”.

³⁹ *APL Co. Pte Ltd v. Voss Peer* [2002] 4 S.L.R. 481; [2002] 2 Lloyd’s Rep. 707 (Sin.C.A.); *J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co. S.A. (The Rafaela S)* [2005] 2 A.C. 423 (H.L.); *Porky Products, Inc. v. Nippon Express USA (Illinois), Inc.*, 1 F.Supp.2d. 227 (S.D.N.Y. 1997). See also Hugo Tiberg, *Legal Qualities of Transport Documents*, 23 Mar. Law 1, 32 (1998); Hugo Tiberg, *Transfer of Documents* [2002] L.M.C.L.Q. 539, 541, pointing out that German and Scandinavian law call such bills “recta bills”, which are “presentation documents”, in the sense that they must be presented to the carrier to take delivery. Article 51.2(b) Rotterdam Rules provides that where a non-negotiable transport document contains a surrender clause, as straight bills of lading do, the consignee must present the original document(s) to the carrier in order to exercise its right to control the goods.

⁴⁰ Convention for the Unification of Certain Rules for International Carriage by Air 1999 (the Montreal Convention), Art. 1.2. The Convention also governs carriage from one place to another within a single State Party if there is an agreed stopping place within the territory of another State Party: Article 1.2 Montreal Convention. Ninety-seven countries are party to the Montreal Convention: <http://www.icao.int/icao/en/leb/mtl99.pdf>. Of these, 57 are also party to the CISG.

⁴¹ Articles 12.1, 12.3 Montreal Convention.

⁴² Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929, Art. 1.2. One hundred and fifty two parties are party to the Warsaw Convention – see <http://legacy.icao.int/icao/en/leb/wc-hp.pdf>. For countries that have adopted both the Montreal Convention and the Warsaw Convention, the Warsaw Convention applies only when the country at the other end of the carriage has adopted the Warsaw Convention but not the Montreal Convention.

⁴³ Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 as amended at the Hague 1955, Art. 1.2. One hundred and thirty seven countries are party to the Warsaw Convention as amended at the Hague: see <http://legacy.icao.int/icao/en/leb/wc-hp.pdf>. For countries that have adopted both the Montreal Convention and the Warsaw/Hague Convention, the Warsaw Convention applies only when the country at the other end of the carriage has adopted the Warsaw/Hague Convention but not the Montreal Convention.

⁴⁴ Warsaw Convention as amended at the Hague 1955 and by Protocol No. 4 of Montreal 1975, Art. 1.2. Fifty-seven countries are party to the Warsaw Convention as amended at the Hague and by Montreal Protocol No. 4: see http://www2.icao.int/en/leb/List%20of%20Parties/MP4_EN.pdf. For countries that have adopted both the Montreal Convention and the Warsaw/Hague Convention, the Warsaw Convention applies only when the country at the other end of the carriage has adopted the Warsaw/Hague/Montreal No.4 Convention but not the Montreal Convention.

⁴⁵ Articles 12.1, 12.3 Warsaw Convention. This provision was not amended by the Hague or Montreal No. 4 Protocols.

⁴⁶ Article 23 UCP 600.

⁴⁷ Forty-five countries are party to COTIF, in Europe, Scandinavia, the Middle East and North Africa. See Intergovernmental Organisation for International Carriage by Rail, *Intergovernmental Organisation for International Carriage by Rail (OTIF)*, para. 11 (July 2010), available at: http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/01_vorstellung/01_allg_info/OTIF_Info_07_2010_e.pdf. Of these, 35 are also party to the CISG.

⁴⁸ Fifty-five countries are party to CMR, in Europe, Scandinavia, the Middle East, North Africa and Central Asia. United Nations Economic Commission for Europe (UNECE), *Legal instruments in the field of transport: Convention on the Contract for the International Carriage of Goods by Road (CMR)*, at http://www.unece.org/trans/conventn/legalinst_25_OLIRT_CM.html. Of these, 42 are also party to the CISG.

⁴⁹ Article 17 § 1 CIM; Article 13.1 CMR.

⁵⁰ Article 18 § 1(c) CIM; Article 12.1 CMR.

⁵¹ Article 18 § 3 CIM; Article 12.3 CMR.

⁵² Article 19 § 1 CIM; Article 12.5(a) CMR.

⁵³ Article 17 § 7 CIM and Article 12.7 CMR provide that the carrier is liable in damages to the consignee if it follows the consignor's orders without requiring production of the duplicate (in the case of CIM) or first copy (in the case of CMR).

⁵⁴ CIM, Art. 19 § 1; CMR, Art. 12.5(a).

⁵⁵ CMR refers to this copy as the "first copy".

⁵⁶ Leif Sevón, *Obligations of the Buyer under the Vienna Convention on the International Sale of Goods*, 106 *Juridisk Tidskrift* 327, 335 (1990). See also Dietrich Maskow, Bianca/Bonell, p. 427 para. 3.1.

⁵⁷ Article 24 UCP 600.

⁵⁸ 49 U.S.C. § 11706(a)(rail); 49 U.S.C. § 14706(a)(road). Under both of these provisions, the carrier is only obliged to issue a bill of lading if it is subject to the jurisdiction of the Surface Transportation Board (STB), which is the case for road and rail carriage between the United States and a place in a foreign country: see 49 U.S.C. § 10501(a)(2)(F)(rail); 49 U.S.C. § 13501(1)(E)(road).

⁵⁹ 49 U.S.C. § 80103. 49 C.F.R. § 1035.1 stipulates the standard forms of order bills of lading and straight bills of lading that must be issued by rail carriers. 49 U.S.C. § 373.101 lists the information that must be contained in bills of lading issued by motor carriers.

⁶⁰ The Pomerene Act, 49 U.S.C. § 80101-16, applies to all bills of lading issued by a "common carrier", which includes road and rail carriers as well as sea carriers.

⁶¹ Article 1(1)(a) CISG.

⁶² BGH VIII ZR 51/95 (3 April 1996), para. II.3, CLOUT Case 171. English translation by Peter Feuerstein available at <http://cisgw3.law.pace.edu/cases/960403g1.html#cx>; original German text available at <http://www.cisg-online.ch/cisg/urteile/135.htm>.

⁶³ Kantonsgericht St. Gallen, 3 ZK 96-145 (12 August 1997), CLOUT Case 216; CISG-online No. 330. Original German text available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/330.pdf>.

⁶⁴ For example, if 40,000 metric tonnes of wheat are shipped on a ship with five holds (or 40,000 metric tonnes of oil on a ship with five cargo tanks), and the shipper later sells 25,000 metric tonnes to one buyer and 15,000 metric tonnes to another, it is impossible to tell where the first buyer's portion ends and the second buyer's portion begins, except that it will be somewhere in the middle of one of the holds (or tanks). It is possible for dry bulk cargoes to be differentiated in advance by the use of separators, and for bulk liquid cargoes to be differentiated in vessels such as parcel tankers, which carry many different cargoes in small tanks.

⁶⁵ See, e.g., GAFTA Contract No. 100, cl. 28(b)(CIF terms bulk grain); GAFTA Contract No. 119, cl. 27(b)(FOB terms bag or bulk grain); FOSFA Contract No. 24, cl. 27(b) (CIF terms soyabeans); FOSFA Contract No. 53, cl. 28(b) (FOB terms bulk vegetable and mineral oil), reproduced in MICHAEL BRIDGE, *THE INTERNATIONAL SALE OF GOODS*, Appendices 1-4 (2d ed. 2007). Each clause excludes the operation of the CISG. See also the NAEGA II Contract, cl. 27(b), produced by the North American Export Grain Association, Inc, which also excludes the CISG. It is available at <http://www.naega.org/images/naegacontract.pdf>.

⁶⁶ It is not possible for the original bill of lading to be surrendered in return for several new bills of lading corresponding to the buyers' respective portions, as a bill of lading must be issued on shipment or soon thereafter. Splitting a cargo issued under a single bill of lading can only be done by issuing ship's delivery orders: see *S.I.A.T. Di Del Ferro v. Tradax Overseas, S.A.* [1978] 2 Lloyd's Rep. 470 at 493 per Donaldson J.

⁶⁷ This procedure is reflected in Article 45 Rotterdam Rules, which deals with: "Delivery when no negotiable transport document or negotiable electronic transport record is issued". Article 45(a) simply provides that the carrier shall deliver the goods to the consignee, which must properly identify itself as the consignee if the carrier requests it to do so.

⁶⁸ Article 51.1 Rotterdam Rules deals with this by defining the "controlling party" for a non-negotiable transport document without a surrender clause as the shipper, "unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party".

⁶⁹ Article 21 UCP 600.

⁷⁰ The dock receipt may in some cases be issued by the dock or terminal operator, rather than by the carrier: see, e.g., *Ferrex Int'l, Inc. v. M/V Rico Chone*, 718 F.Supp. 451, 1989 AMC 1109 (D.Md. 1988). Whoever issues the dock receipt, it typically incorporates the terms of the carrier's bill of lading: see, e.g., *Mediterranean Marine Lines, Inc. v. John T. Clark & Son of Maryland, Inc.*, 485 F.Supp. 1330 (D.Md. 1980).

⁷¹ Dietrich Maskow, Bianca/Bonell, p. 427 para. 3.1.

⁷² This principle is firmly entrenched as a matter of English law: see *Hathesing v. Laing* (1874) L.R. 17 Eq. 92; *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429 (P.C.).

⁷³ See, e.g., *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429 (P.C.).

⁷⁴ Peter Schlechtriem, *UNIFORM SALES LAW – THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* p. 82, n. 327 (1986). In the same spirit, Schlechtriem/Schwenzer now states that maturity of the buyer's obligation to pay is dependent on the seller's presentation of "all documents as required by the contract", including "insurance documents, certificates of origin or quality and/or customs documents". Schlechtriem/Schwenzer, Art. 58, para. 16, p. 849.

⁷⁵ BGH VIII ZR 51/95 (3 April 1996), para. II.3; CLOUT Case 171. English translation available at <http://cisgw3.law.pace.edu/cases/960403g1.html#cx>; original German text available at <http://www.cisg-online.ch/cisg/urteile/135.htm>.

⁷⁶ Unless, of course, it has stipulated for presentation of these documents as a condition for payment under a letter of credit, in which case Article 58(1) CISG would not apply, in any event.

⁷⁷ Dietrich Maskow, Bianca/Bonell, pp. 427-8 para. 3.1.

⁷⁸ See, e.g., *Comercial San Antonio, S.A. v. Grupo Blocnesa, S.L.*, Audiencia Provincial de Barcelona, sección 14^a, 12 February 2002. Spanish text available at <http://www.uc3m.es/cisg/sespan21.htm>. English translation available at <http://cisgw3.law.pace.edu/cases/020212s4.html>.

⁷⁹ Kantonsgericht St. Gallen, 3 ZK 96-145 (12 August 1997), CLOUT Case 216; CISG-online No. 330. Original German text available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/330.pdf>.