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DOCUMENTS THAT SATISFY THE REQUIREMENTS OF CISG ART. 58*

Article 58 of the CISG triggers the buyer's obligation to pay for the goods at the time when the goods or "documents controlling their disposition" are placed at the buyer's disposal, unless the parties have agreed that the obligation to pay shall occur at some other time. This Article considers the meaning of the phrase "documents controlling their disposition". It seems originally to have been intended to refer only to documents giving the buyer the right to take possession of the goods, such as negotiable bills of lading or warehouse receipts. Documents of that kind are far less frequently used in modern transportation practice than they were when the CISG was drafted. The Article shows that most of the documents used for international transportation of goods in the 21st century do not satisfy a narrow interpretation of Article 58. Two alternatives are possible: first, to continue with a narrow interpretation of Article 58, which condemns it increasingly to irrelevance, or secondly, to broaden the interpretation to accommodate changes in international transportation practice. This Article argues for the latter approach.

Key words: *Negotiable and non negotiable transport documents.*

1. INTRODUCTION

What are "documents controlling [the] disposition" of the goods for purposes of Art. 58 of the U.N. Convention on Contracts for the Inter-

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national Sale of Goods (the CISG)? Under Art. 58(1), the buyer's obligation to pay arises when the seller places the goods or "documents controlling their disposition" at the buyer's disposal (unless the parties agree that payment should be made at some other specific time). Article 58(2) provides that if the contract involves carriage of the goods, the seller may send the goods to the buyer on terms whereby the goods or "documents controlling their disposition" will not be handed over to the buyer except against payment of the price. What documents trigger the buyer's obligation under Art. 58(1) and what documents may the seller withhold under Art. 58(2)?

The phrase "documents controlling their disposition" is narrower than the phrase used in CISG Arts 30 and 34, "documents relating to them" (meaning the goods). Articles 30 and 34 are concerned with the seller's primary obligation to "hand over" the documents "relating to" the goods. Clearly, only some of the documents "relating to" the goods are "documents controlling their disposition", so there is broad (but not universal) agreement that the phrase in Art. 58 is narrower in meaning than that in Arts 30 and 34. 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 Arts 30 and 34) but it does not control their disposition in the narrow sense. Conversely, the phrase "documents controlling their disposition" is more generic than the phrase "shipping documents", which appears in Arts 32 and 67(2), and it focuses on different qualities of the document than the phrase "documents embodying the contract of carriage", which appears in Art. 68.

Henry Gabriel has suggested that the phrase "documents controlling their disposition" refers only to documents giving the buyer the right to take possession of the goods, such as bills of lading or warehouse receipts.¹ Dietrich Maskow has argued for a broader view, namely that the phrase should be interpreted to refer to "any documents that are required in practice by the buyer", which may extend to include invoices or certificates of origin if the buyer is required by the Customs authorities of its country to present those documents before taking delivery.² Peter Schlechtriem argued for a still broader interpretation, namely that "controlling" documents should be interpreted in the sense of Arts 30 and 34, so that even an insurance certificate, for example, should be included, even though it is not required for the disposition of the goods, because the seller has not "placed the goods at the buyer's disposal" until the insur-

¹ H. Gabriel, "The Buyer's Performance under the CISG: Articles 53-60 Trends in the Decisions", *Journal of Law & Commerce* 25/2005, 280-81.

² D. Maskow, "Article 58", *Commentary on the International Sales Law, The 1980 Vienna Sales Convention* (eds. C.M. Bianca & M.J. Bonell), 1987, 427.

ance certificate has been tendered.³ Manuel Alba Fernández has recently argued for a functional interpretation that would allow Art. 58 to adapt to new practices and legal changes, so that any transport document issued under a contract of carriage that enables the buyer to take delivery from the carrier should qualify.⁴

There is plenty of scope for scholarly disagreements of this kind because the CISG contains no definition of “documents controlling their disposition” and little assistance in the interpretation of the phrase can be found in the *travaux préparatoires* to Art. 58 itself. The phrase appeared in the Working Group draft as part of what was then Art. 39 and was adopted without comment by Committee of the Whole I in 1977.⁵ It was incorporated in the Draft Convention of 1978 (then as Art. 54)⁶ and was adopted, again without comment, as part of Art. 58 at the Diplomatic Conference in Vienna in 1980.⁷ 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.⁸ At no time was there any discussion of what kind of documents would trigger the buyer’s obligation to pay. The UNCITRAL Secretariat Commentary on Art. 54 in the 1978 Draft simply repeats the phrase “documents controlling their disposition” without elaboration.⁹

The best interpretive assistance to be found in the *travaux préparatoires* lies not in the legislative history of Art. 58 itself, but in the legislative history of Art. 68. In the 1978 Draft, then-Art. 80 (which became Art. 68) used the same phrase, “documents controlling their possession”,

³ P. Schlechtriem, *Uniform Sales Law – The U.N. Convention on Contracts for the International Sale of Goods*, 1986, 82. In the same spirit, the most recent edition of Schlechtriem’s commentary 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”. F. Mohs, “Article 58”, *Slechtriem & Schwenger, Commentary on the UN Convention on the International Sale of Goods (CISG)* (ed. I. Schwenger), 2010, 849.

⁴ M. 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”, *Scritti in Onore de Francesco Berlingieri, 1 2010 Il Diritto Marittimo*, 2010, 3.

⁵ *UNCITRAL Yearbook VIII: 1977* (1978); A/CN.9/SER.A/1977; E.78.V.7, 49.

⁶ UNCITRAL, *Report on Eleventh Session* (1978), A/33/17, 19.

⁷ A/CONF.97/L.13, para. 35.

⁸ A/CONF.97/C.1/L.189.

⁹ Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), *Secretariat Commentary*, A/CONF. 97/5, Commentary to Art. 54 of the 1978 Draft Convention, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm 58.html>, 22 July, 2010.

which now appears only in Arts 58 and 67(1). At the Diplomatic Conference in Vienna, the First Committee approved an amendment to then-Art. 80 proposed by the United States, to substitute the words “documents embodying the contract of carriage” for “documents controlling their disposition”.¹⁰ Proposing the amendment, John Honnold said that the expression “documents controlling their disposition” was likely to be understood as being limited to negotiable bills of lading, whereas the rule about passing of risk in what became Art. 68 should apply whether the document was negotiable or not.¹¹ The Chairman, Roland Loewe, agreed, saying that the phrase “documents controlling the disposition of the goods” did indeed mean negotiable documents.¹²

The Chinese and Russian texts of Art. 58, (Russian: “либо товарораспорядительные документы”) are equivalent in meaning to the English text “documents controlling their disposition”. In the Arabic, French and Spanish texts, Art. 58 speaks literally of documents *representing* the goods, although it seems that in Spanish, at least, the phrase is understood in the narrower sense to mean documents entitling the holder to possession.¹³ In Spanish, the relevant phrase is: “los correspondientes documentos representativos”. In French, it is: “des documents représentatifs des marchandises”. In Arabic, it is: *أهل شمت يتلأ تادنت سملأ وا*.

Although the delegates at Vienna did not debate the meaning of the phrase “documents controlling their disposition” when considering Art. 58, it seems likely from their discussion about Art. 68 that they had in mind the traditional, negotiable bill of lading issued by an ocean carrier, which is the paradigm document controlling the right to possession of the goods it represents. Although negotiable bills of lading of this kind are still common when goods are carried by sea in bulk, they are much less common than they used to be in liner trades of goods carried by sea in containers, as Sections 2.1, 2.2 and 2.3 of this paper will demonstrate. Sections 2.5 and 2.6 will show that the documents used for international carriage of goods by road, rail and air are not (except in North America) and have never been “documents controlling [the] disposition” of the goods under the narrow interpretation of the phrase that makes it equivalent to documents giving the holder the right to possession. Thus, to summarize Section 2 in advance, bills of lading issued directly by ocean carriers control the disposition of the goods in the narrow sense, as do ship’s delivery orders. Negotiable bills for sea carriage issued by intermediaries,

¹⁰ A/CONF.97/C.1/L.231.

¹¹ Report of the First Committee, A/CONF.97/11, 32nd meeting, para. 13 (1980).

¹² *Ibid.*, para. 17.

¹³ M. Alba Fernández, 15.

sea waybills, air waybills, and road and rail consignment notes do not control the disposition of the goods in the narrow sense. In short, only two of the many different types of international transport document now in use clearly fall within the narrow interpretation of Art. 58.

Two responses are possible. The first is to argue for a broader interpretation of Art. 58, one closer in meaning to documents *representing* the goods, as being much better suited to the kinds of document used for international transportation of goods in the 21st century.¹⁴ This would at least match the literal text of the Arabic, French and Spanish versions, if not the way in which that text is apparently understood.¹⁵ All of the transport documents considered in Section 2 *represent* the goods, each of them being at least a receipt acknowledging the carrier's possession of the goods and its undertaking to carry them to their destination. Under this broad interpretation of Art. 58(1), presentation of any kind of transport document would trigger the buyer's payment obligation.

An alternative approach would be to confine Art. 58 narrowly to traditional negotiable bills of lading, so that no other kind of transport document could trigger the buyer's obligation to pay the price under Art. 58(1). If any of the other kinds of transport document were to be used, the buyer's obligation to pay would be triggered only by the seller placing the *goods* at the buyer's disposition, there being no "documents controlling [the] disposition" of the goods. These two alternative interpretations will be considered in Section 4; the former is preferred. Section 3 considers other kinds of documents, such as warehouse receipts, ship's delivery orders and the other documents that a buyer typically asks to see as applicant under a letter of credit.

2. TRANSPORT DOCUMENTS

2.1. Negotiable bills of lading and their decline

The classic example of a "document controlling [the] disposition" of the goods is the negotiable bill of lading issued by an ocean carrier. A bill of lading is made negotiable¹⁶ by insertion of the words "To Order"

¹⁴ *Ibid.*, 16 24.

¹⁵ *Ibid.*.

¹⁶ Strictly speaking, a bill of lading "To Order" is not negotiable, but transferable: see *Kum v. Wah Tat Bank* [1971] 1 Lloyd's Rep. 439 at 446 (P.C.); *J.I. MacWilliam Co. Inc. v. Mediterranean Shipping Co. S.A. (The Rafaela S)* [2005] 2 A.C. 423 at 444 per Lord Bingham. It cannot give the transferee better title than the transferor has. It may, however, transfer the transferor's contractual rights to the transferee by indorsement, including the right to possession of the goods.

in the box where the consignee is to be identified.¹⁷ 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.¹⁸ The order is given to the carrier by indorsing the bill of lading and sending it to the person who is to take delivery, usually in return for the purchase price.¹⁹ The new holder then presents the original bill of lading to the carrier at the port of discharge. The carrier is entitled and obliged to deliver to the holder of the original bill of lading, without inquiring about whether it is the true owner of the goods.²⁰ The document thus controls the right to possession of the goods – it is the “key to the warehouse”.²¹ Whoever has the indorsed original bill of lading is entitled to possession of the goods,²² so there can be no doubt that such a document would satisfy the description in Art. 58 of “documents controlling... disposition” of the goods, even under the narrow interpretation.

“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.²³ Because the carrier is entitled to demand surrender of the

¹⁷ *Henderson v. Comptoir d'Escompte de Paris* (1873) L.R. 5 P.C. 253 (PC) (“[T]o make bills of lading negotiable, some such words as ‘or order or assigns’ ought to be in them”).

¹⁸ *Parsons Corp. v. C.V. Scheepvaartonderneming “Happy Ranger” (The Happy Ranger)* [2002] 2 Lloyd’s Rep. 357 at 363 para. [27] per Tuckey L.J.

¹⁹ The bill of lading may be indorsed to the particular person e.g. “Deliver to B or B’s order” which is called special indorsement, or indorsement in full, or it may be indorsed in blank, by the shipper simply writing its name on the back, which then means that whoever holds the bill is entitled to possession of the goods. See *Scrutton on Charterparties and Bills of Lading*, (eds. S. Boyd et al.), 2008²¹, 169. See also *Bandung Shipping Pte Ltd v. Keppel Tatlee Bank Ltd* [2003] 1 S.L.R. 295 at [18] [20]; [2003] 1 Lloyd’s Rep. 619 at 622 per Chao Hick Tin, J.A. Indorsement in blank is more common in practice.

²⁰ *Barber v. Meyerstein* (1870) L.R. 4 H.L. 317.

²¹ *Sanders Bros v. Maclean & Co.* (1883) 11 Q.B.D. 327 at 341 per Bowen L.J.

²² The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules), Art. 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: Rotterdam Rules, Arts 1(10)(a)(ii), 47(1)(a)(i). The Rotterdam Rules, Art. 47(1)(b) 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).

²³ *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

original straight bill of lading before handing over the goods, this kind of document must also be regarded as a “document controlling...disposition” of the goods in the narrow sense of CISG Art. 58, as the buyer cannot take possession of the goods without the original document.

As noted above, the classic negotiable bill of lading is used far less often in modern international transportation than it was thirty years ago when the CISG was made. Increasingly, it has been replaced by non-negotiable sea waybills,²⁴ which are dealt with in Section 2.2. Sea waybills are particularly common for containerized cargoes on relatively short sea voyages, when the ship may arrive at the port of destination before there has been time for a traditional negotiable bill of lading to be negotiated to the intended receiver.²⁵ When negotiable bills of lading are used in relation to goods carried in containers, they are often issued by operators that are known as NVOCCs (Non-Vessel-Operating Common Carrier) in North America and as freight forwarders or multimodal transport operators (MTOs) elsewhere. Bills of lading of that kind are considered in Section 2.3.

2.2. Sea waybills

Sea waybills are non-negotiable transport documents for carriage of goods by sea. Their non-negotiable nature is unmistakable: they usually have the word “Non-Negotiable” printed across them in large, diagonally-sloping letters. In the box where the consignee’s name is to be written, the caption is usually “Consignee (not to order)”, making it clear that this document should *not* be made out “To order”, as a negotiable bill of lading would be.²⁶ The intended consignee is named on the waybill.

F.Supp.2d. 227 (S.D.N.Y. 1997). See also H. Tiberg, “Legal Qualities of Transport Documents”, *Maritime Law* 23/1998, 32; H. Tiberg, “Transfer of Documents”, *Lloyd’s Maritime and Commercial Law Quarterly (L.M.C.L.Q.)* 2002, 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. The Rotterdam Rules, Art. 51.2(b) 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.

²⁴ In 1989, it was estimated that 70% of all liner goods on North Atlantic routes were carried under sea waybills: see A. Lloyd, “The Bill of Lading: Do We Really Need It?”, *L.M.C.L.Q.* 1998, 49.

²⁵ P. Todd, *Bills of Lading and Bankers’ Documentary Credits*, Lloyd’s of London Press, London New York 2007⁴, 31 32.

²⁶ See, e.g., the Linewaybill and Combiconwaybill forms, two standard form sea waybills created by the Baltic and International Maritime Council (BIMCO), available online in several places, including <https://noppa.lut.fi/noppa/opintojakso/ac40a0050/.../merirahhtikirja.pdf> (Linewaybill) and http://www.infomarine.gr/bulletins/chartering_forms/combiconwaybill.pdf (Combiconwaybill).

The carrier undertakes to deliver to the named consignee. Importantly, 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.²⁷ That is because the named consignee does not have to present the original sea waybill to the carrier in order to take delivery²⁸ (unlike the named consignee on a straight bill of lading, which must surrender the original bill of lading²⁹). The named consignee simply identifies itself to the carrier as the person to whom delivery must be made. That procedure is reflected in the new U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules), Art. 45, 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.

Because there is no longer any need to present an original document to take delivery, sea waybills are very often made in electronic form and are simply e-mailed from consignor to consignee.

Given these qualities, there can be little doubt that a sea waybill is *not* a “document controlling...disposition” of the goods under the narrow interpretation of CISG, Art. 58. 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.³⁰

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.³¹ These variants allow one or other party, either the shipper or the consignee, to change the delivery instructions by

²⁷ See, e.g., the Conlinebill form, a BIMCO standard form bill of lading available in many places online, including http://www.formag_agencies.com/docs/charters/conlinebill.pdf.

²⁸ H. Tiberg,(2002), 542.

²⁹ See *supra* note 23.

³⁰ This will also be the position under the Rotterdam Rules, Art. 45(a).

³¹ See, e.g., the Linewaybill and Combiconwaybill forms, *supra* note 26.

substituting a new person to whom the carrier must make delivery.³² Not even these types of sea waybill are “documents controlling... possession” of the goods under the narrow interpretation of CISG, Art. 58. 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.

A sea waybill does, however, undoubtedly *represent* the goods under the broader interpretation of CISG, Art. 58. It operates as a receipt for the goods, showing their quantity, weight and apparent condition when handed to the carrier, and it is evidence of the carrier’s obligation to carry them to their destination.³³ To that extent, the waybill serves as a kind of sign or symbol for the goods while they are in the carrier’s possession.

2.3. Bills of lading issued by multimodal transport operators, freight forwarders and NVOCCs

In many cases, the seller or buyer of goods has little experience in dealing with international carriers. A seller of goods on CIP terms has contracted to arrange for carriage and insurance of the goods to the named port of destination³⁴ but it may not know how to go about contracting with a shipping line or buying cargo insurance. Often, traders in goods engage operators who specialize in international transportation, effectively delegating the task to them. Such operators are called many different things in different countries, often indicating slight differences in their function: freight forwarders, NVOCCs, logistics operators, multimodal transport operators (MTOs), etc.³⁵ An NVOCC undertakes to arrange transportation from point A to point B. Very often, it undertakes none of the carriage itself, but rather sub-contracts with road, rail, ocean and sometimes air carriers.³⁶

³² The Rotterdam Rules deal with this situation, too, in Art. 51.1, which defines 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”.

³³ C. Proctor, *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document*, Interlegal 1997, 83.

³⁴ International Chamber of Commerce, INCOTERMS 2000, CIP, para. A3. INCOTERMS 2010 come into operation on 1 January 2011.

³⁵ Hereafter, I shall use the North American name Non Vessel Operating Common Carrier (NVOCC), because it conveniently emphasizes the fact that such operators do not carry the goods themselves.

³⁶ 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

The seller or buyer of the goods makes a contract with the NVOCC; the NVOCC makes sub-contracts with the actual carriers of the goods. When the seller hands the goods over to the NVOCC's first sub-contracting carrier, the NVOCC usually issues its own document to the seller, acknowledging receipt of the goods and undertaking to carry them to the named destination. Just like an ocean carrier, the NVOCC may issue a bill of lading³⁷ (sometimes called a "house" bill of lading), which is negotiable if made out "To Order" or non-negotiable if made "straight" for delivery to a named consignee, or the NVOCC may issue a waybill,³⁸ which merely acknowledges receipt and evidences the contract of carriage. The goods are actually carried by the NVOCC's sub-contractors pursuant to the terms of the contracts between the NVOCC and the actual carriers. The NVOCC may have bought a large block of space on an ocean vessel on a liner route under a slot charter party or some other kind of contract between the NVOCC and the ocean carrier.³⁹ Alternatively, the NVOCC buys space on a carrying ship on an ad hoc basis, depending on how much trade it arranges between the two ports in question. The ocean carrier usually issues its own transport document naming the NVOCC as shipper.⁴⁰ That document is usually a straight bill of lading (often

with the shipper. Rotterdam Rules, Art. 1(6)(a) 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: Rotterdam Rules, Art. 1(6). Thus, the Rules provide for the situation where the contracting "carrier" does not perform itself, but sub contracts with "performing parties".

³⁷ See, e.g., the Negotiable FIATA Multimodal Transport Bill of Lading (FIATA FBL), designed for use by multimodal transport operators and issued subject to the UNCTAD/ICC Rules for Multimodal Transport Documents, available at many locations online, including <http://www.pier2pier.com/links/files/Certi/FBL.pdf>.

³⁸ See, e.g., the FIATA Multimodal Transport Waybill (FIATA FWB), designed for use by multimodal transport operators, available in <http://www.oasis.open.org/committees/download.php/14902/annex2r.pdf>.

³⁹ See, e.g., *Metvale Ltd v. Monsanto International SARL (The MSC Napoli)* [2009] 2 Lloyd's Rep. 246 (slot charterers seek limitation); M. Reilly, "Identity of the Carrier: Issues under Slot Charters", *Tulane Maritime Law Journal* 25/2001, 505. If the contract between NVOCC and ocean carrier is a slot charter, the Rotterdam Rules would not apply as between ocean carrier and NVOCC: see Art. 6.1. Other types of carriage sub contract might be governed by the Rotterdam Rules, although if the contract between NVOCC and ocean carrier amounts to a "volume contract" as defined in Art. 1(2), then special rules would apply as between the NVOCC and the ocean carrier, by operation of Art. 80.

⁴⁰ See, e.g., *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 2004 AMC 2705 (2004), where an NVOCC (called a freight forwarder because it was Australian) issued a bill of lading to a seller of goods for carriage from Sydney, Australia to Huntsville, Alabama. The NVOCC/forwarder contracted with an ocean carrier, Hamburg Süd, for ocean transportation from Sydney, Australia to Savannah, Georgia, and for rail carriage from Savannah to Huntsville. Hamburg Süd issued an ocean bill of lading naming the NVOCC as shipper.

called the main bill to distinguish it from the NVOCC's "house" bill) or a sea waybill, naming the NVOCC as shipper and the NVOCC's foreign agent or subsidiary as receiver. The main bill or waybill is non-negotiable, as there is no need for it to be made negotiable because the ocean carrier simply delivers the goods to the NVOCC or its agent at the port of discharge.

Under such an arrangement, which is very common in relation to goods carried in containers, the document that passes from the seller's hands to the buyer's hands under the sale contract is the NVOCC's bill of lading. The seller and buyer usually never see the ocean carrier's transport document, which regulates the sub-contracting relationship between the NVOCC and the ocean carrier. Importantly for our present purposes, the NVOCC bill of lading cannot be regarded as a "document controlling...disposition" of the goods in the strict sense, even if it is made negotiable by inclusion of the words "To Order". True, a negotiable bill of lading issued by an NVOCC regulates the relationship between NVOCC, shipper and holder in the same way that a classic negotiable bill of lading does. The NVOCC will (or should) only hand over the goods (or arrange for them to be handed over) at the named place of destination in return for the original bill of lading, presented by the holder. Importantly, though, the NVOCC does not have (and may never have had) possession of the goods itself. It has the right to receive possession of the goods from the ocean carrier (or sub-contracting inland carrier) but that right is regulated by the terms of the contract between the NVOCC and the actual carrier. If, for example, the NVOCC owes freight to the ocean carrier, the ocean carrier may be entitled to exercise a lien over the goods for non-payment of freight, and may refuse to deliver them. In those circumstances, the NVOCC cannot give possession of the goods to the buyer of the goods at the place of destination in return for the original NVOCC bill of lading.

In other words, the NVOCC 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. It only does so in combination with the transport document issued by the ocean carrier (or other sub-contracting carrier). The latter document (the main bill) is not among those transferred from seller to buyer, as the seller may never see it. The NVOCC bill can have no effect in controlling the disposition of the goods in the narrow sense unless and until the ocean carrier (or other sub-contracting carrier) has made delivery under its contract of carriage with the NVOCC. Thus, a strict interpretation of Art. 58 should exclude NVOCC bills of lading from the category of "documents controlling [the] disposition" of the goods, because the NVOCC does not have and cannot give possession of the goods itself. The document may or may not control disposition

of the goods, depending on the NVOCC's relationship with the sub-contracting carriers.

There can be no doubt, however, that an NVOCC bill *represents* the goods under the broader interpretation of CISG, Art. 58. It operates as a receipt for the goods, showing their quantity, weight and apparent condition when handed to the carrier (usually the first sub-contracting actual carrier), and it is evidence of the NVOCC's obligation to arrange carriage of them to their destination.

2.4. Ship's delivery orders

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 bulk⁴¹ may sell parts of the cargo to different buyers. The bill of lading issued by the carrier to the shipper when the goods are shipped on board represents the whole quantity of the goods. In order for the seller to pass to several different buyers the right to take delivery of portions of the cargo that are presently undifferentiated, the seller must present to those buyers documents giving them the right to take possession of their respective portions. In short, the seller must be able to split the whole cargo into parts. 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.⁴²

Standard form contracts for the sale of bulk cargoes often expressly exclude the CISG,⁴³ so the question whether a ship's delivery order is

⁴¹ 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.

⁴² See, e.g., *Peter Cremer, Westfaelische Central Genossenschaft G.m.b.H. v. General Carriers, S.A. (The Dona Mari)* [1973] 2 Lloyd's Rep. 366 (cargo of bulk tapioca shipped under single bill of lading split into two by issue of ship's delivery orders for smaller quantities; ship's delivery order presented in return for payment by buyers, who presented their delivery orders to the carrier to take delivery).

⁴³ 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 M. Bridge, *The International Sale of Goods*, Oxford

a “document controlling... disposition” for purposes of CISG, Art. 58 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, even under the narrow interpretation of Art. 58, if tender of such a document is permitted under the sale contract. For all practical purposes, it functions in the same way as a bill of lading, except for an undifferentiated portion of the cargo on the ship.⁴⁴ Each buyer needs the ship’s delivery order to take possession of its portion of the goods on the ship. The seller should be able to retain withhold the document under CISG, Art. 58(2) until the buyer pays, and the buyer should be obliged to pay under CISG, Art. 58(1) once it receives the document.

2.5. Road and rail consignment notes

2.5.1. *Under the international conventions governing road and rail carriage*

If the goods are to be carried from one country to another by road or rail, the transport document is usually a non-negotiable one. 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. 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. Although COTIF and CMR were originally confined to Europe, they both now reach far beyond, to Scandinavia, the Middle East, North Africa and (in the case of CMR) Central Asia. Forty-five countries are party to COTIF,⁴⁵

University Press, Oxford 2007², Appendices 1 4. 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>, 21 July 2010.

⁴⁴ 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.

⁴⁵ The parties are: Albania, Algeria, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iran, Iraq, Ireland, Italy, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Monaco, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine and United Kingdom. Intergovernmental Organisation for International Carriage by Rail, *Intergovernmental Organisation for International Carriage by Rail (OTIF)*, para. 11 (July 2010), available at: <http://www.otif>.

of which 35 are also party to the CISG;⁴⁶ 55 countries are party to CMR,⁴⁷ of which 42 are also party to the CISG.⁴⁸

For rail carriage under CIM and road carriage under CMR, the transport document issued by the carrier is called a consignment note. In both cases, the consignment note is non-negotiable; the consignee is named on the consignment note.⁴⁹ 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.⁵⁰ Under CIM, the consignment note is carried with the goods to the destination and delivered to the consignee there, and a duplicate copy is given to the consignor.⁵¹ Under CMR, three original consignment notes are made: one is handed to the sender, one accompanies the goods and is handed to the consignee on arrival, and the third is retained by the carrier.⁵² 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.⁵³ Because the consignee takes delivery of the goods and the

org/fileadmin/user_upload/otif_verlinkte_files/01_vorstellung/01_allg_info/OTIF_Info_07_2010_e.pdf, 6 July 2010. The membership of Iraq and Lebanon is suspended because international rail traffic with those states is interrupted. *Ibid.* para. 12.

⁴⁶ Of the countries party to COTIF (see *supra* note 41), only Algeria, Iran, Ireland, Liechtenstein, Monaco, Morocco, Portugal, Tunisia, Turkey and the U.K. are not party to the CISG.

⁴⁷ The parties to CMR are: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iran, Ireland, Italy, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, The Former Yugoslav Republic of Macedonia, Malta, Moldova, Mongolia, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom and Uzbekistan. 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, 7 July 2010.

⁴⁸ Of the countries party to COTIF (see *supra* note 37), only Azerbaijan, Iran, Ireland, Jordan, Kazakhstan, Malta, Morocco, Portugal, Tajikistan, Tunisia, Turkey, Turkmenistan and the U.K. are not party to the CISG.

⁴⁹ CIM, Art. 7 § 1(g); CMR, Art. 6.1(e). CIM, Art. 6 § 5 specifically provides that the consignment note shall not have effect as a bill of lading.

⁵⁰ H. Beale, L. Griffiths, "Electronic Commerce: Formal Requirements in Commercial Transactions" *L.M.C.L.Q.* 2002, 479; A.D. Messent, D. Glass, *Hill & Messent's CMR: Contracts for the International Carriage of Goods by Road*, 2000³, Ch. 4.

⁵¹ CIM, Art. 6 § 4 (duplicate copy to consignor), Art. 17 § 1 (original consignment note to be delivered to consignee).

⁵² CMR, Art. 5.1.

⁵³ CIM, Art. 17 § 1; CMR, Art. 13.1.

original consignment note from the road or rail carrier at the same time, it is obvious that the original consignment note itself cannot constitute a “document controlling...disposition” of the goods under a narrow interpretation of CISG, Art. 58.

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 copy⁵⁴ of the consignment note (in the case of CMR) is a document controlling the disposition of the goods for the purposes of CISG Art. 58(1).⁵⁵ 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.⁵⁶ 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.⁵⁷ Thus, under CIM, the consignee has the right of disposal and the consignor does not unless the consignment note reserves the right to the consignor.⁵⁸ Conversely, under CMR, the sender has the right of disposal and the consignee does not unless the consignment note confers the right on the consignee.⁵⁹

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).⁶⁰ Thus, the consignor is no longer entitled to redirect the goods if it has sent the duplicate or first copy to the consignee.⁶¹ Conversely, the consignee cannot exercise the right of disposal until it has received the

⁵⁴ CMR refers to this copy as the “first copy”, which is the expression that will be used hereafter.

⁵⁵ L. Sevón, “Obligations of the Buyer under the Vienna Convention on the International Sale of Goods”, *Juridisk Tidskrift* 106/1990, 335 (1990). See also Maskow, *supra* note 50; Alba Fernández, *supra* note 131 at 22.

⁵⁶ CIM, Art. 18 § 1(c); CMR, Art. 12.1.

⁵⁷ CIM, Art. 18 § 3; CMR, Art. 12.3.

⁵⁸ CIM, Art. 18 § 2(d) provides that the consignor’s right is extinguished when the consignee becomes entitled to give orders under Art. 18 § 3. The consignee is entitled to give orders as soon as the consignment note is drawn up unless the consignor indicates to the contrary (see CIM, Art. 18 § 3), so the consignor’s right is extinguished immediately unless it is expressly reserved in the consignment note.

⁵⁹ CMR, Art. 12.3.

⁶⁰ CIM, Art. 19 § 1; CMR, Art. 12.5(a).

⁶¹ CIM, Art. 17 § 7 and CMR, Art. 12.7 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).

duplicate or first copy from the consignor.⁶² This is the basis for the argument that the duplicate or first copy may be a “document controlling... disposition” of the goods for purposes of CISG, Art. 58.⁶³

That view overstates the significance of the duplicate or first copy. The document itself does not control the disposition of the goods in the narrow sense. If, under CMR, the sender does not reserve the right of disposal to the consignee on the face of the consignment note, transfer of the first copy of the consignment note does not pass the right of disposal to the consignee.⁶⁴ The UNECE Ad Hoc Working Party that drafted CMR considered and rejected such a rule, on the basis that it would have been contrary to the principle that the consignment note is not a negotiable instrument but principally a document of proof.⁶⁵ If the sender exercises the right of disposal by presenting the first copy to the carrier, it can divert delivery of the goods from the named consignee but in those circumstances, *ex hypothesi*, it is not presenting a document “controlling...disposition” to the *buyer*, it is exercising a right conferred on it by CMR, using the document as a means of proving to the *carrier* that it has that right.

If the consignee has the right of disposal,⁶⁶ it cannot exercise that right unless it presents the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR).⁶⁷ Nevertheless, the document itself does not control the disposition of the goods in the narrow sense. The consignor cannot exercise the right of disposal even if it still holds the duplicate or first copy.⁶⁸ Transfer of the document from consignor to consignee does not transfer the right of disposal, which has always been with the consignee; it merely gives the consignee the ability to exercise that right. If the duplicate or first copy is not transferred, the consignee is entitled to demand delivery of the goods without presentation of the document.⁶⁹

⁶² CIM, Art. 19 § 1; CMR, Art. 12.5(a).

⁶³ *Supra* note 58.

⁶⁴ R. Loewe, “Commentary on the Convention of 19th May 1956 on the Contract for the International Carriage of Goods by Road”, *European Transport Law* 11/1976, 352.

⁶⁵ *Ibid.*

⁶⁶ As it will automatically under CIM unless the consignment note provides otherwise, but not under CMR unless the consignment note so provides: see *supra* note 184.

⁶⁷ *Supra* note 62.

⁶⁸ CIM, Art. 19 § 2 expressly provides that the consignor’s right is extinguished if the consignee has the right of disposal, “notwithstanding that he [the consignor] is still in possession of the duplicate of the consignment note”.

⁶⁹ CIM, Art. 17 § 1; CMR, Art. 13.1.

In summary, possession of the duplicate consignment note (in the case of CIM) or the first copy of the consignment note (in the case of CMR) does not change who has the right of disposal. If the consignor has the right of disposal, transfer of the document does not give the consignee the right; if the consignee has the right of disposal, the consignor cannot exercise the right even if it has the document. Thus, under the narrow interpretation of CISG, Art. 58, which equates “documents controlling... disposition” with documents giving the holder the right to possession, neither the duplicate consignment note (in the case of CIM) nor the first copy of the consignment note (in the case of CMR) would qualify.

Both types of consignment note *represent* the goods under the broader interpretation of CISG, Art. 58 because they operate as a receipt for the goods, showing their quantity, weight and apparent condition when handed to the carrier, and as evidence of the carrier’s obligation to carry them to their destination.

2.5.2. *In North America*

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.⁷⁰ All bills of lading, including road and rail bills, may be either negotiable or non-negotiable.⁷¹ 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,⁷² they would be “documents controlling [the] disposition” of the goods even under the narrow interpretation of CISG, Art. 58, unlike their counterparts under CIM and CMR.

2.6. Air waybills

Goods carried by air from one country to another as cargo are carried under non-negotiable documents called air waybills. Like sea waybills and road and rail consignment notes, air waybills simply name the consignee to which delivery must be made.

⁷⁰ 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).

⁷¹ 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.

⁷² 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.

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.⁷³ Ninety-seven countries are party to the Montreal Convention,⁷⁴ of which 57 are also party to the CISG.⁷⁵

The Montreal Convention requires an air carrier of cargo to issue an air waybill in three original parts, one for the carrier, one for the consignee and one for the consignor.⁷⁶ The carrier is obliged to deliver the cargo to the consignee on arrival at the place of destination, unless the consignor has exercised a right of disposal similar to that considered above in relation to CIM and CMR.⁷⁷ 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.⁷⁸ Unlike CIM and CMR, the Montreal Convention does not confer a similar right of disposal on the consignee. Thus, there is never any need for the consignor to send its copy or the air waybill to the consignee. Accordingly, no copy of the air waybill can be regarded as a "document controlling...disposition" under the narrow interpretation of CISG, Art. 58. The copies of the air waybill play no part in establishing the consignee's right to delivery of the goods from the carrier.

2.7. Summary in relation to transport documents

Negotiable bills of lading and straight bills of lading for sea carriage are "documents controlling...disposition" of the goods under the narrow reading of CISG, Art. 58 if they are issued by the sea carrier directly to the shipper. So are ship's delivery orders reflecting an undertaking by the carrier to deliver parts of an undifferentiated bulk to different receivers. Sea waybills, road and rail consignment notes and air waybills are not "documents controlling...disposition" of the goods under the narrow interpretation of CISG, Art. 58. Negotiable bills of lading for sea

⁷³ 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: Montreal Convention, Art. 1.2.

⁷⁴ The list of countries party to the Montreal Convention can be read at: <http://www.icao.int/icao/en/leb/mlt199.pdf>, 8 July 2010.

⁷⁵ The following 17 countries are party to the CISG but not the Montreal Convention: Belarus, Burundi, Gabon, Georgia, Guinea, Honduras, Iraq, Israel, Kyrgyzstan, Lesotho, Liberia, Mauritania, Moldova, Russia, Uganda, Uzbekistan and Zambia. All other countries party to the CISG are also party to the Montreal Convention.

⁷⁶ Montreal Convention, Art. 7.

⁷⁷ Montreal Convention, Art. 13.1.

⁷⁸ Montreal Convention, Arts 12.1, 12.3.

carriage issued by NVOCCs probably are not. In North America, road and rail bills of lading do fall within CISG, Art. 58, even under the narrow interpretation.

All of these documents *represent* the goods under the broader interpretation of CISG, Art. 58. All acknowledge receipt of the goods and the carrier's obligation to carry them to their destination and to deliver them there.

3. OTHER DOCUMENTS

3.1. Warehouse receipts (or warrants)

The document known in the U.S.A. and in many other countries as a warehouse receipt (but in the U.K. as a warehouse warrant⁷⁹) 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.⁸⁰ The holder of a negotiable warehouse receipt may sell or pledge the goods in the warehouse by dealing with the document.

Because it functions much like a bill of lading, a warehouse receipt is clearly a document "controlling...disposition" of the goods in the warehouse under the narrow interpretation of CISG, Art. 58. 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.⁸¹ 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 CISG, Art. 58(1) clearly applies.⁸² Similarly, the *Kantonsgericht*

⁷⁹ In the U.K., a warehouse receipt is a non negotiable document simply acknowledging receipt of goods. Hereafter, the expression "warehouse receipt" is used in the American sense, which is in common usage in other countries, too. In the U.K. such a document would be called a warehouse warrant.

⁸⁰ See, e.g., the Uniform Commercial Code, U.C.C. § 7 104(a).

⁸¹ CISG, Art. 1(1)(a).

⁸² 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>.

St. Gallen in Switzerland described a negotiable warehouse receipt (“Orderlagerschein”) as the kind of document to which CISG Art. 58 clearly applies.⁸³

3.2. Dock receipts (or warrants), quai receipts, mate’s receipts, etc.

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.⁸⁴ Later, often not until the goods are shipped on board the ship, 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).

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.

It has been suggested that documents such as dock receipts should be regarded as falling within CISG, Art. 58 if transferred to the buyer,⁸⁵ but that seems 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.⁸⁶ If the buyer’s obli-

html#cx (last visited July 8th, 2010); original German text available at <http://www.cisg-online.ch/cisg/urteile/135.htm> (last visited July 8th, 2010).

⁸³ 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> (last visited July 13th, 2010).

⁸⁴ 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).

⁸⁵ Maskow, 427.

⁸⁶ 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., appeal from India).

gation to pay were to be triggered by CISG, Art. 58(1) 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.⁸⁷ 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 under the narrow interpretation of CISG, Art. 58.

It might be argued that a dock receipt or mate's receipt must be regarded as a document *representing* the goods and so must be included under CISG, Art. 58 under the broader interpretation, however undesirable the practical implications. The document does, after all, act as the carrier's (or dock or terminal operator's) initial acknowledgment of receipt of the goods, stating their quantity, weight and apparent condition. There are certainly circumstances in which it might seem appropriate at first sight to treat a dock receipt or mate's receipt as a document qualifying under CISG, Art. 58. For example, if goods are sold on FCA terms and a dock receipt is issued by the terminal operator when the goods are delivered to the port, but the goods are destroyed while waiting to be loaded, the buyer should still be obliged to pay for them because risk passes under FCA terms when the goods are handed to the terminal operator.⁸⁸ It might seem that the buyer should therefore be required to pay for the goods upon presentation by the seller of the dock receipt. However, transfer of the dock receipt would not give the buyer the right to sue the carrier or terminal operator, whichever issued the dock receipt, because it is not the contract of carriage nor even evidence of the contract of carriage, but merely a receipt.⁸⁹ Thus, the buyer should not be required to pay in return for the dock receipt, because purchase of the document would give it no rights against the carrier. In such a case, the seller should present the dock receipt to the carrier and demand a "received for shipment" bill of lading, which the carrier would be obliged to issue, notwithstanding the destruction of the goods before actual shipment. The seller should then transfer the "received for shipment" bill of lading to the buyer, demanding payment. Transfer of the "received for shipment" bill of lading would transfer to the buyer rights of suit against the carrier because it is evidence of the contract of carriage.

⁸⁷ See, e.g., *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429 (P.C., appeal from India).

⁸⁸ International Chamber of Commerce, INCOTERMS 2000, FCA, paras A4, A5. INCOTERMS 2010 come into operation on 1 January 2011.

⁸⁹ *A.R. Brown, McFarlane & Co. v. C. Shaw Lovell & Sons* (1921) 7 Ll. L. Rep. 36 (mate's receipt); Bridge. 424.

This example serves to illustrate that a dock receipt or mate's receipt does not truly represent the *goods* but only the shipper's right to receive a bill of lading representing the goods. It ought not to qualify, even under the broader interpretation of CISG, Art. 58. The example also serves to illustrate a nuance that must be added to the broader interpretation. A document given by a carrier only represents the goods if it acknowledges receipt of the goods *and an undertaking to carry them to their destination*.⁹⁰ In the broader context of goods being carried from one country to another, which is explicitly referred to in CISG, Art. 58(2), it is appropriate to say that a document does not represent the goods unless it also represents the carrier's obligation to get them to their destination. A dock receipt or mate's receipt does not satisfy that requirement.

3.3. Survey reports, certificates of origin, etc.

Many other documents about the quality or condition of the goods may be generated before the goods leave the seller's country. When the buyer is paying 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.

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.⁹¹ 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 accepts that it must present all of these documents before it is entitled to be paid. Thus, CISG, Art. 58(1) only has practical significance when payment is to be made other than by letter of credit.

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

⁹⁰ Alba Fernández, 21.

⁹¹ *Uniform Customs and Practice for Documentary Credits*, 2007 revision (UCP 600), Articles 7, 8, 15.

As noted above, Peter Schlechtriem argued that any documents relating to the goods, including certificates of origin, should be “part of the seller’s performance” under CISG, Arts 30 and 34 and so must be presented before the buyer’s obligation to pay is triggered under CISG, Art. 58(1).⁹² 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.⁹³ The Bundesgerichtshof is surely right on this point. In ordinary circumstances, certificates of origin and survey reports about the quality or condition of the goods clearly do not control the disposition of the goods in the narrow sense, nor are they even documents *representing* the goods in the broader interpretation of CISG, Art. 58. They are plainly documents *relating* to the goods, and so must be presented by the seller under CISG, Arts 30 and 34, 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.⁹⁴

Dietrich Maskow has argued that documents such as certificates of origin should fall within CISG, Art. 58 if the buyer is required by the Customs authorities of its country to present those documents before taking delivery.⁹⁵ The same might be said in relation to sanitary or phytosanitary certificates if required by the quarantine authorities in the importing country. In these circumstances, the buyer cannot take physical possession of the goods unless and until it has the relevant document. In such a case, the certificate of origin (or other document) controls disposition of the goods even in the narrow sense. However, the Kantonsgericht St. Gallen in Switzerland has stated that CISG, Art. 58 applies to documents such as bills of lading or warehouse receipts and not to Customs documents (“ein Konossement oder ein Orderlagerschein, nicht um die Zollpapiere”).⁹⁶ “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 cer-

⁹² Schlechtriem, *supra* note 87.

⁹³ 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> (last visited July 8th, 2010); original German text available at <http://www.cisg-online.ch/cisg/urteile/135.htm> (last visited July 8th, 2010).

⁹⁴ Unless, of course, it has stipulated for presentation of these documents as a condition for payment under a letter of credit, in which case CISG, Art. 58(1) would not apply, in any event.

⁹⁵ Maskow, 427 428.

⁹⁶ 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> (last visited July 13th, 2010).

tificate, 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.

3.4. Insurance certificates

Insurance certificates deserve special consideration. They are plainly not "documents controlling...disposition" of the goods under the narrow interpretation of CISG, Art. 58 because they have no effect whatever on what happens to the goods. They reflect only an obligation on the insurer to indemnify the assured in the event of loss or damage to the goods. Obviously, though, an insurance certificate is a very important document. Peter Schlechtriem highlighted the significance of such documents by positing a situation in which the purchased goods are destroyed after the risk has passed to the buyer.⁹⁷ In such a case, the buyer might be unable to claim on the insurance taken out for its benefit unless it had an insurance certificate containing details of the insurance cover. Schlechtriem's argument on this point is compelling. A buyer on CIF or CIP terms should not be compelled to pay the purchase price for goods unless and until it receives the ability to claim on the insurance relating to those goods. Although the seller's obligation to provide the buyer with details of insurance cover is imposed by the contract, the buyer's obligation to pay is not tied to it.⁹⁸

It is desirable that the CISG should tie the two obligations together. That is impossible, however, under a narrow interpretation of CISG, Art. 58 because an insurance certificate simply does not control disposition of the goods in the narrow sense, by any stretch of the imagination. Schlechtriem's argument that "the seller has not placed the goods at the buyer's disposal"⁹⁹ until it has presented the insurance documents is unconvincing, because it is more relevant to the seller's obligation under Art. 30 to hand over the goods and documents than it is to the buyer's obligation

⁹⁷ Schlechtriem, *supra* note 130. One must also posit that the goods were sold on terms such as CIF and CIP, where the seller undertakes to buy insurance for the buyer. Schlechtriem's example would not work for goods bought on any of the F terms or CFR or CPT, because in each of those cases the buyer buys its own insurance. International Chamber of Commerce, INCOTERMS 2000, FCA, FAS, FOB, CFR, CPT, para. B3 states that the buyer has "No obligation" in relation to insurance, but in each case a footnote directs the reader to para. 10 of the Introduction, which explains that although the buyer has no obligation *to the seller* to buy insurance, that does not mean it is not in its own interest to buy insurance.

⁹⁸ International Chamber of Commerce, INCOTERMS 2000, 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". *Ibid.* para. B1 states only: "The buyer must pay the price as provided by the contract of sale".

⁹⁹ Schlechtriem, *supra* note 93.

under Art. 58(1). In the example posited by Schlechtriem himself, it would be impossible for the seller to place the goods at the buyer's disposal if they had already been destroyed. A better solution would be to say that the insurance certificate is a document *representing* the goods under the broader interpretation of Art. 58, and so must be presented by the seller to trigger the buyer's obligation under Art. 58(1). Admittedly, even that would be an exception, given that the interpretation otherwise favored here is that the document must acknowledge receipt of the goods and an undertaking to carry them to their destination.¹⁰⁰ In truth, all that an insurance certificate represents is the insurer's promise to provide an indemnity if anything befalls the goods. Without an expansive reading of Art. 58 to apply to insurance certificates, however, the situation described by Schlechtriem cannot be avoided.

4. INTERPRETATION OF ARTICLE 58

On one view, the phrase "documents controlling their disposition" was not well chosen because it focused inappropriately on the kinds of negotiable document used in maritime transportation. Even in 1977, when the phrase was first drafted, international carriage of goods by road, rail and air was done using documents that do not control the disposition of the goods in the strict sense. Since then, that has become true for many types of sea carriage, too. As noted in the Introduction, one possible response is to read CISG, Art. 58 expansively, so as to make it apply to all kinds of documents used for international transportation, as well as such documents as warehouse receipts and ship's delivery orders. In the literal sense, the French, Spanish and Arabic texts of the CISG all speak of documents *representing* the goods, which all of the transport documents considered in Section 2 do in one way or another. According to this view, CISG, Art. 58(1) would trigger the buyer's obligation to pay on presentation of any of the types of transport document considered in Section 2. That view is consistent with the provisions of the Uniform Customs and Practice for Documentary Credits, 2007 revision (UCP 600), which contains provisions relating to non-negotiable sea waybills (Art. 21), air transport documents (Art. 23) and road, rail or inland waterway transport documents (Art. 24). If the buyer is to pay by letter of credit, it can ask for presentation of any of these types of document as applicant under the letter of credit. Under the broad reading of CISG, Art. 58(1), the seller could make payment conditional upon the handing over of any of these documents and, under Art. 58(2) could dispatch the goods on terms that the documents will not be handed over until the price is paid.

¹⁰⁰ See *supra* note 94.

Another possible view is that the phrase “documents controlling their disposition” was deliberately chosen to apply only to negotiable bills of lading and other documents, like warehouse receipts and ship’s delivery orders, that actually confer a right to possession of the goods. Non-negotiable air waybills and road and rail consignment notes were in daily use in 1977 when the provision was first drafted and in 1980 when the Convention was made. If the drafters had wanted to use a phrase broad enough to cover non-negotiable transport documents, they would have done so. According to this view, the references to documents in Art. 58 simply do not apply when non-negotiable transport documents are used. Because the buyer can take delivery of the goods whether or not it has possession of the non-negotiable transport document, its obligation to pay should not be contingent upon receiving the document. As a result, CISG, Art. 58(1) triggers the buyer’s obligation to pay only when the goods themselves are placed at the buyer’s disposition, because there are no “documents controlling [the] disposition” of the goods when non-negotiable transport documents are used. Similarly, under Art. 58(2), the seller could dispatch the goods on terms whereby the goods themselves will not be handed over until the price is paid, but could not withhold the non-negotiable transport documents relating to them – although it would have no real interest in withholding those documents, in any event, as they do not control the buyer’s right to take possession of the goods. That view would be consistent with the fact that non-negotiable transport documents do not give the holder the right to possession of the goods, so the buyer routinely receives its own copy of them. The seller would be entitled to withhold delivery of the goods simply by exercising the right of disposal conferred by CIM, CMR, the Montreal Convention and (when and if they come into force) the Rotterdam Rules,¹⁰¹ and not by retaining possession of the document.

There are sound practical reasons for preferring the first of the two views described above. If the goods are lost or destroyed after the risk has passed but before they have been physically delivered to the buyer, the buyer should be obliged to pay the seller, even though it will never receive the goods. That result can only be achieved by imposing an obligation on the buyer to pay in return for the documents representing the goods. For example, if the goods are sold on CIP terms, risk passes to the buyer when the seller hands the goods to the carrier who is contracted to

¹⁰¹ The Rotterdam Rules, Arts 50.1(c), 51.1(a) provide that the shipper under a non negotiable transport document without a surrender clause (i.e., a sea waybill) is the “controlling party” and may give orders to the carrier replace the consignee by any other person, including the shipper itself, unless the consignee is designated as the controlling party. The seller would exercise its right under CISG, Art. 58(2) by not designating the consignee as controlling party.

bring them to the agreed place of destination.¹⁰² If the carriage contract between seller and carrier generates a non-negotiable transport document such as a sea or air waybill or a road or rail consignment note, there is no document controlling disposition of the goods under the narrower of the two interpretations of Art. 58 described above. If the goods were to be destroyed while in the carrier's custody, the buyer's obligation to pay for them would never be triggered under the narrow view of Art. 58(1) because the goods themselves could never be placed at the buyer's disposition and there would be no "documents controlling their disposition". Thus, if the seller were to present the non-negotiable transport document and insurance certificate to the buyer, as contemplated by CIP terms, the buyer would have no obligation to pay under Art. 58(1), despite the fact that the goods were destroyed after risk had passed to the buyer. The buyer's obligation to pay would then depend solely on the contract, which might be silent on this point.¹⁰³

In contrast, the broader reading of Art. 58 would impose an obligation on the buyer to pay in return for the non-negotiable transport document, as it ought, given that risk had passed when the goods were destroyed. The buyer could then claim against the carrier or claim on the cargo insurance policy, if the seller were also to present the insurance certificate, as it ought to under CIP terms and CISG, Art. 30. That returns us to Schlechtriem's concern, considered in Section 3.4, that the buyer might be obliged to pay under Art. 58(1) even if the seller failed, in breach of its obligation under Art. 30, to hand over the insurance certificate. As noted above, although it is something of a stretch to say that an insurance certificate is a document *representing* the goods, the broader interpretation of Art. 58 may be sufficient to address that concern.

5. CONCLUSION

The phrase "documents controlling their disposition" in CISG, Art. 58 should be interpreted as referring to any documents representing the goods. That interpretation is consistent with the literal text of the Arabic, French and Spanish versions of the CISG, which are equally authoritative with the English, Chinese and Russian. Any document given by a carrier that acknowledges receipt of the goods and an undertaking to carry them to their destination would qualify. That would include negotiable ocean bills of lading, whether issued by the ocean carrier itself or an NVOCC,

¹⁰² International Chamber of Commerce, INCOTERMS 2000, CIP, paras A4, A5. INCOTERMS 2010 come into operation on 1 January 2011.

¹⁰³ INCOTERMS 2000, CIP, para. B1 simply provides that: "The buyer must pay the price as provided in the contract of sale".

straight bills of lading, sea waybills, air waybills, road and rail consignment notes (and, in North America, road and rail bills of lading). It would also include other documents that give the holder the right to possession of the goods, such as warehouse receipts and ship's delivery orders. It would not include dock receipts or mate's receipts, commercial invoices, survey reports, packing lists and certificates of origin or quality, *unless* the Customs or quarantine authorities in the buyer's country demand presentation of such a document before the goods are released to the buyer, which may be the case with certificates of origin and sanitary or phytosanitary certificates. There are sound practical reasons for concluding that insurance certificates should be included as well, although in truth they neither control the disposition of the goods in the narrow sense nor do they represent the goods in the broad sense.