

# Chapter 10 of the Rotterdam Rules: Control of Goods in Transit

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## I. GENERAL INTRODUCTION

The new convention's chapter on the right of control deals with situations in which the goods have been delivered to the carrier for transportation, loaded on board a ship, or are somewhere on the high seas. In other words, the convention addresses goods which are in transit and in the carrier's custody.

Goods in transit have an owner, who may be their buyer or even their seller, if he has retained title upon shipment. Such goods may be pledged or they may otherwise serve as collateral security for trade-financing purposes, and under certain circumstances a seller may have a right of stoppage in transit.

Difficulties may arise when any of these rights must be exercised during the maritime transport, most often when the person who seeks to exercise his or her rights in the goods is not a party to the contract of carriage under which the goods make the voyage. Even if that person is a party, the law may be unclear as to the extent of control, if any, that he or she may exercise over the goods.

The provisions of Chapter 10 of the new U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as "Rotterdam Rules" ("Chapter 10"), try to fill this gap.

## II. THE ROLE OF TRANSPORT DOCUMENTS

### A. *In the Absence of Communication, a Symbol of the Goods Was Invented: The Document*

The current legal rules on exercising rights in goods in transit date from when no communication was possible between the party with legal control of the goods and the party actually controlling them. For this reason a document called the "bill of lading," was invented to represent the goods.<sup>1</sup>

Handling this document replaces physically handling the goods, and, when doing so, no involvement is needed from the person actually in custody of the goods during transit. This way, by handing over the document, ownership of the goods may be transferred or a pledge on the goods may be created.

However, the strength of using the bill of lading as a symbol for the goods, a token, is at the same time a weakness. A document may be lost or tampered; a documentary system is prone to fraud; and, importantly, at a certain stage the document must lose its function again. That moment occurs when the person who is entitled to the goods once again obtains actual control of the goods. Normally that happens when the goods arrive at their destination and are delivered by the carrier to the person who presents the bill of lading. The rule has been developed that possession of the token representing the goods legitimates a person to take delivery of the goods from the carrier, and upon delivery of the goods by the carrier, the document returns to the carrier and loses its function.

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1. The UNCITRAL convention does not use this word anymore. It makes a distinction between: (i) non-negotiable transport documents, as defined in article 1(16), (ii) non-negotiable transport documents that indicate that it shall be surrendered in order to obtain delivery of the goods and (iii) negotiable transport documents, as defined in article 1(15). The term "bill of lading" covers the latter two types of transport documents.

### *B. The New Convention Decouples the Legal Rule and the Document*

Today, instant communication is possible to and from all corners of the world, including to carriers in actual control of goods in transit. This means that, for all practical purposes, a document as a symbol of the goods is no longer necessary. Why should anyone use a document for transferring ownership of goods in transit if it is possible to do so directly, namely by transferring legal control over the goods and notifying the carrier of such a change in control?

The only reason is that the current law and practices are still based on the documentary process. A further problem is that many of the legal rules on this subject are based on case law and trade practices. At a national level, clear codification is often only a summary, and at an international level, it does not exist at all.

Therefore, in order to give a fair chance to any change in these documentary practices, two things must happen. First, the legal rules relating to the exercising of rights in goods in transit must be codified. Second, these new rules must be decoupled from the use of a document. This is precisely what the new UNCITRAL convention does in Chapter 10—it legally paves the way for document-free maritime transport.

## III. WHAT IS IN CHAPTER 10?

Chapter 10 provides that under transport law, a person with certain rights in the goods may have constructive possession of them, and such constructive possession, if needed, can be turned into actual possession. These functions are laid down in seven articles, of which the first three are the most important. In subparagraphs B–H I will deal with each of these articles separately. I will begin each subparagraph with the text of the article, followed by explanatory notes.

### *A. Definitions of “Right of Control” and “Controlling Party”*

Before addressing the three articles, I should draw attention to the fact that “right of control” and “controlling party” are defined terms. These definitions are included in article 1, subparagraphs 12 and 13: “Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

### *B. Article 50: Exercise and Extent of Right of Control*

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 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.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

The chapeau of the first paragraph makes it clear that the controlling party is the exclusive person entitled to exercise a right of control.

Subparagraph (a) refers to the normal instructions under a transportation contract (e.g., “Please, keep the goods at a temperature of minus 6 degrees.”; “Please, deliver the goods prior to 3 p.m.”). Often, such instructions are primarily of an operational nature. However, this is not always the case. A quite common instruction is, “Please, seek contact before you actually deliver.” Such instruction is given by a shipper/seller when, upon shipment, there is no certainty that the purchase price of the goods will be paid in time and the shipper/seller wants to be sure that the goods will not be delivered prior to receipt of the money.

The type of instruction under subparagraph (a) may be given in any transportation contract. The instructions referred to under subparagraphs (b) and (c) arise under particular circumstances. They are normally variations of the contract of carriage.

The possibility of obtaining an early delivery may be important when there is a reason to avoid the goods’ arrival in the jurisdiction of the consignee. For instance, the consignee to whom the goods are delivered on credit terms may have become insolvent and unable to pay for the goods. In such a case the unpaid seller may want to keep the goods out of the hands of the consignee’s receiver.

Replacing the consignee may be relevant when the goods are resold to another person. It may also be relevant when the selling price of the goods is not forthcoming and the shipper/seller nominates itself as the new consignee in order to be able to reclaim possession of the goods again. Also, it may be crucial for a bank when it seeks to enforce its rights as the pledgee of the goods.

The second paragraph of Article 50 links the period during which the right of control can be exercised to the period of responsibility of the carrier under the contract of carriage. Because the beginning and the end of the period of the carrier’s responsibility may be determined by agreement,<sup>2</sup> actual custody of the goods by the carrier is not always the decisive factor of whether the right of control can still be exercised. Similarly, the moment that the consignee demands delivery<sup>3</sup> of the goods is legally irrelevant for the termination of the right of control.

### C. *Article 51: Identity of the Controlling Party and Transfer of the Right of Control*

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(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;

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2. *Id.* Annex No. 1, ch. 4, art. 12(3).

3. *Id.* art. 43.

- (b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and
  - (c) The controlling party shall properly identify itself when it exercises the right of control.
- 2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:
  - (a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and
  - (b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.
- 3. When a negotiable transport document is issued:
  - (a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;
  - (b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and
  - (c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.
- 4. When a negotiable electronic transport record is issued:
  - (a) The holder is the controlling party;
  - (b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

- (c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

This article sets out in a detailed manner who, in different situations, the controlling party is.

The first paragraph applies to situations where a non-negotiable transport document, such as a sea waybill, is issued. However, it also applies to cases in which no document at all is used. This may occur in short-haul ferry traffic. More importantly, this may apply in some e-commerce business models where the electronic data relating to the carriage does not qualify as an electronic transport record as defined in Article 1(18) of the convention.

Further, subparagraph (b) expressly provides that the right of control is a transferable right. Generally, the manner in which the transfer must be effected is not dealt with in the convention and, consequently, remains subject to the transfer of rights provisions of the applicable national law. This subparagraph provides that vis-à-vis the carrier a transfer is only effective if and when the carrier has been notified. And pursuant to Article 3 of the convention, this notification may be made electronically.<sup>4</sup>

The first paragraph provides this article's main rule. The following three paragraphs should be regarded as exceptions to this main rule. Each of these relates to a specific type of transport document.

The second paragraph applies when a bill of lading is made out to a named person.<sup>5</sup> The convention defines such transport document as "non-negotiable."<sup>6</sup> Particularly in civil-law jurisdictions, this type of transport document must be legally distinguished from the sea waybill.

The third paragraph applies when a negotiable bill of lading is issued and simply follows the current bill of lading practice.

The fourth paragraph applies when the electronic equivalent of a negotiable bill of lading is issued. It refers to "procedures referred to in article 9, paragraph 1." Article 9, however, only indicates the object of these procedures and does not provide for their contents. The convention leaves it to the parties to the contract of carriage to develop these contents.

#### *D. Article 52: Carrier's Execution of Instructions*

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:
  - (a) The person giving such instructions is entitled to exercise the right of control;
  - (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

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4. *Id.* Annex No. 1, ch. 1, art. 3.

5. Often called a "nominative bill of lading," a "straight bill of lading," or a "recta bill of lading."

6. *Id.* Annex No. 1, ch. 1, art. 1(15), (16).

- (c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.
2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.
  3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.
  4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

This article provides for the principle that the right of control may be unilaterally exercised by the controlling party, even in the cases of an early delivery or a change of consignee that must be regarded as a variation to the contract of carriage. A carrier is, however, only obliged to execute the instructions subject to the conditions specified in this article.

These conditions are not cumbersome. The main condition is that the instructions must fit in the normal operations of the carrier. Further, additional costs and expenses incurred by the carrier must be compensated by the instructing party, and the carrier may request security for such amounts.

As to the liabilities of the carrier, the article only deals with liability for loss of or damage to the goods or for delay in delivery. Remarkably, whether a carrier may be held liable for any loss or damage, other than loss or damage of the goods<sup>7</sup> resulting from non-compliance with any instruction rightfully given, is left to the applicable national law.<sup>8</sup> The limits referred to in article 59 also apply to this carrier's liability.

#### *E. Article 53: Deemed Delivery*

“Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.”

This article provides that the normal rules relating to delivery also apply to the early delivery referred to in article 50, paragraph 1(b).

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7. “Goods” is a term defined in article 1(24) and relates to the goods carried under the contract of carriage only. *Id.* Annex No. 1, ch. 1, art. 1(24).

8. *See id.* Annex No. 1, ch. 10, art. 51(4) (mandating that the procedures for the use of a negotiable electronic transport record “shall be referred to in the contract particulars and readily ascertainable”).

*F. Article 54: Variations to the Contract of Carriage*

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

Articles 54 and 55 further clarify the concept of “controlling party.” As noted above, the controlling party is the party interested in the goods during the carriage. But, unless it is also the shipper, it is not a party to the contract of carriage pursuant to the provisions of the convention.<sup>9</sup>

Instead, the rights and obligations of the controlling party are specifically provided for in the convention, i.e., in Articles 54 and 55. Consequently, the controlling party may, for all practical purposes, act as the counterparty of the carrier during the transport.

In this context, the first paragraph of this article provides that, if during the carriage any variation of the contract of carriage (beyond those referred to in article 50(1)(b) and (1)(c)) becomes desirable, only the controlling party may agree (with the carrier) to such a change.

The second paragraph of this article deals with the evidentiary requirements of any variation of the contract of carriage. Because one of the functions of a transport document is to evidence the contents of the contract of carriage,<sup>10</sup> it follows that any amendment to the terms of this contract of carriage must also be inserted in the transport document.

*G. Article 55: Providing Additional Information, Instructions or Documents to Carrier*

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the

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9. The question whether the controlling party is or becomes a party to the contract of carriage is not dealt with in the convention. As a matter of doctrine, this is left to applicable national law.

10. *Id.* Annex No. 1, ch. 8, art. 41.



shipper, the documentary shipper shall provide such information, instructions or documents.

During the carriage, the carrier has a general duty of care with respect to the goods.<sup>11</sup> This duty may include the carrier's duty, under certain circumstances, to protect the interests of the controlling party relating to the goods. In the past, during the carriage no communication was possible between the carrier and the controlling party. Thus, the carrier had to act on its own in these circumstances. Today, instant communication is widely available, and the carrier should therefore ask for instructions relating to the goods from the controlling party. Similarly, the controlling party is under an obligation to provide such instructions.

The second subparagraph recognizes that the controlling party may not always be known to the carrier, or may not be in a position to provide adequate instructions. In such circumstances, the carrier may defer to the shipper.

The new convention does not oblige the carrier to carry out any instruction given under this article. The carrier may not be reasonably able to execute the instructions, or the instructions given are clearly not in the proper interests of the goods. In such cases, the carrier's general duty of care must override the instructions.

#### *H. Article 56: Variation by Agreement*

"The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b)."

Article 79 of the convention provides that, to a large extent, the obligations of the carrier and the shipper are mandatory law. However, the main provisions of Chapter 10 do not involve matters of public order. To the contrary, they are typically of a trade-law nature. Therefore, article 56 provides that parties may agree that, summarized, no variations to the contract of carriage will be unilaterally imposed on the carrier and the right of control itself (including its transferability) may be restricted or excluded.

## IV. RIGHT OF CONTROL MAY CREATE CONSTRUCTIVE POSSESSION

The provisions of Chapter 10 show that the controlling party has the effective legal control of the goods during transit. The importance of this conclusion for persons with rights in the goods, such as property rights or a right of pledge, cannot easily be overestimated.

If a seller wants to transfer ownership of the goods during a carriage, or wants to retain ownership in the goods because it has not yet received payment, it must have constructive possession of the goods. As to the rights of pledge, many jurisdictions require that the pledgee, such as a trade-financing bank, have actual or constructive possession of the goods. In both cases, the seller or the bank may have constructive possession through the possession of the right of control. In other

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11. *Id.* Annex No. 1, ch. 4, art. 13.

words, the seller or the bank must be the controlling party under the contract of carriage. Through the exercising of the right of control it can turn its constructive possession of the goods into actual possession.

It must be emphasized that the convention does not deal with sales law, property law or bankruptcy law *per se*. Whether possession, right of stoppage, or any other right in the goods exists, is a matter of such other fields of law. What the convention does is provide the legal tools under maritime transport law for the holder of any of these rights to exercise its right with respect to goods that are subject to a maritime carriage.

Obviously, this also goes the other way. Without being a controlling party, a bank runs the risk that its intended pledge does not meet the applicable national law's requirements for the validity of pledges. And a seller that no longer is a controlling party cannot exercise, say, a retention of title, without first becoming a controlling party again through court order or otherwise.

Traditionally, possession of the right of control is linked to possession of a negotiable transport document, such as a bill of lading. Under many (if not all) jurisdictions, holding a bill of lading is recognized as holding rights in the goods. A properly made transfer of a bill of lading is generally regarded—under applicable national law—as a transfer of these rights in the goods.

The new convention still recognizes this existing legal practice. However, it provides that possessing the right of control and holding the bill of lading are no longer necessarily linked. The provisions on the right of control also apply when no document is issued for the carriage involved.<sup>12</sup> In other words, possession of a negotiable document and possession of certain rights in the goods have been decoupled.

It is reasonable to expect that national laws will follow this decoupling with regard to the effects of the right of control on the rights under the above-mentioned other fields of law. Why should a straight transfer (i.e., without the use of a transport document) of the right of control of the goods during a maritime carriage not be recognized by the applicable national law as a transfer of title to these goods, provided the transfer is made by someone entitled to do so under the new convention and the carrier is notified of this transfer? Equally, why should retention of the right of control not be recognized as retention of title?

## V. DECOUPLING OF THE EXERCISING OF THE RIGHT OF CONTROL AND THE USE OF TRANSPORT DOCUMENTS MAKES DOCUMENTLESS CARRIAGE POSSIBLE

If rights in goods, including the transfer of those rights, can be exercised during the maritime carriage without the use of a negotiable transport document, the main obstacle to the development of e-commerce systems in maritime transport (i.e., the bill of lading's document-of-title function) has been removed.

The convention does not address how a transfer of the right of control should be effected. This matter was left to national law. However, under most, if not all, jurisdictions, transfer of rights between the transferor and the transferee may be

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12. *Id.* art. 51.

done electronically.<sup>13</sup> And with respect to the transferor notifying the carrier of the transfer, the convention expressly provides that this notice may be made electronically. Consequently, when the transfer of the right of control under Chapter 10 and the notification thereof to the carrier may be made electronically, the whole document-of-title function of the negotiable bill of lading can be performed electronically.

This points to the next question: what about the “electronification” of the other functions of the transport document, namely receipt and evidence of the contract of carriage?

Under the electronic banking systems widely in use, the bank’s client has, electronically, exclusive access to an electronic record showing its bank accounts. This record is kept by the bank in an electronic vault, to which only the client (i.e., the holder of the account) has access. Through these systems the holder is able to make payments electronically. There are proven, widely used methods of keeping electronic records in electronic vaults. The custodian of the vault can accept electronic orders from the controlling party and provide exclusive access to a certain part of the record to another person. Thereby, automatically, the controlling party can deny access to the transferred part of the record.

Why should a comparable system not be developed by carriers?<sup>14</sup> What is the point of carriers issuing documents at all when the title function of the document can be performed electronically? Carriers can put the documentary data in an electronic record—most of them already have these data in such a record—and maintain it in an electronic vault while granting to the controlling party exclusive electronic access to the record, as well as the maintaining the possibility of transferring access to another person. The electronic notification to the carrier of any transfer of the right of control, made by the prior controlling party upon acceptance of the transfer by the new controlling party, should trigger the carrier’s transfer of the exclusive access to the cargo-data record to the new controlling party.

This does not require a systematic revolution. Many carriers already provide their customers with access to their electronic systems for tracing and tracking purposes. Some carriers already go further and even allow their customers to electronically draw up transport documents in their systems.

There are many similarities between banks and carriers. Clients entrust their money to a bank and expect that their money is, electronically, properly recorded by the bank. Many banks require clients to sign a paper that the records of the bank are conclusive evidence. It would be self-defeating for a bank to tamper with data relating to these financial records.

The same applies to carriers. Shippers entrust their goods to carriers, and sellers and buyers rely in their businesses on the carriers’ documentation. If this documentation is made available electronically, like in electronic banking, why

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13. In earlier versions of the draft there was an express provision that transfer of rights could be done electronically. See U.N. Comm’n on Int’l Trade Law, Nov. 6–17, 2007, *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, ch. 1, art. 63, U.N. Doc. A/CN.9/WG.III/WP.56 (Nov. 17, 2007) (stating that a transfer that is otherwise permissible may be made by electronic means). However, this provision was included in an article with several contentious items, which is why in the negotiation process it was decided to delete the whole article 63. Thereby, regrettably, this non-contentious part was deleted.

14. Smaller carriers without the capability to develop electronic documentary systems themselves, may wish to make use of a specialized third party acting on their behalf.

should a carrier tamper with the cargo records? Just as with a bank, it would be self-defeating for a carrier to tamper with electronic records.

It is my conclusion that, once the title function of a transport document can be performed electronically—which, as explained above, is the great achievement of Chapter 10—paper transport documents and, in my view, so-called electronic transport documents, will no longer be needed in maritime transport.<sup>15</sup> An additional advantage of such an electronic cargo-data system is that, at any time during the carriage, as well as when the goods have arrived at their destination, the carrier knows the identity of the controlling party. As a result, when needed, lines of communication between the carrier and controlling party can easily be established. The provisions of the convention relating to delivery of goods, dealt with in Chapter 9, should be viewed in this light as well.

## VI. CONCLUSION

Chapter 10 of the new UNCITRAL convention provides the rules relating to the control of the goods during a maritime carriage. These rules are drafted in such a way that the controlling party has the effective control during transit.

Furthermore, possession of this right to control may be linked to the possession of a negotiable transport document, but the right to control is not restricted to a party holding such a document. The rules of Chapter 10 also apply where the controlling party does not hold a bill of lading.

Because of these two features, Chapter 10 paves the way for document-free carriage. Parties will now be able to develop e-commerce business models under which all the classic functions of a transport document may be performed electronically. As a result, even so-called electronic transport documents may become superfluous.

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15. Then, as between sellers and buyers the payment term “cash against documents” (“CAD”) must be replaced by “cash against transfer of control” (“CATOC”).