

STOPPAGE IN TRANSIT AND RIGHT OF CONTROL: 'CONFLICT OF RULES'?¹

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Stoppage in transit is a common law mechanism of protection of unpaid seller aimed at protecting the seller against the risk of non payment of the price. This seller's right has been adopted in a modified form by the UN Convention on the International Sale of Goods (CISG). On the other hand, under the rules of maritime law, there is the right of control over the goods performed by the holder of all originals of the negotiable transport document. The stoppage in transit, as defined by the CISG contravenes the right of control under the maritime law rules, particularly in civil law jurisdictions, where the seller does not have the right to stop the goods in transit, unless he is in possession of all originals of a transport document. This 'conflict of rules' became apparent after the UNCITRAL draft of the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted in July 2008. Differently from all previous conventions regulating carriage of goods by sea, this UNCITRAL Draft expressly regulates the issue of right of control during the carriage. Under those provisions, the right of control is in the hands of the holder of all originals of a transport document. Hence, under the UNCITRAL Draft the seller does not have the right to stop the goods in transit, unless he is the holder of all originals of a transport document, which is in conflict with the CISG provision on the stoppage in transit. This paper analyzes this 'conflict of rules' of these two conventions which were, interestingly, adopted by the same international organization.

Keywords: *stoppage in transit, right of control, international sale, carriage of goods by sea, transport documents.*

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1. INTRODUCTION

A new and important legislation is expected to be finalized soon under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). On July 3, 2008, the UNCITRAL approved the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as the "UNCITRAL Draft").² The draft Convention will be presented to the General Assembly for conclusion later in 2008. In accordance with the tradition, once adopted the new convention is likely to be named the New York Rules. This new UNCITRAL legislation has an ambitious goal to restore the unification of law that regulates the international carriage of goods by sea, an important segment of international trade law.³ Presently there are three separate and divergent legal regimes regulating this area of law: the Hague Rules (1924), the Hague-Visby Rules (1968), and the Hamburg Rules (1978). This divergence of legal regimes is, of course, to the detriment of legal certainty.

The present UNCITRAL Draft has naturally attracted great attention from legal scholars. This article will address only one part of the UNCITRAL Draft: the right of control. The purpose of this article is not to analyze the relevant provisions of the UNCITRAL Draft which deal with the issue of the right of control, but rather to examine them in the context of another text adopted by UNCITRAL, the UN Convention on Contracts for the International Sale of Goods (1980)⁴ (hereinafter the "CISG"). This article will focus on Article 71(2) of the CISG, which deals with the issue of stoppage in transit and its relation to the relevant provisions of the UNCITRAL Draft.

Stoppage in transit has only been sporadically examined by transportation law scholars.⁵ This article aims at offering a transportation law perspective of stoppage in transit, focusing on the possible conflict between two UNCITRAL texts: the provisions in the UNCITRAL Draft dealing with the right of control and the CISG provision on stoppage in transit. The focus of this article will be on the right of stoppage in transit of an unpaid seller and the possible conflict that the exercise of this right may cause with the rules governing the carriage of goods. The rules governing

2 See <http://daccessdds.un.org/doc/UNDOC/LTD/V07/881/07/PDF/V0788107.pdf?OpenElement> (last visited July 22, 2008).

3 The title of the text indicates that the UNCITRAL Draft is not limited to the carriage by sea but it also covers multimodal transport when one part of the transport is carriage by sea.

4 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (hereinafter "CISG").

5 See Hugo Tibergh, Stoppage in Transit, 12 *Annuaire de Droit Maritime et Aero-Spatial* 123 (1993); Charles Debattista, The Seller's Right of Stoppage in Goods Carried by Sea - the Carrier's Dilemma, in *ESSAYS IN HONOUR OF HUGO TIBERGH* 181 (Juristfrlaget 1996).

international sales may overlap in some situations with the rules governing the carriage of goods. This may lead to a 'conflict of rules' between two legal regimes which regulate distinct legal issues between distinct sets of parties. The fact that contributes to the confusion is that the parties to both of these transactions are often one in the same, albeit acting in different roles. Namely, the seller in the contract of sale is often, at the same time, the shipper under the contract of carriage, while the buyer is often the consignee.

Hopefully, this article will shed new light on the issue of stoppage in transit by introducing the transportation law perspective in examining this commercial law concept. This perspective is becoming more relevant as the moment of adoption of a new transportation law convention under the auspices of UNCITRAL is approaching. Some provisions of this new UNCITRAL text indicate the existence of a potential conflict between the right of stoppage in transit in international law of sales and the right of control in international transportation law.

2. BACKGROUND OF THE PROBLEM

International sales and carriage of goods are closely interrelated in the context of international trade. Unlike a simple "supermarket" sale, where the buyer and the seller perform their obligations simultaneously at the same place and at the same time, an international sale is much more complex. International sale is a distant sale involving a number of parties: the seller's obligation of delivery is performed through a carrier under a contract of carriage, while the buyer's obligation of payment is performed through a bank.

An international sale is typically a documentary sale where the delivery is made by presentation of documents to the bank under a letter of credit. Transport documents issued under the contract of carriage play an important role in an international sale of goods. The seller is required to present transport documents when the payment is made by letter of credit. This implies that the seller has an obligation to make two kinds of delivery: delivery of the goods and delivery of documents.⁶

An international sale involves a number of risks for the parties. One of those risks relates to the payment of the price. In practice, the seller may deliver the goods before the buyer pays the price. This puts the seller at risk if the buyer fails to pay the price, or becomes insolvent and is unable to pay. Commercial law has developed a number of instruments of protection against such risks. An irrevocable letter of credit drawn on a reputable bank is the most efficient form of protection

⁶ Article 30 of the CISG provides for this double obligation: "*The Seller must deliver the goods, hand over any documents relating to them. . .*" CISG, *supra* note 4, art. 30.

for the seller. In such a case, a right of control based on documents of title can prevent the buyer from receiving goods that he has not paid for. Another possible remedy is stoppage in transit, which is available at common law, as well as in some civil law jurisdictions.

3. STOPPAGE IN TRANSIT IN COMPARATIVE LAW

a) Common Law

Stoppage in transit is a remedy aimed at securing the payment of the price and protecting the interests of unpaid sellers. It was originally developed by the English Chancery Courts, and was based on the equitable doctrine under which a beneficial owner was allowed to trace the property held by a fiduciary, including a bailee, even where the property had been transferred.⁷ Where a seller transfers possession of the goods to the buyer without receiving payment of the price, the situation can be considered a conditional delivery of possession contingent upon the buyer's making payment. If the buyer fails to do so, or it becomes apparent that he cannot pay, the seller is entitled to order the carrier to stop the goods in transit. This right was originally based on the principle of privity of contract, under which only the shipper and the carrier had the right of contractual claims against one another. The consignee might have the right of suit only if title passed to him upon or by reason of an endorsement.⁸ In that case, the transfer of a document of title has the effect of transferring contractual rights to a transferee, so that he becomes a party to the contract of carriage with the carrier, having the same rights and duties, as contained in the bill of lading, as the transferor.⁹ Since title normally will not pass to the buyer unless he pays the price, the shipper retains the right to give instructions to the carrier even after the transfer of a negotiable document to the buyer. This probably represents the basis on which the right of stoppage was originally created, though it is quite difficult to trace its historical origins.

The right of stoppage has been incorporated into the legislations of most common law jurisdictions. Under English law, stoppage in transit was defined as "the right of the unpaid vendor, on discovery of the insolvency of the buyer, and

7 See *Re Hallett's Estate*, (1880) 13 Ch.D. 696 (A.C.) (U.K.); *Nippon Yusen Kaisha v. Ramjiban Serowjee*, [1938] A.C. 429, 450 (P.C. 1938) (appeal taken from Calcutta H.C.) (U.K.).

8 See *Bills of Lading Act, 1855*, 18 & 19 Vict., § 1 (repealed and replaced by the *Carriage of Goods by Sea Act, 1924*) (U.K.).

9 *Partenreederei M/s "Heidberg" and Vega Reederei Friedrich Dauber v. Grosvenor Grain and Feed Co. Ltd., Union Nationale des Cooperatives Agricoles de Cereales and Assurances Mutuelles Agricoles*, (The "Heidberg"), (1994) 2 Lloyd's Rep. 287 (Q.B.) (U.K.).

notwithstanding that he has made constructive delivery of the goods to the buyer, to retake them . . . before they reach the buyer's possession."¹⁰ Section 44 of the British Sale of Goods Act of 1979 and section 2-705 of the American Uniform Commercial Code (hereinafter the "U.C.C.") give the unpaid seller of goods the right to stop the goods in transit when the buyer becomes insolvent.¹¹ Under this remedy, the unpaid seller has the right to order the carrier not to deliver the goods to the buyer regardless of whether or not the buyer is the lawful holder of the document which indicates him as the consignee. The seller has the right to stop the goods in transit, even after he has ceded possession (as long as the goods are in transit), by giving notice of his claim to the carrier or other bailee holding custody of the goods.¹²

The right of stoppage exists whether or not property has passed to the buyer, and is exercised either by the seller's taking possession of the goods or by informing the carrier of his claim to the goods. By giving this order to the carrier, the seller

10 Booth Steamship Co., Ltd. v. Cargo Fleet Iron Co., Ltd., (1916) 2 K.B. 570, 580 (A.C.) (U.K.) (Reading, C.J.).

11 See Sale of Goods Act, 1979, c. 54, § 44 (U.K.) (hereinafter "Sale of Goods Act"), available at <http://www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=48&NavFrom=2&parentActiveTextDocId=1837068&ActiveTextDocId=1837068&filesize=227659> (last visited Mar. 25, 2008); Uniform Commercial Code (hereinafter "U.C.C.") § 2-705 (2005).

12 See Sale of Goods Act, *supra* note 11, § 44.

Subject to this Act, when the buyer of goods becomes insolvent the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment of the price.

Id. Section 2-705 of the Uniform Commercial Code provides:

(1) *The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) or if the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.*

(2) *As against such buyer the seller may stop delivery until*

(a) *receipt of the goods by the buyer; or*

(b) *acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or*

(c) *such acknowledgment to the buyer by a carrier by reshipment or as a warehouse; or*

(d) *negotiation to the buyer of any negotiable document of title covering the goods.*

(3)(a) *To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.*

(b) *After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.*

(c) *If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of possession or control of the document.*

(d) *A carrier that has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.*

U.C.C., *supra* note 11, § 2-705.

imposes on the carrier the obligation to return the goods to him, thereby reassuming possession of the goods, as well as the right to resell them.¹³

There are four conditions that must be fulfilled before the right of stoppage can be exercised, namely:

1. The buyer has failed to pay the price
(only an unpaid seller can exercise this right);
2. The buyer has become insolvent;
3. The seller has parted with the possession of the goods; and
4. The goods must be in transit.¹⁴

The stoppage of goods in transit has the effect of a suspension of performance by the seller. A seller has a right of stoppage from the time of the delivery of the goods to the carrier until the time the goods are handed over to the buyer. Thus, the goods must be in transit in the sense that they are delivered by a seller to a carrier but not yet delivered by the carrier to a buyer, i.e. during the time the goods are in the custody of the carrier. Typically, the goods are in the custody of a carrier as "a third intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession."¹⁵ The essential element of stoppage in transit is that it must occur prior to actual physical possession of the goods being acquired by the buyer; once the buyer has acquired possession, the goods are no longer in transit and they cannot be stopped anymore. The right of stoppage exists regardless of whether property has passed to the buyer and is exercised either by the seller's taking possession of the goods or by informing the carrier of his claim to the goods.¹⁶

13 See Sale of Goods Act, *supra* note 11, §§ 46(4), 48(3).

14 See *id.* at § 44; U.C.C., *supra* note 11, § 2-705(1).

15 Gibson v. Carruthers, [1841] 8 M. & W. 321, 328.

16 Section 46 reads:

(1) *The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are.*

(2) *The notice may be given either to the person in actual possession of the goods or to his principal.*

(3) *If given to the principal, the notice is ineffective unless given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.*

(4) *When notice of stoppage in transit is given by the seller to the carrier or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller; and the expenses of the re-delivery must be borne by the seller.*

Sale of Goods Act, *supra* note 11, § 46.

The right of stoppage may exist even if property has already passed to the buyer.¹⁷ The question of whether title over the goods has passed is not relevant to the right to stop delivery.¹⁸ This applies only to the relations between the seller and the buyer. Where the bill of lading has been transferred to a third party acting in good faith, the stoppage in transit has no legal effect.¹⁹ Under American law, the seller loses his right of stoppage if the transport document is negotiable and is negotiated to the buyer.²⁰

b) Civil Law

Most civil law jurisdictions do not recognize stoppage in transit.²¹ Instead of the common law principle of privity of contract, civil law recognizes the principle of contracts for the benefit of third parties. Under this principle, the transfer of a negotiable document has the effect of transferring contractual rights to a transferee, as a third party to the contract between the shipper and the carrier.²² This is also in line with the civil law theory on "*Wertpapier*" (literally: "valuable paper"), under which the third party holder of negotiable documents acquires contractual rights

17 See BENJAMIN'S SALE OF GOODS 1093 (A.G. Guest, et al. eds., Sweet & Maxwell 1974) (1868).

18 See *In re Kellstrom Indus., Inc.*, 282 B.R. 787, 790 (Bankr. D. Del. 2002).

19 See Sale of Goods Act, *supra* note 11, § 47(2)(a).

20 See U.C.C., *supra* note 11, § 2-705(2)(d).

21 The right of stoppage in transit is recognized in some civil law jurisdictions. See, e.g., Contract Law of China, art. 308 (P.R.C.) (promulgated by National People's Congress, Mar. 15, 1999, effective Oct. 1, 1999), available at http://www.novexc.com/contract_law_99.html (last visited Mar. 26, 2008), stating that:

Prior to carrier's delivery of the cargo to the consignee, the consignor may require the carrier to suspend the carriage, return the cargo, change the destination or deliver the cargo to another consignee, provided that it shall indemnify the carrier for any loss it sustains as a result.

Id., see also Norwegian Maritime Code § 307, available at <http://folk.uio.no/erikro/WWW/NMC.pdf> (last visited Mar. 25, 2008). The Norwegian Maritime Code provides:

The right of a seller in the event of breach of contract to prevent delivery of the goods to the buyer...or to demand their return, shall apply even though the bill of lading has been passed on to the buyer. The right of stoppage can not be asserted against a third party who has acquired an order or bearer bill of lading in good faith.

Norwegian Maritime Code § 307. Other Scandinavian Maritime Codes contain similar provisions.

22 Section 364(1) of the German Commercial Code provides that "the effect of the endorsement is that all rights under the endorsed instrument are transferred to the endorsee." Handelsgesetzbuch [HGB] [Commercial Code] May 10, 1897, Bundesgesetzblatt, Teil I [BGBl. I] 17, as amended, § 364(1) (F.R.G.).

not through a transfer of rights, but from the negotiable document itself.²³ These two concepts are compatible, not contradictory, because by the transfer of a negotiable document to a third party, in fact, the rights embodied in the document are, in fact, also transferred. Thus, the transferee becomes a party to the contract of carriage with the carrier, with the same rights and duties as the transferor as contained in the negotiable document. Based on these principles, the seller loses the right to give instructions to the carrier after he transfers the negotiable document to the buyer because he has lost the source of this right against the carrier: the negotiable document. By transferring the negotiable document, the contractual rights against the carrier embodied in that document are also transferred, including the right of control and the right of suit.²⁴ This means, of course, that the seller is deprived of the right of control, including the right to give orders to the carrier, after he transfers the bill of lading to the buyer. The seller may retain control over the goods only if he retains one original document. But this may merely allow the seller to prevent delivery of the goods to the buyer, and does not include the right to give instructions to the carrier. The carrier who would obey the seller's order to stop the goods in transit after the negotiable document is transferred to the buyer would breach the explicit rules on negotiability. The carrier may obey such orders only if the seller can produce all the original negotiable documents.²⁵ As a result, the right of stoppage is not recognized in most civil law jurisdictions.

Civil law has developed its own instruments for the seller's protection, such as the right of retention.²⁶ The main difference between the right of retention and the right of stoppage in transit relates to the right of giving orders to the carrier. With stoppage of transit, an unpaid seller is allowed to make orders to the carrier, while in the case of right of retention, the unpaid seller cannot give direct orders to the carrier. Alternatively, under civil law, an unpaid seller may rely on an injunction granted by the court as a provisional remedy by which the seller may prevent the carrier from delivering the goods to the consignee.

23 See HEINZ PRÜSSMANN & DIETER RABE, *SEEHANDELSRECHT* 610 (Beck 3d ed. 1992).

24 For example, in *The Mercandia Transporteur II*, the shipper could not sue the carrier even though he suffered a loss because he transferred the bill of lading to the consignee. See *Chambre commerciale et financière* [Cass. com] [Commercial and Financial Chamber] June 25, 1985, *Bull. civ. IV*, No. 198 1985 659 [Fr.].

25 See, e.g., *Handelsgesetzbuch* [HGB] [Commercial Code] § 654(1) (F.R.G.), which expressly provides that the carrier may not follow the shipper's instructions as to returning or delivering the goods "except when all counterparts of the bill of lading are returned to him." *Id.* In a similar fashion, § 364(3) provides that "[t]he debtor is only obliged to give performance upon the surrender of the relinquished instrument, cancelled with a receipt." *Id.* at § 364(3).

26 See *Code Civil* [C. civ.] art. 1613 (Fr.); *Handelsgesetzbuch* [HGB] [Commercial Code] § 455 (F.R.G.).

4. STOPPAGE IN TRANSIT UNDER THE CISG

Under the CISG, the seller has at his disposal a number of remedies. One such remedy in the seller's hand is the stoppage in transit as defined by Article 71(2):

“If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.”²⁷

This means that a seller who has already dispatched the goods may prevent handing over the goods to a buyer who refuses to pay or becomes unable to pay the price, even though the buyer holds the document which entitles him to obtain the goods. Article 71(2) does not require an actual breach of contract by the buyer in order for the seller to exercise the right of stoppage. In order to exercise the right of stoppage, it must be apparent that the buyer will not ultimately fulfill his duty of payment.²⁸

The right of stoppage is directed against the buyer, even if he is the lawful holder of a negotiable document, which gives him the constructive possession of the goods and the right to demand delivery of the goods against the carrier. Article 71(2) allows the seller to reclaim possession, even if the seller has lost control and possession during the course of the transaction.²⁹ The right of stoppage is terminated when the goods are delivered to the buyer.

According to the last sentence of Article 71(2), the right of stoppage relates to “the rights in the goods as between the buyer and the seller.” This may be interpreted in various ways, which are not mutually exclusive:

- 1) One interpretation is that the right of stoppage has effect only between the seller and the buyer. The seller is entitled to stop the goods in transit, and if the seller uses this right by ordering the carrier to stop delivery to the buyer, such action is not to be considered a breach of the contract of sale. If the buyer attempts to circumvent this seller's right, for example by suing the carrier for failure to deliver the goods, such action will be unlawful, making the buyer liable in damages.
- 2) A second interpretation is that the stoppage in transit is not available to the seller against a third holder of the bill of lading after the buyer has

²⁷ CISG, *supra* note 4, art. 71(2).

²⁸ See Alexander von Ziegler, The Right of Suspension and Stoppage in Transit, 25 J. L. & COM. 353, 368-69 (2005), available at <http://www.uncitral.org/pdf/english/CISG25/von%20Ziegler.pdf> (last visited Mar. 25, 2008).

²⁹ See *id.* at 367.

transferred such bill of lading to the third party. Obviously, where a buyer has resold the goods to a new buyer, the seller can no longer exercise the right of stoppage in transit against a third party. Most domestic laws protect the property rights of good faith purchasers, which means that the seller would not be able to exercise the right of stoppage when the goods are resold in transit.

3) Finally, a third interpretation is that the carrier is not bound to comply with a direction of the seller not to hand over the goods to the buyer. The effect of the stoppage right with respect to the carrier requires more detailed elaboration.

Article 71(2) was apparently drafted on the basis of the common law concept of stoppage in transit, but with one important distinction: it does not impose obligations upon the carrier. One part of the original Article 73 of the Convention relating to a Uniform Law on the International Sale of Goods, 1964 (ULIS) has been deleted because it implied that the right of stoppage includes the seller's right to give orders to the carrier. As a result, the scope of Article 71(2) of the CISG was limited to the rights "as between the buyer and the seller"³⁰

The fact that the CISG limits the scope of application of the right of stoppage to the relation between the seller and the buyer makes the nature of this right different from the right of stoppage at common law. American common law, in particular, differs from the CISG in an additional way. While Article 71(2) permits the seller to intercept the goods "even though the buyer holds a document which entitles him to obtain them," under U.C.C. section 2-705(2)(d), a seller's right to stop goods in transit ceases upon "negotiation to the buyer of any negotiable document of title covering the goods."

A number of scholars have expressed doubts with regard to the practical usefulness of Article 71(2). For example, according to Honnold, "paragraph (2) will be useful only in an unusual combination of circumstances..."³¹ Similarly, according to Bennett, "the effective operation of the paragraph could therefore be quite limited."³² In fact, this provision may serve a useful purpose in situations which may not have been intended by the drafters: it may protect the seller who

30 See Trevor Bennett, Article 71, in BIANCA BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW 516-17 (1987), available at <http://cisgw3.law.pace.edu/cisg/biblio/bennett-bb71.html> (last visited Mar. 26, 2008).

31 JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 431 (3d ed. 1999), available at <http://cisgw3.law.pace.edu/cisg/biblio/honnold.html#4237> (last visited Mar. 27, 2008).

32 Bennett, *supra* note 31, at 520.

enforces this right through the courts by temporary injunction.³³ But, if article 71(2) was intended to serve such a purpose, it should have been drafted differently and without implying a different purpose, for example, without mentioning the transfer of transport documents to the buyer. If the seller decides to apply for an injunction, it is irrelevant whether the transport document is transferred to the buyer.

There is another way in which the seller may prevent delivery of the goods to the buyer: the seller may retain one original negotiable document by which he can challenge the buyer's right on delivery of the goods at the port of destination. In such a case, where both the seller and the buyer demand delivery of the goods at the port of destination, each producing a bill of lading, the carrier is obliged to deliver the goods to a warehouse and let a court determine who has rights over the goods. This approach is not problematic under the principles of sales law, as defined by the CISG, since the seller may suspend performance of his obligations in case of anticipatory breach. This is also not contrary to the principles of transportation law, since negotiable documents may be issued in duplicate originals. If the seller retains one original, this may be an efficient way of preventing the buyer from receiving the goods. But in this case, the seller is not entitled to give instructions to the carrier unless he holds all original documents. At least this is the case in civil law jurisdictions. Thus, this method actually relates to the right of control and should be distinguished from the common law concept of right of stoppage.

5. EFFECT OF THE RIGHT OF STOPPAGE AS BETWEEN SELLER AND CARRIER

Article 71(2) expressly limits its operation "only to the rights in the goods as between the buyer and the seller." The CISG rules are written in a seller-buyer context and should not be interpreted to interfere with an area of the law that the CISG was not intended to cover. The CISG only addresses the permissibility of a conveyance, not the possibility thereof.³⁴ Article 71(2) merely confirms that a seller is not in breach of a sales contract when, under the circumstances listed in Article 71(2), he prevents the carrier from handing over the purchased goods to the buyer at the destination. The rights and obligations of the seller towards the carrier are unaffected by Article 71(2).³⁵ The carrier is, accordingly, not bound to comply with

33 See FRITZ ENDERLEIN & DIETRICH MASKLOW, INTERNATIONAL SALES LAW 287433: (1992), available at <http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html>.

34 See Ziegler, *supra* note 28, at 363.

35 See CISG, *supra* note 4, art. 71(2) (containing no mention of a seller's obligation towards the carrier).

a direction of the seller not to hand over the goods to the buyer. Indeed, where the buyer holds a document which entitles him to obtain the goods, the carrier may be precluded from withholding them by his obligations under the contract of carriage.³⁶

Honnold argues that the rules on stoppage contained in Article 71(2) are not so feeble even though their scopes are limited only to rights between the buyer and the seller. To support this argument, Honnold states that even though the CISG does not state that the carrier must deliver the goods to the seller, it does state that the seller may stop the goods "even though the buyer holds a document which entitles him to obtain them."³⁷

Under certain circumstances, the rules governing stoppage in transit in the law on sales may conflict with some principles of the relevant transportation law. Depending on the applicable laws pertaining to transportation and property, the seller might be deemed to have lost control over the goods by transferring a negotiable document, which would therefore transfer the right of control to the buyer. Under such a regime, the contract of carriage effectively empowers the buyer to dispose of the goods during transit. A problem may arise if the negotiable document is already transferred to the buyer who did not pay the price. Can a seller prevent delivery of the goods to the buyer in such a case? The answer to this question, which may also determine the effective operation of Article 71(2), is not simple. There are some important differences among various modes of transportation, as well as among national laws.

Under civil law, in principle, the seller does not have the right of stoppage against the carrier, because by transferring the negotiable document he loses this right under the contract of carriage. Once the negotiable document is transferred to the buyer, the seller loses the right to make any orders to the carrier related to the disposal of the goods (unless the seller retains one original). Many civil law jurisdictions explicitly prohibit the seller, acting as the shipper, from giving instructions to the carrier as to the return or delivery of the goods, unless he is in possession of all the originals.³⁸ When the shipper demands delivery of the goods at a port different from the port of destination, the carrier is not allowed to deliver the goods against one negotiable document, but rather he must require the full set of negotiable documents. The full set of originals is required in order to protect the carrier against the risk that at the port of destination a lawful holder

36 See Ziegler, *supra* note 28, at 366-67; BENJAMIN'S SALE OF GOODS, *supra* note 18, 1369.

37 See HONNOLD, *supra* note 31, at 432 (quoting CISG art. 71(2)).

38 See, e.g., Handelsgesetzbuch [HGB] [Commercial Code] May 10, 1897, Bundesgesetzblatt, Teil I [BGBl. I] 17, as amended, § 654(1) (F.R.G.); Shoho [Commercial Code], art 772, para XX, no. XX (Japan); South Korean Commercial Code, 1991, art. 817; Tiawanese Maritime Commercial Code, Year, art. 702.

of the negotiable document may appear and demand delivery of the goods. This compulsory obligation of the carrier effectively deprives the seller of the right of stoppage in those jurisdictions.

At common law, the right of stoppage includes the seller's right to give orders to the carrier. Under English law, if the seller has already delivered the goods to the carrier, and failed to retain the bill of lading, he may still prevent delivery of the goods to the buyer and retake possession of the goods, even when the buyer holds a bill of lading.³⁹ This may put the carrier in a precarious position, since according to section 46 of the Sale of Goods Act of 1979, the carrier "must re-deliver the goods to, or according to the directions of, the seller," but is, at the same time, obliged to deliver the goods to the lawful holder of the negotiable document. Under the Bills of Lading Act of 1855, the seller's right of stoppage of transit seemed to prevail over the right of a buyer as the lawful holder of the negotiable document.⁴⁰ However, under section 2(5)(a) of the UK Carriage of Goods by Sea Act of 1992 (hereinafter "COGSA 1992"), after the transfer of the bill of lading to the buyer, the seller loses his contractual rights against the carrier, including the right of control over the goods.⁴¹

Under U.S. law, the transportation law principles are recognized, and section 2-705(2)(d) of the U.C.C. is consistent with the Federal Bills of Lading Act (hereinafter the "FBLA"). Under section 2-705(3)(c) of the U.C.C., a carrier is not required to obey a stop order unless a negotiable document of title covering the goods is surrendered. Section 80105(b) of the FBLA makes it clear that the carrier is not excused where the seller orders stoppage but the bill has been duly negotiated to a good faith purchaser.⁴² These provisions of the U.C.C. and FBLA put the efficiency of Article 71(2) in doubt under American law, particularly the part of Article 71(2) which provides that the seller may prevent the delivery of the goods to the buyer "even though the buyer holds a document which entitles him to

39 See Sale of Goods Act, *supra* note 11, § 46.

40 See Bills of Lading Act, 1855, 18 & 19 Vict., c. 111, § 2 (repealed and replaced by the Carriage of Goods by Sea Act, 1992, c. 50) (U.K.) (providing that "nothing herein contained shall prejudice or affect any right of stoppage in transit . . .").

41 See Carriage of Goods by Sea Act, 1992, c. 50, § 2(5) (U.K.) (hereinafter "COGSA 1992"). This act repealed the Bills of Lading Act 1855.

42 The Federal Bills of Lading Act provides:

When a negotiable bill of lading is negotiated to a person for value in good faith, that person's right to the goods for which the bill was issued is superior to a seller's lien or to a right to stop the transportation of the goods. This subsection applies whether the negotiation is made before or after the common carrier issuing the bill receives notice of the seller's claim. The carrier may deliver the goods to an unpaid seller only if the bill first is surrendered for cancellation.

Federal Bills of Lading Act, 49 U.S.C. § 80105(b) (1994) (hereinafter "FBLA").

obtain them.”⁴³ Under section 80115 of the FBLA, the seller may not even resort to an attachment through judicial process unless the bill is surrendered to the carrier or its negotiation is enjoined. The situation is, however, different in the case of non-negotiable transport documents. Under section 80113(a) of the FBLA, the carrier's liability to the owner of the goods carried under a non-negotiable bill is subject to the right of stoppage in transit.

Under many municipal laws, the transportation laws create a serious obstacle for the effective operation of Article 71(2). While the scope of Article 71(2) is limited to the relations between the buyer and the seller and does not impose any obligation on the carrier, it implies that the seller may give orders to the carrier to stop the goods in transit. In that respect, Article 71(2) contravenes most domestic laws governing the carriage of goods by sea, under which the seller, acting as a shipper, loses control over the goods after he transfers the negotiable document to the buyer. This is particularly the case in civil law jurisdictions where the transfer of a negotiable document includes the transfer of contractual rights embodied in that document. Thus, the transferor has no legal standing to make any requests to a carrier after the document of title is transferred, since he no longer has a contractual relationship with the carrier. Hence, in most jurisdictions, a seller who, under Article 71(2) of the CISG has the right to stop the goods in transit, will not be able to exercise that right under the contract of carriage after he has parted with the negotiable document. He will have to seek other means to prevent delivery of the goods by the carrier, e.g. through court injunctions.

6. RIGHT OF CONTROL IN TRANSPORT LAW

The right of stoppage in transit under the contract of sale is closely related to the right of control under transportation law. Only the person who has control over the goods in transit is in the position to give orders to the carrier, including the order of stoppage of goods in transit.⁴⁴

Typically, the shipper has the right of control over the goods in transit. This right includes the right to give orders to the carrier, to change the destination or the consignee (although the burden is on him to show that he still retains this power, which requires presenting a full set of bills of lading). The right of control can be very important for the shipper, since it enables him (as seller) to prevent delivery to a buyer who failed to pay the price. In this respect, this right resembles stoppage in transit under common law, or the right of retention in civil law. The

⁴³ CISG, *supra* note 4, art. 71(2). Compare CISG, *supra* note 5, art. 71(2), with U.C.C., *supra* note 11 § 2-705(3)(c), and 49 U.S.C. § 80105(b).

⁴⁴ See Ziegler, *supra* note 28, at 367.

consignee is deprived of the right of control unless this right was transferred to him before the goods were delivered for carriage. This means that the consignee does not have any right to the goods until he receives them, and he cannot resell them during the voyage.

The right of control depends on the will of the parties. Parties are free to determine who will have the right to control the goods during their carriage. In the event the goods have been paid for and ownership has been transferred to the consignee upon loading of the goods, the transport document may state that the right of control is in the hands of the consignee.

The content of the right of control depends on the type of transport documents. A distinction has to be made depending on whether a negotiable transport document has been issued or not. Where a negotiable transport document is issued, the right of control is performed through such transport documents and the carrier is obliged to deliver the goods to the holder of the document upon presentation of an original negotiable document. It follows that only the holder of that document (whether he be the original shipper or a transferee) is entitled to demand delivery and he may do so only upon presentation of an original document. The right to demand the goods from the carrier is thus transferable by transfer of the document.

Negotiable documents, having the character of a document of title, such as the bill of lading, entitle the person in possession of such documents to receive, hold and dispose of the documents and the goods they cover. A negotiable document is issued by a bailee for the goods in his possession and entitles its holder to obtain the goods specified in it from the bailee, or to dispose of them by transferring the document. By means of a legal fiction, the negotiable document is deemed to represent the goods so that possession of it is equivalent to possession of the goods. The document of title enables its lawful holder to use it to obtain physical delivery of the goods at the port of destination, as well as to dispose of them during transit by transferring the document.

Even where the document is made out to the order of a named consignee, the shipper may, nevertheless, be entitled to redirect the carrier to deliver the goods to another person.⁴⁵ The shipper may delete the name of the consignee and either leave this portion of the document blank or insert the name of another consignee, provided that he has retained the right of disposal of the goods.⁴⁶ This right is lost, however, once the shipper transfers at least one original to the consignee, who, by becoming the lawful holder of the document, acquires the right to demand delivery of the goods.⁴⁷ Once the shipper has transferred all originals to a transferee, the right to control is also transferred to the transferee.

⁴⁵ See *id.* at 1369.

⁴⁶ See *id.*

⁴⁷ See *id.*

The issue of property is not relevant from the transportation law perspective. From this perspective, the carrier is obliged to deliver the goods to the lawful holder of the document, and is not required to investigate the issue of ownership. Strictly speaking, the right of control is not based on property rights because the controlling party may not be the owner of the goods. The controlling party is in the position to give orders to the carrier, either because he is the holder of a negotiable document (in which case his power of control is based on this document) or because he was given the right of control under the contract of carriage. By issuing a negotiable document, the carrier neither certifies property rights over the goods, nor has the authority to do so. The carrier simply confirms receipt of the goods as described in the document and undertakes to deliver them to the lawful holder of the document. Of course, the act of delivery of a negotiable document may have the effect of transferring title. But from a transportation law standpoint, the ownership issue is not relevant to the exercise of the right of control, or the right to receive the goods.⁴⁸ The only issue that matters under a contract of carriage is who has the right to delivery of the goods.⁴⁹ When a negotiable document is issued, the only relevant factor for the carrier is: who is the lawful holder of the negotiable document?

In the case of a non-negotiable document, although such a document is not a document of title, the seller can still retain control over the goods in transit, can reclaim the goods, can convey them to a third party, or can stop them in transit.⁵⁰ The seller retains this kind of control by having the right to give instructions to the carrier as to the delivery of goods. When the seller gives an instruction to the carrier to deliver the goods to a person different from the originally named consignee, the carrier will be obliged to obey such order. The seller is entitled to give such orders up until the moment the goods arrive at the destination and the named consignee is notified. At that point, control over the goods passes to the named consignee.⁵¹

48 See UNCITRAL Draft, art. 1(22) (defining the issuance and the transfer of a negotiable transport record, and restricting the meaning of issuance and transfer to the exclusive control over the record). Obviously, the intention of the drafters is that the carrier should not be concerned with the effects that the transfer may have as between the parties outside the contract of carriage.

49 Caslav Pejovic, Documents of Title in Carriage of Goods By Sea: Present Status and Possible Future Directions, J. Bus. L. 461, 470 (Sept. 2001).

50 Under section 5(3) of the U.K.'s COGSA 1992, even if the buyer is identified in a sea waybill the seller may still alter his delivery instructions to the carrier and redirect the goods to a third party. See COGSA 1992, *supra* note 43, § 5(3).

51 For more details, see Hugo Tibergh, Legal Qualities of Transport Documents, 23 TUL. MAR. L.J. 1, 36 (1998).

7. SIMILARITIES AND DIFFERENCES BETWEEN STOPPAGE IN TRANSIT AND RIGHT OF CONTROL

There are some similarities and differences between stoppage in transit and the right of control. First, in terms of similarities, both serve as a kind of security. Stoppage in transit is the right of a seller who is entitled, under certain conditions, to exercise this right even where he is not the legal owner of the goods. Right of control also protects the seller, and does so even more effectively by allowing the seller to retain control over the goods until the price is paid. Typically, the right of control will be transferred to the buyer against the payment of the price under a letter of credit.

The differences between stoppage in transit and the right of control lie in the difference in nature of the bases of these rights. Stoppage in transit is based on the contract of sale, which serves to transfer the property rights in a specific object to the buyer in return for the latter's payment of the purchase price to the seller. If the buyer fails to pay the purchase price, the stoppage in transit right aims to restore the property to the seller. On the other hand, the right of control has its basis in the rights derived from the contract of carriage, particularly the rules governing the negotiability of transport documents, which determine the right of control over the goods. This right is only indirectly related to the property right in the sense that the contract of carriage is an instrument which enables the seller to perform his main duty under the contract of sale: delivery of the goods.

The right of control is important in situations where the seller does not trust the buyer, whereas stoppage in transit is a "reservation" needed where the seller has shown trust in the buyer by granting him credit, but the buyer turns out to be unable to live up to that trust. The seller may retain the right of control and exercise stoppage in transit as long as he is the controlling party. Once this right is transferred to the buyer, the seller is no longer in a position to exercise his right of stoppage in transit.

With respect to transportation law, the link between stoppage in transit and the right of control lies in the question of who has control over the goods in transit. Only the person with control over the goods is in the position to give orders to the carrier, including the one related to the stoppage of goods in transit. The identity of the controlling party can be established on the basis of the contract of carriage and transport documents. In the case of non-negotiable documents, the controlling party is the shipper, unless he has transferred this right to the consignee. In the case of negotiable documents, the controlling party is the lawful holder of the document.⁵²

52 In case of a straight bill of lading, despite some contradictory views, the situation is not so complicated, at least in the civil law system. In principle, the controlling party is the shipper, despite

8. POSITION OF THE CARRIER

A peculiar feature of the common law concept of stoppage in transit is the fact that the seller relies on the carrier in exercising this right. For example, under English law the carrier must obey the seller's orders relating to the delivery of goods.⁵³ The exercise of the right of stoppage in transit may cause serious problems for the carrier where the buyer is in possession of the negotiable document. Under the principles governing carriage of goods, the carrier is bound to deliver the goods to the lawful holder of a negotiable document.⁵⁴ The carrier cannot rely on the contract of sale and the seller's right of stoppage as a defense against the buyer, who, acting as the consignee, may sue the carrier for wrongful delivery. The liability for wrongful delivery under those principles may be very harsh and expose the carrier to a high risk. In the case of wrongful delivery, he may not rely on the benefit of a limitation of liability.

The contract of carriage and the contract of sale are two independent contracts governed by different legal regimes. Liability for non-performance of the carrier's obligations is based on the rules governing the carriage of goods, and the carrier is not allowed to rely on the rules and principles governing the contract of sale. Logically, the carrier would look at the contract of carriage, to which he is a party, rather than to the sales contract. Consequently, the carrier would normally deliver the goods to the lawful holder of a negotiable document. In the end, why should the carrier bear the consequences of the seller's carelessness in transferring a bill of lading to a buyer who failed to pay the price?

The most difficult situation is when the seller transfers a negotiable document to the buyer without being paid the price. In this case, there are two competing claims to the goods: the seller derives his claim from his right to stop the goods in transit, while the buyer is entitled to receive the goods as a lawful holder of the negotiable document. The party under pressure in this situation is the carrier. On one hand, he is obliged to obey the seller's order to stop delivery of the goods, while on the other hand, he risks liability to the consignee for wrongful delivery if he obeys the seller's order. This is, at least, the situation under English law.⁵⁵

the fact that delivery is to be made to a named person. The shipper retains the right to replace the name of the consignee, as long as he retains the possession of the straight bill. Once this document is assigned to the consignee, the right of control is transferred to the assignee. See Caslav Pejovic, *The Straight Bill of Lading: Do We Really Need It?*, 40 EUR. TRANSP. L. 303 (2005).

53 See Sales of Goods Act, *supra* note 11, § 4 (the carrier "must re-deliver the goods to, or according to the directions of, the seller...").

54 See, e.g., Sale of Goods Act, *supra* note 11, § 27; U.C.C., *supra* note 11, § 2-705(2)(d).

55 See COGSA 1992, *supra* note 43, § 2(1)(a) (stating that the buyer as the lawful holder is entitled to delivery of the goods and the carrier will breach the contract with the buyer if he obeys the

In this kind of situation, the carrier should make a decision by balancing the seller's right of stoppage based under the law of sales with the transportation law rule that the goods may be delivered only to the lawful holder of the negotiable document. Unless there are some special circumstances (e.g. there are long time business relations between the seller and the carrier), once a negotiable document is transferred to the buyer, the carrier will most probably ignore the seller's request of stoppage in transit. As one author stated, "it is difficult to see why the carrier should put himself to cost and trouble on account of a problem created by the seller's folly (transferring the bill of lading before payment) and the buyer's default (non-payment)."⁵⁶

If the carrier decides to give preference to the seller's right of stoppage, the carrier would usually require from the seller a letter of indemnity. By such a letter, the seller should undertake the risk of wrongful exercise of the right of stoppage in transit, as well as cover the expenses caused by the exercise of this right. However, this may still expose the carrier to serious risk because he might not be able to rely on a letter of indemnity issued by the seller if the court holds that such letter is fraudulent.⁵⁷ Moreover, under American law, a person may be held criminally liable for fraudulent violation of rules governing duties related to transport documents.⁵⁸ It is unlikely that a letter of indemnity could bring comfort to a person sentenced to prison.

Under many municipal laws, the carrier would not have adequate protection if he relied on the right of stoppage. It is not clear on what legal basis the exercise of the right of stoppage may be possible in jurisdictions that do not recognize such a right.⁵⁹ Even at common law, the right of stoppage may be allowed only if it does not interfere with the rules on presentation of negotiable documents, as is the case with the U.C.C. and the FBLA provisions.⁶⁰ In other situations, the seller has at his

seller's instructions regarding to the delivery). See also *Elder Dempster Lines v. Zaki Ishag*, (The "Lycaon"), [1983] 2 Lloyd's Rep. 548.

56 CHARLES DEBATTISTA, *THE SALE OF GOODS CARRIED BY SEA* (2D ED., 1998).

57 *Brown Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd.*, (1957) 2 Q.B. 621 (A.C.) (U.K.).

58 See FBLA, *supra* note 42 (providing that a person who violates the provisions on the right of control under the Act "shall be fined under title 18, imprisoned for not more than 5 years, or both . . .").

59 In *Siebel-Hegner & Co. v. The Peninsular & Oriental Steam-Navigation Co.*, the Court held that the seller's right of stoppage in transit was not recognized by Japanese law. In this case, the carrier refused to deliver the goods to the consignee because of the seller's order to stop the goods in transit. See *Siebel-Hegner & Co. v. The Peninsular & Oriental Steamnavigation Co.*, (Yokohama Dist. Ct., Oct. 29, 1918) (Japan).

60 Under the U.C.C., the right of stoppage can be exercised by the seller until "negotiation to the buyer of any negotiable document of title covering the goods." U.C.C., *supra* note 11, § 2-705(2)(d)

disposal other, and more efficient, ways of protection. The seller can exercise this right by issuing a bill of lading to his own order and defer transfer of the bill of lading to the buyer until the price is paid. The seller may also retain one original bill of lading made out in his name, which would enable him to prevent the buyer from receiving the goods when the ship arrives at the destination. Also, when the bill of lading is negotiated to the buyer, the seller may demand from the buyer, by an appropriate procedure, the return of the bill of lading and other documents.

The carrier is obviously not bound by the CISG, but rather by laws governing the carriage of goods. From the perspective of the carrier, the CISG regime is irrelevant, since the carrier is not a party to the sales contract. He is party to a carriage contract, which is governed by the legal regime governing the carriage of goods. Since the CISG does not impose any obligation on the carrier, the seller may only rely on the carrier's voluntary compliance with his instructions regarding stoppage. The point here is not whether the seller can demand something from the carrier, but whether the carrier should obey such a demand. Why would the carrier obey such an order and risk liability for wrongful delivery? The answer to these questions may not be simple, and will depend on the rules governing the carriage of goods rather than those regulating the sales contract.

9. UNCITRAL DRAFT TRANSPORT LAW

The UNCITRAL Draft Transport Law addresses a number of issues that have not been regulated so far by previous international conventions. All of the existing international conventions governing carriage of goods by sea have ignored the issues related to the right of control. Differences among national laws and different practices may have been the reason that those issues were left aside by the drafters of these conventions. The growing use of non-negotiable documents and electronic documents has brought the issue of the right of control to the attention of the drafters of the UNCITRAL Draft Transport Law. The essence of this right is the right to give the carrier instructions with respect to the goods, which includes instructions that do not modify the contract of carriage, demanding delivery at the place of destination, and replacing the consignee.⁶¹

Under the FBLA,
when a negotiable bill of lading is negotiated to a person for value in good faith, that person's right to the goods for which the bill was issued is superior to a seller's lien or to a right to stop the transportation of the goods...The carrier may deliver the goods to an unpaid seller only if the bill first is surrendered for cancellation.

FBLA, *supra* note 42, § 80105(b).

61 Under UNCITRAL Draft, *supra* note 2, art. 53(1),

The right of control may be exercised only by the controlling party and is limited to:

a) The right to give or modify instructions in respect of the goods that do not constitute a variation

The UNCITRAL Draft makes a clear distinction between a situation where a non-negotiable document is issued, and one where a negotiable document is issued. When no negotiable document is issued the carrier holds the goods for the shipper or the party, who directly or indirectly acquires the right of control from the shipper.⁶² It is important to note that a consignee is the controlling party when designated as such by the shipper. When the non-negotiable document is issued, providing that it shall be surrendered in order to obtain delivery of the goods, the shipper, as the controlling party, may transfer the right of control to the consignee named in the document.⁶³ Finally, when a negotiable document is issued, the holder of such a document is the controlling party.⁶⁴

10. CONFLICT BETWEEN THE CISG AND THE UNCITRAL DRAFT

The effect of stoppage in transit is limited to the law on sales, and may contradict the rules governing carriage of goods. "Where the buyer holds a document which entitles him to obtain the goods, the carrier may be precluded from withholding them by his obligations" under transportation law.⁶⁵ According to Bennett, in such circumstances the effective operation of Article 71(2) would be "quite limited."⁶⁶ With the adoption of the UNCITRAL Draft, it will be even more limited because of a possible "conflict of rules" between the CISG and the UNCITRAL Draft.

The potential conflict between the CISG and the UNCITRAL Draft arises from the co-existence of the right of stoppage under sales law and the right of control under transportation law, so that the exercise of one of these two rights affects the other right. Under the principles of transportation law, the buyer, who is a lawful holder of a negotiable transport document, has an exclusive right of control and

of the contract of carriage;

b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

c) The right to replace the consignee by any other person including the controlling party.

Id.

62 See UNCITRAL Draft, *supra* note 2, art. 54(1)(a) ("The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party.").

63 See *id.* at art. 54(2)(a) ("The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document or the electronic transport record by transferring the document to this person without endorsement...").

64 See *id.* at art. 54(3)(a) ("The holder or, if more than one original of the negotiable document is issued, the holder of all originals is the controlling party.").

65 Bennett, *supra* note 32, at 520.

66 *Id.*

the seller has no recourse to prevent him from exercising this right. In the hands of a buyer, such a document confers the power to control the goods and demand their delivery at the destination, regardless of whether the purchase price has already been paid in accordance with the applicable sales law or not.⁶⁷ On the other hand, under Article 71(2) of the CISG, the seller is allowed to intercept the cargo before actual delivery to the buyer, even where the seller has lost control over the goods. In other words, the right of stoppage under Article 71(2) might be in conflict with the right of control under transportation law principles.

Under the UNCITRAL Draft, if the shipper has transferred the negotiable document to the consignee, then he cannot prevent delivery of the goods to the consignee. The seller would have no right to make any orders to the carrier when he designates the consignee as the controlling party under Article 54(1)(a), when he transfers a non-negotiable document to the consignee without endorsement under Article 54(2)(a), or when the consignee is the holder of a negotiable document under Article 54(3)(a). Therefore, under the UNCITRAL Draft Instrument, the carrier would be in breach of his duties toward the controlling party if he were to obey the seller's orders related to stoppage in transit.

The main source of the conflict with the UNCITRAL Draft is the portion of Article 71(2) that states that the seller can exercise the stoppage in transit "even though the buyer holds a document which entitles him to obtain them." This implies that the seller may give instructions to the carrier even if the buyer is in possession of a negotiable document. On the other hand, Article 54(3)(a) of the UNCITRAL Draft says something to the opposite effect, i.e., that the seller is not the controlling party and cannot give instructions to the carrier unless he is the holder of all the originals. What the CISG gives the seller with one hand is taken away by the other hand - the UNCITRAL Draft. The seller may have the right to give instructions to the carrier under the CISG, but does not have the same right under the UNCITRAL Draft. Under the CISG, the seller is allowed to give orders to the carrier related to the stoppage, and he will be protected against the buyer if he exercises this right. But what is the meaning of having such protection if the seller (as a shipper) is not allowed, under the UNCITRAL Draft, to give such orders to the carrier? It comes to the point that the seller will be protected by the CISG if he exercises the right of stoppage, which he is not allowed to exercise under the UNCITRAL Draft. Where is the logic of being protected if one does something he is not allowed to do? What is the purpose of having a right that does not exist in the real world? This "conflict" may also be understood in a "non-conflict" way, in the sense that the seller may give orders under the CISG to the carrier who would not obey them under the Draft Transport Law. But then again, what is the point of giving orders that will not be obeyed?

⁶⁷ See Ziegler, *supra* note 28, at 367.

Article 71(2) may also apply to a situation where the seller retains one original negotiable document. Such a seller may prevent the handing over of goods to the buyer by appearing at the port of destination with a demand for delivery, regardless of whether or not one original is in the hands of a buyer. But, again in this case, the text of Article 71(2), which provides that the seller may prevent the handing over of goods to the buyer "even though the buyer holds a document which entitles him to obtain them," is not necessary, and is even confusing because it may mean that all originals are in the hands of the buyer.

Finally, another possible use of Article 71(2) might be in the case of a seller using a temporary injunction. But in this case, as mentioned above, this provision should have been drafted differently. If Article 71(2) is intended to be used to protect the seller who resorts to a temporary injunction, the portion that states that the seller may prevent handing over of the goods "even though the buyer holds a document which entitles him to obtain them," would be confusing. This implies a different situation since the issue of who holds a transport document is irrelevant to the use of an injunction.

Hence, in none of the above cases is there a need for the portion of Article 71(2) which provides that the seller "may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them." This provision may also be misleading and create unnecessary confusion. It remains a puzzle why this sentence entered the text of Article 71(2). The "Report of the 1977 UNCITRAL Committee of the Whole I relating to the draft Convention on the International Sale of Goods" sheds some light on how it did. In rejecting a proposal to delete the provision on the stoppage in transit, the Report states that "it was pointed out that the right of "stoppage in transit" of the goods, as set out in paragraph (2), appears in many legal systems."⁶⁸ Another mystery is how the UNCITRAL Committee came to the conclusion that the right of stoppage in transit, as defined in Article 71(2), "appears in many legal systems." The Committee would have been more accurate had it stated that the concept of stoppage in transit, as defined in the CISG, does not exist in any legal system. In English law, the right of stoppage includes the right of the seller to give orders to the carrier.⁶⁹ Under American law, the seller loses his right of stoppage if the transport document is negotiable and is negotiated to the buyer.⁷⁰ In most civil law jurisdictions this concept simply does not exist. The concept of stoppage in transit in Scandinavian Code might be a misnomer; it is more likely that it actually corresponds to the

68 *Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods*, [1977] UNCITRAL Y.B. VIII, U.N. Doc. A/32/17, available at <http://cisgw3.law.pace.edu/cisg/legislative/B01-71.html> (last visited Mar. 25, 2008).

69 See Sale of Goods Act, *supra* note 11, § 46(1).

70 See U.C.C., *supra* note 11, § 2-705(2)(d).

right of control based on transportation law principles rather than on equity principles.

This article provides evidence that the right of stoppage in transit, as defined in Article 71(2), does not exist in many legal systems. Moreover, this CISG provision is in conflict with the rules of transportation in most legal systems. Paradoxically, Article 71(2) of the CISG may operate without hindrances if the CISG is applied in the United Kingdom, one of the very few developed countries that has not ratified the CISG. Even in that case, the seller would be able to rely on the right of stoppage only under the conditions defined by Section 44 of the Sale of Goods Act of 1979. Only after those conditions are satisfied can the seller be entitled to require the carrier to redirect the goods.⁷¹ The questions of why and for what purpose this problematic sentence became a part of Article 71(2) are still waiting for convincing answers. This article represents an attempt to demonstrate why Article 71(2) would be better without that sentence.

The courts have not had much opportunity to examine the legal issues related to stoppage in transit, presumably because unpaid sellers have preferred to secure their positions by more efficient instruments. As a result, there is little modern litigation relating to the exercise of this right in international trade. The fact that in the twenty years since the CISG entered into force there has been only one case in which the courts in the CISG member states would apply Article 71(2) is a convincing argument for its lack of practical importance.⁷² However, one may also take the converse interpretation and argue that Article 71(2) was drafted so skillfully and clearly that it operates without causing any disputes. But after a detailed examination of Article 71(2), this does not appear to be a credible interpretation. It is more likely that the right of stoppage in transit is rarely, if ever, exercised in modern practice. Moreover, the text of this provision clearly contradicts the rules governing carriage of goods and the UNCITRAL Draft, which is an unwelcome situation that could and should have been avoided. When the UNCITRAL Draft eventually comes into force it is even less likely that anyone will use the right of stoppage in transit. Why would anyone rely on a non-existent right?

Article 71(2) may not be harmful, and in certain (though extremely rare) situations, it may play a useful role. But when observed in the light of modern practice, which offers much safer and more efficient instruments to protect sellers,

71 See Sale of Goods Act, *supra* note 11, § 46.

72 See Kassationsgericht des Kantons Zürich [Court of Cassation of Zürich], Apr. 2, 2007, available at <http://cisgw3.law.pace.edu/cases/070402s1.html> (last visited Mar. 25, 2008), *aff'd*, Bundesgericht [BGer] [Federal Court] July 17, 2007, Entscheidungen des Schweizerischen Bundesgerichts [BGE] III (Switz.), available at <http://cisgw3.law.pace.edu/cases/070717s1.html> (last visited July 22, 2008). However, even this case does not relate to the situation where a negotiable document is transferred to the buyer. Moreover, neither the UNILEX nor CLOUT databases contain a single case involving stoppage in transit.

this provision seems to be obsolete. Moreover, its conflict with well established rules on right of control under transportation law leads one to conclude that the CISG would be better off without Article 71(2), or, more precisely, without the provision stating that the seller can exercise the stoppage in transit "even though the buyer holds a document which entitles him to obtain them." In fact, the main criticism in this article is inspired by this portion of Article 71(2). Without it, this provision would be spared most of the criticism, and the author would be spared spending his time and efforts writing this article.

Some doubts with respect to the viability or usefulness of Article 71(2) have already been expressed by a number of scholars. Its existence has been partly justified by the fact that it may operate within the transportation laws of different legal regimes. However, once the UNCITRAL Draft is transformed into a Convention, this justification will lose ground. While previous international conventions failed to regulate the right of control, the UNCITRAL Draft explicitly addresses this issue. This part of the UNCITRAL Draft, which is based on well settled principles of transportation law, clearly contradicts Article 71(2). If the UNCITRAL Draft becomes a widely adopted Convention, it would no longer be easy to justify the contents of Article 71(2) by invoking the differences among the legal regimes.

The most complicated questions regarding stoppage in transit arise not in connection with sales law, but in connection with the possibility of enforcing this principle in other fields of law that affect sales, such as transportation law. The CISG does not, and could not, address the conditions under which the seller may be able to enforce that right in the context of transportation law, since that issue depends on the legal regime governing the carriage of goods.

11. CONCLUSION

Some of the most complicated issues in law arise in situations where there is a conflict between the rules belonging to different areas of law. In those situations, a difficult issue may arise: which rule should prevail? The answer to this question is often quite difficult. The causes of this "conflict of rules" often lie in different traditions, as well as in different backgrounds of different areas of law. That is why such issues deserve particular attention by the drafters of international conventions.

The fact that UNCITRAL is the author of both the CISG and the UNCITRAL Draft makes the situation rather odd. It is difficult to understand why the CISG contains a rule which provides for a right involving the breach of another rule, under a different legal regime, adopted by the same organization. Would it, perhaps, have been better to provide for a different right which does not interfere with the transportation law rules and would be more effective, such as the right of retention?

Was such a provision necessary at all? If the CISG has expressly excluded from the scope of its application the effect which the contract of sale may have on title or the goods, why did it retain this provision which is rooted in the common law transfer of property system? Wouldn't it have been better to leave this issue to national law too?

Stoppage in transit is an outdated instrument in international sales. The right of stoppage in transit has lost its importance in the modern system of international sales due to widespread use of letters of credit and retention of title clauses. In modern business, the right of stoppage might be important only in rare cases where the sale is on credit and the payment is made through an open account upon delivery. In those situations, the most convenient way in which an unpaid seller can protect his interests against the buyer's default is to retain possession of the document of title until payment.

Policy reasons also speak against the use of stoppage in transit. The carrier should not have to get involved in legal wrangling about the supremacy between the right of stoppage of an unpaid seller and the constructive possession acquired by the lawful holder of a bill of lading. Additionally, this kind of interference with the right of stoppage with the rules on presentation of negotiable documents may adversely affect the status of bills of lading and undermine the whole system of financing in international sales. Also, for policy reasons, one convention should not offer protection to a party which prompts the other party to break the rules of another convention. In most jurisdictions, the seller is not allowed to give orders to the carrier related to delivery of the goods after he effectively loses control over the goods by transferring a negotiable document to the buyer. If the carrier obeys such an order, that would mean a violation of rules of transportation law, similar to a case of wrongful delivery of the goods. Of course, the party breaching the rules would be the carrier, but the CISG, in a sense, encourages that kind of breach. Legislation may not be capable of preventing violations of rules in practice, but, at least, it should not encourage such violations.

Now, with this situation already having been created, it is not realistic to expect that the CISG should be revised. The problems in practice are not expected to appear often because the mechanism of the letter of credit has already significantly limited the risk of problems arising in this area. On the other hand, the UNCITRAL Draft will be the subject of further attention before the text is eventually adopted. In this situation, the drafters of the UNCITRAL Draft should not pay much attention to the CISG provisions on the stoppage in transit, as any accommodation of Article 71(2) by the UNCITRAL Draft may lead to the deviation from traditional and well settled rules of transportation law. Hence, the UNCITRAL text should remain in line with the traditions and principles of transportation law.

It is well known that the same issue may be seen differently when observed from different angles. From the perspective of sales law, Article 71(2) has its

logic of protecting an unpaid seller. On the other hand, when observed from the perspective of transportation law, Article 71(2) does not seem logical at all because it contravenes fundamental principles of transportation law. In other words, Article 71(2) protects the seller if he exercises the right he is not allowed to exercise under transportation law. When these two different principles and manners of reasoning are contrasted, one question that arises is: Where is the logic in protecting someone for doing something he is not allowed to do? The answer to this question, however, may also depend on different perspectives.

When there are situations where some legal norms are closely related to different areas of law, an interdisciplinary approach to drafting the rules is welcome. In fact, one of the messages of this article is to promote the interdisciplinary approach in situations similar to the "conflict of rules" case examined in this article. Hopefully, some lessons for the future can be drawn from this experience.

Sažetak:

ZAUSTAVLJANJE ROBE U PRIJEVOZU (STOPPAGE IN TRANSIT) I PRAVO KONTROLE : "SUKOB PRAVILA"?

Pravo zaustavljanja tereta tijekom prijevoza je mjera zaštite prodavatelja od rizika neplaćanja cijene, koju prodavatelj ima u anglosaksonskom pravu na temelju pravila koja reguliraju prodaju robe. To pravo je u modificiranoj formi sadržano i u Konvenciji UN o međunarodnoj prodaji robe iz 1980. (Bečka konvencija). Prema pravilima pomorskog prava, postoji pravo kontrole na teretu tijekom prijevoza koje posjeduje ovlašteni imatelj prenosive prijevozne isprave. Pravilo o zaustavljanju robe tijekom prijevoza, na način na koji je definirano Konvencijom UN o međunarodnoj prodaji robe, u suprotnosti je s načelima na kojima je utemeljeno pravo kontrole u pomorskom pravu, osobito u zemljama kontinentalnog prava. Naime, prema Konvenciji UN prodavatelj ima pravo spriječiti kupca da primi robu, čak i ako je kupac u posjedu prijevozne isprave koja mu daje pravo na predaju robe. Ta odredba je u suprotnosti s pravilima pomorskog prava u zemljama kontinentalnog prava, u kojima prodavatelj nema pravo na zaustavljanje robe tijekom prijevoza, osim ako je u posjedu svih izvornika prijevozne isprave. Ovaj "sukob pravila" je postao evidentan usvajanjem nacrtu Konvencije o ugovorima o prijevozu tereta u cijelosti ili djelomično morem, koji je usvojio UNCITRAL u srpnju 2008. godine. Naime, za razliku od prethodnih međunarodnih konvencija u materiji prijevoza tereta morem, nacrt ove nove Konvencije sadrži izričite odredbe koje reguliraju pravo kontrole na teretu tijekom prijevoza. Na temelju tih odredbi, pravo kontrole ima osoba koja je u posjedu svih izvornika prijevozne isprave. Dakle, prema odredbama nacrtu nove Konvencije, prodavatelj nema pravo zaustaviti teret tijekom tranzita, osim ako je u posjedu svih izvornika prijevozne isprave, što je u suprotnosti s tekstom Bečke Konvencije o međunarodnoj prodaji robe. Ovaj tekst analizira ovaj "sukob pravila" dviju konvencija, koje je, što je zanimljivo, donijela ista međunarodna organizacija.

Ključne riječi: zaustavljanje robe u prijevozu (stoppage in transit), pravo kontrole, međunarodna prodaja robe, prijevoz tereta morem, prijevozne isprave.