The Legal Position of Terminal Operators in Hinterland Networks

This book is part 23 in the NTHR-reeks, an accompanying book series to the Dutch Journal for Commercial Law (*Nederlands Tijdschrift voor Handelsrecht*).

Titles in this series:

1. Mr. drs. M.L. Hendrikse, mr. ing. N.J. Margetson & prof. mr. J.G.J. Rinkes, *Overzicht Verzekeringsrecht 1998-2004*
2. Mr. J.A. Kruit, *Avarij-grosse en de aanwezigheid van schuld*
3. Mr. drs. M.L. Hendrikse & prof. mr. Ph.H.J.G. van Huizen (red.), *CMR: Internationaal vervoer van goederen over de weg. Een praktische en rechtsvergelijkende benadering*
4. Mr. M.J. Bruins Slot, *De overeenkomst van goederenvervoer per spoor*
5. Mr. I. Koning, *Aansprakelijkheid in het luchtvervoer*
6. Mr. B.H.G. Kruissen, *Retentierechten in het vervoer*
7. Mr. A.L.H. Ernes, *Tussenpersonen in het handelsverkeer*
8. Mr. dr. H.P.A.J. Martius, *Elektronisch handelsrecht*
9. Dr. M.L. Hendrikse & prof. dr. J.G.J. Rinkes (red.), *Knelpunten in het verzekeringsrecht*
10. Prof. mr. F.G.M. Smeele (red.), *Conflictenrecht in ontwikkeling*
11. Dr. M.L. Hendrikse & prof. dr. J.G.J. Rinkes, *Knelpunten in het verzekeringsrecht - deel 2*
12. Mr. P.A.M. Seck, *Reisbevrachting en cognossementsvervoer: een rechtsvergelijkend onderzoek naar de verhouding tussen de reisbevrachting en het cognossementsvervoer als gevolg van de uitgifte en de overdracht van een order-cognossement bij de uitvoering van een reisbevrachting*
13. Prof. mr. drs. M.L. Hendrikse, *Eigen schuld, proportionaliteitsbeginsel en causaliteitstoerekening: een proportionele benadering bij eigen schuld in het (schade)verzekeringsrecht*
14. Mr. H. Logmans, *Zekerheid op lading*
15. Mr. dr. A.H. Lamers, *Opdracht, lastgeving en bemiddeling*
16. Prof. dr. M.L. Hendrikse & prof. dr. J.G.J. Rinkes, *Knelpunten in het verzekeringsrecht - deel 3*
17. Mr. drs. R. Zwitser, *De rol van het cognossement als waardepapier in het handelsverkeer*
18. Mr. M. Spanjaart, *Vorderingsrechten uit cognossement*
19. Mr. S.E. van Hall, prof. mr. drs. M.L. Hendrikse, mr. dr. ing. N.J. Margetson, mr. H.P.D. den Teuling en mr. dr. G.J.P. de Vries, *Capita Internationaal Handelsrecht*
20. Mr. dr. J. Elbers, *Misbruik van het identiteitsverschil en crediteursbenadeling. Een onderzoek naar vereenzelviging en klassieke vormen van redres*
21. Mr. J. Eckoldt, *De forumkeuze in het zeevervoer*
22. Mr. drs. H.M.B. Brouwer, *Eigen gebrek in het transportverzekeringsrecht*

The Legal Position of Terminal Operators in Hinterland Networks

Mixed contracts and third parties

Part 23 NTHR-reeks

Susan Niessen

Zutphen 2017

Paris LEGAL PUBLISHERS

The Legal Position of Terminal Operators in Hinterland Networks

ISBN 978-94-6251-149-1
NUR 822

The Legal Position of Terminal Operators in Hinterland Networks

Mixed contracts and third parties

De juridische positie van terminal operators in hinterland netwerken gemengde overeenkomsten en derden

Proefschrift

Ter verkrijging van de graad van doctor aan de Erasmus Universiteit Rotterdam
op gezag van de rector magnificus

Prof. dr. H.A.P. Pols

en volgens besluit van het College voor Promoties.

De openbare verdediging zal plaatsvinden op
donderdag 21 december 2017 om 11:30 uur

door
Susan Helena Lambertus Niessen
geboren te Venlo

Erasmus University Rotterdam

PROMOTIECOMMISSIE

Promotor:	Prof. mr. dr. F.G.M. Smeele
Overige leden:	Prof. mr. dr. M. Claringbould
	Prof. mr. dr. E. Eftestøl-Wilhelmsson
	Prof. mr. dr. H.N. Schelhaas
Copromotor:	Mr. dr. W. Verheyen

Table of Contents

Table of abbreviations

AA	Ars Aequi
AC	Law Reports, Appeal Cases
ADSp	Algemeinen Deutschen Spediteurbedingungen
AGV	Automated Guided Vehicle
AV&S	Aansprakelijkheid, Verzekering & Schade
BB	Beursbengel
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Supreme Court)
BIFA	British International Freight Association
BIMCO	Baltic and International Maritime Council
BW	Burgerlijk Wetboek (Dutch Civil Code)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
CMI	Comité Maritime International
CMNI	The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway of 22 June 2001
CMR	Convention on the Contract for the International Carriage of Goods by Road, done at Geneva 19 May 1956
COGSA 1971/1992	Carriage of Goods by Sea Act 1971/1992
COTIF-CIM	The Convention concerning International Carriage by Rail(COTIF) of 9 May 1980 as amended by the Protocol of Modification of 3 June 1999 (Vilnius) — Appendix B (CIM)
CT-Directive	Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules of certain types of combined transport of goods between Member States
DAOR	Revue Internationale du Droit des Affaires / Internationaal Tijdschrift voor Ondernemingsrecht
DCFR	Draft Common Frame of Reference
DTLB	Deutsche Transport und Lagerbedingungen
ECLI	European Case Law Identifier
ECT	Europe Container Terminal
EEC	European Economic Community
EJCCL	European Journal of Commercial Contract Law
EJIL	European Journal of International Law
ERIM	Erasmus Research Institute of Management
ETL	European Transport Law
EU	European Union
FASNAG	Federatie van de Antwerpse Stouwers-, Natie- en Aanverwante groeperingen
FENEX	Nederlandse Organisatie voor Expeditie en Logistiek

FIO	Free In and Out
FIOS	Free In and Out Stowed
GS	Groene Serie
HGB	Handelsgesetzbuch (German Commercial Code)
HHR	Hamburg Rules; United Nations Convention on the Carriage of Goods by Sea, Hamburg, 30 March 1978
HKLJ	Hong Kong Law Journal
HPH	Hutchinson Port Holding
HR	Hoge Raad (Dutch Supreme Court)
H(V)R	The Hague (Visby) Rules. The Hague Rules; The Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924. The Hague-Visby Rules; the Hague Rules as Amended by the Brussels Protocol of 23 February 1968
IDM	Il Diritto Marittimo
IMO	International Maritime Organization
ISO	International Organization for Standardization
ITT	Inter-Terminal-Transport
J	Justice
JBL	The Journal of Business Law
JIML	The Journal of International Maritime Law
JMLC	Journal of Maritime Law and Commerce
LJ	Lord Justice
LJN	Landelijk Jurisprudentie Nummer (www.rechtspraak.nl)
Lloyd's Rep.	Lloyd's Law Reports
LLP	Lloyd's of London Press
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
MC	Montreal Convention; Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999
MTC	Multimodal Transport Convention; The United Nations Convention on International Multimodal Transport of goods, Geneva, 24 May 1980
MTO	Multimodal Transport Operator
MULTIDOC 2016	Negotiable Multimodal Transport Bill of Lading issued by BIMCO in 2016
NbBW	Nieuwsbrief BW
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJW(-RR)	Neue Juristische Wochenschrift (-Rechtsprechungs-Report Zivilrecht)
Nr.	Number
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht
NTHR	Nederlands Tijdschrift voor Handelsrecht
OTT / OTT 1991	United Nations Convention on the Liabilities of Operators of Transport Terminal in International Trade, Vienna, 19 April 1991

PECL	Principles of European Contract Law
PELSC	Principles of European Law on Service Contracts
RABG	Rechtspraak Antwerpen Brussel Gent
Rb.	Rechtbank
RdTW	Recht der Transportwirtschaft
RHA	Rechtspraak van de Haven van Antwerpen
RR	The Rotterdam Rules; United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, signed at Rotterdam on 23 September 2009
RSC	Rotterdam Stevedoring Conditions
RTO	Temporary storage premises
RW	Rechtskundig Weekblad
S&S	Schip & Schade
SDR	Special Drawing Right
SOLAS	International Convention for the Safety of Life at Sea (IMO)
SVA	Stichting Vervoeradres
TEU	Twenty Foot Equivalent Unit
Tex. Int'l L. J.	Texas International Law Journal
TMLJ	Tulane Maritime Law Journal
TPR	Tijdschrift voor Privaatrecht
TranspR	Zeitschrift Transportrecht
TRR	Transportation Research Record
TVR	Tijdschrift Vervoer & Recht
UCTA 1977	Unfair Contract Terms Act 1977
UN	United Nations
VAR	Warehousing conditions
VC	Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969
VersR	Zeitschrift Versicherungsrecht
VGB	Verbond der Behandelaars van Goederen
VGM	Verified Gross Mass
VRTO	Algemene Voorwaarden van de Vereniging van Rotterdamse Terminal Operators
W&W	Weg & Wagen
WC	Warsaw Convention; The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929
WOW	Wet Overeenkomst Wegvervoer
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
WRB	Wet Rivierbevrachting
WvK (1955)	Wetboek van Koophandel (1995) (Dutch Commercial Code)

Chapter 1
Introduction

1.1 Focus on terminal operators in hinterland networks

This research focuses on the liabilities of terminal operators who integrate the inland transport of goods into their service profile, which until recently mainly covered the handling of cargo in sea port terminals.

Terminal operators are logistic services providers who generally perform a wide range of services. Traditionally, their core business involved linking different modes of transport by performing the transshipment of goods from one means of transport to another.[1] These services included taking over and delivering goods on behalf of the sea carrier, loading onto and discharging from vessels or other means of transport, stowing goods on vessels, storing goods in terminals and performing customs related operations. However, recent developments show that some terminal operators have shifted their focus and are becoming involved in the transportation of goods beyond the premises of their sea port terminals. In addition to providing transshipment services at sea terminals, these terminal operators are carrying goods by different modes of transport between sea and inland terminals. This process has been referred to as Inter-Terminal-Transport (ITT). These inland terminals are located in the sea port's hinterland; a term with German origins which can be defined as the area over which a port draws the majority of its business.[2] Inland terminals in the hinterland of the port of Rotterdam are for example located in Venlo (the Netherlands), Duisburg (Germany) and Liège (Belgium). In doing this, these terminal operators take advantage of their strategic position in the supply chain and are able to bundle cargo, reduce the use of trucks and increase the use of more preferable modes of transport such as inland waterways and rail transport.

This can be illustrated by the case of the transport from a Seller of electronic devices in China to a Buyer with establishments in the Netherlands, Belgium and Germany. The Seller and the Buyer agree that the Seller arranges the transport to the port of Rotterdam and that the Buyer takes care of the further transport to the hinterland. The Seller therefore concludes a contract of carriage with a sea carrier. This sea carrier transports the goods by sea from Shanghai to Rotterdam and employs the terminal operator for the transshipment at the sea port terminal in Rotterdam. The Buyer subsequently concludes a contract with this terminal operator for the

1. The term transshipment (in German: *Umschlag*, in Dutch: *overslag*) is defined in para. 6.3.1.
2. The hinterland varies with respect to the commodity (cf. bulk versus containers), the time (cf. seasonal impact, economic cycles, technological changes, changes in transport policy, etc.) and the transport mode for which reason it is very hard, or even not feasible, to delimit the hinterland of a port. Notteboom (2008), p. 25-75. See for a study on the economic history of the port of Rotterdam and its Hinterland: Paardenkooper-Suli (2014).

inland carriage of the containers to inland terminals in the hinterland. In this contract, it is not agreed by which mode(s) of transport the carriage will be performed and this is left to the terminal operator's discretion. Thus, the terminal operator performs the following obligations. At the sea port terminal, the terminal operator first discharges the containers from the sea going vessel with a crane and places them in a stack. After several days, he brings some containers from the stack to the quay where an inland barge is moored, other containers to the railway tracks on the terminal and others to awaiting trucks. Then he loads the containers with cranes onto the inland barge, train and trucks and the containers are transported outside the sea port terminal to the hinterland. If the goods are stolen while the terminal operator is in charge of the goods in the period between their arrival in the port of Rotterdam and their subsequent arrival in the hinterland, the following questions may arise. When confronted with a claim for compensation, is it relevant where the goods were stolen and whether employees of the terminal operator were involved? Which legal regimes are applicable to the terminal operator's contracts? Is the contract concluded for the transshipment in the port a contract of carriage, contract of deposit or service contract? Is the contract for the inland carriage of goods from Rotterdam to the hinterland subject to international transport law conventions? Can the terminal operator rely on terms, such as exonerations or limits of liability, contained in his own contract or in that of the sea carrier?

1.2 Different roles and terminology

There is no uniform definition of a **terminal operator**. A typical terminal operator performs a variety of operations which are related to the carriage of goods but not the carriage of goods itself. The explanatory note to the failed UN Convention on the liability of operators of transport terminals in international trade 1991 describes terminal operators as:

> '… commercial persons or enterprises that handle goods before, during or after the carriage of goods. Their services may be contracted for by the consignor, the carrier or the consignee. Typically, they perform one or more of the following transport-related operations: loading, unloading, storage, stowage, trimming, dunnaging or lashing. The terms used in practice to refer to such enterprises are varied and include, for example: warehouse, depot, storage, terminal, port, dock, stevedore, longshoremen's or dockers' companies, railway stations, or air-cargo terminal.'

This definition covers a wide range of persons and enterprises. It covers stevedores in the sea port who load and discharge cargo into and from sea vessels or other means of transport as well as the warehouses at inland locations where products are stored, assembled and/or packed. In this study the term terminal operator will be used to refer to those who provide a broad range of services, mainly in connection with the transport of containers, like those mentioned in the definition above. The term **stevedore** will be used to refer to persons in the sea port area who typically perform the taking over and delivery of goods for the carrier at the terminal, the lifting of goods for the purpose of loading and discharge of vessels or other means

of transport and the performance of trimming, stowage and lashing. It is irrelevant whether the operations are carried out in sea port areas or at inland locations.

Furthermore, in cases where goods are stored for a number of days at the terminal before or after the stevedoring has taken place and a separate independent obligation under a warehousing or deposit contract has been undertaken, the legal term **depositary** will be used to describe the person providing this service. This legal term is used rather than the term warehouse(keeper) which is more common in practice.

Terminal operators are now shifting their focus of attention from merely handling cargo in a terminal to connecting sea port areas with the hinterland. Thus, in addition to providing services related to terminal operations they assume the responsibility for the carriage of goods between the sea port and inland locations. The terminal operator who is the object of this study provides to his customers the service of transporting goods to inland locations as a carrier rather than as a freight forwarder. This is because the terminal operator who is the object of this study regards it commercially more attractive to provide the service as a carrier. Maritime or multimodal carriers who undertake the carriage to or from inland locations and who employ the terminal operator for the inland stage often require him to take on the responsibility as a carrier rather than as a freight forwarder. Moreover, also for other clients of the terminal operator, such as cargo interests who directly employ the terminal operator for the inland transport, it can be commercially attractive. When performing Inter-Terminal-Transport, the terminal operator is thus responsible for the goods as a carrier under transport law. Moreover, it can successfully be argued that this is also the case during the transshipment, which includes the lifting and transportation of goods between stacks or means of transport within the terminal. When performing carriage of goods, the term **carrier** will be applied.

1.3 Research questions and structure

The starting point of this research is that the terminal operator is now performing a variety of logistic services which may be subject to different legal regimes. This gives rise to the following main research question:

> What is the legal position of terminal operators performing services in the sea port and hinterland networks?

This central question revolves around the applicability of different legal regimes to the terminal operator's contract(s) and focuses on the legal risks and liabilities involved in the performance of a variety of logistic activities.

The central question is addressed in three parts which are divided into eight substantive chapters.

Part I of this research explores the activities which are performed by these terminal operators, after which an overview will be given of the relevant legal framework. The first part of this research is divided into three chapters (Chapter 2-4). Chapter

2 addresses the question: What activities are performed by terminal operators active in sea ports and hinterland networks and what logistic developments have taken place in the last one and a half centuries which have led to this transport integration by terminal operators? After discussing the logistic background of the wide range of activities performed by terminal operators, Chapter 3 focuses on the question: What legal regimes are applicable to a service contract, contract of deposit and contract of carriage? The aim is to give an overview of the legal regimes which are applicable to the performance of contractual obligations by the terminal operator in different roles and explore to what extent the terminal operator enjoys freedom of contract. When performing obligations which are subject to different (mandatory and non-mandatory) legal regimes, the terminal operator's objective can be to design a uniform contractual liability regime which covers all obligations. Thus avoiding problems which arise when diverging legal regimes are or might be applicable. Chapter 4 therefore raises the question: Can a valid uniform contractual liability regime be designed which would comply with the legal regimes applicable to the contract concluded by the terminal operator?

After the analysis of the distinctive legal regimes applicable to a wide range of obligations performed by terminal operators, **Part II** explores the subject of mixed contracts. A 'mixed contract' is one which is concluded for the performance of a combination of obligations subject to different legal regimes. Obligations of a different legal nature are mixed together in one obligatory agreement. The main focus of attention in this section is on how best to approach these mixed contracts and how to apply these approaches to transport integration by terminal operators? It is important to demarcate the different legal regimes in order to be able to determine which rules are applicable during the process of transshipment and transport of goods. The subject of mixed contracts is explored in Chapters 5 and 6. Various doctrines and types of mixed contracts are discussed in Chapter 5. These are then applied to the position of a terminal operator performing transshipment and inland carriage of goods in Chapter 6. It serves to determine the beginning and end of the contract of carriage. Moreover, the question arises whether the transshipment, when goods are lifted for the purpose of loading and discharge and brought from one means of transport to another, can be considered as carriage of goods subject to transport law and whether the transshipment constitutes an independent transport stage under multimodal contracts of carriage.

The reason that the demarcation of legal regimes, as discussed in Part II, serves a practical purpose and one of the main differences between the legal regimes discussed in Part I is the terminal operator's liabilities towards third parties such as cargo owners or ship owners who do not have a contractual relation with the terminal operator. The terminal operator's legal position towards these third parties will, therefore, be discussed in **Part III**. This part addresses the rights and obligations of third parties and how these affect the legal position of terminal operators. The central questions are therefore: In what situation can the terminal operator be faced with extra-contractual claims from third parties? What is the legal position of the terminal operator as a service provider, depositary and carrier when faced with extra-contractual claims from third parties?

This study aims to provide an overview of the relevant legal regimes within the law of obligations in general and the rules applicable to the nominate contracts of carriage, services and deposit in particular, and to determine rules for their applicability in order to enable operators of transport terminals involved in a wide range of services including the transport between sea and inland terminals to explore their available options and to adequately deal with their legal risks and liabilities.

1.4 Research method

This thesis can be classified as a classic doctrinal legal study. Its primary sources are legislation which can be found on national and international level. In order to reach the objective stated above, it involves a comparative law study in which legislation, doctrine and case law are analysed and compared. The functional method is used when focusing on answering the specific research question.[3]

On national level, the study focuses on the general law of obligations and on legislation regarding nominate contracts, i.e. contracts specifically regulated by law. For the reasons mentioned above, importance is given to the legal rules applicable to contracts of services, deposit and carriage. First of all, the national laws of the Netherlands, Germany and England are compared.[4] Dutch law is taken as a starting point from which the laws of Germany and England are discussed. However, Belgian law represents an interesting divergent view on certain aspects of the research and in those cases Belgian law is also discussed. These legal systems were selected because the terminal operator who is the focus of this study performs its obligations in these countries and the law which governs the terminal operator's performance is, in most situations, that of these countries.[5] English law was selected because it represents a dominant view on (maritime) transport law. To find a common ground between these European legal systems, reference is additionally made to the European principles which find their reflection in the Draft Common Frame of Reference (DCFR) and the Principles of European Contract Law (PECL).

The conventions which govern the legal position of the terminal operator on an international level are then examined. There are a large number of distinctive international conventions covering the carriage of goods by different modes of transport. Some of these not only contain rules governing the conduct of carriers but also that of their servants, agents and other independent contractors (e.g. in the Rotterdam Rules). Several conventions govern the carriage of goods by sea. The countries examined in this study are all party to the Hague Rules[6] (hereafter also referred to as HR). The Netherlands and England are also party to the Visby Protocol[7]

3. Zweigert and Kötz (1998), p. 34.
4. In this study, English law is understood as the law which is in force in the jurisdiction of England and Wales. Within the United Kingdom three legal systems can be distinguished: England and Wales, Scotland and Northern-Ireland.
5. This can be in case of contractual claims due to a choice of law clause in the terminal operator's contract or the law applicable to an extra-contractual claim brought against the terminal operator.
6. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924.
7. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, Brussels 21 December 1979.

which amended the Hague Rules (hereafter referred to as the Hague Visby Rules or HVR). Although Germany is not party to the HVR some important rules have been taken over in its national legislation. For this reason, the HVR form the basis of this research when it concerns the carriage of goods by sea. The Hamburg Rules[8] (hereafter also referred to as HHR[9]) and the Rotterdam Rules[10] (hereafter also referred to as RR) are also discussed. The Rotterdam Rules, although not yet in force, are taken into account because they introduce the new concept of 'the maritime performing party' which will become extremely relevant for terminal operators should the convention enter into force. When transporting goods from the sea port to the hinterland networks, the terminal operator usually makes use of inland waterways, rail or road. This study looks at goods transported between the sea port in Rotterdam and the inland terminals in the Netherlands, Germany and Belgium. These countries are party to the same inland transport conventions and for this, CMR,[11] CMNI[12] and COTIF-CIM[13] are examined. England is also party to these inland transport conventions, except CMNI. As the terminal operator in this study is generally not involved in carrying goods by air the legislation concerning carriage by air is not taken into account except for some occasional references. Although a number of conventions cover international carriage by air, reference is generally only made to the Montreal Convention[14] (hereafter also referred to as MC) given the large number of countries currently party to this convention. Finally, the United Nations Convention on the Liabilities of Operators of Transport Terminal in International Trade[15] (hereafter referred to as OTT) is studied. This convention is however not in force (and it is only dealt with insofar as it regulates the liability of terminal operators to third parties in Part III).

In order to obtain a fuller understanding of relevant national law and conventions, legislative history, if publicly available, is studied as is the interpretation given by national courts and the legal literature of the selected jurisdictions. Save for exceptional cases, case law and literature research was concluded on 18 March 2017. The abovementioned legislation on national and international level, case law and doctrine is analysed and compared in order to gain insight in the way the legal position of terminal operators performing a variety of services is currently regulated in different legal systems and to find a common core which can be used to identify the best solution to the problem posed in the research questions.

8. United Nations Convention on the Carriage of Goods by Sea, Hamburg, 30 March 1978.
9. In order to distinguish the Hamburg Rules from the Hague Rules, the Hamburg Rules are referred to as HHR. The commonly used abbreviation HH stands for *Hansestadt Hamburg* (Hanseatic city of Hamburg).
10. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 11 December 2008.
11. Convention on the Contract for the International Carriage of Goods by Road, Geneva, 19 May 1956.
12. Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, Budapest, 22 June 2001.
13. The Convention concerning International Carriage by Rail (COTIF), 9 May 1980 as amended by the Protocol of Modification, Appendix B (CIM), Vilnius, 3 June 1999.
14. Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999.
15. United Nations Convention on the Liabilities of Operators of Transport Terminal in International Trade, Vienna, 19 April 1991.

Part I
The logistic concept within a legal framework

Chapter 2

Background: Transport integration by terminal operators

2.1 Introduction

Before focusing on the legal implications carried by the transport integration in the following chapters, this chapter first gives a brief overview of the logistic background to the situation. Paragraph 2.2 discusses relevant logistic developments which have taken place since the second half of the twentieth century. Paragraph 2.3 focuses on cargo handling operations performed at terminals, and paragraph 2.4 discusses the integration of inland transport services into the terminal operator's traditional service profile.

2.2 Logistic developments

The transport container was invented in the mid twentieth century and has radically changed global transport since then. Article 2.1 of the International Convention for Safe Containers 1972 defines a container as follows:

> 'Container means an article of transport equipment:
> (a) of a permanent character and accordingly strong enough to be suitable for repeated use;
> (b) specially designed to facilitate the transport of goods, by one or more modes of transport, without intermediate reloading;
> (c) designed to be secured and/or readily handled, having corner fittings for these purposes;
> (d) of a size such that the area enclosed by the four outer bottom corners is either:
> (i) at least 14 sq. m. (150 sq. ft.) or
> (ii) at least 7 sq. m. (75 sq. ft.) if it is fitted with top corner fittings;
> the term "container" includes neither vehicles nor packaging; however, containers when carried on chassis are included.'

A container is a standardized unit used for the storage and transport of goods.[16] Its universal characteristics allow it to be easily interchanged between ships, trains[17] and trucks by standardized handling equipment without the need to rehandle the contents in the container. Before the introduction of the container, cargo in ports was handled in much the same way as it had been done for centuries. After a ship arrived in the port, numerous longshoreman gathered at the quay to discharge the

16. A container is generally 20 or 40 feet long, 8 feet wide and 8 or 8.5 feet high. The container which is considered a 20-foot equivalent unit is referred to as a TEU and the 40-foot container as two TEU. These standards are set by the International Organization for Standardization (ISO).
17. Containers which are used for train transport have however different dimensions.

cargo from the holds and the outbound cargo was loaded onto the ship at the same time. This often led to a game of 'maritime Tetris'. It was a time consuming process which caused long delays at the port, was expensive and prone to criminal activity. The introduction of the container changed everything dramatically. The container was invented by the US military during the second world war and was used for commercial purposes in the late 1940s, early 1950s. Within a few decades after its invention, nearly 90% of countries in the world had container ports.[18] The first container arrived in the port of Rotterdam in 1965.[19] The transport sector rapidly modified its infrastructure to facilitate the use of these standardized units. Vessels and other means of transport were adapted to be able to carry these containers, specialized container terminals with cranes were created, and information and communication technology was introduced. This evolution in the logistic supply chain shifted the focus from unimodal to integrated transport systems. In the pre-container era the supply chain was predominantly focused on unimodal transport unless practically impossible as in intercontinental transport. However, the introduction of the container removed these barriers and led to an efficient and automated transshipment of goods from one means of transport to another. It has since become possible to combine several modes of transport in cases where it had previously been considered difficult as in cases of transport over small distances. The carrier has begun to integrate these different modes of transport by organizing the whole trajectory leading to multimodal transport. The reduced costs of transport associated with this development enhanced global trade and, it has been said that 'the container has been more of a driver of globalization than all trade agreements in the past 50 years taken together.'[20]

This evolution in the logistic supply chain and the reduced transport costs associated with this development resulted in a vast increase in the volume of goods transported world wide. Due to the division of labour, products could be produced at optimal locations on the other side of the world and be transported in containers to their consumers. Large containerships arrive daily in sea ports and containers are discharged and stored for a period of time in sea port terminals. The terminal operator takes care of the containers in stacks until they are released by the sea carrier, cleared by the customs authority and picked up by cargo interests (or those working on their behalf). In many cases it can take up to 45 days before the goods are removed from the terminal. This leads to congestion in port terminals. As the majority of containers are picked up individually from the terminal by trucks, this can often result in congestion on the roads around the port. In spite of the many benefits these logistic developments have had, they have also had a negative impact upon the environment.

18. 'Containers have been more important for globalisation than freer trade', 18 May 2013, www.economist.com/news/finance-and-economics/21578041-containers-have-been-more-important-globalisation-freer-trade-humble (lastly retrieved on 25 September 2017).
19. Kuipers (2014).
20. 'Containers have been more important for globalisation than freer trade', 18 May 2013, www.economist.com/news/finance-and-economics/21578041-containers-have-been-more-important-globalisation-freer-trade-humble (lastly retrieved on 25 September 2017).

In an attempt to avert these negative consequences, some terminal operators have started to integrate the transport of goods between the sea port and terminals they have created in the hinterland into their logistic profile.[21] These terminal operators may be in a better position to organize this than the traditional logistic actors like freight forwarders and multimodal carriers. They have developed what have become known as 'extended gates'. Some terminal operators have created a network of inland terminals in easily accessible areas which are closer to their final destination and which are regarded as an extension of the sea port by their clients, the sea carriers and the customs authority. In this way, the gate of the sea port terminal has been extended all the way into the hinterland. Inter-terminal-transport (ITT) is treated the same as the movement of cargo within the premises of the terminal. Containers can be pushed out of the port area before they are released or cleared by the customs authority. Moreover, the terminal operator can bundle the cargo and load to full capacity onto a more sustainable means of transport like trains and inland barges which can travel during less congested moments of the day and week. Goods can be collected from or brought to these inland locations by the cargo interests. Terminal operators who extend their activities to include terminal operations as well as inland transportation are taking the integration process a step further.[22]

2.3 Terminal operations

A wide variety of services can be performed at the terminal. The kinds of operations vary as do the characteristics of the terminal and its equipment depending on the types of cargo handled. Most terminals are specialized and do not handle all types of cargo. This study focuses on terminals specialized in container transport. But first a distinction must be made between bulk cargo and general cargo. The term bulk cargo covers materials which are carried in large volumes. It can consist of liquid bulk such as oil products and chemicals or of dry bulk such as grain, ore and coal. These commodities can be transported by specialized means of transport such as tankers or specially designed trucks, trains and barges. The terminals which serve this type of cargo employ specialized equipment to load and discharge the cargo from the means of transport and to move the goods within the terminal. They have equipment such as pumps, tubes, grabs, elevators and conveyer belts depending on the type of bulk cargo involved. Bulk cargo is also regularly transported by pipeline. Dry bulk can also be transported in this way but first a 'slurry' — a mix of the product with liquids such as water — is created in order to transport the goods more easily.[23]

These commodities transported in bulk can be distinguished from general cargo in that general cargo usually consists of manufactured or packaged products. Al-

21. Terminal operators are not the only ones to be shifting their focus of attention to the hinterland, some port authorities are doing so as well. See for a study on the role of port authorities: Van der Lugt (2015); Lugt, Langen and Hagdorn (2015).
22. See the report of ECT on 'The future of freight transport': www.ect.nl/sites/www.ect.nl/files/ect_boekvisieect_04k_nl_lr.pdf (retrieved on 8 October 2013). For further information on this development I refer to Veenstra, Zuidwijk and Van Asperen (2012), p. 14-32.
23. De Wit (1995), p. 8.

though bulk cargo can be shipped in containers it is usually general cargo which is containerized. These products are mostly 'stuffed' in the container at the premises of the consignor. The container is then 'stripped' of its contents at the place of destination when the discharged goods are delivered to the consignee. As a result of this, the handling of the cargo inside the container has been eliminated from the transport. This has dramatically improved the process of transshipment. Cargo consisting of items such as boxes, bags, bales, crates and drums does not have to be separately handled during loading and discharge when the goods are transferred from one means of transport to another. Instead, the fully loaded container is lifted by a crane with spreaders. A large rectangular frame fits over and locks into the container's corner fittings and lifts it from one means of transport and, either places it in a stack, and/or onto another vehicle for further transport to its destination.

The means of transport have also adapted to deal with containers more efficiently. Container vessels operate at sea or on inland waterways. Progress in the development of technology for inland barges has been slower than for sea going vessels. The capacity of the latest seagoing container vessels increased to almost 22,000 TEU in 2017. These cellular containerships contain cargo holds specifically constructed for rapid loading and discharge and to keep containers secure while at sea. A container chassis structure has been developed which is similar for both transport by road and by rail.[24]

After discharge, a container may immediately be transferred to the following means of transport but it may also remain in the stack at the container terminal for some time. Immediate transshipment is possible when inland means of transport, such as barges, trucks and trains, have direct access to the gantry crane used for loading and discharging sea vessels. In this way, the crane can discharge the goods from the sea vessel directly onto the subsequent means of transport in one single movement. If direct transshipment is not possible or desired, containers remain initially at the container terminal. The container's standardized measurements allow it to be stacked easily and its watertight construction means there is no need for additional shelter. The container functions as a mini-warehouse. Most container terminals employ separate stacks for inbound, outbound or empty containers which can be further subdivided per shipping line or destination. Efficient management of these stacking areas substantially reduces the necessity to lift and reshuffle containers, thus resulting in a decrease in the time needed for the loading and discharge of vessels and to a decrease in the space required at the terminal.[25]

Modern sea port terminals are large open spaces which are well connected to the available infrastructure and closed off by fences. These areas are filled with container stacks, cranes and marshalling yards used to move the container between the sea vessels and other vehicles such as inland barges, trains and trucks. Special-

24. De Wit (1995), p. 13.
25. For research aimed at optimizing the stacking operations by developing methods for minimising the makespan (the time taken for a particular job) of container yard cranes and for minimising the number of container reshuffles see: Gharehgozli (2012).

ized equipment like yard trucks, automated guided vehicles (AGV's), mafi-trailers,[26] fork-lift trucks and straddle carriers are used to move the containers within the premises of the terminal. The terminals are connected to different types of infrastructure to guarantee accessibility and ensure an efficient supply chain. Sea vessels can berth at quays with large gantry cranes built with sufficient height and depth to reach all types of container vessels. Some terminals have separate quays for handling sea vessels and inland barges whereas others serve both types of vessels at the same location.[27] Terminals also have gates with entrances to the road where trucks can be checked in and out. Large container terminals have their own railway station which is directly connected to the national railway network.

In modern terminals like the ones built in the port of Rotterdam on the '*Tweede Maasvlakte*', operations are managed centrally in operating rooms and container handling is automated. Large terminals of 86 hectare can already be run by approximately 400 staff members, most of whom are in offices.[28] This ensures the safe, swift transshipment of goods as the risk of human error and the handling time are minimized. The cranes are operated at a distance by specialized crane operators and handling operations like stowing and stacking are scheduled and controlled by computer systems. These computer systems replace or assist human experts in all aspects of the operation of seaport container terminals. Specially designed algorithms and modeling tools are used to increase the terminal's productivity.[29] These computer systems are also used for stowing and trimming the cargo. Detailed stowage plans are drawn up and each container is efficiently allocated a suitable slot. Computer programs calculate the allocation of the weight of the various containers in an appropriate manner for the safety of the ship while taking into account which port of call serves as the discharge port for each container.

The exact weight of the containers is an essential piece of information when calculating the stowage plan. The International Convention for the Safety of Life at Sea (SOLAS) has therefore recently been amended to include rules on container weight verification requirements.[30] The regulations regarding Verified Gross Mass (VGM) were introduced into SOLAS amending regulation VI/2 in order to guarantee the safety of the ship, crew, stevedores, cargo and safety in maritime traffic. The verified packed weight of a container is now a precondition for loading onto a vessel for international transport. The shipper is responsible for the verification of the packed container's weight. The vessel operator and marine terminal operator are in violation of SOLAS if they load a packed container onto a vessel without proof of the verified container weight.[31] Some terminals are equipped with gantry cranes which

26. The term Mafi-trailer is a generic term which refers to a trailer used by terminal operators for loading and discharge of goods. The name Mafi originates from the German company, Mafi-Transport-Systeme GmbH who produced this transport system.
27. See for a research on the planning of the distribution of inland barges in order to solve the problems concerning the handling of barges in sea port terminals: Douma (2008).
28. 'APM Terminals MVII: snel, groen, veilig. Revolutie aan de diepzeekade', www.maasvlakte2.com/uploads/magazine_mv2_2013.pdf (retrieved on 29 March 2016).
29. Günther and Kim (2005), p. 5.
30. The SOLAS conventions which includes these rules on container weight verification requirements came into force on 1 July 2016.
31. SOLAS regulation VI/2.6.

can measure the weight of the containers during lifting before they are loaded onto a ship.[32]

Some terminals are able to store goods under customs control. Goods that arrive from outside the European Union (EU) and enter the customs territory can be stored under the supervision of the customs authority. For this, terminals need a special license which is only provided after requirements concerning safety and administrative procedures are met. Goods may be stored in these secured areas for a period of time during which no import duties and other import taxes are due. Furthermore, certain trade policy and agricultural policy measures, import bans and restrictions are not applied. The customs authority exercises physical and administrative supervision over all goods under customs control. If the storage facility and administrative accounts in the terminal are seen as reliable, less physical control is exercised and the customs follow the goods on paper. Furthermore, based on a risk assessment some goods are selected for an inspection. Some terminals are equipped with their own high-tech scanning gear so as to avoid time-consuming, costly inspections. A number of different types of storage facilities are controlled by customs, these include temporary storage premises (RTO), customs warehouses ranging from type A to F, free warehouses and free zones. Goods can remain in storage for a limited or unlimited period of time depending on the type of facility. Large terminals in the sea port area are usually RTOs where goods can be temporarily stored for up to 45 days. All goods must obtain a new destination within this period. This could be, e.g. for import, for transport under customs control (8 day permit) or for placement in a customs warehouse (for an unlimited period of time). A customs declaration must be obtained before any goods can be removed from the storage location. This declaration must be filed by the cargo interests unless the storage facility has obtained a separate authorization from the customs authority. This is why goods often remain at the sea port terminal for up to 45 days depending on the initiative taken by the cargo interests and the customs procedure. Inland terminals which are not in the vicinity of a customs office can only qualify as warehouse type C, D or E. Goods can be stored in these types of customs bonded warehouses for an unlimited period of time.

A growing number of container terminals can be found at inland locations along rivers as the necessary investments have been made to develop their cargo handling infrastructure. These inland terminals can be reached by inland barges and preferably also by trains and have similar features to sea port terminals albeit on a smaller scale. The quays are equipped with cranes for loading and discharging inland barges. Straddle carriers are often used for stacking and moving containers and are able to stack containers up to four units high. Containers are stored in stacks until further transport to the sea port or until transport to the consignee can be arranged. Some terminals also offer activities like physical distribution or facilitate customs related services or inspections. These inland terminals are located

32. See: Eckardt (2016), p. 54-58; Piltz (2016), p. 59-62; Van Leijen and Methorst-Smaling (2016), p. 17-20. The topic of declaring container weights is outside the scope of this research. See for an analysis of the consequences and legal problems concerned with inaccurately declaring the weight: Kofopoulos (2014), p. 279-289.

in areas close to the destinations where the consignors or consignees are established.[33]

2.4 Integration of inland transport

Some terminal operators have successfully integrated Inter-Terminal-Transports (ITT) into their traditional service profile and have been able to take control of the inland flow of goods.[34] They might even be in a more favourable position than others, like freight forwarders and multimodal transport operators, who had once held the lead. Large terminals like ECT[35] are capable of making arrangements with their customers and the customs authority to treat selected inland terminals as extensions of the sea port terminal. The gate of the sea port terminal is thereby metaphorically extended to include the inland terminals, and the carriage of goods between the sea port terminal and the inland terminal in the hinterland is treated in the same way as the movement of cargo within the sea port terminal. This way, the terminal operator proactively transports the goods to and from the hinterland without having to wait for the release by the sea carrier, the customs clearance and collection by other parties. If a large flow of containers arrive at the port, the terminal operator can create space by pushing containers into the hinterland, resulting in less congestion at the terminal.[36]

One of the key aspects of the extended gate concept is the arrangement made with the customs authority. The terminal in the sea port is a temporary storage premises (RTO) where goods can be stored for up to 45 days. As goods cannot be removed from the terminal without a customs declaration, valuable space is often occupied for a considerable period of time. So, pressure is put on cargo interests to obtain this authorization from the customs authority and determine another destination for the goods. However, a simplified procedure for the removal of containers from the sea port terminal can be followed pursuant to an agreement with the customs authority. The terminal operators are authorized to make the necessary declarations and remove the containers from the sea port terminal and transport them to the inland terminal before they are cleared by customs. The inland terminals in the hinterland are customs bonded warehouses where goods can remain for an unlimited period of time. What is more, the customs supervisions and inspections can be transferred to other locations in the country reducing the workload and the time pressure of the customs authority in the port area. Although the practical

33. It is for this reason that the inland logistic hub of Venlo has been ranked as top European logistic location. 'Rotterdam climbs to second place in ranking of top European logistics locations', 16 February 2016, www.portofrotterdam.com/en/news-and-press-releases/rotterdam-climbs-to-second-place-in-ranking-of-top-european-logistics?utm_source=Haven%20in%20Bedrijf%20Nieuwsbrief&utm_campaign=7be0d214d8-Nieuwsbrief_Haven_in_Bedrijf_februari_2016&utm_medium=email&utm_term=0_02497fa59f-7be0d214d8-71893225&ct=t%28Nieuwsbrief_Haven_in_Bedrijf_februari_2016%29&mc_cid=7be0d214d8&mc_eid=4dd832e1e7 (retrieved on 29 March 2016).
34. See also: Smeele and Niessen (2013), p. 95-108.
35. Europe Container Terminals, part of Hutchinson Port Holding (HPH), is a major deep sea terminal operator in the port of Rotterdam.
36. Van den Berg has been studying the development of inland networks by terminal operators into depth and has found that similar initiatives are being developed by other terminals such as DP World, ECT, APMT, Eurogate, SIPG and PSA. Van den Berg (2015), p. 70-72.

relevance of these extended gates depends, to a large extent, on these arrangements with the customs authority, the legal implications of transport integration discussed in this study are unrelated to these arrangements. This study is therefore also relevant for other transport integrators who do not have arrangements with the customs authority.

Taking control over the inland flow of goods has brought about some changes for the terminal operator and for the maritime and business community at large. Currently, the main customers of terminal operators are sea carriers or multimodal carriers who are responsible for the sea stage of the transport. If they assume responsibility for both the sea stage and the loading and discharge of goods to and from the seagoing vessels, they subcontract and delegate the performance of certain transport related services to the terminal operators in the port. The terminal operators' commercial success is, therefore, dependent on their business relation with sea carriers. However, this is currently changing as some carriers are acquiring sea port terminals of their own and terminal operators are increasingly offering their services directly to shippers. Shippers, or their forwarding agents, are booking inland transport directly with terminal operators. By attracting the cargo of shippers to their terminals, the terminal operator's bargaining position towards the sea carriers has improved. It is of strategic importance for the operators of sea terminals that their port (i.e. their terminal) is on the list of ports of call (i.e. terminals) that are regularly visited by the vessels operating the shipping lines. It is beneficial for all if the terminal gathers a substantial volume of cargo from shippers and receivers in its hinterland. Moreover, terminal operators become increasingly attractive for sea carriers or multimodal carriers if they provide an additional service to carry goods to inland terminals instead of merely handling their cargo in the sea port terminal. Providing this extra service makes the terminal operator more competitive when compared to other terminals, which is an important advantage in view of the increased competition between terminals at *Maasvlakte 2*.

Inter-Terminal-Transport, when organized by terminal operators can lead to a reduction of costs due to economies of scale and to an increased use of different modes of transport like inland waterways and rail.[37] Operators can collect and bundle large quantities of cargo and load freight trains and inland barges to their full capacity at a sea terminal. The same applies to inland terminals, which can serve as collection points for containers with export products or for empty containers returning to the sea port. These terminals therefore need well established connections to the rail infrastructure and direct access to inland waterways. The frequent operation of freight trains can be arranged and inland barge operators can coordinate reliable and frequent transport between inland terminals and the sea port.[38] It is clear that the establishment of a stable and reliable hinterland connection is of fundamental importance. The use of road trucks between the sea port and inland terminals has been reduced to a minimum and trucks are only used for the 'first'

37. Ypsilantis and Zuidwijk (2013).
38. See for example an initiative of four independent terminals in the Brabant region (NL). A joint subsidiary — Brabant Intermodal — is coordinating shipments from the deep sea terminal hinterland terminals. Their aim is to provide reliable logistic services with high frequencies and larger shipments. www.brabantintermodal.com/ (retrieved on 30 March 2016).

or 'last mile' to reach the cargo interests or warehouses from where the goods are distributed.[39]

This approach is not only more efficient, it is also more sustainable.[40] The increased use of inland barges or freight trains has significantly reduced the use of trucks for the inland transport of goods. This has led to less congestion on roads in and around the sea port and an optimized supply-chain contributes to a reduction of CO2 emissions. This type of freight integration is supported at policy level of the EU which addressed it in the 'CT-Directive'.[41]

In 2013, road carriage had the biggest market share among inland transport modes in the EU. 74,9% of total inland freight was transported by road, compared to 18,2% for transport by rail and 6,9% for transport by inland waterways. Although the shares of rail and inland waterways transport have noticeably increased, a considerably large portion of freight in Europe is still transported by road.[42] International transport law conventions contain no rules that can oblige carriers to make use of more sustainable modes of transport.[43] As the obligation to carry goods by environmentally friendly modes of transport is not part of an existing legal framework, local authorities and private entities have come up with solutions to encourage sustainable decision making. The Port of Rotterdam has introduced policy measures aimed at improving the modal split. Concessions granted in the *Maasvlakte 2*-project impose certain targets on the distribution of cargo over various modes of transport upon sea terminal operators exploiting terminals in this area.[44] The Port of Rotterdam aims to gradually decrease the share of road transport and increase the share of transport by rail and inland waterways. To pursue this objective, modal split obligations were inserted into concession contracts aiming at a share of 35% for cargo leaving the terminal by road by the year 2035. At the same time, an increase in the use of rail to 20% and in inland barges to 45% is required. Non-compliance with these obligations may lead to heavy financial penalties on the relevant terminals. The container terminals are therefore required to contribute to the 'modal shift' and to influence the increased use of inland barges and freight trains. In 2014, a slight majority of containers which arrived in the port of Rotterdam by sea were still transported to the hinterland by road.[45] It is therefore important that terminal operators reduce the number of containers leaving their terminal by truck.

39. See for a research on the main operations and challenges when scheduling containers for inland transport: Fazi (2014). This research provides mathematical models and algorithms in order to choose the most efficient mode of transport per consignment.
40. See also: Eftestøl-Wilhelmsson (2011), para. 1.
41. Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between member states. See for further information: http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:31992L0106 (retrieved on 30 March 2016).
42. The modal split outlined here is based on the total inland freight transport performance expressed in tonne-kilometre. http://ec.europa.eu/eurostat/statistics-explained/index.php/Freight_transport_statistics_-_modal_split (retrieved on 30 March 2016).
43. Eftestøl-Wilhelmsson (2011), para. 3.
44. Van den Berg (2015), p. 116.
45. According to the information on the modal split provided by the Port of Rotterdam in 2014 the distribution of containers over the inland modes of transport was: 53.4% by road, 10.9% by rail and 35.7% by inland waterways. www.portofrotterdam.com/sites/default/files/Modal%20split%20maritieme%20containers%202014-%202011.pdf (retrieved on 30 March 2016).

It is clear that a terminal operator who is in control of the inland flow of goods is in a better position to influence the decision making process and to comply with these requirements.

In order to meet these requirements and to select the most appropriate mode of transport for Inter-Terminal-Transport, it is essential that the contract of carriage concluded with the terminal operator responsible for the goods as a carrier, gives the latter full discretion as to how goods are transported. However, carriers are not always free to choose the mode of transport for the performance of the contract. Some contracts of carriage are mode specific and do not allow the use of alternative modes of transport. Such contracts reduce the carrier's flexibility. It is therefore important to conclude optional contracts of carriage which enable the carrier to choose the most appropriate mode of transport at the time of performance of the contract. At that time the carrier can correctly assess the most appropriate method of inland transport based on the capacity of the available means of transport, the saturation of certain infrastructure, the costs involved in the transport and the characteristics of the particular shipment including its time constraints.[46] Arguably, this vertical integration does not only make the terminal operator more competitive with other terminals in the region, but also contributes to an optimized supply-chain which can be beneficial for the community at large.

46. See the advisory report 'Partituur naar de top' of Topteam Logistiek. www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/06/17/partituur-naar-de-top.html, p. 14. (retrieved on 18 October 2013). For optional contracts of carriage and the applicable transport law regime I refer to para. 3.4.2 and 3.4.3.

Chapter 3

Overview of applicable legal regimes

3.1 Introduction

The terminal operator who integrates the transport of goods to the hinterland networks into his service profile usually concludes a contract covering the performance of a variety of services and duties with his customer. These services and duties fall into different categories of contracts for which the law provides specific rules (also referred to as 'nominate contracts'). These contracts may be subject to mandatory or non-mandatory rules. For example, carriage of goods is generally subject to mandatory transport law rules, whereas contracts for the storage of goods are subject to non-mandatorily applicable rules on deposit (in Dutch: '*bewaarneming*', which shares similarities with the common law concept of 'bailment (on terms)'). The performance of transport related services is generally subject to non-mandatory rules on service contracts (in Dutch: '*overeenkomst van opdracht*').

The question arises as to how the different services can be categorized. A terminal operator lifts goods with cranes for the purpose of loading and discharging or stacking and transports containers within the premises of the terminal between different means of transport or stacks. In principle, these activities qualify as carriage of goods.[47] This also applies to the performance of Inter-Terminal-Transport. Moreover, before, after or during carrying out these typical transport services, the goods may be stored at the terminal for a number of days. Storage services qualify as obligations under a 'contract of deposit'. Other activities performed by the terminal operator may include measurement, weighing,[48] container scanning, packaging and customs related services. The contract for the performance of these services performed by the terminal operator can generally be brought under the nominate contract 'service contract'.[49] Often the terminal operator combines services of a different nature in a single contract. In that case, the applicable rules should be determined by taking into account the approaches on mixed contracts.[50]

The legal position of terminal operators is not only determined by the applicable provisions on national or international levels. When undertaking obligations, terminal operators may also conclude contracts to further define their legal position. Terminal operators usually incorporate general terms and conditions developed

47. See para. 6.3 for the legal qualification of the process of transshipment, which concerns the movement of goods between means of transport.
48. A number of terminal operators check the weight of the goods. See: Eckardt (2016), p. 54-58; Piltz (2016), p. 59-62; Van Leijen and Methorst-Smaling (2016), p. 17-20. The topic of declaring container weights is outside the scope of this research. See for an analysis of the consequences and legal problems concerned with inaccurately declaring the weight: Kofopoulos (2014), p. 279-289.
49. Cf. Haak and Zwitser (2003), p. 401.
50. See Part II.

by professional organizations into their contracts. Terminal operators and their clients may enter into agreements for services to be performed under individually negotiated terms. Some of the terminal operators' clients, especially those with large volumes of cargo and therefore in a stronger bargaining position, might not be prepared to accept terms by which the terminal operator limits or excludes his own liability. The solution is often a tailor-made contract drawn up after negotiations, which the parties, for obvious reasons, prefer to keep confidential.

Many terminal operators apply general terms and conditions which clearly define their legal position. The stevedores in the port of Rotterdam usually incorporate the '*Rotterdamse Stuwadoors Condities*' (RSC)[51] or the '*Algemene Voorwaarden van de Vereniging van Rotterdamse Terminal Operators*' (VRTO)[52] into their contracts. A number of warehouses execute their duties under the '*Nederlandse Opslagvoorwaarden*'.[53] These conditions tend to exonerate terminal operators to a certain extent for damage or loss caused during the performance of services.[54] These general terms and conditions also contain other clauses beneficial to the terminal operator. These include clauses covering limits of liability, exonerations, arbitration, right of retention and time for suit. Belgian terminal operators usually incorporate the general terms and conditions developed by their professional associations in their contracts with customers.[55] These too, limit or exclude liability. Terminals in Germany operate under standard terms and conditions like the operating rules for the public quays in Hamburg, '*Betriebsordnung für die öffentlichen Kaianlagen in Hamburg*', or the terms regarding storage of goods in the '*Algemeinen Deutschen Spediteurbedingungen*' (ADSp)[56] or the '*Deutsche Transport und Lagerbedingungen*' (DTLB).[57] For the sake of clarity and to avoid legal disputes, the general terms and conditions of most terminal operators

51. 'Rotterdam Stevedoring Conditions' (RSC) (freely translated). These conditions were deposited at the registry of the District Court at Rotterdam on 12 August 1976.
52. 'General terms and conditions of the Association of Terminal Operators in Rotterdam' (freely translated). These conditions were deposited at the registry of the District Court at Rotterdam on 2 September 2009. See also: Claringbould (2010), p. 26-28.
53. 'Dutch Storage Conditions' (freely translated). These conditions were deposited by the FENEX at the registry of the District Court at Rotterdam on 15 November 1995.
54. See for example art. 8 RSC: 'The stevedore is not liable for damage nor for the event which causes such damage, unless and in sofar as it is satisfactorily proved these are the result of actual fault or privity or gross negligence of the stevedore or someone for whom he is responsible and, in the latter case, the stevedore has not exercised due diligence in the choice and the supervision of the person(s) involved.' Furthermore, in the following paragraphs and articles of the RSC the exemption from liability is further developed. E.g. it is stated that possible liability is limited to a certain amount and a number of situations is listed in which the subordinates of the stevedore are not liable even in case it is proved that damage was caused by the actual fault or privity or gross negligence. Furthermore, in art. 6 VRTO it is stated that 'The Terminal Operator does not accept liability for the damage or loss stated if the Terminal Operator is able to prove that such damage or loss was not caused by negligence on the part of the Terminal Operator or people or parties for whom the Terminal Operator is responsible within the scope of the Work. The Terminal Operator does not accept liability whatsoever for the damage or loss stated if the Terminal Operator is able to prove that such damage or loss was caused by gross negligence or willful intent on the part of people or parties for whom the Terminal Operator is responsible within the scope of the Work.'
55. For Belgian stevedores this is usually '*Verbond der Behandelaars van Goederen*' (VBG) (freely translated: 'Union of cargo handlers') or the conditions of the '*Federatie van de Antwerpse Stouwers-, Natie- en Aanverwante groeperingen*' (F.A.S.N.A.G.) (Freely translated: 'Federation of Antwerp Stevedores, depositaries and related groups').
56. Valder (2016), p. 213.
57. Peltzer and Wülbern (2016), p. 218.

in Hamburg contain a liability regime which is similar to the German general land transport regime of § 407 ff HGB.[58]

Moreover, when carriage is performed by professional parties general terms and conditions are generally incorporated into the contract. Transport contracts, unlike the previously discussed contracts above, are generally subject to mandatory law, restricting the freedom of contracting parties. National or international legislation is mandatorily applicable to these contracts, so these general terms and conditions supplement the aspects regulated by law. Terms can be invoked by the carrier if they comply with the applicable national or international instruments. This can be seen with Dutch carriers who generally incorporate the '*Algemene Vervoerscondities 2002*'[59] into their carriage contracts.

This chapter gives an overview of the relevant legal framework. In paragraph 3.2, the focus is on the terminal operator as a service provider and paragraph 3.3 discusses the terminal operator as a depositary. The terminal operator as a carrier is covered in paragraph 3.4.

3.2 The terminal operator as a service provider: Service contracts

3.2.1 Characterization of service contracts

National rules developed for service contracts (in the Netherlands: '*overeenkomst van opdracht*',[60] in Germany: '*Werkvertrag*'[61] or '*Dienstvertrag*',[62] in Belgium: '*Aanneming van werk*',[63] and under English law this is a contract for the supply of a service[64]) vary widely and there is no coherent body of service contract law on the European level. To fill this void, the Principles of European law on Service Contracts (hereinafter: PEL SC) were published in 2006.[65] Although these rules do not yet have legal status, they could form the basis for service contracts between service providers and clients in the European Union in the future. These principles have been taken over, with some amendments, in book IV.C of the Draft Common Frame of Reference (hereinafter: DCFR).[66] In art. IV. C. — 1:101: Scope DCFR the service contract is described as follows:

> '(1) This Part of Book IV applies:
> (a) to contracts under which one party, the service provider, undertakes to supply a service to the other party, the client, in exchange for a price; and

58. Herber (2006), p. 437.
59. 'The Transport Terms and Conditions' (freely translated). These conditions are deposited at the Court of Amsterdam with number 81/2014 and at the Court of Rotterdam with number 2/2015. See for the explanation of these terms: Claringbould (2015 b).
60. The *overeenkomst van opdracht* is specifically regulated by Dutch law in art. 7:400 ff BW.
61. *Werkvertrag* §§ 631-651 BGB.
62. *Dienstvertrag* §§ 611-630 BGB.
63. Art. 1787-1799 BW (Belgium).
64. This contract is subject to the Supply of Goods and Services Act 1982.
65. Barendrecht (2007).
66. Von Bar (2009).

(b) with appropriate adaptations, to contracts under which the service provider undertakes to supply a service to the client otherwise than in exchange for a price.
(2) It applies in particular to contracts for construction, processing, storage, design, information or advice, and treatment.'[67]

Pursuant to this definition of a contract for services, a variety of persons could be seen to qualify as service providers. These include accountants, (ship) brokers, architects and stevedores.

3.2.2 The obligation of result or of dilligent conduct

The chapter covering contracts for services in the DCFR formulates several main rules in order to provide some guidance. One of the main rules covers the liability for bad performance by the service provider. This rule states that the service provider must exercise the care and skill of a reasonable service provider in the conduct of his work.[68] This implies that certain standards concerning the preparation and the performance of the service and those relating to the quality requirements of the staff, machinery and materials used for the performance of the service must be met.[69] However, the service provider is only liable if the specific result stated or envisaged by the client, which was previously determined, was not achieved.[70] In that case, the service provider can only escape liability if he can prove that the failure to achieve the result was a consequence of a situation for which he could not be held accountable due to a *force majeure*.[71] This indicates that, in general, the service provider is under an obligation of diligent conduct ('*obligations de s'efforcer*'), which is similar to the Dutch and English approach to service contracts.[72] This 'best efforts' obligation requires service providers to take reasonable measures to ensure the desired result.[73] The obligation of diligent conduct can be distinguished from the obligation of result ('*obligation de resultat*').[74] In general, service providers have fulfilled their obligations if they took reasonable care during the execution of their services. If damage occurs, the claimant has to prove the service provider did not take reasonable care when fulfilling his obligations. This means evidence has to be produced that proves the service provider's performance was not up to standard. This is more difficult to prove than in cases where a desired result has not been achieved, as would be the case in an obligation of result.

---

67. This is similar to art. 1:101.1 PEL SC. Under Dutch law a service contract is defined in art. 7:400 (1) BW as: 'A contract for services is a contract whereby one party, the provider of services, binds himself towards the other, the client, to perform, otherwise than on the basis of a contract of employment, work consisting of something other than the creation of a work of a tangible nature, the safekeeping of things, the publication of work, or the carriage or transportation of persons or things.' (Translated from Dutch by Warendorf, Thomas and Curry-Sumner (2013), p. 839.)
68. Art. IV.C 2:105 DCFR: 'Obligation of skill and care (1) The service provider must perform the service: (a) with the care and skill which a reasonable service provider would exercise under the circumstances…' Cf. art. 1:107 PEL SC.
69. Loos (2011), p. 776.
70. Art. IV.C. 2:106 DCFR; art. 1:108 PEL SC.
71. Loos (2011), p. 776.
72. Art. 7:401 BW; art. 13 of the Supply of Goods and Services Act 1982.
73. For English law: Murdoch (1983), p. 654-655.
74. Dupuy (1999), p. 371-385.

Under German law, on the other hand, a service provider is under the obligation of result, which requires the guarantee of a particular outcome. The service provider therefore takes upon himself the obligation to successfully perform the contract.[75]

3.2.3 Contracting parties

The terminal operator who performs services is usually employed by the person responsible under a contract of carriage for the loading and discharge of the goods.[76] This can be either the carrier or the cargo interests. In a contract of carriage by sea, the carrier is generally responsible for the loading and discharge operations.[77] If that is the case, the sea carrier can delegate the performance of these duties to the terminal operator. The carrier, who remains responsible for the handling of the goods, is then the contracting party of the terminal operator. Usually, the operations performed by the stevedore are mentioned on the invoice issued to the sea carrier as the 'Terminal Handling Charge' which covers all activities at the sea port terminal from loading and discharging cargo on board sea vessels, and temporary storage. It also includes the loading and discharge of inland vehicles.[78]

Stevedores can also perform other services in the port like storing at the request of parties interested in the cargo. In that case, a direct contract is constituted between the shipper/consignee and the stevedore. A direct contract is often concluded in the port of loading where the sea carrier assumes no responsibility for the goods before the commencement of loading and the goods are in the stevedore's custody on behalf of the consignor.[79] In the port of discharge on the other hand, the stevedore is more likely to be employed by the sea carrier who bears responsibility until the person entitled to the goods takes possession of them. Moreover, privity of contract between the stevedore and the cargo interests may also be created when a carrier (or freight forwarder) makes clear that he is acting as an agent of the stevedore for the performance of terminal operations.[80] In order to determine which party in the chain of transport contracts is the contractual counterparty of the stevedore, it is important to take a closer look at the content of these contracts which may include a type of FIOS clause. If a FIOS clause has been validly agreed upon, and the cargo interests are under the obligation to perform the loading and discharge operations, they can either perform these duties themselves or delegate the performance to the stevedore. The sea carrier can conclude the contract with the stevedore as the cargo interests' agent. If an agency relation is established, the cargo interests become the contracting parties of the stevedore.[81]

75. § 631 BGB. Rabe (2008), p. 188.
76. The stevedore can, however, also be appointed by a port authority. In that case the carrier nor the cargo interests is vicariously liable for the acts and omissions of the stevedore. The answer to the question which party is liable for faulty handling of the cargo depends on the division of risk in the contract of carriage or the applicable law. Court of Appeal, A. Meredith Jones and Co. Ltd. v. Vangemar Shipping Co. Ltd. [2000] 2 Lloyd's Rep. 337 (The Apostolis No. 2).
77. Art. II H(V)R; Art. 13 RR. It also follows from art. 4 (1) HHR.
78. See for example: Rb. Rotterdam 2 September 2016, ECLI:NL:RBROT:2016:6868, *S&S* 2017, 10.
79. Herber (2014), § 498 HGB, Rn. 37.
80. Glass (2004), p. 213-216. See below para. 9.2.1 concerning the Himalaya clause.
81. See for example English Court of Appeal, The Saudi Prince (No. 2) [1988] 1 Lloyd's Rep. 1 where the bill indicated that the master had authority to appoint the stevedore for the risk and expense of the cargo owners. The contract was subject to Italian law. On page 4 the court argued: 'At the end

3.3 The terminal operator as a depositary: Contracts of deposit

One of many services performed by the terminal operator is the storage of goods at the terminal. Goods are often placed at the terminal for a period of time during transshipment from one means of transport to another. The goods await collection by a subsequent carrier in order to proceed further in the transport chain. This intermediate period of storage can also be used by the shipper to adjust or determine the destination of the goods. Moreover, in some situations the period of storage is used to complete the required customs formalities. Specialized storage is sometimes required for certain types of goods. In other cases the containerized goods are placed in a stack, where the container functions as a mini-warehouse.

It is important to determine whether storage is performed collaterally to another obligation or whether the storage represents the entire object of the contract (see also Part II).[82] The former occurs when the storage is auxiliary to some other relationship, like the provision of services or carriage. This category includes storage by a stevedore before or after loading onto and discharge from the sea vessel, the storage of goods by a carrier during transport or after the transit has ceased but before the goods are collected by the consignee. In these cases, the approaches to mixed contracts are used to determine the applicable legal regime(s).[83] In some situations the storage of goods by a carrier is absorbed by the main, more dominant obligation to carry the goods, whereby transport law rules would apply to this period of storage. On the other hand, if goods are placed in the custody of a warehouse or terminal operator for the purpose of storing them, then the storage represents the entire object of the contract. In this case, the depositaries are free of any obligation towards the goods other than those which arise from the duty of safekeeping.

3.3.1 Characterization of contracts of deposit

A contract of deposit is concluded when a person (the depositor) places goods at a location and leaves them in the care of somebody else (the depositary) to be stored in return for remuneration with a view to redelivery when demanded. Under this

of the day I am satisfied that the Italian Court would not hold on all the facts of this case that the owner had effectively absolved himself from all liability for negligent loading, stowage and unloading. I am prepared to accept that even where one is concerned with the loading of part cargo on a general ship, it may be possible for the owner to provide by a properly drawn contract that his functions will begin after stowage and end before unloading, the functions of loading, stowage and unloading being the responsibility of cargo interests. It may also be possible for him to provide that stevedores will be appointed by him as the agent of cargo interests and on their behalf, at any rate provided the appointment is made in their name. But there is a presumption that an owner, his servants and agents are responsible for the loading of a part cargo on a general ship and the unloading of that cargo, and that presumption is in Italian law, as I conclude, a very strong one.' Privity between the cargo interests and the stevedore is not always established under Dutch law. It depends on whether the carrier who contracts with the stevedore as the cargo interests' agent concludes the stevedoring contract in his own name or in the cargo interests' name. If the carrier acted in his own name there is no contractual relation between the stevedore and the cargo interests. See: Zwitser (2012), p. 142. The subject of the FIOS clause is further developed below in para. 6.2.2.

82. Haak and Zwitser (2003), p. 409; Verheij (2016), nr. 363; Palmer (2009), nr. 14-002, p. 752-753; Frantzioch (2014), § 467 HGB, Rn. 31.

83. HR 22 January 1993, ECLI:NL:HR:1993:ZC0831, *S&S* 1993, 58 (Van Loo/Wouters) as discussed in para. 5.4.1 A below.

contract, goods are handed over to the depositary who ensures that they can ultimately be returned in the same condition as they were when handed over, or in such condition as could reasonably be expected (taking normal wear and tear into account). The primary objective of the contract is custody, the safekeeping of goods for reward or *locatio custodiae,* and there is no duty to improve the goods or to perform any other service upon them. The depositary is therefore under the obligation to organize the storage of the goods in an orderly fashion in order to keep them free from harm. The contract can therefore be distinguished from a contract for the rent of a storage location in which there is no such duty, as the use of the space is merely left to the cargo interests and the storage facility obtains no custody of the goods. It is not necessary that the goods are delivered directly to the depositary. The contract of deposit is a consensual contract concluded by parties who undertake the obligation to store goods.[84]

The national legal systems studied for this research provide non-mandatory rules which are applicable to contracts of deposit. Under Dutch law this contract of deposit ('*bewaarneming*') is specifically regulated by law in the Dutch civil code in art. 7:600 ff BW. Under German law the contract of deposit ('*Lagervertrag*') is regulated in §§ 467 ff HGB. These provisions in the German commercial code only apply to contracts of deposit which are performed by commercial enterprises. This contract is a category of, and must therefore be distinguished from, the general contract of deposit ('*Verwahrungsvertrag*') in §§ 688 ff BGB, which provisions only supplementary apply to the '*Lagervertrag*'.[85] The terminal operator who stores goods at the terminal concludes a contract of deposit as a commercial party for which he can be considered a '*Lagerhalter*' under German law. Under English law, the safekeeping of goods for reward is considered a classic form of bailment. Bailment is a concept in common law unknown to civil law. It is a factual situation which occurs when physical possession of goods is transferred from *the bailor to the bailee*, who voluntarily accepts the common law duty of safekeeping.[86] Bailment arises when one party delivers goods to another for the purpose of their storage and redelivery on demand, in return for remuneration The bailee receives the goods for a particular aim, such as deposit. If this duty of safekeeping is breached, the bailee can be confronted with a claim for compensation. A warehouse is a typical bailee, and there is an additional basis for liability for damage to or loss of goods which does not exist in civil law countries. The bailment relationship between the bailor and the bailee subject to provisions in a contract is known as bailment on terms. Contracts for the storage and custody of goods are not specifically regulated by English law although they undoubtedly qualify as contracts for the provision of services under the Supply of Goods and Services Act 1982.[87] The rules on contracts of deposit are relatively similar in the relevant legal systems which are reflected in the DCFR. In the DCFR, contracts of deposit (here referred to as contracts for storage) are regulated as a subcategory of service contracts in book IV. The contract for the storage of goods is defined in IV.C.—5:101 sub 1 DCFR as 'a contract under which one party, the

84. Frantzioch (2014), § 467 HGB, Rn. 3; Palmer (2009), nr. 14-001, p. 752; Haak and Zwitser (2003), p. 409.
85. Frantzioch (2014), § 467 HGB, Rn. 18.
86. Palmer (2009), p. 379.
87. Palmer (2009), nr. 14-001, p. 752-753. See para. 3.2 on service contracts.

storer, undertakes to store a movable or incorporeal thing for another party, the client.'

3.3.2 Duties under a contract of deposit

The main duty imposed on the depositor is to remunerate the depositary for the safekeeping of the goods. The depositary is, on the other hand, under the obligation to take the goods into custody and to return them upon demand.

As stated above, the DCFR has formulated several rules covering contracts for storage. One of these deals with quality standards imposed on the depositary (referred to as the storer).[88] When a depositary takes control over goods he must provide a place fit for storing the goods so that he can return them in a condition as could reasonably be expected. These quality standards aim at minimizing the risk of damage during storage. The storage location must be fit for the storage of those particular goods. The depositary who provides the service to the depositor must therefore ensure that the storage location is suitable for the storage by taking account of factors like the level of humidity and temperature.

In the Netherlands and England this obligation to provide a location suitable for the storage of the goods is explicitly imposed on the depositary.[89] The depositary is therefore under the obligation to provide a place for the safekeeping of goods which is fit for the purpose of custody. German law too, imposes a duty on the depositary to provide a storage location suitable for the type of storage. The depositary is under the obligation to return the goods to the depositor or another person entitled to the goods in accordance with the depositor's reasonable expectations regarding its condition. The depositary can therefore be held liable if the failure to provide a proper location leads to loss or damage to the goods. This is considered the main obligation under the contract of deposit.[90] The depositary would fail to fulfil this obligation if, for example, the goods were damaged due to a defect in the refrigeration equipment, even if the defect were caused by a mechanic employed by the depositary.[91] Another example would be where goods of different natures are jointly stored. Here the depositary would be obliged to ensure that the goods in question were compatible, e.g. chemicals cannot be stored with certain other goods as this could lead to a chemical reaction.[92]

Furthermore, DCFR obliges the depositary to perform the storage himself and may not subcontract the performance of the service unless the depositor has agreed to it.[93] This is in line with the approach taken in the relevant jurisdictions in which the delegation of storage to a third person without the depositor's authorization

88. IV.C.—5:102 DCFR.
89. England: Chitty 2 (2012), no. 33-048. The Netherlands: HR 28 November 1997, ECLI:NL:HR:1997:ZC2511, *NJ* 1998, 168 (Smits/Royal Nederland).
90. Heublein (2015), § 467 HGB, Rn. 26-28.
91. HR 28 November 1997, ECLI:NL:HR:1997:ZC2511, *NJ* 1998, 168 (Smits/Royal Nederland).
92. Heublein (2015), § 467 HGB, Rn. 26-28.
93. IV.C.—5:102 DCFR.

is not permitted.[94] The reason behind this rule is that personal considerations are often involved in a depositor's choice of depositary. It can be questioned whether these personal considerations would still be significant, especially for storage by professional parties. In Dutch law, subcontracting is only permitted without a depositor's consent under certain specific circumstances.[95]

3.3.3 **Standard of care**

Similar to the provisions in DCFR, the standard of care required of the depositary is in the relevant jurisdictions described as the duty to take reasonable care.[96] The depositary must take reasonable precautions to prevent unnecessary damage to the goods accepted for storage. The circumstances of each case decide what can be expected from a reasonable depositary. Factors such as the general customs at the location, the nature of the goods, the professionalism of the parties and whether or not the depositary is specialized in the type of goods are all taken into account. Parties are free to develop this further in their contract and to agree on specific requirements which the depositary must satisfy. Unless otherwise agreed, the depositary is not under any obligation to examine the goods or conduct checks and controls. This is different when the goods are obviously damaged for example when this can be seen by checking the packaging or the seals. German law contains a provision to this extent in the commercial code.[97] The depositary's duty to take reasonable care may include the duty to obtain insurance cover for the goods. This duty to insure the goods can be imposed on the depositary under the contract. Should the depositary fail to obtain this insurance cover, he could be held liable for any damage to the stored goods.[98]

As stated above, the depositary accepts the obligation to keep the goods from harm. The depositary is generally in the best position to protect the goods from any imminent danger and must take all proper measures to protect the depositor's interests. However, the depositary is not under the obligation to provide absolute protection against all kinds of damage. He is not expected to take all possible precautionary measures as damage cannot always be prevented under all circumstances. The depositary weighs the extent of any impending damage and the costs he would have to incur to prevent it, while taking the value of the goods into account.[99]

As a result of this, the depositary is not liable for damage or loss that could not have been prevented even though he exercised due care. The onus of proof is on the depositary to show that the damage was not caused by any failure take reasonable care on his part. The depositary can either show that he had taken reasonable care of the goods, or he may show that the failure to take such care did not contrib-

94. Chitty 2 (2012), nr. 33-051. Art. 7:603 (2) BW. § 472 (2) HGB.
95. Art. 7:603 (2) BW. Verheij (2016), nr. 370.
96. Art. IV.C.—5:103 DCFR; art. 7:602 BW; § 475 HGB. Chitty 2 (2012), nr. 33-049; Palmer (2009), nr. 14-010, p. 757. See for the leading Dutch case law: HR 28 November 1997, ECLI:NL:HR:1997:ZC2511, *NJ* 1998, 168 (Smits/Royal Nederland); HR 30 September 1994, ECLI:NL:HR:1994:ZC1464, *NJ* 1995, 45.
97. § 470 HGB.
98. § 472 HGB. Chitty 2 (2012), nr. 33-048; Palmer (2009), nr. 14-013, p. 764; Verheij (2016), nr. 369.
99. Heublein (2015), § 467 HGB, Rn. 27. Chitty 2 (2012), nr. 33-048.

ute to the loss or damage.[100] Special conditions in the contract may exempt the depositary from this liability.

3.3.4 Document of title

At the conclusion of the contract, a depositary may issue a document of title related to the storage of goods similar to a bill of lading for the carriage of goods by sea. This document of title is known as a warehouse warrant (in Dutch: '*ceel*' and in German: '*Lagerschein*'). The document of title is issued to order or to bearer, and can be transferred to a third party before the depositary has returned the goods. In that case, the transfer of the document of title also transfers the right to demand the cargo from the depositary.[101] The depositary has the duty to return the goods to the person entitled to them in accordance with the legal regime applicable to contracts of deposit and the terms of the contract as evidenced in the document of title. If the deposited goods are damaged during storage the depositary can be held liable. Whether the depositary has to compensate the damage depends on the terms of the contract as evidenced in the document of title which may include liability exclusions or limits of liability. If a document of title is issued, the third party holder of the document of title becomes party to it and is bound by the terms of the contract of deposit as evidenced in the document of title.[102]

3.4 The terminal operator as a carrier: Contracts of carriage

If the terminal operator performs the transport of goods within a terminal (lifting, or moving containers between stacks or means of transport[103]) or takes control of the inland flow of goods, he generally assumes responsibility for the carriage of goods. These terminal operators act as subcarriers when concluding contracts of carriage with main (ocean) carriers or they act as main carriers when directly contracting with cargo interests (or their forwarding agents). The terminal operator can decide to perform the carriage himself with his own vehicles or he can subcontract with subcarriers to outsource the operations. The terminal operator who assumes these obligations is responsible for the goods as a carrier and is subject to national or international transport law.[104] Although the transport may be delegated to a subcarrier, the carrier's responsibility for the execution of the contract is undelegable.

The terminal operator need not assume the obligation to transport the goods as a carrier, he can also just arrange the carriage as a forwarding agent for his customers. If the terminal operator assumes the obligation to arrange the carriage of goods for his customers, he can be qualified as a freight forwarder. A freight forwarder who acts as an agent and concludes contracts of carriage is, under English, German

100. Palmer (2009), nr. 14-010, p. 758.
101. Under Dutch law: art. 7:607 BW. See: HR 10 February 1978, ECLI:NL:HR:1978:AC1257, *NJ* 1979, 338 with commentary from W.M. Kleijn (Nieuwe Matex). Under German law: § 475 HGB.
102. Asser/van Schaick 7-VIII (2012), nr. 49; Zwitser (2006), nr. 13; Heublein (2015 a), § 475d HGB, Rn. 2-4.
103. See para. 6.3.
104. Verheyen (2014), p. 65-288.

and Dutch law, subject to a liability regime which is different from the liability regime governing carriers. There are differences with regard to aspects like the duty of care, burden of proof and the possibility to agree on liability exonerations or limits of liability. A freight forwarder merely undertakes the obligation to select a proper carrier and possibly some additional obligations to ensure the proper shipment of the goods. Unlike carriers, freight forwarders who do not perform the carriage by themselves ('*Selbsteintritt*'),[105] are therefore not responsible for the delivery of unharmed goods to their destination.[106] When compared to carriers, freight forwarders enjoy greater freedom to determine their liability in contracts, they can, for example, include limits of liability.[107] Under German law, the freight forwarder is however subject to transport law rules when he has custody of the goods if he charges a fixed amount (*Fixkostenspediteur*) or if he collects and bundles cargo.[108] Terminal operator can be qualified as both a carrier or a freight forwarder, which, depends on the intentions of the parties and their willingness to be bound to the performance of transport.[109] For this, several factors have to be taken into account. These include the qualification given to the contract by the parties, the reference to general terms and conditions, the invoice, the transport documents used and the common practice between the parties.[110] It is important to make clear whether the terminal operator is acting as a carrier or as a freight forwarder because the position of a forwarding agent is very different from that of a carrier. As mentioned above, the focus of this study is on terminal operators who take on the obligation to transport goods between the sea port and inland terminals as a carrier. This is because it is commercially more attractive.

Transport law, which applies to contracts of carriage, consists to a large extent, of mandatory rules. For this reason, the freedom of contracting parties to adopt deviating contractual terms is limited. This particularly applies to international conventions[111] and to a lesser extent to national transport law.[112] Because of this, a carrier is responsible for the unharmed delivery of the goods and cannot exonerate himself from liability as it is contrary to the mandatory transport law rules. It is therefore also not possible to stipulate lower limits of liability than the ones provided in the mandatory liability regimes. International transport law conventions differentiate between different modes of transport as there is no harmonized liability system for transport law.[113] The mandatory liability regimes applicable to these different

105. § 458 HGB. Art. 8:61 BW.
106. Smeele (2016), p. 106-115; Glass (2004), p. 1-15; Tetley (1987), p. 79-95; Hoeks (2009), p. 52-57; Verheyen (2014), p. 124-134; Bydlinski (2014), § 453 HGB, Rn. 42-66.
107. See for example: FIATA Model rules; ADSp (*Allgemeine Deutsche Spediteurbedingungen*); FENEX (from the Dutch association of forwarding and logistics); BIFA (from the Britisch international freight association).
108. §§ 459-460 HGB.
109. Basedow (1987), p. 42 ff; Loyens (2011), p. 376-378; Clarke (2014), nr. 10 a, 21-26.
110. Verheyen (2014), p. 279-281.
111. Art. 5 COTIF-CIM; art. 26, 27, 47 and 49 MC; art. 25 CMNI; art. III (8) HVR; art. 41 CMR.
112. Under Dutch law the general transport law rules are not mandatorily applicable, art. 8:20 BW ff. Moreover, the German transport law rules which are applicable to carriage by road, rail, inland waterways and air contain only few mandatory provisions, §§ 407 ff HGB. English law contains no specific national rules on inland carriage.
113. It has been suggested that a uniform liability system for multimodal contracts is required to minimize the problems of the existing legal framework. See: Eftestøl-Wilhelmsson (2014), p. 246; Haak (2005), p. 13; Hoeks (2009), Ch. 1; Lamont-Black (2012), p. 707.

modes of transport contain diverging rules on matters such as the standard of care, exoneration grounds, liability limits, and procedural rules. Although these regimes differ to a large extent, some general principles underlying international transport law conventions can be observed. These general principles are discussed in paragraph 3.4.1.

In the terminal operator's contracts for the inland transport of goods, the mode of transport to be used is rarely determined at the moment of the conclusion of the contract. The terminal operator who acts as a carrier prefers to leave his options open so that he can choose the most efficient mode of transport at a later stage.[114] Moreover, the terminal operator's contracting parties are not usually particularly interested in the mode of transport used to carry their goods, their main concern is that the goods arrive at their destination on time and in good condition. The mode of transport used is irrelevant provided it does not result in higher freight rates.[115] The contract of carriage concluded between these parties can therefore be considered an optional carriage contract. An optional contract of carriage is a contract in which the mode of transport is unspecified. It allows the carrier the discretion (option) to select the mode of transport but it does not offer the carrier the option to choose whether or not to carry the goods. This type of carriage contract is distinguished from other types in paragraph 3.4.2. The legal qualification of these contracts and the applicable law will be discussed in paragraph 3.4.3. Furthermore, Chapter 4 addresses question of whether a uniform contractual liability regime which complies with the applicable mandatory transport law rules, irrespective of the mode of transport used for the performance of the contract, can be agreed upon by contracting parties.

3.4.1 General principles of transport law

Although there are considerable differences between the liability regimes relating to different modes of transport, it is possible to observe some general principles underlying them.[116]

First of all, the carrier is under the obligation to preserve the goods and to carry them to their destination. During the performance of these services, the carrier is responsible for the acts and omissions of his performance agents.[117] The carrier is furthermore under an '*obligation de résultat*', under which he promises to achieve a certain result, viz. the timely unharmed delivery of the goods to the person entitled to receive them at the destination.[118] The carrier is therefore responsible for the goods from the moment of 'taking over' until 'delivery'.[119]

114. Claringbould (2016), nr. 80, p. 6-7.
115. Basedow (1987), p. 291.
116. See: De Wit (1995), p. 219-220; Verheyen (2014), p. 72-74; Van Empel and Van Huizen (2007), p. 15-22.
117. Art. 3 CMR; art. 40 COTIF-CIM; art. 4,2, 17 CMNI; art. 30, 39 MC. Cf. art. IV (2) (q) HVR.
118. De Wit (1995), p. 332.
119. In principle, a carrier is subject to a mandatory liability regime between taking over until delivery. See: art. 4.1 HHR, art. 12 RR, art. 17,1 CMR, art. 18.1 MC, art. 3.1 CMNI, art. 23.1 COTIF-CIM. An exception can be found in the HVR which is only mandatorily applicable from tackle-to-tackle. See: art. I (e) HVR. See also below para. 6.2.

The liability of the carrier who breaches these obligations is dealt with in a similar manner under different conventions. Most conventions have adopted a negligence based liability with a reversal of the burden of proof.[120] Should loss, damage or delay occur while in the carrier's custody, the carrier may attempt to disprove his presumed liability. Transport law regimes contain some specific exoneration grounds which vary according to the features of the different modes of transport. The carrier is therefore provided with exemption grounds to avoid liability which go beyond the notion of *force majeure* known in the general law of obligations.[121] The road carrier subject to CMR is, for example, relieved of liability when loss, or damage arises from the use of open un-sheeted vehicles.[122] The CMR contains a general rule which is supplemented by a list of special risks.[123] This is similar to COTIF-CIM for carriage by rail.[124] Where goods are carried under bills of lading, the Hague (Visby) Rules relieve the maritime carrier of liability if some specific duties are performed with due diligence. This is similar to the situation under CMNI for carriage by inland waterways.[125] The HVR become relevant for terminal operators when they perform services related to sea carriage on behalf of the sea carrier. Furthermore, HVR contain an extensive list of exceptions like nautical faults and fire exception which, the contracting parties can agree on under CMNI.[126] An exception to this negligence based liability with a reversal of the burden of proof is the strict liability standard which can be found in the Montreal Convention covering the carriage of goods by air.[127] This is different from other conventions in that here the air carrier is strictly liable for any loss, damage or delay that may occur while the goods are in his custody. On the one hand, the air carrier has few grounds for exoneration, similar to the ones under the general law of obligations, but on the other hand this strict liability is offset by unbreakable limits of liability.[128]

Under all transport law conventions, the carrier's liability is limited to the loss in value of the goods, therefore all consequential losses are generally excluded. The carrier's liability for loss, damage or delay[129] is furthermore limited to amounts calculated by reference to the weight of the goods, the number of packages or to the freight charges.[130] The carrier's liability cannot exceed the applicable liability limit unless this limit had been contractually increased.[131] However, this right to limit liability can be lost if there is evidence of wilful misconduct.[132] There are

120. De Wit (1995), p. 33-37.
121. Verheyen (2014), p. 72-73.
122. Art. 17.4 (a) CMR. Cf. art. 23.3 (a) COTIF-CIM.
123. Art. 17 CMR.
124. Art. 23 COTIF-CIM.
125. Art. III, IV HVR. Cf. art. 3.3 CMNI.
126. Art. IV (a) resp. (b) HVR. Cf. art. 25.2 CMNI.
127. Art 18-20 MC.
128. Art. 22.3 MC. Art. 22.5 MC, which provides a rule for breaking the limits, only applies to carriage of persons and their baggage.
129. Liability for delay is, however, not regulated under the H(V)R.
130. Art. IV (5) (a) HVR; art. 23 CMR; art. 30-33 COTIF-CIM; art. 20 CMNI; art. 22.3 MC.
131. Art. IV (5) HVR; Art. 19, 20 CMNI; art. 30-35 COTIF-CIM; art. 23 CMR; art. 22 MC. However, it has to be taken into account that the carrier's liability limit cannot be increased under the CMR pursuant to art. 41 CMR.
132. Art. 29 CMR; art. IV (5) (e) HVR; art. 36 COTIF-CIM; art. 21 CMNI.

considerable differences with regard to the height of the monetary limits of liability, as well as to the required degree of fault for breaking these limits.

Transport law conventions also contain special rules covering procedural aspects like notice periods,[133] time bars and the right of action. The group of persons who have a right to sue is limited[134] and they only have a short period of time in which to bring their suit.[135]

All international transport law conventions are applicable irrespective of whether a claim is brought in contract, in tort or otherwise.[136] Therefore, the terminal operator who performs a contract of carriage as a main or subcarrier has the benefit of defences and limits of liabilities when claims are brought by either contracting parties or third parties.[137] This also applies to a certain group of persons, other than the carrier, who are used for the performance of the contract of carriage, they too, can rely on the defences under the conventions when faced with direct claims.[138]

3.4.2 Optional carriage and other types of carriage

When a terminal operator undertakes the obligation to carry goods from a sea port terminal to an inland terminal or vice versa, the terminal operator is responsible for the goods as a carrier and is generally subject to transport law. In many cases the terminal operator transports the goods either by road, rail or inland waterways or by a combination of these modes of transport. When the contract of carriage is concluded, the terminal operator often wishes to have the discretion to choose the mode of transport for the performance of the contract at a later date. He likes to leave his options open so that he can choose the most efficient and convenient mode of transport at a later moment in time when the contract is being performed. The terminal operator then takes a decision based on issues such as the available infrastructure between the place of taking over and delivery, on the capacity of the vehicles at his disposal, the availability of sustainable alternatives, the freight rates and the timeframe in which the goods have to reach their destination. The contract of carriage concluded by the terminal operator can therefore not be considered a standard unimodal or even a multimodal contract of carriage, but rather an optional contract of carriage. In order to characterize the contract for inland carriage, it is necessary to distinguish several different types of contracts of carriage.

It is possible to distinguish different types of contracts of carriage based on the mode(s) of transport used for the performance of the carriage. The term mode of transport refers to a particular transport technique and includes carriage by sea, inland waterways, road, rail and air. The Dutch legislator adds 'pipeline' to the list

133. Art. III (6) HVR; art. 30-32 CMR; art. 23 CMNI; art. 31 MC; art. 47 COTIF-CIM.
134. Art. 44 COTIF-CIM; art. 12-14 MC; art. 13 CMR. This is different when a bill of lading is issued, see: Spanjaart (2012).
135. Art. 35 MC; art. III (6) HVR; art. 32 CMR; art. 48 COTIF-CIM; art. 24 CMNI.
136. Art. 4 RR; art. IV bis HVR; art. 7 Hamburg Rules; art. 28 CMR; art. 29 Montreal Convention; art. 22 CMNI; art. 41 COTIF-CIM. See also para. 8.2.
137. See below para. 8.2-8.3.
138. Art. IV-bis (2) HVR (explicitly excluding independent contractors); art. 7.2 and 10.2 HHR; art. 4.1 RR; art. 30, 43 MC; art. 41.2 COTIF-CIM; art. 17.3 CMNI; art. 28.2 CMR. See also below para. 8.4.

of modes of transport in art. 8:40 BW, but this has been criticized, as a pipeline should be regarded as a means of transport rather than a mode of transport.[139]

Following this, a distinction should be made between the term mode of transport and the term means of transport. When determining the law applicable to a contract, the mode of transport used is usually decisive rather than the means of transport. However in some cases, the scope rules of a legal regime might add additional requirements regarding the means of transport. This is for example the case under Dutch law on carriage by sea which only applies to contracts of carriage by sea under which the carrier undertakes the obligation to carry goods by sea in a vessel.[140] Means of transport can be vehicles such as vessels, trucks, trains, and aircrafts. In general, the mode of transport is relevant when qualifying the contract of carriage. This is why carriage by a single means of transport over more than one mode of transport can be considered multimodal carriage. Carriage by more than one means of transport over a single mode of transport can, on the other hand, not be considered as multimodal transport.[141] This paragraph deals with the different types of contracts of carriage, after which, paragraph 3.4.3 discusses the legal nature and implications of a so-called optional contract.

A Unimodal carriage

Under a unimodal contract of carriage, the carrier undertakes the obligation to carry goods by a single mode of transport. This can, for example, be performed by road, rail, inland waterways, sea or air and be performed by one or more carriers.[142]

B Through carriage

The term through carriage is used to describe transport by a single mode of transport which involves transshipment along the way. The goods are, for example, carried by a vessel and discharged and loaded onto another vessel in an intermediate port. The carriage can be performed by one or more carriers, who then act as a subcarrier.[143]

Although the term through carriage refers to carriage by a single mode of transport which includes transshipment along the way, the term is regularly used in practice to describe another concept. The term through transport is often used for carriage of goods by sea and refers either to the concept of multimodal transport or to a contract which provides for carriage and freight forwarding. These 'through bills of lading' issued by the sea carrier, cover services provided by the carrier beyond the sea carrier's main service which is carriage by sea. This term therefore refers to supplemented non-sea carriage from the port of discharge to an inland location or vice versa. It is possible to distinguish different types of through bills of lading. The carrier can either undertake the responsibility for the entire carriage or he can

139. Van Beelen (1996), p. 66.
140. Art. 8:370 (1) BW.
141. Claringbould (1992), p. 88.
142. Van Beelen (1996), p. 6; De Wit (1995), p. 18.
143. De Wit (1995), p. 18.

act as an agent when arranging supplemented carriage. In the former case, the sea carrier undertakes the responsibility for the entire carriage and may subcontract for the non-sea carriage section.[144] If the carrier undertakes the responsibility for the entire carriage and the carriage involves more than one mode of transport, the carrier can be qualified as a multimodal carrier. In the latter case on the other hand, if the sea carrier acts as a carrier for the part concerning the sea carriage and forwards the goods to a further location, the carrier is not responsible as a carrier for the entire process. In that case, the document usually indicates an inland final destination but the sea carrier only takes responsibility for the carriage to the sea port and acts as a forwarding agent for the land transport to the final destination. The delivery under the contract of carriage by sea therefore takes place in the sea port after the completion of the carriage by sea. Any loss, damage or delay caused to the goods during the inland transport therefore falls outside the carrier's period of responsibility. Any liability for such damage would have to be based on his capacity as freight forwarder.[145] If the carrier only takes responsibility for the sea carriage, the contract can be qualified as a unimodal contract of carriage.

C Successive carriage

The term successive carriage is one found in CMR,[146] COTIF-CIM[147] and the Warsaw and Montreal Conventions.[148] Under CMR and COTIF-CIM, the rules state that the system of successive carriage applies when carriage, which is governed by a single contract, is performed by successive carriers and these carriers take over the goods as well as the consignment note. Pursuant to this, if more than one consignment note is issued, each one covering part of the carriage performed by two or more carriers, then no successive carriage in the sense of CMR and COTIF-CIM takes place. The carriers are required to accept a single consignment note which binds them to the contract and subsequently to the convention that applies to this contract.[149]

If these requirements are met, the legal consequences are such that each successive carrier becomes party to the contract of carriage and these carriers assume the obligations arising from them. As a result of this, the claimant, who suffered damage due to loss of, damage to or delay in delivery of the goods, has a right of action against a larger group of persons. Direct actions can be brought against the first and the last carrier as well as against the carrier who was in charge of the goods when the event causing the loss, damage or delay occurred. Moreover, under COTIF-CIM the carrier who was contracted to deliver the goods and who is entered into the consignment note with his consent is also added to the list. An action may be brought against this carrier who is obliged to deliver the goods even if he had received neither the goods nor the consignment note.[150] The system of successive

144. De Wit refers to this as a 'pure through bill of lading': De Wit (1995), p. 296.
145. Glass (2004), p. 211-213. GLASS also distinguishes another type of through bill of lading: 'joint arrangements'. These types of through bills of lading are however rarely used.
146. Art. 34 ff CMR.
147. Art. 26 COTIF-CIM.
148. Art. 1.3, 30 WC; art. 1.3, 36 MC.
149. See para. 8.3.2.
150. Art. 45.2 COTIF-CIM.

carriage therefore implies a significant advantage for the cargo interests. Moreover, the position of a carrier seeking recourse also improves. If successive carriage is involved, CMR ensure a prompt and speedy settlement of legal disputes between the various carriers in the logistic chain.[151] This can be beneficial to the legal position of the terminal operator, who as a main carrier, employs subcarriers for the performance of the inland carriage.[152]

D Multimodal carriage

When goods are transported by more than one mode of transport, for example, from A to B by sea and from B to C by rail, this is referred to as multimodal transport. Separate independent contracts of carriage can be concluded for each mode of transport, or a single contract of carriage can be concluded to cover the transport by both modes of transport. The latter case only, can be qualified as a multimodal contract of carriage.[153] An authoritative definition on international multimodal transport can be found in the failed Multimodal Convention.[154]

> '(…) the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.'[155]

According to this definition, the carrier undertakes the obligation to perform the whole carriage by at least two different modes of transport in a single contract. The carrier is therefore responsible for the goods from the moment they are taken over from the consignor until the moment that they are delivered to the consignee at the place designated for delivery. The carrier merely undertakes the obligation to perform the carriage and may actually perform the carriage only in part or not at all.[156] A similar definition has been adopted by the Dutch and German legislators.[157] However, the German definition of multimodal transport additionally requires that different liability regimes would apply to the contracts if separate contracts for each mode of transport had been concluded. As German non-maritime transport law rules cover carriage by land, inland waterways and by aircrafts, a contract for inland carriage which is subject to German non-maritime transport law, does not qualify as a multimodal contract of carriage.[158]

151. However, parties can exclude the application of art. 37 and 38 in their contracts.
152. See also: HR 11 September 2015, ECLI:NL:HR:2015:2528, *NJ* 2016, 219 with commentary from K.F. Haak, *S&S* 2016, 1 (C&J Veldhuizen Holding/Beurskens Allround Cargo).
153. Van Beelen (1996), p. 13.
154. The United Nations Convention on International Multimodal Transport of goods, Geneva, 24 May 1980 (Multimodal Convention).
155. Art. 1.1 Multimodal Convention.
156. Van Beelen (1996), p. 13; De Wit (1995), p. 3-4; Hoeks (2009), p. 6.
157. Art. 8:40 BW; § 452 HGB.
158. Paschke (2017), § 452 HGB, nr. 11.

The Dutch legislator however, does not use the term multimodal transport but refers to this as 'combined' transport (*gecombineerd vervoer*). The term combined transport was also used in international legislative efforts in the past and can still occasionally be found in documentation that has not been adapted to the more modern term of multimodal transport adopted by the failed Multimodal Convention in 1980. Currently, the use of the term multimodal transport seems to be more widespread.[159] It is also more accurate as it indicates a combination of more than one mode of transport whereas the term combined transport can also refer to a combination of transport means by the same mode of transport.[160] Other similar terms like intermodal, co-modal or synchro-modal transport can be found. These however, merely refer to logistic concepts and have no legal significance.[161]

E Optional carriage

The terminal operator often also concludes optional contracts of carriage for the inland transport of goods. This type of contract of carriage should be distinguished from unimodal or multimodal contracts of carriage, although the performance of this optional contract can ultimately lead to unimodal or multimodal transport. Under an optional contract of carriage, the carrier undertakes the obligation to carry the goods without indicating by which mode(s) of transport the carriage will be performed.[162] The carrier is, however, not offered the option to choose whether or not to transport the goods. So-called 'liberty clauses' are often inserted in transport documents indicating that the carrier wishes to leave his options open on the mode of transport he intends to use for the performance of the contract of carriage. An example of a 'liberty clause' can be found in the Negotiable Multimodal Transport Bill of Lading issued by BIMCO in 2016 (MULTIDOC 2016) where contract clause 6 states:

> '(a) The MTO (read: Multimodal Transport Operator) is entitled to perform the transport in any reasonable manner and by any reasonable means, methods and routes'.

A number of different types of optional contracts can be distinguished. First, the carrier can leave all his options open and not specify which mode of transport he intends to use. Some modes of transport can automatically be ruled out due to their impracticality viz., if they are heavily influenced by commercial or geographical factors or are have time constraints. These unspecified optional contracts can ultimately be performed by a single (unimodal) or several (multimodal) modes of transport. Moreover, an optional contract can be said to exist when one mode of transport is selected and the carrier is given the option to perform the carriage by replacing this mode of transport or by adding another mode of transport which

159. Glass (2004), p. 3.
160. De Wit (1995), p. 3-4.
161. Claringbould (2012), nr. 65, p. 10; Claringbould (2012 a), under 1; Hoeks (2009), p. 6; Van Beelen (1996), p. 2, 63-64.
162. Other terms used to describe the same or similar phenomenon are: synchromodal transport, unspecified transport, *transport alternatif*, contract of carriage containing an option. See: Verheyen (2014), p. 25.

can be specified or unspecified.[163] In that case, the carrier is offered a choice to carry the goods entirely or partly by another mode of transport than the one initially agreed upon. The Dutch legislator also observed these possibilities when adopting the rules on multimodal carriage. The example was given of a sea carrier transporting goods to Rotterdam or Amsterdam who has the option of transhipping the goods onto a barge in Antwerp and carrying them to their final destination by inland waterways. The barge operator could also carry the goods by rail should low tides prevent carriage by inland waterways.[164]

Verheyen records another distinction on optional contracts of carriage. The term 'fleximodal contract of carriage' (*fleximodale vervoerovereenkomst*) is introduced to describe a subcategory of optional contracts of carriage. These fleximodal contracts of carriage are contracts in which the carrier is given the option to carry goods by more than one mode of transport and which are subject to different liability regimes.[165] The applicable law is taken into account when qualifying contracts of carriage in this way. In some legal systems each mode of transport is subject to its own particular liability regime. This also largely applies to the international transport law conventions which cover a particular mode of transport viz. CMR for carriage by road, CMNI for carriage by inland waterways, COTIF-CIM for carriage by rail, H(V)R for carriage by sea and MC for carriage by air.[166] However, several modes of transport can be subject to the same liability regime. This is the case under German law, where carriage by road, rail, inland waterways and air are subject to a uniform regime which can be found in §§ 407 ff HGB. Here, if a contract offers the carrier the choice to perform the contract by any of these modes of transport, his legal position is clear as all these modes of transport are subject to the same regime. These contracts are therefore covered by the term 'mode specific contracts of carriage' (*modusspecifieke vervoerovereenkomsten*), which are treated as unimodal contracts of carriage.[167] Verheyen distinguishes between those optional contracts which are 'fleximodal' or 'mode specific' in order to determine whether it is relevant to determine which law is applicable for optional contracts of carriage.

In order to avoid confusion, the term optional contract will hereafter only be used to refer to those contracts of carriage which provide the carrier with an option to carry goods by different modes of transport. Unless otherwise indicated, these modes of transport are not subject to the same transport law regime.

3.4.3 The applicability of transport law rules in case of optional contracts of carriage

A terminal operator who takes upon himself the obligation to transport goods between inland terminals in the hinterland and terminals in the sea port area can

163. Haak (2006), p. 303; Van Beelen (1996), p. 77; Claringbould (2016), p. 6-7.
164. Claringbould (1992), p. 88.
165. Verheyen (2014), p. 293.
166. In some cases a convention for a particular mode of transport may cover accessory carriage by another mode of transport. This could be when carriage by another mode of transport takes place within an airport. In that case, the air carriage regime applies according to art. 18.3 and 18.4 MC.
167. Verheyen (2014), p. 22-25, 305-307.

be considered a carrier. The inland transport is usually performed either by inland waterways, rail or road, and the terminal operator often wishes to leave the options open about which mode of transport to use until after the conclusion of the contract of carriage. The contract concluded for the performance of this obligation is therefore an optional contract of carriage. The use of an optional contract of carriage leads to legal difficulties when determining the applicable transport law rules.[168]

Some uniform international transport law conventions which connect to a specific mode of transport contain definitions on the term contract of carriage.[169] They, however, do not touch upon the elements a contract must contain for it to be considered a contract of carriage. The formation and validity of contracts is left to national law and these definitions are only relevant when determining the applicability of the rules.[170]
The national law applicable to the optional contract of carriage determines whether it qualifies as a contract of carriage subject to transport law. Dutch and German legal systems contain definitions on the contract of carriage in general. The definitions in these legal systems do not require a reference to a mode of transport. In the Netherlands, art. 8:20 BW defines a contract of carriage as (freely translated): 'the contract, in which one party (the carrier) with regard to another party (the shipper) takes upon himself the obligation to carry goods'.[171] This is similar to the German definition which can be found in § 407 I and II HGB which reads (freely translated): '(I) By reason of the contract of carriage the carrier is under the obligation to transport the goods to their destination and deliver them there to the consignee. (II) The shipper is under the obligation to pay the agreed freight'.[172]
However, the supplementary transport law rules in the Dutch civil code are only applicable insofar as the rules on carriage by a specific mode of transport cannot be applied. These rules therefore supplement the transport law regimes for specific modes of transport. Moreover, § 407 III HGB adds a scope rule and determines that the subsection containing general transport law rules applies only if carriage is performed by land, inland waterways or with aircrafts. From this it becomes clear that the Dutch and German definitions of contract of carriage do not contain an element relating to the mode of transport. The mode of transport becomes relevant when determining the applicability of a certain liability regime and not when qualifying the contract.

An optional contract of carriage might give rise to legal uncertainty when determining the applicable transport law regime. This is especially true in situations where the options offered in the contract of carriage cover modes of transport which adhere to different liability regimes. It is therefore relevant to first determine the applicable

168. Basedow (1987), p. 39, 58-59; De Wit (1995), p. 171; Verheyen (2014), p. 89-114; Hoeks (2009), p. 68-69.
169. Art. I (b) HVR; art. 1.1 RR; art. 1.1 CMNI.
170. Verheyen (2014), p. 102-105.
171. Art. 8:20 BW: '*de overeenkomst, waarbij de ene partij (de vervoerder) zich tegenover de andere partij (de afzender) verbindt zaken te vervoeren.*' 'The contract in which a party (the carrier) commits himself towards the other party (the shipper) to carry goods' (freely translated).
172. § 407 I and § 407 II HGB: '*(I) Durch den Frachtvertrag wird der Frachtführer verpflichtet, das Gut zum Bestimmungsort zu befördern und dort an den Empfänger abzuliefern. (II) Der Absender wird verpflichtet, die vereinbarte Fracht zu zahlen.*'

liability regime as these vary considerably with regard to matters such as the liability limits, standard of care, exoneration grounds and procedural rules. These problems are not restricted to contracts of carriage which offer an option for the mode of transport but also to cases where there is agreement on the use of a specific mode or a combination of modes of transport and where the carrier is allowed to deviate from this agreement while performing the contract of carriage.[173]

When concluding an optional contract of carriage, it may be unclear which specific liability regime will apply to any damage sustained due to events that occurred during the performance of the carriage. This uncertainty stems from the uncertainty about the mode the carrier may select and the fragmented transport law which contains liability regimes connecting to a specific mode of transport or a combination of several modes of transport. Moreover, some legal regimes only apply to carriage by a specific mode (or modes) of transport while other regimes require carriage by a specific mode of transport and additionally apply to supplemented carriage by another mode of transport.[174] An example of the former can be seen in HVR which, according to art. I (b) HVR '(…) applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea (…)' and an example of the latter is provided by the RR which states in art. 1.1 RR that 'The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage'.[175] It is therefore possible that a liability regime covers carriage by more than one mode of transport.

Pursuant to this, some optional contracts do not lead to difficulties when determining the applicable liability regime. If German law applies to the contract of carriage and the options include only non-maritime modes of transport, one liability regime applies to all available options.[176] It is possible that some modes of transport are (tacitly) excluded. It is quite possible that it might not be reasonable to consider one or more modes of transport for a particular contract of carriage. This would depend on the place of taking over and delivery, the nature of the goods, the agreed freight, the time frame in which the goods are to be transported and the available infrastructure. An example of a situation like this would be for the transport of a package from New York to Rotterdam within a timeframe of 2 days. In a case like this, the only reasonable mode of transport which would guarantee delivery on time, would be carriage by air, possibly supplemented by carriage by another mode of transport.[177] Here there would be no difficulty in determining the applicable liability regime as there was only one option available or the available options

173. De Wit (1995), p. 171.
174. Haak and Hoeks (2004), p. 425; Haak and Hoeks (2005), p. 91.
175. Cf. art. 1.3 and 1.4 COTIF-CIM (COTIF-CIM additionally applies to national transport by road or inland waterways and to international transport by sea and inland waterways which supplements rail carriage); art. 2.2 CMNI (CMNI additionally applies to transport by sea if the goods are not transshipped); art. 2 CMR (CMR additionally applies to 'roll-on, roll-off' carriage); art. 18.4 MC (MC additionally applies to transport by land, sea and inland waterways within the confines of the airport or for the purpose of loading, delivery or transshipment).
176. § 407-450 HGB.
177. Verheyen (2014), p. 303-304.

specified in the contract solely included modes of transport governed by the same liability regime.

In general, two aspects have to be considered before one can determine with any certainty which law is applicable when concluding an optional contract. The first aspect was discussed above. It relates to the question of whether the options available in the contract include modes of transport which are subject to different liability regimes. The second requires an analysis of the applicable liability regimes and relates to the question of whether the scope of application of the relevant liability regimes connects to the terms of the contract or to the mode of transport used during the performance of the contract.

Performance-related or contract-related scope rule

The contract of carriage might offer various options including several modes of transport which adhere to different liability regimes. In these cases, it is important to analyse the requirements for the application of the relevant liability regimes on national and international levels. This is to determine whether, and in which case, these regimes apply to optional contracts of carriage. In addition to legal regimes which have no requirements as to the mode of transport, like the Dutch supplementary rules on transport in general in art. 8:20 ff BW, and liability regimes which contain scope rules which determine that the applicability depends on the issuance of a particular transport document,[178] there are two types of scope rules that relate to the required mode of transport. The first is the 'contract related scope rule' in which the liability regime applies if the carriage by a specific mode of transport has been contractually agreed upon. The second is the 'performance related scope rule' in which the applicability of the liability regime depends on the performance of the contract by a specific mode of transport irrespective of the mode of transport agreed upon in the contract.[179]

In some cases the scope rule of a particular liability regime clearly shows whether the applicability is related to either the mode of transport agreed upon in the contract or to the one used for the performance. The scope rules of the air carriage regimes, unlike other international unimodal transport law regimes, clearly determine that the applicability of the rules depends on the performance of the transport.[180] Art. 1.1 MC determines that 'this Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward'.[181] Clearly, the use of the term 'performed' indicates that the applicability depends on the use of aircrafts during transport. This convention therefore, contains a performance related scope rule which is why it is applicable for carriage by aircrafts irrespective of whether any mode of transport or which mode of transport has been agreed upon in the contract of carriage. Other unimodal transport law conventions do not contain a similar requirement as their scope rules contain a reference to a contract

178. See for example art. I (b) HVR, which determines that the rules apply 'only to contracts of carriage covered by a bill of lading or any similar document of title'.
179. Verheyen (2014), p. 293.
180. Art. 1.1 MC; art. 1.1 WC.
181. Cf. art. 18 MC.

of carriage by a specific mode of transport.[182] This is also true for the scope rules of the national transport law regimes in Germany, the Netherlands and the England.[183] If there is no clear performance based scope rule, it is the role of national courts to interpret whether the transport law regimes are applicable to optional contracts of carriage.

Contract-related approach in Belgium

The courts in Germany, the Netherlands, United Kingdom and Belgium differ considerably in their interpretations of the scope of application of CMR.[184] In *TNT v. Sony and Mitsui Marine,* the Belgian *Hof van Cassatie* determined that CMR contains a contract-related scope rule.[185] This approach can arguably be analogously applied to other conventions too. The Court held that for CMR to be applicable, a contract of which the subject matter was the carriage of goods by road was required. According to the Belgian court, a contract does not meet this requirement if it does not specify which mode of transport should be used for its performance nor if it does not become clear from the circumstances of the case that the parties to such contract envisaged carriage by road.[186] The court therefore holds that CMR contains a contract-related scope rule and is subsequently strict in its interpretation of the terms of the contract. As a result of this, an optional contract of carriage would not meet this requirement and is therefore not subject to the convention's rules. It is clear for contracting parties at the conclusion of an optional contract that the conventions

182. The scope rules determine that the rules apply to: Art. I (b) HVR: '(…) contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea (…)'; art. 1.1 and 5.1 RR: contracts of carriage which '(…) shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage'; art. 1.6 and 2.1 HHR: '(…) contracts whereby the carrier undertakes against payment of freight to carry goods by sea (…)'; art. 1.1 COTIF-CIM: '(…) every contract of carriage of goods by rail (…)'; art. 1.1, 2.1 CMNI: '(…) any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway (…)'; art. 1.1 CMR: '(…) contract for the carriage of goods by road (…)'.

183. Germany: § 407 III (1) HGB, which applies to non-maritime carriage, states: '*Die Vorschriften dieses Unterabschnitts gelten, wenn das Gut zu Lande, auf Binnengewässern oder mit Luftfahrzeugen befördert werden soll* (…)'. 'The provision of this subsection apply in case goods are to be carried by land, inlwaterways of with aircrafts' (freely translated). Cf. § 481 HGB. In the Netherlands, for each mode of transport a scope rule is adopted which is similar to: art. 8:1550 BW '*De overeenkomst van goederenvervoer in de zin van deze titel is de overeenkomst van goederenvervoer, waarbij de ene partij (de vervoerder) zich tegenover de andere partij (de afzender) verbindt tot het vervoer van zaken uitsluitend over spoorwegen.*' '(…) the contract of carriage in which one party (the carrier) in relation to the other party (the shipper) takes upon himself the obligation to carry goods exclusively by rail' (freely translated). Cf. art. 8:370 BW; art. 8:890 BW; art. 8:1090 BW; art. 8:1350 BW. For maritime transport in England: S. 1 (4) COGSA 1971 states: '(…) nothing in this section shall be taken as applying in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title.'

184. See also: Haak (2013), p. 18-25; Verheyen (2014), p. 433-442.

185. Hof van Cassatie 8 November 2004, *TBH* 2005, 512 with commentary from M. Godfroid. See also: Loyens (2011), p. 418-420.

186. Hof van Cassatie 8 November 2004, *TBH* 2005, 512 with commentary from M. Godfroid: '*de toepassing van het CMR-Verdrag het bestaan van een overeenkomst vereist die het vervoer van goederen over de weg tot voorwerp heeft; Dat die voorwaarde niet is vervuld indien de overeenkomst de wijze van vervoer niet nader bepaalt en evenmin uit de omstandigheden van de zaak blijkt dat partijen een vervoer over de weg voor ogen hadden*'. The the application of the CMR requires a contract of carriage in which the carriage of goods by road is the object of the contract; that this requirement is not fulfilled if neither the contract specifies the mode of transport nor from the circumstances of the case, then one can infer that parties had the intention to carry the goods by road (freely translated).

which contain contract-related scope rules are not applicable. So, if the options in the contract solely connect to liability regimes which contain contract-related scope rules, it is absolutely certain that these regimes are not applicable.[187] If no unimodal transport law regimes are applicable, the contract is subject to general transport law rules and in the absence of such, to the national law of obligations.[188]

Performance-related approach in England

English courts, on the other hand, interpret CMR's scope rule as a performance-related rule. CMR's applicability therefore depends on the performance of the contract of carriage. The requirements are met if an optional contract of carriage is performed by road. This position was advocated by the English Court of Appeal in *Quantum v. Plane Trucking*[189] and by the English House of Lords in *Datec v. UPS*.[190] In *Quantum*, Air France undertook the obligation to carry goods from Singapore to Dublin. The goods were transported from Singapore to Paris by air and a subcontractor was employed for the remaining part of the transport to Dublin which was performed by road. This substitution was permissible under the general terms and conditions which stated that: 'the carrier may without notice substitute alternate carriers or other means of carriage'. The goods were stolen during the last part of the carriage by truck. The Court of Appeal dismissed the opinion of the Queen's Bench and determined that CMR was applicable to such a contract which contained an option as to the performance of the contract by other means of transport. Lord Mance distinguishes four different alternative optional contracts related to the carriage of goods by road.

> 'a) the carrier may have promised unconditionally to carry by road and on the trailer,
> b) the carrier may have promised this, but reserved either a general or a limited option to elect for some other means of carriage for all or part of the way,
> c) the carrier may have left the means of transport open, either entirely or as between a number of possibilities at least one of them being carriage by road, or
> d) the carrier may have undertaken to carry by some other means, but reserved either a general or a limited option to carry by road.'

CMR applies to all the abovementioned options if the carriage by road is performed between locations in two different countries. This is because the English Court of Appeal interprets the scope rule of CMR as having two cumulative conditions. First of all, it requires that a contract is concluded for carriage of goods and subsequently that this contract is performed by road in vehicles for reward. For this reason, the applicability of the rules depends on whether there is a contract of carriage which

187. Verheyen (2014), p. 380-384.
188. See: Verheyen (2012 a), p. 364-371.
189. Court of Appeal, Quantum Corporation Inc. and others v. Plane Trucking Ltd. and another [2002] 2 Lloyd's Rep. 25.
190. House of Lords, Datec Electronic Holdings Ltd. v. United Parcels Service Ltd. [2007] 2 Lloyd's Rep. 114.

allows for its performance by road and which is actually performed by road. This view was confirmed by the House of Lords in *Datec*. That case dealt with a framework-contract in which UPS had discretion as to the route and means. The House of Lords referred to *Quantum* when stating that CMR is applicable if the carrier is entitled and chooses to undertake international road carriage.[191]

Mixed approach in Germany and the Netherlands

The same views are held in Germany and the Netherlands although the interpretation of art. 1 CMR is similar to the Belgian contract-related interpretation of CMR's scope rule.[192] In these jurisdictions art. 1.1 CMR is interpreted as requiring a contract for the carriage of goods by road. The subject matter of the contract should therefore be international road carriage. However, courts in Germany and the Netherlands hold that a contract which contains an option to carry by road and the carriage is actually performed by road, should be considered as a contract which provides for the carriage of goods by road. As a result of this, the law applicable to the optional contract of carriage can be determined from the moment the carrier actually performs the contract of carriage by road.[193]

As the application of a specific liability regime depends on the mode of transport used in the performance of the contract, the applicable rules cannot be determined at the time the optional contract of carriage is concluded. The parties to the contract therefore do not obtain absolute certainty about the rights and obligations which arise from the contract until the performance under the contract commences or until the carrier has exercised the option in another way. It has been argued that this uncertainty on the applicability of a specific transport law regime to a particular contract of carriage is the main disadvantage of this approach.[194] However, this approach which takes into account by which means of transport the carriage is actually performed, serves legal certainty on a larger scale. The international transport law conventions, which have adopted mandatory rules, strive towards international uniformity. This uniformity serves legal certainty in international commercial law.[195] This legal certainty is provided if the mandatory provisions which cannot be avoided, govern legal relations between carriers and shippers/consignees for which these provisions have actually been adopted. As can be seen above, an optional contract of carriage can still be qualified as a contract of carriage although the mode of transport is not specified. These types of contracts of carriage should therefore not be dealt with differently than other similar contracts. The

191. The main issue in this case revolved around the question of whether there was a 'contract of carriage' between the parties. UPS stated in its contractual terms that it only commits itself to carrying packages with a value below $50,000. As the value of the goods was considerably higher than this amount, the main issue in this case addresses the formation of the contract.
192. In Germany: BGH 4 March 2004, *TranspR* 2004, 460. In the Netherlands: Hof The Hague 28 November 2007, ECLI:NL:GHSGR:2007:BB9150, *S&S* 2009, 28; Rb. The Hague 10 April 2002, ECLI:NL:RBSGR:2002:AL2179, *S&S* 2003, 104.
193. Jesser-Huß (2014), art. 1 CMR, Rn. 18-21; Koller (2013), art. 1 CMR, Rn. 6; Basedow (1987), p. 58; Haak (2010), p. 53; Haak (2006), p. 312-314; Van Beelen (1996), p. 77-81; Dorrestein (1977), p. 70.
194. This is the main concern expressed by Verheyen about this approach. Verheyen (2014), p. 397. See also: Van Beelen (1996), p. 77-81.
195. Haak (2006), p. 304.

advantage of the performance-related approach therefore lies in the application of uniform transport law to this type of contract of carriage.[196]

However, an optional contract should be distinguished from a multimodal contract of carriage. Contrary to the English *Quantum*-case, in Germany and the Netherlands, *BGH*[197] and *HR*[198] hold that a multimodal contract of carriage does not fall within the scope of application of CMR. CMR is therefore not autonomously applicable to the road stage of a multimodal contract of carriage. The *BGH* and subsequently the *HR* adopted similar reasoning to reach this conclusion.

> In the German case in question, goods were to be carried from Tokyo to Mönchengladbach. They first went by sea to Rotterdam and were then loaded onto a truck for the remaining transport. The goods were lost during this time. The court held that CMR was not applicable as the German court has no jurisdiction via art. 31 CMR.
>
> Moreover, a similar situation occurred in the Dutch *Godafoss-* case where the parties concluded a contract of carriage in which they agreed that the carriage from Reykjavik to Rotterdam was to be performed by sea and left the options open for the transport between Rotterdam and Naples. This multimodal contract of carriage contained a clause specifying that the contract was governed by Icelandic law and provided that Icelandic courts had exclusive jurisdiction. When proceedings were initiated before the court of Rotterdam, the question arose whether this jurisdiction clause was set aside by art. 31 CMR in accordance with art. 41 CMR. This would depend on whether CMR is (autonomously) applicable to the road stage of a multimodal contract of carriage.
>
> The reasoning employed by the *HR* in the *Godafoss*-case is that although art. 1 CMR does not explicitly exclude multimodal contracts from the scope of application, they are not explicitly included either. Multimodal contracts of carriage entail various modes of transport in which the option for a road stage is often left open. Moreover, art. 2 CMR explicitly extends the scope of application to a specific type of multimodal transport, known as roll-on, roll-off transport. The Protocol of Signature explicitly stated that the signing parties aimed to create a multimodal convention, which confirms the belief that CMR is not an adequate regime for multimodal carriage contracts. The court referred to the German decision in which the autonomous applicability of CMR to multimodal transport contracts was rejected and to the English decision in the *Quantum*-case in which the court referred to cases from which the autonomous applicability of CMR did not unambiguously follow. The *HR* therefore concluded that there were no compelling arguments to reject the interpretation of the *BGH* as it would be in the interests of international trade if a uniform interpreta-

196. De Wit (1995), p. 171-172; Haak (2006), p. 314-315.
197. BGH 17 July 2008, TranspR 2008, 365.
198. HR 1 July 2012, ECLI:NL:HR:2012:BV3678, NJ 2012, 516 with commentary from K.F. Haak, S&S 2012, 95 (Godafoss).

> tion of CMR existed. In addition to this, there are practical objections to the autonomous applicability of CMR to multimodal contracts because of its jurisdiction rules. The jurisdiction rules link jurisdiction to the place the goods are taken over and the place designated for delivery. However, in the case of multimodal transport, these places are not necessarily the place where the road stage commences or ends. Cases in which the loss is not localized or damage is caused during several transport stages could have an adverse effect on jurisdiction issues which would not be beneficial to legal certainty.

According to the Dutch, as well as to the German view, CMR does not autonomously apply to an international road stage of a multimodal contract of carriage.[199] It is, however, possible that the substantive provisions of CMR are nevertheless applicable if the multimodal contract is governed by national law which provides for its applicability. This is, for example, the case under Dutch law where art. 8:40 ff BW prescribes the network system for multimodal contracts of carriage.[200] The provisions of CMR can also be applied if the multimodal contract contains contractual terms which lead to this result.

This approach to determining the applicable law to multimodal contracts of carriage has, in principle, no effect on the legal relations of the parties to optional contracts of carriage. Optional contracts of carriage are contracts in which the carrier undertakes the obligation to carry the goods without indicating by which mode of transport the carriage will be performed. If the carriage is performed by a single mode of transport, the problems which arise under multimodal contracts of carriage, such as jurisdiction issues, do not occur. It is therefore important to distinguish between these optional contracts of carriage and cases where a multimodal contract of carriage includes options for the mode of transport to be used. This was exactly the situation in the *Godafoss*-case where the court decided that the CMR was not autonomously applicable to the transport stage which was performed by road. It can therefore be concluded that under Dutch law the CMR does not autonomously apply to a road stage of a multimodal contract of carriage but it does apply to an optional contract of carriage performed by road.

199. See also: Hoeks (2012), p. 237-248.
200. Spanjaart (2012 a), p. 278-279; Claringbould (2012), p. 8-9; Claringbould (2012 a), p. 20; Claringbould (2016), p. 4.

Chapter 4

The validity of a uniform contractual liability regime

4.1 Introduction

Terminal operators taking control of the inland flow of goods, generally assume responsibility for the carriage of goods between inland terminals and terminals in the sea port area as well as providing cargo handling services at terminals, which may include the warehousing of goods. As Chapter 3 showed, various different legal regimes can be applicable to contracts for the provision of these services. The rules applicable to contracts of carriage, unlike those for contracts for (stevedoring) services and contracts of deposit are of a mandatory nature. As a result of this, contracting parties have limited freedom to adopt deviating contractual terms.

When concluding contracts for the performance of a combination of these services, it is beneficial for terminal operators and their customers to have a degree of certainty on the applicable legal regimes. Currently, conflicts occur between the terminal operator and his clients on the applicable legal regime when loss, damage or delay occurs during the performance of different services. Some terminal operators therefore, would like to be able to agree on a uniform contractual liability regime. They would like to be subject to a single set of liability rules irrespective of the services performed and irrespective of the mode of transport used for the carriage of goods. This would enable the terminal operators to provide their clients with legal certainty on the applicable legal regime and the risks involved. Claims for compensation in cases of damage or loss of the goods or delay in delivery could then be settled more easily and more amicably. Moreover, any possible additional costs for the terminal operator for compensation payable in case of loss, damage or delay or a higher insurance premium could be charged to the client who, in turn, would save on transaction and legal costs. The contract concluded between the parties would therefore cover issues such as limits of liability, grounds for breaking these limits, place of taking over and delivery, period of responsibility, responsibility for persons used for the performance of the contract, exonerations and on procedural issues.

However, a uniform contractual liability regime like this raises questions about its material validity. As discussed above, there is no difficulty with the validity of uniform contractual liability regimes for contracts for services or contracts of deposit as these are not subject to mandatory provisions. The parties to such contracts enjoy, to a large extent, freedom to contract on the terms they seem fit. So, the questions on the validity of a uniform contractual liability regime only concerns contracts of carriage.

For Inter-Terminal-Transport, these terminal operators usually conclude contracts of carriage in which they undertake to perform inland transport by either road, rail or by inland waterways. During the performance of this inland transport contract one mode of transport is used so the contract can be qualified as a unimodal contract of carriage. The contract could also be performed by making use of a combination of these modes of transport, which would make it a multimodal contract of carriage. At the time of the conclusion of this optional contract of carriage, it is not clear which mode(s) of transport will ultimately be used. The choice for a mode of transport depends on the destination, the available infrastructure, transport capacity of the vehicles, costs and on time constraints.

The validity of a contractually agreed uniform liability regime depends, to a large extent, on the applicability of mandatory transport law rules. In the previous paragraph the applicability of these rules has been discussed for optional contracts of carriage which were unimodal or multimodal in nature.[201] The manner in which national courts interpret the scope of application of these transport law regimes is decisive. The relevant conventions covering international inland carriage are CMNI, COTIF-CIM and CMR. Belgium courts do not regard CMR and arguably the other inland transport law conventions as applicable to optional contracts of carriage, neither are national unimodal transport law rules applicable.[202] As a result of this, contracts of carriage are subject to Belgian general transport law or the general law of obligations, which is why there is no problem about the validity of the uniform contractual liability regime. In the legal systems in Germany, England and the Netherlands on the other hand, optional contracts are subject to these conventions as the applicability depends on the mode of transport used during the performance of the contract of carriage. This also holds true for the national unimodal transport law regimes. The uniform contractual liability regime therefore, has to comply with the applicable mandatory regimes. However, an exception has to be made for optional contracts of carriage which are multimodal in nature. According to the German and Dutch courts, CMR does not autonomously apply to multimodal contracts of carriage. As much depends on how the national courts view the scope of application of the transport law conventions, parties to a contract of carriage are advised to insert jurisdiction clauses into their contract particulars.

This paragraph will make an analysis of the liability regimes which could be applicable to a contract for the inland carriage of goods. As in most cases, inland transport is performed on either inland waterways, road or rail, the relevant liability regimes will be discussed while taking account of the extent to which they allow for contractual deviations. This section will focus on the international transport law regimes for inland carriage; CMNI, COTIF-CIM and CMR. These international regimes contain mandatory provisions for the carrier's liability which are divergent in some aspects. This raises the question of the extent to which a uniform contractual liability regime could be created which would be valid irrespective of which inland convention applied to the contract.

201. See for an extensive study on this matter: Verheyen (2014).
202. Verheyen (2014), p. 57-58, 447.

However, this question would not be relevant if these international conventions were not applicable to the inland contract of carriage, and national law, including national transport law, were to apply. First, this is not relevant for transport subject to English, Belgian and German law. German law has a single liability regime covering all non-maritime modes of transport. The modes of transport used for inland carriage are therefore all subject to the regime which can be found in §§ 407 HGB. This transport law regime allows for a considerable contractual deviations.[203] Moreover, there is no mandatory transport law regime in place for inland transport under English law. The inland carriers, unlike sea and air carriers, are subject to the English general law of obligations, more specifically the law of bailment, which is not of a mandatory nature. It would therefore be possible to create a valid uniform contractual liability regime for the contract of carriage for inland transport, irrespective of the mode of transport, in these legal systems. This also applies to optional contract of carriage under Belgian law for the reasons discussed above. Dutch national transport law, on the other hand, contains diverging rules on carriage by road, rail and inland waterways, however a uniform contractual liability regime could be created which would comply with these rules. This is because the rules on carriage by inland waterways and rail are only mandatory one way.[204] The carrier may, therefore, deviate from these rules if he assumes a liability greater or takes on more burdensome obligations. Although the rules on carriage by road are two-way mandatory, it is possible for the contracting parties to individually negotiate on terms which could deviate from these rules.[205] It would therefore be possible to create a valid uniform contractual liability regime for contracts of carriage which are subject to these national legal systems. The extent to which this is possible for situations in which international conventions are applicable will be discussed below.

The liability regime of the international conventions on inland transport will be compared in relation to the different aspects of the carrier's liability, such as limits of liability, grounds for breaking these limits, period of responsibility, responsibility for other persons and exonerations. This paragraph focuses on these aspects of the carrier's liability because the three relevant regimes differ on these points. Other aspects on which the conventions share similarities, such as the ones discussed in paragraph 3.4.1 on general principles of transport law, will be left out of this comparison. By comparing the liability regimes of the inland conventions — CMNI, COTIF-CIM and CMR — it will be possible to determine the extent to which a valid uniform liability regime can be created contractually.

4.2 The mandatory nature of inland transport law rules

A general characteristic of transport law is the mandatory nature of its rules.[206] The transport law rules therefore limit the freedom of contracting parties when concluding contracts of carriage. A contractual stipulation decreasing the carrier's liability, such as a provision for lower limits of liability than those provided in

203. Merkt (2016), § 407 HGB, Rn. 25; Basedow (1998), p. 58-65.
204. Art. 8:902 BW; art. 8:1553 BW.
205. Art. 8:1102 BW.
206. See for example: Haak (2006 a), 183-202.

mandatorily applicable transport law rules, is therefore not permitted. When agreeing on a uniform contractual liability regime it is important to ascertain which aspects of the carrier's liability are covered by the conventions and to what extent deviation from these rules is permitted.

One-way or two-way mandatory

In general, transport law provides minimum liability standards. Contractual terms which deviate from the mandatory rules to the detriment of the cargo interests are therefore null and void.[207] This can be illustrated by art. 5 COTIF-CIM which states:

> 'Unless provided otherwise in these Uniform Rules, any stipulation which, directly or indirectly, would derogate from these Uniform Rules shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract of carriage. Nevertheless, a carrier may assume a liability greater and obligations more burdensome than those provided for in these Uniform Rules.'

This implies that the carrier cannot rely on lower limits of liability or more extensive exonerations stipulated in the contract of carriage than the ones provided in the applicable transport law regime. The carrier can furthermore not reverse the burden of proof, reduce the notice periods or the period of time in which suit can be brought. There are, however, some exceptions to this rule under CMNI, concerning liability for acts and omissions of certain personnel, damage caused by fire and for damage as a result of defects to the vessel existing prior to the voyage which were not discoverable by due diligence. Stipulations covering these limited issues are permitted in the contract of carriage to exonerate the carrier.[208]

CMR, contrary to other transport law conventions, can be considered two-way mandatory. Following art. 41 CMR, the carrier is not allowed to stipulate provisions which directly or indirectly derogate from the provisions of the convention. For this reason, stipulations which decrease and also those that increase the carrier's liability are null and void.[209] The uniform contractual liability regime therefore has to comply with the liability regime as provided in CMR.

4.3 Limits of liability

The three international transport law regimes for inland carriage; CMNI, COTIF-CIM and CMR, have set different liability limits for carriers who transport goods under contracts of carriage which are subject to their rules. The limit of liability under CMR is 8.33 SDR per kilogram,[210] under COTIF-CIM 17 SDR per kilogram[211] and under CMNI this limit is 2 SDR per kilogram of weight of the goods lost or damaged. In addition to this kilo limitation, CMNI provides for a package limitation,

207. Art. 5 COTIF-CIM; art. 25 CMNI. Cf. art. III 8 HVR; art. 26, 27, 47, 49 MC.
208. Art. 25.2 CMNI.
209. Cf. art. 79.2 RR.
210. Art. 23.3 CMR.
211. Art. 30.2 COTIF-CIM.

which is set at 666.67 SDR per package or other shipping unit if so stated in the transport document. Moreover, in container transport where the number of packages/shipping units is not specified in the transport document, this amount is replaced by 1,500 SDR for the container and 25,000 SDR for the goods in the container. In carriage by inland waterways the limit is either based on the weight or on the number of packages. This additional limit based on the number of packages is beneficial to the cargo interests' position as the limit which leads to a higher amount of compensation applies.[212] Moreover, the conventions adopt different limits of liability for damage as a result of delay in delivery of the goods. Whereas under CMR and CMNI the amount of compensation payable by the carrier is set at one times the freight charges, this limit is higher under COTIF-CIM where the injured party receives compensation for delay up to four times the freight charges.[213]

Pursuant to this, the liability limits based on the weight of the goods diverge considerably. Although the limit of liability of 2 SDR under CMNI can be raised for the benefit of the cargo interests, this is not possible for the limit of 8,33 SDR under CMR. Furthermore, lowering the limit of liability of 17 SDR under COTIF-CIM would be null and void. It is therefore not possible to agree on a weight limit which would comply with the provisions of these conventions. The same applies to the limit for damage as a result of delay. Moreover, stipulating an additional package limitation in line with CMNI would not conflict with the provisions of COTIF-CIM as such an additional limit would be in favour of the cargo interests, however this would not comply with the rules of CMR. Furthermore, the limits of liability for damage caused by delay vary between one and four times the freight charges depending on the applicable convention.

Although this option is in practice rarely used, these predetermined limits of liability can be replaced if the parties to the contract declare the value of the goods in the transport document. This possibility is provided for road carriage under art. 24 CMR, which states:

> 'The sender may, against payment of a surcharge to be agreed upon, declare in the consignment note a value for the goods exceeding the limit laid down in article 23, paragraph 3, and in that case the amount of the declared value shall be substituted for that limit.'

This possibility to declare the value of the goods is also given to the parties to a contract subject to CMNI and COTIF-CIM.[214] The corresponding provisions in these

212. Art. 20.1 CMNI: 'Subject to article 21 and paragraph 4 of the present article, and regardless of the action brought against him, the carrier shall under no circumstances be liable for amounts exceeding 666.67 units of account per package or other shipping unit, or 2 units of account per kilogram of weight, specified in the transport document, of the goods lost or damaged, whichever is the higher. If the package or other shipping unit is a container and if there is no mention in the transport document of any package or shipping unit consolidated in the container, the amount of 666.67 units of account shall be replaced by the amount of 1,500 units of account for the container without the goods it contains and, in addition, the amount of 25,000 units of account for the goods which are in the container.'
213. Art. 23.5 CMR; art. 33.1 CMNI; art. 20.3 COTIF-CIM.
214. Art. 20.4 (a) CMNI; art. 34 COTIF-CIM.

conventions specify that the shipper and the carrier must declare the value of the goods in the transport document or consignment note. In that case, the carrier is free to calculate the freight rate and charge extra for the transport of the goods. The price rise is justified on the grounds of an increased liability risk as the declared value of the goods replaces the lower limit of liability. However, contrary to the other inland conventions, CMR requires the parties to the contract to agree to a higher freight rate which will then have to be paid to the carrier. For transport by road, the parties to the contract are free to calculate this surcharge for which they may in theory settle at € 0,01. This practice undoubtedly meets the requirement of CMR.[215] It is therefore possible to agree on limits of liability in the contract of carriage which comply with the rules of all three conventions by declaring the value of the goods in the transport document.

4.4 Grounds for breaking these limits

The international regimes for inland transportation provide limits of liability to cap the compensation payable by the carrier in case of loss, damage or delay. However, these limits cannot be invoked by the carrier under all circumstances as the conventions employ provisions for breaking the limits. The wording of these provisions differ when specifying the necessary degree of fault for breaking the liability limits.

Under CMR, the carrier is not able to limit his liability if the damage was caused by his wilful misconduct or by such fault on his part as, in accordance with the law of the court seized of the case, is considered as equivalent to wilful misconduct. It is clear that the provision refers to the substantive law of the court seized in order to determine which degree of fault is considered as equivalent to wilful misconduct. According to the German, Dutch and English view, it is not sufficient for the claimant to show that the carrier acted with gross negligence and the claimant does not fulfil the burden of proof if he shows that the damage would not have been caused if the carrier had shown the necessary care, and that the carrier violated the duty of care in a grave manner.[216] Although the courts in the said countries all interpret the required fault equivalent to wilful misconduct in such way that a subjective element is required, there is still a considerable difference in their interpretation of what constitutes the presence of such subjective element.[217] From the

215. Koller (2013), art. 24 CMR, Rn. 2.
216. Damar (2011), p. 230-236.
217. In Germany only reckless conduct with knowledge that damage will probably result is to be considered as the degree of fault equivalent to wilful misconduct. See: BGH 21 March 2007, *TranspR* 2007, 361; BGH 20 January 2005, *TranspR* 2005, 311. Thume (2000), art. 29 CMR Rn. 19a. In the Netherlands the *HR* determined that the carrier is deprived of the liability limits: '…if the act was reckless and he who conducts himself in this way knew of the danger inherent to his act and was aware that the chance that the risk would manifest itself was considerably greater than the chance that it would not, but nevertheless he does not refrain from such conduct.' (freely translated). See: HR 5 January 2001, ECLI:NL:HR:2001:AA9308, *NJ* 2001, 391 with commentary from K.F. Haak, *S&S* 2001, 61; HR 5 January 2001, ECLI:NL:HR:2001:AA9309, *NJ* 2001, 392 with commentary from K.F. Haak, *S&S* 2001, 62. Furthermore: Smeele (2000), p. 329-341; Smeele (2001), p. 37-40; Hendrikse, Margetson and Mater (2005), p. 189-213. Following this rule, it is rather difficult to break the liability limits before Dutch courts. Furthermore, English law requires that the person must appreciate that he is acting or omitting to act unlawfully, foresee the probable consequences and nonetheless

Dutch point of view, the claimant is also required to prove that 'the chance that the risk would manifest itself was considerably greater than the chance that it would not'. This objective requirement is almost impossible to meet.[218] It can therefore be maintained that the outcome of a specific case depends much on which court is seized since no uniformity exists on this matter.

Contrary to the provision in CMR, the provisions on breaking the limits under CMNI and COTIF-CIM do not refer to the national interpretation of the court seized. The required degree of fault for breaking the liability limits is wilful misconduct which is defined in both conventions in similar wording. The carrier cannot limit his liability for acts or omissions committed with intent to cause such damage, or recklessly and with knowledge that damage would probably result. The required degree of fault for breaking the limits under these conventions shares similarities with the view supported by the German and English courts concerning cases of breaking the limits under CMR.

However, these conventions each approach the question of whose behaviour qualifies for breaking the liability limits differently. Under CMNI, the personal conduct of the carrier qualifies for breaking the limit, so the carrier is accountable for his own conduct.[219] The acts and omissions of servants and agents are therefore not considered sufficient to break the liability limits. This is different under CMR and COTIF-CIM. In both these conventions, the acts or omissions of the carrier's servants, agents and of other persons of whose service the carrier makes use during the performance of the carriage can deprive the carrier of his right to limit.[220] This follows from art. 29.2 CMR and in COTIF-CIM from the interpretation of the explanatory reports.[221] The carrier is therefore not entitled to limit his liability if his servants, agents or other persons he uses are guilty of wilful misconduct, or in the CMR of a fault equivalent to wilful misconduct. However, the limit is only broken if the persons for whom the carrier is liable act or make omissions within the scope of their employment. Carriers are deprived of their liability limits in cases of criminal activities, such as theft or smuggling performed by these persons during the carriage.[222]

Although these conventions have a different approach to the issue of the required degree of fault and to the issue of which person's behaviour qualifies for breaking the liability limits, a uniform contractual liability regime is most likely to comply with the relevant conventions if an agreement is reached which is in line with the position under COTIF-CIM. That way, the degree of fault is defined in accordance

insist on doing so. See for example: Court of Appeal, Denfleet Ineternational Ltd. and another v. TNT Global Spa and another [2007] 2 Lloyd's Rep. 504. Furthermore: Clarke (2014), p. 317-318.

218. See: HR 5 January 2001, ECLI:NL:HR:2001:AA9308, *NJ* 2001, 391 with commentary from K.F. Haak, *S&S* 2001, 61; HR 5 January 2001, ECLI:NL:HR:2001:AA9309, *NJ* 2001, 392 with commentary from K.F. Haak, *S&S* 2001, 62. Furthermore: Smeele (2000), p. 329-341; Smeele (2001), p. 37-40; Claringbould (2012 b), p. 145-164.

219. Art. 21 CMNI.

220. Art. 29.2 jo. art. 3 CMR. Art. 40 COTIF-CIM.

221. Damar (2011), p. 237-238.

222. HR 14 juni 2002, ECLI:NL:HR:2002:AE0657, *NJ* 2002, 495 with commentary from K.F. Haak, *S&S* 2003, 2 (Geldnet/Kwantum). Furthermore: Damar (2011), p. 228.

with CMNI and with some national interpretations of art. 29 CMR. Moreover, the carrier is deprived of the liability limits in cases of his own personal fault or of those of the persons he uses if they act within the scope of their employment. The last aspect is a deviation from CMNI to the benefit of the cargo interests and is therefore allowed.

4.5 Period of responsibility and obligation to load and discharge

The inland carrier is liable for loss of, damage to or for delay in delivery of the goods during the period of responsibility. This period of responsibility covers the time the goods are in the carrier's custody from the moment they are taken over for transport until they are delivered.[223] The goods are taken over by the carrier when they are brought under the carrier's control and the goods are delivered when control passes to the consignee or a person who acts on his behalf. These conventions do not regulate or define the moment of taking over and delivery. It is for this reason that the moment goods are taken over and delivered depends on the particular circumstances of each case and can (to a certain extent) be determined in the contract of carriage. Provisions on the division of the obligation of loading and discharge between the shipper/consignee and the carrier can be relevant in this. The obligation of loading or discharge can either be assumed by the carrier or by the shipper/consignee. This duty can be distributed amongst the carrier and the shipper/consignee in the contract of carriage. The carrier is, therefore, exonerated from liability if damage occurs during loading or discharge by the cargo interests.[224]

However, CMNI determines in art. 3.2 that 'unless otherwise agreed, the taking over and delivery of the goods shall take place on board the vessel.' So, it is determined that in general the period of responsibility covers the time that the goods are in the carrier's control, which is the period of time in which the goods are located in the vessel. The period of responsibility does therefore not cover the loading and discharge of the goods. This is in line with art. 6.4 CMNI which determines that the shipper is under the obligation to load, stow and secure the cargo. The parties to the contract are however permitted to deviate from these rules in the contract of carriage. By stipulating that the obligation to load and discharge is not imposed on the shipper or consignee, the carrier's period of responsibility is extended to cover these activities. The contracting parties can agree on a different moment of taking over and delivery of the goods for example, on a terminal.[225] An agreement at the moment of taking over and delivery in the contract of carriage will therefore not bring the uniform contractual liability regime into conflict with the international inland conventions.

223. Art. 16.1 CMNI; art. 23.1 COTIF-CIM; art. 17.1 CMR. See also below para. 6.2.
224. Art. 17.4 (c) CMR; art. 23.3 (c) COTIF-CIM; art. 18.1 (b) CMNI.
225. Otte (2014), art. 3.2 CMNI, Rn. 9-10.

4.6 Carrier's responsibility for and protection of persons used for the performance of the contract

The inland conventions regulate the vicarious liability of the carrier for certain persons he uses for the performance of the carriage and these conventions extend the benefit of their defences to these persons if they are confronted with direct claims.[226] It is clear under CMR and COTIF-CIM that this relates to all persons of whose service the carrier makes use irrespective of the nature of their relation with the carrier (independent or subordinate). A limit is however established to this rule as the conventions determine that this only applies to these persons when they are acting within the scope of their employment. CMNI on the other hand, only refers to servants and agents.[227] The question therefore arises whether independent contractors can invoke the exonerations and limits of liability available to the carrier under CMNI in cases of direct claims.[228] In order to avoid discussion on this matter, it has been recommended that a well drafted Himalaya clause be inserted into the contract. That way, the position of the carrier and that of the other persons involved in the performance of the contract becomes equal, irrespective of the convention which applies to the contract.

However, these questions only relate to those independent contractors who are not covered by the concept of the 'actual carrier' or 'substitute carrier' under CMNI, respectively COTIF-CIM.[229] If the contracting carrier employs a subcarrier for (part of) the performance of the contract of carriage, the subcarrier is already subject to these conventions. If an actual/substitute carrier is involved in the carriage of goods, the main carrier remains responsible for the entire carriage contracted by him. Furthermore, an actual carrier is also liable under the convention and can therefore be confronted with direct claims under the convention. At the same time, this actual carrier is protected from unlimited liability as he can invoke the defences provided by the convention when confronted with direct claims. The liability of the actual carrier is similar to the liability of the carrier provided it is limited to the part of the carriage performed by him.[230] CMR however, does not contain the actual carrier concept. Although subcarriers are covered by the term 'or any other persons of whose service the carrier makes use for the performance of the contract' which is why they can invoke the exonerations and defences provided by the convention in case of direct claims, the convention itself does not provide the basis for bringing these direct claims unless the subcarrier can be considered a successive carrier under art. 34 ff CMR. Whether a direct claim can be brought to a subcarrier (not being a successive carrier) of a carrier who is subject to CMR depends on national law. As this convention does not address this issue, the uniform contractual liability regime can adopt this concept in line with CMNI and COTIF-CIM.

226. Art. 3, 28.2 CMR; art. 40, 41.2 COTIF-CIM.
227. Art. 17.1, 17.3 CMNI. Cf. art. IV bis (2) HVR.
228. See below para. 8.4.5.
229. Art. 1.3, 4.1 CMNI; art. 3 (b), 27 COTIF-CIM.
230. See below para. 8.3.1.

4.7 The carrier's duty of care and specific exonerations

The carrier is under a duty to take care of the goods during the period of responsibility. If damage to, loss of or delay in delivery of the goods occurs because of a breach of this duty of care, the carrier is liable unless the convention provides a defence. The duty of care imposed on the carrier varies depending on the applicable inland transport law convention. Under CMR and COTIF-CIM, a duty of care is imposed on the carrier which can be considered fault-based with a duty of utmost care.[231] In general, the carrier is relieved of liability if loss, damage or delay was caused through circumstances which the carrier could not avoid, and the consequences of which he was unable to prevent.[232] Although this standard is set below the level of absolute liability, it is relatively high so that it is almost impossible for the carrier to use unavoidable loss as a successful defence.[233] Under CMNI, on the other hand, the standard of care expected from an inland carrier is lower because the duty imposed on the carrier can be considered to be of reasonable care. The inland waterways carrier is relieved of liability if he can show the damage was due to circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted.[234] This standard is similar to the standard set in the law concerning carriage by sea.[235] The carrier is relieved of liability if he observed the general duty of care.[236] In practice however, it is difficult to draw the dividing line between these standards of care.

A difference can be found covering hidden defects in the means of transport used for the performance of the carriage. Under CMR, the carrier is strictly liable for damage, loss or delay caused by the defective condition of the vehicle.[237] On the other hand, under CMNI and COTIF-CIM no strict liability is imposed on the carrier in cases of hidden defects in the means of transport. So, under CMNI and COTIF-CIM a defective or impaired infrastructure or means of transport can amount to unavoidable circumstances.[238]

The inland transport law conventions contain special grounds for exoneration from liability.[239] These are:

231. CMR: Clarke (2014), nr. 74e-75e, p. 229-240; Jesser-Huß (2014 a), art. 17 CMR, Rn. 3-4. COTIF-CIM: Freise (2014), art. 23 COTIF-CIM, Rn. 12-13.
232. Art. 17.2 CMR; art. 23.2 COTIF-CIM. Concerning CMR uniformity exists in the relevant jurisdictions. In England the leading case is: Queen's Bench Division (Commercial Court), J.J. Silber Ltd. and others v. Islander Trucking Ltd. Patenta G.m.b.H. and others [1985] 2 Lloyd's Rep. 243. In the Netherlands: HR 17 April 1998, ECLI:NL:HR:1998:ZC2632, *NJ* 1998, 602, *S&S* 1998, 75 (Oegema/Amev). In Germany: BGH 28 February 1975, *NJW* 1975, 1597. This is similar to the requirement under the COTIF-CIM: BGH 15 March 1988, *TranspR* 1988, 278. Furthermore: Freise (2014), art. 23 COTIF-CIM, Rn. 22-26.
233. Clarke (2014), nr. 74e, p. 230.
234. Art. 16.1 CMNI.
235. Art. IV (2) (q) HVR; art. 5.1 HHR; art. 13.1, 14 RR.
236. Hartenstein (2012), p. 442.
237. Art. 17.3 CMR.
238. Freise (2014), art. 23 COTIF-CIM, Rn. 26.
239. Art. 23.3 COTIF-CIM; art. 18.1 CMNI; art. 17.2, 17.4 CMR.

1. Faults (acts, omissions, instructions) of the claimant/cargo interests;
2. Inherent vice of the goods (decay, wastage);
3. Nature of the goods;
4. Handling, loading, stowage or discharge of the goods by the cargo interests;
5. Carriage on deck or in open/un-sheeted wagons/vehicles;
6. Defective packaging of the goods;
7. Carriage of live animals;
8. Insufficient or inadequate marks identifying the goods.

These lists are almost identical save for differences in wording and a few grounds which cannot be found in all three conventions. The exoneration for inherent vice of the goods is not included in the list under CMNI. However, an additional special risk lies in rescue or salvage operations.[240] Moreover, COTIF-CIM convention alone lists an exoneration concerning damage which occurs in the presence of an attendant who was employed to avert this risk. It also contains a separate rule on the carriage of railway vehicles as goods and additionally imposes a fault based liability on the carrier for similar situations.[241] The grounds for exoneration are therefore broadly similar.

There is however, a remarkable difference between the conventions concerning the burden of proof relating to some of these grounds. Under CMR and COTIF-CIM, the usual burden of proof is on the carrier when it comes to exonerations which are listed as numbers 1 and 2 in the list above. In these cases, the carrier has to prove that these events actually occurred and they caused the loss, damage or delay. Under CMNI, on the other hand, these grounds are listed as special risks, as are number 3-8 under COTIF-CIM and CMR. In the case of special risks, the carrier merely has to prove, on the balance of probabilities, that the risk occurred and that it could have caused the loss, damage (and delay, which is only referred to in CMNI). The carrier is therefore not required to prove that the risk was the actual cause.[242] The cargo interest is therefore better off for the grounds numbered 1 and 2 under CMNI than under the other inland conventions.

CMR therefore requires the highest standards of care (especially concerning the vehicle) and for this reason a uniform contractual liability regime in line with this convention also complies with CMNI and COTIF-CIM. The three conventions employ almost identical lists for the special grounds for exoneration. The additional grounds which can be found in CMNI and COTIF-CIM will not pose difficulties for drafting a uniform contractual liability regime as they are related to the particularities of these modes of transport. Moreover, provisions on the burden of proof in line with CMR and COTIF-CIM do not conflict with those of CMNI as this would increase the inland waterways carrier's liability risk.

240. Art. 18.1 (g) CMNI.
241. Art. 23.3 (g), 24 COTIF-CIM.
242. Art. 25 COTIF-CIM; art. 18.2 CMNI; art. 17, 18 CMR.

4.8 Procedural matters: notice periods and periods of limitation

The inland conventions have similar rules on the notice to be given to the carrier in the event of loss, damage or delay. There are however some differences which need briefly highlighting. Under CMNI and CMR, the acceptance of the goods by the consignee without reservation is prima facie evidence of the delivery by the carrier of the goods in the same condition and quantity as when they were handed over to him for carriage.[243] This is different in COTIF-CIM where the acceptance without reservation leads to the extinction of the right of action.[244] Furthermore, in the event of loss or damage which is not apparent, all conventions observe a seven day period during which the consignee can give notice of this loss or damage. Under CMR, these seven days exclude Sundays and public holidays, whereas these days are included under the other inland conventions. Moreover, the notice period in case of delay is differently regulated. Under CMR and CMNI the period in which notice can be given is 21 days, whereas under COTIF-CIM it is 60 days. Sundays and public holidays are included in these notice periods for delay under all three conventions. Another difference can be observed regarding the moment that these notice periods commence. Under CMR these notice periods start to run the day after the delivery, the date of checking or the date that the goods were placed at the consignee's disposal, whereas under CMNI and COTIF-CIM the periods start to run from the time of delivery.[245]

It is also possible to detect a number of differences between the three conventions with regard to the period of limitation. Although the period of limitation under all three inland transport law conventions is set at one year, the conventions have different limitation periods in the event of wilful misconduct (or in CMR to a fault equivalent to wilful misconduct). This period is extended to three years under CMR and to two years under COTIF-CIM. In addition to this, the day on which these periods begin differs depending on the convention. Under COTIF-CIM it is the day on which the delivery took place, with an exception in the event of total loss when it runs from the thirtieth day after the expiry of the transit period. Unlike CMNI, CMR also contains a rule for cases of total loss which provides that the period begins to run from the thirtieth day after the expiry of the agreed time-limit or where there is no agreed time-limit from the sixtieth day from the date on which the goods were taken over by the carrier. Furthermore, COTIF-CIM and CMR provide a separate category for 'all other cases' than loss, damage or delay. Under COTIF-CIM, the period of limitation for those other cases runs from the day the right of action may be exercised. Under CMR it runs for a period of three months after concluding the contract of carriage. Another important difference is that the day on which the limitation period commences is not included in the period under CMR and CMNI. There are also different rules on the suspension of these periods under CMR and COTIF-CIM, whereas the time bar is purely one of prescription under CMNI.[246]

243. Art. 23.1 CMNI; art. 30.1 CMR.
244. Art. 47.1 COTIF-CIM.
245. Art. 23 CMNI; art. 47 COTIF-CIM; art. 30 CMR.
246. Von Ziegler (2005), p. 85-86.

Although the notice periods and periods of limitation can be extended under CMNI,[247] COTIF-CIM does not allow for such deviation according to art. 5 COTIF-CIM. The carrier may only deviate from these rules if he assumes a greater liability or more burdensome obligations. All other deviations are null and void. Moreover, CMR does not generally allow for deviation. Although the inland conventions employ similar rules covering the notice and limitation periods, they differ on essential aspects which makes them irreconcilable.

4.9 Conclusions Part I

Transport integration by terminal operators

Terminal operators are logistic service providers who generally perform a wide range of services. Traditionally, their main focus of attention is to link different modes of transport by performing the transshipment of goods from one means of transport to another. These services include taking over and delivering goods on behalf of the sea carrier, loading onto and discharging from vessels or other vehicles, stowing goods on vessels, storing goods in terminals and performing customs related operations. However, recent developments show that some terminal operators are shifting their focus and are becoming involved in the transportation of goods beyond the premises of their sea port terminals. In addition to providing transshipment services at a sea terminal, these terminal operators are taking control of the inland flow of goods by assuming the responsibility for the carriage of goods between inland terminals and terminals in the sea port area.

This vertical integration makes the terminal operator more competitive with other terminals in the region and this optimized supply-chain can also be beneficial for the community at large. The terminal operator has an excellent position in the supply chain — as a spider in a web — to coordinate the transport of cargo between sea ports and the hinterland. These terminal operators are creating a network of inland terminals which serve as extra storage capacity thereby extending the gate of the terminal into the hinterland. In this way, terminal operators are taking the lead by organizing the inland transport instead of depending on others for factors like the release of goods by the sea carrier, the collection of goods by cargo interests and administrative burdens. The large quantity of cargo that arrives at its terminals can be efficiently bundled and transported. This leads to a reduction of costs and an efficient use of more preferable means of transport, thereby contributing to the modal shift. Clearly, there are major advantages for terminal operators if they take advantage of their strategic position in the supply chain and combine cargo handling with the carriage of goods.

Applicable legal regimes

The variety of services performed by terminal operators fall into different categories of nominate contracts. Three categories can be distinguished: service contracts, contracts of deposit and contracts of carriage. The legal regimes applicable to these

247. Art. 25.1 CMNI.

different nominate contracts vary widely. So, the terminal operator who performs a mix of these services has to take account of the peculiarities of these legal regimes when drafting general terms and conditions and when concluding individual contracts. Whereas the former two types of contracts are not subject to mandatory rules in the jurisdictions which are the focus of this study, the latter contract is generally subject to mandatorily applicable legal instruments which can be found on national or international levels. As a result of this, a contract of carriage is subject to a legal regime which restricts the freedom of contract to a greater extent than the legal regimes which apply to contracts of services and deposit.

Optional contracts of carriage

The terminal operator who takes upon himself the obligation to carry goods between the sea port and inland terminals often prefers to leave his options open and choose the most efficient mode of transport for the goods at a later stage. The contract of carriage concluded by the terminal operator can therefore not be considered a standard unimodal or even a multimodal contract of carriage, but rather an optional contract of carriage. An optional contract of carriage is a contract in which the mode of transport is unspecified. When concluding an optional contract of carriage, it may be unclear which specific liability regime applies at the moment the contract is concluded. This uncertainty is the result of fragmented transport law which contains liability regimes connecting to a specific mode of transport or a combination of several. The applicability of international transport law conventions depends on the interpretation national courts give of the scope of application of these transport law regimes. The relevant conventions covering international inland carriage are CMNI, COTIF-CIM and CMR. According to the Belgian view, CMR is not applicable to optional contracts of carriage. Arguably, this approach can analogously be applied to the other international transport law conventions and to national unimodal transport law rules. As a result of this, these contracts of carriage are subject to Belgian general transport law or the general law of obligations which is why there is no problem about the validity of uniform contractual liability regimes here. In the legal systems of Germany, England and the Netherlands however, optional contracts are subject to these conventions and the applicability depends on the mode of transport used during the performance of the contract of carriage. The same can be seen in the national transport law regimes. However, an exception has to be made for optional contracts of carriage which are multimodal in nature. According to the German and Dutch courts, CMR does not autonomously apply to multimodal contracts of carriage.

Uniform contractual liability regime

When concluding contracts for the performance of a combination of services such as carriage, storage and stevedoring, it is beneficial for terminal operators and their customers to have a degree of certainty on the applicable legal regimes. This, to avoid legal disputes if loss, damage or delay occurs to the goods during the performance of a wide range of services. It is for this reason that also for commercial reasons terminal operators may wish to agree on a uniform contractual liability regime. Then the terminal operator would be subject to one set of liability rules

irrespective of the services performed, and for the carriage of goods irrespective of the transport mode used. In this way, terminal operators would be able to provide their clients with legal certainty about the applicable (contractual) liability regime and the risks involved. Claims for compensation for damage, loss of goods or delay in delivery could then be settled easier and more amicably. Moreover, possible extra costs for compensation payable in case of loss, damage or delay or a higher insurance premium could then be charged to the client who, in his turn, would save on transaction costs.

There is no difficulty with the validity of uniform contractual liability regimes for contracts for (stevedoring) services or contracts of deposit as these are not subject to mandatory provisions. However, the terminal operator has to be aware of the mandatory transport law rules concerning the inland transport of goods. International transport law regimes differentiate between different modes of transport. The mandatory liability regimes applicable to these different modes of transport contain diverging rules on matters such as the standard of care, exoneration grounds, liability limits, and procedural rules. Because of this, a carrier cannot invoke contractual terms which are in conflict with the mandatory transport law rules. It is not possible to stipulate limits of liability lower than the ones provided in the mandatory liability regimes. The freedom to adopt deviating contractual terms covering a contract of carriage is therefore limited. This is especially applicable to international conventions[248] and, to a lesser extent, to national transport law. Inland transport, which is subject to national (transport) law rules, poses fewer problems for the issue of an uniform contractual liability regime. English and German law have no diverging inland transport law regimes and Dutch law grants contracting parties more freedom to deviate from these rules (in individually negotiated terms).

Pursuant to this, a comparison was made between the three liability regimes of the inland conventions — CMNI, COTIF-CIM and CMR — in order to establish whether a valid uniform contractual liability regime could be designed. The extent to which contractual deviations from these rules covering specific liability aspects were permitted was determined. One vital element of a possible uniform contractual liability regime is the liability limits. These limits vary considerably in the inland conventions, and CMR does not allow for an increase in the limit. However, although not practical, these predetermined limits of liability can be replaced if the parties to the contract declare the value of the goods in the transport document. It is therefore possible to agree on the value of the goods which serves as the maximum amount for which compensation can be sought. Some difficulties can be seen with regard to rules governing breaking the limits and procedural matters such as notice periods and periods of limitation. A uniform contractual liability regime in line with the position of limits under COTIF-CIM would be most compatible with the other legal regimes as the degree of fault would then be defined in accordance with CMNI and with some national interpretations of art. 29 CMR. Fewer difficulties can be found concerning a uniform rule on the period of responsibility and on the carrier's responsibility for and protection of persons used for

248. Art. 5 COTIF-CIM; art. 26, 27, 47 and 49 MC; art. 25 CMNI; art. III.8 HVR; art. 41 CMR.

the performance of the contract. In addition to this, a list covering special grounds for exoneration could also be designed which would comply with the relevant legal regimes (safe for a number of aspects related to the peculiarities of a specific mode of transport). Taking the above into consideration, it should be possible for terminal operators (to a large extent) to agree on a uniform contractual liability regime in their contracts.

Part II
Mixed contracts

Chapter 5

Doctrines on mixed contracts

5.1 Introduction

Services and duties performed by terminal operators who operate within hinterland networks fall into different categories of contracts for which the law provides specific rules (also referred to as 'nominate contracts'). For example, carriage of goods is subject to transport law, whereas storage is subject to rules on deposit (in Dutch: '*bewaarneming*', which shares similarities with the common law concept of 'bailment (on terms)'). The combination of these services and duties in a single contract creates legal uncertainty. This is because the combination of these services and duties cannot be accommodated within the framework of a single nominate contract, but instead it assumes the features of several nominate contracts. It may therefore be unclear which rules apply to (aspects of) such a contract, which can be referred to as a 'mixed contract'. In many cases it is not possible to combine the rules of all relevant nominate contracts as the rules can be substantially different from each other or even incompatible (see Part I and Part III). This is particularly problematic for nominate contracts to which mandatory rules apply (e.g. in case of contracts of carriage).

This chapter approaches the law applicable to terminal operators' mixed contracts from the framework of Civil law. Within the Civil law tradition, nominate contracts are distinguished from innominate contracts, and the first step in interpreting a contract is generally to qualify or characterize it in order to determine whether it falls within the limits of a particular nominate contract. This is so as to be able to determine which rules are applicable. These can be of either a mandatory or non-mandatory nature. The discussion is based on Dutch and German perspectives, as much of the available literature on mixed contracts originates from these countries. However, the way one approaches mixed contracts can also be of interest for Common law. In English law, for example, an increasing number of types of contracts are codified by law. These include sales of goods, construction, insurance contracts or contracts for the carriage of goods.[249] Common law is confronted with similar difficulties regarding the categorization of these contracts as Civil law especially for contracts which are governed by mandatory rules. Approaching mixed contracts from the framework of Civil Law can therefore also be relevant for the Common Law tradition.

Three doctrines have been developed to determine which rules apply to a mixed contract. These are discussed in paragraph 5.3 and none can be applied in all circumstances. Which one applies depends on the category of the mixed contract at

249. Chitty 2 (2012).

hand. The different categories of mixed contracts are then discussed in paragraph 5.4. Prior to discussing these doctrines and the categories of mixed contracts, it is necessary to take a close look at what a mixed contract is. In order to clarify this, paragraph 5.2 discusses the difference between nominate and innominate contracts.

5.2 Innominate, nominate and mixed contracts

5.2.1 Innominate and nominate contracts

As in many other modern civil law countries, contract law in the Netherlands is based on an open system of contracts. Under an open system of contracts, parties are free, within the limits imposed by mandatory law and public order, to determine the content and in that sense also the legal effects of their contracts.[250] Agreements are not required to fit a previously defined model of a particular type of contract in order to create legally enforceable rights and obligations — as would be the case under a closed system of contracts — but parties enjoy freedom of contract to shape their contracts according to their wishes and ideas. The principle of freedom of contract, which is characteristic of modern civil law, relates to party autonomy. A person is, in principle, free to enter into a contract, to determine the contents of the contract and to constitute the contract in any desired manner.[251] There are no formal requirements (consensualism).[252] In theory, under an open system of contracts (in which freedom of contract is upheld) it is not necessary to regulate certain types of contracts, as general rules on contract should answer all questions. However, it can be convenient to regulate certain specific types of contract by law.[253] The reasons for regulating specific types of contracts by law is discussed in paragraph 5.2.1.

Contracts which are regulated by law and which are therefore subject to specific provisions are 'nominate contracts'. The term 'nominate contract' is used because these contracts are named in the law. 'Innominate' contracts are all contracts that do not fall into a category of a nominate contract.[254] Nominate contracts have to be distinguished from innominate contracts as the latter are only subject to general rules on contract whereas the former are subject to specific rules and, additionally, to general rules on contract.[255] In order to determine whether a contract is nominate or innominate, it is necessary to analyse whether a contract contains all the required characteristics of a particular nominate contract. This is not always easy as opinions may differ on the required characteristics of a particular nominate contract.[256] The

250. Van Zeben, du Pon and Olthof (1981), p. 919; Van Zeben, Reehuis and Slob (1991), p. 3; Van Zeben (1998), p. 1.
251. Chitty 1 (2015), nr. 1.027-1.035; Schelhaas and Wessels (2016), p. 3.
252. Feenstra (1984), p. 134; Feenstra and Ahsmann (1988); Hartlief and, Stolker (1999). For the principle of freedom of contract in the common law tradition I refer to Chitty 1 (2015), nr. 1.027-1.035; Atiyah (1979).
253. Gernhuber (1989), p. 152-157.
254. Asser/Houben 7-X (2015), 1; Schelhaas and Wessels (2016), p. 2.
255. Asser/Houben 7-X (2015), 3.
256. Hofmann and Van Opstall (1959), p. 300. Hofmann and Van Opstall provide the example of a contract of hire as a nominate contract of which the required characteristics are not easily determined.

characterization of a contract as a nominate or innominate is however not equivalent to determining the applicable rules.[257] The characterization of a contract as a particular nominate contract is a matter of construction of the contract. This also includes interpreting the law.[258] Contracting parties who wish to characterize their contract are free to insert this in the content of the contract. They can specify this for the total or part of the contract. However, the characterization of the contract by the contracting parties does not always have the desired effect as it is a matter of objective law. If the content of a contract contradicts the name given by the parties, the content is decisive rather than the description. The objective categorization of the law prevails over the subjective qualification given by the parties.[259]

In Dutch law, there is a clear difference between specific contracts ('*bijzondere overeenkomsten*') and nominate contracts ('*benoemde overeenkomsten*'). Not all nominate contracts are specific contracts. A nominate contract is a contract that falls into a category of contracts which can be clearly distinguished from contracts that belong to other contract types. A number of nominate contracts are regulated by law in Book 7 of the BW under the title 'specific contracts' ('*bijzondere overeenkomsten*').[260] Specific contracts only, are subject to the specific rules provided in the law. It is quite possible that a type of contract is mentioned in legal literature, or is regulated in other legal systems, and can be considered a nominate contract, although it is not (yet) regulated by law. Examples of these types of contracts are energy supply contracts, contracts for leasing, factoring, franchising or repair contracts. These are examples of (newly developed) types of contracts, which, under Dutch law are not subject to specific provisions, but only to the general rules on contract.[261] Although the term nominate contract is not entirely accurate it will be used to describe those contracts that are regulated by law.[262]

5.2.1.1 *Origins in Roman law*

The division between nominate and innominate contracts can be found as far back as in Roman law. Classic Roman law recognized a closed system of contracts. This meant that, in general, contractual obligations would only exist if an agreement fitted the model of a particular nominate contract. This can also be described as a *numerous clausus* (fixed number) of contracts, where only agreements that could be brought under the existing categories were actionable.[263] It was important that there was a suitable procedural formula for this type of action. Roman law was an action-based law in the sense that the question of whether a contract was binding was not the most relevant. It was far more important to ascertain whether there was a procedure to enforce it. Only where there was a remedy was there a right

257. Asser/Houben 7-X (2015), 18.
258. Asser/Houben 7-X (2015), 19.
259. Gernhuber (1989), p. 153.
260. Schelhaas and Wessels (2016), p. 2.
261. Fontaine (1998), p. 373.
262. Asser/Hartkamp and Sieburgh 6-III (2014), nr. 66. Van den Berg and Zondag use the term specific contracts for the category of contracts which have taken on a name and the term nominate contracts for those that are regulated by law, in: Van den Berg and Zondag (2003), p. 4-5.
263. Zimmermann (1996), p. 508.

('*ubi remedium, ibi ius*').[264] For this reason, *contractus* — 'agreements' that were sanctioned by *actiones civiles* — were distinguished from mere *pacta*, which were generally not enforceable because there were no actions available.[265] However, at a later stage, some *pacta* were also provided with actions.

In closed contractual system like that, one can envisage a great number of agreements that could not easily be brought under one of the existing contracts. For those agreements there was no action available and in practice such an agreement would have no binding force. This led to many unsatisfactory results. For certain types of transactions, like for example, a hire-purchase agreement, two different sets of actions were therefore combined. This can be referred to as a combined transaction.[266] However, combining different sets of actions does not solve all the problems that arise when an agreement does not neatly fit into one of the existing contractual niches, or if an agreement combines certain elements of more than one existing contract. In order to deal with the problems of these early forms of mixed contracts, classical law at the time of Justinian (in the 6th century), recognized the existence of innominate contracts. This new class was provided with a general action, without a specific name. This solution later became available for all types of agreements (*pacta*), including the early forms of mixed contracts.[267] However, this general action was only available if one party performed his part of the transaction and the counterparty was unwilling to perform his.[268] Here, with the relaxation of the closed system of contract, Zimmermann states that the 'doctrinal bridge towards the modern general law of contract' can be found.[269]

The introduction of innominate contracts led to increased contractual freedom (in the material sense) for the parties involved.[270] No longer were only contracts that met the requirements of one of the existing nominate contracts enforceable, the contracts that fell in this residual category of contracts became enforceable too. Consequently, parties could more easily shape their contracts according to their wishes and ideas. Although opening the closed system of contract by recognising innominate contracts led to more contractual freedom, it would not be accurate to state that there was no degree of contractual freedom in classic Roman law. One type of contract, the *stipulatio,* had only formal requirements and if these were met — which at the time of Justinian was merely the existence of a written contract — the *stipulatio* could have any desired content.[271] This useful and flexible type of contract could be used for almost every purpose.[272] Although there was already a degree of contractual freedom (in the material sense), the impact of the introduction of innominate contracts cannot be underestimated.[273]

264. Zimmermann (1996), p. 6.
265. Feenstra (1984), p. 134-136; Zimmermann (1996), p. 508. Zimmermann emphasizes that 'This did not, however, mean that such a pactum — or pactio — was entirely ineffective or invalid.'
266. Zimmermann (1996), p. 530-532.
267. Feenstra (1984), p. 140-141.
268. Zimmermann (1996), p. 532-535.
269. Zimmermann (1996), p. 33.
270. Feenstra (1984), p. 134.
271. Feenstra (1984), p. 134.
272. Zimmermann (1996), p. 89.
273. Feenstra (1984), p. 134.

In summary, in classic Roman law, with its closed system of contracts, as well as in modern civil law systems, nominate contracts are distinguished from innominate contracts. The purpose of this distinction in Roman law was to know whether a specific action was available in order to enforce a particular contract. In modern civil law, however, there is a different purpose, as all contracts are enforceable irrespective of whether they are nominate or innominate. This distinction is relevant today because it determines which legal regime is applicable to the contract at hand.

5.2.1.2 *Applicable law to innominate and nominate contracts*

As in other modern legal systems, the Dutch legal system too, has moved beyond a closed system of contracts and accepted a general notion of contract. The general rules on contract are contained in Books 3 and 6 BW. These general rules on contract deal with the most important problems affecting all types of contract. The relevant sections answer questions like: What is a contract? What are the contents of a contract? How does it come into existence? How can a contract be terminated? When is a contract invalid? What are the consequences of a breach of contract? These general rules on contract apply to all types of contracts, whether nominate or innominate. In addition to general rules, specific rules only apply to certain nominate contracts. The previous Dutch Civil Code captured the open system of contracts in art. 1355 BW 1838,[274] which reads as follows (freely translated):

> All contracts, whether nominate or innominate, are subject to general rules, which are dealt with in this section and in the former section. The specific rules on particular types of contract are dealt with in the sections that concern those types of contract, and the specific rules on commercial matters are laid down in the commercial code. [275]

In principle, the general rules apply to innominate and nominate contracts and the specific rules apply only to nominate contracts.[276] Nominate contracts that are subject to the general and specific rules do not cause problems if the general and specific rules are compatible and both have the same outcome. However, problems

274. This rule was not adopted by the legislator when drafting the new BW. As, according to the new BW all contracts (nominate or innominate) are subject to general rules and nominate contracts to their specific rules as well, the previous art. 1355 BW 1838 became redundant. At the time it was drafted, this article was a response to the closed system of contract found in Roman law, which already had given way to freedom of contract (in the material sense) in the late Middle Ages. Legal literature comments: 'One cannot think of a more redundant article'. It was considered wise to delete the entire article as stating the unnecessary can do harm. This is because this article would unnecessarily refer to the distinction between innominate and nominate contracts as found in the Roman law, while this distinction had already been deprived of all legal consequences. Opzoomer (1879), p. 71.

275. Art. 1355 BW 1838: '*Alle overeenkomsten, het zij dezelve eene eigene benaming hebben, het zij dezelve onder geene bijzondere benaming bekend zijn, zijn onderworpen aan algemeene regelen, welke het onderwerp van dezen en van den vorigen titel uitmaken. De bijzondere regelen ten aanzien van bepaalde overeenkomsten worden opgegeven in de titels welke over ieder dezer overeenkomsten handelen, en de bijzondere regelen omtrent handelszaken zijn vastgesteld bij de wetten tot den koophandel betrekkelijk.*'

276. However, it is stated that the general rules on contracts can have an influence on nominate contracts and at the same time the specific rules that apply to nominate contracts can have an influence on the general rules on contracts. See: Van den Berg and Zondag (2003), p. 4-5.

arise when the rules conflict. In those cases specific rules have priority over more general rules (*lex specialis derogat legi generali*).[277]

The categorization of a contract as a particular nominate contract or as an innominate contract can bear significant legal relevance. The legal regime applicable to the contract can differentiate and this is especially relevant in case of contracts subject to mandatory rules. In general, the innominate and nominate contracts laid down in the Dutch Civil Code are subject to default rules which can be overridden by the parties to the contract. This means that the parties to a contract are free to determine the content and legal consequences of the contract. In these cases, the contract is only subject to the supplementary provisions governing the particular contract in the absence of terms deviating from those provisions. However, limits can be imposed on this freedom if public policy so requires.[278] A relevant example of this are the mandatory rules governing a contract for the carriage of goods conducted by the terminal operator who performs services in the sea port and the hinterland. This nominate contract is subject to mandatory provisions which find their origin in international or in national law.

5.2.1.3 *Reasons to regulate specific contracts by law*

Although it is not necessary to regulate certain contract types under an open system of contracts as general rules on contract should answer all questions, it can be efficient to regulate several specific types of contract by law.[279] When studying a particular nominate contract in detail it can be useful to bear in mind why this nominate contract is regulated by law.[280] In general, the reasons for regulating specific contracts by law are twofold.

Firstly, some contract types are so commonly and frequently used that it has become necessary to regulate them in the interests of the contracting parties involved. After finding a balance of interests, the law adopts specific rules which are the implementation of what is deemed reasonable and fair in most circumstances.[281] These guidelines can also be used by the court or arbitrators when deciding on the validity of (unfair) contract terms. At the same time, parties do not have to regulate their legal position in detail every time a contract is concluded. This can be useful because parties do not always envisage (all) legal effects at the time the contract is concluded. It is quite possible that problems arise during the performance of the contract for which the parties did not (expressly or not) provide a solution. In order to fill those gaps, the law lays down clear guidelines which complement what the

277. Hofmann and Van Opstall (1959), p. 299.
278. Van Zeben, Reehuis and Slob (1991), p. 3-6.
279. Gernhuber (1989), p. 152-157.
280. For an overview of the developments concerning specific contracts around the time of introduction of the new civil code see: De Boer (1990), p. 730-733; Florijn (1994), Ch. 8; Hartlief (1997), p. 225-237.
281. The specific rules that govern the nominate contracts for this reason are the implementation of the principle laid down in art. 6:248 sub. 1 BW which states that 'A contract not only has the legal effects agreed to by the parties, but also those which, according to the nature of the contract, apply by virtue of the law, usage or the requirements of reasonableness and fairness.' Translated from Dutch by: Warendorf, Thomas and Curry-Summer (2013), p. 719.

contracting parties had agreed upon. The rules drafted for this purpose are usually default rules that can be overridden by all parties.[282] A contract of sale is a good example of a nominate contract which is regulated for this reason. This commonly used contract requires specific rules as the general part of the law of obligations may be somewhat broad.

The second reason to regulate a contract type by law is to restrict the freedom of contract in the public interest.[283] These types of rules are often made when one of the parties concerned, or a third party, is in a(n) (economically) weaker position and in need of protection.[284] Mandatory law is usually enforced if a measure of protection is deemed necessary. The mandatory law either provides provisions that prescribe juridical effects that cannot be overridden by the parties, formal requirements for the entire contract or for a particular clause in the contract,[285] or provisions on the burden of proof or the admissibility of certain evidence.[286] This enactment of mandatory law shows that even within a legal framework based on an open system of contracts, it is of great importance to categorize each contract in order to determine whether it is an innominate or a particular nominate contract. The categorization of contracts is especially important when it covers nominate contracts to which mandatory law applies.[287]

Although it is possible to distinguish an unlimited number of contract types which are prone to specific regulations, it is not desirable or feasible to try to regulate every possible contract type. For this reason, the legislator selected some contracts that require attention. These contracts include contracts that are most commonly used and for which there is a clear need to provide provisions which would apply if parties fail to include customized terms. Different countries regulate different types of contracts. Swiss law contains a chapter on publishing agreements.[288] Under German and Italian law banking contracts are nominate contracts[289] and the Italian Civil Code provides regulations for a number of bank contracts, including savings deposits, credit contracts and the use of a safe in a bank.[290]

---

282. Van Zeben, Reehuis and Slob (1991), p. 3-4. See also: Schelhaas and Wessels (2016), p. 3-4.
283. Van Zeben, Reehuis and Slob (1991), p. 4; Chitty 1 (2015), 1-034; Schelhaas and Wessels (2016), p. 4.
284. Asser/Hartkamp and Sieburgh 6-III (2014), nr. 66.
285. Formal requirements can be prescribed for the validity of a particular contract or a particular clause in a contract. In principle, a verbal agreement is binding, but in some cases legal certainty requires a certain form for a contract or a clause. In other cases it might be necessary to protect a party with lesser bargaining power by prescribing formal requirements in order to give that party the possibility to take it into careful consideration. See: Van Zeben, Reehuis amd Slob (1991), p. 6.
286. The fact that an agreement can be(come) particularly burdensome does not always lead to the enactment of formal requirements. It can also be dealt with by adopting rules concerning evidence. Some agreements are not required to be written down, however, if the (content of the) agreement is disputed it has to be proved by means of a written document. Van Zeben, Reehuis and Slob (1991), p. 4, 7-8.
287. HR 26 June 1953, *NJ* 1953, 634, *AA* 1953, p. 38-43 with commentary from L.J. Hijmans van den Bergh, D. Hazewinkel-Suringa and A.M. Donner (Heijdens/Gofilex).
288. Art. 380-393 Swiss Civil Code.
289. Germany: art. 355-357 HGB; Italy: art. 1823-1833 ICC.
290. Italy: art. 1834-1857 ICC. See for an analysis of modern contracts for the purpose of a European civil code: Fontaine (1998), p. 371-379.

In general, contracts that are specifically regulated by Dutch law can roughly be divided into three main categories. These include contracts for the transfer or use of a right or of a corporeal thing (e.g. contract of sale, donation, rent, lease, bareboat charter), contracts for the provision of services (e.g. contract for work, employment contract, service contract, carriage of goods, deposit, freight forwarding, agency) and accessory contracts (suretyship, settlement contract).[291] The legislator's decision to regulate some particular nominate contracts has been criticized in legal literature.[292] According to some critics the traditional structure of the civil code fails to acknowledge modern contract types such as repair contracts, energy supply contracts and contracts for subordinated loans.[293] However, the traditional structure, which refers to the fact that most nominate contracts in the new civil code were already regulated under the previous civil code, indicates that society apparently cannot do without the regulation of these contracts. Furthermore, the list of nominate contracts is not exhaustive and other specific contracts may be regulated in the future.[294]

5.2.2 **Mixed contracts**

A mixed contract assumes the features of several nominate contracts and it may be unclear which rules apply to (aspects of) it. It does not neatly fit in one category of nominate contracts.[295] Its construction may give rise to difficulties in determining the rules applicable to specific aspects under a contract. Mixed contracts exist in every legal system in which specific rules are provided for some types of contracts. An agreement might not fit into a category of one nominate contract, or it might combine elements of more than one. In certain instances one part of the contract falls into a category regulated by law and another into the category of innominate contracts. These mixed contracts exist in civil law systems which distinguish several nominate contracts and is becoming more visible in common law systems. An example of this is a contract for the carriage of goods which is subject to the common law rules on bailment as well as to the rules on contracts of carriage in domestic law and international conventions. Although there are many ways in which different elements can be combined in a contract and some types are already distinguished in legal literature, this entire category of contracts is referred to as 'mixed contracts'.[296]

This is similar to the approach taken in the DCFR where a mixed contract is defined in art. II. — 1:107 DCFR as:

---

291. Van Zeben, Reehuis and Slob (1991), p. 8-9. Van den Berg and Zondag add a fourth category to the list; chance contracts (gaming and wagering, insurance contract) in: Van den Berg and Zondag (2003), p. 17-18.
292. Polak (1973), p. 385-387.
293. Van Zeben, Reehuis and Slob (1991), p. 10.
294. Van Zeben, Reehuis and Slob (1991), p. 11.
295. In Dutch: '*gemengde overeeenkomst*'. In German: *´gemischter Vertrag*'. In French: '*contrat mixte*', or '*contrat complexe*'. The previous terms are often translated into English as 'mixed contract'. It refers to contracts which have characteristics of two or more nominate contracts. See: Hartkamp, Tillema and Ter Heide (2011), p. 42-43; Markesinis, Unberath and Johnston (2006), p. 163.
296. Furthermore: Baat (1920).

> 'II. — 1:107: Mixed contracts
> (1) For the purposes of this Article a mixed contract is a contract which contains:
> (a) parts falling within two or more of the categories of contracts regulated specifically in these rules; or
> (b) a part falling within one such category and another part falling within the category of contracts governed only by the rules applicable to contracts generally.'

An example of a typical mixed contract is the contract for the rent of a room in a guesthouse. Several obligations belonging to different types of contracts can be distinguished here. It qualifies as a 'rental contract' as it deals with the rent of a room, it shares similarities with a 'sale contract' as meals are provided and the cleaning or service can be brought under the 'contract for the provision of services'.[297] Another example of a mixed contract is the contract concluded by a terminal operator who performs services in the sea port and in the hinterland. This too, is a mixed contract because it combines a variety of services and duties (e.g. carriage, storage, loading and discharge, taking over and delivery, possibly freight forwarding services and services relating to customs). These activities cannot be accommodated in the framework of a single nominate contract, but instead assume the features of several nominate contracts. A regular contract of carriage is also a mixed contract.[298] A contract of carriage is generally not merely limited to the carriage and delivery of goods. The carrier often performs other services like loading and discharge, packaging, storing before, after, or during the carriage, notifying parties, seeking instructions, paying duties, taking out transport insurance and collecting the 'cash on delivery' charge.[299] These other services however, do not necessarily affect the contract's nature as a contract of carriage.[300] Moreover, the contract for the transshipment of goods by a stevedore can also be considered a mixed contract. The stevedore/terminal operator performs a variety of duties such as loading and discharge, stowage, storage, taking over and delivery. These duties fall under different nominate contracts. The applicable rules are therefore determined by taking account of the approaches to mixed contracts.[301]

Paragraph 5.2.1 on the origins in Roman law shows that mixed contracts were already a problem in early times. When categories of contracts are distinguished — whether it is for determining the available actions or for determining the applicable law — contracts may arise that cannot be accommodated in the framework of the existing nominate contracts. Roman lawyers came up with some solutions.

297. Van Zeben, Du Pon and Olthof (1981), p. 871; Völlmar (1950), p. 427; Asser/Hartkamp and Sieburgh 6-III (2014), nr. 67; Suijling (1934), p. 199.
298. Thume (1994), p. 384-385.
299. As described in art. 21 CMR.
300. This can be illustrated by the French case on a multi-service contract. 'A multi-service' is a contract in which the determinant and characteristic element consists in the displacement of household glass from collection points to recycling area. Other services are accessory. This contract is to be qualified as a contract of carriage. A claim for outstanding debts upon revalorization of tariffs which goes back to more than one year, is therefore time barred. Cour de Cassation de France 28 May 2013, *ETL* 2013, p. 542-547.
301. See below para. 6.3.

Firstly, available actions were combined in cases of the combined transaction. Secondly, innominate contracts were introduced which were provided with a general action.[302]

There is currently no uniform approach to mixed contracts. The first difficulty lies in establishing whether a mixed contract belongs to the group of innominate contracts or to the group of nominate contracts. On the one hand, mixed contracts are similar to innominate contracts as no specific rules for that particular type of contract exist in the law. On the other hand, mixed contracts have essential features of nominate contracts, which implies they resemble nominate contracts. So it would not be wise to merely apply the general rules on contract, as one would do for innominate contracts. Specific rules may be more adequate than general rules and it is usually not the intention of the parties only to apply the general rules and ignore the specific rules. Moreover, specific rules can be of a mandatory nature which would restrict the freedom of the contracting parties. In general, it is also in line with the nature and scope of the specific rules to expand their application to contracts which do not neatly fit into a category of a nominate contract.[303]

Furthermore, if one were to decide that a mixed contract is subject to the provisions of a nominate contract, the question of which specific provisions were applicable would remain. In many cases it would not be possible to simultaneously apply the rules of more than one nominate contract as every nominate contract has its own legal regime. These legal regimes can differ from one another substantially and might even be incompatible. Where mandatory rules are involved, it is particularly important to determine whether a contract should be brought under a particular nominate contract (e.g. in case of transport law).[304] In that situation suggestions have been made to give priority to those rules which are of a mandatory nature.[305] Three doctrines have been developed to provide further guidance in dealing with the problems surrounding mixed contracts.

5.3 Three doctrines on the applicable law to mixed contracts

Mixed contracts may give rise to legal uncertainty as it is unclear which rules govern certain aspects of the contract. Legal literature has distinguished three doctrines to determine the legal regime applicable to mixed contracts. These are, the absorption doctrine, the sui-generis doctrine and the cumulation doctrine. None of these doctrines can be used in every situation. The nature and the scope of the particular provision and the nature and the scope of the contract always have to be taken into consideration when determining the applicable rules.[306]

302. These solutions share similarities with the cumulation doctrine and with the sui-generis doctrine respectively, which will be discussed in detail below.
303. Suijling (1934), p. 199.
304. Hijmans van den Berg, Hazewinkel-Suringa and Donner (1953), p. 43; Zeijlemaker (1963), p. 461-463; Asser/Hartkamp and Sieburgh 6-III (2014), nr. 70.
305. Suijling (1934), p. 198; Hofmann and Van Opstall (1959), p. 302; De Baat (1920), p. 73-74.
306. HR 26 June 1953, 1953-634, *AA* 1953, p. 38-43 with commentary from L.J. Hijmans van den Bergh, D. Hazewinkel-Suringa and A.M. Donner (Heydens/Gofilex). This case concerns the application of protective provisions concerning rental contracts for the use of a room for screening movies. Furthermore: Van Zeben, Du Pon and Olthof (1981), p. 871; Schoordijk (1979), p. 475; Asser/Hartkamp and Sieburgh 6-III (2014), nr. 68-69; Gernhuber (1989), p. 162-163.

5.3.1 The absorption doctrine

The absorption doctrine assumes that if a contract contains a dominant element which characterizes the contract, the contract is governed by the provisions which apply to that dominant element.[307] This means that the supplementary elements of the contract are absorbed into the main element. In order to determine the characteristic obligations under a contract, one should not forget that the intentions of the contracting parties as well as those of the legislator have to be taken into consideration. Therefore, mandatory provisions (or other type of provisions which provide protection) will usually prevail.[308] This may be different when the element to which non-mandatory rules apply is substantially more dominant under a particular contract. In that case, the mandatory provisions have to give way to the non-mandatory rules. This occurs, for example, when goods are transported over a short distance within a warehouse or terminal and the performance of storage is deemed the characteristic element under the mixed contract. In those cases the rules on carriage are generally not applied.[309] What is more, the choice for a particular legal regime can also be influenced by a provision on priority provided in the law.[310]

The disadvantage of this doctrine is that it is not always possible to determine a dominant element under a contract. Even in cases where a dominant element can be distinguished, the question arises whether the provisions which are designed for that dominant element should also apply to the other elements under the contract for which these were not designed, and for which other more specific rules exist.[311] This doctrine can therefore not be applied under all circumstances.

5.3.2 The *sui-generis* doctrine

In the sui-generis doctrine a contract that meets the requirements of several nominate contracts is regarded as a contract type of its own kind, not specifically regu-

307. Völlmar (1950), p. 427; Gernhuber (1989), p. 162. The ECJ applied the absorption doctrine in a case about a distribution agreement in: ECJ 19 December 2013, case C-9/12, ECLI:EU:C:2013:860, *NJ* 2014, 346 with commentary from L. Strikwerda (Corman-Collins SA/La Maison du Whiskey). The question was whether a distribution agreement can be classified as a contract for the sale of goods and/or the provision of services, within the meaning of Article 5(1)(b) of the Brussels I Regulation. The Court has stated that, in order to classify a contract in the light of that provision, the classification must be based on the obligations which characterize the contract at issue (…). The *Hoge Raad* applied the absorption doctrine in a case concerning the rent of a room in a guesthouse. As a result, the provisions on rental contracts were not applicable: HR 12 April 1935, 12041935, *NJ* 1936, 1 with commentary from E.M. Meijers (Griffioen/Zaalberg).

308. Suijling (1934), p. 198; Hofmann and Van Opstall (1959), p. 302; De Baat (1920), p. 73-74; Van Zeben, Du Pon and Olthof (1981), p. 872.

309. See below para. 6.3.

310. For example, in art. 7:5 (4) BW on contracts of sale, the legislator provided a priority rule. Such priority rule can also be found in art. 7:290 (3) BW on rental contracts (former 7A:1624 former BW. See: HR 16 December 1994, ECLI:NL:HR:1994:ZC1588, *NJ* 1995, 185 (Huting/Peters); HR 24 January 1997, ECLI:NL:HR:1997:ZC2255, *NJ* 1997, 558 with commentary from P.A. Stein (Tokkie/Michael); HR 25 April 2003, ECLI:NL:HR:2003AF4616, *WR* 2003, 52 ([A]/'t Sweiland) (although in the latter case the court decided that the rule on priority was ignored as there was an element which clearly dominated). Additionally, art. 7:610 (2) BW regarding employment contracts also contains a priority rule.

311. Van Zeben, Du Pon and Olthof (1981), p. 872.

lated by law and therefore an innominate contract.[312] These mixed contracts are therefore only subject to the general rules on contracts and terms stipulated in the contract. The provisions of nominate contracts still apply, as an analogy can be drawn from the rules of the relevant nominate contracts[313] but if these include mandatory provisions it might be to the detriment of their mandatory character.[314] There is generally some hesitation about designating mixed contracts as innominate contracts to which only the general rules on contracts apply, and by analogy, the specific rules. This is because these contracts may share similarities with one or more nominate contracts and the results might be unsatisfactory if the specific rules regarding nominate contracts were not directly applied. This is underlined by the fact that the specific rules governing nominate contract should apply directly and not by analogy to the contracts that fall within the definition of the nominate contracts. The rules should also be directly applied in atypical cases.[315]

5.3.3 The cumulation doctrine

Dutch law chooses as a main rule the cumulation doctrine contained in art. 6:215 BW to solve problems surrounding the rules applicable to mixed contracts.[316] According to the cumulation doctrine, a contract which, in its entirety, fits the description of more than one nominate contract is subject to all legal regimes of these relevant nominate contracts.[317] In other words, all appropriate provisions are combined and apply to the mixed contract.[318] Art. 6:215 BW functions as a rule of thumb. In principle, all relevant provisions apply cumulatively, unless there is a good reason to refrain from the application of certain rules.[319] Reasons can be that the rules are incompatible with each other or that the scope, in relation to the nature of the contract, opposes their application. The Dutch Civil Code does not specify which rules should be applied if it is not possible to apply and combine all rules. It is not deemed necessary to provide further rules in the law since a wide variety of mixed contracts may arise and room should be given for the court to do justice in every situation by taking account of the particular circumstances of each case.[320] It is possible to distinguish several categories of mixed contracts and one should not forget that art. 6:215 BW only applies to mixed contracts in the narrow

312. An example of a case in which the *Hoge Raad* applied the sui-generis doctrine: HR 10 December 1936, 101936, *NJ* 1937, 525 with commentary from E.M. Meijers. In this case concerning a mixed contract the court decided that the rules on agency (‘*lastgeving*’) are not applicable to a contract of a architect.
313. Gernhuber (1989), p. 162.
314. Meijers (1948), p. 169; Van Zeben, Du Pon and Olthof (1981), p. 872.
315. De Baat (1920), p. 40-45; Van Zeben, Du Pon and Olthof (1981), p. 872.
316. Art. 6:215 BW: ‘Where a contract falls within the description of two or more types of contract specifically regulated by law, the rules applicable to each apply to the contract concurrently, except to the extent that the provisions are not easily compatible or that their scope, in relation to the nature of the contract, makes them inapplicable’ (freely translated).
317. HR 21 February 1947, 211947, *NJ* 1947, 154 with commentary from E.M. Meijers. In this case the inspector of a life insurance company not only sold insurances, but also performed activities of another nature.
318. Gernhuber (1989), p. 162.
319. Van Zeben, Du Pon, Reehuis and Slob (1990), p. 1432.
320. Van Zeben, Du Pon, Reehuis and Slob (1990), p. 1432.

sense. Other types of mixed contracts can be approached differently.[321] The different types of mixed contracts will be discussed below.

5.4 Categories of mixed contracts

A contract which does not fall neatly under one nominate contract can be referred to as a mixed contract. However, it should be noted that not all contracts which share similarities with several nominate contracts are mixed contracts (in the narrow sense). Only mixed contracts (in the narrow sense) are subject to art. 6:215 BW which adheres to the cumulation doctrine. In order to determine the applicable law, a distinction has to be made between several categories of mixed contracts.[322] First, composite contracts are distinguished from mixed contracts. Then, the mixed contracts are further subdivided into four categories. Each category requiering a different approach.

5.4.1 Mixed and composite contracts

As stated above, a distinction should be made between mixed contracts and composite contracts. A mixed contract can be defined as a contract which, in its entirety, meets the requirements of more than one nominate contract. In German law these contracts are seen to have '*Vertragseinheit*' (contractual singularity). This category of mixed contracts can be distinguished from composite contracts.[323] A composite contract is a contract which contains several elements which fall into different categories of nominate contracts. This situation is similar to the one in which contracting parties conclude multiple separable contracts which belong to different contract types. These contracts show '*Vertragsmehrheit*' (contractual plurality).[324] Some have argued that it is not relevant to determine whether an agreement is composed of multiple separable contracts or whether it is a mixed contract. According to them, characterizing a contract either as composite or mixed does not resolve the problems that could occur if applicable rules conflict.[325] This distinction however, would provide guidance on the applicable rules if the rules appear to conflict. If a contract can be considered as composite then the distinct contracts would have to be approached separately so that each contract would be subject to its own regime Other solutions may be provided for mixed contracts (i.e. the absorption, cumulation or *sui-generis* approach).

A composite contract is a compilation of multiple agreements that can be separated from each other, whereas a mixed contract is a contract which combines different types of elements into an inseparable unit.[326] The distinction has to be made between composite and mixed contracts as the different agreements under a com-

321. Van Zeben, Du Pon and Olthof (1981), p. 872.
322. Asser/Houben 7-X (2015) 15.
323. In Dutch: '*gestapelde overeenkomst*': Haak and Zwitser (2003), p. 171. In German: '*zusammengesetzten Verträgen*': Temme (2008), p. 374-380.
324. Temme (2008), p. 374-380; Gernhuber (1989), p. 159-160; Haak and Zwitser 2003, p. 171.
325. Castermans and Krans (2003), p. 104-108.
326. Haak and Zwitser (2003), p. 171; Van Zeben, Du Pon and Olthof (1981), p. 873; Asser/Hartkamp and Sieburgh (2014), nr. 67; Gernhuber (1989), p. 159-160; Gass (2000), p. 211.

posite contract have to be approached separately and each part of the contract is subject to its own legal regime.[327] A composite contract therefore follows a 'network system', which is a concept commonly known in the law applicable to multimodal contracts.[328] The applicable law can easily be determined when any loss, damage or delay can be attributed to a certain element under the contract. If the loss, damage or delay cannot be localized then the most favourable law for the person suffering the loss should be applied.

A mixed contract, on the other hand, has to be approached in its entirety. Even if agreements are laid down in a single document, it is quite possible that separate contracts were concluded. It has to be borne in mind that just because an agreement for the performance of several obligations is printed on a single piece of paper, it does not automatically mean that the agreement is a mixed contract and has to be approached in its entirety. It is not always easy to determine whether a contract is composed of separable agreements. This is because in composite contracts too, the distinct agreements are usually connected due to their origin and purpose. Furthermore, the distinction between a mixed or composite contract is not only determined by the existence of separate elements. It is also relevant to determine whether the contract itself identifies separate elements.[329] Thus, any expressed or implied intentions of the parties can play a decisive role in determining whether a contract can be defined as mixed or composite.[330]

This division into mixed and composite contracts also find its reflection in the rules on determining the applicable legal regime for mixed contracts under the DCFR. Art. II. — 1:107 DCFR defines a complex system which leaves room for the specific circumstances of each case:

> '(2) Where a contract is a mixed contract then, unless this is contrary to the nature and purpose of the contract, the rules applicable to each relevant category apply, with any appropriate adaptations, to the corresponding part of the contract and the rights and obligations arising from it.
> (3) Paragraph (2) does not apply where:
> (a) a rule provides that a mixed contract is to be regarded as falling primarily within one category; or
> (b) in a case not covered by the preceding subparagraph, one part of a mixed contract is in fact so predominant that it would be unreasonable not to regard the contract as falling primarily within one category.
> (4) In cases covered by paragraph (3) the rules applicable to the category into which the contract primarily falls (the primary category) apply to the contract and the rights and obligations arising from it. However, rules applicable to any elements of the contract falling within another category

327. HR 22 January 1993, ECLI:NL:HR:1993:ZC0831, *NJ* 1993, 456, *S&S* 1993, 58 (Van Loo/Wouters); BGH 13 September 2007, *TranspR* 2007, 477.
328. Hoeks (2009), p. 22; Van Beelen (1996), p. 34-35; Wieske (2002), p. 178.
329. See for example art. 1 of the FENEX conditions, which indicates that different rules apply to the distinct stages. Gernhuber illustrates this with an example of a hotel where each service is separately charged in the invoice. This shows the parties intention to constitute separate contracts for the distinct services: Gernhuber (1989), p. 159.
330. Gernhuber (1989), p. 159; Haak and Zwitser (2003), p. 179-183.

> apply with any appropriate adaptations so far as is necessary to regulate those elements and provided that they do not conflict with the rules applicable to the primary category.
> (5) Nothing in this Article prevents the application of any mandatory rules'.

The main point under paragraph 2 is that the network approach should be used to determine the rules applicable to the contract. In this way, each element is isolated so as to determine the applicable law unless this would be contrary to the nature and purpose of the contract as a whole. The rules applicable to each relevant category generally apply to the corresponding part of the contract and the rights and obligations arising from it. If, and only if, this were to lead to unsatisfactory results, because it contradicted the nature and the purpose of the contract, would it be possible to derogate from the main rule. This main rule would furthermore not be applied if the contract consisted of a dominant and auxiliary obligations.[331] This could occur if it were explicitly stated or inherent to the contact. In that case the absorption theory would be applied, without ignoring the subordinate elements of the contract.

Before discussing the four categories of mixed contracts, i.e. contracts that consist of a main obligation and of auxiliary obligations; combined contracts; linked contracts and mixed contracts in the narrow sense,[332] the following paragraphs (A-C) discuss case law of civil and common law countries in which courts isolated the different elements under a contract in order to determine the applicable law. These contracts can be regarded as composite contracts.

A Case: 'Van Loo/Wouters'[333]

> In July 1983, Wouters and the removal firm Van Loo concluded a contract for the removal of Wouters' furniture and belongings from Spain to Weesp in the Netherlands, where the goods were to be stored until Wouters' new house was completed in October 1983. After the goods were collected on 3 August 1983, Van Loo stored the furniture at a terminal in Altea (Spain) awaiting road carriage to Weesp. There was a fire within the premises of that terminal at the end of September and the goods were lost. Wouters brought a claim for compensation against Van Loo, who invoked the short one year time bar that exists in road transport law.[334] Contracts of deposit, on the other hand, are not subject to this short time bar.
>
> The Court in first instance agreed with van Loo and explained that the contract consisted of two stages; removal from Spain to the Netherlands (carriage) and temporary storage in the Netherlands (deposit). No separate contract was concluded covering the storage in Altea (Spain). As the damage occurred during the temporary storage which took place after

331. See para. 5.4.2.
332. Gass (2000), p. 211; Temme (2008), p. 376-378; Gernhuber (1989), p. 160-162.
333. HR 22 January 1993, ECLI:NL:HR:1993:ZC0831, *NJ* 1993, 456, *S&S* 1993, 58 (Van Loo/Wouters).
334. Art. 95 K (old) which rule is currently codified in art. 8:1711 BW.

the performance of the removal and before it ended, van Loo was liable as a carrier. The result was that the claim was subject to the one year time bar.

The Court of Appeal took a different view. The contract was aimed at carriage and, additionally, at the storage of furniture and belongings in the sense that separate agreements exist for carriage and storage. This follows from the circumstance that during the period of storage in Altea (instead of in Weesp) the element of storage was dominant. As a result of this, the claim for the compensation of damage that occurred during the storage stage was not subject to the short time bar that exists in transport law.

Van Loo disagreed with this view and advocated in cassation appeal that the element of carriage is the characteristic and dominant obligation under the contract. The fact that storage took place in Spain does not change this. After all, van Loo only charged transport costs and not storage costs.

The Dutch Supreme Court, the *Hoge Raad,* upheld the decision although it disagreed with the Court of Appeal's reasoning and clarified that the Court of Appeal did not fail to appreciate the rule that if a contract meets the requirements of more than one nominate contract, in principle, the provisions of each nominate contract apply to the contract cumulatively. However, the contract between Van Loo and Wouters did not, in its entirety, meet the requirements of both the nominate contract of carriage and the contract of deposit. According to the *Hoge Raad*, the Court of Appeal rightly did not apply the short time bar to the claim for compensation of damage that occurred at the time that Van Loo acted in the capacity of a depositary and not of a carrier. This is also consistent with the scope of the statutory provision on the short time bar which does not apply to contracts of deposit and which by its nature does not require an extensive interpretation.

This case shows the relevance of categorizing contracts and demonstrates the different legal consequences if a contract is considered composite or mixed in the narrow sense. From art. 6:215 BW, which adopts the cumulation doctrine, it follows that a mixed contract in the narrow sense is subject to all rules cumulatively. If a contract, in its entirety, meets the requirements of both the contract of carriage and the contract of deposit, all rules concerning these two types of contracts will apply to the performance under the contract. If rules conflict, which is the case when the time bars prescribed for contracts of carriage and of deposit are divergent, the mandatory rules will most likely prevail. This leads to the application of the short time bar found in transport law being applied to the storage stage of the contract. On the other hand, if a contract is not mixed (in the narrow sense) but exists of separate agreements, each element is subject to its own rules. The short time for suit therefore only applies to the carriage stage under the contract. This

shows that it is important to determine whether a contract is a mixed contract (in the narrow sense) or a composite contract.[335]

B Case: Contract for carriage and packaging[336]

> This case concerns a contract for packaging and carriage of goods. The claimant was a producer of machines for the motor and car industry. The claimant contracted the defendant, who has a packaging and transport company, for the packaging and carriage of four machines for a fixed price. The machines were intended for the production of car engines. The claimant and defendant had a permanent business relationship. The claimant and the defendant agreed to use a new method for packaging the machines that would protect the machines from corrosion. Nevertheless, the machines arrived at their destination in a corroded condition.
>
> The defendant's company was specialized in packaging, and used general conditions that solely concern the packaging of goods. The claimant had asked the packaging company for advice on how best to pack the machines. The claimant and defendant both knew from previous experience how important packaging was, especially for carriage by sea. For this reason, both parties had orally agreed to change the method of packaging. The new method was with a special film.

The German Fedeal Court, the *BGH,* answered the question of whether the packaging was subject to the provisions concerning '*Werkvertrag*' (which can be translated as a contract for services) or to transport law, considering that the time bar or the first is six months and the second one year. The *BGH*[337] classifies the contract as follows:

> In principle, the *Fixkostenspediteur* (freight forwarder who performs the services for a flat rate) is not obliged to pack the goods. However, packaging by the *Fixkostenspediteur* can be agreed on as an additional service. This results in the application of transport law to the performance of services which, by nature, is a duty under a contract for services. However, this can only be the case if the packaging is agreed on as an auxiliary obligation to the transport of the goods, and not independently from it.[338]
>
> According to the agreement between the claimant and the defendant, the defendant had to perform two obligations. The first was to pack the goods with a new method against corrosion and the second was to carry the goods and deliver them in the USA. The *BGH* interprets the contract as a contract for two separate parts and sees the packaging and the transport as independent elements. The claimant employs the defendant, as a specialized company, for the packaging and the defendant subsequently

335. Cf. Haak and Zwitser (2003), p. 231.
336. BGH, 13 September 2007, *TranspR* 2007, 477.
337. BGH 13 September 2007, TranspR 2007, 477.
338. Cf. § 454 II HGB. This rule concerns the absorption of auxiliary obligations in case of a '*Fixkostenspediteur*'.

> takes upon himself the independent obligation to transport the goods. The obligation to package the goods is subject to the provision on contracts for services ('*werkvertragrecht*'). This is because the packaging of the goods by the defendant was not a mere supplementary obligation with regard to the contract of carriage. Instead, it is a substantive obligation, independent from the obligation to carry goods. The circumstances of the case lead to the conclusion that, according to the intention of the parties, the packaging is of exceptional importance in its relation to the subsequent carriage.

The abovementioned case concerns an exception to the rule that transport related services assumed by a *Fixkostenspediteur* or a carrier are generally subject to transport law rules.[339] The element of transport is considered dominant and absorbs the subordinate elements of other related services. In the German case on packaging and carriage on the other hand, the packaging is not considered an auxiliary obligation relating to the carriage. Although there is a special relation between the packaging and the carriage, as the packaging is necessary for the performance of the carriage and is customized for it, the packaging has special significance. In the case at hand, two different obligations are contracted for and performed which are legally and economically connected. A situation like this raises questions about which legal provisions apply to these separate obligations. Categorizing the contract could provide a solution. The packaging in this case has special significance in relation to the subsequent carriage. It concerns obligations which are at least of equal importance, which are taken over independently from each other. If multiple equally important obligations are connected, then it must be assumed that the contracting parties both intended that each obligation was subject to the provisions that would apply if separate contracts were concluded. The packaging of the goods was therefore subject to the provisions on service contracts. Hence, the short six months time bar applied.[340]

C Case: 'The Maheno'

A case which came before the New Zealand Supreme Court concerns a 'freight consolidator' who took upon himself the obligation to carry some goods by land and to arrange for their carriage by sea as a freight forwarder.[341] The freight consolidator was employed by a buyer of radio parts for the consolidation of the shipment. He was to stuff the goods in a container which was to be carried by land to the port of Sydney and from there by sea to Wellington. The freight consolidator arranged for the owners of the ship Maheno to carry the goods by sea. The goods sustained damage during the sea voyage and the question arose as to whether the freight consolidator could be held liable as a carrier. The court approached the contract by distinguishing each element of the contract in order to determine the applicable law. Importance was given to the intention of the parties when concluding the contract of a mixed nature. The court held:

339. See for example: BGH 4 February 2016, *RdTW* 2016, 340.
340. Temme (2008), p. 375; Koller (2017), p. 1-2.
341. The Maheno [1977] 1 Lloyd's Rep. 81.

> 'I infer from these matters that it was the intention of the parties that the role of the defendant was to pack the goods in the sea freighter and then get them on the ship. (…) Neither the plaintiff nor its agents nor the defendant envisaged that the defendant would carry by sea as there is only one service to New Zealand. The contract itself envisaged that the defendant would enter into a contract of sea carriage as agent for the consignor and upon the terms of the bills of lading issued by the sea carrier. (…) In my view, therefore, Mr. Bryers was right when he submitted that the liability of the defendant is restricted to its position, first, as a carrier and bailee for reward for the land segments of the journey, and secondly, that its liability for the sea leg is simply that of a ship forwarder or shipper's agent.'

This example illustrates the importance of the theories on mixed contracts in common law systems.

5.4.2 Contracts that consist of a main obligation and auxiliary obligations

These types of contracts contain several obligations which can be divided into main and auxiliary obligations. The main obligation meets the requirements of a nominate contract and the auxiliary obligations serve or complement this nominate contract.[342] Contracts which consist of a dominant obligation and one or more auxiliary obligations adhere to the absorption doctrine. The main element of the contract should be determined first as the legal regime of the main element applies to the contract as a whole and the auxiliary aspects of the contract are absorbed into the main element.[343] A regular contract of carriage belongs to this category of mixed contracts. Several obligations are often undertaken in a contract of carriage. These can be brought under different nominate contracts. An example of this is a contract of carriage in which the carrier places the goods at a terminal for a limited period of time before, during or after the transport. The storage for a limited period of time does not alter the nature of the contract for the carriage of goods.[344] This also applies to other transport-related services such as packaging and labelling when these obligations are taken over by the carrier.[345] Thus, the dominant and auxiliary obligations under the contract are subject to (mandatory) transport law. However, when the transport related obligation, such as the storage of goods is sufficiently important (according to the implied or expressed intention of the parties) this constitutes a separate element which is therefore subject to its own legal regime. In that case, there is a composite contract in which all elements are

342. In German: '*Typische Verträge mit anderstypischen Nebenleistungen*'.
343. Thume (1994), p. 383; Temme (2008), p. 377; Gernhuber (1989), p. 164; Gass (2000), p. 211.
344. An example of a '*Fixkostenspediteur*' a freight forwarder for a flat rate (under German law treated as a carrier) who is subject to transport law during storage preceding carriage: BGH 12 January 2012, *TranspR* 2012, 107. Furthermore: Koller (2013 a), p. 420; Cleveringa (1961), p. 401 ff.; Dorrestein (1977), p. 38 ff.; Korthals Altes and Wiard (1980), p. 22; Haak (1984), p. 93 ff; Conclusion A-G Hartkamp before HR 22 January 1993, ECLI:NL:HR:1993:ZC0831, *NJ* 1993, 456, *S&S* 1993, 58 (Van Loo/Wouters). See also: Claringbould (2015 b), p. 232 where this is considered as transshipment rather than as storage.
345. BGH 4 February 2016, *RdTW* 2016, 340. Koller (2017), p. 1-4.

subject to their own rules.[346] Another example related to transport law is the transshipment of goods in the sea port. The transshipment of goods covers activities such as loading, discharge, storage and other cargo handling activities. If the transshipment is performed in connection with inland carriage, freight-forwarding or storage contract, and cannot be considered a characteristic element under the contract, it is subject to the rules applicable to the main obligation under the contract. The person who performs, or undertakes to perform, this obligation is therefore subject to inland transport law, the law on freight-forwarding or storage.[347]

A Case: 'General Vargas'[348]

The Supreme Court of the Netherlands, the *Hoge Raad*, applied the absorption doctrine in the case of the *General Vargas*. This case clearly illustrates that the expressed or implied intention of the contracting parties can, to a large extent, determine the categorization of a contract and therefore the applicable rules.[349]

> Marc Rich concluded a contract with Steinweg for the taking over and discharge from the sea going vessel 'General Vargas', and for the storage of a consignment of aluminum ingots owned by Marc Rich. The General Vargas was moored at the quay of Steinweg at the 'Waalhaven'. Steinweg stored part of the consignment at its Waalhaven terminal and intended to store the remaining part at Spijkenisse inland terminal. The remaining part needed to be transported from the Waalhaven to Spijkenisse and was therefore directly transshipped onto an inland barge named the 'Klaja', which was chartered by and for the account of Steinweg. Marc Rich was unaware of the transshipment as he had left it to Steinweg to plan the discharge, the taking over, the transport and decision on (the exact location of) the storage. During transit, the 'Klaja' capsized and sank. The barge and cargo were salvaged.
>
> In the proceedings, Marc Rich and his cargo insurers brought a claim for compensation against Steinweg for their contribution in general average. To support this claim, Marc Rich and his insurers argued that the Warehousing Conditions were applicable to the carriage by inland barge to Spijkenisse. Art. 17 of the Warehousing Conditions state that the warehouse keeper is free to select the storage location, unless it is otherwise agreed upon. A warehouse is always authorized to transfer goods to other storage locations. The costs associated with these transfers are covered by the warehouse, unless the transfer was required in the interest of the goods or due to circumstances beyond the reasonable control of the warehouse. According to Marc Rich and his insurers, this meant that Steinweg was liable for the damage sustained by Marc Rich during the

346. Rb. Rotterdam 22 February 2006, ECLI:NL:RBROT:2006:AV2808. See also: Van Beelen (1996), p. 92-93; Korthals Altes and Wiarda (1980), p. 22. See para. 5.4.1.
347. BGH 29 April 2014, *RdTW* 2014, p. 271. See Chapter 6.
348. HR 28 November 1997, ECLI:NL:HR:1997:ZC2512, *NJ* 1998, 706 with commentary from J. Hijma, *S&S* 1998, 33 (General Vargas).
349. Haak and Zwitser (2003), p. 179.

transport from the Waalhaven to Spijkenisse, as the carriage was for the sole risk of Steinweg.

In its defense, Steinweg invoked, among other things, the Dutch forwarding conditions (the FENEX-conditions). The contract between Steinweg and Marc Rich contained several relevant provisions. A clause in the contract referred to different sets of general conditions that apply depending on the activity performed. It stated that the storage activities were subject to Warehousing Conditions (VAR), freight forwarding activities to the FENEX-conditions and stevedoring activities to the 'General Conditions of the Association of Stevedores in Rotterdam'.[350] Further, it stated that in case of doubt the choice for a particular set of general conditions was made at the discretion of the warehouse keeper. Steinweg therefore claimed that he acted in the capacity of a (receiving) agent (which shares similarities with a freight forwarder) and not as a depositary when the incident occurred during transit from the Waalhaven to Spijkenisse. This would benefit Steinweg because, pursuant to the FENEX-conditions, Steinweg is only liable when fault or negligence of Steinweg or his employees is established.

The question which requires answering here is: From what moment did Steinweg act in his capacity as a warehouse keeper? Was it from the moment he accepted the goods for delivery at the quayside at Waalhaven, or from the moment the goods arrived at the — intended — final storage location at Spijkenisse? This question is relevant in order to decide which general conditions were applicable. In the former case the warehousing conditions apply throughout, whereas in the latter, they do not.

The Hague Court of Appeal held that Steinweg acted in his capacity as a warehouse keeper from the moment he accepted the goods for delivery at the quay at the Waalhaven. This is because the agreement between March Rich and Steinweg essentially aimed at providing storage activities, and other activities performed under this agreement were subordinate to it. Based on this, the receipt of the goods and the inland transport to Spijkenisse could not be considered an independent service subject to the FENEX-conditions, but was instead a non-independent part, auxiliary to the storage and therefore subject to the Warehousing Conditions.

The Court of Appeal then held that a reasonable explanation of art. 11 Warehousing Conditions entails that when goods, in accordance with the agreement between the parties, are delivered at a place used by the warehouse keeper as a storage facility, the goods are assumed delivered to and accepted by the warehouse keeper for storage at that storage location. This is also the case if goods are ultimately stored at another location. Taking this into consideration, the Court held that the transport to the terminal in Spijkenisse was subject to the warehousing conditions. In that

350. '*Algemene Voorwaarden van de Vereniging van Rotterdamse Stuwadoors*' (AVVRS).

situation it was neither relevant whether the depositor left it to the depositary to decide on the storage location, nor whether the depositor knew that carriage was required (including the risks involved) to the ultimate storage location.

Steinweg attempted to defend himself before the *Hoge Raad* by invoking the clause in the contract that referred to a different set of general conditions for each distinct activity. The *Hoge Raad* explained that Steinweg only had the right to choose between these sets of general conditions if there were doubt about which set was applicable. In this case, Steinweg did not have the right to choose as the Court of Appeal had assessed that there could be no doubt about this. The Warehousing Conditions were applicable and were applicable from the moment he accepted the goods for delivery at the quay in the Waalhaven.

Furthermore, the Court of Appeal did not fail to appreciate the rule that if a contract meets the requirements of several nominate contracts, in principle, each 'part of the contract' is subject to its own legal regime; the cumulation doctrine. The Court of Appeal did not breach this rule when it interpreted the contract between Marc Rich and Steinweg as one that had been essentially aimed at providing storage services and that other activities were subordinated, with the result that from the moment the goods were taken over at the Waalhaven, the performance was subject to the Warehousing Conditions.

The outcome of the case would only have been different if the transport of the goods to another location was solely in the interest of the goods (art. 17 Warehousing Conditions). In that case the transport would not be for the risk of the warehouse keeper. However, Steinweg did not provide sufficient evidence to substantiate that this exception applied. The reason for transporting part of the consignment to the storage facility in Spijkenisse was, in fact, to divide goods among its locations and this was solely in the interests of Steinweg.

The *Hoge Raad* gave a general rule which clearly shows the importance of the agreement between the parties and the nature of the contract. When a person accepts goods for delivery and stores them, it cannot automatically be assumed in which capacity that person performs these activities. It is always important to pay attention to the special circumstances of the case at hand in order to be able to interpret the agreement between the parties reasonably. One cannot state that the *Hoge Raad* generally adheres to the absorption doctrine in cases of mixed contracts. The *Hoge Raad*'s reasoning merely leads to the result that the contract at hand does not meet the requirements of a freight forwarding contract, as defined under Dutch law. The rules on deposit are therefore applicable to the contract between Steinweg and Marc Rich.[351]

351. J. Hijma under HR 28 November 1997, ECLI:NL:HR:1997:ZC2512, *NJ* 1998, 706 (General Vargas).

Although the intention of the parties is clearly important, there are limits to the freedom of contract when determining the applicable rules.[352] This is particularly true for cases involving nominate contracts which are subject to rules of a mandatory nature. An example of this would be a warehouse keeper who is contracted to perform additional international carriage of goods by road. Parties to contracts like these cannot avoid the application of mandatory road transport law under CMR or national law by way of absorption.[353] This is also true in other fields of law in which the issue of mixed contracts emerge. Mandatory rules, or those that provide more protection, generally prevail if there is any doubt about the applicable legal regime, unless another element of the contract is clearly dominant. The more dominant element, to which non-mandatory rules or less protective rules apply, can very well absorb the other element (to which mandatory rules apply).[354] If mandatory rules are enacted it clearly shows that the legislators intended to give more weight to the particular provision in order to protect the weaker parties. This cannot be overlooked and should provide guidance when determining the applicable law to a mixed contract but, this approach is not conclusive.

5.4.3 Combined contracts

The second type of mixed contract, the combined contract or twin contract, contains several obligations which each fall under a different nominate contract.[355] The mixture of these obligations in the contract results in tension between the distinct obligations and the contract in its entirety. In a combined contract each of the distinct obligations constitutes a primary element. These elements are equally important and cannot be separated from each other without doing harm to the purpose of the contract.[356] The obligations under a combined contract can follow a particular sequence and the obligations can be intertwined and performed throughout the contract. An example of the former is the sale of a machine with the additional obligation to install it. An example of the latter is the contract for a stay in a hospital. This contract contains elements of rent (of the room), the provision of services (medical care) and sale of goods (meals and medicine).[357] This is similar to the situation of storage and intermediate handling of goods. The obligations are interwoven and performed throughout the contract. The poor performance of one element has direct consequences for the performance of the other obligations under the contract.

352. Haak and Zwitser (2003),, p. 182: Koller (2014), p. 313.
353. Haak and Zwitser (2003), p. 182.
354. For example in cases of the rental of a building with different purposes (offices and residential purposes): HR 10 August 2012, ECLI:NL:HR:2012:BW6737, *NJ* 2014, 141. A-G M.H. Wissink explains clearly in 2.4-2.6 that the main rule of 6:215 BW leads to the cumulation of provisions unless these are incompatible. If these are incompatible it should be decided whether the elements can be separated into multiple contracts in order to apply different provisions to each separate element. If this is not possible, mandatory rules (or those that provide more protection) generally have priority, unless the other element is clearly more dominant. Furthermore: Rb. Utrecht 16 May 2012, ECLI:NL:RBUTR:2012:BW6298, *NJF* 2012, 297. The latter case concernes a mixed contract on the provision of care and accommodation and revolves around the question of whether the protective mandatory rules on rental contracts are applicable The court decided that the provision of care (contract for the provision of services) was clearly more dominant.
355. In German: '*Kombinationsverträge*' or '*Zwillingsverträge*'.
356. Thume (1994), p. 383; Gass (2000), p. 211.
357. Gernhuber (1989), p. 164-166.

If the obligations in a combined contract can be isolated and the legal consequences can be limited to the particular obligation, the legal regime covering the corresponding nominate contract is applicable.[358] However, it is often difficult to separate the obligations as the poor performance of one can prevent the successful completion of the entire contract.[359] In a situation like this, one wonders if the fee for handling goods can still be charged if the goods are, for example, lost later due to a fire in the storage facility. It has been suggested that the absorption doctrine should be applied if the distinct obligations cannot be distinguished from each other. The law which applies to the most characteristic element of the contract would then apply to the entire contract.[360]

It seems reasonable to approach a stevedoring contract, in which goods are loaded/discharged, carried and stored for a substantial period of time, as a combined contract if the element of storage or carriage is substantial enough.[361] The element of storage is substantial when goods are stored at a terminal for several days before or after they are loaded or discharged. The containers stored in a stack can be reshuffled and are therefore both handled and stored throughout the entire performance. If a stevedoring contract is considered a combined contract, then the rules on deposit would also apply. However, when goods are merely loaded or discharged from a ship by the stevedore, the element of storage is not significant and the contract does not constitute a combined contract. An analogy can be drawn with the common law concept of bailment. Bailment does not apply to 'classic stevedoring duties' such as loading and discharge.[362] Here the stevedore handles the goods for a short period of time, it is temporal, of a 'fleeting nature', and there is no transfer of possession, which is a requirement under bailment.[363] However, if goods are at the terminal some days prior to loading or after discharge, and there is a duty to take care of them, then the stevedore is a (sub-)bailee under English law.[364] Despite the difference between the common law concept of bailment and the civil law concept of deposit, the common law approach to the stevedore's mixed contracts may also be useful within the civil law approach. Moreover, the stevedoring contract also contains elements of carriage of goods because when a stevedore unloads goods from a vehicle they are moved from one place to another and often have to be transshipped to another vehicle. It is quite possible that at large terminals the distance between the two vehicles is substantial and that the goods have to be transported over a considerable distance. This raises the questions of whether the transshipment meets the requirements of the nominate contract of carriage.[365]

358. Thume (1994), p. 383; Temme (2008), p. 377; Gernhuber (1989), p. 164-166.
359. Temme (2008), p. 377; Gernhuber (1989), p. 164-166.
360. Temme (2008), p. 379-380.
361. Haak and Zwitser (2003), p. 438-440.
362. Palmer (2009), p. 137, 1103.
363. House of Lords, Midland Silicones Ltd. v. Scruttons Ltd. [1961] 2 Lloyd's Rep. 365 at 372.
364. Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto) at 539-540.
365. See para. 6.3.

5.4.4 Linked contracts

Linked contracts are contracts in which two obligations are exchanged which each fall into a different category of nominate contract.[366] A classic example would be one in which an employee receives accommodation in return for labour.[367] In general, each obligation (rent and employment) is subject to its own rules, unless it leads to unsatisfactory results.[368] The rules of the other nominate contract can then be applied by analogy.[369] Furthermore, if one of the contracts is terminated it is possible to complement the other with monetary benefits.[370] A transport related example of a linked contract is provided by the *Femina*-case which came before the *Hoge Raad* on 10 July 2015. It deals with the question of whether a contract for the storage of a ship in the port can be characterized as a contract of deposit if the depositary uses the ship for fairs and promotional purposes.[371]

5.4.5 Mixed contracts in the narrow sense

A mixed contract in the narrow sense[372] is a contract which has a single element that meets the requirements of several nominate contracts.[373] They are similar to combined contracts in that several obligations, which can be brought under several nominate contracts, are performed by a single contracting party. The difference however, is that in combined contracts, the various types of obligations cumulate leading to multiple primary obligations, resulting in several distinguishable elements under the contract. In mixed contracts in the narrow sense, the different types of obligations are merged into one primary element.[374] The Dutch Civil Code states that the cumulation doctrine determines the applicable law in cases of a mixed contract in the narrow sense. This results in the simultaneous application of all provisions unless these rules are incompatible with each other. The Dutch civil code does not state what rules should then be applied.

A Case study: Logistic contracts

Contracts of logistics can be referred to as mixed contracts in the narrow sense.[375] There is, however, no universally accepted definition of a contract of logistics. These contracts can take on a variety of forms and not all contracts which are considered 'logistic contracts' are true mixed contracts.[376] The specific details of a contract of logistics determine whether it falls in any of the categories of mixed

366. In German: '*Doppeltypische Verträge*', '*Zwitterverträge*' or '*gekoppelte Verträge*'.
367. Asser/Houben 7-X (2015), 11.
368. Thume (1994), p. 383.
369. Temme (2008), p. 377; Gernhuber (1989), p. 166-168.
370. Gernhuber (1989), p. 166-168.
371. HR 10 July 2015, ECLI:NL:HR:2015:1830, *S&S* 2015, 135 (Femina).
372. In German: '*Typenverschmelzungsverträge*', '*Typenvermengungsverträge*' or '*gemischte Verträge im engeren Sinne*'.
373. Thume (1994), p. 383; Gass (2000), p. 211.
374. Temme (2008), p. 377; Gernhuber (1989), p. 168.
375. Valder (2013), p. 133; Temme (2008), p. 377.
376. Ulfbeck (2011), p. 219.

contracts (in the broad sense).[377] A considerable amount of research on the logistic contract as an example of a mixed contract has been conducted in legal literature.[378] The term logistic services can refer to various activities including those performed under more classic contracts such as carriage, freight forwarding and deposit contracts. Other logistic services can include order picking, packaging, labelling, receiving and confirming orders, loading and discharge, customs related services, distribution, control of goods, issuing transport documents, tracking goods, taking out insurance and claims handling.[379] Some businesses are entering into long term contracts to outsource the entire 'supply chain management'.[380] This wide range of services performed by the logistic service provider can be brought under several nominate contracts. Opinions vary on the law applicable to these logistic contracts when the relevant rules are incompatible. In general, it has been agreed that a logistic contract is not considered a contract sui-generis as the contract for logistic services is too closely connected to existing nominate contracts. The difficulties which arise when attempting to categorize logistic contracts should therefore not lead to merely applying general rules on contract.[381] However, in some logistic contracts, especially those in which the entire 'supply chain management' has been outsourced, the traditional roles of the parties to a contract of carriage have been shifted to such an extent that it would not make sense to apply (certain) transport law rules to them. In cases like this, some have suggested that the sui-generis doctrine be applied.[382]

Furthermore, if it is possible to distinguish one dominant obligation then the absorption doctrine should be applied.[383] The law which applies to the most dominant element under the logistic contract should then apply to the entire contract. However, it is often not easy to determine if there is one dominant element in a logistic contract and in some cases the rules which would apply to the dominant element cannot be applied to the entire contract.[384] Much depends on the particular circumstances of each case.[385]

Moreover, if it is possible to distinguish several obligations, then they can all be approached separately.[386] This would mean that the liability of the logistic service

377. Gass (2000), p. 211.
378. Thume (1994), p. 382-385; Gass (2000), p. 203-213; Wieske (2002), p. 177-182; Gran (2004), p. 1-14; Ramberg (2004), p. 135-151; Heuer (2006), p. 89-95; Gran (2006), p. 91-95; Valder and Wieske (2006), p. 221-226; Krins (2007), p. 269-279; Temme (2008), p. 374-380; Gilke (2008), p. 380-383; Wieske (2008), p. 388-394; Ulfbeck (2011), p. 219-225; Valder (2013), p. 133-140; Wieske (2013), p. 272-277.
379. Gran (2004), p. 4-6; Gass (2000), p. 205; Ulfbeck (2011), p. 219.
380. Ulfbeck (2011), p. 219.
381. Gran (2004), p. 2. Cf. Wieske (2013), p. 277. Wieske takes the view that problems with the delivery under a logistic contract should only be subject to the general rules on contract.
382. Ulfbeck (2011), p. 219-225; Ramberg (2004), p. 135-151. Furthermore: Krins (2007), p. 269-279; Gran (2004), p. 1-14; Wiekse (2002), p. 177-182.
383. Gass (2000), p. 203-213.
384. Cf. Ulfbeck (2011), p. 219-225; Ramberg (2004), p. 135-151. These authors advocate that certain logistic contracts in which the entire 'supply chain management' is outsourced should not be subject to transport law.
385. Wieske (2002), p. 178.
386. Gran (2004), p. 2; Thume (1994), p. 383; Krins (2007), p. 271; Temme (2008), p. 377; Valder (2013), p. 133.

provider depends on the particular logistic activities it performs.[387] The solutions for localized and unlocalized loss which can be found in the law applicable to multimodal contracts can be used to determine the rules applicable for logistic contracts. The applicable law can easily be determined if loss, damage or delay can be attributed to a certain element under the contract. If the loss, damage or delay cannot be localized, however, then the most favourable law for the person suffering damage can be applied.[388]

It therefore appears that a 'two step' approach to determining the applicable law for incompatible rules concerning mixed contracts (in the narrow sense) might be best.[389] The first step would be to analyse whether the contract can be subdivided into separate elements and if the loss, damage or delay can be attributed to a particular element, then the law applicable to that element would determine the outcome of the case.[390] If this cannot be attributed to a single element or it is not possible to distinguish elements, then the law of the most dominant obligation would apply.[391] The second step would be to leave it to the court to interpret the contract and the relevant provisions and to come up with the solutions which best suit the specific circumstances of every case.[392]

387. Gran (2004), p. 9.
388. Wieske (2002), p. 178.
389. Temme (2008), p. 378 and the literature referred to in fn. 27.
390. See also: Koller (2014), p. 311.
391. This method was already described by Meijer in his commentary to: HR 21 February 1947, 211947, *NJ* 1947, 154 with commentary from E.M. Meijers.
392. Support for this can be found in the German Civil Code in § 313 BGB and in the Dutch Civil Code in art. 6:248 BW.

Chapter 6

Transshipment: Theories of mixed contracts applied

6.1 Introduction

The terminal operator who is the object of this study, generally takes upon himself the responsibility for the carriage of goods between the sea port and inland locations. He concludes a contract with either the (main) carrier or directly with the cargo interests. In those cases the terminal operator is responsible as an inland carrier under transport law in addition to the performance of other services and duties such as storage. In these cases it is also important to determine which part of the total performance of the terminal operator's duties falls within the scope of the inland contract of carriage. The scope of an inland contract of carriage and the period of responsibility of the inland carrier is from the moment of taking over until delivery. The legal concepts of 'taking over' and 'delivery' will therefore be discussed in the first paragraph of this chapter.

One question related to the matter of determining the scope of a contract of carriage is whether transshipment falls within the definition of carriage of goods to which transport law applies. Goods are often moved from one place to another while handled in the port by stevedores and terminal operators. This can either be vertically, from a vessel to the quay, or horizontally, from one stack to another. The legal nature of the transshipment of goods is discussed in paragraph 6.3.

Furthermore, when goods are transported under a multimodal contract, there may be some uncertainty over the demarcation between transport stages. This question often arises when goods are stolen or damaged during the transshipment phase while they are being moved from one vehicle to another, for example, when goods are discharged from a sea vessel, stored for a few days and loaded onto a truck which then transports them from the sea port to an inland location. The attribution of (part) of the transshipment process to a transport stage has an effect on the liability of the multimodal carrier. This follows from the diverging (unimodal) transport law regimes applicable pursuant to the network system which is applicable under Dutch, English and German law. This, in its turn, also affects the stevedore's legal position. If the transshipment phase does not constitute an independent transport stage, then to which transport stage should it be assigned? Paragraph 6.4 discusses the demarcation of transport stages under multimodal contracts of carriage.

6.2 The period of responsibility under the contract of carriage

The contract of carriage and generally also the carrier's period of responsibility covers the time that the goods are in his custody, from the moment they are taken

over for transport until they are delivered.[393] Goods are taken over by the carrier when they are brought under the carrier's control and they are delivered when control passes to the consignee or a person acting on his behalf. Taking over and delivery are bilateral acts where one party surrenders control to the other party who accepts control over the goods.[394] Taking over and delivery are therefore two sided legal acts aimed at making the goods available to the other party who can exercise the actual or legal control over the goods. Merely making the goods available to the consignee (unilaterally) at the destination, by for example, placing them at the front door, does therefore not end the period of responsibility.[395] Furthermore, it is not necessary that the goods physically move from one party to the other. Contrary to the factual acts of loading and discharge, taking over and delivery are legal acts and do not require physical movement. It is sufficient that the other person gains control of the goods without them actually being transferred.[396] This is in line with the rules on transfer of property.[397]

The moment of taking over and delivery delimitates the contract of carriage. This contract of carriage does not only cover the actual movement of the goods from A to B, for the goods may already be (or may have been) in storage in custody and control of the carrier for a period of time.[398] In that case, the contract of carriage extends to the time the goods were in storage. In some cases, however, the period of storage constitutes a separate element which is not absorbed into the contract of carriage. The carrier is liable for any loss, damage or delay which occurs to the goods during the period of responsibility. This liability is of a mandatory nature and any clause decreasing the carrier's liability is null and void.[399]

Under the H(V)R, the period of responsibility does not always stretch from taking over until delivery. A carrier who performs carriage under a contract of carriage by sea subject to the H(V)R is therefore not always mandatorily liable during the entire period between the moment of taking over and delivery. This follows from the scope of application of the H(V)R which 'cover the period from the time the goods are loaded on, to the time they are discharged from, the ship'.[400] The period during which the sea carrier is mandatorily liable is also referred to as the 'tackle to tackle period'. It covers the period between the beginning of loading until the end of discharge.[401] As a result, there may be a period from taking over until the beginning of loading and the period between the end of discharge until the moment of delivery that the carrier is not subject to the mandatory liability regime of the H(V)R. As the H(V)R are not applicable before loading and after discharge, the car-

393. Art. 17.1 CMR; art. 18.1, 18.3, 18.4 MC; art. 23.1 COTIF-CIM; art. 3.1, 16.1 CMNI art. 12 RR; art. 4 HHR. Cf. art. I(e) H(V)R.
394. HR 17 February 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289 with commentary from K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy).
395. Dorrestein (1973), p. 1120.
396. Boonk (1993), p. 97; Japikse (1980), p. 114.
397. Art. 3:114 BW; art. 3:115 BW.
398. Palmer (2009), p. 927-928; Asser/Japikse 7-I (2004), nr. 153.
399. Art. 41 CMR; art. 47 MC; art. 5 COTIF-CIM; art. 25 CMNI; art. 79.1 RR; art. 23 HHR. Some conventions are two way mandatory: art. 41 CMR; art. 5 COTIF-CIM; art. 79.2 RR.
400. See art. I (e) H(V)R.
401. Art. I (e) and art. VII H(V)R.

rier's liability during these periods depends on the national law governing the contract of carriage. Depending on the applicable national law, the carrier can exclude liability in a so-called 'before-and-after' clause.[402] These clauses often exclude the carrier from any liability for damage or loss caused while the goods are in his custody but before loading them onto the ship and after discharge from the ship.

The stevedore who performs the carrier's duties before loading and after discharge can also rely on these clauses if the contract of carriage contains a Himalaya clause to its benefit. However, these clauses can only be to stevedore's advantage if the performance of stevedoring duties falls within the scope of the contract of carriage.[403] Consequently, it is important to establish the exact moment that the goods are taken over and delivered.[404]

It is not always easy to determine the exact time goods are taken over or delivered by the carrier. The carrier and the shipper can take over or deliver the goods for transport directly or indirectly through servants, agents or independent contractors.[405] They could be stevedores or freight forwarders and they obtain constructive/indirect possession of the goods. The carrier gains custody of the goods when they are received by a person, such as a stevedore, acting on his behalf.[406] This should be distinguished from the agreement between the carrier and the stevedore. In cases of stevedoring services performed on behalf of the carrier, the carrier and the stevedore usually mention the goods and vessel to be loaded for the purpose of transport in the stevedoring contract. Moreover, the carrier and stevedore often agree that the goods are not taken over by the ship before they are placed on deck or in the holds. This however, is a mere distribution of obligations between the carrier and the stevedore and does not affect the relation between the carrier and cargo interests.

The contract of carriage may end with the delivery if the goods remain in the custody and control of the carrier while they are subject to another type of contract, like a contract for storage or hire. The contract of carriage ends the moment the other contract becomes operative.[407] This can also occur at the beginning of a voyage. In cases of carriage by inland waterways, the moment of taking over and delivery is usually restricted to the period of time that the goods are on board the vessel. Art. 3.2 CMNI states that taking over and delivery takes place on board the

402. See para. 9.2.2 below.
403. English case law on this matter: Judicial Committee of the Privy Council, Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty. Ltd. [1980] 2 Lloyd's Rep. 317 (The New York Star); Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto); Queen's Bench Division (Commercial Court), Raymond Burke Motors Ltd. v. The Mersey Docks and Harbour Co [1986] 1 Lloyd's Rep. 155. The leading Dutch case: HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 with commentary from R.E. Japikse, *S&S* 1997, 121 (Sriwijaya). Furthermore: Zwitser (2012), p. 131-132; Chao and Nguyen (2007), p. 194.
404. Clarke (2014), nr. 54b, p. 183-185.
405. Art. 4.2 HHR; art. 12.2 RR. Furthermore: Asser/Japikse 7-I (2004), nr. 153.
406. Herber (2014), § 498 HGB, Rn. 36.
407. In order to determine whether a period of storage prior to or following the carriage is covered by the contract of carriage or whether it constitutes a separate contract independent from the contract of carriage depends on the type of mixed contract concluded. See above Part II on mixed contracts.

vessel unless otherwise agreed. The exact moment of taking over and delivery, therefore, often depends on the circumstances of a case and, in particular, the terms in the contract of carriage. A relevant factor is the agreement between the parties to the contract of carriage on the loading or discharge process, especially when it concerns other modes of transport than carriage by sea (see below paragraph 6.2.2).

Transport documents too, play an important role in determining the moment that goods are taken over and delivered.[408] Documents like consignment notes, way bills and bills of lading can serve as evidence of the receipt of the goods.[409] However, signing or transferring these documents does not always launch or terminate the scope of the contract of carriage as the important part is the actual transfer of possession of the goods. A received-for-shipment bill of lading cannot replace the moment the goods are actually taken into the carrier's custody.[410]

6.2.1 **From taking over…**

'Taking over' is the moment of receipt of goods for carriage, the moment the carrier obtains possession of the goods. This occurs at the carrier's premises or at another point of collection. The carrier must actually gain control of the goods for them to be considered as 'taken over'. Consequently, goods which have already been loaded on a vehicle, but which remain in the sender's control, are not regarded as having been taken over yet. However, goods which are awaiting loading by the carrier are in the carrier's custody from the moment they were handed over to him.[411]

These examples illustrate how important the actual moment of taking over is. It is relevant, yet not decisive, to determine which party to the contract of carriage is under the obligation to load the goods onto a vehicle. The obligation of loading or discharge can be assumed by either the carrier or by the shipper/consignee. Unless the parties to the contract of carriage by sea agree otherwise, the sea carrier is under the obligation to load the goods.[412] This duty can be distributed between the carrier and the shipper/consignee by national law for other modes of transport. In the absence of mandatory national provisions this is usually arranged in the contract of carriage. If the goods are damaged during loading or discharge by the cargo interests, the carrier is exonerated from liability.[413] There is, however, a default rule which determines that the shipper is under obligation to load, stow and secure the cargo in carriage by inland waterways.[414]

408. See: Schouten (2012), p. 50 ff.
409. Bugden and Lamont-Black (2013), p. 124.
410. Herber (2014), § 498 HGB, Rn. 38.
411. Clarke (2014), nr. 206-207, p. 341.
412. Art. III.2 HVR; art. 13.1 RR.
413. Art. 17.4 (c) CMR; art. 23.3 (c) COTIF-CIM; art. 18.1 (b) CMNI.
414. Art. 6.4 CMNI; art. 3.2 CMNI.

A Carrier has the duty to load

The shipper hands the goods over to the carrier if the carrier is under obligation to load them onto the vehicle, This can occur either directly or indirectly and does not have to be physically performed by the shipper himself. It often occurs through a third party, e.g. a freight forwarder.[415] The contract of carriage commences the moment he gains custody of the goods for the purpose of loading them under the contract of carriage. In this case the goods are loaded at the risk of the carrier.

> This is in line with a recent German case where a *Fixkostenspediteur* (under German law liable as a carrier[416]) stored goods for a substantial period of time before transporting them to their destination. The *BGH* decided that the carrier's period of responsibility commenced when goods were in the carrier's custody, even if they had been stored for several days before they were loaded onto a vehicle. Relevant facts of the case are that the carrier was under the obligation to load the goods onto the vehicle and that the contract of carriage had already been concluded. Although the instruction to transport the goods had already been given, the carrier decided to postpone the performance of the transport due to a lack of transport capacity. For this reason the *Fixkostenspediteur* was liable for the damage which occurred during the pre-transport stage under transport law and not under otherwise applicable German storage law.[417]

Activities which are performed before the actual transport of the goods are subject to transport law if a transport document has been issued or the contract of carriage has already been concluded and the carrier is under the obligation to load the cargo (unless the goods are in the custody of the carrier subject to another type of contract). If a carrier decides to postpone the transport for reasons unrelated to the goods but to issues on the carrier's side, this does not alter his liability. Moreover, a carrier who, in addition to his obligation to transport the goods, assumes auxiliary obligations such as storage, packaging or repackaging is subject to the mandatory liability regime for performing this contract of a mixed nature from the moment he gains custody of the goods. However, the period of responsibility does not commence if the goods are handed over to the carrier or stevedore for the purpose of mere storage or safekeeping, and no particular contract of carriage is concluded or in view, even though the intention to ultimately transport the goods is present.[418]

B Shipper has the duty to load

The parties to a contract of carriage by sea have the opportunity to deviate from the main rule by agreeing that the shipper is under obligation to load the goods. This usually occurs when a variation of a 'FIOS clause'[419] is inserted into the

415. Furthermore: Verheyen (2014), p. 129.
416. § 459 HGB.
417. BGH 12 January 2012, *TranspR* 2012, 107.
418. Herber (2014), § 498 HGB, Rn. 40.
419. FIO: Free In and Out. FIOS: Free In and Out Stowed. FIOST: Free In and Out, Stowed, Trimmed. More variations are possible.

agreement.[420] The loading, discharge and stowage is then at the risk of the shipper.[421] This also applies to carriage by other modes of transport if it is agreed that the goods are taken over by the carrier after the shipper has performed his duty to load the goods onto the vehicle according to the agreement. This duty can also be discharged by a person acting on behalf of the shipper. This, however, does not absolve the carrier from all obligations. If the shipper is under obligation to perform the loading process, it is important to recognize that the carrier is under the residual obligation to keep watch on the loading operations so as to ensure the safety of the vehicle and goods during transport.[422]

The situation in which a stevedore performs his duties, including loading or discharge from the vessel, on behalf of the cargo interests pursuant to a FIOS clause, has to be distinguished from a situation in which the consignor hands the goods over to the stevedore and employs the stevedore for taking care of the goods until the outgoing transport commences. In these cases the sea carrier assumes no responsibility for the goods before the loading commences and a direct contract is concluded between the stevedore and the consignor. Although the duties at the terminal in the port of loading are performed on behalf of the consignor, the loading is still usually performed on behalf of the sea carrier. For this reason, the goods are brought in the sea carrier's custody and the contract of carriage by sea starts the moment the loading commences.[423]

6.2.2 …Until delivery

The contract of carriage ends with the delivery of the goods. This is the moment the carrier surrenders control over the goods with the expressed or implied consent of the consignee who is then in a position to exercise actual control over the goods.[424] Neither international transport conventions nor Dutch law contains a description of the term delivery. According to the parliamentary history of Book 8 BW the moment delivery takes place is not defined in the law but depends on the circumstances of the case and should therefore be determined on a case-by-case basis.[425] For this reason, the exact time the goods are delivered and the carrier is no longer responsible for them, depends on the circumstances of each specific case. The moment of delivery is also relevant when calculating the one year time bar within which suit can be brought to the carrier.[426]

---

420. These clauses are commonly used in charterparties, and especially in time or voyage charters. These clauses can subsequently be incorporated into the bill of lading terms.
421. See para. 6.2.2 below.
422. House of Lords, Court Line Ltd. v. Canadian Transport Company Ltd. [1940] 67 Lloyd's Law Rep 161. Carver (2011), p. 660. Furthermore: Oostwouder (2001), p. 96; Herber (2014), § 498 HGB, Rn. 39; Claringbould (2015 a), nr. 75, p. 4-6. Cf. art. 3.5 CMNI.
423. Herber (2014), § 498 HGB, Rn. 37.
424. Dutch case law: HR 17 February 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289 with commentary from K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy). Furthermore: Claringbould (2012 c), nr. 67, p. 6-10. German case law: BGH 19 January 1973, *VersR* 1973, 350; BGH 9 November 1979, *VersR* 1980, 181. Under English law: Carver (2011), p. 663 in fn. 543.
425. Claringbould (1992), p. 67.
426. Art. III 6 HVR; art. 8: 1711 BW.

A Which party is under the obligation to discharge the goods? FIOS clause

A stevedore can perform typical activities relating to sea ports, like loading and discharge, stowing, trimming and handling, which are generally the responsibility of the sea carrier on behalf of the cargo interests.[427] This usually occurs when a variation of a 'FIOS clause'[428] is inserted into the agreement. These clauses often contain wording like 'the cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by the Charterers free of any risk, liability and expense whatsoever to the Owners',[429] and are commonly used in charter parties and especially in cases of time or voyage charters.[430] These clauses in charter parties may affect the parties to a bill of lading if they are validly incorporated.[431] In this way, some of the responsibilities of the carrier are transferred to the relevant cargo interests.

A FIOS clause which is incorporated into a bill of lading subject to the HVR poses questions about their content and validity. First of all, does the clause merely refer to the division of costs or also to the division of risks? In other words, does the clause only shift the duty to pay the costs for loading, stowage and discharge or does the responsibility for this process pass to the relevant cargo interests? Cargo interests are inclined to take the former view whereas carriers usually take the latter. If a clause like this merely shifts the duty to pay the costs to the cargo interests, the carrier remains liable for any loss or damage which might occur during the performance of these duties. On the other hand, the carrier would not be liable if the responsibility transferred to the cargo interests. Under Dutch, German and English law, the FIOS clause incorporated into a bill of lading is generally considered a responsibility clause and not merely a clause referring to the payment of costs.[432] However, the FIOS clause shifts responsibility to the relevant cargo interests only if it is clear from the wording that the carrier wishes to take no responsibility for the loading and or discharge. It does not have that effect when the carrier merely indicates who pays for the performance of these activities.[433]

The question furthermore arises as to whether a FIOS clause incorporated into a bill of lading which shifts responsibility for some of these duties to the cargo interests, is contrary to the mandatory provision of the Hague Visby Rules.[434] Accord-

427. The stevedore can also be appointed by a port authority. In that case the carrier nor the cargo interests is vicariously liable for acts and omissions of the stevedore. The decision about which party is liable for faulty handling of the cargo depends on the division of risk in the contract of carriage or applicable mandatory law. See for example: Court of Appeal, A. Meredith Jones and Co. Ltd. v. Vangemar Shipping Co. Ltd. [2000] 2 Lloyd's Rep. 337 (The Apostolis No. 2).
428. FIO stands for: Free In and Out. FIOS: Free In and Out Stowed. FIOST: Free In and Out, Stowed, Trimmed. More variations are possible.
429. See: art. 5 of the GENCON 1994 (voyage charter).
430. Furthermore: Van Overklift (2005), p. 35.
431. For an extensive comparative law study on the legal aspects relating to the issuance and the transfer of bills of lading during the performance of a voyage charter and more specifically the incorporation of charter party clauses in the Bill of Lading I refer to Seck (2014), Ch. 5.
432. The Netherlands: Boonk (1993), p. 190-191 with reference to HR 19 January 1968, ECLI:NL:HR:1986:AB5254, *NJ* 1968, 112 with commentary from G.J. Scholten, *S&S* 1968, 20 (Favoriet). Germany: Pötschke (2014 a), § 486 HGB, Rn. 10-11; Carver (2011), p. 659-660.
433. Cleveringa (1961), p. 481; Herber (2014), § 498 HGB, Rn. 32 ff; Carver (2011), p. 660.
434. Art. III 8 HVR.

ing to art. II and III 2 HVR 'the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried'. Under Dutch law, the carrier is generally obliged to properly and carefully perform the duties related to the loading and discharge if he, or persons employed by him, undertake or actually perform these duties.[435] The carrier may delegate this obligation to his contracting party and is not liable to the cargo interests for any loss or damage sustained during the performance of these duties by the cargo interests.[436] This is line with the general nature of the convention which tries to restrict the far-reaching liability exclusions formerly used by carriers in their contracts and to create uniformity in these clauses. The drafters of the convention did not intend to obstruct useful common practice in the port, such as FIOS clauses, which are appreciated by carriers as well as by cargo interests.[437]

This is similar to the view prevailing in England.[438] Before *Pyrene v Scindia,* art. II and III 2 HVR were generally considered to determine that the carrier was always obliged to take responsibility for these activities and a clause exempting the carrier from liability by allocating the risks and costs to the cargo interests would be void.[439] However, in 1954, Devlin J (as he then was) reasoned that the object of the Rules was to define 'not the scope of the contract service but the terms on which that service is to be performed.'[440] The HVR therefore only apply to those parts of the loading and discharge which the carrier undertakes in his contract of carriage. If stevedores perform obligations on behalf of persons other than the carrier, the carrier does not bear responsibility for these activities as such clause refers to the scope of the contract of carriage.[441] This was later upheld by the House of Lords in '*the Jordan II*' and '*Renton*'.[442]

435. Seck (2014), p. 286-289.
436. HR 19 January 1968, ECLI:NL:HR:1986:AB5254, *NJ* 1968, 112 with commentary from G.J. Scholten, *S&S* 1968, 20 (Favoriet).
437. Royer (1959), p. 429-432. Furthermore: Cleveringa (1961), p. 481-482; Boonk (1993), p. 190.
438. Carver (2011), p. 659-660 with reference to House of Lords, Jindal Iron and Steel Co. Ltd. and others v. Islamic Solidarity Shipping Co. Jordan Inc. [2005] 1 Lloyd's Rep. 57 (The Jordan II); House of Lords, G.H. Renton & Co., Ltd. v. Palmyra Trading Corporation [1956] 2 Lloyd's Rep. 379; Queen's Bench Division, Pyrene Company Ltd. v. Scindia Steam Navigation Company Ltd. [1954] 1 Lloyd's Rep. 321.
439. Carver (2011), p. 657 with reference to: King's Bench Division, Heyn and others v. Ocean Steamship Company Ltd. [1927] 27 Lloyd's Law Rep. 334 (The Eumaeus).
440. Queen's Bench Division, Pyrene Company Ltd. v. Scindia Steam Navigation Company Ltd. [1954] 1 Lloyd's Rep. 321.
441. There has been some serious criticism on FIOS clauses especially after the decision in the English Court of Appeal, Balli Trading Ltd. v. Afalona Shipping Co. Ltd. [1993] 1 Lloyd's Rep. 1 (The Coral). This case on damage to cargo due to insufficient stowage dealt with a bill of lading which incorporated the terms of the NYPE charterparty. Clause 8 of this charterparty provides: 'the charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the captain'. As the bill of lading incorporated the terms of the charterparty, the shipowner argued that there was an express agreement that the shipowner did not bear responsibility for the stowage. According to the English Court of Appeal, the shipowner was therefore not liable to the cargo owner. It was held that the clause was not in conflict with art. III (8) HVR. Cf. Gaskell (1993), p. 170.
442. House of Lords, Jindal Iron and Steel Co. Ltd. and others v. Islamic Solidarity Shipping Co. Jordan Inc. [2005] 1 Lloyd's Rep. 57 (The Jordan II); House of Lords, G.H. Renton & Co., Ltd. v. Palmyra Trading Corporation [1956] 2 Lloyd's Rep. 379.

This is also the prevailing view in Germany, where FIOS clauses which allocate both the risks and the costs to the relevant cargo interests are valid.[443] In France and the USA on the other hand, these clauses are mere cost division clauses and the carrier remains responsible for the performance of these duties under the HVR.[444]

However, art. III 2 HVR does impose duties with regard to loading, handling, stowing and discharge if the carrier actually performs these duties, irrespective of whether the contract contains a FIOS clause. If the carrier, or a person employed by the carrier, performs the loading and discharge contrary to the FIOS clause contained in the contract, the carrier is nevertheless liable for the loss or damage caused.[445] Moreover, the carrier cannot avoid all responsibility. There could be an overriding responsibility or right on the carrier to supervise the loading and discharge operations. In that sense the carrier can be held liable if it can be established that any loss was due to faulty supervision or a failure to intervene when necessary.[446]

This gives rise to another question viz. whether a FIOS clause only transfers the responsibility for certain duties under the contract of carriage to the relevant cargo interests or whether it also refers to the scope of the contract of carriage. According to the former point of view, the contract of carriage covers the discharge of the goods even though the carrier is not liable for loss or damage caused during this process. According to the latter point of view however, the taking over and delivery by the carrier to the consignee under the contract of carriage takes place on board the vessel. The carrier takes over the goods when the goods are placed on board and the goods are delivered when discharge commences, for example when the stevedore's crane (employed by the shipper/consignee) attaches itself to the goods. The contract of carriage therefore does not extend to loading/discharge process and to the time that the goods are at the terminal. This question is extremely relevant as it has consequences for matters like the burden of proof,[447] the time bar[448] and the grounds for liability,[449] which are particularly relevant for cases where goods

443. Herber (2014), § 498 HGB, Rn. 39. BGH 23 May 1990, *TranspR* 1990, 328, 329.
444. Seck (2014), p. 289-291; Tetley (2008), Ch. 24, p. 8-9; Gaskell, Asariotis and Baatz (2000), p. 262.
445. See: Hof Amsterdam 5 July 2007, ECLI:NL:GHAMS:2007:BI0511, *S&S* 2009, 26; Rb. Rotterdam, 18 January 2006, ECLI:NL:RBROT:2006:BA6922, *S&S* 2006, 50 and *S&S* 2007, 62.
446. Carver (2011), p. 660 with reference to House of Lords, Court Line Ltd. v. Canadian Transport Company Ltd. [1940] 67 Lloyd's Law Rep 161. Furthermore: Oostwouder (2001), p. 96; Boonk (2010), p. 88-89; Herber (2014), § 498 HGB, Rn. 39.
447. If it is considered that a FIOS clause is able to establish that goods were delivered, which terminates the contract of carriage, before discharge, it is up to the claimant who holds the carrier liable for breach of his obligation of result under the contract of carriage to prove that the goods were damaged when they were delivered; i.e. before they were discharged. This is different if the FIOS clause is thought to state the terms on which discharge is performed with the result that the scope of the contract of carriage extends to the discharge and possibly to the after discharge period. In that case, the claimant is merely under the obligation to prove that the goods were damaged at delivery to the terminal and it is up to the carrier to provide evidence that damage was caused by events for which the carrier was not liable (for example with regard to a before-and-after clause).
448. The time bar starts to run when the goods are delivered.
449. The question whether a contractual or extra-contractual claim can be brought, depends on whether the damage occurred before or after the moment of delivery. If goods sustain damage due to acts or omissions of the carrier or persons working on his behalf within the scope of the contract of carriage, a contractual claim can be brought. However, if damage occurs outside the contract of carriage, an extra-contractual claim has to be brought. See: Haak and Zwitser (2003), p. 543.

are lost or damaged, or when it is unclear whether the loss or damage occurred during or after discharge or during or before loading.

Under English law, a FIOS clause usually transfers responsibility for the loading and discharge processes to the cargo interests by defining the terms on which these processes are to be performed and does not refer to the scope of the contract of carriage.[450] Under German law, however, a FIOS clause regularly reduces the scope of the contract of carriage. The delivery of the goods therefore takes place on board the vessel before the goods are discharged.[451] Under Dutch law, the clause allocates the risks and the costs to the relevant cargo interests but generally does not define the scope of the contract of carriage. However, there have been cases in which the court took a different stance.[452] Whether that was justified will be discussed below.

Article 13.2 of the Rotterdam Rules recognizes FIOS clauses. The carrier is not liable if loss, damage or delay occurs when these operations are done by or on behalf of the cargo interests (art. 17.3.(i) Rotterdam Rules). The period of responsibility of the carrier can be determined by the parties to the contract, by agreeing on the time of receipt and the time of delivery. However, the time of receipt cannot be later than the initial loading and the time of delivery cannot be earlier than the final discharge under the contract of carriage according to art. 12.3.(a) and (b) Rotterdam Rules. This means that the carrier still has some responsibility for the goods, although a valid FIO clause shifts the responsibility for loading, handling, stowing, and discharge the goods to the cargo interests.[453]

For other modes of transport, such as carriage by road or by inland waterways, the agreement on the obligation to load and discharge in contracts of carriage more clearly reflects the intentions of the parties with regard to the scope of the contract of carriage.[454] This is due to the fact that the party who undertakes these obligations for carriage of goods by road usually performs these himself and no independent contractor is employed to act on his behalf. Furthermore, no use is made of documents of title. The goods are considered delivered when they arrive at their destination and are made available to the consignee for removal. If the consignee is obliged to perform the discharge, however, the goods are considered delivered the moment the consignee gains and accepts control over them. This is not always the exact moment the goods are actually discharged or handed over to the consignee, but may occur when the consignee merely has access to the goods still situated in the vehicle for the purpose of discharge.[455] It could be quite sufficient for the car-

450. Carver (2011), p. 659-660.
451. Herber (2014), § 498 HGB, Rn. 39. Furthermore: Schaps, Abraham and Abraham (1978), p. 633-634.
452. Japikse (1980), p. 116-118.
453. According to Boonk this should be the case under the current law in: Boonk (2010), p. 88-89. Furthermore, the carrier will still be liable for his own actions, if regardless of a FIO clause, the relevant operations are carried out by the carrier: Sturley, Fujita and Van der Ziel (2010), p. 90-92; Røsaeg (2002), p. 324-325; Diamond (2008), p. 148-149; Diamond (2009), p. 469-470; Delebecque (2010), p. 83-86; Fujita (2008-2009), p. 355-356.
454. See for example art. 4.1 (e) AVC 2002 ('*Algemene Vervoerscondities 2002*' 'Dutch Transport Conditions') where the obligation to load, stow and discharge is, unless otherwise agreed, assumed by the shipper. Claringbould (2015 a), p. 4-6.
455. See for example: HR 24 March 1995, ECLI:NL:HR:1995:ZC1677, *NJ* 1996, 317 with commentary from R.E. Japikse, *S&S* 1995, 74 (Mars).

rier to open the hatch covers while the vessel is moored at the quay in order to give the consignee the opportunity to exercise control over the goods. In that case it is not necessary for the consignee to take immediate possession of the goods, he can take control of them by, for example, giving instructions about the discharge.[456]

Concerning the carriage of goods by inland waterways, the CMNI takes a different approach than the sea carriage conventions. Art. 3.2 CMNI states: 'Unless otherwise agreed, the taking over and delivery of the goods shall take place on board the vessel.' According to this point of view, the period of responsibility covers the time the goods are in the carrier's control, which is the period in which the goods are located in the vessel. The period of responsibility therefore does not cover the loading and discharge of goods. This is in line with art. 6.4 CMNI which determines that the shipper is under the obligation to load, stow and secure the cargo.[457] It is unfortunate that the convention does not determine who is responsible for the discharge of the goods. It seems that this matter is left to national law.[458] Under Dutch law the obligation to load and stow the goods is on the shipper and the obligation to discharge them is on the consignee (art. 8:929 sub 2 BW, which provision is non-mandatory).[459] This is different under German law, where these obligations are in principle all on the shipper (§ 412 II HGB).

B A parallel with delivery under a contract of sale

Delivery under the contract of carriage has been compared to delivery under the contract of sale.[460] Under a contract of sale, goods are delivered when they come into the possession of the buyer.[461] There are two views on delivery relating to contracts of sale. In the first view delivery is a unilateral act of the seller who takes all the necessary steps to make the goods available to the buyer.[462] It is therefore not necessary that the buyer assumes possession of the goods in order to constitute delivery. A seller who leaves the goods behind at their destination without any cooperation of the buyer therefore also meets his responsibilities. In the second view, delivery can only take place with the consent of the buyer. The goods are delivered when the buyer actually takes possession of them . This view is reflected in Dutch law, see art. 7:9 sub 2 BW. For this reason, goods can only be delivered if there is consensus between seller and buyer and the buyer is given the opportunity to exercise control over the goods. Under the contract of sale it is not necessary for

456. Herber (2014), § 498 HGB, Rn. 43-45. Cf. Japikse (1980), p. 117; Boonk (2012), p. 115-116.
457. In case damage to the ship occurs during the loading or discharge by the shipper, the question arises whether the carrier can no longer bring a contractual claim because the contract of carriage already came to an end. See: Claringbould (2014), p. 30.
458. Otte (2014 a), art. 6 CMNI, Rn. 44a.
459. In a recent case which came before the Dutch court it was held that the shipper who was not under the obligation to discharge the goods cannot be held liable under art. 8:319 BW for the damage caused to the barge during the discharge by the consignee or persons employed by him. Hof Den Haag 23 February 2016, ECLI:NL:GHDHA:2016:439, *S&S* 2016, 52 (Elan). See: Claringbould (2016 a), p. 29.
460. Japikse (1980), p. 114.
461. Art. 7:9 BW. See: Schelhaas (2016), p. 31.
462. See: art. IV.A.-2:201 (1) DCFR; art. 31 CISG.

the buyer to have physical possession of the goods. Goods are also considered delivered if the buyer merely gains control over the goods (constructive possession).[463]

Every contract of carriage commences with the taking over and ends with the delivery of the goods.[464] This view is also expressed in the Rotterdam Rules where the delivery of the goods is an obligation imposed on the carrier under art. 11. Delivery takes place when the carrier loses the control and the goods pass to the consignee's control. This can be illustrated with a example of a case in which delivery takes place although the goods are never discharged from the vessel.

> The goods remain in the holds after the vessel arrives in the port of destination. The consignee presents the bill of lading to the carrier and gives instructions to the carrier to transport the goods with the same vessel to another destination, which the carrier accepts. So, the goods are never discharged from the vessel. They are made available to the consignee who can decide their fate. The first carriage terminates in the first port of destination as the consignee exercises control over the goods. This can be done by checking the goods for damage or by merely being able to do so without actually checking them.[465]

Although the goods were not actually handed over to the consignee, they were considered delivered when control of them passed to the consignee. This indicated the end of the contract of carriage and at the same time the moment the time bar started to run. Following this, every contract of carriage ends with the delivery of the goods.[466]

C Delivery is a bilateral act

The term delivery can be defined as the end of the contract of carriage whereby the carrier surrenders custody and control over the goods with expressed or implied consent of the consignee who then has the opportunity to exercise actual control over them.[467] This is in line with the decision taken by the Netherlands *Hoge Raad* in the case *Tele-Tegelen/Stainalloy*.[468] A similar decision was made for a contract of carriage by sea in 1997 where the *Hoge Raad* decided that there are two ways in which a contract of carriage could end. In the first of these, delivery takes place

463. Asser/Hijma 7-I (2013), nr. 290. Under a contract of sale goods are delivered in line with art. 3:114 and 3:115 BW. Cf. Goode (2004), p. 263-265.
464. Boonk (1993), p. 97 ff. Cf. Zwitser (2012), p. 133-135.
465. See: Japikse (1980), p. 119.
466. This is in line with the use of the term delivery in Dutch case law: HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 with commentary from R.E. Japikse, *S&S* 1997, 121 (Sriwijaya); HR 24 March 1995, ECLI:NL:HR:1995:ZC1677, *NJ* 1996, 317 with commentary from R.E. Japikse, *S&S* 1995, 74 (Mars); HR 20 april 1979, ECLI:NL:HR:1979:AC6562, *NJ* 1980, 518, with commentary from B. Wachter, *S&S* 1979, 83 (Smits/Ribro).
467. Dutch case law: HR 17 February 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289 with commentary from K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy). German case law: BGH 19 January 1973, *VersR* 1973, 350; BGH 9 November 1979, *VersR* 1980, 181. Furthermore: Schaps, Abraham and Abraham (1978), p. 633; Palmer (2009), p. 925-926.
468. Dutch case law: HR 17 February 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289 with commentary from K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy).

when goods are brought into the actual control (*feitelijke macht*) of the person entitled to the goods or a person acting on his behalf. And in the second, delivery takes place when goods arrive at their destination where, pursuant to another type of contract with the person entitled to the goods, they remain in the custody of the carrier, or a person employed by the carrier.[469] Consequently, it is not deemed necessary that goods are actually transferred to the consignee for the goods to be considered delivered under the contract of carriage. For this reason, the seemingly unambiguous term 'delivery' loses much of its simplicity. It is not confined to simply handing the goods over or to bringing the goods actually in another persons' possession. Goods can be considered delivered when they are brought under the control of the person who is entitled to the goods, for example when they remain in the custody of the carrier, for example subject to a contract of deposit.[470]

D Boundaries set by the nature of the bill of lading as a document of title

In principle, goods are delivered and the contract of carriage ends when control passes in accordance with the agreement between the parties. The parties can agree on the moment that control passes, by for example, defining who is responsible for the discharge of the goods or by making other arrangements for the goods after their arrival at their destination.[471] However, for contracts of carriage evidenced by bills of lading, the nature as a document of title brings with it that goods can only be available for removal by the consignee after presentation of the bill of lading to the carrier. The bill of lading is a document of title as well as one with a contractual function. It is the carrier's duty to surrender the goods to the holder of the bill of lading when he presents the bill of lading to the carrier identifying himself as such.[472] The possession of the bill of lading therefore gives control of the goods to the holder. What is more, the endorsement of a bill of lading can transfer possessory rights but also rights of ownership of the goods described therein if this is in accordance with the party's intention when endorsing the bill of lading.[473] For this reason, an agreement between the parties aimed at fixing the end of the period of responsibility before (in combination with a FIOS clause) or immediately after the fulfillment of discharge obligations (delivery clause) should be inoperative if the holder of the bill of lading is deprived of his control over the goods. An example of a 'delivery clause' is Clause 9 of the Conlinebill 2000, which states that 'any discharge [is] to be deemed a true fulfillment of the contract'. Agreements like this would be contrary to the nature of the bill of lading as a

469. HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 with commentary from R.E. Japikse, *S&S* 1997, 121 (Sriwijaya) with a reference to HR 24 March 1995, ECLI:NL:HR:1995:ZC1677, *NJ* 1996, 317 with commentary from R.E. Japikse, *S&S* 1995, 74 (Mars).
470. See: Japikse (1980), p. 114.
471. HR 17 February 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289 with commentary from K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy); HR 24 March 1995, ECLI:NL:HR:1995:ZC1677, *NJ* 1996, 317 with commentary from R.E. Japikse, *S&S* 1995, 74 (Mars).
472. In the Netherlands this follows from art. 8:441 sub 1 BW. Under English law there is a statutory rule on the right to delivery of the goods in section 2 COGSA 1992. See: Smeele (2009), p. 251-253; Carver (2011), Ch. 5-6; Girvin (2011), Ch. 8; Scrutton (2015), Ch. 2, 10; Stevens (2012), p. 54-56; Lamont-Black (2015), p. 280-299.
473. In the Netherlands this follows from art 8:417 BW. Under English law compare: Baughen (2015), p. 6-8.

document of title and therefore unlawful.[474] Delivery of goods only occurs when they are made available to the consignee who consents to their delivery and who then has the opportunity to exercise control over them. It is irrelevant whether the consignee actually exercises this control, it is merely necessary that control can be exercised. For this reason, agreements between the contracting parties on the manner by which goods are to be made available to the consignee for removal (for example on the division of loading and discharge obligations) should be distinguished from clauses which are merely aimed at excluding the carrier's liability. These clauses can be seen in the light of liability exclusion clauses within the boundaries set by mandatory provisions.

E Delivery orders

At what moment can goods carried under a bill of lading be considered delivered terminating a contract of carriage by sea? Is it at the moment the bills of lading are presented and the receiving agent receives the delivery order? Or is it at the moment the goods are actually removed from the port of destination for transport to the consignee? The Netherlands *Hoge Raad* dealt with these questions in the following case:

> Part of a consignment of bundles of wood stored in a stevedore's premises were stolen. This happened after discharge from the vessel *Sriwijaya* while the wood was awaiting removal by or on behalf of the person entitled to it. The cargo interests brought an extra-contractual claim against the stevedore. The contract of carriage contained a Himalaya clause and a before-and-after clause, which stated that the stevedore and the carrier were not liable for damage to or loss of goods which occurred after discharge but before delivery. However, these clauses could only have been invoked if the goods had not yet been delivered and the contract of carriage had not yet come to an end when the goods were stolen. The relevant facts to determine the moment of delivery were:
>
> — The goods were discharged and stored in the stevedore's terminal for the period between 16 and 30 November 1989.
> — On 15 or 16 November the receiving agent presented the bills of lading to the shipping agent and received a '*laat volgen*' (Delivery Order).[475]
> — On 11 and 13 December the receiving agent arranged for the removal of the goods with trucks.

The *Hoge Raad* followed the decision of the First Instance Court and the Court of Appeal and held that delivery takes place when goods are actually handed over to the consignee unless he obtains control over the goods at an earlier moment in time. According to the *Hoge Raad*, the consignee did not obtain control

474. Boonk (2012), p. 115-116.
475. '*Laat volgen*' or '*Laissez passer*' can be translated as a Delivery Order. However, a Delivery Order can take on more aspects than a 'laat volgen'. See: Boonk (1993), p. 106; Zwitser (2012), p. 54-55.

(*beschikkingsmacht*) over the goods by receiving the delivery order. Consequently, the contract of carriage did not come to an end before the goods were removed from the terminal on 11 and 13 December which was why the stevedore could still invoke the before-and-after clause pursuant to the Himalaya clause.

This decision has attracted a great deal of criticism from those holding a different view on the (legal) consequences of a delivery order (or '*laat volgen*', '*volgbriefje*', '*laissez passer*').[476] Delivery orders are generally issued when the goods have arrived in the port of destination after the presentation of a bill of lading.[477] The document often states that the goods are stored for the risk and account of the consignee and that storage costs are owed. Furthermore, the delivery order gives the consignee the opportunity to remove the goods from the designated storage facility at any desired moment.[478] Control of the goods may be transferred to the consignee depending on the content of the delivery order which may contain a variety of texts and forms.[479] One can infer from the document that goods are stored until they are collected by the person entitled to them, i.e. the goods remain with the carrier, or a person employed by him, pursuant to another type of contract with the person entitled to the goods (referred to by the *Hoge Raad* as a possible way for the contract of carriage to come to an end). A situation might arise whereby the consignee is entirely in control of the use of the delivery order to collect the goods and at the same time the carrier has fulfilled all contractual obligations so he can only await the moment that the goods are collected by the consignee. It should however be clearly stated on the delivery order that the intention of the parties is to end the contract of carriage. The wording that the goods are stored for the risk and account of the consignee does not satisfy as it can also refer to the carrier's responsibility and function as an exoneration clause, rather than determining the scope of the contract of carriage.

Japikse questioned the view taken in the *Sriwiyaja*-case where it was held that the consignee did not obtain control over the goods when receiving the delivery order and he feared that following this, a consignee could unilaterally determine the scope of the contract of carriage and could therefore postpone the moment of delivery with the time bar attached. For this reason, he emphasizes that the court did not challenge the previously discussed arguments relating to delivery orders and based its decision solely on the facts of the case at hand. The court took account of the circumstances of the case and decided that in this particular case, the goods were not delivered when the consignee received the delivery order. Consequently, he states that this decision does not preclude other courts from attaching signifi-

476. An electronic system is used for the release and delivery of containers, in the Belgian port of Antwerp see: Goldby (2015), p. 339-347.
477. In line with art. 8:481 BW and art. 8:482 BW.
478. Claringbould (2012 c), p. 8-9. See: Rb. Rotterdam, 4 October 2006, ECLI:NL:RBROT:2006:BD2316, *S&S* 2008, 53 where a road carriage stage was deemed to have commenced after the road carrier presented the bill of lading to the shipping agent and received the delivery order although the road carrier decided to leave the goods at the sea port terminal in order to transport the goods at a later moment in time.
479. R.E. Japikse in his commentary under: HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 (Sriwijaya).

cance to delivery orders when determining the moment of delivery under other circumstances.[480]

Thus, depending on the wording on the delivery order, the contract of carriage ends when the goods are brought into actual control (*feitelijke macht*) of the person entitled to them or a person acting on his behalf or when goods arrive at their destination where, pursuant to another type of contract with a person entitled to the goods, they remain in the custody of the carrier, or a person employed by the carrier. The presentation of a bill of lading by the consignee and the issuance of a delivery order by the carrier specifying that the contract of carriage comes to an end demonstrates a bilateral act whereby the carrier surrenders control over the goods with the consent of the consignee who then has the opportunity to exercise actual control over the goods.[481] If a delivery order terminates the contract of carriage, it is still possible that the carrier is responsible for the goods under another type of contract.

6.2.3 Taking over and delivery by the stevedore on behalf of the sea carrier

The sea carrier is responsible for the goods from the moment of taking over until their delivery to the consignee or a third party acting on the consignee's behalf (e.g. an inland carrier). The taking over takes place when the sea carrier, or a person acting on his behalf, gains custody over the goods in the port of loading. The goods may be handed over to a stevedore after the sea going vessel has arrived at the port of destination. This does not constitute delivery if the stevedore is employed by the sea carrier for the discharge and delivery of the goods to the consignee.[482] The contract of carriage by sea is operative from the moment the goods are taken over until they are delivered by the stevedore who acts on behalf of the sea carrier. When goods are delivered or picked up from the terminal by the consignor or consignee or a person acting on his behalf, the question arises as to the exact moment the taking over and delivery under the contract of carriage by sea takes place. Is it the discharge of the preceding vehicle? Or is the loading of the subsequent vehicle by the stevedore part of the contract of carriage by sea?

The answer to these questions depends on the agreement between the parties to the contract of carriage by sea about the obligations undertaken by the sea carrier. To avoid any conflict it is important to clearly state in the contract the exact moment that taking over and delivery take place. The contract should clearly mention all cargo handling operations which the sea carrier has undertaken to perform and

480. R.E. Japikse in his commentary under: HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 (Sriwijaya).

481. Claringbould (2012 c), p. 9. According to Claringbould, this bilateral act in which the carrier and the consignee reach consensus on the moment of transfer of control is required for the contract of carriage to end. This is different when under a contract of carriage by road, where no use is made of bill of lading, the carrier issues a delivery order. This unilateral act does not lead to delivery of the goods if the goods remain in the custody of the carrier. See: HR 20 April 1979, ECLI:NL:HR:1979:AC6562, *NJ* 1980, 518, with commentary from B. Wachter, *S&S* 1979, 83 (Smits/Ribro).

482. Whether this also applies to situations where the stevedore is employed by the cargo interests pursuant to a FIOS clause has been discussed above in para. 6.2.2 A.

which he may have delegated to the stevedore. If this includes the discharge from or loading onto/into an inland vehicle, these activities are also covered by the contract of carriage by sea.[483] This would be in line with the agreement between the sea carrier and the stevedore. The stevedore's invoice usually bills the carrier for the 'cargo handling charge'. This charge includes the costs of discharge from and loading onto the subsequent vehicle. This is mainly relevant for the relation between the sea carrier and his independent contractor, but it can indicate the agreements made and reflect the intention of all parties involved. The sea carrier and also the independent contractor, if there is a Himalaya clause in his favour, can then benefit from the terms of the contract of carriage throughout the transshipment process.[484]

This is more in line with the practice in port than the suggestion that the goods under the contract of carriage by sea are delivered when the loading into the subsequent vehicle commences. The delivery of the goods under the contract of carriage by sea has been said to take place when the loading into a truck at the sea port terminal commences.[485] Following this, the contract of carriage by sea ends when the loading into the truck begins. One question remains; when does the loading operation actually begin? Is it when the goods are picked up in the stack in order to take them to the truck for the purpose of loading, or is the transport from the stack to the truck still covered by the contract of carriage by sea and is only lifting and placing into the truck not covered by this contract? Irrespective of the answer to the question on the commencement of loading, this would mean that part of the transshipment performed by the independent contractor of the sea carrier would not be covered by the contract of carriage by sea. As a result of this, the contract of carriage by sea, including any terms benefitting independent contractors, would not be operative during the loading into/onto inland vehicles. If loss or damage were to occur during these operations, the independent contractor could therefore not benefit from the terms of the contract of carriage by sea.[486]

It is clear that the latter view may have undesirable consequences for independent contractors who perform transshipment in the port. It would therefore seem sensible for those running this risk to request that the sea carrier explicitly determines the moment of taking over and delivery under the contract of carriage by sea and define that these moments should lie before discharge resp. after loading the

483. See also: HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris).
484. Glass (2004), p. 216.
485. BGH 18 October 2007, *TranspR* 2007, 472. In this case the *BGH* determined that the loading onto the truck had already started when the goods sustained damage. One of the machines sustained damage before it was lifted on the truck during the maneuvers of the mafi-trailer. The chains which held the machine in its place during the transfer from the vessel to the truck with the mafi-trailer, were unbroken when the goods were lifted onto the truck and as the mafi-trailer repositioned itself to lift the machine onto the truck more easily. The crate fell from the mafi-trailerat at that moment and was damaged. The loading had already commenced and the goods were damaged due to the risks that involved in the loading process.
486. England Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto) at 544-545. The Netherlands: HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 (ann. R.E. Japikse), *S&S* 1997, 121 (Sriwijaya). Furthermore: Glass (2004), p. 216; Tetley (2003), p. 54; Haak and Zwitser (2003), p. 534-538.

inland vehicles.[487] It would have to be commercially possible, of course. This result could also be achieved by extending the application of the Himalaya clause.[488] In this way, independent contractors can rely on the terms of the underlying contract of carriage throughout the performance of the transshipment. If the contract of carriage is extended, the moment of taking over should lie before the performance of all operations by independent contractors in the port of shipment and the moment of delivery after its performance in the port of discharge.

Determining the moment of taking over and delivery during transshipment raises fewer issues for the terminal operator who operates in hinterland networks

Under the new business model, the terminal operator performs or undertakes to perform the transport between the sea port terminal and inland terminals as an inland carrier. For this, the contracting party of the terminal operator is generally the cargo interests. The performance of stevedoring services, like loading and discharge of sea vessels and the transport between the vessel and the stacks are, however, generally still done on behalf of the sea carrier. For this reason, the goods can be taken over by the terminal operator in his capacity as an inland carrier when they are placed in the stack at the sea port terminal, irrespective of whether these goods remain in the stack for a certain period of time. The activities performed before the actual movement of the goods to the inland vehicle are therefore already covered by the contract of carriage under which the terminal operator is responsible for the goods as an inland carrier. This also applies to the situation in which the terminal operator uses performance agents for the inland transport as he is responsible for the goods as a (main) carrier. The terminal operator is therefore subject to inland transport law during this part of the transshipment. The inland transport commences when a transport document has been issued or the contract of carriage has been concluded and the terminal operator is under the obligation to load the cargo. The same applies to the export situation in which the goods are stored in the terminal after the inland carriage. The terminal operator remains responsible for the goods as a carrier until the goods are picked up for loading onto the sea going vessel. In conclusion, the terminal operator can rely either on the terms of the contract of carriage by sea which are to his benefit when performing stevedoring duties on behalf of the sea carrier, i.e. the loading or discharge of goods from seagoing vessels, or he can rely on the inland transport contract (and the international or national transport law rules which are applicable to this contract) during the performance of the inland carriage which covers part of the transshipment process. The terminal operator is advised to determine the moment of taking over and delivery in the contract of inland carriage.

6.3 The legal nature of transshipment

The question arises whether the performance of the transshipment in which goods are lifted and a distance is covered between one means of transport and the follow-

487. See: Drews (2013), p. 257. Drews also suggested this in relation to the demarcation of transport stages concerning multimodal contracts.
488. Glass (2004), p. 216-218.

ing qualifies as carriage of goods in itself. The answer to this could affect the legal position of the stevedore/terminal operator as the contract for the transshipment of goods would then be subject to transport law.

This may also be relevant for the legal position of the main carrier on whose behalf the terminal operator performs the transshipment of containers from one means of transport to another. If the carrier's obligation to transport the goods includes transshipment under the underlying contract of carriage, can the contract of carriage be considered a multimodal contract? If the transshipment in the sea port or inland terminal is considered as carriage of goods, the transshipment may constitute a separate transport stage with regard to multimodal contracts of carriage. In that case, every sea carrier who initially undertakes the obligation to transship the goods, becomes a multimodal carrier. This multimodal carrier may therefore also be subject to different transport law regimes.

Following this, two issues should be distinguished.[489] The first concerns the qualification of the transshipment process as carriage of goods (paragraph 6.3.2). This concentrates on the qualification of the contract concluded between the stevedore/terminal operator and the unimodal/multimodal carrier or cargo interests for the transshipment in the port. The second issue focuses on whether transshipment constitutes an independent transport stage relating to multimodal carriage (paragraph 6.3.3). It focuses on the underlying contract of carriage concluded between the main carrier and the shipper and establishes the number of transport stages that can be distinguished. It therefore deals with the main carrier's legal position and focuses on the relation between the carrier and the shipper under that contract of carriage. This issue may furthermore also indirectly affect the position of the terminal operator employed for the transshipment, as some benefits (e.g. lower limits of liability) which the terminal operator may have under the contract of carriage by sea, are attached to the maritime stage of the multimodal contract. However, these two issues are also interrelated. An independent transport stage under a multimodal contract can only exist if a contract of carriage is concluded for the performance of that particular part of the transport.[490] If the sea carrier or multimodal carrier employs a stevedore for the performance of the transshipment in the port and this contract with the stevedore does not qualify as a contract of carriage, the transshipment in the port does also not constitute an independent transport stage.[491] If, on the other hand, the sea carrier employs a trucking company (or a terminal operator) for the transport of goods to or from the ship and that contract qualifies as a contract of carriage, the question arises as to whether this transport is an independent transport stage or whether it should be attributed to the stage preceding or following it.

489. Koller (2013), § 407 Rn. 10a.
490. Koller (2008), p. 335-336; Ramming (2011), p. 268, Rn. 949.
491. BGH 18 October 2007, *TranspR* 2007, 472 with commentary from R. Herber at 475. Herber discusses the relation between qualifying the contract for the transshipment of goods as either a '*Werkvertrag*' (service contract) or a contract of carriage and determining whether it constitutes an independent transport stage within a multimodal contract of carriage.

6.3.1 Transshipment

Transshipment takes place when more than one mode of transport is used to carry goods or containers to their destination and goods are loaded, discharged and taken from one vessel or other means of transport to another, e.g. from a sea going vessel to a train. In this study, the term transshipment is used to refer to a process in which goods/containers are transloaded from one means of transport to another. It is therefore not only used to refer to the transfer between ships. In Dutch and German, the term *overslag* resp. *Umschlag* is used to describe transshipment.

During the process of transshipment, containers are lifted with cranes for the purpose of the loading and discharge of vessels or other vehicles or placing in the stacks (vertical carriage). Moreover, containers are brought from one means of transport to another, or to a stack, for example from the quay where the vessel is moored to an awaiting truck by the use of a mafi-trailer or other type of vehicle (horizontal carriage). If this process takes place in a large (seaport) terminal, the distance covered between different means of transport can be substantial. It might even be necessary to transport the goods from one terminal to another. A private road has been constructed to connect terminals in the port of Rotterdam. Transshipment of goods covers every loading on, or into a means of transport, every discharge from a means of transport, as well as the activities connected to the loading and discharge. A terminal operator who is employed for the container handling in the port is a typical example of a person performing the transshipment. Transshipment of goods can take place at the beginning, at the end or at an intermediary stage of the transport when goods are transported by more than one means of transport.[492] In sea ports goods are regularly moved from one location to another by a (container) crane, port railway, fork-lift truck, mafi-trailer or other type of machinery. Goods are often stored, repacked, stowed in holds of seagoing vessels or barges, or lifted onto trucks or trains. Some goods are discharged from one vehicle and immediately loaded onto another in one single movement. In order to be able to do this, one of these vehicles may be equipped with a device of its own to perform the transshipment.[493] Other containers are discharged from one means of transport, such as a vessel, placed in a stack and after several days brought from the stack to another means of transport, such as a truck used for the transport to the hinterland.

In most cases, independent contractors are used for the performance of the transshipment of goods especially for transshipment in sea ports. Independent contractors, like stevedores/terminal operators can be employed by either the carrier or by the shipper/consignee depending on who is under the obligation to perform this task under the contract of carriage. The (sea) carrier usually has the duty to perform the loading and discharge.[494] If the carrier is under the obligation to perform this service under the contract of carriage, he can employ a stevedore or terminal operator to perform this duty on his behalf. The subcontract for the perfor-

492. Ramming (2011), p. 266, Rn. 943. See also: De Wit (1999), p. 182; Hoeks (2009), para. 2.3.3.2.2.
493. Ramming (2007), p. 92.
494. This is in line with art. III (2) HVR.

mance of the transshipment should therefore be distinguished from the underlying contract of carriage. This subcontract can be considered a mixed contract due to the multitude of possible duties that a contract for the performance of transshipment may contain.[495] A stevedoring contract, which is often concluded between the sea carrier and the stevedore/terminal operator for the performance of transshipment services, does not fall easily into one of the categories of nominate contracts which are regulated by law, and its qualification depends much on the circumstances of each case. The applicable rules therefore depend on the specific duties undertaken and whether main and secondary obligations can be distinguished.[496]

A definition of transshipment of goods was given in a case which came before the *BGH*. The *BGH* held that transshipment — in German: *Umschlag* — includes all services performed on goods by a stevedore/terminal operator in the period between two transport stages and which serves the transport to their destination.[497]

In general, transshipment in the port is a process which can take several forms. The most straightforward form includes a container which has already been stowed and sealed. This container is discharged from a truck, barge or train and subsequently stored, picked up again, transported to the quay, placed briefly at the quay, picked up by the bridge crane and placed onto the ship in the correct slot. Of course, this sequence of events can be reversed for incoming transport.

6.3.2 Is transshipment carriage of goods?

The contract concluded with a stevedore for the transshipment of goods in the port is not specifically regulated in German, Dutch and English law.[498] An attempt to regulate this contract at an international level failed when the 1991 UN Convention on the liability of operators of transport terminals in international trade never entered into force.[499] How can we best qualify the contract for the performance of transshipment services as it can include a wide variety of duties including the lifting of goods or containers for the purpose of loading and discharge of vehicles, the movement of goods between vehicles and stacks and the storage of goods? In order to determine whether this process can be considered carriage of goods it is necessary to first take a closer look at the required elements of the contract for the carriage of goods.

The question of whether transshipment qualifies as the carriage of goods is a practically relevant question. A contract for the carriage of goods is subject to (mandatory) transport law. As we saw above, the main legal consequence of the qualification of a contract for the transshipment of goods as a contract of carriage

495. Thume (2014), p. 183.
496. Herber (2006), p. 437; Koller (2008), p. 334-335.
497. BGH 10 June 2002, *TranspR* 2002, 358 at 359. The *HGB* holds that the transshipment concerns the following: '*alle Leistungen an Gütern, die von einem Umschlagunternehmen zwischen zwei Transportphasen erbracht werden und deren Weitertransporte dienen*'.
498. See para. 3.2.
499. See para. 8.4.4.

is that the assumed obligation is an obligation of result rather than an obligation of diligent conduct which has implications for the burden of proof.[500] Furthermore, a short time bar applies to cases of claims under contracts of carriage[501] and different rules apply for liability towards third parties (see also below Part III). In order to determine whether the contract for the performance of transshipment meets the requirements of a contract of carriage it is first necessary to analyse the required elements of this nominate contract. Neither the national legal systems nor the international transport law regimes define a contract of carriage.[502]

A contract of carriage can be defined as follows. The contract consists of a reciprocal agreement in which each party promises and is obliged to perform at least one task. The main obligation for the carrier under a contract of carriage of goods is to carry and deliver the goods. The main obligation of this contracting party (the shipper) is to provide the carrier with the goods and to pay the freight, although the obligation to pay the freight is not always imposed on the shipper as contracting party himself. In addition to these main obligations, both parties to the contract may promise to perform some transport related duties. A contract which contains the following elements can be qualified as a contract of carriage of goods.

- Obligation to transport goods;
- A certain time span in which the goods have to be carried;
- The goods must be delivered to the person entitled to receive them at their correct destination and in good condition.[503]

The first requirement is fulfilled when the obligation undertaken by the terminal operator covers the movement of goods from one place to another. Goods are lifted for the purpose of loading and discharge of sea vessels, barges or other vehicles and are transported between means of transport or stacks during transshipment. This lifting also entails movement as the goods reach a different destination during and after the lifting. It is not relevant whether the distance travelled is short or long, or whether the movement is horizontal or vertical.[504] This also applies to transport within a terminal or warehouse, where goods are moved between means of transport or stacks.[505] Moreover, during transshipment, goods should be taken from one means of transport to another within a certain time span, which is determined by the planning within the chain of operations. Transshipment is done in order to ultimately deliver goods in good condition to the person entitled to them at their destination. The terminal operator who performs the transshipment is a link in this process. Transshipment which involves the movement of goods from

500. See para. 3.5.1. See also: Van Beelen (1996), p. 64; Claringbould (1992), p. 67.
501. For the time bar under international conventions see: art. 35 MC; art. III (6) HVR; art. 32 CMR; art. 48 COTIF-CIM; art. 24 CMNI. For Dutch transport law: art. 8:1711 BW. For German transport law: § 439 HGB and §§ 605 ff HGB. Under English law, COGSA 1971 incorporates the one-year time bar of art. III (6) HVR.
502. See also: Loyens (2011), p. 1.
503. Korthals Altes and Wiarda (1980), p. 19; Fremuth, Thume and Eckardt (2000), § 407 HGB, Rn. 45; Loyens (2011), p. 1; Basedow (1987), p. 34-35; Cleton (1994), p. 107; Asser/Japikse 7-I (2004), nr. 133-134.
504. See also: Claringbould (2008), p. 33-34; Boonk W.E. (2016), p. 141.
505. Asser/Japikse 7-I (2004), nr. 139.

one means of transport to another therefore fulfills the previously stated requirements.

The above is in line with the intentions of the Dutch legislator when drafting transport law rules. The Dutch legislator characterized certain methods of transport as carriage of goods subject to transport law. In the civil code, supplementary rules on contracts of carriage in general were adopted in addition to rules on specific modes of transport.[506] The legislator adopted these rules for methods of transport such as transport by pipeline, 'trottoir-roulant' (moving walkway), escalator, monorail, hovercraft and transport within warehouses. The legislator even anticipated future developments such as interplanetary transport and transport by rocket.[507] Following this, processes which cover the movement of goods even if only for relatively short distances or within privately enclosed areas, can under Dutch law, be characterized as carriage of goods.[508] It therefore falls in line with legislator's intention to apply the general rules on contracts of carriage which can be found in art. 8:20 ff BW to methods of transport such as lifting for the purpose of loading and discharge and transport between means of transport or stacks within a terminal or warehouse.[509]

Transshipment of goods (*Umschlag*) is also considered carriage of goods under German law. The 1998 reform of German transport laws took account of the fact that transshipment is subject to the general rules on transport law and that the terminal operator/stevedore performing this obligation is therefore liable for loss, damage or delay according to the §§ 425 ff HGB.[510] This was confirmed by the *BGH* in a recent case.[511] The court held that it should be seen as a starting point that transshipment necessarily concerns the movement of goods, even if a minor distance is traveled.[512]

In two cases in 1993/1994 the Court of Rotterdam[513] and the German *BGH*[514] qualified the transshipment process in the port resp. the lifting of goods as carriage of goods subject to transport law. In the Dutch case, the decision was based on the express intention of the contracting parties. The parties' agreement contained a provision qualifying the terminal operator as a carrier.

> The Dutch case dealt with the transport of aluminum panels by road from Duffel (Belgium) to Antwerp (Belgium) and from there by inland waterways to a terminal in the port of Rotterdam (Netherlands). The goods were to be loaded onto a sea vessel at the terminal in Rotterdam. When they ar-

506. Art. 8:20 ff BW.
507. Claringbould (1992), p. 59.
508. Cf. Van Beelen (1996), p. 67-73; Ramming (2011), p. 267, Rn. 946. Moreover, according to Ramming there is a difference between the legal qualification of horizontal transport between vehicles and the vertical movement when lifting goods. See: Ramming (2004), p. 59-60; Ramming (2007), p. 91.
509. See also: Boonk W.E. (2016), p. 141.
510. Herber (2016), p. 172; (Koller (2013), § 407 HGB, Rn. 10a.
511. BGH 10 April 2014, *TranspR* 2014, 283.
512. In that specific case, however, the obligation to transship goods was deemed auxiliary to the other more dominant obligation to store the goods for which reason the transport law rules were not applicable (see below para. 6.3.3).
513. Rb. Rotterdam 24 December 1993, ECLI:NL:RBROT:1993:AJ2921, *S&S* 1995, 116.
514. BGH 15 December 1994, NJW-RR 1995, 415.

> rived, the goods were transported to the quay where the sea vessel was moored. They were transported over a distance of two km within the confines of the terminal. This transport was performed by a multi-trailer; a combination of a truck and five trailers of 90 meters long. During the transport the containers placed on the last two trailers fell off and sustained severe damage. The court considered that in cases of multimodal transport, each transport stage is subject to the rules applicable to that stage and as the damage occurred during carriage by road, the rules on carriage by road were applicable.[515] The terminal operator who performed the transport in the terminal was liable as a carrier as the bill of lading stated that the goods were under the 'care, custody and carriage' of the terminal operator who acted as a 'Participating Carrier'. For this reason, the terminal operator was subject to transport law.

In the German case, the decision taken by the *BGH* dealt with the movement of goods by crane from the fourth to the third floor of a building. The court decided that the contract for the movement of these machines is a transport contract in the sense of §§ 425 ff HGB.

> A film wrapping machine owned by company X sustained damage when it was moved by crane from the fourth to the third floor of the company's building. The crane, which was owned by company T and operated by company T's employee, was located outside the building. While the machine was being moved by the crane, it fell in the courtyard as it had not been sufficiently well secured and was a total loss. The transport insurer of company X then brought a claim against the transport company who had hired the crane. According to the *BGH,* the contract for the transport of the machine between two floors of a building can be considered a contract of carriage. In order to qualify as a contract of carriage, goods have to be taken over for transport with a commercial purpose even if the transport merely covers a short distance. The transport of furniture from one room to another or crane operations can also qualify as carriage of goods.

This German case on the movement of goods by crane from one floor of a building to another demonstrates that the small distance traveled by the goods was found sufficient to qualify the process as the carriage of goods. It was, furthermore, also held as irrelevant whether the transport was vertical (lifting with a crane) or horizontal.[516]

A contract meets the requirements of a contract of carriage if the object of the contract is the movement of goods between different locations, irrespective of the length of the distance travelled or whether it is vertical or horizontal. The element of movement is present in a wide variety of contracts, viz. lifting, towing, pushing,

515. At that time the WOW (*Wet Overeenkomst Wegvervoer*, freely translated: Contract of carriage by road act) governed the carriage of goods by road. This act is a predecessor to title 8.13 BW on carriage of goods by road.
516. Thume (2014), 181.

transport within a terminal or warehouse and loading and discharge. All these activities attempt to move goods to another place. For this reason, the movement of goods from one location to another with machinery such as a mafi-trailer, bridge crane, forklift or a truck within the confines of a (sea port) terminal, an airport or a warehouse can be characterized as carriage.[517] Other activities, on the other hand, which do not concern the movement of goods such as measurement, weighing, container scanning, packaging, stowing or storing do not qualify as carriage of goods.[518]

Following this, when lifting goods or containers for the purpose of stacking or loading and discharging vessels or other means of transport with a bridge crane, the terminal operator is performing the carriage of goods (vertical transport). The terminal operator can furthermore also be considered a carrier when moving containers with a mafi-trailer or other vehicle between the vessel or other means of transport and stacks (horizontal transport). Under German law, the terminal operator who is handling containers in a terminal is therefore in principle liable as a carrier according to §§ 425 ff HGB. Moreover, under Dutch law, the supplementary (non-mandatory) rules on carriage of goods in art. 8:20 ff BW, or those on the carriage of goods by road, would then apply.[519] According to the Dutch legislator, the rules on road transport are not only applicable to carriage on public roads. Transport by road within a terminal which is accessible by trucks is also covered by art. 8:1090 ff BW.[520]

In general, the lifting of the goods with a bridge crane for the purpose of stacking or the loading and discharge of vessels or other means of transport is subject to art. 8:20 ff BW. These rules also apply to the moving of goods over roads within the terminal which are not accessible by trucks. Thus, this is the case when moving containers with a fork-lift or mafi-trailer in areas which are designated for these kind of vehicles and from which trucks are banned. When carrying goods on roads (within the terminal) which are also accessible by trucks, the terminal operator is performing road carriage subject to art. 8:1090 ff BW. When a terminal operator performs both the lifting of the goods or transport on roads within the terminal not accessible by trucks (in principle subject to art. 8:20 ff BW) and carriage on other roads within the terminal (in principle subject to art. 8:1090 ff BW), the question may arise as to which of these regimes applies to the entire performance of the contract. This question is solved by the approaches to mixed contracts. Moreover, if the terminal operator performs the obligations which can be qualified as carriage of goods in combination with other obligations which do not concern the carriage of goods, such as storage or stowage, the question on mixed contracts

517. See also: Claringbould (1992), p. 59; Boonk W.E. (2016), p. 141; Herber (2016), p. 172; (Koller (2013), § 407 HGB, Rn. 10a; Herber (2006), p. 437; Thume (2014), 183; Rabe (2008), p. 188; Koller (2008), p. 334.
518. Thume (2014), 183.
519. See: Rb. Rotterdam 5 October 2000, ECLI:NL:RBROT:2000:AK4361, *S&S* 2001, 132. In this case the court decided that the transport of part of an engine from a hall in the 'Ahoy' in Rotterdam to a truck awaiting outside the hall is subject to the rules on transport by road of art. 8:1090 ff BW. See for the interpretation of the term 'road' also: HR 8 April 1983, ECLI:NL:HR:1983:AJ4948, *NJ* 1986, 457.
520. Claringbould (1992), p. 1033.

may also arise. It is then important to consider whether the element of transport is sufficiently significant in the contract for the transshipment of goods.

Is the element of transport sufficiently significant during transshipment (mixed contracts)?

When the terminal operator performs the transshipment in the port, the movement of goods is only one of a wide variety of duties, some of which do not concern the movement of goods. It is therefore important to note that a contract concluded with a terminal operator or stevedore for the terminal handling can only qualify as contracts for the carriage of goods if the element of transport is sufficiently significant.[521]

When regarding transshipment of goods in a port, it is important to determine whether the element of transport is sufficiently significant to qualify the process as carriage of goods so that transport law can apply to the contract.[522] The contract for the transshipment of goods in a port cannot easily be qualified as a particular nominate contract. It is important to determine what elements the contract contains and whether the element of transport is sufficiently significant to be able to apply transport law to either the entire contract or to part of the contract by applying the theories on mixed contracts.[523] Transshipment is regularly performed in combination with other transport related obligations such as carriage outside the terminal, freight forwarding, storage or other activities, which do not concern the movement of goods such as measurement, weighing, container scanning, packaging, stowing. It should be determined whether the transport constitutes an independent element under the stevedoring contract or whether it is an auxiliary element and therefore should be absorbed into the more dominant elements under the contract. The latter, for example, would be the case in a sales contract for the transfer of goods from a seller to a buyer. The same applies to contracts of deposit where goods are moved within a warehouse (without it being requested by the cargo interests).[524]

During transshipment, the terminal operator in the port usually selects one specific container out of the thousands in the stacks and takes it to the right bridge crane in an exact timeframe. The crane then lifts and places the container onto the ship in the precise slot that had been calculated and planned in advance. This operational and often automated process requires complex software and regular communication with interested parties. The process of moving a container from a delivering vehicle to a ship, with a short storage period in between (or vice versa), is complex. It requires perfect planning and control to get the container in the right place at the right time. Other activities include administrative preparations, detailed planning of the ship's stowage plan, use of equipment, customs clearance, communication with the ship owners and other interested parties such as carriers and authorities as well as the delivery to and the loading of the ship. It entails a complex mix of obligations which are all brought together in one mixed contract. When all these

521. Korthals Altes and Wiarda (1980), p. 19; Cleton (1994), p. 107; Loyens (2011), p. 2-3; Herber (2016), p. 172; Koller (2013), § 407 HGB, Rn. 10a; BGH 10 April 2014, *TranspR* 2014, 283.
522. Basedow (1987), p. 34-35.
523. Koller (2008), p. 334-335. Koller follows the approach concerning mixed contracts.
524. Dorrestein (1973), p. 1116; Cleton (1994), p. 107. Cf. HR 28 November 1997, ECLI:NL:HR:1997:ZC2512, *NJ* 1998, 706 with commentary from J. Hijma, *S&S* 1998, 33 (General Vargas).

other activities are taken into account, it is understandable that some have said that transport is not the characteristic element in the transshipment of goods although it is performed as part of the contract.[525]

However, it can also be argued that the multitude of activities described above are all carried out in order to ultimately move the goods from one means of transport to another. The terminal operator promises to achieve that result and the way in which it is achieved is entirely left to the terminal operator's discretion. The main obligation therefore is to discharge and load, as well as to carry the containers back and forth over short distances. Thus, the movement of containers or goods from one location to another is the main task during transshipment and the remaining duties described in the previous paragraph are merely supplementary to that duty. Therefore, the horizontal or vertical movement of goods, even if only for a short distance, qualifies as transport and the contract for the transshipment of goods in the port can therefore be considered a contract of carriage. This is supported by the observation that transport by other means of transport, such as carriage by truck or by a vessel, also requires extensive planning and management in order to carry goods over longer distances between two locations.[526] If the terminal operator undertakes to transship the goods, by handling the containers in the port, the characteristic element is indeed the movement of the goods between two locations.[527]

Furthermore, the intention of the parties when concluding a contract for transshipment of goods in the port plays a role.[528] A contract for transshipment concluded with a terminal operator is usually not defined as a contract for the carriage of goods. This factor can be used to claim that the parties do not regard the object of a stevedoring contract to be transport of goods. If parties had envisaged transport of goods they would probably have defined the purpose of the contract as such.[529] However, the contracting parties, who are usually businessmen, cannot be expected to master legal terms and concepts.[530] Moreover, the parties' qualification of the contract should be used as a starting point but it is not an end point of contract qualification.[531] Therefore, a contract which meets the requirements of a contract of carriage falls into the category of that nominate contract irrespective of the name given by the contracting parties. Nevertheless, when the contracting parties do define the contract for transshipment of goods in the port as a contract of carriage, for example by stating that the person performing the transshipment at the terminal should be regarded as a 'Participating Carrier' in the bill of lading, it can be used as a factor when determining the intention of the parties. In the Dutch case men-

525. Drews (2013), p. 257; Drews (2008), p. 18-20; Ramming (2004), p. 58-59 with reference to BGH 18 October 2007, *TranspR* 2007, p. 472 with commentary from R. Herber at 475. Furthermore: Dorrestein (1973), p. 1117-1118.
526. Rabe (2008), p. 187-188.
527. Thume (2014), 181; Herber (2016), p. 172; Koller (2013), § 407 HGB, Rn. 10a; Boonk W.E. (2016), p. 141.
528. Rabe (2008), p. 187; Bartels (2005), p. 203; Cleton (1994), p. 108.
529. Drews (2008), p. 20. For the issue of the influence of the contracting parties' intention when determining whether a contract is a multimodal contract of carriage I refer to Van Beelen (1996), p. 70.
530. Rabe (2008), p. 188.
531. Gernhuber (1989), p. 153.

tioned above, the court characterized the transshipment process in the port as carriage of goods subject to transport law as it was the expressed intention of the contracting parties that the terminal operator qualified as a carrier.[532] Terminal operators/stevedores who wish to rely on transport law rules should therefore expressly state this in their contracts, and press their contracting parties (carriers or shippers) to agree that the main obligation under the contract for transshipment is the transport of goods performed as a carrier. Lifting containers with cranes and bringing containers from the vessel to stacks or other means of transport can then be deemed as carriage of goods.

The transshipment in which goods or containers are brought from one means of transport to another should therefore in general be qualified as the carriage of goods. The rules applicable under Dutch law are the supplementary rules on carriage of goods in art. 8:20 ff BW. These non-mandatory transport law rules apply unless the carriage takes place by road and is subject to rules on road carriage, which also includes roads within a terminal accessible by trucks.[533] The stevedore is therefore under an obligation of result, the short time bar applies[534] and the stevedore can rely on the statutory provisions covering third party effect of contractual terms for claims from third parties.[535] Under German law, the stevedore/terminal operator who performs the transshipment as a carrier is subject to the unified general transport law rules of §§ 407 ff HGB.[536] This would have less far-reaching consequences under English law.[537]

It should, however, be borne in mind that transshipment is often performed in combination with other obligations such as carriage outside the terminal, freight forwarding, the provision of services or storage. In that case, the rules applicable to the individual obligations are also determined by the rules on mixed contracts. Transshipment regularly constitutes a dependent element under the contract and should therefore be absorbed into the more dominant element(s) under the contract. This can be illustrated by a recent case brought before the *BGH*.[538]

> This case covers a stevedore employed by a sea carrier for the discharge and intermediate storage of a consignment of pipes from a seagoing vessel in the port of Hamburg. Part of the consignment which was stowed at the bottom of the holds was contaminated due to a leak in the ballast tank. During the discharge, the contaminated pipes were lifted over some clean pipes which had already been unloaded on the quay causing these pipes to be contaminated as well. The stevedore, under local environmental

532. Rb. Rotterdam 24 December 1993, ECLI:NL:RBROT;1993:AJ2921, *S&S* 1995, 116.
533. According to the Dutch legislator the transport by road within a terminal which is accessible by trucks is subject to art. 8:1090 ff BW. Claringbould (1992), p. 1033. In that case art. 8:1102 BW is relevant. Parties to a contract of carriage by road concluded for the transshipment at the terminal cannot deviate from the provisions in the civil code by way of general terms and conditions, such as the VRTO conditions.
534. Art. 8:1711 BW. For German transport law: § 439 HGB and §§ 605 ff HGB.
535. Art. 8:31 BW and art. 8:1081 BW, art. 8:361-366 BW. See below para. 9.3.1.
536. Herber (2016), p. 172-173. See below para. 9.4.1.
537. See below para. 9.5.3.
538. BGH 10 April 2014, *TranspR* 2014, 283.

laws, was obliged to treat the contaminated pipes. He subsequently brought a claim against the consignee for the reimbursement of the costs involved. The consignee, in turn, brought a claim against the stevedore for damage to the pipes caused by faulty discharge, which, according to the consignee was an obligation under the contract of carriage concluded between the stevedore and the sea carrier. According to the *BGH*, the obligation to transship goods indeed concerns the carriage of goods, irrespective of the (short) distance covered. However, in this case, the stevedore also undertook the obligation to store the consignment of pipes awaiting further transport and the element of storage was deemed more dominant in relation to the minor movement of the pipes during discharge. Transport law rules were therefore not applicable to (part of) the contract.

The application of transport law depends on what the characteristic element under the contract is considered to be. If it is solely the lifting by cranes or the carrying of goods within the terminal from one means of transport or stack to another, then it can be characterized as carriage of goods, but if any freight forwarding or storage is undertaken, then the transport for the purpose of transshipment may become an element auxiliary to these more dominant obligations. This also applies to transshipment in combination with the obligation to carry goods outside the terminal. In that case, the carriage, for example by sea, may be considered the characteristic obligation for which reason the auxiliary obligation to transship (lifting and carrying within the terminal) is absorbed and subject to the rules on carriage of goods by sea. This can only be different if the transshipment constitutes a separate transport stage under multimodal transport contracts. This underlying (multimodal) contract should, however, be distinguished from the contract for the transshipment concluded with the stevedore. It is clear that even in that case the contract between the sea carrier and the stevedore for the handling of containers in the sea port can then still be considered a contract of carriage.

6.3.3 Transshipment as an independent transport stage under multimodal transport contracts

The different stages of transport under multimodal transport law bear relation to the question of the legal nature of transshipment. If the contract for transshipment qualifies as a contract of carriage the question arises whether the performance of this activity also constitutes a separate transport stage under a multimodal contract. Transshipment can only constitute a transport stage of its own if the risks involved in the specific case of transshipment are not typical for the transport of goods by one of the transport stages adjacent to the transshipment. In that case, transshipment cannot reasonably be absorbed into the other transport stages but constitutes a separate transport stage[539] resulting in legal consequences on a wider scale.[540]

If transshipment constitutes a separate transport stage, the legal relation between the main carrier and the cargo interests alters as an additional transport stage creates

539. Koller (2013 a), p. 419.
540. Herber (2006), p. 435.

a multimodal contract or adds a transport stage to it. This would mean that all contracts of carriage by sea become multimodal contracts of carriage if transshipment in the port is included. Carriage by sea is usually preceded and followed by the loading and discharge of goods in the port by a stevedore who carries the goods within the confines of the terminal. This would then lead to the result that a mere contract of carriage by sea is a multimodal carriage contract, and in that sense the sea carrier would qualify as a multimodal carrier.[541] German law dismissed this as it would undermine maritime law.[542] The rules on multimodal transport contracts in § 452 ff HGB would be applicable and the non-maritime transport regime of § 407 ff HGB would be applied to the multimodal contract of carriage including the sea stage. Under Dutch law, the rules on multimodal contracts of carriage would be applicable (art. 8:40 ff BW). Following this, the supplementary (non-mandatory) rules on carriage of goods, or those on the carriage of goods by road,[543] would then apply to the transport stage for transshipment depending on the circumstances of each particular case. This would have unsatisfactory consequences as the loading and discharge of the seagoing vessel undertaken by the multimodal carrier would not be subject to the liability rules on carriage of goods by sea.[544] The Dutch legislator took this issue into consideration and considered that 'short range moving of an auxiliary nature' generally does not to constitute an independent transport stage.[545]

A multimodal contract of carriage is a contract for carriage by at least two different modes of transport in which each constitutes an independent transport stage. The distance travelled is not decisive. The different unimodal transport regimes are designed for a specific mode of transport and these rules should therefore be applied even if the transport is only over relatively minor distances.[546] However, there is no multimodal carriage contract consisting of different transport stages for situations in where carriage by one mode of transport is clearly auxiliary to the carriage by the other.[547] It may be difficult to determine whether there are two or more independent transport stages. There is little room for doubt when sea transport over a distance of 1000 km is followed by road transport over 1000 km. The sea stage and the road stage are two independent transport stages and the contract for this transportation is a multimodal contract of carriage. However, considerable doubt arises when the sea transport over a distance of 1000 km is followed by road transport of just over one km. Is this a multimodal contract of carriage containing two independent transport stages or is it a unimodal contract of carriage by sea in which the road transport is considered auxiliary to the main obligation of carriage

541. The sea carrier would then be subject to liability rules in § 425 ff HGB instead of the more lenient rules on carriage of goods by sea.
542. BGH 3 November 2005, *TranspR* 2006, 35. Furthermore: Koller (2014), p. 311; Drews (2013), p. 254.
543. According to the Dutch legislator, transport by road within a terminal which is accessible by trucks is subject to art. 8:1090 ff BW. Claringbould (1992), p. 1033.
544. Cf. art. III (2) HVR.
545. Claringbould (1992), p. 88.
546. See for example: Hof Den Haag 25 October 1994, ECLI:NL:GHSGR:1994:AL8990, *S&S* 1995, 38 para. 8 (obiter dictum) where the transport of goods by road from the Rotterdam Margriethaven to the Marconistraat (which is over a distance of a few km) was considered as a separate road transport stage with the result that the main contract of carriage was a multimodal contract.
547. Clarke (2014), nr. 13, p. 33-35; Claringbould (1992), p. 88.

by sea? In the latter case, the road transport is auxiliary to the sea transport and is therefore absorbed into the contract of carriage by sea. There is then no multimodal contract of carriage.[548]

This question also arises for transshipment in ports. In some situations, especially in large terminals, transport from one means of transport to the following can cover long distances sometimes over two km. In situations where carriage by inland waterways is followed by transport on the terminal from the barge to a sea vessel, one wonders whether this transport on the terminal constitutes an independent transport stage. If so, this multimodal contract of carriage contains an inland navigation — general or land transport — sea stage. Otherwise, it would merely contain an inland navigation — sea stage. In the latter case the transshipment in the port is absorbed into one of the adjacent transport stages.[549]

Dutch courts generally reject the idea that transshipment constitutes an independent transport stage. The courts usually take the view that when goods are taken from one vehicle to another on a terminal or from a vehicle to a storage location within the premises of a certain terminal, this does not constitute an independent transport stage but it is absorbed into the main obligation, usually carriage by sea.[550] The decisions of the Dutch courts are in line with the intention of the Dutch legislator who determined that the transshipment is generally auxiliary to the carriage by other modes of transport and does therefore not constitute an independent transport stage under a multimodal contract.[551] This was also the interpretation held by the *BGH*, when they reversed a decision by OLG Hamburg.[552]

> The *Mafi-trailer*-case concerned the carriage of a consignment of printing machines from Bremerhaven (Germany) to Durham, North Carolina (USA) with an transshipment stage in Portsmouth, Virginia (USA). The machines were transported in crates which were stowed on a mafi-trailer for the section of the ocean carriage from Bremerhaven to Portsmouth. After arrival in Portsmouth, the mafi-trailer with the crates were moved a distance of 300 meters from the vessel to a truck where the machines were to be loaded onto the truck for further road transport to Durham. The chains which had held the machine in place during the move from the vessel to the truck with the mafi-trailer, had already been disconnected to facilitate lifting the goods onto the truck. The mafi-trailer then repositioned itself to be able to lift the machine onto the truck more easily. At that moment the crate fell off the mafi-trailer and was damaged. The *BGH* held that the movement of goods over a distance of 300 meters from the vessel to the subsequent vehicle by the mafi-trailer did not constitute an independent transport stage.

548. Van Beelen (1996), p. 67.
549. For transshipment in relation to air carriage see: Koning (2004), p. 93-101. See also para. 6.4.
550. Rb. Rotterdam 26 August 1999, ECLI:NL:RBROT:1999:AK4152, *S&S* 2000, 12 (Hanjin Singapore); Hof Den Haag 17 October 1995, ECLI:NL:GHSGR:1995:AL7248, *S&S* 1996, 54 (Salar).
551. Claringbould (1992), p. 88.
552. BGH 18 October 2007, *TranspR* 2007, 472.

Transshipment can take on a wide variety of forms, from small cargo handling operations to complex operations involving specialized equipment which can create considerable risk for damage to cargo, other property and persons involved. Transshipment forms part of all transport contracts unless the carrier undertakes to do it exclusively with a single vehicle and the loading and discharge is not performed by the carrier but by the cargo interests themselves. In order to determine whether transshipment constitutes a separate transport stage, the rules on mixed contracts should be applied. From the perspective of the contract of carriage, the transport of the goods is the characteristic obligation and the transshipment for the purpose of loading and discharge can generally be considered a supplementary obligation. This also applies to transshipment within the sea port for which the carrier is usually responsible under the applicable transport law rules. Art. III (2) HVR states that the carrier is under the obligation to 'properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carrier'. The typical case of transshipment undertaken by the sea carrier for the purpose of loading and discharge should be considered auxiliary to the transport by sea. The auxiliary obligation is then absorbed into the main obligation.[553] This can only be different if the transshipment constitutes an independent element according to the agreement between the contracting parties with regard to the multimodal contract of carriage.[554] Conclusively, transshipment in the port does not generally constitute a separate transport stage under a multimodal transport contract. Transshipment should therefore be attributed to the transport stage preceding or following it.[555]

6.4 Demarcation of transport stages during transshipment: Points of reference

As discussed above, transshipment in a port does not generally constitute an independent transport stage relating to multimodal transport. Furthermore, legal literature and case law generally interpret this to mean that multimodal transport is entirely divisible into transport stages. The individual transport stages are seamlessly connected and no fragments exist during the multimodal transport that are not covered by a transport stage.[556] This means that in the transshipment phase in which goods are taken from one vehicle to the following during multimodal transport is covered by a transport stage. As transshipment does not usually constitute an independent transport stage, the questions arises as to which transport stage this phase can be attributed. This is especially relevant as goods are frequently lost (stolen) or damaged during transshipment.[557]

It is also important to determine which party is under the obligation to perform the transshipment and whether transshipment takes place between two transport stages of a multimodal contract or whether it takes place in the beginning or at the end. Who is under the obligation to perform the transshipment? Where the

553. Herber (2016), p. 173.
554. See also: Claringbould (1992), p. 88.
555. Bartels (2005), p. 203; Herber (2016), p. 345; Van Beelen (1996), p. 69-72.
556. Ramming (2011), p. 265, Rn. 941; BGH 18 October 2007, *TranspR* 2007, 472 with commentary from R. Herber at 475. Cf. Ramming (2007), p. 92.
557. Koller (2014), p. 309-310; Rogert (2005), p. 254.

main contract of carriage is concerned, this can either be the shipper/consignee or the main (multimodal) carrier. If the cargo interests previously instructed the terminal operator to perform the transshipment, then it is clear that this phase is not part of the multimodal contract and will therefore not create problems when demarcating the transport stages. However, if the multimodal carrier has undertaken to perform this obligation himself, then the question of the demarcation of transport stages arises. For this reason only the latter case will be discussed in this paragraph. Moreover, the moment transshipment takes place in the transport chain is also relevant. Transshipment is part of the first transport stage if goods are loaded onto the first vehicle. The same applies to discharge from the last vehicle which is then part of the last transport stage. The problem only exists when transshipment takes place between two transport stages which are subject to different transport law rules.[558]

In cases where transshipment takes place between two transport stages, a choice has to be made either to attribute the transshipment phase to the transport stage preceding it or the transport stage following transshipment.[559] For example, if goods are transported by sea to a port terminal where they are transshipped onto an inland barge which takes them to an inland location, then the transshipment phase can either be attributed to the sea carriage stage or to the inland navigation stage. Moreover, the transshipment operation could also be split up whereby the transshipment is partly covered by the sea stage and partly by the inland navigation stage. In that case, the legal regime changes during the transshipment. In the *Mafi-trailer*-case,[560] the *BGH* focused on the attribution of the transshipment phase to one of the transport stages which covered the transport preceding or following the transshipment.[561]

> First of all, the court considers that transshipment does not constitute an independent transport stage. Next, it holds that multimodal transport can be entirely divided into separate transport stages. This leads to the result that there are no parts within the multimodal transport which are not part of a transport stage. From this it follows that transshipment of goods, in which goods are taken from one vehicle to another, is covered by a transport stage. The question therefore arises as to which transport stage transshipment can be attributed? In other words, at what moment during transshipment does one transport stage end and the following commence? In this case the court considered that a substantial part of the transshipment of machines at the port terminal was part of the sea carriage stage. The subsequent road carriage stage therefore did not commence before the goods were loaded onto the truck.
>
> In the case at hand, the *BGH* held that the loading onto the truck had already started when the goods sustained damage. One of the machines sustained damage before it was lifted onto the truck during the maneuvers

558. Freise (2013), p. 260-261; Koller (2013 a), p. 417.
559. See also: Castermans and Demper (2017), p. 342-345.
560. BGH 18 October 2007, *TranspR* 2007, 472.
561. Another element of this case has been discussed above in para. 6.3.3.

> by the mafi-trailer. The chains, which held the machine in place during the move from the vessel to the truck with the mafi-trailer, had already been disconnected to facilitate lifting the goods onto the truck. When the mafi-trailer repositioned itself in order to be able to lift the machine onto the truck, the crate fell from the mafi-trailer and was damaged. As the loading of the truck had already commenced the goods were damaged due to the risks involved in the loading process.[562]

It is clear that difficulties in determining the beginning and end of a transport stage arise in cases where goods are transshipped from the sea going vessel onto an awaiting truck for the inland transport after the vessel arrives in a port. In situations like this it is uncertain whether parts of the transshipment process are covered by the sea stage or by the road stage.[563] This is relevant as the legal regimes which apply to carriage by sea and by road differ to a large extent. It has to be noted that the discussion on the demarcation of transport stages is only relevant if the transshipment of goods connects two modes of transport which adhere to different legal regimes. The question becomes obsolete if the same legal regime applies to the transport before transshipment and the transport after transshipment.[564]

The demarcation of transport stages is relevant for the parties involved in the transport. If goods are damaged, lost or something causes a delay at a point during transshipment, it needs to be established during which transport stage this happened. This determines the applicable transport law regime. First of all, it is relevant for the multimodal carrier's liability for the cargo loss, damage or delay and affects both parties to the multimodal carriage contract. Dutch and German transport laws contain a rule on determining the law applicable to multimodal contracts. In these jurisdictions, the multimodal carrier's liability regime is based on the network principle which provides that if damage, loss or the cause of delay can be localized (i.e. where it is known at what moment during the transport the damage or loss occurred or the delay was caused) the multimodal carrier's liability is governed by the transport law rules that would have applied for the relevant

562. BGH 18 October 2007, *TranspR* 2007, 472 at 474.
563. See also an English case on the demarcation of transport stages concerning ro-ro transport. Queen's Bench Division, Thermo Engineers Ltd. and Anhydro A/S v. Ferrymasters Ltd. [1981] 1 Lloyd's Rep. 200. In this case it is also determined that the sea stage had already commenced because the loading was well advanced as 'the trailer had already passed across the outboard ramp and across the line of the stern'.
564. Koller (2014), p. 311; Koller (2013 a), p. 419; Ramming (2011), p. 270, Rn. 955.

mode.[565] The applicable transport law regime therefore, influences the amount of compensation the cargo interests can obtain and other factors determining the liability of the carrier. If transshipment is, for example, attributed to the sea stage, the relevant rules on carriage of goods by sea and the terms of the contract of carriage by sea are applicable.

The demarcation of transport stages under multimodal contracts can also have a (more indirect) effect on subcontractors who perform (part) of the multimodal transport, such as terminal operators performing transshipment. If loss, damage or delay occurs during the performance of these duties, these parties can, in certain jurisdictions, be faced with (extra-contractual) claims from the shipper or consignee who are parties to the multimodal contract of carriage. Whether the subcontractors can rely on contractual terms stipulated to their benefit, such as exonerations or limits of liability on which the multimodal carrier can also rely under the multimodal contract of carriage, depends on the demarcation of transport stages.

However, there is no such direct effect on parties to the subcontracts which are related to the underlying multimodal contract, for example subcarriers or independent contractors. The contractual levels should be carefully distinguished. The demarcation of transport stages under the multimodal contract of carriage does not always coincide with the scope of the unimodal contracts of carriage which are concluded for the performance of the multimodal contract. Whether they coincide depends on which points of reference are used to demarcate the transport stages. The demarcation of transport stages under the multimodal contract of carriage does therefore not necessarily determine which subcarrier is responsible for the goods if the multimodal carrier wishes to bring a recourse claim. This could possibly result in recourse gaps.

All the above gives rise to questions on how to demarcate the transport stages under a multimodal contract. First of all, it should be determined whether the parties to a contract of carriage agreed on this matter by defining the beginning and end of each transport stage in the multimodal contract of carriage. Clearly, these agreements should be conform any mandatory rules applicable. If no such agreements are made, or gaps can nevertheless be found, some points of reference can be used. Moreover, some of these points of reference can be used when drafting contracts. These points of reference are discussed below after analysing whether national law or international conventions provide some guidance.

German and Dutch law on multimodal transport contains no rules to suggest that a stage which covers one specific mode of transport should have preference over

565. For the network principle codified in German law see: §452 HGB, and in Dutch law see: art. 8:40 ff BW. Hoeks (2009), p. 27-30; Van Beelen (1996), p. 35; Clarke (2003), p. 28. For English case law on the legal regime applicable to a multimodal contract of carriage see: Court of Appeal, Quantum Corporation Inc. and others v. Plane Trucking Ltd. and another [2002] 2 Lloyd's Rep. 25.

another mode of transport.[566] In other words, all transport stages are in principle equally significant.[567]

However, in some cases the international transport law conventions provide guidance for demarcating transport stages.[568] For carriage by air, international conventions determine the applicable transport law regime during transshipment in the airport as the application of these conventions coincides with the boundaries of the airport.[569] This follows from art. 18.3 WC and 18.4 MC which state that 'The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside [an airport (under MC), or aerodrome (under WC)]…' As a result of this, conventions on carriage by air apply when the goods are transshipped while they are in the air carrier's charge inside the confines of the airport. Moreover, the conventions extend their scope even wider as they contain a presumption that their rules apply outside an airport in cases of unlocalized loss, provided that the carriage by other modes of transport outside the airport is covered by a contract of carriage by air and it takes place for the purpose of loading, delivery or transshipment,[570] and in cases of unauthorized substitution of carriage by air by other modes of transport under the Montreal Convention.[571] Following this, it is clear that transshipment which solely takes place within the confines of an airport, in a situation where goods are transported from one vehicle to another (from a plane to another vehicle or vice versa), is part of the air stage. These operations are therefore subject to an air carriage regime. A different, more complicated, issue arises when goods are transported by truck within the confines of an airport as part of a national or international road stage, which is not merely an auxiliary service. This occurs when either the place of taking over or the place of delivery under the road stage is located in an airport. Which regime would apply to this first or last part of the road carriage performed within the airport? There is much

566. See for example the German rule which refers to transport stages ('*Teilstrecken*') in Multimodal transport § 452 HGB: '*Frachtvertrag über eine Beförderung mit verschiedenartigen Beförderungsmitteln. Wird die Beförderung des Gutes auf Grund eines einheitlichen Frachtvertrags mit verschiedenartigen Beförderungsmitteln durchgeführt und wären, wenn über jeden Teil der Beförderung mit jeweils einem Beförderungsmittel (Teilstrecke) zwischen den Vertragsparteien ein gesonderter Vertrag abgeschlossen worden wäre, mindestens zwei dieser Verträge verschiedenen Rechtsvorschriften unterworfen, so sind auf den Vertrag die Vorschrifen des Ersten Unterabschnitts anzuwenden, soweit die folgenden besonderen Vorschriften oder anzuwendende internationale Übereinkommen nichts anderes bestimmen. Dies gilt auch dann, wenn ein Teil der Beförderung zur See durchgeführt wird.*' For an English translation see: Rittler (2015), § 452 HGB: 'Freight agreement pertaining to a transportation by different means of transport. In case that, based on a uniform freight agreement, a transportation of the goods is carried out by different means of transportation and, had a separate agreement been concluded between the parties with regard to each part of the transportation from time to time (partial route), at least two of these agreements would have been subject to different legal provisions, the provisions of the first Sub-chapter have to be applied to the agreement, provided that the following special provisions or applicable international conventions do not provide otherwise. This also applies in case that a part of the transportation is carried out on sea.' For a similar rule under Dutch law I refer to art. 8:41 BW.
567. Ramming (2007), p. 92. Cf. Koller (2008), p. 338. Koller shares the view that the fact that no rules exist on the priority of certain modes of transport does not directly lead to the conclusion that all modes of transport rank equally.
568. Art. 2 CMR; 1.3, 4 COTIF-CIM; 18.3, 31 Warsaw Convention; art. 18.4, 30, 38 Montreal Convention.
569. Leloudas (2014), p. 86-89.
570. Art. 18.3 WC and art. 18.4 MC.
571. Art. 18.4 MC.

debate on the interaction between the CMR and the Montreal convention,[572] but in general it is understood that transport by truck from a location in the airport to a location outside the airport is part of a road stage.[573] The air carriage regimes are therefore not applicable and depending on the national view on the applicability of the CMR to international road legs of multimodal transport, the CMR can be applicable to that part of the road stage performed within the airport.[574] In that case, the air carriage regime does not cover the movements of the goods by truck within the airport. This is supported by the view that there are only difficulties in determining the moment of transition between the air stage and the road stage if the air carrier is still in charge of the goods. If they are transported by truck within the confines of the airport as part of a national or international road stage, the air carrier is usually no longer in charge of the goods.[575] Returning to the question at hand on the attribution of the transshipment to a transport stage, it can be concluded that transshipment within the confines of the airport is part of the air stage.

However, if no adequate agreement exists between the parties to the multimodal contract of carriage and if national rules or international transport law conventions do not provide guidance on the demarcation of transport stages under multimodal transport contracts, several aspects of the transport can be used as points of reference. It can be useful to take into account the characteristics of the transport before and after transshipment in order to be able to attribute it to one of these transport stages. It can be extremely difficult to determine the beginning and the end of transport stages if the transshipment process is more complex, for example if the goods remain at the port terminal for several days and if they are stored and transported over considerably large distances within the premises of the terminal. Moreover, when dealing with transport of containers, one should not forget that containers may be handled a great number of times during transshipment. Containers can be transported to a stack where they are stored, reshuffled and ultimately transported to the following means of transport. When attempting to demarcate transport stages, it should be noted that transshipment can either be divided into parts whereby it is partly covered by one transport stage and partly by another or the entire transshipment process can be attributed to either one of the transport stages. The following paragraphs will discuss the different points of reference which can be used to determine the demarcation of transport stages. These methods are evaluated in paragraph 6.4.6.

572. For the issue of the interaction of the CMR and Montreal Convention: Court of Appeal, Quantum Corporation Inc. and others v. Plane Trucking Ltd. and another [2002] 2 Lloyd's Rep. 25. Furthermore: Leloudas (2014), p. 91-93; Hoeks (2009), p. 363-365; Clarke and Yates (2004), p. 39.
573. De Wit (1995), p. 182-183.
574. According to the German and Dutch view, the CMR does not apply autonomously to the international road stage of a multimodal contract. See: BGH 17 July 2008, *TranspR* 2008, 365; HR 1 July 2012, ECLI:NL:HR:2012:BV3678, *NJ* 2012, 516 with commentary from K.F. Haak, *S&S* 2012, 95 (Godafoss).
575. Court of Appeal, Quantum Corporation Inc. and others v. Plane Trucking Ltd. and another [2002] 2 Lloyd's Rep. 25. Mance LJ implies that the conflict between the WC and the CMR (which applies to the international road stage of multimodal transport) only occurs when the air carrier is in charge of the goods in the airport: 'Mr McLaren opened up the possibility of a "clash of Conventions" if the Warsaw Convention could apply to air carriage while CMR applied to prior or ensuing road carriage leg. This clash related to goods in an airport in the charge of the air carrier after he had taken them over for road carriage, or possibly while he was completing road carriage.'

6.4.1 Distance

First of all, the distance covered by the different modes of transport can be used as a decisive factor when determining to which transport mode transshipment can be attributed.[576] When goods are, for example, carried by an ocean vessel from Hong Kong to Rotterdam, from where they are transshipped onto an inland barge which carries them to an inland terminal a few kilometers away, there is clearly a difference between the distance covered by both modes of transport. The distance of maritime carriage is considerably longer than the carriage over inland waterways. Using the distance covered by the modes of transport adjacent to the transshipment as a point of reference for attributing the transshipment process to one of these transport stages, would mean that the transshipment phase was covered by the transport stage relating to the mode of transport that covered the largest distance.[577] In this case, it would mean that the transshipment phase would be absorbed into the maritime transport stage. For this reason, the maritime transport regime applies during transshipment in the port.

The theories on mixed contracts can be applied if the distance covered by the mode of transport preceding and following transshipment is seen as a decisive factor for demarcating the transport stages.[578] As it is possible to distinguish dominant and secondary obligations, the absorption doctrine could be applied. The absorption doctrine assumes that the rules which apply to the dominant element under the contract should also apply to the auxiliary elements. This means that the auxiliary elements of the contract are absorbed into the main element.[579] In the example above, the transport stage covered the largest distance and would therefore be considered the dominant element under (that part of) the contract. Transshipment would therefore be absorbed into the transport stage which covered the largest distance.

However, in the absence of rules on priority, all transport stages would rank equally in the sense that the length of a transport stage or the time required to perform the stage in relation to the entire transport would not be relevant for demarcating stages.[580] Furthermore, in some cases, it might take longer to perform a transport stage even though the distance covered was shorter and the costs might be higher.[581] Therefore, one cannot assume that the larger distance covered by one transport stage makes it more dominant than one covering a shorter distance which justifies absorbing the transshipment phase.

6.4.2 Splitting transshipment in half

An option which might help demarcate the transport stages in direct transshipment could be to divide the transshipment phase in half. Direct transshipment occurs

576. Koller (2008), p. 338.
577. Koller (2014), p. 314.
578. See Chapter 5.
579. Völlmar (1950), p. 427; Gernhuber (1989), p. 162.
580. Ramming (2007), p. 92.
581. Van Beelen (1996), p. 95-96.

when goods are transshipped from one vehicle to another located next to it in one constant movement. In cases like this, the discharge from the first vehicle and the loading onto the subsequent vehicle are merged. In order to speak of direct transshipment, the distance between the two vehicles must be less than 300 meters.[582] The discharge from the first vehicle ends and the loading onto the subsequent vehicle commences when the goods have traveled half way across to the second vehicle. If the vehicles are located directly next to each other the end of the first transport stage and the beginning of the next takes place when the goods pass the outer boarders of these vehicles.[583] It is, however, difficult to determine during which transport stage damage occurs if goods are damaged in the gap between the two vehicles.[584] Moreover, direct transshipment can also take place if goods are discharged from a vessel and are directly transported by mafi-trailer to an awaiting truck. The sea stage ends and the road stage commences when the cargo is midway between the vessel and the truck.[585]

However, this method is not practical if goods are not directly transshipped but are stored at a terminal for a period of time. If the transshipment phase contains a period of storage, it will be difficult to divide this in two and establish the moment of transition between the transport stages. This can be illustrated by a case in which sea transport is followed by road transport. The discharge from the vessel forms part of the sea stage and this process ends when the goods are placed in the terminal, for example in a stack. The subsequent road transport stage commences the moment the goods are picked up from that place and are transported to the awaiting truck for the purpose of loading into the truck.[586] However, in certain cases the goods may remain in the terminal for a period of time between the end of discharge and the beginning of loading. During this period in the terminal or warehouse, other cargo handling operations like reshuffling may take place. This intermediate period also has to be attributed to either one of the transport stages. The longer this period of intermediate storage lasts, the more problematic it becomes.[587] Dividing this period in half does not always lead to practical results. This is because the number of days the goods remain at the terminal is not always determined in advance and the goods are not (constantly) checked for damage while they are stored in the stacks in the terminal. This obviously gives rise to legal uncertainty. If it were possible to establish the exact halfway point of the transshipment process and if it could be established that the goods were damaged during storage, it would still be unclear which transport stage covered the moment the damage occurred. This uncertainty will ultimately result in more cases of unlocalized loss.[588] It would therefore only be reasonable to apply this method for cases of direct transshipment. In situations like this it could provide easily applied criteria for determining the demarcation between transport stages while creating legal certainty. What is more, it does justice to the principle that all modes of transport rank equally.

582. Ramming (2007), p. 92.
583. Koller (2014), p. 314.
584. Ramming (2007), p. 92.
585. Ramming (2007), p. 93.
586. Ramming (2007), p. 92-94.
587. Koller (2014), p. 314.
588. Koller (2014), p. 314.

6.4.3 Most lenient liability regime

In order to determine to which transport stage transshipment should be attributed, it is also possible to consider which of the applicable legal regimes would be more beneficial to the cargo interests. Transshipment could then be absorbed into the transport stage which would provide for a higher amount of compensation.

It would be in line with the reasoning behind the rules on the law applicable to multimodal contracts to consider which legal regime would be more beneficial to the legal position of the cargo interests.[589] Art 8:43 BW and § 452 HGB provide rules on the applicable law in case of unlocalized loss. These rules are therefore applicable if it is unclear at which transport stage the goods sustained loss, damage or delay. Art. 8:43 sub 1 BW states:

> If the combined carrier is liable for the damage resulting from damage, total or partial loss, delay or any other damaging fact, and if it has not been ascertained where the fact leading thereto has arisen, his liability shall be determined according to the regime which applies to that stage or to those stages of the transport where this fact may have arisen and from which the highest amount of damages results.[590]

German law deals with unlocalized loss in a different way. Firstly, § 452 HGB determines that a multimodal contract of carriage is subject to the German general transport law rules concerning land, inland waterways and air transport.[591] This also applies to multimodal transport contracts which include a sea stage. The legal provisions which apply to a contract of carriage covering this stage would only be applicable if the person who alleges it can establish that the loss occurred at a particular transport stage (§ 452a HGB).[592] The rules on carriage by a specific mode of transport are therefore only applicable if it can be established (most likely by the person who would benefit most from it) that the damage occurred during that specific transport stage. In all other cases the general land transport law rules apply.

The national rules on unlocalized loss discussed above should be analogously applied when determining the rules applicable to the transshipment phase.[593] If goods are lost, damaged or delayed during transshipment it may be unclear during which transport stage it occurred. This situation is similar to one of unlocalized loss (where it cannot be established where the loss occurred) for which the rules are made.[594]

---

589. Van Beelen (1996), p. 96; Koller (2008), p. 338. Also Koller states that there is no reason to favor the carrier when determining the applicable law.
590. '*Indien de gecombineerd vervoerder aansprakelijk is voor schade ontstaan door beschadiging, geheel of gedeeltelijk verlies, vertraging of enig ander schadeveroorzakend feit en niet is komen vast te staan waar de omstandigheid, die hiertoe leidde, is opgekomen, wordt zijn aansprakelijkheid bepaald volgens de rechtsregelen die toepasselijk zijn op dat deel of die delen van het vervoer, waarop deze omstandigheid kan zijn opgekomen en waaruit het hoogste bedrag aan schade vergoeding voortvloeit.*'
591. §§ 407 ff HGB.
592. BGH 17 September 2015, *RdTW* 2015, p. 409. See for a discussion on the issue of whether the place where the damage was caused or where it manifested itself is relevant: Koller (2016), p. 1-6.
593. Van Beelen (1996), p. 96.
594. Van Beelen (1996), p. 96.

It opposes the view of the Dutch legislator that the carrier should have the prerogative to choose the most favourable liability regime for intermediate storage, transshipment or during the performance of other cargo handling duties.[595] The application of these national rules on unlocalized loss in multimodal transport would bring cargo interests into a more favourable position. It would be in line with transport law in general, where the carrier is liable for loss, damage or delay from the moment of 'taking over' until 'delivery' and bears the risk that the cause of the event leading up to the loss, damage or delay cannot be established. This view is furthermore compatible with the rules on determining the applicable liability regime to multimodal contracts in particular.

Under the Dutch system this would unequivocally lead to the most beneficial result for the cargo interest. Art. 8:43 BW states that in cases of unlocalized loss, the liability regime which results in the highest amount of compensation should be applied. Furthermore, under German law, the rules on unlocalized loss would lead to the application of the non-maritime transport law rules which can be found in § 407 ff HGB. Under these rules the carrier is liable if the goods are damaged, lost or delayed in the time between the 'taking over' (in German: '*Übernahme*') and 'delivery' (in German: '*Ablieferung*')[596] and this liability is limited to an amount of 8,33 SDR per kilogram of gross weight short. This amount can be contractually increased or decreased.[597] This would also apply in situations where the multimodal transport includes a sea stage, which contains lower limits of liability. The general transport law rules are therefore also applicable to the sea stage if it is not possible to establish when the loss, damage or delay occurred. The analogous application of national rules on unlocalized loss therefore leads to more beneficial results for the cargo interests.

6.4.4 Following custody of goods

Alternatively, when determining to which transport stage the transshipment should be attributed under multimodal contracts of carriage, one can also consider the unimodal carrier who has (constructive) custody of the goods. The unimodal carrier performed or has undertaken to perform transshipment. This unimodal carrier is employed for the performance of part of the underlying multimodal contract and undertakes to perform transshipment additional to transport. For this he can use his own devices and employees or he can employ an independent contractor, like a terminal operator or stevedore. The contractual connection can be a decisive

595. Claringbould (1992), p. 92: '*Zijn nu goederen tussen het zeevervoer en het wegvervoer in door de zeevervoerder opgeslagen, dan zal het zeerecht gelden; sloeg de wegvervoerder hen op, dan treedt het recht nopens wegvervoer in werking. Verzorgt in het gegeven voorbeeld de gemengd-vervoerder zelf het vervoer, dan heeft hij, voor zover althans daarin niet door een bestendig gebruikelijk beding, dat dit tijdvak bij één bepaalde vervoerstak onderbrengt, de keuze of hij zich op zijn hoedanigheid van zeevervoerder, dan wel op die van wegvervoerder wil beroepen*.' Freely translated as: In case the goods are stored by the sea carrier in the period between the sea carriage and the road carriage, the rules concerning carriage by sea will be applicable and in case the goods are stored by the road carrier the rules concerning carriage by road will be applicable. In case the multimodal carrier performs the storage himself he can choose whether to act as a sea carrier or as a road carrier, unless there is a common practice which suggests that this should be part of a particular transport stage.
596. § 425 HGB.
597. § 431 HGB.

factor when attributing the transshipment to the transport stage of the unimodal carrier who is under the obligation to perform the service, irrespective of whether the carrier performs transshipment himself or whether he instructs an independent contractor to perform it for him.[598]

The application of this method is only relevant when one of the unimodal carriers has undertaken the obligation to transship the goods. This is usually the case for transshipment between two transport stages. In these situations, it is highly unlikely that the shipper or consignee are responsible for transshipment. It is also possible that a multimodal carrier does not employ a unimodal carrier but directly subcontracts a terminal operator or a stevedore for the transshipment. Although it is important to determine the applicable transport law rules, the method of contractual connection can then be to no avail. In that case the transshipment could constitute a separate transport stage.[599]

Parallel with 'taking over' and 'delivery' under unimodal transport contracts

The demarcation of transport stages under a multimodal contract corresponds with the scope of the unimodal contracts of carriage which are concluded for the performance of this underlying multimodal contract. The beginning and end of a transport stage under a multimodal contract therefore coincide with the taking over and delivery of the goods under the unimodal contract. The main advantage of this method is that in some cases, it provides the multimodal carrier with a congruent recourse action against his subcontractors if the law applicable to both contracts is the same.[600]

This is, however, not always the case as the rules on the law applicable to multimodal contracts focus on hypothetical subcontracts when determining the law applicable to the multimodal contract. It is therefore possible that the law which applies to the subcontract is different from the law that would apply if a unimodal transport contract were concluded between the parties to the multimodal transport contract. For that reason, the law which applies to the subcontract that was actually concluded, may differ from the rules applicable to the multimodal contract.[601]

The Dutch legislators attached importance to the contractual connection and to custody when drafting the rules on multimodal carriage. In the legislative history to the book 8 of the BW the legislator described how to define a transport stage and explains briefly how to demarcate these stages when goods are stored during the transport.[602] This view can also be applied to other cargo handling duties such as transshipment, stowage, packaging or special care for the cargo.[603] For the demarcation of transport stages in cases of intermediate storage, the Dutch legislator considers as follows:

598. Freise (2013), p. 260-261; Koller (2014), p. 312.
599. Freise (2013), p. 261-262. See also: para. 6.3.3.
600. Koller (2014), p. 312.
601. Van Beelen (1996), p. 97-117; Koller (2014), p. 312.
602. Claringbould (1992), p. 92.
603. Van Beelen (1996), p. 92.

> A transport stage is not merely a stage over which the goods are moved. The storage before and after these stages is also part of the transport for which the multimodal carrier is responsible. As the storage after one stage is at the same time also the storage before the subsequent stage, the criteria for determining the applicable transport law regime can be established by answering the question in which carrier's custody the goods were. (…) If the goods are stored by the sea carrier in the period between the sea carriage and the road carriage, the rules concerning carriage by sea will be applicable and if the goods are stored by the road carrier, the rules concerning carriage by road will be applicable. If the multimodal carrier performs the storage himself, he can choose whether to act as a sea carrier or as a road carrier, unless there is a common practice which suggests that this should be part of a particular transport stage.[604]

The demarcation of transport stages under a multimodal contract can therefore be seen to follow the scope of the unimodal contracts as it takes into account in which unimodal carrier's custody the goods are. The carrier is responsible for the goods which are in his custody which starts with the 'taking over' and ends with the 'delivery' of the goods.[605] In order to determine when the moment of 'taking over' and 'delivery' occurs, it is however, not relevant whether the carrier has direct possession of the goods. The carrier himself can have direct possession, but it is also satisfactory if the carrier obtains constructive/indirect possession of the goods or if another person acts on his behalf. For this reason, the carrier has custody of the goods when they are in the possession of a person, such as an independent contractor, acting on his behalf.[606]

The performance of operations by independent contractors

According to the method of contractual connection, when the obligation to transship the goods is undertaken by a unimodal carrier, for example by a sea carrier or an air carrier, the transshipment phase should be attributed to the transport stage for which this unimodal carrier is employed. This rule is applied without hesitation in cases of transport by road where the carrier's employee loads or discharges the goods making use of devices such as a handcart or a pallet mover. Loading and discharge as well as the transport between a truck and another vehicle is considered part of the road stage.[607] This should also apply to transshipment in sea ports or airports, regardless of the fact that these ports are becoming increasingly bigger

604. '*(...) Onder "deel van het vervoer" moet worden verstaan "niet slechts een traject… waarover de goederen worden verplaatst". Ook de opslag vóór en ná deze trajecten immers maakt deel uit van het vervoer, waartoe de gemengd-vervoerder zich verbond. Daar de opslag ná het ene traject tevens is de opslag vóór het volgende traject, zal het criterium welk recht van toepassing is, moeten liggen in de beantwoording van de vraag onder de hoede van welke vervoerder de goederen zich bevonden. (…) Zijn nu goederen tussen het zeevervoer en het wegvervoer in door de zeevervoerder opgeslagen, dan zal het zeerecht gelden; sloeg de wegvervoerder hen op, dan treedt het recht nopens wegvervoer in werking. Verzorgt in het gegeven voorbeeld de gemengd-vervoerder zelf het vervoer, dan heeft hij, voor zover althans daarin niet door een bestendig gebruikelijk beding, dat dit tijdvak bij één bepaalde vervoerstak onderbrengt, de keuze of hij zich op zijn hoedanigheid van zeevervoerder, dan wel op die van wegvervoerder wil beroepen.*' Claringbould (1992), p. 92.
605. See para. 6.2.
606. Herber (2014), § 498 HGB, Rn. 36.
607. Koller (2013 a), p. 417-420.

and that cargo handling operations are becoming ever more complex. In cases like this, there are no grounds to divide this transport obligation into parts and to apply different sets of rules to the parts. The same would be true if the carrier instructs independent contractors to perform the obligations elsewhere in the (air)port with special cargo handling equipment such as fork-lifts, quay cranes or mafi-trailers.[608]

Legal consequences

If this method were applied, all activities performed by the unimodal carrier or his independent subcontractor, relating to the transport or the transshipment would be covered by the transport stage for which the unimodal carrier was employed. This would include activities like loading, discharge, storage and transport between vehicles. As a result of this, the transshipment performed by a stevedore or terminal operator employed by the sea carrier in the port of loading or discharge would be part of the sea stage under the multimodal contract. What would the consequences of this method be in practice? The performance of loading onto and discharge from the sea vessel, transport between the sea vessel and the storage location and the storage of the goods (in a stack) are generally covered by the sea stage. But what about the discharge from or loading into/onto inland vehicles? These operations are usually performed by the independent contractor employed by the sea carrier. Whether these operations are covered by the sea stage or whether they are part of the inland transport stage depends on the delimitation of the scope of the unimodal contract of carriage. (See paragraph 6.2.)

This would mean that the multimodal carrier could influence the applicable rules. The multimodal carrier could determine which unimodal carrier he employs for the performance of the transshipment. As the transport law rules applicable during transshipment depend on the type of unimodal carrier he employs for its performance, the multimodal carrier could influence the applicable rules.[609] If, for example, he were able to choose between appointing either a road carrier or a carrier by inland waterways for the transshipment, the multimodal carrier could make a decision based on his liability exposure. If the road carrier were employed for the transshipment as a subcontractor and this became part of a road stage subject to the CMR, the multimodal carrier would be liable to a greater extent for loss, damage or delay which occurred during the transshipment than if he were to employ a carrier by inland waterways to perform this task. This is because the liability limits under the application of the CMNI provide for lower limits than the ones in the CMR.[610]

One could argue that this method is not in line with the *ratio legis* of the rules on multimodal transport. According to that view, the rules are not intended to treat a multimodal transport contract as a sum of unimodal subcontracts actually concluded. The considerations on avoiding a recourse gap, in the sense that the mul-

608. Freise (2013), p. 261, 262.
609. Koller (2014), p. 312.
610. It has to be taken into account, however, that the CMNI does not cover loading and discharge of the vessel unless the parties agreed that the taking over and delivery does not take place on board the vessel. See art. 3.2 CMNI.

timodal carrier is liable to the same extent as his subcarriers, should not be taken into account when determining the applicable law to multimodal contracts.[611] This is because the network principle which is applied to multimodal contracts[612] prescribes that the applicable law should be determined based on a hypothetical subcontract and not on the subcontract which was actually concluded with the subcarrier.[613] This view was voiced in discussions about which national or international transport law rules were applicable to a multimodal contract. In that situation, the law applicable to the actually concluded subcontract does not always coincide with the law applicable to the multimodal contract. It is, for example, quite possible that the multimodal carriage contract is subject to Dutch road transport law and the unimodal subcontract to German land transport law. This should not be avoided as it provides legal certainty for the shipper under the multimodal contract. However, focusing on hypothetical subcontracts was not prescribed for discussions on the demarcation of transport stages. The Dutch legislator takes account of which (unimodal sub)carrier's custody the goods are when demarcating transport stages.[614] Following this, the sea stage under a multimodal contract commences when the unimodal sea carrier takes over the goods for transport under the unimodal subcontract.

6.4.5 Location: generally accepted views

The method discussed above cannot be applied in cases where the multimodal carrier himself employed a terminal operator for the transshipment in the port. The generally accepted views can be decisive when attributing the transshipment phase to a transport stage. It is possible to distillate these views from case law or legal doctrine. Whether such generally accepted views exist in a given case often depends on where transshipment takes place. This can, for example, be in a sea port, airport, railway station, inland distribution center or other spatially enclosed areas.

The Dutch legislator also prescribed the application of this method as a second step. Firstly, it should be ascertained whether a unimodal carrier has custody of the goods. If no unimodal carrier has custody over the goods and the multimodal carrier employed the stevedore/terminal operator himself, he can determine in which capacity he performs the service unless there is a common practice which suggests otherwise.[615]

There are some generally accepted views on the demarcation of transport stages under multimodal contracts. Some are of the opinion that if the transshipment takes place in an area in which a particular mode of transport can be deemed

611. Koller (2014), p. 312.
612. For the network principle codified in German law see: §452 HGB, and in Dutch law see: art. 8:40 ff BW. Hoeks (2009), p. 27-30; Van Beelen (1996), p. 35; Clarke (2003), p. 28.
613. For the German view on hypothetical subcontracts I refer to BGH 18 October 2007, *TranspR* 2007, 472 at 474. Furthermore: Koller (2008), p. 338; Herber (2006), p. 438. This is also the view of the Dutch legislator when drafting art. 8:41 BW. Claringbould (1992), p. 91-93. See also: Van Beelen (1996), p. 110-113.
614. Claringbould (1992), p. 92.
615. Claringbould (1992), p. 92.

dominant, it should be attributed to the transport stage which covers that particular mode of transport.[616] Transshipment in, for example, a sea port should therefore be attributed to the sea stage and transshipment in a railway station to the rail stage of a multimodal contract.[617] This view is reflected in the international conventions on air carriage as these rules determine that transshipment which takes place within an airport is attributed to the air stage. However, the rules on carriage by air only apply when the air carrier is in charge of the goods during transshipment.[618]

The typical risks involved in a specific transport stage are subject to the rules which are designed for this specific purpose, irrespective of the scope of the subcontracts which are actually concluded.[619] This view presupposes that transshipment which takes place between two transport stages poses typical risks to the transported goods and should therefore be subject to the rules which were developed accordingly. Transshipment is therefore considered to be characteristic for a specific mode of transport.

Transshipment in the sea port area

When demarcating transport stages under multimodal contracts, transshipment in the port is usually attributed to the sea stage. There are some particular reasons to attribute the operations performed in sea port terminals to the sea stage of a multimodal contract of carriage. Transshipment in sea ports, which includes operations such as the loading onto and discharge from a sea vessel, the storage and possible reshuffling at a port terminal is a characteristic element of the transport of goods by sea.[620] These operations have a close connection to the sea stage and should therefore be subject to the rules on carriage of goods by sea. This view can be substantiated by taking into account that the unimodal contract of carriage by sea usually also covers these operations. The sea carrier is responsible for the goods from taking over until delivery.[621] Delivery takes place when the carrier surrenders control over the goods with the expressed or implied consent of the consignee who then has the opportunity to exercise actual control over the goods.[622] Under most contracts of carriage by sea the moment of taking over takes place before the goods have been loaded onto the vessel and the delivery takes place after the goods have

616. Freise (2013), p. 260-265.
617. See also: Koller (2008), p. 338. Here Koller states that the transshipment of goods into or from a sea vessel should be attributed to the sea stage; the transshipment between trucks and barges to the inland waterways stage; the transshipment between sea vessels and barges in a sea port to the sea stage; the transshipment between trucks and aircrafts to the air stage; the transshipment between trucks and trains to the rail stage. This seems to coincide with the idea that the transshipment which takes place in an area in which a particular mode of transport can be deemed dominant should be attributed to the transport stage which covers that particular mode of transport.
618. Art. 18.3, 31 WC; art. 18.4, 30, 38 MC. See: Leloudas (2014), p. 86-89.
619. Koller (2014), p. 312.
620. BGH 18 October 2007, *TranspR* 2007, 472; BGH 3 November 2005, *TranspR* 2006, p. 35.
621. See para. 6.2.
622. Dutch case law: HR 17 February 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289 with commentary from K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy). See for an overview of Dutch case law on delivery: Claringbould (2012 c), p. 6-10. German case law: BGH 19 January 1973, *VersR* 1973, 350; BGH 9 November 1979, *VersR* 1980, 181. For English case law on delivery see: Carver (2011), p. 663 in fn. 543.

been discharged from the vessel.[623] It is for this reason that the (unimodal) contract of carriage by sea usually covers the transshipment process in the port. In that case, an independent contractor is often employed for the performance of the transshipment and this stevedore or terminal operator acts on behalf of the sea carrier. Transshipment is therefore covered by the contract of carriage by sea. As the sea carrier generally performs or undertakes to perform these operations in the port it is considered characteristic for the transport of goods by sea.

This method was applied by the *Hoge Raad* in the *Iris*-case.

> The court faced the question on the demarcation of transport stages in the case of a multimodal contract of carriage including a road stage and a sea stage. The case concerned the transport of a non-reefer (not refrigerated) container of deep-frozen butter from the Netherlands to the UK. The container was first transported by road to the port of Rotterdam from where it would leave for the UK aboard a vessel named Iris. However, the container was placed in the wrong stack and shipped aboard a vessel named the Cardigan Bay to Hong Kong. The container was not refrigerated so the butter was completely ruined. As the cause of the loss was that the container had been placed in the wrong stack, the question arose as to whether the loss could be attributed to the road stage or to the sea stage. The *Hoge Raad* had to determine whether the multimodal carrier could rely on the before-and-after clause in the terms of the bill of lading which is only operative during the sea stage. The court considered that according to the national provisions on (unimodal) contracts of carriage by sea, a sea carrier is responsible for the goods from the moment of taking over until delivery. The taking over can take place before the goods are loaded onto the sea vessel. In this case it was determined that the multimodal carrier acted as a sea carrier when taking over the goods which took place when the goods were placed in the wrong stack on the container terminal. For this reason, the court drew the conclusion that the sea stage under the multimodal contract commenced at that exact moment. For this reason, the multimodal carrier was subject to the rules on carriage by sea for which reason he could rely on the before-and-after clause.[624]

In this case, the *Hoge Raad* could not focus on the subcontract actually concluded for the transport by sea, as prescribed by the Dutch legislator, because the multimodal carrier himself contracted the independent subcontractor for the performance of the transshipment. The *Hoge Raad* therefore, took account of common practice in the port. Common practice is used in particular cases to determine to which transport stage the transshipment should be attributed. As it does not focus on the contractual connections which exist in a case at hand, it can be distinguished from the method described in paragraph 6.4.4.

---

623. BGH 18 October 2007, *TranspR* 2007, 472 at 747; BGH 3 November 2005, *TranspR* 2006, 35 at 36. Furthermore: Drews (2004), p. 452; HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris).
624. HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris). See also para. 9.2.2.

There are also more practical reasons to allocate transshipment in the port to the sea stage. This covers the moments when goods are usually checked for damage during transport. In general, goods are not checked for possible damage while being loaded onto or discharged from the sea vessel. This check usually only takes place when the goods enter or exit the terminal.[625] It can therefore be difficult to allocate the presence of damage to a particular transport stage if the period during which the goods were at the terminal before or after the sea transport is not part of the sea stage. It would be more practical to include transshipment in the sea stage as it would avoid cases of unlocalized loss. However, it is questionable as to whether the common practice of checking for damage should be taken into account when determining the applicable legal regime. The multimodal carrier could also adapt its behavior and that of its subcontractors by introducing more controls to prevent liability risks.[626]

General accepted views on loading and discharge of other vehicles than sea vessels

Not all services performed by the sea carrier's independent contractor at a sea port terminal are always considered part of the sea stage. It is generally accepted that the loading into/onto and the discharge out of/from a vehicle are always attributed to the transport stage which covers that mode of transport.[627] For this reason, the loading and discharge of, for example, a truck or an inland barge in a sea port is part of the road stage resp. the inland navigation stage and is not part of the sea stage. It is therefore irrelevant whether this part of the transshipment is performed by the sea carrier's independent contractor in the sea port.[628]

In some cases a question may arise concerning the exact moment the discharge ends or the loading commences. This is relevant when, for example, the goods are being transported over the terminal to an awaiting truck and they fall off the mafi-trailer. Is this part of the loading process? In general, activities such as picking up from the stack, transporting to and loading into/onto the subsequent vehicle are part of the loading process and can therefore be attributed to the subsequent transport stage. This also applies to the discharge from the vehicle which carries the goods to the port, the transport to a location on the terminal and placing the goods into the stack, which is part of the discharge process and therefore belongs to the transport stage preceding transshipment.[629]

---

625. BGH 18 October 2007, *TranspR* 2007, 472 at 747; BGH 3 November 2005, *TranspR* 2006, 35 at 36; Drews (2004), p. 450-454.
626. Koller (2008), p. 338.
627. HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris); BGH 18 October 2007, *TranspR* 2007, 472; Koller (2014), p. 314. For an English case on the demarcation of transport stages concerning ro-ro transport I refer to Queen's Bench Division, Thermo Engineers Ltd. and Anhydro A/S v. Ferrymasters Ltd. [1981] 1 Lloyd's Rep. 200. Here it was also determined that the sea stages had already commenced because the loading was well advanced as 'the trailer had already passed across the outboard ramp and across the line of the stern'.
628. Koller (2008), p. 338.
629. See the commentary from R.E. Japikse under 6 after HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 (Iris). Furthermore: BGH 18 October 2007, *TranspR* 2007, 472; Ramming (2007), p. 92.

6.4.6 Conclusion: The three-step approach on demarcating transport stages

After discussing these points of reference which can be used in the absence of agreements between the parties on the demarcation of transport stages, it can be concluded that some of these views have more to offer, do more justice in a particular case and contribute to legal certainty. In addition to providing justice and legal certainty, account has been taken of whether the methods prescribed are in line with the existing legal system and whether they can be integrated into these rules.

The method of comparing the distance covered by the transport modes preceding and following the transshipment is arbitrary in some cases and would not be a solution which could be used throughout. In some cases the distance covered by one mode of transport is not significantly larger than the other. In other cases the time required to perform a transport stage is longer although a shorter distance is covered, or the costs involved are higher. It should therefore not be concluded that the larger distance covered by one mode of transport automatically makes that particular transport stage more dominant than another and should lead to the absorption of the transshipment phase by the more dominant transport stage.[630]

The second point of consideration gives rise to even more uncertainty, especially when goods are not directly transshipped to the subsequent vehicle. The suggestion to divide a transshipment phase in half and attribute the first half to the transport stage preceding it and the second to the transport stage following transshipment should not be recommended. This method can only be applied in cases of direct transshipment when the goods are transshipped from one vehicle to the following in one single movement. In that case the transport stage covering the transport by the first vehicle ends when the goods are lifted over the outer boundaries of the vehicle and the following transport stage commences when the goods reach the outer boundaries of the subsequent vehicle.[631] Nevertheless, problems arise if the goods sustain damage in the gap between the two vehicles. It would therefore not be advisable to apply this method in situations where goods are not directly transshipped but are stored or handled at a terminal for a period of time.[632] This intermediate period also has to be attributed to either one of the transport stages. The longer this intermediate period of storage or handling lasts, the more problematic it becomes and dividing the period in half does not always lead to practical results.[633] One of the reasons for this is that the length of the intermediate period is not always determined in advance, so it is not clear at the outset when half of the period has passed. What is more, the goods cannot always be checked for damage throughout this period of storage. It can therefore be difficult to establish whether damage occurred during the first half of the transshipment or during the second. This method will therefore ultimately result in more cases of unlocalized

630. This view has, however, been advocated by Ramming in: Ramming (2007), p. 92.
631. Ramming (2007), p. 92.
632. Koller (2014), p. 314.
633. Koller (2014), p. 314.

loss as it is not clear during which transport stage the transported goods were damaged.[634]

The first step when attempting to demarcate transport stages is to define which unimodal carrier has custody of the goods. The demarcation of transport stages under a multimodal contract corresponds with the scope of the unimodal contracts of carriage which are concluded for the performance of this underlying multimodal contract. The beginning and end of a transport stage under a multimodal contract therefore coincides with the taking over and delivery of the goods under the unimodal contract. The main advantage of this method is that in some cases it provides the multimodal carrier with a congruent recourse action against his subcontractors if the law applicable to both the main- and the subcontract is the same.[635] However, the law which applies to the subcontract and to the multimodal contract can diverge. This is because the rules on multimodal contract in Dutch and German law focus on hypothetical subcontracts when determining the law applicable to the multimodal contract.[636] It is therefore possible that different national or international rules apply to these separate contracts. The primary objective of the rules on multimodal contracts is therefore not to avoid a recourse gap. Nevertheless, a greater degree of transparency and legal certainty would be achieved if this method were used as the transport stages under the main multimodal contract coincide with the scope of the subcontracts. The Dutch legislator envisaged this method as the first step in demarcating transport stages.

Furthermore, generally accepted views can be deduced from legal doctrine and case law. These views can be taken into account if there is no unimodal carrier who takes upon himself the responsibility to transship the goods, and the multimodal carrier himself subcontracts with a terminal operator/stevedore for the performance of the transshipment.[637] In that case, the previous method cannot be used and the location of the transshipment can be taken into account. So, if transshipment takes place in an area in which a particular mode of transport can be deemed dominant it should be attributed to the transport stage which covers that particular mode of transport.[638] These locations are spatially enclosed areas such as sea port (terminals), airports, railway stations and inland distribution centers. The dominant means of transport in these areas can be determined and the transshipment phase could therefore be attributed to the transport stage covering this means of transport. Transshipment in, for example, a sea port should be covered by the sea stage and transshipment in a railway station by the rail stage of a mul-

634. Koller (2014), p. 314.
635. Koller (2014), p. 312.
636. For the German view on hypothetical subcontracts: BGH 18 October 2007, *TranspR* 2007, 472 at 474; Koller (2008), p. 338; Herber (2006), p. 438. This is also the view of the Dutch legislator when drafting art. 8:41 BW as expressed in Claringbould (1992), p. 91-93. Furthermore: Van Beelen (1996), p. 110-113.
637. This has also been applied by the *Hoge Raad* in: HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris). Furthermore, this is also the view of the Dutch legislator in case there is no unimodal carrier who took upon himself the obligation to transship the goods and the multimodal carrier subcontracted directly with the stevedore/terminal operator. Claringbould (1992), p. 92.
638. Freise (2013), p. 260-265.

timodal contract of carriage.[639] This method serves legal certainty for the parties involved in the multimodal contract of carriage as the demarcation of transport stages under this contract can be clearly ascertained in advance. The generally accepted views which take account of the location where transshipment takes place reflect common practice. Accordingly, transshipment in the sea port is characteristic for the sea stage and should therefore be attributed to this stage.[640] It is seen as characteristic for sea transport because in most cases the sea carrier is the person who performs or undertakes to perform transshipment in the sea port area. This method therefore takes into account which unimodal carrier usually has custody of the goods in a particular area. The contractual connections and the person who usually has custody of the goods is considered when demarcating transport stages. This method is applied when demarcating transport stages under multimodal contracts in German law. The scope of the subcontracts actually concluded is of little relevance.[641]

If, however, it is not possible to demarcate transport stages by first following the contractual connection and establishing which unimodal carrier has custody of the goods or if no generally accepted views exist then, as a second step, the rules on unlocalized loss could function as a safety net. In that case, as a third step, the rules on unlocalized loss regarding multimodal transport contracts should analogously be applied.[642] Art 8:43 BW as well as § 452 HGB provide rules on the applicable law in cases of unlocalized loss. These rules are applicable if it is unclear during which transport stage loss, damage or delay occurred to the goods. Applying this method to the case of transshipment therefore fits into the existing legal system.

6.5 Conclusions Part II

Theories on mixed contracts

The terminal operator who operates in the logistic network between the sea port and the hinterland usually concludes a contract for the performance of a variety of services and duties with his customer. These include carriage, stowage, storage, loading and discharge, taking over and delivery, and services relating to customs. These services and duties fall into different categories of specific contracts for which the law provides specific rules (also referred to as 'nominate contracts'). In Part I it is determined that these contracts fall into the category of a service contract, contract of carriage and/or contract of deposit. The contract concluded by the terminal operator for the performance of these services can therefore be characterized as a mixed contract. A mixed contract is a contract which does not neatly fit in one category of nominate contracts.[643] The construction of mixed contracts may give

639. See also: Koller (2008), p. 338.
640. HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris); BGH 18 October 2007, *TranspR* 2007, 472.
641. BGH 18 October 2007, *TranspR* 2007, 472.
642. Van Beelen (1996), p. 96.
643. In Dutch: '*gemengde overeeenkomst*'. In German: '*gemischter Vertrag*'. In French: '*contrat mixte*', or '*contrat complexe*'. The previous terms are often translated into English as 'mixed contract'. It refers to contracts which have characteristics of two or more nominate contracts. See: Hartkamp, Tillema and ter Heide (2011), p. 42-43; Markesinis, Unberath and Johnston (2006), p. 163.

rise to difficulties in determining the applicable rules to specific aspects under a contract. These mixed contracts exist in every legal system in which specific rules are provided for certain types of contracts. In those systems an agreement may not fit into a category of a single nominate contract, or an agreement combines elements of more than one nominate contract. Mixed contacts raise issues on determining the rules applicable to (parts of) the contract. This may arise in cases where the terminal operator provides carriage and storage services. If goods are lost due to a fire during storage the question arises as to whether the transport law rules or the rules on contracts of deposit are applicable.[644] Moreover, some contracts contain different sets of general terms and conditions for each service. Legal literature has distinguished three doctrines to determine the applicable legal regime. These are the absorption doctrine, the sui-generis doctrine and the cumulation doctrine. None of these approaches can be used in every situation and the use of these doctrines depends on the category of mixed contract at hand.

When applying these doctrines to the terminal operator's contract, much depends on its construction. The contract can be constructed in such a way that the obligations under the contract are equally significant and can be isolated from each other. Each obligation is then approached separately in order to determine the applicable rules. Thus, the cargo handling services in the sea port area (i.e. loading/discharge), the storage (in the port area and/or in the hinterland) and the inland carriage to or from the hinterland constitute separate elements under the contract. The construction of the terminal operator's contract can however result in one or more obligations being absorbed into a more dominant obligation. The performance of carriage between two terminals can, for example, be absorbed into the more dominant obligation to deposit the goods depending on the agreements between the parties.[645] Carriage of goods can also absorb the element of preceding or subsequent storage, which results in the application of transport law to the storage part.[646] The different approaches to mixed contracts may also be combined under a contract so that some elements are absorbed and others are separated in order to constitute independent stages. The loading and discharge of the ocean vessel in the sea port area can, for example, constitute an element under the contract which absorbs temporary storage at the terminal. The subsequent carriage to the hinterland, however, constitutes a separate element, which is subject to transport law.

Fortunately, contracting parties can, to a large extent, determine the approach taken themselves. This also means that the problems of mixed contracts can be solved by smart contract drafting. Terminal operators are advised to clarify the distinguishable elements in a contract and, to some extent, when they commence and end. This would significantly reduce the problems surrounding the laws applicable to the terminal operator's mixed contracts.

644. HR 22 January 1993, ECLI:NL:HR:1993:ZC0831, *NJ* 1993, 456, *S&S* 1993, 58 (Van Loo/Wouters).
645. HR 28 November 1997, ECLI:NL:HR:1997:ZC2512, *NJ* 1998, 706 with commentary from J. Hijma, *S&S* 1998, 33 (General Vargas).
646. See also: Claringbould (1992), p. 88.

Theories on mixed contracts applied to the transshipment of goods

During the transshipment phase in which goods are moved from one vehicle to another, for example, when goods are discharged from a vessel and after an intermediate period of storage placed onto a truck and subsequently transported to the hinterland, it is important to demarcate the legal regimes. This is because the legal position of the terminal operator performing the transshipment and transport to the hinterland varies according to the legal regime applicable (see Part I and Part III). This is especially relevant as goods are frequently lost (due to theft) or damaged at the terminal while they are being transshipped.[647]

In order to demarcate the legal regimes during the transshipment process, the scope of the contract of carriage is determined. First of all, it is important to determine whether the terminal operator is responsible for the goods as a carrier subject to transport law during the performance of transshipment. This covers the matter of the legal qualification of the transshipment process as carriage of goods. Another issue is the scope of an inland transport contract under which the terminal operator is responsible for the goods as a carrier. The scope of the maritime contract of carriage is also relevant for the legal position of the terminal operator performing stevedoring duties. The stevedore can only rely on clauses stipulated to his benefit (pursuant to a Himalaya clause) during the performance of obligations within the scope of the maritime contract of carriage.

The legal nature of a contract for the performance of transshipment is analysed in order to determine whether the terminal operator is subject to transport law. Transshipment entails a variety of duties and obligations, and can therefore be considered a mixed contract. The rules applicable to individual obligations are determined by the rules on mixed contracts. During transshipment, goods are moved from one means of transport to another. The lifting of goods for the purpose of loading/discharge or stacking and the movement of goods between vehicles or stacks, all concern the carriage of goods. These activities in themselves, concern transportation and if these obligations are solely undertaken it can be qualified as carriage of goods.[648] The short distance travelled, whether it is horizontal or vertical, or the place where it takes place, i.e. in a privately enclosed area, is irrelevant for its qualification.

It should however, be borne in mind that transshipment, i.e. lifting for the purpose of loading and discharge and carriage within the terminal, is often performed in combination with other obligations such as carriage outside the terminal, freight forwarding, the provisions of other services or storage. It is therefore a mixed contract. In that case, the characteristic element under the contract should be determined. Transshipment regularly constitutes a dependent element under the contract and should therefore be absorbed into the more dominant elements under the contract. If, for example, storage is involved, the transport for the purpose of

647. Koller (2014), p. 309-310; Rogert (2005), p. 254.
648. Claringbould (1992), p. 59; Boonk W.E. (2016), p. 141; Herber (2016), p. 172; Koller (2013), § 407 HGB, Rn. 10a; Herber (2006), p. 437; Thume (2014), p. 183; Rabe (2008), p. 188; Koller (2008), p. 334.

transshipment may become an auxiliary element to this more dominant obligation to store the goods. This also applies to transshipment undertaken in combination with the carriage of goods outside the terminal. In that case the carriage, for example, carriage by sea, is considered the characteristic obligation and the auxiliary obligation to transship is absorbed and thus subject to the rules on carriage of goods by sea.[649] Taking into account the above, different contractual levels should be distinguished. One should bear in mind that with respect to a contract of carriage for carriage outside the terminal, the transshipment can be deemed an auxiliary element absorbed into the more dominant obligation to carry the goods, for example by sea. This should however be distinguished from the (sub)contract concluded between the main (sea) carrier and the terminal operator. The performance of the loading and discharge under the latter contract can be deemed carriage of goods subject to other transport law rules.[650]

The scope unimodal transport contracts

The scope of transport contracts covers the time that goods are in the carrier's custody from the moment they are taken over for transport until they are delivered. The carrier is generally subject to the mandatory liability regime from taking over until delivery.[651] An important exception is formed by the H(V)R which apply from 'tackle-to-tackle'.[652] The goods are taken over by the carrier when they are brought under the carrier's control and are delivered when control passes to the consignee or a person who acts on his behalf. Taking over and delivery does not require the physical transfer of the goods but is a bilateral act where one party surrenders control to the other who accepts control over the goods.[653] It is therefore not always easy to determine the beginning and end of the scope of the contract of carriage. The carrier and the shipper/consignee often use others to act on their behalf when taking over or delivering goods. What is more, the goods may remain in the carrier's custody under another type of contract after delivery or before taking over. In that case, the performance of that contract would not be covered by the contract of carriage.[654] It could, therefore be useful to apply the theories on mixed contracts when determining the beginning and the end of the scope of the contract of carriage.

In principle, the moments of taking over and delivery under a contract of carriage can be determined and agreed on by the contracting parties, within the boundaries set by mandatory provisions or by the nature of the agreement between the parties, e.g. when a document of title is issued. The goods are taken over and delivered when control passes in accordance with these agreements. The parties are, in principle, free to agree on the moment that control passes. They can define who

649. See also: Claringbould (1992), p. 88.
650. Under German law: §§ 407 HGB. Under Dutch law: art. 8:20 ff BW or, depending on the case, the rules on road transport: art. 8:1090 ff BW.
651. Art. 17.1 CMR; art. 18.1, 18.3, 18.4 MC; art. 23.1 COTIF-CIM; art. 3.1 CMNI art. 12 RR; art. 4 HHR. For Dutch transport law see: art. 8:21 BW.
652. Art. I (e), VII H(V)R.
653. HR 17 February 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289 with commentary from K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy).
654. HR 24 March 1995, ECLI:NL:HR:1995:ZC1677, *NJ* 1996, 317 with commentary from R.E. Japikse, *S&S* 1995, 74 (Mars).

is responsible for the loading or discharge of the goods or make other arrangements for the goods before they are transported or after their arrival at their destination. However, boundaries have to be set when deciding the freedom of the contracting parties to determine the moment of delivery in cases of contracts of carriage evidenced by bills of lading. The nature of the bill of lading as a document of title generally implies that goods can only be available for removal by the consignee after the bill of lading is presented to the carrier who subsequently releases the goods to the consignee. In practice this is often done by issuing a delivery order. It is for this reason that clauses aimed at fixing the end of the contract of carriage before (in combination with a FIOS clause) or immediately after the fulfillment of discharge obligations (in a so-called 'delivery clause') should be deemed inoperative.

When determining the moment of taking over and delivery under a contract of carriage by sea, the question arises as to whether the discharge from and the loading into/onto an inland vehicle by the independent subcontractor on behalf of the sea carrier should be covered by that contract. All cargo handling operations which the sea carrier has undertaken to perform and which he may have delegated to the terminal operator/stevedore should be covered. This contract should also cover all obligations for which the terminal operator/stevedore is employed by the sea carrier. If the sea carrier instructed the terminal operator to deal with the loading or discharge of inland vehicles, this should also be considered part of the contract of carriage by sea. This is a better view than the one which considers that the loading and discharge of the inland vehicles is not covered by the contract of carriage by sea. In that view, delivery of the goods under the contract of carriage by sea takes place when the loading commences into a truck which collects the goods at the sea port terminal. Part of the transshipment performed by the stevedore as an independent contractor employed by the sea carrier is therefore not covered. The contract of carriage by sea, including those terms benefitting independent contractors pursuant to a Himalaya clause, would therefore not be operative during the discharge from or loading into/onto inland vehicles. If loss, damage or delay were to occur during these operations, the independent contractor could not benefit from its terms.[655] This is a problem faced by the sea carrier's independent contractors, such as stevedores and terminal operators especially in those jurisdictions where extra-contractual claims can be brought against them (see Part III below). These persons should therefore be aware of their exposure to liability and subsequently arrange for adequate insurance cover or, if commercially viable, stipulate in their contracts that the sea carrier should extend the scope of the defenses under the contract of carriage by sea to all activities performed by the person employed by the sea carrier. In that case the independent contractor would be able to rely on the terms of the contract of carriage by sea when faced with a claim from a shipper or consignee who is a party to that contract.

This problem is not as apparent under the new business model where the terminal operator performs or undertakes to perform the inland transport between the port

655. England: Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto). The Netherlands: HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 with commentary from R.E. Japikse, *S&S* 1997, 121 (Sriwijaya). Glass (2004), p. 216; Tetley (2003), p. 54; Haak and Zwitser (2003), p. 534-538.

and inland terminals himself. In that case the terminal operator performs the loading and discharge of the sea going vessel as an independent contractor on behalf of the sea carrier. It is advised that the contract of carriage by sea stipulates that the performance of these obligations is covered by the contract of carriage by sea. However, the storage of the goods in the stack and the loading and discharge of inland vehicles is performed by the terminal operator as an inland carrier under the inland carriage contract. This also applies to the situation in which the terminal operator ultimately uses performance agents for the inland transport. The terminal operator is therefore subject to inland transport law in the port of loading until the loading of the sea going vessel commences and in the port of discharge, until the delivery under the contract of carriage by sea takes place when the discharge is complete and the terminal operator as an inland carrier takes over the goods for inland transport.

The demarcation of transport stages under multimodal contracts

Similar issues arise under multimodal contracts with regard to determining the moment of taking over and delivery as under unimodal contracts of carriage. When goods are transported under a multimodal contract, there may be some uncertainty over the demarcation of transport stages. If goods are transshipped from one vehicle to another with a possible period of storage, difficulties surrounding the demarcation of transport stages emerge. Although the transshipment of goods can be considered a contract of carriage, from the perspective of the multimodal contract the transshipment can generally not constitute an independent transport stage. As a result of this, the transshipment of goods can be attributed to either the transport stage preceding or the one following the transshipment.

The demarcation of transport stages not only affects the legal position of the multimodal carrier who is responsible for the entire transport but it also affects the legal position of the terminal operator who performs the transshipment. In cases of extra-contractual claims from third parties, the terminal operator may wish to rely on contractual clauses in the contract of carriage to which the claimant is party. The parties to the multimodal contract of carriage possibly agreed on different liability limits for each transport stage, which is why it is important to determine whether loss, damage or delay occurred during the maritime stage or at a stage preceding or following this one. Thus, the liability exposure of the party employed by the multimodal or sea carrier, depends on the demarcation of the individual transport stages of the multimodal transport; i.e. the exact moment a transport stage begins and ends.[656]

Just as it is difficult to determine the scope of a unimodal contract of carriage, it can also be difficult to demarcate transport stages under a multimodal contract. During the performance of a multimodal contract of carriage, the goods are transshipped from one means of transport to another. This transshipment can cover a considerable distance and it can take a substantial period of time during which

656. HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris).

goods are handled or stored in the terminal before they are transported further. It is recommended to the parties to a multimodal contract of carriage to make clear agreements on the demarcation of transport stages. In the absence of adequate agreements, the attribution of transshipment to the transport stage preceding or following transshipment should be done in the following manner.

Account is first taken of which unimodal carrier has custody of the goods. The transshipment phase is attributed to the transport stage for which this unimodal carrier is employed by the multimodal carrier. The demarcation of transport stages under a multimodal contract of carriage should coincide with the unimodal contract of carriage which are concluded for the performance of the underlying multimodal contract. If no such unimodal contracts are concluded, and if the multimodal carrier performed or undertook to perform the transshipment himself, the generally accepted views should be considered. In that case the location where the transshipment takes place is relevant. If this does not solve the issue, the rules on unlocalized loss under multimodal contracts of carriage can be analogously applied as it is unclear during which transport stage the loss, damage or delay occurred.

Part III
Third parties

Chapter 7

Extra-contractual liability of terminal operators

7.1 Introduction

Part III discusses the rights and obligations of third parties in relation to terminal operators. Third parties are parties such as cargo owners, ship owners or owners of other transport vehicles who do not have a contractual relation with the terminal operator. The terminal operator often finds himself, like a spider in a web of contracts, connected to a number of parties in the logistic chain. His legal position is not only determined by his relation with parties by whom he is employed or other contracting parties but also by the position of third parties with whom he does not have a contractual relation.

This can be illustrated by the case of a terminal operator with a client who is a maritime or a multimodal carrier. This main carrier is employed by a shipper for the transport of goods from Hong Kong to Duisburg in Germany. The main carrier then concludes a subcontract with the terminal operator whereby he entrusts the performance of stevedoring services in the port of Rotterdam and the transport of the goods from the sea port to the inland terminal in Duisburg to the terminal operator. The terminal operator first discharges the cargo from the sea vessel in the port of Rotterdam and then loads the goods onto an inland barge by which they are to be transported to the inland terminal in Duisburg. In a situation like this, the terminal operator performs these obligations as a subcontractor of the main carrier. The terminal operator has no contractual relationship with the shipper or other cargo interests and these are therefore considered as third parties. If the goods are lost, damaged or delayed in the period between their arrival in the port of Rotterdam and their subsequent arrival at the inland terminal in Duisburg, the question arises as to whether the terminal operator can be held liable for the damage resulting from these events and if so, to what extent.[657]

Pursuant to a breach of contract, these third parties usually bring a claim against their contracting party. In the abovementioned case, the shipper or consignee would usually bring a claim against the main carrier. This main carrier can be held liable as a main contractor remains responsible, although (part of) the contract is performed by the terminal operator.[658] This is also the approach taken in the DCFR where art. III. – 2:106 states that a debtor who entrusts the performance of an

657. Outside the scope of this research is the issue of security rights which the terminal operator might enjoy against third parties. This was the question in the case which came before the Rotterdam court in: Rb. Rotterdam 2 September 2016, ECLI:NL:RBROT:2016:6868, *S&S* 2017/10. See for a dissertation on security rights in transport law: Logmans (2011).

658. Under Dutch law this follows from art. 6:76 BW and under German law from § 278 BGB. For English law see: Chitty 1 (2015), nr. 19-081-19-084; Treitel and Peel (2011), para. 17-013.

obligation to another person remains responsible for the performance. Subsequently, the carrier who is held responsible may want to recover the compensation payable to his contracting party by bringing a recourse claim against the terminal operator. When following these contractual links, the carrier (towards the cargo interests) and terminal operator (towards the carrier) can rely on the contractual terms they had concluded in order to exclude or limit their liability. Moreover, the main carrier is also protected by national or international transport law and in some cases this protection offered by transport law also extends to subcontractors.[659]

If the terminal operator can also be found extra-contractually liable to third parties under the applicable national law the following needs to be observed. In the abovementioned case the terminal operator can be faced with extra-contractual claims brought by the cargo interests who sustained damage during the performance of services by the terminal operator if the requirements for extra-contractual liability are met under the applicable national law. Contracts concluded by terminal operators generally contain liability exclusions and limitations, as well as other clauses for their benefit, such as arbitration clauses and time for suit. However, in cases of claims from third parties, the terminal operator can, in principle, not rely on these contractual terms and conditions. This follows from the privity of contract rule which establishes that a contract is only binding upon the parties to it.[660] It follows from this rule that a terminal operator who is faced with an extra-contractual claim cannot rely against third parties on the contract concluded with his contracting party, nor can he rely on a contract to which he is not a party (e.g. the contract which the claimant has concluded). Nevertheless, in some jurisdictions the terminal operator, who is part of a network of contractual relations, may find himself in a position whereby he can rely on contractual clauses which then have external effect. Whether the terminal operator is able to rely on contractual clauses often depends on the capacity in which he acts. A distinction has to be made between the rules applicable if the terminal operator is responsible for the goods as a carrier, a service provider or a depositary. Moreover, if the terminal operator is considered a carrier, national and international transport law provides protection against claims from third parties. Statutory rules can also be found on the liability of depositaries or service providers to third parties depending on the national law applicable.

The central questions in this part are: What is the legal position of the terminal operator as a service provider, depositary and carrier when faced with extra-contractual claims from third parties? Chapter 8 focuses on the applicability of the international (transport) law conventions and on the position of the terminal operator when subject to these conventions. Chapter 9 discusses the liability of the terminal operator to third parties under national law. Before going into the legal position of terminal operators in cases of cargo claims from third parties in Chapter 8 and 9, Chapter 7 first deals with the question of whether terminal operators can be held extra-contractually liable.

659. See Chapter 8 and 9.
660. Under German law this principle is codified in § 241 BGB. Under Dutch law it was codified under the former civil code in art. 1376 BW. See: Zwitser (1984). For English law see: Chitty 1 (2015), nr. 18-003 and para. 9.5.1.

Chapter 7 addresses the following questions: Under what circumstances can a terminal operator be held liable in tort? An act which constitutes a breach of contractual obligations (with regard to one party) does not necessarily fulfill the requirements for tortious liability (with regard to another party). Paragraph 7.2 covers the co-existence and concurrence of contractual and extra-contractual liabilities. Paragraph 7.3 focuses on the requirements for extra-contractual liability. Not all damage leads to liability. The terminal operator is only extra-contractually liable if he falls short of a certain standard of care owed to the person suffering damage. In paragraph 7.3 the example of damage to vessels or other vehicles serves to illustrate the issue on the requirements for extra-contractual liability, and paragraph 7.4 addresses whether the terminal operator can bind third parties to limits of or exemptions from liability by placing warning signs at the entrance to the terminals.

7.2 Co-existence and concurrence of contractual and extra-contractual claims

Terminal operators can expect to receive extra-contractual claims from other types of third parties, not only cargo claims brought by cargo interests. It is, for example, possible that the terminal operator is confronted with an extra-contractual claim from a ship owner for damage caused to his vessel during loading or discharge operations. The ship owner is not a contracting party if the terminal operator is employed by the cargo interests or by the charterer who is not the ship owner. The terminal operator can then be held extra-contractually liable in those jurisdictions where the path of extra-contractual claims can be followed regardless of the contractual claim the ship owner might have against the charterer or against the cargo interests.[661] If the conditions for extra-contractual liability are fulfilled, the terminal operator is liable for any damage caused to the vessel during the performance of stevedoring activities. Similarly, damage to other vehicles, such as inland barges, trucks or trains can also result in extra-contractual claims from the owner of these vehicles with whom the terminal operator usually has no contractual relation. Other types of claims, although outside the scope of this research, could include claims for personal injury to stowaways who might have smuggled themselves on board in empty containers[662] or personal injury claims by members of the carrier's or ship's crew if they sustained an injury due to the negligent handling of the cargo by the terminal operator, or by other (traffic) accidents caused on the terminal. However, claims for damage to vehicles and cargo claims are the ones terminal operators will most likely encounter when engaged in cargo handling activities.

The terminal operator's legal position is therefore not only determined by his relation with contracting parties but also by the position of third parties with whom he has no contractual relation. If these third parties suffer damage during the performance of services, they might decide to bring a direct claim against the terminal operator although a contracting party is also responsible for the occurrence. In most legal systems this direct action will necessarily be an action in tort as the

661. For the liability of cargo interests under Belgian law I refer to Stevens (2013), p. 91-97.
662. This is found to be a growing problem for the shipping industry. See: www.imo.org/OurWork/Facilitation/Stowaways/Pages/Default.aspx (retrieved on 10 October 2014).

privity of contract rule denies a person the right to sue under a contract to which he is not a party. However, some legal systems contain the possibility of direct action against a third party in contract.[663] In most jurisdictions, including Germany, England and the Netherlands, an act which constitutes a breach of contractual obligations may give rise to extra-contractual liability towards third parties.[664] Contractual and extra-contractual claims can co-exist. Therefore, the rights and interests of parties who are not privy to the contract also have to be taken into account when performing contractual obligations and the person who carries out the contract can be held extra-contractually liable if the requirements are fulfilled. The mere breach of contract will not always suffice to found a claim in tort.[665]

However, no consensus exists on the issue of concurrent causes of action in contract and tort for contracting parties. In the Netherlands, Germany and England, a claimant can choose to base a claim against its contracting party either in contract or in tort if the requirements for liability under each of them are fulfilled. These legal systems therefore admit concurrence in its purest form and a wrongful act of a contracting party which is a breach of a contractual obligation can simultaneously give rise to an action in tort. A party to a contract has the right to choose whether to bring his action in contract or in tort depending on what seems to be best suited to his needs.[666]

However, in Belgium, an extra-contractual claim against a contracting party is excluded if a contractual claim is available.[667] For that reason, a terminal operator is generally not confronted with an extra-contractual claim from his contracting party. This is of course not the case if the wrongful act does not at the same time constitute a breach of contract. For example, if a carrier makes a social call on his consignor and breaks a valuable vase while he is there.[668] In that case an action in tort would not be excluded, even under Belgian law. This Belgian rule on the preclusion of concurrent actions also affects the relation between cargo interests and subcontractors such as service providers, depositaries and subcarriers. In Belgium this relation is, contrary to the view in other jurisdictions, considered to be of a quasi-contractual nature. Under Belgian law, stevedores and cargo interests who are both in a contractual relation with the carrier, are therefore not considered 'true third parties' and therefore cargo interests are generally not allowed to bring extra-contractual claims against stevedores, who can be equated with a contracting party. This follows from the rule that if the conduct which causes the damage is a mere breach of a contractual obligation and the harm is solely the result of the non-performance of that contractual obligation, an extra-contractual claim is excluded.[669] Therefore, two conditions need to be fulfilled before a contractual and an extra-contractual claim can concur; first, the damage should be different from

663. De Wit (1995), p. 439.
664. Asser/Hartkamp and Sieburgh 6-IV (2015), nr. 10; Claeys (2003), p. 44-45; House of Lords, Donoghue v. Stevenson [1932] AC 562.
665. See para. 7.3.
666. De Wit (1995), p. 45; Du Perron (1999), p. 254-255.
667. Claeys (2003), p. 55; Vansweevelt and Weyts (2009), p. 97-116.
668. De Wit (1995), p. 44-46.
669. Hof van Cassatie 7 December 1973, *ETL* 1974, 534 with commentary from M. Fallon.

the damage that would follow from a mere breach of a contractual obligation and second, the fault should be different from the mere non-performance of the contractual obligation. Only if it is possible to sue either in contract or in tort, for example when damage is caused by a criminal act, can the terminal operator expect extra-contractual claims from cargo interests under Belgian law.[670]

However, under English, German and Dutch law, where the stevedore is considered a third party as no direct contractual relation exists, the cargo interests can choose to pursue compensation by either bringing a contractual claim to their contracting party (e.g. the carrier) or an extra-contractual claim to a third party (e.g. the stevedore). The co-existence of liabilities is thus admissible. However, in that case the act which constitutes a breach of contract must also fulfill the requirements of extra-contractual liability. A breach of contract does not necessarily constitute a tortious act.[671]

7.3 Extra-contractual liability in case of stevedore damage

If an owner of a vessel (seagoing or inland barge) sustains damage to his vessel during loading and discharge operations and seeks to be compensated, several options are available. He can decide to bring an extra-contractual claim against the stevedore whose acts caused the damage. Moreover, a contractual claim can be brought against the person responsible for the damage under a contract e.g. the charter-party or another contract of carriage. A claim against the stevedore may be a contractual matter if a contractual relation exists between the stevedore and the ship owner whereby the stevedore is liable if the performance constitutes a breach of contractual obligations. As discussed in Chapter 3 on contractual liability, the stevedore and its contracting party are, to a certain extent, free to decide on the division of risks. Stevedores may be able to exclude or limit liability for damage caused to vessels or other vehicles, but it could be commercially attractive for the stevedore (if important clients are involved) to assume higher risks (than legally necessary). Depending on the agreement between the parties to the contract, the stevedore can be held contractually liable if damage to the vessel occurs during the performance of stevedoring services.[672]

However, there is no direct contractual relation between the person suffering damage, the ship owner and the stevedore if the charterer/the cargo interests (in case of maritime transport due to a FIOS clause) employs the stevedore (see paragraph 6.2.2 for a more extensive discussion on FIOS clauses). FIOS clauses, with wording similar to 'the cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by the Charterers free of any risk, liability and expense whatsoever to the Owners',[673]

670. Claeys (2003), p. 43-46.
671. Van Gerven, Lever and Larouche (2000), p. 32-34.
672. See for example art. 6.1 (a) and art. 6.5 (a) VRTO, where the terminal operator assumes a fault based liability for damage to the means of transport which is subsequently limited to €1,000,000.
673. See art. 5 of the GENCON 1994 (voyage charter) available at www.bimco.org/Chartering/Clauses_and_Documents/Documents/Voyage_Charter_Parties/GENCON_94.aspx (lastly retrieved at 3 September 2016). See also: art. 8 sub a of the NYPE 2015 (time charter) available at

are commonly used in charter parties, and especially in time or voyage charters.[674] If, pursuant to this clause, the responsibility for the loading and discharge is transferred to the charterer/cargo interests, this resembles the situation in inland navigation. If goods are carried by inland barge, the owner of the barge who is generally also the carrier under the contract of carriage, is rarely under the obligation to perform loading and discharge. In these cases, the stevedore is generally, directly or indirectly, employed by the cargo interests for the performance of the loading and discharge operations, therefore the barge owner does not have a contractual relation with the stevedore.[675] Furthermore, the charterers/cargo interests remain responsible for the performance of stevedoring services in their relation with the ship owner.[676]

In cases of maritime transport, parties can make use of a 'stevedore damage clause'. A 'stevedore damage clause' is commonly inserted in voyage or time charter parties (in combination with a FIOS clause) in order to divide the risks between the charterer and the ship owner for damage caused during the stevedoring operations in the port. See for example the BIMCO FIO Time Charter Parties 2008 in which a clause with the following wording can be found:

> 'BIMCO Stevedore Damage Clause for Time Charter Parties 2008
> (a) The Charterers shall be responsible for damage (fair wear and tear excepted) to any part of the Vessel caused by Stevedores. The Charterers shall be liable for all costs for repairing such damage and for any time lost.
> (b) The Master or the Owners shall notify the Charterers or their agents and the Stevedores of any damage as soon as reasonably possible, failing which the Charterers shall not be responsible.

www.bimco.org/Chartering/Clauses_and_Documents/Documents/Time_Charter_Parties/NYPE_2015.aspx (lastly retrieved at 3 September 2016).

674. See also: Van Overklift (2005), p. 35.

675. This follows from art. 3.2 CMNI where it is determined that in principle taking over and delivery under the contract of carriage shall take place on board the vessel and art. 6.4 CMNI which states that the shipper is under the obligation to load, stow and secure goods. Although this provision does not mention the obligation to discharge or the consignee, there is consensus in that it is an obligation of the cargo interests. See: Ramming (2009), nr. 403, p. 112. Under German law, the obligations to load, stow and discharge are all on the shipper, § 412 II HGB. In the Netherlands it is supplemented by art. 8:929 sub 2 BW, which determines that the shipper is under the obligation to load and stow and the consignee under the obligation to discharge the goods. Under Belgian law this is regulated in art. 8 WRB (*Wet Rivierbevrachting*), which states that the obligations to load, stow and discharge are imposed on the shipper and consignee who operate under supervision of the ship owner. In the Netherlands the ship owner remains responsible for the safety of the ship during loading and discharge. Rb. Rotterdam 20 August 2014, ECLI:NL:RBROT:2014:6975, *S&S* 2015/88 (Jonas).

676. The shipper is liable for the performance of these duties by the stevedore according to art. 8.2 CMNI. This also follows from art. 8:913 sub 1 BW which allocates the responsibility of cargo handling operations to the shipper. However, this is no provision of mandatory law, i.e. the parties are free to alter their position by contract. See: Koedood (1996), p. 78. Hof Den Haag 23 February 2016, ECLI:NL:GHDHA:2016:4309, *S&S* 2016, 52 (Elan); Rb. Rotterdam 8 March 1991, ECLI:NL:RBROT:1991:AJ2657, *S&S* 1992, 74 (Pauline P) and Rb. Rotterdam 28 February 1979, ECLI:NL:KTGROT:1979:AJ1492, *S&S* 1980, 93 (Concordia) where it was held that the shipper is responsible for the loading and the consignee for the discharge, who can be held liable for the damage caused to the barge during the performance of services by the stevedore. Only if it is specified in the contract that the shipper is additionally responsible for the discharge both the consignee and shipper can be held liable, see: Rb. Rotterdam 11 November 2009, ECLI:NL:RBROT:2009:BP252, *S&S* 2011, 6 (Minerva).

> (c) Stevedore damage affecting seaworthiness shall be repaired without any delay before the Vessel sails from the port where such damage was caused or discovered. Stevedore damage affecting the Vessel's trading capabilities shall be repaired prior to redelivery, failing which the Charterers shall be liable for resulting losses. All other damage which is not repaired prior to redelivery shall be repaired by the Owners and settled by the Charterers on receipt of Owners' supported invoice.'

Pursuant to this clause, the charterers can be held contractually liable by the ship owner for damage caused to the vessel by the stevedore.

Following these contractual links, in their relation with the ship owner, the charterers/cargo interests are responsible for damage caused to the means of transport during the performance of stevedoring duties.[677] After being held liable, these charterers/cargo interests can, depending on their agreement with the stevedore, bring a recourse claim against the stevedore. Also with regard to these contracting parties, stevedores may be able to exclude or limit liability for damage caused to vessels or other vehicles.

However, in practice, irrespective of the contractual balance discussed above, there may be reasons for the ship owner to directly claim from the stevedore, e.g. due to the financial instability of their contracting party. This is not a legally attractive option nor is it available in all jurisdictions.[678] In the Netherlands, an action like this from a ship owner against a stevedore would be based in tort as there is no direct contractual relation between the ship owner and the stevedore. The terminal operator can therefore be faced with extra-contractual claims in the event of damage caused during the execution of stevedoring duties. In order to be able to hold the stevedore liable in tort and obtain compensation, the ship owner bears the burden of having to prove that the requirements for extra-contractual liability were met. For tortious liability to be established, the ship owner has to prove that the stevedore acted negligently when the damage to the vessel occurred.[679] In 1953,

677. See for Dutch law: art. 8:397 BW, art. 8:913 BW, art. 8:1117 BW.

678. In German law, the contract for stevedoring duties concluded between the charterer/cargo interests and the terminal operator is considered a contract with protection for third parties (*Vertrag mit Schutzwirkung zugunsten Dritter*) (see below para. 9.4). In this case, the third party is the carrier or vessel owner. These persons can consequently bring a contractual claim against the stevedore who can, in turn, rely on the liability limits stipulated in the contract. Thume (2014), p. 183; Von Waldstein and Holland (2007), § 412 Rn. 15, p. 490; BGH 12 March 1984, *VersR* 1984, 552 (in this case on transport by inland waterways, the *BGH* decided that although the shipowner had the option to bring a contractual claim, the stevedoring contract, to which he was a third party, should nevertheless be considered a contract with protection for third parties ('*Vertrag mit Schutzwirkung zugunsten Dritter*')). Claiming under the stevedoring contract could be beneficial for the ship owner because a breach of contract has to be proven rather than negligence on the part of the stevedore. For the requirements of tortious liability under German law see: Zweigert and Kötz (1998), p. 599-600. Moreover, in Belgium, stevedores are protected against extra-contractual claims from third parties pursuant to the principle of quasi-immunity (see below para. 9.6).

679. Art. 6:162 BW. A breach of a general duty of care as a requirement for tortious liability was introduced by HR 31 January 1919, ECLI:NL:HR:1919:AG1776, *NJ* 1919, 161 with commentary from W.L.P.A. Molengraaff (Lindenbaum/Cohen). For a discussion on the interpretation of art. 1401 BW (old) I refer to Van Maanen (1986). It is one of three distinct and alternative requirements for tortious liability. Asser/Hartkamp and Sieburgh 6-IV 2015, nr. 81; Jansen (2007), 28 under 4; Sieburgh (2000), p. 58. However, some authors take the view that in recent years the third requirement of *onzorgvuldigheid* has gained ground, for which reason they state that the existence of that requirement

in a landmark case concerning the vessel '*Nicolaos Pateras*', the Netherlands *Hoge Raad* decided that the stevedore's performance should be judged by the general standard of care. In general, this burden rests upon the plaintiff and is only different in certain circumstances.[680] This could be if it were practically impossible for the plaintiff to prove what the relevant act or omission which set events in motion and caused damage was, and whether it were more likely that this act or omission constituted a failure to take proper care on the part of the defendant.[681] In that case the occurrence of damage would, prima facie, establish tortious liability on the part of the stevedore. As the ship owner is usually represented by the master who is under a duty to supervise and ensure the safety of the vessel during cargo handling operations, it is generally not impossible for the ship owner to gather evidence on factual circumstances which would prove a lack of reasonable care. It can be a heavy burden to prove that this requirement is fulfilled.[682]

Reasonable care when performing stevedoring duties

In recent years numerous cases have been brought before Dutch courts aimed at assessing whether a stevedore had taken reasonable care while performing loading or discharge operations. The mere occurrence of damage does not render his actions unlawful and the *onzorgvuldigheid*, on the part of the stevedore has to be proven by the claimant. This was discussed in the recent case about damage to the barge '*Pretoria*'.

> This case concerned the loading and discharge of containers with a spreader. The operation was complicated as there was little space to manoeuvre between the steering house and the stack. The spreader hit the steering house after it hooked onto the container door and swept it in the air. Although the cause of the damage was established as being the sweeping of the spreader there was no proof of any unlawful act on the part of the stevedore. The ship owner could not substantiate his claim as there was no proof of lack of reasonable care on the part of the stevedore. Moreover, the court commented that the ship owner should recognize that his vessel is exposed to risks during loading and discharge at terminals.[683]

---

renders the others superfluous. Smit's doctrine points in that direction, as it states that a mere infringement of a statutory provision or a violation of a right is not unlawful if *onzorgvuldigheid* is not proved: Smits (1940), p. 374-375. For other authors who adhere to Smit's doctrine I refer to Van Dam (1989), nr. 56; Hartlief and Van Maanen (1995), p. 64; Verheij (2005), p. 42; Zonderland (1971), p. 147; Schut (1963), p. 148.

680. Art. 150 Rv (Code of Civil Procedure).

681. Giesen (2001), p. 445 ff. See for this rule under English law: Lunney and Oliphant (2008), p. 204-205.

682. Some recent cases: Hof Den Haag 1 March 2016, ECLI:NL:GHDHA:2016:600, *S&S* 2016, 88 (MTM North Sound) (this case concerns a seagoing vessel); Hof Den Haag 25 February 2014, ECLI:NL:GHDHA:2014:1524, *S&S* 2014, 72 (Allegonda); Rb. Rotterdam 27 November 2013, ECLI:NL:RBROT:2013:11196, *S&S* 2014, 86 (Descanso); Rb. Rotterdam 27 February 2013, ECLI:NL:RBROT:2013:8426, *S&S* 2014, 4 (Leenders SR en Leenders SR II); Hof Den Haag 2 September 2014, ECLI:NL:GHDHA:2014:2829, *S&S* 2015, 31 (Bernard Burmester); Rb. Rotterdam 13 July 2012, ECLI:NL:RBROT:2012:BZ1757, *S&S* 2013, 32 (Tornado); Rb. Zwolle-Lelystad 28 March 2012, ECLI:NL:RBZLY:2012:BX2876, *S&S* 2013, 31 (Robine).

683. Rb. Rotterdam 29 September 2010, ECLI:NL:RBROT:2010:BO0063, *S&S* 2011, 50 (Pretoria).

> In a similar case, the steering house of the vessel '*Descanso*' was damaged when a spreader made a sideways movement due to heavy wind. The spreader was positioned at the same level as the steering house when the wind picked up. Whether positioning the spreader at the level of the steering house could be considered as a negligent act would depend on the position of the container which it had to lift. If this container were located on the first level, this would amount to an unlawful act, whereas on the third level it would not. As both parties produced contradictory proof on the position of the container, the court held that the risk of this uncertainty was on the ship owner who bore the burden of proof.[684] This is a rather onerous task as it often depends on the factual circumstances of the case and the possibility to gather evidence. This can also be seen in the case concerning the '*Leenders SR I & II*' where the ship owner had to prove that the grabber which was used for the discharge of scrap was too heavy, or was dropped into the hold with more force than usual.[685]

However, when it comes to trucks sustaining damage due to cargo handling activities, the court seems to be more willing to accept the liability of the stevedore.

> Lack of reasonable care was proven when a truck sustained damage because a container was placed on the truck's cabin. According to the court, the mere fact that the container was wrongly placed constituted a wrongful act. It was held that the crane operator could have prevented this damage if he had been more observant as he had a clear vision of the situation through a window in the bottom of the crane cabin. Hence, negligent behaviour was established for which the stevedore was in principle liable, save for the presence of validly agreed exoneration clauses.[686]

> Moreover, in another case concerning damage to a truck, the stevedore was held liable because he failed to conform to the standard of care when he disregarded his own safety plan which aimed at preventing the type of damage the truck sustained.[687]

It is more difficult to prove that the stevedore failed to take sufficient care in cases of damage to vessels. This is due to the higher risks involved, especially as vessels which are moored may still move along the quayside. This higher risk should be

684. Rb. Rotterdam 27 November 2013, ECLI:NL:RBROT:2013:11196, ECLI:NL:RBROT:2012:9096, *S&S* 2014, 86 (Descanso).
685. Rb. Rotterdam 27 February 2013, ECLI:NL:RBROT:2013:8426, *S&S* 2014, 4 (Leenders SR I and Leenders SR II). See also: Hof Den Haag 2 September 2014, ECLI:NL:GHDHA:2014:2829, *S&S* 2015, 31 (Bernard Burmester) in which the ship owner had to prove knowledge on the part of the stevedore concerning the peculiarities of the ship. Furthermore: Rb. Rotterdam 13 July 2012, ECLI:NL:RBROT:2012:BZ1757, *S&S* 2013, 32 (Tornado) in which the court considered that the crane operator could not be expected to adjust the method of loading and discharge according to the peculiarities of every specific vessel.
686. Rb. Rotterdam 24 August 2012, ECLI:NL:RBROT:2012:BZ6370, *S&S* 2013, 51 (Hans Lubrecht/Waalhaven Botlek).
687. Rb. Rotterdam 9 July 2014, ECLI:NL:RBROT:2014:5378, *S&S* 2014, 141 (Hoofdstad BV/Cetem Containers).

deemed acknowledged by the relevant parties and negligence has been established on occasions.

> An unlawful act is committed when the stevedore makes use of material which is unfit and unsafe for the loading of the particular type of cargo (flyash).[688]

> In a case concerning the vessel '*Allegonda*', the ship owner provided convincing proof that the stevedore had acted negligently (*onzorgvuldig*) during the performance of stevedoring duties for which he was found liable in tort. Several factual circumstances were used to determine the unlawfulness of his behaviour. First of all, it was established that the spreader was disconnected and retrieved before the crane was wheeled far enough back. Furthermore, the crane operator did not verify whether the spreader was kept a reasonable distance from the steering house. Finally, it was not established that the damage was caused by the movements of the vessel due to wind and water, which should have been taken into account by the operator. If they had thought that the wind would pose an increased risk of damage, the relevant parties should have discussed the matter in order to make other arrangements. Based on these findings the Appeal Court decided that the stevedore committed an unlawful act.[689]

> In a case similar to the *Allegonda*-case, the Court of Appeal in the Hague held that lack of reasonable care by the crane operator had been sufficiently proven. The court came to this conclusion because the crane operator stated that although he realized the container was misaligned he continued lifting it as he hoped it would not hit the steering house. This witness statement produced sufficient proof of *onzorgvuldigheid* (negligence) on the part of the stevedore resulting in liability arising from an unlawful act.[690]

In these cases, reference can be found to a case regarding the vessel '*Nicolaos Pateras*'. This case also dealt with damage caused to a vessel during the discharge of goods. The court held that the commonly used method in the port of Rotterdam involves risk of damage even when cranes are used in a correct and skillful manner. The court therefore held that the ship owner should be deemed to have accepted that handling was done in this manner provided that the stevedore took reasonable care. At the same time, the ship owner shall be deemed to have accepted the situation that damage can occur even though reasonable care is taken. For that reason the stevedore did not commit an unlawful act even though damage had been caused to the ship.[691]

---

688. Rb. Zwolle-Lelystad 28 March 2012, ECLI:NL:RBZLY:2012:BX2876, *S&S* 2013, 31 (Robine). According to the court it can reasonably be expected of a professional stevedore that use is made of a system of loading of which the overfill protection functions in a timely manner.
689. Hof Den Haag 25 February 2014, ECLI:NL:GHDHA:2014:1524, *S&S* 2014, 72 (Allegonda).
690. Hof Den Haag 4 August 2009, *S&S* 2011, 97 (Noordkaap).
691. HR 6 March 1953, ECLI:NL:HR:1953:791, *NJ* 1953, 791 with commentary from Ph.A.N. Houwing (Nicolaos Pateras).

Okeanoporos, owner of the steamship '*Nicolaos Pateras*', brought a claim in tort against stevedore Thomsen. Okeanoporos claimed compensation for the damage to his vessel arguing that Thomsen acted negligently in discharging, against payment, a consignment of iron ore from the vessel in September-October 1948. Thomsen, who was employed by the consignees, performed the discharge using grabbers at his premises at the 'Waalhaven'. According to the claimant, the heavy grabbers were dropped into the holds with force. They crashed against the corners of the holds and collided with parts of the vessel while being lifted, causing damage to the vessel.

According to the Court of Appeal, cargo of this kind is discharged in a customary manner in the port of Rotterdam. It is customary that stevedores discharge these goods with the consent of the interested parties while taking the interests of commerce into account which might require a swift discharge. They sometimes have to perform their duty with more speed than would be acceptable if utmost care had to be exercised for ship and cargo. However, in the normal course of proceedings, the stevedore repairs the damage he causes without any charge. In the case at hand, the manner in which the stevedore performed the discharge was in line with the aforementioned custom. The damage caused to the vessel was therefore not unusual for this method of discharge.

The Court of Appeal determined that the mechanical method used for the discharge of the vessel in question was customary in the port of Rotterdam. This method should only be used with the approval of the interested parties, as even the proper and professional operation of the machines poses some risk to vessel and cargo. However, this risk is considered of less importance than the benefit gained by this method due to its speed.

The ship owner, or his substitute, should be aware of the existence of this customary method if he leaves the discharge of his vessel to the consignee. A stevedore performing the discharge, who is employed by the consignee, may presume that both the consignee and the ship owner consented to the discharge being performed in the customary manner, unless the contrary is expressed by the consignee, by or on behalf of the ship owner.

As the ship owner's consent to the method of discharge is presumed, provided that the discharge is performed with reasonable care, and he is considered to accept that, although the performance is done with reasonable care, possible damage can be caused to the vessel, the party causing such loss is not liable in tort.

This shows that the court takes account of the consent of the vessel owner regarding the usual and proper method of handling. However, this does not grant permission to inflict damage. It merely means that the vessel owner is assumed to have realized the risks involved. It is not considered grounds for justification which would remove

liability for a stevedore's wrongful conduct.[692] Instead, the fact that the ship owner tacitly understands the risks involved is taken into account when qualifying the stevedore's action as unlawful or when assessing whether there was any contributory negligence on the side of the ship owner (art. 6:101 BW). The fact that the vessel owner accepts the risks involved, influences the standard of care applied by the stevedore.[693]

It follows from the above that if a vessel or inland barge is damaged, the owner of the vessel or barge will want to seek compensation for this damage. It seems reasonable that the owner follows the contractual links in which the contracting parties (ship owners, charterers /cargo interests and stevedores) have agreed on the division of risks. If there is a contractual relation between the ship owner and the stevedore, a claim for stevedore damage would be subject to the terms of the contract agreed between the parties. In some maritime cases and in most cases concerning carriage by inland waterways, there is no direct contractual relation between the ship owner and the stevedore. In those cases, the charterers/ cargo interests (in cases of maritime transport, due to a FIO clause) are under the obligation to perform loading and discharge which they delegated to the stevedore. In practice, in the relation between the ship owner and the charterers/cargo interests, the risk of stevedore damage is assumed by the charterers/cargo interests. The charterers/cargo interests who, if they have been held liable for the stevedore damage can bring a recourse claim against their contracting party, and against the stevedore, in line with their agreement under the stevedoring contract. This contractual balance is carefully designed by all parties involved and liability insurance has most likely been obtained to cover these risks. It is therefore reasonable that it is not easy for a ship owner to circumvent these contractual links by bringing an extra-contractual claim against the stevedore.

The ship owner under Dutch law finds himself in a difficult position when damage is caused to his vessel during the performance of duties by the stevedore. If there is no contractual relation between the ship owner and the stevedore, the ship owner can seek compensation by bringing a contractual claim against the charterers/cargo interests who bear responsibility for the loading and discharge. Should the ship owner chose to disregard the contractual agreements in place and bring an extra-contractual claim against the stevedore, the requirements for tortious liability have to be met. If a vessel sustains damage during loading or discharge, it appears to be relatively difficult to prove that the requirements for tortious liability have been met. It can be difficult to gather evidence on the factual circumstances to prove that the stevedore failed to conform to the general standard of care applicable to him. Moreover, the risks are relatively high in cases covering the loading and discharge of vessels, a fact which is generally accepted by the vessel owner. In some cases the stevedore or terminal operator provide a warning for these specific

692. The voluntary assumption of risk is in the Netherlands not considered a ground of justification which removes the wrongful character of the tortfeasor's conduct. HR 28 juni 1991, ECLI:NL:HR:1991:ZC0300, *NJ* 1992, 622 with commentary from C.J.H. Brunner (Dekker/van der Heide).

693. See: Smits J.M. (1997), p. 213-227; Asser/Hartkamp and Sieburgh 6-IV (2015), nr. 94-97.

risks on terminal signs. It is therefore quite onerous for the vessel owner to prove that the stevedore fell short of a certain standard of care.

7.4 Terminal signs

The terminal operator can individually negotiate with contracting parties on issues such as the liability for loss of or damage to property and/or apply general terms and conditions to their contracts. However, the terminal operator also frequently comes into contact with parties other than his contractual counterparties. This occurs for example, in cases where the terminal operator is employed by the charterers/cargo interests pursuant to a FIO clause and no contractual relation exists between the ship owner and the stevedore. Moreover, goods are often collected or delivered at the terminal by inland transport companies with whom the terminal operator has no contractual relation. When loss or damage occurs to the inland carriers or to their employees or property at the terminal operator's premises, the terminal operator can be held extra-contractually liable if the requirements for tortious liability are met.

In order to preclude such claims from third parties for damage to their property or personal injury or loss of life, the terminal operator often places a warning sign at the terminal. There is often a sign at the entrance to a terminal expressing that any person with possible vehicles or other belongings entering the premises does so at their own risk. The sign can also refer to a specific set of general terms and conditions. By placing this sign at the entrance, the terminal operator intends to exclude, or limit liability, for damage caused at the terminal. In other words, the operator of a terminal attempts to preclude liability claims from third parties who might sustain damage at the terminal. This could for example, include damage to goods, vehicles (vessels, trucks or trains) or damage due to personal injury.

The question arises as to whether these signs can have the effect envisioned by the terminal operator, viz. to establish that any person who enters the premises, and can be deemed to have read the sign, concludes a contract with the terminal operator on the terms stated on the sign which may include exclusions or limits of liability. Alternatively, the sign affects the standard of care required during the performance of cargo handling by the terminal operator as the person who visits the terminal accepts the risks involved. The effectiveness of these signs will be discussed in this paragraph.

Dutch law contains rules on the strict liability of owners of structures and buildings as well as movable objects. Under Dutch law a terminal operator is vicariously liable for damage which occurs by reason of the defective condition of the structures and buildings (in Dutch: *opstallen*) which are permanently attached to the land either directly or through incorporation with other buildings or works. A terminal operator therefore has a duty to take care of structures such as cranes and warehouses within the premises of the terminal. The terminal operator is also similarly vicariously liable for defective objects, such as equipment used for the performance of his duties. The rule on the liability for structures and buildings in art. 6:174 BW is similar to the liability for defective things in art. 6:173 BW and determines that

whosoever possesses a structure or building which does not comply with the standards which may be imposed upon it in given circumstances and which poses a danger to persons or things, is liable for it if this danger materializes, unless liability based upon the previous section had been absent had he known this danger at the moment of its conception.[694] These provisions impose a strict liability on the possessor of a structure or thing. German law on the other hand, only establishes strict liability for the keepers of a variety of dangerous things like cars, animals, and nuclear power plants.[695] German law imposes no strict liability on owners of structures and buildings as it merely provides a fault-based liability regime in which the burden of proof is reversed to the victim's advantage.[696] Moreover, English law is also rather reluctant to introduce any liability regime not based on fault and constrains strict liability to exceptional cases.[697]

The terminal operator often places a sign at the entrance of the terminal, of which the wording may be similar to the sign used by the terminal operator in a case which came before the Hague Court of Appeal.[698]

> ATTENTION
> All visitors must register at the desk
> Any person entering this terminal, the buildings, the quay side and the vessel moored accepts the following conditions:
> Anyone present at the abovementioned locations with vehicles and/or goods does so entirely at their own risk. The [name terminal] and its employees are not liable for any damage and/or injury caused to persons, vehicles and goods, however caused.
> Where necessary, the Rotterdam Stevedoring Conditions can be invoked, as filed with the registry of the court of Rotterdam.
> Be aware of moving machinery, cranes and vehicles.
> Instructions from personnel should be followed unconditionally.
> Entry in the container stacks is forbidden.
> Maximum speed 15 km/h.
> Smoking is prohibited.
> The management. (freely translated)[699]

694. See also: art. 6:197 BW.
695. Koziol (2015), p. 700.
696. §§ 836-838 BGB.
697. Werro (2011), p. 935.
698. Hof Den Haag 15 September 2015, ECLI:NL:GHDHA:2015:2440, *S&S* 2016/82 and Hof Den Haag 24 January 2017, ECLI:NL:GHDHA:2017:608, *S&S* 2017/66.
699. '*ATTENTIE, iedere bezoeker dient zich te melden bij de balie, een ieder die dit terrein, de gebouwen, de kademuur en de daaraan afgemeerde schepen betreedt, aanvaardt de navolgende voorwaarden: men bevindt zich op bovengenoemde plaatsen met eventuele vervoermiddelen en/of goederen volledig op eigen risico. Voor schade en/of letsel, toegebracht aan personen, vervoermiddelen en goederen, hoe dan ook ontstaan, zijn [naam terminal] en voor deze vennootschap werkende personen niet aansprakelijk. Voor zover nodig, kan door ons een beroep worden gedaan op de Rotterdamse Stuwadoors-condities, zoals gedeponeerd bij de griffie van de arrondissementsrechtbank Rotterdam. Let op bewegende bedrijfswerktuigen, kranen en voertuigen. Instructies van ons terminalpersoneel dienen onvoorwaardelijk te worden opgevolgd. Verboden zich in de container stacks te bevinden. Maximum snelheid 15 km/u. Roken verboden. De directie.*'

Visibility of the sign

Signs like these have to be placed in a prominent position and should be clearly visible in order for them to have any effect.[700] In most cases these signs are placed at the entrance to the terminal where they are clearly visible to all truck drivers from their cabin as they enter the premises. If there are multiple entrances, a sign should be placed at every one of them.[701] The text needs to be clear and the sign's size has to be sufficiently large for drivers to be able to gain knowledge of the text as they enter the premises. It might be sensible to express it in a number of languages.[702] Furthermore, if the terminal also services other vehicles like inland vessels or trains, these signs should be visible to the operator, the master and crew members from the quayside where the barge is moored and from the tracks where the trains arrive. Therefore, a sign which is placed at the (road) entrance of the terminal is not binding for the persons for whom it is not visible from a barge or train. If this were the case, it would be difficult to establish that knowledge of the sign was gained prior to the mooring at the terminal.[703]

In addition to being clearly visible to all who enter the terminal, it is also important that the wording on the sign is simple and unambiguous.[704] This is an important factor as it would ultimately establish whether the relevant person can be deemed to be familiar with the risks involved. The signs generally point out that a port terminal poses considerable risks to persons and their property due to the activities undertaken there. Moreover, while pointing out these hazards relating to the storage and handling of goods, it imposes conditions to the entry into the terminal. This warning should be presented in a clear and unambiguous manner. Another factor which should also be taken into account is whether a person has visited the terminal before. In that case it is likely that the visitor would have seen and understood the sign.

Consent

The effect of these signs under Dutch law revolves around the central issue concerning the consent to the terms it contains. In general it can be stated that in order to constitute a contract a clear declaration of the parties' intention is required. Can merely passing a sign and entering the premises or mooring at the quay be considered as a clear declaration of intention? Although the sign states that the terminal operator assumes that the visitor accepts the terms on entering the premises, the question remains as to whether a contract has been concluded merely on the

700. Hof Den Haag 15 September 2015, ECLI:NL:GHDHA:2015:2440, *S&S* 2016/82 and Hof Den Haag 24 January 2017, ECLI:NL:GHDHA:2017:608, *S&S* 2017/66 (here the appeal court decides that the general terms and conditions mentioned on the sign are applicable because it has not been disputed with solid grounds); Hof Den Haag 1 February 2006, ECLI:NL:GHSGR:2006:BA4016, *S&S* 2009, 74; Hof Den Haag 2 July 1991, ECLI:NL:GHSGR:1991:AJ5853, *S&S* 1992, 116.

701. See: Hof Den Haag 1 February 2006, ECLI:NL:GHSGR:2006:BA4016, *S&S* 2009, 74.

702. Huyghe (2013), p. 1783.

703. Rb. Breda 17 November 2010, *S&S* 2011, 51 (Paradox); Rb. Rotterdam 7 July 2004, ECLI:NL:RBROT:2004:AY7234, *S&S* 2006, 91.

704. Cf. HR 25 November 2005, ECLI:NL:HR:2005:AT8782, *NJ* 2009, 103, with commentary from I. Giesen (Eternit). In this case it has been held that the unclear wording of an exoneration may lead to the result that its effect should be denied.

grounds that the visitor refrains from objecting to the terms. What can a person do if he does not agree to the terms? Should he refuse to enter the terminal? An explicit agreement to the terms is not required. In some cases, an implied consent can also lead to the conclusion of a contract.[705] A contract containing general terms and conditions can be concluded through implied consent in other situations too. For example when buying a train ticket which contains a reference to general terms and conditions or when staying in a hotel with a sign stating that the hotel is not responsible for various matters.

Here the question arises as to which party's consent is required. When an inland barge enters a terminal, the barge owner is probably also the captain of the vessel and can therefore bind himself to a contract. But for other modes of transport, especially road transport it is questionable whether the relevant person actually consents. It depends on the relation between the road haulage company or the owner of a vehicle and a truck driver. One cannot automatically assume that a truck driver is instructed and authorized to conclude a contract between the road haulage company and the terminal operator. Moreover, in determining whether such signs constitute a contractual relation, commercial reality should also be taken into account. It should not be assumed that terms on signs excluding liability are applicable between parties who are not bound by contract.[706]

There is generally no contractual relation between the person sustaining damage at a terminal and the stevedore because the transport companies are instructed to collect or deliver cargo at a specific terminal by the shipper or consignee (or through their forwarding agent or multimodal carrier) and not by the stevedore. This implies that the owner of vehicles such as barges and trucks is usually not entirely free to choose which terminal they engage, because the fulfillment of a pre-existing contractual obligation requires them to visit the terminal. They can therefore not decide to engage in business with one terminal or another based on the distinctive liability rules and risks involved. Hence, even though a terminal excludes its liability to a large extent (on signs) this will not directly influence a decision to participate in commercial activities with that terminal. This is generally the case in other sectors, where parties can refuse to engage in business if the terms are not to their liking.[707] A clear acceptance of the terms should be required especially if they cover exoneration for damage caused by intent or gross negligence.

Following this, signs like these can in general not constitute a contractual relation between parties but merely indicate the risks involved at the terminal posed by the nature of the activities undertaken; these include moving goods with cranes, machinery and vehicles. These signs therefore serve as a warning to any person entering the premises and the persons entering should adapt their behaviour and take great care as they are exposed to considerable risks. At the same time, these persons acknowledge and accept these risks involved with the usual and proper handling when they choose to enter the premises. This is taken into account when

705. Asser/Hartkamp and Sieburgh 6-III (2014), nr. 165-168.
706. Hof Den Hague 1 March 2016, ECLI:NL:GHDHA:2016:600, *S&S* 2016, 88 (MTM North Sound); Hof Den Haag 25 February 2014, ECLI:NL:GHDHA:2014:1524, *S&S* 2014, 72 (Allegonda).
707. Otherwise: Bannier (1973), p. 317; Claringbould (2011), p. 27-30.

qualifying the stevedore's action as unlawful or when assessing whether there was any contributory negligence (art. 6:101 BW). The fact that the visitor accepts the risks involved, affects the standard of care required during the performance of cargo handling at the terminal.[708] The care which the terminal operator should reasonably take is therefore different from what can be expected of persons under other circumstances, i.e. to avoid damage at all times. This means that the terminal operator is not liable and does not have to compensate damage which was caused by the regular performance of stevedoring activities. However, the terminal operator is liable if damage is caused through negligence. It would only be different if the person visiting the terminal expressly agreed to those terms excluding or limiting liability for negligent behaviour, which would preferably have been done in writing, and which therefore, can be considered the conclusion of a contract. Following this, if the terminal operator wishes to exclude liability for damage caused by negligence it should take more effort to bring this to the attention of the visitors and to obtain their consent, for example by presenting a document for signature. Under certain circumstances exonerations can then however still be deemed unacceptable according to standards of reasonableness and fairness (art. 6:248 (2) DCC).[709]

708. See: Smits J.M. (1997), p. 213-227; Asser/Hartkamp and Sieburgh 6-IV (2015), nr. 94-97.
709. Schelhaas (2017), para. 5.35.2. See also: Hof Den Haag 25 February 2014, ECLI:NL:GHDHA:2014:1524, *S&S* 2014, 72 (Allegonda).

Chapter 8

Liability to third parties: International transport law conventions

8.1 Introduction

The remainder of Part III will focus on the liability of the terminal operator to third parties under international conventions[710] and national law.[711] The terminal operator generally prefers to deal with his contracting party only, and will try to avoid claims from non-contracting parties. However, is the terminal operator liable in full if a claim for damages is brought by a third party? What defences are available for terminal operators when contractual relations are circumvented and he faces extra-contractual claims? This section also explores the influence of contracts on third parties and on the possibility to confer rights or impose obligations on third parties to a contract. A distinction is drawn between the terminal operator's liability to third parties for damage as a carrier, a service provider and a depositary.

The first question to ask is whether international conventions govern the legal position of a terminal operator when he is employed by a carrier for the performance of carriage, the provision of services or storage of goods. The rules applicable in international transport law conventions govern not only the contractual relationship between the contracting carrier and the shipper, but also that of other parties which have no direct contractual relationship with the shipper. A distinction can be made between persons who are protected against extra-contractual claims by providing them the right to rely on the defences and limits of liability of the conventions, and persons who are also subject to the liability regime of the conventions and on whom the conventions impose duties and obligations. The maritime transport conventions which are currently in force do not apply to the performance of parties that assist the carrier. Thus, these parties are generally not governed by international mandatory liability regimes. However, agents and servants of the carrier are protected under HVR and HHR and the liability of subcarriers is governed by the latter due to the concept of the 'actual carrier'.[712] However, subcarriers are not covered by H(V)R, neither are independent contractors such as stevedores and depositaries. These subcontractors may therefore not rely on defences and limits of liability available to carriers when faced with extra-contractual claims. The situation will change however, if the Rotterdam Rules enter into force. Persons performing one or more of the carrier's main obligations within a maritime port or between two ports will then be governed by a uniform liability regime, as the Rotterdam Rules are applicable to persons who fall within the definition of the maritime performing party. Direct claims can be brought under the convention to

710. See Chapter 8.
711. See Chapter 9.
712. Art. 1.2 HHR.

these persons and they may, in their turn benefit from the defences and limits of liability provided by the rules of the convention.[713]

Contrary to the maritime conventions currently in force, the inland transport conventions protect an extensive group of persons on the carrier's side. CMR, COTIF-CIM and CMNI protect agents and servants and the former two protect any other persons whose services the carrier makes use of for the performance of carriage, when these persons act within the scope of their employment.[714] Therefore, all persons that assist the carrier, including employees or independent contractors such as subcarriers can rely on the defences and limits of liability provided in these conventions provided that they act within the scope of their duties. Moreover, CMNI and COTIF-CIM recognise the concept of the actual or substitute carrier,[715] so the liability of subcarriers entrusted with the performance of carriage is also governed by these conventions. CMR and COTIF-CIM furthermore have distinctive rules on successive carriage, which applies to subcarriers if certain additional requirements are met.[716]

8.2 Application of conventions irrespective of nature of claim

The various international conventions under discussion contain rules on the issue of concurrence and co-existence of liabilities. The conventions offer a clear and practical solution to the problem of extra-contractual claims brought by contracting and third parties. The international transport law conventions adopt a fundamental solution to avoid problems concerning diverging national positions on extra-contractual actions against carriers (or other persons). The drafters of the conventions did not try to reach consensus on the various national approaches to this matter, but avoided the problem altogether.[717] These conventions state that the rules of the convention apply to any claim against a carrier, irrespective of the nature of the claim. The conventions are applicable to all, and it is therefore irrelevant whether a person who is a carrier under a contract which is subject to the convention is faced with a contractual or an extra-contractual claim. Furthermore, it is irrelevant whether the claim is brought by an contracting or by a third party. The provisions in these conventions therefore state that the rules of the convention apply irrespective of the nature of the claim. All conventions under discussion contain rules to the same effect as the rule in CMR.[718] Art. 28.1 CMR states:

> 'In cases where, under the law applicable, loss, damage or delay arising out of carriage under this Convention gives rise to an extra-contractual claim, the carrier may avail himself of the provisions of this Convention which exclude his liability of which fix or limit the compensation due.'

713. Art. 1.6, 1.7 and 19.1 RR.
714. Art. 3, 28.2 CMR; art. 40, 41.2 COTIF-CIM; art. 17.3 CMNI.
715. Art. 27 COTIF-CIM, art. 4 CMNI. See also: art. 39 MC.
716. Art. 34 ff CMR; art. 26 COTIF-CIM. See below para. 8.3.2.
717. De Wit (1995), p. 475.
718. Art. IV bis HVR; art. 7.1 HHR; art. 4.1 (a) RR; art. 28.1 CMR; art. 22 CMNI; art. 41.1 COTIF-CIM; art. 29 MC. See also: art. 7 OTT.

The rules of the conventions therefore apply whether a claim brought by a contracting party or third party is founded in contract or in tort or on some other legal ground. A carrier confronted with a claim for damages can therefore rely on the rules of the conventions to defend himself. This general rule is however confined to claims regarding loss of, damage to or delay in delivery[719] of the goods which are covered by the contract of carriage subject to the convention. A few conventions provide somewhat broader rules and apply to 'any action in respect of liability',[720] to 'any action for damages',[721] or 'in respect of loss of, damage to, or delay in delivery of the goods covered by a contract of carriage or for the breach of any other obligation'.[722]

Moreover, under some international transport law conventions the rules of the conventions also apply to other persons who assist the carrier in the performance of contractual obligations. These groups may include servants, agents and independent contractors, such as stevedores and terminal operators (see paragraph 8.4). If rights are imposed on persons other than the carrier, these persons may also invoke the rules of the conventions irrespective of the nature of the claim.

The carrier (or other protected persons) can rely on rules concerning the defences, exonerations and limits of liability provided for in the respective conventions. There is, however, a notable exception in CMNI. According to this rule, the carrier of goods by inland waterways is provided the right to not only rely on the exonerations and limits of liability provided for in the convention, but also on those which are stipulated in the contract of carriage. It is for this reason that the contract of carriage by inland waterways can have external effect on third parties.[723]

However, England appears somewhat reluctant to apply the rules of the conventions to claims from third parties with regard to contracts of carriage by sea, as confronting a third party with rules of a contract or the Hague Visby Rules might go against the privity of contract doctrine. This can be seen in the case of the '*Captain Gregos*' where the Court of Appeal held that the mandatory contractual regime set out in the HVR is clearly intended to regulate the rights and disputes of parties to the bill of lading and not to regulate relations between non-parties.[724] However, the correct interpretation of art. IV bis HVR is that 'any action in tort against the contracting carrier in respect of loss of or damage to the goods covered by a contract of carriage to which the Rules apply is subject to the Rules, whether brought by a party to the contract of carriage of not.'[725] This is also the position of continental law jurisdic-

719. An exception is the HVR which do not cover liability for delay.
720. Art. 41.1 COTIF-CIM.
721. Art. 29 MC.
722. Art. 4.1 RR.
723. See art. 22 CMNI: 'The exonerations and limits of liability provided for in this Convention or in the contract of carriage apply in any action in respect of loss or damage to or delay in delivery of the goods covered by the contract of carriage, whether the action is founded in contract, in tort or on some other legal ground.' (emphasis added).
724. English Court of Appeal, Compania Portorafti Commerciale S.A. v. Ultramar Panama Inc. and others [1990] 1 Lloyd's Rep. 310 (The Captain Gregos).
725. Berlingieri (1991), p. 21. See also: Todd (2016), p. 287-290.

tions some of which have even more extensive rules regarding third parties than the one which can be found in HVR.

The international transport law conventions protect carriers (and others) when a contractual or extra-contractual claim is brought by a third party. A carrier who concludes a contract of carriage which is subject to international transport law conventions with a shipper, has the right to rely on the defences, exonerations and limits of liability provided for in the conventions and for cases of transport by inland waterways under CMNI additionally on the provisions excluding or limiting the carrier's liability in the contract of carriage. The following paragraphs explore the extent to which international transport law conventions and the OTT-convention govern the legal position of terminal operators that assist the carrier when performing obligations as a subcarrier or as another subcontractor, i.e. as a service provider or depositary.

8.3 Subcarriers

The terminal operator, when performing the carriage of goods as a subcarrier, may be held responsible for the loss of, damage to or delay in delivery of goods. In the contractual network of transport contracts, the terminal operator could be a main carrier or he could possibly be considered a subcarrier if he is employed for the performance of inland carriage by a carrier who undertook the responsibility for the carriage. In both cases the terminal operator might decide not to physically perform the carriage himself and employ a (sub)subcontractor for the performance of carriage.[726] In this network of contractual relations, the terminal operator may be faced with contractual or extra-contractual claims from contracting or third parties. If the terminal operator faces a claim from a third party, he can, in principle, not benefit from the defences available in contracts to which he or the claimant is not a party due to the privity of contract rule. However, the international transport law conventions contain rules on their application in cases of extra-contractual claims. Any person who can be considered a carrier under the conventions can benefit from its rules. This could be a main carrier but it is also very likely that a subcarrier would qualify as a carrier under the convention.

This would be the case if a main carrier concluded a contract for international carriage by road subject to CMR and employed a subcarrier for the performance of this carriage under a subcontract which was also subject to CMR. Both the main carrier and subcarrier would qualify as 'carrier' under the convention. However, not all main carriers and subcarriers are subject to the same legal regime. It is quite possible that the main carrier contracted for international road carriage subject to CMR, and that he employs subcarriers for parts of the carriage which take place within the territory of one state only. The subcontract of carriage would therefore not be within the scope of CMR which only applies to international carriage but it would possibly be subject to relevant national transport law. In that case the subcarrier would not qualify as 'carrier' under the convention and would therefore not be subject to its rules. CMR does however extend the protection of the provisions

726. See also: Loyens (2011), p. 375.

of the convention which exclude the liability of the carrier or which fix or limit compensation due to a large group of persons. This group includes the carrier's servants and agents and 'any other persons of whose services he makes use for the performance of the carriage'. Although CMR does not regulate the liability of subcarriers, it offers protection to these persons as they are covered by the category of 'any other person of whose service the carrier makes use' in art. 3 CMR.[727] A restriction is however imposed on this right. The carrier is only liable for these persons and they can only rely on the provisions in the CMR if they were acting within the scope of their employment.[728]

In order to subject subcarriers that do not qualify as 'carrier' under the conventions to their liability regime some international transport law conventions introduced the concepts of 'actual carrier' and 'successive carrier'.

8.3.1 **Actual carrier**

Some international transport law conventions recognise the concept of an 'actual carrier'.[729] Carriers employed by the main carrier for the performance of (part of) the contract of carriage are therefore liable under the convention and they can also rely on the convention's defences and limits of liability. The conventions impose rights and obligations on persons that are covered by the term actual carrier.

Pursuant to the aforementioned general rule, persons who can be considered carriers under contract of carriage which are subject to a convention can rely on the rules of this convention irrespective of whether a contractual or extra-contractual claim is brought. It is for this reason that a subcarrier can also rely on the rules provided for in the convention in so far as the contract concluded with his shipper, either the main carrier or another subcarrier, falls within the scope of the convention.[730] If an extra-contractual claim is brought by a third party, for example the shipper or consignee who are solely parties to the main contract of carriage, the subcarrier can rely on the rules of the conventions.[731] However, the underlying main contract of carriage could be governed by a convention which is not applicable to the subcontract of carriage. As stated above, this could be because the international carriage for which the main contract was concluded is divided into parts which do not all cross state borders. The subcontracts which concern solely national carriage therefore, do not meet the requirements for the application of a convention.[732] In order to bring these carriers under the umbrella of the convention, the concept of the 'actual carrier' was first introduced in the Guadalajara Convention

727. Clarke (2014), nr. 50, p. 166-167; Koller (2015), p. 418-420.
728. Art. 3, 28.2 CMR.
729. Art. 1.2 HHR; art. 1.6, 1.7 RR (here the subcarrier is covered by the definition of the maritime performing party); art. 1.3 CMNI; art. 3 (b) COTIF-CIM (the term used here is 'substitute carrier'); art. 39 MC, art. 1 (c) Guadalajara Convention.
730. In the same sense: Clarke (2014), nr. 51, p. 172-173.
731. See for a discussion on the position of the consignee: Van Bockel (2002), p. 79-87.
732. The uniform transport law conventions under discussion only apply to international carriage. See: art. X HVR; art. 2.1 HHR; art. 5.1 RR; art. 1.1 CMR; art. 2.1 CMNI; art. 1.1. COTIF-CIM; art. 1.1, 1.2 MC.

on carriage by air and later in the HHR, RR, CMNI, COTIF-CIM and MC.[733] There are slight variations in terminology between these conventions. The term actual carrier is referred to as 'substitute carrier' under COTIF-CIM and under the RR the term is covered by the concept of the 'maritime performing party'.

These conventions define the contractual carrier as 'any person by whom or in whose name a contract of carriage has been concluded with a shipper'[734] or by similar terms.[735] The term carrier under these conventions is therefore a concept which refers to any person who takes upon himself the obligation to carry goods from one place to another; the person who concludes the contract of carriage with a shipper. This person need not necessarily perform the carriage himself and a subcontractor can be employed for the performance. This subcontractor does not have a contractual relation with the initial shipper and is then referred to as an 'actual carrier'. Under CMNI, the term actual carrier is defined as 'any person to whom the performance of the carriage of goods, or a part of the carriage, has been entrusted by the carrier'.[736] The definition not only includes subcarriers who perform the actual transport but also those who the carrier has entrusted to perform the carriage. For this reason, a subcarrier who does not perform any part of the transport himself, can still be qualified as an 'actual carrier'. This is different under the air carriage regimes where the actual carrier is defined as a person who 'performs' the carriage. Thus, only the person who physically performs the carriage is covered by the definition of an actual carrier.[737]

When an actual carrier is involved in the carriage of goods, the main carrier remains responsible for the entire carriage contracted by him. The carrier may delegate performance of this obligation, but cannot delegate his responsibility (non-delegable duties).[738] Furthermore, an actual carrier is also liable under the convention and can therefore be confronted with direct claims under the convention. The actual carrier can also benefit from the provisions in the conventions as he can invoke the defences provided by them. The liability of the actual carrier is similar to the liability of the contractual carrier provided it is limited to the part of the carriage performed by him. The liability of the contractual carrier and possible multiple actual carriers is joint and several, meaning that payment by one debtor extinguishes claims against the other debtor(s) up to the amount paid. For that reason, the claimant cannot obtain a higher amount in damages by suing both the carrier and the actual carrier. The limits provided in the conventions also apply to the aggregate amount recoverable from these carriers.[739]

733. Art. 1.2 HHR; art. 1.6, 1.7 RR; art. 1.3 CMNI; art. 3(b) COTIF-CIM; art. 39 MC; art. 1 Guadalajara Convention.
734. Art. 1.2 CMNI.
735. Art. 1.1 HHR; art. 1.5 RR; art. 3 (a) COTIF-CIM; art. 39 MC.
736. Art. 1.3 CMNI. Rules to the same extent can be found in: art. 1.2 HHR; art. 1.6, 1.7 RR; art. 3(b) COTIF-CIM.
737. Art. 39 refers to: '(…) another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage (…)'; art. 1 Guadalajara Convention. Koning (2007), p. 109.
738. Under Dutch law this follows from art. 6:76 BW and under German law from § 278 BGB. For English law see: Chitty 1 (2015), nr. 19-081-19-084; Treitel and Peel (2011), para. 17-013.
739. Art. 10 HHR; art. 4, 19, 20 RR (however, there are special rules on the scope of application of the convention to maritime performing parties); art. 4 CMNI; art. 27 COTIF-CIM; art. 39-48 MC.

Moreover, under CMNI the subcarrier may not only invoke the defences available to the carrier under the convention but he may also rely on the terms of the contract of carriage concluded by the main carrier.[740] Contractual increases of liability in the main contract of carriage are however different. If the main carrier voluntarily increases his liability under the contract of carriage, by for example, including a declaration of value or special interests in delivery or a waiver of rights or defences conferred by the convention, this would only affect the position of the actual carrier if he had expressly agreed to these terms.[741] This is also the position under the other conventions that deal with the notion of the actual carrier.[742]

8.3.2 Successive carrier

The term successive carriage refers to a contract of carriage which is performed by several carriers who are all parties to the main contract of carriage. The interpretation of the requirements for the application of the chapters on successive carriage in the different unimodal conventions is relevant for deciding the rules governing the inland carriage performed by terminal operators. The terminal operator can arguably be considered a successive carrier himself when performing the inland carriage on behalf of a contracting carrier or he can be considered a contracting carrier who employs subcarriers for the performance of the actual transport. In the latter case these subcarriers can be considered successive carriers. In both cases, the terminal operator is subject to the rules on successive carriage.

The concept of successive carriage can be found in CMR,[743] COTIF-CIM[744] and in the Warsaw and Montreal Conventions.[745] The pre-conditions for successive carriage in the air law regimes are different from those in the road and rail carriage regimes. The Warsaw and Montreal Conventions define two conditions which have to be met. First, carriage has to be performed by more than one carrier and second, these parties must regard the undivided carriage as a single operation. It is therefore not relevant whether an agreement was made in the form of a single contract or in a series of contracts. Under CMR and COTIF-CIM, on the other hand, the rules state that the system of successive carriage applies for carriage which is governed by a single contract. It is performed by successive carriers and these carriers take over the goods as well as the consignment note. Therefore, if more than one consignment note is issued and each covers a part of the carriage performed by two or more carriers, there is no successive carriage in the sense of CMR and COTIF-CIM. The carriers' acceptance of a single consignment note is required. In this way, the carriers bind themselves to the contract and subsequently to the convention to which it applies.[746]

740. Art. 4.4 CMNI.
741. Art. 4.4 CMNI.
742. Art. 10.3 HHR; art. 19.2 RR; art. 27.3 COTIF-CIM; art. 41.2 MC. See: Koning (2007), p. 112.
743. Art. 34 ff CMR.
744. Art. 26 COTIF-CIM.
745. Art. 1.3, 30 WC; art. 1.3, 36 MC.
746. Palmer (2009), p. 982-983; Loyens (2011), p. 388-389; Haak (1984), p. 109.

The legal consequences under air, road and rail carriage regimes are such that each successive carrier becomes party to the contract of carriage and these carriers assume the obligations arising from them. A claimant who has suffered damage due to loss of, damage to or delay in delivery of the goods therefore has a right of action against a larger group of persons.[747] Contractual actions can be brought against the first and the last carrier as well as against the carrier who was in charge of the goods when the event causing the loss, damage or delay occurred. This is different under the air carriage regimes where this right of suit is distributed between the consignor and the consignee. Only the former can bring a claim against the first carrier and only the latter against the last successive carrier.[748] Moreover, under COTIF-CIM also the carrier who must deliver the goods and who is entered into the consignment note with his consent is added to the list. An action may be brought against him even though he might have received neither the goods nor the consignment note.[749] It is therefore clear that the system of successive carriage is of great benefit to the cargo interests.

The ever increasing occurrence of chartering operations in air carriage should be distinguished from successive carriage. Under the air carriage regimes, the provisions on successive carriage do not apply if air carriage is subcontracted to an air carrier. In that case carriage is performed by a carrier who is neither a contracting carrier nor a successive carrier. The carrier performing the carriage can then be qualified as an actual carrier.[750] Although the distinction is less relevant under the Montreal Convention, it is still important to distinguish between actual and successive carriers when it concerns the right of suit. As mentioned above, in case of successive carriage, this right is distributed between the consignor and consignee whereas the distribution is not made concerning actual carriage.[751]

The current version of COTIF-CIM is strikingly similar to CMR especially for the conditions for successive carriage. Under the former versions of COTIF-CIM, strict formality existed concerning the use of consignment notes. It was for example required that a through consignment note was issued covering the entire carriage and this consignment note together with the goods had to be taken over by the railway carrier from the consignor before the convention could apply to the contract of carriage.[752] For this reason, successive carriage became the rule rather than the exception in international rail carriage.[753]

When it comes to CMR, different views exist on what should be regarded as successive carriage. The rules in the chapter on successive carriage apply if the conditions set out in art. 34 CMR are met. This provision states that these rules apply 'if carriage

747. See also: Loyens (2011), p. 397.
748. Art. 36.3 MC; art. 30.3 WC.
749. Art. 45.2 COTIF-CIM.
750. Art. 39 ff MC; art. 2 Guadalajara Convention (which subjects the actual carrier to the rules of the Warsaw Convention).
751. Art. 40 ff MC. Koning (2007), p. 115. Koning discusses the relevance of the distinction according to the Dutch case Sainath/KLM: HR 19 April 2002, ECLI:NL:HR:2002:AD9137, *NJ* 2002, 412 with commentary from K.F. Haak.
752. Art. 35.2 COTIF-CIM 1985.
753. De Wit (1995), p. 122-123.

governed by a single contract is performed by successive road carriers (…) by reason of his acceptance of the goods and the consignment note.' The narrow view holds that the rules on successive carriage only apply if more than one carrier physically performs the carriage. This would be the case if the first carrier performs part of the carriage and the subsequent carrier or carriers takes over the goods and the consignment note while performing the remaining part of the carriage.[754] In the wider view, on the other hand, it would not be necessary for more than one carrier to actually perform the carriage. For, if a main carrier were to subcontract a subcarrier who performed the entire carriage this could also be considered successive carriage. It would not be necessary for the first carrier to handle the goods, he would just be the first person to contract as a carrier.[755]

In the Netherlands, the *Hoge Raad* recently put a wide interpretation on art. 34 CMR in the following case. According to this interpretation, successive carriage is one in which carriage is performed by a single performing carrier and the other carrier or carriers are merely paper carriers and do not perform any part of the carriage themselves and also do not take over the goods or the consignment note.

> The case concerned a chain of contracts in which an initial shipper contracted a paper carrier ('Carrier 1') who contracted a second paper carrier ('Carrier 2') who contracted a carrier actually performing the carriage ('Performing Carrier 3'). Carrier 1 and 2 did not perform any part of the carriage and the Performing Carrier 3 took over the goods and the consignment note from the initial shipper. The question of whether this process complied with the conditions set out in art. 34 CMR was answered in the affirmative. The court did not require the carriage to be actually performed by more than one carrier whereby the successive carrier took over the goods and consignment note from a previous carrier, and it did not require the first carrier to place a signature on his own behalf on the consignment note.
>
> In this case it was beneficial to the position of the paper carrier seeking recourse from Performing Carrier 3. Carrier 2 had compensated Carrier 1 in full as the German court ruled that the limits of liability had been broken under art. 29 CMR. Carrier 2 was liable in full as he was responsible for the acts of Performing Carrier 3 whose acts according to the German court, qualified as wilful misconduct. In a recourse action brought by Carrier 2 against Performing Carrier 3 before the Dutch court, Carrier 2 claimed that the rules on successive carriage applied to the case. In this way, Performing Carrier 3 could not dispute the validity of the payment made by Carrier 2 as the amount of the compensation was determined by legal authority after Performing Carrier 3 had been given due notice of the proceedings and was afforded an opportunity to enter in the pro-

754. Loyens (2011), p. 388-389.
755. In the Netherlands this view is supported by the *Hoge Raad* in: HR 11 September 2015, ECLI:NL:HR:2015:2528, *NJ* 2016, 219 with commentary from K.F. Haak, *S&S* 2016, 1 (C&J Veldhuizen Holding/Beurskens Allround Cargo). This case has been critically discussed in: Van Dijk and Spijker (2016), nr. 9, p. 341-345.

ceedings.[756] Consequently, the Dutch court, although generally having a different opinion on the notion of wilful misconduct under the CMR, had to comply with the German judgement.

The reasoning that the first carrier should not necessarily be the first one to handle goods, but can also merely be the first carrier to contract with a shipper as carrier for art. 34 ff CMR to apply, has also been accepted in England.[757] In that case, both the first carrier and the carrier performing the carriage are liable on the basis of art. 34 CMR, provided that the latter accepts the goods and the consignment note. In Germany, however, it has been held that art. 34 CMR requires the main carrier to handle part of the carriage himself. If the carrier subcontracts the entire carriage to another person he is responsible for this person pursuant to art. 3 CMR who is then considered a subcarrier but not a successive carrier.[758] The successive carrier must himself accept the goods and the consignment note for the entire transport, which is issued by a carrier higher up in the chain. The requirements under art. 34 CMR are in that view not met if the subcarrier issues the consignment note as he cannot accept a note that he himself has issued.[759]

The requirement of acceptance of the goods and the consignment note in order for the chapter on successive carriage to apply gives rise to difficulties in a case, such as the one discussed above, when Carrier 1 subcontracts the entire carriage to Carrier 2, who subcontracts the entire carriage to Carrier 3. How can Carrier 2 be considered a successive carrier under art. 34 CMR if it does not appear that he has accepted the goods and the consignment note? Carrier 2 is a mere paper carrier, who usually does not accept the consignment note. It is therefore questionable whether he has accepted to be bound by the consignment note, its terms and by what is mentioned on it about the quantity and condition of the goods.

It has been argued that this issue can be resolved by considering that Carrier 2 can take over the goods and the consignment note himself or through his servants or agents. In that view, Carrier 3 also acts on behalf of Carrier 2 when taking over the goods and the consignment note thereby binding them to the contract.[760] Moreover, the *Hoge Raad* resolved this issue by considering that for Carrier 3 to be considered a successive carrier it is not required that Carrier 2 can also be considered a successive carrier. It held that it is not required that all carriers in the chain are successive carriers.[761] Furthermore, the problem that Carrier 3 cannot accept the consignment note if the consignment note has been issued by himself can also be resolved. The issuance of the consignment note by the performing carrier is considered as an act done as an agent for the paper carriers.[762]

---

756. Art. 39.1 CMR.
757. Clarke (2014), nr. 50a(i), p. 167-168. See also: Palmer (2009), p. 982-983.
758. Jesser-Huß (2014 b), art. 34 CMR, Rn. 13. BGH 19 April 2007, *TranspR* 2007, p. 416.
759. Ebenroth, Boujong, Joost and Strohn (2015), art. 34 CMR, Rn. 6.
760. Koller (2013), art. 34 CMR, nr. 4, p. 1196-1197; Palmer (2009), p. 984; Clarke (2014), nr. 50 (b) (i), p. 171.
761. HR 11 September 2015, ECLI:NL:HR:2015:2528, *NJ* 2016, 219 with commentary from K.F. Haak, *S&S* 2016, 1 (C&J Veldhuizen Holding/Beurskens Allround Cargo), para. 3.7.2. See also: Claringbould (2008 a), p. 38-39.
762. Clarke (2014), nr. 50 (b) (i), p. 171.

That Carrier 3 in the Dutch case which came before the *Hoge Raad* acted as an agent for the paper carriers when issuing the consignment note does however not follow from that decision. To hold that it is not required under art. 34 CMR that the carriage is actually performed by more than one carrier whereby the successive carrier takes over from a previous carrier and accepts the goods and consignment note, is therefore a view which reflects, to a lesser extent, the obvious meaning behind art. 34 CMR. It views the matter from the perspective of the cargo interests and gives consignors and consignees a 'viable choice of targets for claims'.[763] This is in line with the purpose of Chapter VI CMR. The fact that the contracting carrier subcontracted the entire carriage should not necessarily complicate matters.[764]

The legal consequences of the application of art. 34 ff CMR are that each carrier will be responsible for the performance of the whole operation. The second carrier and each succeeding carrier will become party to the contract of carriage under the terms of the consignment note. This will bring cargo interests in a more favourable position as a claim can now be brought against more carriers in the chain and such claim does not have to be brought in tort. Moreover, the position of a carrier seeking recourse is also improved.[765] In cases where successive carriage is involved, the application of the CMR can ensure a prompt and speedy settlement of the legal disputes between various carriers in the logistic chain.[766]

8.4 Other subcontractors

The previous paragraphs explore the extent to which the liabilities of carrier and subcarriers towards third parties are governed by international transport law conventions. The following paragraphs explore to what extent the international (maritime and inland) transport law conventions and the OTT-convention confer rights or impose obligations on terminal operators to whom (part of) the performance of the carriage of goods is entrusted while being responsible for the goods as a service provider or depositary.

8.4.1 Hague (Visby) Rules

Under the Hague Rules the carrier is usually responsible for the loading and discharge of the goods.[767] This is because the carrier's mandatory period of liability runs from 'tackle-to-tackle'.[768] The Hague Rules do not prevent the carrier from excluding liability for damage that occurs before loading and after discharge in 'before-and-after clauses'.[769] This may be restricted under national law as it is, for example, under German law.[770] The carrier who is responsible for the loading and

763. Palmer (2009), p. 982-983.
764. See also: Haak (1984), p. 122; Clarke (2014), nr. 50a, p. 167-168; Boon and Dokter (2005), p. 285-286; Claringbould (2015), nr. 77, p. 3-7; K.F. Haak under HR 11 September 2015, ECLI:NL:HR:2015:2528, *NJ* 2016, 219.
765. Loyens (2011), p. 397-398.
766. However, parties have the option to exclude the application of art. 37 and 38 CMR in their contracts.
767. Art. 2 H(V)R.
768. Art. 1 (e) H(V)R.
769. Art. 7 H(V)R. See also: Chao and Nguyen (2007), p. 193.
770. Under § 512 HGB.

discharge often employs independent contractors for the performance of his obligations. However, only the carrier, defined as including 'the owner or the charterer who enters in to a contract of carriage with a shipper',[771] can rely on the defences and limits of liability provided for under the Hague Rules. Parties that assist the carrier in the performance of the contract of carriage are not covered by this convention and are therefore not protected by the Hague Rules if faced with contractual or extra-contractual claims. This situation changed in 1968 when the convention was amended by the Visby protocol. Art. 4bis was added in order to prevent attempts to circumvent the limitations and exemptions of the convention. This article states that the convention applies whether an action is founded in contract or in tort, and it also determines that the exemptions and the limitation of the carrier's liability are extended to the carrier's agents and servants. With this, the group of parties protected under the rules has grown. However, independent contractors are still excluded from the scope of application. Art. 4bis of the Hague-Visby Rules reads as follows:

> '1.The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.
> 2. If such action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor) [emphasis added, SHLN], such servant or agents shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.
> 3. The aggregate of the amounts recoverable from the carrier, and such servants or agents, shall in no case exceed the limit provided for in this Convention.'

It had not always been envisaged to exclude independent contractors from the scope of the Hague-Visby Rules. In 1963, while the protocol was being prepared, the Sub-Committee to the CMI proposed a text in which defences and limits of liability were not only granted to agents and servants but also to independent contractors employed by the carrier in the carriage of goods.[772] However, a minority in the Sub-Committee was reluctant to adhere to this draft version of art. 4bis with regard to independent contractors. Their position was explained as follows:[773]

> 'In their view a contractor who is independent of the carrier should not, by the mere fact that he performs duties which might have been performed by the carrier himself, become entitled to avail himself of the limitation and exceptions of the Convention. A distinction should be drawn between, on the one hand, the carrier, his servants or agents and, on the other, the independent contractor. The servants and agents should be protected for social reasons and should have the benefits of the Convention whereas,

771. Art. 1 (a) H(V)R.
772. Berlingieri (1997), p. 596.
773. Berlingieri (1997), p. 598. It reproduces the CMI 1963 Stockholm Conference Report of the Committee of Bills of Lading Clauses.

> in the view of the minority, these reasons do not apply to the independent contractor who should thus not have this benefit.'

This minority view was that the benefits of the convention should only be conferred on servants and agents and not on independent contractors. The aim was primarily to protect the employees of the carrier.[774] This view was supported by several delegations.[775] The social reason for the protection of servants and agents refers to situations in which the carrier's employees, such as the chief officers, chief engineers or the master, are usually not able to financially compensate the cargo owner's loss unless the carrier or ship owner, who is vicariously liable, supports them.[776] This means that extra-contractual claims brought against the servants and agents are, in practice, claims against the carrier himself.[777] The provisions in the convention aimed at protecting the carrier's interests can be circumvented by indirectly claiming from the carrier through his servants and agents. However, this social reason does not apply to independent contractors. It states that independent contractors have sufficient protection through appropriate contractual clauses in bills of lading and furthermore, carriers usually give an indemnity to the independent contractors they engage.[778] Although several delegations at the Stockholm Conference in 1963 were in favour of including independent contractors[779] in the scope of application it was felt that 'a good rule with world-wide application is better than a better rule opposed by a number of nations'.[780] Consequently, the final draft adopted by the Stockholm Conference and presented to the diplomatic conference in Brussels did not grant independent contractors the same benefits as servants and agents. Art. 4*bis* explicitly states that independent contractors are not covered by the Hague-Visby Rules. The result is that servants and agents, such as the master and crew, can benefit from the defences and limits of liability provided for in the convention whereas independent contractors, such as service providers and depositaries, cannot rely on the statutory protection of the Hague-Visby Rules.[781]

8.4.2 **Hamburg Rules**

The Hamburg Rules (also: HHR) were adopted in 1978 in order to establish a uniform legal regime governing the rights and obligations of parties to contracts of carriage of goods by sea. The convention entered into force on 1 November 1992. The drafters

774. Carver (2011), p. 757-758.
775. Berlingieri (1997), p. 606-607. See for an overview of the discussion at the Stockholm Conference 1963: Grönfors (1964), p. 26-27.
776. In return, the shipowner is protected by his P&I cover which also extends to his servants and agents.
777. This social reason was explained by the English delegation at the Stockholm Conference in 1963. Berlingieri (1997), p. 600.
778. Berlingieri (1997), p. 601-602.
779. Also another solution came up which included only stevedores in the scope of the convention and no other independent contractors. This middle way was supported by the Canadian Maritime Law Association. Berlingieri (1997), p. 604-605.
780. Grönfors (1964), p. 25. (Mr. Grönfors was present at the Stockholm Conference in 1963 where the amendment was adopted.)
781. Under English law the word 'agent' can be broadly interpreted. Independent contractors like stevedores can be considered as agents. However, it always has to be determined whether the stevedore is an employee of the carrier or an independent contractor. Only if the stevedore is an employee of the carrier can the HVR offer protection. See: Carver (2011), p. 758.

of this convention intended to supersede the existing regimes covering the carriage of goods by sea. The Hamburg Rules were not very successful in that sense as only 34 states have until now ratified the treaty.[782] What is more, most of the states that ratified the treaty do not play a significant role in maritime traffic.[783]

Compared to the Hague (Visby) Rules, the Hamburg Rules have a wider scope of application.[784] The Hamburg Rules apply to contracts of carriage by sea which are defined as 'any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another'.[785] Moreover, the rules apply during (and the carrier's period of responsibility covers) the time in which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.[786] The carrier is therefore subject to the Hamburg Rules during the entire performance of a port-to-port contract or during the maritime stage of a multimodal contract. This means that the Hamburg Rules can also apply when the goods are awaiting transport or delivery at a terminal in the sea port area. However, when the goods are located at a terminal outside the sea port area, the rules are not applicable. Art. 4 of the Hamburg Rules is designed to remedy the 'before-and-after problem' which exists under the HVR. This problem is the result of the mandatory application of the HVR from tackle-to-tackle, by which the carrier is entitled to exclude liability before the goods are loaded onto and after the goods are discharged from the ship. The Hamburg Rules solve this problem since its provisions apply throughout the entire period that the carrier is in charge of the goods under a contract of carriage by sea or during the sea leg of a multimodal contract of carriage.[787]

The Hamburg Rules focus on the contractual relationship between the contractual carrier and the shipper, and also on other parties that have no direct contractual relationship with the shipper. These parties include servants, agents (provided they can prove that they acted within the scope of their employment), and the 'actual carrier.' The carrier is vicariously liable for acts and omissions of these parties.[788] These parties are protected against extra-contractual claims as they can rely on the defences and limits of liability of the convention.[789] However, the difference between the legal position of agents and servants, and the 'actual carrier' is that 'actual

782. www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html (retrieved on 8 September 2017).
783. Carver (2011), p. 626; Berlingieri (1994), p. 17.
784. This period is wider than the period of application under the Hague-(Visby-)Rules where they only apply from tackle-to-tackle; from the time when the goods are loaded on to the ship until the time they are discharged from the ship. Art. 1 (e) Hague-(Visby-)Rules.
785. Art. 1(6) Hamburg Rules. This is different than the approach taken by the Hague (Visby) Rules which only apply to 'contracts of carriage covered by a bill of lading or any similar document of title' (art. 1 (b) Hague (Visby) Rules). Under the Hamburg Rules it is irrelevant whether a bill of lading or a non-negotiable instrument is issued. The Rules are not applicable, however, to charterparties or to bills of lading that are issued pursuant to charterparties unless it has been issued or negotiated to a party other than the charterer.
786. Art. 4(1) Hamburg Rules.
787. Wilson (2010), p. 216.
788. This follows from art. 5.1 HHR concerning servants and agents and from art. 10(1) Hamburg Rules concerning the 'actual carrier'.
789. Art. 7.2 HHR deals with servants and agents and art. 10 HHR with the actual carrier.

carriers' only, are subject to the carrier's liability regime under the convention.[790] 'Actual carriers' are governed by the convention and are therefore liable for loss, damage or delay incurred during the part of the carriage performed by them.[791] The Hamburg Rules make no reference to the liability of servants and agents. It would appear that these persons assume no obligations and liabilities under the convention, and that the Hamburg Rules provide no basis to claim against them.[792]

So, do independent contractors such as terminal operators and depositaries fall into the category of either servants and agents or of the 'actual carrier'? Art.7(2) of the Hamburg Rules, like art. 4*bis* of the Hague-Visby Rules, provides that servants and agents are entitled to the defences and limits of liability of the carrier if an action is brought against them. Unlike in the Hague-Visby Rules, independent contractors are not explicitly excluded from the category of servants and agents under the Hamburg Rules. It appears that the term agents may also include independent contractors who perform services within port areas.[793] If these terms cover independent contractors, it would mean that stevedores or warehouses can also avail themselves of the provisions in the Hamburg Rules by excluding or limiting their liability when confronted with claims.

Furthermore, it seems that certain independent contractors may also fall into the category of 'actual carriers'.[794] According to art. 1.2 Hamburg Rules an 'actual carrier' is:

> 'any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.'

According to Tetley, this definition is sufficiently wide to include persons who perform services for the carrier relating to the carriage of goods such as stevedores and terminal operators.[795] These are then covered by the convention as the Hamburg Rules apply from port to port. 'Actual carriers' are not only protected by the convention but are also subject to the carrier's liability regime. So the terminal operator who qualifies as an 'actual carrier' will have to adapt to a new liability regime when subject to the Hamburg Rules. However, the reports of working group III only mention the 'actual carrier' in the sense of a person performing carriage by sea and not merely one who performs operations at a terminal. It is therefore not clear whether the Hamburg Rules's definition of the 'actual carrier' intends to

790. Art. 10 HHR.
791. Art. 10.2 and 10.4 HHR.
792. Smeele (1998), p. 18-19.
793. Berlingieri (2009), p. 13; Gaskell, Asariotis and Baatz (2000), p. 379 and fn. 9.
794. The notion of the actual carrier is related to the notion of the 'actual carrier' in the Convention supplementary to the Warsaw convention for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier, 1961 (Guadalajara Convention) and the term 'performing carrier' in the Convention relating to the carriage of passengers and their luggage by sea, 1974 (Athens Convention).
795. Tetley (2003), p. 64.

cover stevedores and terminal operators.[796] The use of the term 'carrier' instead of a more neutral term seems to point in this direction. Bearing this in mind, it would seem appropriate to assume that independent contractors such as stevedores and depositaries who do not perform carriage are not covered by the Hamburg Rules' definition of the 'actual carrier'.[797] However, some operations performed by the terminal operator can be considered as carriage of goods (see paragraph 6.3.2). If the obligation to carry goods at the terminal can be deemed dominant in relation to the other transport related operations performed by the stevedore it clear that this person is covered by the definition of the 'actual carrier'. The stevedore is then a person to whom part of the carriage has been entrusted.

In summary, terminal operators or depositaries can benefit from the provisions in the convention if they are covered by the terms servants and agents. Moreover, to the extent that these independent contractors perform carriage of goods they are subject to the liability rules under the convention and fall in the category of the 'actual carrier'.

8.4.3 **Rotterdam Rules**

If the Rotterdam Rules enter into force, most terminal operators active in sea port areas in contracting states will have to adapt to a new situation as they will become subject to an international mandatory liability regime. This is a result of the Rotterdam Rules scope of application. The Rotterdam Rules introduce two new concepts: the concept of the 'performing party'[798] and that of the 'maritime performing party'.[799] These concepts are introduced in order to determine for whose conduct the carrier is responsible and to make certain independent contractors that help the carrier with his duties during the maritime stages subject to the rules of the convention. The Rotterdam Rules will alter the position of these independent contractors, like terminal operators, stevedores and depositaries, who are at present, not bound by any mandatory liability regime.[800] The Rotterdam Rules attempt to offer 'protection'[801] for these independent contractors as they establish that all parties that fall within the definition of the maritime performing party can benefit from the same defences and limits of liability offered to the carrier. At the same time, these maritime performing parties will also be subject to the obligations and liabilities imposed on the carrier under the convention.[802]

The liability of the maritime performing party will only be determined by these rules if the goods are received, delivered or handled by the maritime performing party in a contracting state and the incident that caused the damage, loss or delay

796. A/CN.9/88 — Report of the Working Group on International Legislation on Shipping on the work of its sixth session, 4-20 February 1974, Geneva, para. 118-136.
797. See also: Smeele (2010), p. 80; Kienzle (1993), p. 67.
798. Art. 1.6 RR.
799. Art. 1.7 RR.
800. See the previous paragraphs on H(V)R and the HHR and the paragraph on the OTT Convention below.
801. For the possible disadvantages for independent contractors I refer to Boonk (2010), p. 82; Neame (2010).
802. Art. 4, 19.1 RR.

took place during the maritime performing party's 'period of responsibility'.[803] If the contractual carrier and the maritime performing party are both liable, their liability is joint and several.[804] Furthermore, a claim against the maritime performing party can only be brought before a competent court determined by the convention's jurisdiction rules.[805]

In order to ascertain whether a terminal operator falls within the scope of application of the convention it is necessary to take a closer look at the definitions in the convention.

Article 1.6 of the Rotterdam Rules on the 'performing party', reads as follows:

> '(a) "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.
> (b) "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.'

Article 1.7 of the Rotterdam Rules on a subcategory of the 'performing party', namely the 'maritime performing party' reads as follows:

> '"Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.'

According to the definition, 'performing parties' are persons that perform, or undertake to perform, one or more of the main obligations of the carrier. 'Maritime performing parties' are those 'performing parties' who are employed by the carrier[806] in order to perform the carrier's duties during the maritime stages of the transport; from the moment the goods arrive in the port of loading until they leave the port of discharge. It is necessary that these persons are involved in the receipt, loading,

803. Art. 19.1 (b) RR.
804. Art. 20 RR.
805. Art. 68 RR. According to this provision the competent court is a court within the jurisdiction where the maritime performing party is domiciled or where the goods are received, delivered or handled by the maritime performing party. It should be noted that an action can be brought against the martitime performing party in the courts determined by art. 71.1 RR if a single action is brought against both the carrier and the maritime performing party arising out of a single incident.
806. A carrier normally does not perform every aspect of the carriage himself. The carrier subcontracts with other persons for the performance of some, or all obligations and sometimes subcontractors subcontract as well. All parties that ultimately act for the carrier, directly (subcontractors of the carrier) or indirectly (subcontractors of the subcontractors), can be (maritime) performing parties.

handling, stowage, carriage, care, keep, unloading and delivery of the goods.[807] So, only those parties that perform any physical activity with regard to the goods are covered by this definition. The carrier's obligation are listed to ensure that only parties that are involved in the core obligations of the carrier for a specific contract of carriage are included. The list excludes other parties that merely assist the carrier in the conduct of its business and those that are not involved in a specific contract of carriage.[808] These could include persons that provide the carrier with documentary services, a ship repair yard, a security company that guards a container yard and a caterer of a ship.[809]

The rules also indicate that inland carriers can also be regarded as 'maritime performing parties', but only when inland carriage is performed exclusively within the sea port area. It is important to distinguish 'maritime performing parties' from other 'performing parties', as only those who fall into the subcategory of the 'maritime performing party' are subject to the substantive rules of the convention.[810] Clearly, this is only the case when the goods are received, delivered or handled in a sea port area which is located in a contracting state.[811]

According to these definitions, we can safely assume that subcarriers employed by a main carrier for the performance of (part of) the sea carriage and terminal operators employed by the carrier for handling cargo in the sea port area will undoubtedly be covered by the definition 'maritime performing party' under the Rotterdam Rules.[812] Moreover, the terminal operator who performs inland carriage is covered by the definition 'maritime performing party' if the inland carriage is only performed within the sea port area. As a result of this, the carriage of goods within the confines of a terminal or between terminals in the sea port area will be covered by the convention, whereas carriage between a terminal in the sea port area and an inland terminal in the hinterland which is located outside the sea port terminal will not. In the latter case the inland carrier cannot be considered a maritime performing party. The reason to exclude these inland carriers is to prevent the application of the Rotterdam Rules to subcontractors who are not aware that they are performing carriage subject to the Rotterdam Rules. Another reason would be so as to avoid conflicts with already existing (unimodal) transport law regimes.[813]

Does a terminal operator who mixes different kinds of obligations in a contract, so that the obligations are not exclusively performed in the sea port area, fall

807. Art. 1.6 and 13.1 RR.
808. Report of Working Group III (Transport Law) on the work of its ninth session, document A/CN.9/510, para. 95-104, which refers to the annex to the preliminary draft instrument on the carriage of goods by sea, document A/CN.9/WG.III/WP.21, para. 14-21; Annex to the preliminary draft instrument on the carriage of goods by sea, document A/CN.9/WG.III/WP.21, para. 17.
809. See also: Berlingieri (2009 a), p. 54, 55. Cf. Zunarelli (2009), p. 1022-1023; Hoeks (2010), p. 33-34.
810. Being a mere 'performing party' also has some legal consequences. Stevens (2012 a), p. 20-21.
811. Art. 19.1 RR.
812. Annex to the Preliminary draft instrument on the carriage of goods by sea, document A/CN.9/WG.III/WP.21, para. 17. See also: Sturley, Fujita and Van der Ziel (2010), p. 134.
813. Report of Working Group III (Transport Law) on the work of its twelfth session, document A/CN.9/544, para. 21, 23-24 and 27. Furthermore: Sturley, Fujita and Van der Ziel (2010), p. 140-141; Czerwenka (2004), p. 301-302.

within the definition of a maritime performing party?[814] The terminal operator's cargo handling activities are for example performed in the sea port area, after which, the goods are transported to an inland terminal outside the sea port area. The approaches to mixed contracts discussed in Part II could shed some light on this and provide an answer when dealing with the problem on the applicable law.[815]

Whether the terminal operator can be characterized as a maritime performing party during the performance of (part of) the obligations depends on the construction of his contract. The contract can be constructed in such a way that the obligations under the contract are equally significant and each can be isolated from the other. Each obligation can then be approached separately in order to determine the applicable rules.[816] Thus, the terminal operator who performs cargo handling services in the sea port area (i.e. loading/discharging and storage) in its capacity as a maritime performing party is subject to the Rotterdam Rules. During the inland carriage to the hinterland, however, the terminal operator is an inland carrier, hence a (non-maritime) performing party and is therefore subject to already existing national or international transport law.[817] During the (possible) cargo handling part at the inland terminal, the terminal operator is a non-maritime performing party.

Another way of constructing the terminal operator's contract could be one in which a dominant element could absorb others.[818] Carriage of goods can, for example, absorb the element of the preceding or subsequent storage, resulting in the application of transport law to the storage part.[819] As the terminal operator's period of responsibility as an inland carrier covers the storage part in the port area, this part of the contract would not be subject to the Rotterdam Rules. This would not create gaps in mandatory liability regimes because the storage part is subject to transport law for inland carriage. Nevertheless, the loading and discharge of the ocean vessel in the sea port area would constitute a separate element under the contract. This part would not be absorbed by the inland carriage stage and would therefore be subject to the Rotterdam Rules. This shows that it is also possible that several approaches to mixed contracts are taken under a single contract. Some elements are isolated and subject to their own rules and other elements are absorbed. This should be clearly determined in the contract.

The addition of inland carriage to the contract for cargo handling does therefore not necessarily mean that the terminal operator's entire (mixed) contract is outside the scope of the mandatory liability regime of the Rotterdam Rules. The mixed

814. See for a more extensive analysis of this issue: Niessen (2014), p. 33-40.
815. This approach was also taken for cases of logistic contracts in Ulfbeck (2011), p. 219-225.
816. See para. 5.4.1. The situation becomes more complex in cases of logistic/distribution contracts as discussed in para. 5.4.5. See also: Ramberg (2004), p. 135-151; Krins (2007), p. 269-279; Gran (2004), p. 1-14; Wiekse (2002), p. 177-182.
817. The question which transport law regime is applicable is not always easily answered. Especially in case the mode of transport is not agreed upon and left to the discretion of the carriers: Verheyen (2012), p. 25-30.
818. See para. 5.4.2.
819. An example of a 'Fixkostenspediteur' subject to transport law during preceding storage: BGH 12 January 2012, *TranspR* 2012, 107.

contract approach allows elements within a contract to be isolated and approached separately and/or allows elements to be absorbed. This can lead to satisfactory results as the maritime and transport related elements under terminal operator's contracts are either subject to the Rotterdam Rules or to other transport law regimes, which is in line with the intention of the drafters of the Rotterdam Rules. It would be advisable for terminal operators performing this mix of obligations to clarify the distinguishable elements in its contract and, to some extent, when they commence and end. This would significantly reduce the problems they encounter when determining the laws applicable to their mixed contracts.

In short, the legal position of terminal operators will change as 'maritime performing parties' are in a similar position as the contracting carrier. Subcontractors will no longer have to rely on a Himalaya clause in the contract of carriage when faced with cargo claims, as they will be able to benefit from the defences and limits of liability under the convention.[820] Himalaya clauses will, however, not become redundant. There will still be situations where it will be necessary to insert a Himalaya clause in a contract of carriage.[821] This will be because the Rotterdam Rules only provide statutory defences for subcontractors who are considered 'maritime performing parties', whereas a Himalaya clauses might also provide additional contractual defences.[822] Furthermore, a subcontractor will only be able to rely on the protection of the Rotterdam Rules if goods are lost, damaged or delayed which are carried under a contract of carriage in respect of which the subcontractor is considered a 'maritime performing party'. This is because the qualification as a 'maritime performing party' is only done with respect to a specific contract of carriage only.[823] If, while performing obligations under a specific contract of carriage (for which the subcontractor qualifies as a 'maritime performing party'), other goods are damaged (which are carried under a contract of carriage for which the subcontractor does not qualify as a 'maritime performing party') the subcontractor might not be protected by the Rotterdam Rules.[824] Sturley uses the example of a carrier who contracts for the carriage of a machine and containers on the same vessel. The carrier contracts stevedore A for the discharge of the containers and stevedore B for the discharge of the machine. As stevedore A did not perform or undertake to perform any aspect of the carriage of the machine, he is not a performing party in relation to the contract of carriage of the machine. If stevedore A were to damage the machine while loading or unloading the containers, he would not be protected by the Rotterdam Rules.[825] It depends obviously on the circumstances of the case and the wording of the particular Himalaya clause as to whether a Himalaya clause in a bill of lading would be beneficial to the stevedore in this case.

820. Art. 4 and 19.1 Rotterdam Rules.
821. See also: Smeele (2010), p. 77-78; Nikaki (2011), p. 37-40.
822. Smeele (2010), p. 77.
823. Report of Working Group III (Transport Law) on the work of its ninth session, document A/CN.9/510, para. 102.
824. See the facts in Queen's Bench Division (Commercial Court), Raymond Burke Motors Ltd. v. The Mersey Docks and Harbour Co [1986] 1 Lloyd's Rep. 155.
825. Sturley, Fujita and Van der Ziel (2010), p. 132-135.

However, besides the protection offered to terminal operators under the Rotterdam Rules, the qualification as a maritime performing party also has less advantageous consequences. First of all, the Rotterdam Rules will abolish the freedom of contract these subcontractors currently enjoy.[826] A maritime performing party is faced with obligations and liabilities under the convention. This means that the risk of liability will increase because before-and-after clauses'[827] will become invalid under the Rotterdam Rules.[828] Although it is possible, with restrictions, under art. 12.3 RR for the parties to a contract of carriage to agree on the time and location of receipt and delivery of the goods, the carrier cannot exclude liability for loss, damage or delay which occurs while he, or persons who act on his behalf, are in charge of the goods in the port. Moreover, there will be a basis for direct action against a maritime performing party. This means that if loss, damage or delay occurs during the terminal operator's 'period of responsibility,' a claim can directly be brought against him as a maritime performing party.[829] Circular indemnity clauses or similar clauses designed to prevent cargo interests from bringing claims against terminal operators will be void under Article 79(1) of the Rotterdam Rules.[830] When taking all these consequences into consideration, one can only conclude that the Rotterdam Rules will influence the risk profile of terminal operators who will be covered by the definition of the maritime performing party and who perform services in the sea port area in contracting states.[831]

In conclusion, terminal operators operating in sea port areas in contracting states will be confronted with the Rotterdam Rules if they enter into force. Terminal operators performing services outside the sea port area or those which are not located in a state party will not be affected by the convention. The consequences of being subject to this uniform liability regime will have advantages and disadvantages for the terminal operator's legal position. On the one hand, the terminal operator who qualifies as a 'maritime performing party' (as well as carriers) will no longer be able to rely on before-and-after clauses in contracts of carriage and there will be a basis for direct actions against terminal operators under the convention. But, on the other hand, the terminal operator will benefit from the protection he will receive from the defences and limits of liability under the convention. This protection will be provided whether the claim is brought in contract, tort or otherwise.[832] This however will not mean that Himalaya clauses in contracts of carriage will become redundant. Himalaya clauses can grant subcontractors better supplementary protection than the Rotterdam Rules in some situations. For this reason, it would be

826. Nikaki and Soyer (2012), p. 342.
827. See below para. 9.2.2.
828. Boonk (2010), p. 82.
829. Art. 19.1 RR. The result is that the stevedore will be confronted with claims from a larger group of claimants than before. See: Neame (2010): 'For the first time, the Rotterdam Rules will therefore put many terminals directly in the firing line for cargo claims. At the moment, cargo claimants normally bring their claim against their contractual counterparty, the shipowner. The carrier then seeks an indemnity from the terminal — in accordance with either the terms of the bespoke terminal handling agreement or local law. In short, at the moment, terminals normally only have to deal with a small number of claimants, namely the shipping lines, rather than the individual cargo claimants. All that is about to change'.
830. Nikaki and Soyer (2012), p. 342.
831. Chua (2010), p. 302-303.
832. Art. 4 RR.

advisable to remain including well-constructed Himalaya clauses in contracts of carriage for the benefit of independent contractors such as terminal operators.

8.4.4 OTT Convention

The UN Convention on the Liability of Operators of Transport Terminals in International Trade 1991 (hereinafter referred to as: OTT Convention 1991) was designed to create a uniform mandatory liability regime governing operators of transport terminals. The convention has an international element because it only applies to transport-related services performed in relation to goods which are involved in international carriage. This convention has never entered into force and deals with the liability for the loss of or damage to goods and for delay in handing over the goods. As the Convention aims to govern parties that perform activities typical to a terminal operator, it is important to determine what can be understood as a terminal operator. The explanatory note to the Convention describes terminal operators as:

> '… commercial persons or enterprises that handle goods before, during or after the carriage of goods. Their services may be contracted for by the consignor, the carrier or the consignee. Typically, they perform one or more of the following transport-related operations: loading, unloading, storage, stowage, trimming, dunnaging or lashing. The terms used in practice to refer to such enterprises are varied and include, for example: warehouse, depot, storage, terminal, port, dock, stevedore, longshoremen's or docker's companies, railway stations, or air-cargo terminals.'

The applicability of the OTT Convention 1991 is triggered by the transport-related services performed, irrespective of the name or designation of the enterprise.[833] A non-exhaustive list of examples of transport-related services can be found in the first article of the convention. The list includes activities such as loading, unloading, storage, stowage, trimming, dunnaging or lashing.[834] The examples in the list indicate that these services only include physical handling of goods. Consequently, non-physical services such as financial or commercial services are not covered.[835] Another important exclusion from the scope of application is a person who performs transport-related services while being responsible for the goods as a 'carrier' under transport law.[836] Art. 1 (a) states that a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage. This would mean that whenever the terminal operator was responsible for the goods as a carrier under transport law, he would not be subject to this convention. The issue of mixed contracts comes into play when the terminal operator performs a mix of obligations, including services in the port and carriage of goods. The obligations he fulfills while responsible for the goods as a carrier are subject to other transport law conventions or national transport law and outside the scope of the

833. Art. 2 OTT Convention 1991. This also follows from the Explanatory Note to the OTT Convention 1991, nr. 2.
834. Art. 1 (d) OTT Convention 1991.
835. Sekolec (1992), p. 1056.
836. Art. 1 (a) OTT Convention 1991.

convention. It is therefore possible that part of the obligations he discharges are subject to the OTT-convention and another part to the applicable transport law rules. If obligations are performed by the terminal operator while responsible for the goods as a carrier, and if the obligation to handle and store the goods is considered supplementary to the obligation to carry the goods and therefore absorbed into the carriage stage, the terminal operator would not be subject to the OTT-convention.[837]

Moreover, a terminal operator can be subject to the convention if the transport-related services are performed in a contracting state, by a transport operator whose place of business is located in a contracting state or if the services are according to the rules of private international law are governed by the law of a contacting state. The convention furthermore only applies to cargo handled by the terminal operator in relation to goods involved in international carriage.[838] It is therefore possible for a terminal operator to be subject to the convention with regards to one particular shipment which crossed or will cross state borders, while being subject to national law for another which remained in one state. This legal uncertainty for the terminal operator whose liability regime depends on the origin and destination of the goods handled could be avoided if a uniform approach were adopted by contracting states under their national law.

The drafters of the OTT Convention 1991 saw the need for improvement and harmonization of liability rules. The main reasons given in the explanatory note to the convention were that international conventions had left gaps in mandatory liability regimes, that the rules in national legal systems differ widely and that in most cases these national rules were not of a mandatory nature.[839] According to the explanatory note, this convention would be beneficial for all parties involved; cargo owners would be able to obtain compensation irrespective of the applicable national law, carriers would be able to base a recourse action against the terminal operator on the convention and terminal operators would be subject to a modern regime with liberal rules on documentation, low financial limits of liability and have a right of retention.[840]

The substantive rules of the convention are in general, similar to those of the international liability regimes concerning unimodal carriage of goods. Some of these substantive rules will be discussed here. First of all, the period of responsibility of the terminal operator under the OTT Convention 1991 starts at the moment the

837. See para. 6.3.2.
838. Art. 2 (1) OTT Convention 1991.
839. Note 2 of the explanatory note. Often gaps occur in international mandatory liability regimes. This occurs when goods are handed over to a terminal operator prior to transport. It is likely that the carrier's period of responsibility has not yet begun or has already ended. That means that transport law is not mandatorily applicable during the period in which goods are in the charge of a terminal operator. This is especially true for the transport of goods by sea to which the Hague Visby Rules apply, as these mandatory rules only apply from tackle-to-tackle. However, the risk of gaps in mandatory liability regimes is reduced if the Hamburg Rules are applicable, in which case the carrier's period of responsibility is expanded to the period in which the carrier is in charge of the goods at the port of departure and destination. The OTT Convention 1991 is patterned on the Hamburg Rules in: Falvey (1992), p. 1064.
840. Note 4 of the explanatory note.

goods are 'taken in charge'.[841] What this means depends on the circumstances of the case and the type of services involved. In general, being 'in charge' begins when the operator comes into physical contact with the goods.[842] The convention also deals with the issuance of documents and does so in a flexible manner. The terminal operator is free to issue a document or not, unless the customer explicitly requests one, in which case he is obliged to issue it. An operator is liable for loss resulting from physical loss of or damage to goods and from delay in handing over the goods. The operator's liability is based on the principle of presumed fault or neglect. In order to be relieved of this liability, the operator has to prove that all measures were taken that could reasonably be required to avoid the occurrence and its consequences. What is more, the convention sets two limits of liability, depending on the mode of transport to which the services relate.[843] These limits are calculated with reference to the weight of the goods.[844] The last element, which the OTT Convention 1991 has in common with international transport conventions, is that according to art. 7 OTT the defences and limits of liability provided for in the convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, irrespective of whether the action is founded in contract, in tort or otherwise. Moreover, this protection is also offered to servants, agents or other persons of whose services the operator makes use provided they acted within the scope of employment. This way, the operator and persons that assist him in the performance of transport-related services could benefit from the defences and limits of liability when faced with contractual or with extra-contractual claims.

There is little chance that the OTT Convention 1991 will ever enter into force. One of the reasons for this is that there is disagreement on the definition of the terminal operator's activities. It is considered unclear. Moreover, the main reason the states rejected the uniform stricter rules on the liability of terminal operators is that many terminal operators are — directly or indirectly — state owned. For this reason, some states are particularly opposed to more onerous liability rules.[845]

In conclusion, it becomes clear from the convention's description of the 'operator of a transport terminal' that a terminal operator located in a contracting state, performing stevedoring services such as loading, unloading and storage, would be governed by the OTT Convention 1991 if it had entered into force. The convention would have applied to transport-related handling of cargo in international carriage if it were performed within a sea port area or at an inland terminal.[846] This would not have been the case for inland carriage subject to national or international

841. The term 'in charge' is used to distinguish it from having custody or full control over the goods. Explanatory Note to the OTT Convention 1991, nr. 24.
842. Koller (1990), p. 91-92.
843. Art. 6.1 (a) (b) OTT. The limit of liability is 8.33 SDR, unless the terminal operator receives the goods before or after transport by sea or inland waterways, when the limit is 2.75 SDR.
844. Ramberg (2005), p. 99. Ramberg argues that the different monetary limits will lead to considerable administrative difficulties.
845. Herber (2016), p. 171-172.
846. As long as the transport related services are performed within the territory of a State Party, the operator's place of business is located in a State Party, or the services are subject to the national law of a State Party, art. 2 OTT Convention 1991.

transport law. If it had entered into force, the problem surrounding the extra-contractual liability of the terminal operator as a service provider or depositary would have become clearer as, according to art. 7 of the OTT Convention, the convention's defences and limits of liability can be invoked in cases of claims brought in contract, tort or otherwise. Not only the operator himself (sub 1), but also all agents and servants of the operator acting within the scope of their employment or engagement by the operator would have been able to invoke these defences and limits of liability (sub 2). This would have brought more legal certainty for terminal operators. On the other hand, the OTT Convention 1991 would also have had some disadvantages for the terminal operator compared to his current situation.[847] The operator would have been mandatorily governed by a stricter liability regime and the breakability of the limits of liability could have become an issue.[848] The fact that these independent contractors could avoid liability completely (by being able to benefit from before-and-after clauses, via Himalaya clauses or circular indemnity clauses) would have come to an end. This would have led to an increase in costs for insurance cover for terminal operators.[849]

8.4.5 Inland conventions

The terminal operator can be faced with contractual or extra-contractual claims when loss, damage or delay occurs during the performance of services related to an inland, non-maritime, transport stage. In cases of inland transport, the performance of loading and discharge is usually the duty of the shipper or consignee, who can employ a terminal operator for its performance. In some situations the inland carrier might be under the obligation to perform these duties for which he can employ the terminal operator. If the inland carrier is under the obligation to load and discharge the goods he may conclude a contract with the stevedore, as a subcontractor, for the performance of these duties. Moreover, a terminal operator can be employed by the inland carrier for the storage of goods before, during or after the inland transport. If damage to, loss of the goods or delay in their delivery were to occur during the performance of these obligations, the cargo interests could either bring a contractual claim against the carrier, who in his turn could seek recourse from the terminal operator, or he could bring a direct (extra-contractual) claim to the terminal operator if provided for in national law. Whether the terminal operator can only rely on defences and limits of liability against these claims depends on the following international transport law conventions:[850] COTIF-CIM for rail carriage; CMR for road carriage; and CMNI for carriage by inland waterways.[851]

First of all, a terminal operator responsible for performing services or deposit can in general, not invoke the rules of these inland transport law conventions. This

847. This clearly depends on the particular situation under national law. See for an analysis of possible consequences of the Convention in different countries: Harten (1990), p. 56.
848. Falvey (1992), p. 1065.
849. Falvey (1992), p. 1065.
850. If the transport stage covers national inland transport, the international conventions are obviously not applicable. Then the national law on this aspect determines the legal position of the stevedore.
851. As the terminal operator who is the object of this study does not usually perform carriage of goods by air, the Montreal Convention will not be dealt with here.

can only be different in case the international conventions expand their scope of application to parties that assist the inland carrier. A terminal operator can only benefit from the rules of these conventions if he is employed by the inland carrier for performing the carrier's duties under a contract which is subject to the particular convention. A terminal operator who performs stevedoring services or deposit cannot invoke the convention's defences and limits of liability unless he is employed by an inland carrier. If loading the vehicle is not one of the obligations of the inland carrier, the stevedore will not be able to rely on an inland transport law convention. The stevedore can alternatively invoke the terms of the contract of carriage by sea concluded by his contracting party, the sea carrier, if that contract of carriage contains stipulations to the stevedore's benefit (a Himalaya clause) and if the contract of carriage by sea has not yet come to an end.[852] In some situations, the terminal operator may also be able to invoke the terms of his own contract with his principal.[853]

If an inland carrier employs a terminal operator for the performance of part of his duties under the contract of carriage, the carrier remains responsible for the acts of his subcontractor. Art. 3 CMR, art. 40 COTIF-CIM and art. 17.1 CMNI describe this as follows:

> 'For the purposes of this Convention the carrier shall be responsible for the acts and omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.'[854]

Although art. 17.1 CMNI only refers to 'servants and agents' one can assume that these terms also include independent contractors, such as terminal operators.[855] The carrier therefore remains responsible for the performance of duties if the terminal operator acts within the scope of his employment. The inland carrier can therefore be held liable for the wrongdoings of his subcontractor. After being held liable, the carrier may want to bring a recourse claim against the terminal operator. Should the inland carrier wish to bring a recourse claim against the terminal operator, the terms of the contract concluded between them can be invoked.

Moreover, in cases of extra-contractual claims from cargo interests with whom the terminal operator has no contractual relation, the terminal operator, and the main carrier by whom he is employed, may invoke the provisions of these conventions as they apply whether a claim is brought in contract, tort or otherwise. The terminal operator is therefore protected by the inland transport conventions for claims brought arising out of carriage under the conventions.[856] The provisions of these inland transport conventions on the protection of persons other than the carrier

852. See above Chapter 6.
853. See below Chapter 9.
854. Art. 3 CMR.
855. Hacksteiner (2014), p. 279; Otte (2014 b), art. 17 CMNI, Rn. 15. For this issue under the HHR I refer to para. 8.4.2.
856. Art. 28 CMR; art. 41 COTIF-CIM; 22 CMNI.

is also indirectly to the benefit of the carrier himself. If the persons who act on the carriers behalf can be held liable outside the scope of these conventions and these persons can bring a recourse claim against the carrier based on their contractual agreements, the conventions' provisions would be circumvented to the detriment of the carrier.[857]

857. See also: Spiegel (2005), p. 183-184.

Chapter 9

Liability to third parties: National law

9.1 Introduction

Terminal operators sometimes have to deal with extra-contractual claims brought against them by third parties. This can happen if, for example, a terminal operator is employed by a maritime or multimodal carrier for the performance of (part of) the contract of carriage. The main carrier could have taken upon himself the obligation to carry the goods from one location to another and subsequently employed a terminal operator to perform certain or all of his obligations under the contract of carriage. If the goods were damaged or lost during the performance of these services, the terminal operator could therefore be faced with a claim for damages.

If a terminal operator is confronted with extra-contractual claims from third parties, such as cargo owners or vehicle owners, with whom he has no contractual relation, it would follow from the principle of privity of contract that the terminal operator can, in principle, not rely on the contract to which these third parties are not a party nor on a contract to which the terminal operator is not a party. This principle is in practice however more of a starting point. This gives rise to the question of whether there are means by which the terminal operator can defend himself. If the international conventions do not cover this matter, then the legal position of the terminal operator depends entirely on the applicable national law. This chapter will therefore discuss and compare the national laws relating to the legal position of terminal operators in the Netherlands, Germany, England and Belgium. A distinction is made between the different roles a terminal operator can play as carrier, service provider and depositary.

9.2 Contractual devices to the terminal operator's benefit

Before discussing the national positions on the terminal operator's liability to third parties and contractual devices, this paragraph provides an overview of these commonly used clauses. The terminal operator may introduce an indemnity clause in his contract to obtain the carrier's guarantee for repayment of loss or damage caused by the absence of these clauses. The terminal operator is likely to ensure that these clauses are inserted in contracts of carriage to his benefit. The three most commonly used clauses that could benefit a terminal operator are the Himalaya clause, the before-and-after clause and the Circular Indemnity clause.

9.2.1 **Himalaya clause**

The Himalaya clause is a clause benefiting a third party and is often used in maritime matters.[858] With this clause, the third party, a terminal operator employed by a sea carrier, could benefit from certain terms in a bill of lading to which he is not a party. It offers the third party the same defences as a contracting carrier. These terms in the bill of lading on which the subcontractor wishes to rely may include the limits and the one-year time bar of the Hague Visby Rules and a clause excluding liability before loading and after discharge, which is permitted by these Rules.

Himalaya clauses in bills of lading aim to extend the protection available in the contract of carriage to certain other persons than the contracting carrier. A Himalaya clause aims to create a contractual relation between the cargo interests and employees of the carrier or independent contractor employed by the carrier on the terms of the contract of carriage. This commonly used clause can be seen as a stipulation for the benefit of a third party (in Dutch: '*derdenbeding*' and in German: *Vertrag zugunsten Dritter*)[859] or as an effect of agency.[860] Himalaya clauses are often included by sea carriers in contracts of carriage because it safeguards their interests as well as the persons it refers to. It serves the carrier's interests as it protects against recourse claims.

The Himalaya clause finds its origin in the English case of *Adler v. Dickson* (*The Himalaya*).[861]

> Mrs Adler, a passenger on the S.S. Himalaya, was injured by an insufficiently secured gangway of the vessel. The passenger ticket contained a non-responsibility clause exempting the carrier from liability. To avoid this exemption clause, Mrs Adler brought a claim against the master, Mr Dickson, and the boatswain. According to the Court of Appeal, the law permits a carrier (of goods or passengers) to make an express or implied stipulation for himself or for others who perform the contract of carriage. However, in this case the passenger ticket did not expressly or impliedly benefit servants or agents. The master and the boatswain could therefore not benefit from the non-responsibility clause and Mr. Dickson was held liable in tort.

In the case of *The Himalaya,* the master and boatswain could not invoke the clauses of the contract of carriage as there was no stipulation for their benefit. Following this decision, bills of ladings started to contain 'Himalaya clauses' specifically for

858. Tetley (2003), p. 40.
859. Art. 6:253-6:256 BW; § 328 BGB.
860. The 'agency theory' was developed by Lord Reid in House of Lords, Midland Silicones Ltd. v. Scruttons Ltd. [1961] 2 Lloyd's Rep. 365. See para. 9.5.2.
861. English Court of Appeal, Adler v. Dickson [1954] 2 Lloyd's Rep. 267 (The Himalaya).

the benefit of stevedores and other independent subcontractors as well as servants and agents.[862]

An example of a typical Himalaya clause can be found in the Conlinebill 2000. Clause 15 reads as follows:

> 'Defences and Limits of Liability for the Carrier, Servants and Agents
> (a) It is hereby expressly agreed that no servant or agent of the Carrier (which for the purpose of this Clause includes every independent contractor from time to time employed) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant under this Contract of carriage for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect of default on his part while acting in the course of or in connection with his employment.
> (b) Without prejudice to the generality of the foregoing provisions in this Clause, every exemption from liability, limitation condition and liberty herein contained and every right, defence and immunity of whatsoever nature applicable to the Carrier or to which the carrier is entitled, shall also be available and shall extend to protect every such servant and agent of the Carrier acting as aforesaid.
> (c) The Merchant undertakes that no claim shall be made against any servant or agent of the Carrier and, if any claim should nevertheless be made, to indemnify the Carrier against all consequences thereof.
> (d) For the purpose of all the foregoing provisions of this Clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who might be his servants or agents from time to time and all such persons shall to this extent be or be deemed to be parties to this Contract of Carriage.'

This clause consists of several elements and aims to protect persons performing duties under a contract of carriage like servants, agents and independent contractors. The combination of paragraph (a) and (c) of this clause aims to achieve an immunity for these protected persons by stipulating that no claim should be brought against them, and if such claim are brought, that the carrier should be indemnified.[863] If a claim were brought, regardless of the earlier paragraphs, paragraphs (b) and (d) would act as a fallback option and would create a contractual relation between the cargo interests and the protected persons in order to place the latter in the same position as the carrier. After this, the term Himalaya clause is used to refer to a clause which contains the elements described in paragraph (b) and (d).

In the context of maritime transport law, a clause for the benefit of independent contractors, such as stevedores and terminal operators, would not be in conflict with art. IV bis, 2 HVR. The clause can be deemed valid and consequently would

862. It should be made clear that with a Himalaya clause the persons protected also include the contractors engaged by subcontractors. Central London County Court (Business List), Sonicare International Ltd. v. East Anglia Freight Terminals Ltd. and others and Neptune Orient Lines Ltd. (Third Party) [1997] 2 Lloyd's Rep. 48 (Sonicare).

863. See below para. 9.2.3 on circular indemnity clauses.

benefit independent contractors as the content of the clause goes beyond the scope of the statutory rules.[864] The convention only confers its benefits on servants and agents and specifically excludes independent contractors. During the preparations for the Visby protocol, it was held that independent contractors have sufficient protection through appropriate contractual clauses in bills of lading which is why independent contractors were excluded in art. IV bis HVR.[865] Art. IV bis explicitly states that independent contractors are not covered by the HVR. The liability of these independent contractors is therefore beyond the scope of the convention.[866] This can, however, be different if the ship owner is considered as the independent subcontractor. In that case, a clause which relieves the 'carrier or the ship' would be rendered null and void.[867] The courts in the jurisdictions under discussion have generally upheld Himalaya clauses.[868]

There are, however, restrictions on the way the clause functions. The words of the clause and the other terms of the bill of lading determine the scope of the Himalaya contract. A Himalaya clause extends the same protection as is available to the carrier to third parties. As a result of this, the third party cannot be relieved of liability if the carrier is liable for the conduct that caused the damage. This could happen for example, if damage to or loss of goods occurs during the loading and discharge operations for which the carrier is responsible. In that case, both the carrier and the terminal operator are not relieved of liability.[869] At most, they can rely on the limit of liability or the time bar in the Hague (Visby) Rules. If damage occurs outside the mandatory period of responsibility under these Rules, the carrier and therefore, also the stevedore, may be able to rely on an exemption clause in the contract of carriage.

Whether the independent contractor can rely on certain terms of contract pursuant to a Himalaya clause depends on the wording of the particular clause. If the wording of the Himalaya clause is not sufficiently broad, the independent contractor may not be able to rely on certain contractual clauses. This was the reasoning behind the ruling of the Privy Council in the *Mahkutai* where the wording of the Himalaya clause was not sufficiently broad to cover the exclusive jurisdiction clause in the bill of lading. In that case the Himalaya clause only referred to terms in the bill of

---

864. Prüssmann and Rabe (2000), § 607a Rn. 11; Rabe (2016), p. 139; Baughen (2013), p. 273.
865. Berlingieri (1997), p. 601-602.
866. On the contrary, some scholars believe that the clause is in conflict with the HVR to the extent that it aims to benefit independent contractors. Himalaya clauses are deemed to be in conflict with the HVR to the extent that they apply to persons other than the carrier's servants and agents. In this view, independent contractors would never be able to benefit from the HVR: Drews (2008), p. 24; Tetley (2003), p. 47.
867. House of Lords, Homburg Houtimport B.V. v. Agrosin Private Ltd. and others [2003] 1 Lloyd's Rep. 571 (The Starsin).
868. For the Netherlands: HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 with commentary from R.E. Japikse, *S&S* 1997, 121 (Sriwijaya). For England: Judicial Committee of the Privy Council, The New Zealand Shipping Company Ltd. v. A.M. Satterthwaite & Company Ltd. [1974] 1 Lloyd's Rep. 534 (The Eurymedon); Judicial Committee of the Privy Council, Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty. Ltd. [1980] 2 Lloyd's Rep. 317 (The New York Star). For Germany: BGH 7 July 1960, *VersR* 1960, p. 727; BGH 28 April 1977, *VersR* 1977, p. 717; BGH 26 November 1979, *VersR* 1980, p. 572.
869. See analogous to this situation: House of Lords, Homburg Houtimport B.V. v. Agrosin Private Ltd. and others [2003] 1 Lloyd's Rep. 571 (The Starsin).

lading benefitting the carrier.[870] As an exclusive jurisdiction clause is not always in the carrier's interests, but can also be for the benefit of its contracting party under other circumstances, the court held that the third party could not rely on the exclusive jurisdiction clause. This shows that a well-defined clause is essential for terminal operators or other third parties to be able to rely on it.[871]

Moreover, such clauses can only affect the rights and responsibilities of the parties involved if the underlying contract is operative. These contracts start to run when the carrier or his independent contractors take over the goods for transport and end when the goods are delivered. The contract of carriage may therefore also cover the time before loading and after discharge even though the carrier is not liable for loss of or damage to the goods which occurs in those periods of time. This means that the terminal operator acts within the contract terms if the goods are at the terminal before loading and after discharge, and therefore the stevedore can benefit from a before-and-after clause in the contract of carriage. However, the terminal operator cannot rely on the terms in the contract of carriage before taking over and after delivery under the contract of carriage.[872]

It seems a fair, practical and commercial solution to hold independent subcontractors responsible for their acts and at the same time allow them to invoke liability limits or other provisions which also benefit the carriers whose obligations they perform. This could be obtained by permitting these independent contractors (by way of Himalaya clauses) to benefit from the clauses or statutory provisions limiting or excluding liability on which the contracting carrier can also rely. This is underlined by the fact that the shipper agreed to these terms excluding or limiting liability and it would therefore be unfair to circumvent the contract by bringing a direct claim against a person who cannot invoke the agreed terms.[873] It would therefore seem desirable to deem Himalaya clauses as valid, were it not for the fact that these contractual devices are often inserted in contracts of carriage along with before-and-after clauses. The combination of these two clauses in a contract of carriage effectively relieves independent contractors of a large part of their responsibility depending on which national law is applicable.

870. Privy Council, The Mahkutai [1996] 2 Lloyd's Rep. 1. In this case the Himalaya clause stated that: '… Without prejudice to the foregoing, every such servant, agent and subcontractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit …'

871. An example of a case where the wording of the Himalaya clause was deemed sufficiently broad to cover an exclusive jurisdiction clause: Hof Den Haag 26 june 2008, ECLI:NL:GHSGR:2008:BD5585, *S&S* 2008, 115.

872. English case law on this matter: Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto); Queen's Bench Division (Commercial Court), Raymond Burke Motors Ltd. v. The Mersey Docks and Harbour Co [1986] 1 Lloyd's Rep. 155. The leading Dutch case: HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 with commentary from R.E. Japikse, *S&S* 1997, 121 (Sriwijaya). Furthermore: Glass (2004), p. 216; Haak and Zwitser (2003), p. 534-538; Tetley (2003), p. 46-47.

873. House of Lords, Elder, Dempster & Co. and Others v Zochonis & Co [1924] 1 A.C. 522.

9.2.2 Before-and-after clause

The second clause which can often be found in maritime contracts of carriage for the benefit of the carrier or his independent contractors emanates from the limited scope of application of the HVR's mandatory provisions.[874] Contrary to other more modern maritime transport law conventions, the HVR only apply from tackle-to-tackle.[875] This convention is therefore not mandatorily applicable to the period after the goods have been taken over by the carrier but before loading, and while the carrier is in charge of the goods after discharge but before delivery. During this period, the carrier's liability is therefore subject to the national law applicable to the contract. The national law may also contain mandatory provisions. In the USA, for example, the Harter Act 1893 applies to the periods before loading and after discharge while the goods are located in the port area in the custody of the carrier. This means that the carrier is liable for loss or damage until their 'proper delivery' which prevents the carrier from excluding liability.[876] Moreover, some jurisdictions might have mandatory rules for the liability of warehouses or carriage in general. The reformed German Maritime Law of 2013 puts to a stop the use of these so-called '*Landschadenklausel*' in § 512 I HGB.[877] Under German law, a before-and-after clause can only have effect if it is individually negotiated between the parties to a contract of carriage. It is, therefore, impossible to exclude liability in the pre-printed terms of a bill of lading. Parties to a contract subject to German law should therefore individually agree on the liability exclusion and only then will the carrier not be liable for damage to or loss of the goods which might occur during this before-and-after period.

However, in the absence of mandatory rules covering the period before loading and after discharge under the HVR, the carrier can generally exclude his liability for damage to or loss of goods in the terms of the contract of carriage. An example of before-and-after clause can be found in the BIMCO Conlinebill 2000. The clause reads as follows:

> 'The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, …'[878]

These before-and-after clauses are recognized by art. VII of the HVR.[879] The carrier is therefore not liable for loss of or damage to goods which occurs outside the

874. See also: Chao and Nguyen (2007), p. 193-197.
875. Other maritime transport law conventions such as the Hamburg Rules or the Rotterdam Rules, on the other hand, apply to the entire period that the goods are in the carrier's charge at the port of loading, the carriage and at the port of unloading. The Rotterdam Rules also apply to the inland leg which is part of a contract of carriage additional to a sea carriage stage. The parties to a contract of carriage may, however, agree on the time and location of receipt and delivery of the goods thereby delimiting the period of responsibility (art. 12.3 RR; art. 4 HHR).
876. Glass (2004), p. 217.
877. See para. 9.4.
878. Clause 3 (a) BIMCO Liner Bill of Lading, code name: Conlinebill 2000. Digitally available at: www.bimco.org/~/media/Chartering/Document_Samples/Bill_of_Ladings/Sample_Copy_CONLINEBILL_2000.ashx (retrieved on 10 December 2014).
879. Art. VII H(V)R: 'Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care

mandatory liability period, provided such a clause is validly incorporated in the contract of carriage[880] and provided that it does not exclude liability for the breach of a fundamental obligation under the contract. The carrier can, for example, not be relieved of liability for damage caused by 'arbitrarily refusing to ship them to the port of discharge at all.'[881]

Moreover, the clause cannot exempt the carrier from liability for damage occurring beyond the tackles under all circumstances. Whether the clause has effect depends on the applicable national law. Under English law, for example, these clauses might be subject to the Unfair Contract Terms Act (UCTA) 1977 for the period before loading and after discharge.[882] This Act subjects exception and limitation clauses to the test of reasonableness.[883] This is similar to German law where these clauses are subject to the content control of §§ 305-310 BGB.[884] Under Dutch law, there is no such substantive control to restrict the use of unreasonable terms and conditions. In the Netherlands, provisions to restrict the use of unreasonable terms and conditions are included in the Dutch Civil Code (art. 6:231-247 BW) where, it should be noted that large, foreign or other companies using similar terms and conditions cannot rely on these provisions.[885] In some circumstances, for example if damage is intentionally caused, it can be deemed unacceptable to rely on certain onerous terms according to standards of reasonableness and fairness. This stems from art. 6:248 (2) BW.[886] Dutch law however, contains less room for the application of this provision for commercial contracts than for contracts for consumers.[887] In general, relying on these clauses is accepted under Dutch law. It could be seen as relevant

and handling of goods prior to the loading on, and subsequently to the discharge from, the ship on which the goods are carrier by sea.' Such before-and-after clauses are not in conflict with art. III (8) H(V)R since the Rules do not apply before loading and after discharge.

880. Tetley (2008), p. 2117-2118. There are three methods: '(i) by signature of the parties, (ii) by effective notice or (iii) by course of dealing.' In civil law countries this requirement can be compared to the rule that the parties must have accepted clauses in order for them to be valid.

881. Queen's Bench Division (Commercial Court), Mitsubishi Corporation v. Eastwind Transport Limited and others [2005] 1 Lloyd's Rep. 383 (The Irbenskiy Proliv). If the exclusion clause is given a literal interpretation which would conflict with the main purpose of the contract, the clause will be restricted. It is therefore that words excluding the carrier's liability for loss of or damage to cargo such as 'however caused' or 'arising or resulting from any other cause whatsoever' bear a restrictive meaning.

882. Gaskell, Asariotis and Baatz (2000), p. 283.

883. Section 2 UCTA 1977: 'Negligence Liability: (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence. (2) In case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.' Section 3 UCTA 1977: 'Liability arising in contract. (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business. (2) As against that party, the other cannot by reference to any contact term — (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or (b) claim to be entitled — (i) to render a contractual performance substantially different from that which was reasonable expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.'

884. All clauses in bills of lading are subject to §§ 305-310 BGB. Krins (2012), p. 85.

885. See also: Schelhaas (2017), para. 7.47.1.

886. Schelhaas (2017), para. 5.35.2; Boonk (1993), p. 62-63; Chao and Nguyen (2007), p. 194.

887. Schelhaas (2008), p. 150.

that all parties involved are professionals in the field and that it is customary in the maritime industry to include these clauses in contracts of carriage. These factors were taken into account in a recent decision by *Hof Den Haag* and impliedly confirmed by the *Hoge Raad.* The court also considered it relevant that the damage was partly insured. Subsequently, the court held that the acts were not unacceptable according to the standard of reasonableness and fairness and that therefore the defendant could invoke a clause exonerating him from liability included in a charter party pursuant to a Himalaya clause.[888]

In general, before-and-after clauses are capable of excluding liability for negligent behaviour.[889] The carrier or third parties can generally not rely on the clause exonerating their liability if they acted with wilful misconduct when the damage to or loss of the goods occurred.[890] This can be different if the clause stipulates an exclusion of liability for the intent or conscious recklessness of subordinate employees.[891] The situation in the jurisdictions under discussion is similar to the rules provided in the DCFR, where liability for intentionally caused damage cannot be restricted or excluded, but damage caused by negligence can, save for situations of personal injury or other situations which are contrary to good faith and fair dealing.[892]

Due to the limited scope of the HVR, carriers can exempt themselves from liability which occurs between the moment the carrier takes over the goods for the purpose of transport and before loading onto the ship, and between discharge from the ship and delivery to the consignee. If damage occurs during this before-and-after period the carrier will not be held liable and can therefore not seek recourse from a possible independent contractor whose fault caused the damage or loss. Moreover, in jurisdictions where the Himalaya clause is upheld, the combination of this clause with a before-and-after clause will relieve the independent contractor of liability.[893]

In recent years, there have been several legislative attempts to avoid the liability gap. Contrary to the HVR, the Hamburg Rules and the Rotterdam Rules (not in force) extend the carrier's period of responsibility beyond the tackles. The Hamburg Rules have a wider scope of application than the HVR.[894] The Hamburg Rules apply to contracts of carriage by sea which are defined as 'any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to

888. Hof Den Haag 11 December 2012, ECLI:NL:GHSGR:2012:4764, *S&S* 2013/86 (Vos Sympathy); HR 24 January 2014, ECLI:NL:HR:2014:157, *S&S* 2014, 63 (Vos Sympathy).
889. Queen's Bench Division (Admiralty Court), The Arawa [1977] 2 Lloyd's Rep. 416; Supreme Court of Canada, ITO v. Miida Electronics Inc. [1986] 1 S.C.R. 752 (The Buenos Aires Maru).
890. German law: Rabe (2016), p. 139-147. Under English law such clause has to pass the test of reasonableness under UCTA 1977. Dutch law: HR 18 June 2004, ECLI:NL:HR:2004:AO6913, *NJ* 2004, 585 (Kuunders/Swinkels); HR 17 February 2006, ECLI:NL:HR:2006:AU5663, *NJ* 2006, 158 (Spector/Photoshop). See also: Aser/Hartkamp and Sieburgh 6-I (2016), nr. 366; Kortmann (1988), p. 1232-1233: Duyvensz (2011), p. 225-226; Schelhaas (2017), para. 5.35.2.
891. HR 31 December 1993, ECLI:NL:HR:1993:ZC1210, *NJ* 1995, 389 with commentary from C.J.H. Brunner, *S&S* 1994, 36 (*Matatag/De Schelde*) (*Serra*).
892. Art. VI.-5:401 DCFR.
893. See furthermore para. 9.7 for a discussion on the desirability of before-and-after clauses.
894. This period is wider than the period of application under H(V)R as they only apply from tackle-to-tackle; from the time the goods are loaded on to the ship until the time they are discharged from the ship. Art. 1 (e) H(V)R.

another'.[895] Moreover, the rules apply during (and the carrier's period of responsibility covers) the time in which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.[896] The carrier is therefore subject to the Hamburg Rules during the entire performance of a port-to-port contract or during the maritime stage of a multimodal contract. This means that the Hamburg Rules also apply while the goods are awaiting transport or delivery at a terminal in the sea port area. Under the RR (not in force), the carrier's period of responsibility commences when the goods are taken over for carriage by the carrier and lasts until the goods are delivered to the consignee.[897] The RR also apply to the inland leg which, in addition to a maritime stage, forms part of a contract of carriage. This is the result of the convention's 'Maritime-Plus approach'.[898] The mandatory provisions of both the HHR and the RR therefore also apply to the obligations of the carrier such as handling and storage when the goods are awaiting transport or delivery at a terminal in the sea port area. For this reason, before-and-after clauses which exclude the carrier's liability during the performance of his obligations are null and void.[899] However, there is some room for the parties to the contract of carriage to agree on the time and location of receipt and delivery of the goods.[900] Although it is possible under art. 4 HHR and art. 12.3 RR for the contracting parties to agree on the time and location of receipt and delivery of the goods, the carrier cannot exclude liability for damage or loss which occurs while he, or persons who act on his behalf, are in charge of the goods in the port.[901] Subsequently, independent contractors who are put in the same position as the carrier pursuant to a Himalaya clause would also no longer be able to benefit from this exoneration. Moreover, the Rotterdam Rules, as well as the OTT-convention, aim to subject certain independent contractors such as stevedores and terminal operators directly to their mandatory liability regime.[902]

9.2.3 Circular indemnity clause

A more indirect way in which terminal operators who are responsible for the goods as subcontractors can be protected against extra-contractual claims is by the use of 'circular indemnity clauses'.[903] These clauses included in the bill of lading contain a promise of the bill of lading holder not to sue the carrier's servants, agents and independent (sub)contractors in respect of loss or damage caused by these third parties during the performance of the carrier's obligations under the contract of carriage, and otherwise to indemnify the carrier if he does. If a claim is nevertheless

895. Art. 1.6 HHR. This is different from the approach taken by H(V)R which only apply to 'contracts of carriage covered by a bill of lading or any similar document of title, art. I (b) H(V)R. Under HHR it is irrelevant whether a bill of lading or a non-negotiable instrument is issued. The Rules are not applicable, however, to charterparties or to bills of lading that are issued pursuant to charterparties unless it has been issued or negotiated to a party other than the charterer.
896. Art. 4.1 HHR.
897. Art. 12 RR.
898. Berlingieri (2009), p. 54-55; Eftestøl-Wilhelmsson (2010), p. 274.
899. Art. 79.1 RR and art. 23.1 HHR.
900. Art. 4 HHR; art. 12.3 RR. See also: Berlingieri (1994), p. 87-89.
901. This also follows from the strict definition of the term 'delivery' in art. 4.2 (b), which will lead to the result that clauses which stipulate a fictive moment of delivery are void. Art. 23.1 HHR.
902. See para. 8.4.3 and 8.4.4.
903. See also: Newell (1992), p. 97-108.

brought against third parties, the carrier[904] can sue the bill of lading holder for breach of his promise and seek an injunction, stay of the proceedings or he can bring a claim against the bill of lading holder to indemnify the carrier against all the consequences. An example of a circular indemnity clause can be found in the previously mentioned clause 15 of the Conlinebill 2000.[905]

It should be borne in mind that this clause in the bill of lading gives a remedy to the carrier but not to the terminal operator. It neither prevents the terminal operator from being held liable. Under English law, the terminal operator could only indirectly benefit from a circular indemnity clause with a grant of an injunction or stay of proceedings sought by the carrier. The validity of the circular indemnity clause was upheld under English law in the case *The Elbe Maru.*[906]

> In *The Elbe Maru,* a combined transport bill contained a circular indemnity clause.[907] The sea carrier who issued the bill was therefore able to obtain a stay when a claim was brought by the cargo owner against the road carrier to whom the carriage had been subcontracted and from whose custody the goods had been stolen. In order to obtain the stay, the carrier had to show that he had 'sufficient interests' in the enforcement of the cargo owner's promise not to sue the road carrier. There was sufficient interest as, according to the contract between the sea carrier and the road carrier, the sea carrier was bound to indemnify the road carrier against liabilities to third parties incurred by the road carrier in the performance of their contract.

Although under civil law an injunction can generally not be sought, the circular indemnity clause can have effect because the bill of lading holder is under the obligation to indemnify the carrier for all the consequences of a breach of the promise not to sue third parties. This requirement would be fulfilled if the carrier were exposed to legal liability towards the third party, e.g. terminal operator, as a result of the breach of the cargo owner's promise not to sue.[908] This is for example the situation, if the contract between the terminal operator and the carrier contains a provision to the effect that the carrier is bound to indemnify the terminal oper-

---

904. The carrier is the person who can sue the cargo owner who breaches this promise and the terminal operator cannot rely on this clause in his own right. The terminal operator requires the cooperation of the carrier in the litigation since only the carrier can enforce the circular indemnity clause in the contract of carriage.
905. See para. 9.2.1.
906. Queen's Bench Division (Commercial Court), Nippon Yusen Kaisha v. International Import and Export Co. Ltd. [1978] 1 Lloyd's Rep. 206 (The Elbe Maru).
907. The circular indemnity clause in Queen's Bench Division (Commercial Court), Nippon Yusen Kaisha v. International Import and Export Co. Ltd. [1978] 1 Lloyd's Rep. 206 (The Elbe Maru) at 207 reads as follows: 'Sub-Contracting… (2) The Merchant undertakes that no claim or allegation shall be made against any servant, agent or subcontractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the Goods and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.'
908. In art. 6.7 VRTO a clause to this extent can be found.

ator against liabilities to third parties incurred during the performance of this contract.[909]

Art. 6.7 VRTO is an example of a clause to this effect:

> 'Upon first request thereto the Principal shall indemnify the Terminal Operator against all and any claims by third parties in connection with the Work where exceeding the liability of the Terminal Operator under the General Terms and Conditions.'

Tetley considers however, that if the claim relates to the mandatory period of responsibility under the H(V)R, which is from tackle-to-tackle, the clause would be held invalid as it is in conflict with art. III(8) H(V)R.[910] This would mean that a circular indemnity clause cannot benefit the stevedore when performing loading and discharge operations, provided that these are the carrier's duties under the contract of carriage and therefore subject to the Rules. The idea behind this criticism seems to be that the carrier or the ship is (indirectly) relieved of liability if a claim cannot be brought against the stevedore pursuant to such clause. This refers to the situation whereby a carrier may be under the duty to indemnify the stevedore for extra-contractual claims depending on the terms in the contract between the carrier and the stevedore. This is however not correct, because neither the contract concluded between the carrier and the stevedore nor the (extra-contractual) relation between the cargo interests and the stevedore are subject to the H(V)R, the latter because independent contractors were explicitly excluded from its scope of application. If the clause purports to avert a claim against a stevedore or other third party, not being 'the carrier or the ship', it would not be in conflict with this provision of the H(V)R.[911]

This was confirmed in two English cases following *The Elbe Maru*[912] in which the clause's validity was upheld.[913]

> The case *Sidney Cooke Ltd. v. Hapag Lloyd Aktiengesellschaft* concerned a multimodal transport operation where the sea leg was subcontracted to a sea carrier. Yeldham J. enforced the cargo owner's contractual undertaking in the circular indemnity clause not to make a claim against the subcontractor, as the performing sea carrier was not a party to the contract of

909. This is similar to the situation in *The Elbe Maru* where the sea carrier had sufficient interest as he was exposed to legal liability. However, the requirement of 'sufficient interest' could also be fulfilled if the carrier is not exposed to legal liability. For example, in the Queen's Bench Division, Whitesea Shipping and Trading Corporation and another v. El Paso Rio Clara Ltd. and others [2010] 1 Lloyd's Rep. 648 (The Marielle Bolten) the carrier had sufficient interest as a foreign proceeding against the subcontractor would deprive the carrier from the benefit of an exclusive English jurisdiction clause.
910. Tetley (2003), p. 59.
911. Newell (1992), p. 97.
912. Queen's Bench Division (Commercial Court), Nippon Yusen Kaisha v. International Import and Export Co. Ltd. [1978] 1 Lloyd's Rep. 206 (The Elbe Maru).
913. B.H.P v. Hapag Lloyd Aktiengesellschaft [1980] 2 N.S.W.L.R. 572; Sidney Cooke Ltd. v. Hapag Lloyd Aktiengesellschaft [1980] 2 N.S.W.L.R. 587.

carriage covered by the bill of lading and therefore not a 'carrier' for the purpose of art. III(8) HVR.[914]

There is a restriction to the operation of the circular indemnity clause similar to one for a Himalaya clauses. The clause can only have effect if the loss or damage is caused by the terminal operator while performing the duties of the carrier under the contract of carriage. If damage is caused after the completion of the contract of carriage or before its commencement, it is not possible to rely on such clause.[915]

If parties validly agree on the clause it becomes difficult for cargo interests to extra-contractually claim from persons employed by the carrier. The clause ensures that no claim will be made by the bill of lading holder against persons such as the carrier's agents, servants, stevedores, terminal operators and other subcontractors and that in the event of such a claim, the bill of lading holder will indemnify the carrier against all consequences. It could be advisable to suggest the clause specifically refers to 'stevedores' and 'terminal operators'. Moreover, these persons should stipulate in their contract with the carrier, that the carrier is under the obligation to insert a circular indemnity clause in the contract of carriage for their benefit and that the carrier is bound to indemnify these persons if this obligation is breached.[916]

9.3 Dutch law

The Netherlands is party to the Hague Visby Rules. The Rotterdam Rules were signed on 23 September 2009 but have not yet entered into force. The Netherlands ratified CMR, CMNI, COTIF-CIM and MC for the non-maritime modes of transport. There are separate sections at national level for the carriage of goods by sea (art. 8:370 ff BW), inland navigation (art. 8:889 ff BW), road (art. 8:1090 ff BW), air (art. 8:1350 ff BW) and rail (art. 8:1550 ff BW). Supplementary rules on transport in general can be found in art. 8:20 ff BW and rules on multimodal transport are provided in art. 8:40 ff BW. Rules governing contracts of deposit can be found in art. 7:600 ff BW and on service contracts in art. 7:400 ff BW.

Dutch general rules on contract law deal with the liability of parties other than contracting parties. However, no protection for independent contractors (*zelfstandige hulppersonen*) is provided if these persons are faced with extra-contractual claims from third parties. The protection given in the general rules on contracts, art. 6:257 BW, only applies to servants and does not cover independent contractors.[917] For

914. However, Newell questions this reasoning and states that although in this case the clause does not relieve the 'carrier' of its liability, the clause infringes art. III(8) HVR as it reduces the liability of 'the ship'. The clause therefore will not have its desired result for persons that fall within the terms 'the carrier or the ship' if the Rules are applicable. Following this, a claim against the stevedore can be precluded by the clause even though damage is caused within the tackle-to-tackle period as it does not affect the liability of the carrier nor the ship. See the analysis of which persons are included in the term 'the carrier or the ship', in: Newell (1992), p. 97-108.
915. Carver (2011), p. 469.
916. See also: Tetley (2003), p. 59.
917. Cahen (2004), p. 55-60.

this reason, these rules offer no protection to terminal operators employed by a carrier for the performance of (part of) the contract of carriage.

The liability of the terminal operator towards third parties is statutorily regulated for two nominate contracts; contracts of carriage[918] and contracts of deposit.[919] The provisions in the Dutch civil code offer protection against extra-contractual claims from third parties depending on the role assumed by the terminal operator. It is important to determine whether he is a service provider, a carrier or a depositary. Under the rules on contracts of carriage, a carrier is protected against extra-contractual claims coming from within or outside the chain of contract of operation (*exploitatieketen*). Parties that conclude contracts of affreightment or contracts of carriage[920] and their servants[921] are protected by this regulation in book 8 BW. A depositary can also benefit from similar statutory rules on third party effect (art. 7:608 BW). However, a terminal operator who is not responsible for the goods as a carrier or as a depositary but as a service provider, is not statutorily protected against extra-contractual claims. A service provider is, in principle, neither protected by the general law on contracts nor by the rules on third party effect which can be found in the sections concerning contracts of carriage or contracts of deposit. The statutory rules on third party effect concerning contracts of carriage and contracts of deposit will be discussed, as will the Dutch principles on external effect of contractual clauses which can also benefit other service providers such as terminal operators during the performance of obligations other than carriage and storage.

9.3.1 Statutory rules on third party effect: Contracts of carriage

The Dutch civil code offers protection to persons that are part of a chain of operational contracts in relation to a means of transport, e.g. a ship. These persons are protected from extra-contractual claims brought by contracting parties (referred to as *parallelsprong*) and by third parties (referred to as *paardensprong*). The group of persons enjoying this protection includes carriers and subcarriers who perform or undertake to perform carriage of goods and their servants and agents. In general, terminal operators who perform transshipment, i.e. loading, discharging and transport within the terminal, can be considered carriers and are therefore protected by these rules.[922] If persons who are offered protection are faced with extra-contractual claims, art. 8:361-366 BW provides that they can defend themselves by invoking the terms of a contract. These provisions contain a comprehensive system to determine which contract in the chain of operational contracts can be invoked by the defendant. In principle, the contract can be invoked to which the claimant is a contracting party or which lies closest to him.[923] This is a different solution than the one supported in the previous commercial code, in art. 320 (3) WvK (1955), which accepted the idea that a ship owner who is faced with an extra-contractual

918. Art. 8:361-8:366 BW.
919. Art. 7:608 BW.
920. Art. 8:361 BW.
921. Art. 8:365 BW.
922. For the issue on the qualification of the contract concluded by the stevedore/terminal operator for the transshipment of goods in the port as a contract of carriage, I refer to para. 6.3.
923. Cleton (1994), p. 89.

claim, should be able to rely on the contract which he himself concluded with regard to the damaged goods.[924] Book 8 of the present civil code determines that a claimant shall not be confronted with the contract concluded by the defendant, but with his own contract. As a result of this, the claimant would not be in a better position by bringing a direct claim towards a third party than by bringing a contractual claim against his contracting party. Following this, the Dutch approach to the carrier's position in relation to third parties goes beyond the one found in most international conventions. Under Dutch law, a carrier can invoke the applicable mandatory provisions on transport law if faced with an extra-contractual claim and he is also able to rely on the terms of a contract of carriage, often the one the claimant is seeking to circumvent.[925]

These provisions on the protection of carriers against extra-contractual claims can be found in the section on maritime law. However, these provisions apply *mutatis mutandis* to carriage by other modes of transport.[926] It is for this reason that carriers performing carriage by these modes of transport can rely on contractual provisions when confronted with extra-contractual claims.

In short, the section on operational contracts is drawn up as follows. Art. 8:361 BW defines the relevant concepts. Art. 8:362 BW protects those parties who are confronted with extra-contractual claims brought by their contracting parties. In that case, the contract concluded by these parties themselves can be invoked. Art. 8:363 BW determines that a party within the operational chain who is confronted with an extra-contractual claim brought by another party within the chain of operation, not being his contracting party, can invoke the contract to which the claimant himself is a party. It follows from art. 8:364 BW that the same applies to the situation in which the claimant is not a party within the operating chain, but a party from outside the chain. The defendant can invoke the contract which is closest to the claimant. Furthermore, if a claim is brought against a servant of a person in the chain, the servant can rely on the same contract as his superior could have relied upon. Art. 8:366 BW states that the person bringing a claim can never obtain a higher amount in damages than the amount agreed on in the contract. It follows from these rules that the defendant can rely on the terms of a contract as if he is party to that contract. This does, however, not mean that the defendant attains the position of the claimant's contracting party. It is for example, possible that this contracting party may not be able to rely on the contractual terms excluding or limiting his liability because his acts were done with intent to cause damage. In that case the defendant, whose acts cannot be considered to amount to wilful misconduct, will not be denied the right to rely on the contractual terms.[927]

This system on the external effect of contractual clauses is merely intended to protect parties confronted with extra-contractual claims. It does, however, not

924. Claringbould (1992), p. 330-331.
925. Claringbould (1992), p. 336.
926. Art. 8:31 BW (general transport law rules); art. 8:880 BW (inland waterways); art. 8:1081 BW (road); art. 8:1340 (air). The rules on carriage by rail do not refer to art 8:361 ff BW, but they contain specific rules on the liability of subcarriers in art. 8:1575 BW.
927. Claringbould (1992), p. 332.

impose obligations on the parties in the operating chain, nor does it grant the cargo interests with a right to bring direct claims to non-contracting parties.

Multimodal contracts of carriage

This system also applies to multimodal contracts of carriage. Although the rules on multimodal contracts of carriage do not contain a provision which refers directly to this system, this is the indirect result of art. 8:41 ff BW. Art. 8:41 BW determines that the network theory should be applied to multimodal contracts of carriage which are subject to Dutch law. The multimodal contract of carriage is therefore divided into separate unimodal contracts, each subject to their own legal regime. Transport stages under this multimodal contract are therefore, subject to legal regimes which, in turn, prescribe the application of art. 8:361 ff BW.[928] The multimodal carrier who, for example, concludes a contract of carriage by road therefore qualifies as a party to a contract of operation concerning that part of the multimodal contract of carriage which covers the carriage by road. When confronted with extra-contractual claims, this multimodal carrier can therefore invoke contractual clauses if the goods sustain loss, damage or delay during the performance of this transport stage (art. 8:362 BW). Moreover, if a subcarrier is employed for the performance of part of a multimodal contract of carriage, this subcarrier can also invoke the underlying multimodal contract of carriage when confronted with a direct claim. Pursuant to art. 8:363 BW, the subcarrier can rely on the contract to which the claimant is party. This would also apply to a situation where either the multimodal carrier or the subcarrier is confronted with a direct claim from a person outside the operational chain. This could happen if a freight forwarder concluded a multimodal contract of carriage in his own name and on his own behalf with the multimodal carrier. The contracting party of the freight forwarder (e.g. the cargo owner) who brings an extra-contractual claim against the multimodal carrier or his subcarrier would therefore be faced with the terms of the multimodal contract of carriage (art. 8:364 BW).[929] Moreover, it is possible to invoke the terms of the contracts of carriage in addition to the national transport law rules.

9.3.2 Statutory rules on third party effect: Contracts of deposit

The Dutch civil code also provides rules on third party effect in the section on contracts of deposit in art. 7:608 BW. According to parliamentary history, the contract of deposit can have third party effect if the goods which are deposited sustain damage.[930] However, the section on third party effect is not applicable if the deposited goods cause damage, e.g. to other goods stored.[931] From this provision it follows that a depositary can, in general, rely on certain contractual defences such as clauses exonerating him from or limiting his liability in cases of extra-contractual claims from third parties.

928. Van Beelen (1996), p. 186-190.
929. Van Beelen (1996), p. 195-197.
930. Van Zeben, Reehuis and Slob (1991), p. 389, 406.
931. HR 29 April 2011, ECLI:NL:HR:2011:BP0567, *NJ* 2011, 406 with commentary from T.F.E. Tjong Tjin Tai (Melchemie/Delbanco).

The rules on third party effect in the section on contracts of deposit provide that a depositary can rely on contractual clauses when faced with claims from third parties. This situation should be distinguished from the one in which a contractual claim is brought by a contracting party. As discussed in paragraph 3.3.4, if the depositary issues a document of title, parties other than the initial depositor might become party to the contract of deposit. In such cases, the parties to the contract of deposit are bound by its terms which is why there is no need for the depositary to rely on the rules on third party effect.

However, if claims are brought by third parties, the terminal operator who is responsible for the goods as a depositary, might want to invoke contractual defences to evade full liability. In that regard, it is important to distinguish the legal positions of a depositary and a subdepositary. A subdepositary who is held extra-contractually liable for damage to the goods deposited, is in his relation to the depositor, liable to the same extent as the contracting party (the main depositary) to the contract of deposit. This rule, which follows from art. 7:608 (1) BW, provides that the subdepositary can rely on the contract concluded between the depositor and the main depositary in cases of extra-contractual claims brought by the depositor.[932] Defences such as exoneration clauses or clauses limiting the depositary's liability can be relied upon by the subdepositary. This third party effect to the benefit of the subdepositary is considered reasonable because the depositor consented to the storage of the goods on these terms, and the mere fact that the performance of the obligation to store the goods was delegated by the depositary to his subcontractor himself, should not alter the position of the depositor.[933] It would, therefore, not be beneficial from a liability perspective, for the depositor to bring a claim against the subdepositary instead of bringing a contractual claim against his contracting party, the main depositary. However, other considerations, such as jurisdiction and insolvency of the main depositary may provide a good motive.

In principle, the depositary only has a legal relationship with the depositor to whom he has to return the goods. However, situations occur in which the depositor, the person who employed the depositary for the storage of the goods, is not the person interested in the goods. This occurs for example when the interests of a (subsequent) owner of the goods are involved. In that case the person interested in the goods is a third party to the contract of deposit. If the goods were damaged when the third party received them from the depositor, and he decided to bring a claim against the depositary, the contract of deposit could be invoked.[934] This follows from art. 7:608 (2) BW which shares similarities with the provision concerning contracts of carriage (art. 8:364 BW). This provision determines that a depositary who is confronted with an extra-contractual claim brought by a third party who is not the depositor, can invoke the contract which he concluded with the depositor. In that case, the terms in the contract of deposit which may exclude or limit the liability of the depositary, will have external effect to the detriment of the third party (cargo owner). This would also apply to the subdepositary who would be

932. De Boer (GS), art. 7:608 BW, under note 2.
933. Van Zeben, Reehuis and Slob (1991), p. 406.
934. The third party can in any case bring a revendicatory action against the depositary based on art. 3:124 BW.

confronted with a claim from a third party who is not the depositor (art. 7:608 (3) BW). In that case, the subdepositary can also invoke the contract of deposit concluded between the depositor and the main depositary.

However, contractual clauses cannot be invoked against third parties if the depositary acted in bad faith. Art. 7:608 (4) BW therefore provides that a depositary or subdepositary who knew or ought to have known, at the conclusion of the contract, that his contracting party in relation to the person bringing the claim was not authorized to deposit the goods cannot rely on the clauses in the contract of deposit when held extra-contractually liable.[935] What is important in this regard is whether the storage was delegated to a subdepositary without the depositor's authorization.[936] If so, the rules on third party effect cannot be relied upon if the depositary employed a subdepositary for the performance of the obligation to store the goods without authorization from the depositor.[937]

Following these rules, a terminal operator in the port employed by a maritime carrier for the intermediate storage of goods after a sea stage, can invoke the contract of deposit if an extra-contractual claim is brought by the owner of the goods. In that case the owner of the goods and the maritime carrier conclude a contract of carriage after which the maritime carrier concludes a contract of deposit with the terminal operator for the intermediate storage of the goods. If the goods are damaged during storage, they are returned to the depositor who, as a maritime carrier, returns them to the cargo owner. Art. 7:608 (2) BW would apply in cases like this, which is why the terminal operator can rely on the terms of the contract of deposit.[938]

9.3.3 Third party effect of contractual clauses

If the statutory rules on the third party effect of contractual clauses in the Dutch civil code are of no avail, because the terminal operator cannot be considered a carrier, freight forwarder[939] or depositary, the terminal operator is, in principle, not able to rely on contractual defences in cases of extra-contractual claims brought by third parties. The principle of privity of contract precludes binding persons to a contract to which they are not a party. However, under special circumstances, Dutch case law accepts an exception to this rule. This paragraph will discuss under what circumstances the terminal operator can benefit from the external effect of contractual clauses. The main focus will be on the terminal operator who is responsible for the goods as a service provider in cargo handling operations, as carriers and depositaries can rely on the statutory rules on third party effect. The findings on third party effect of contractual clauses can also apply to other persons confronted with extra-contractual claims from third parties.

935. HR 20 September 2002, ECLI:NL:HR:2002:AE2513, *NJ* 2004, 171 with commentary from H.J. Snijders (Van der Wal/Duinstra).
936. See also para. 3.3.2.
937. Art. 7:608 (4) BW.
938. Asser/van Schaick 7-VIII (2012), nr. 40.
939. Art. 8:71 BW.

When analysing the exceptions to the principle of privity of contract, a distinction has to be made between the external effect of contractual clauses (also referred to as the third party effect, in Dutch: '*derdenwerking*') to the detriment and to the benefit of third parties. The third party benefits when the (third-party) defendant can invoke the contract concluded by the claimant. Contrary to this, relying on contractual clauses is detrimental to a third party if the defendant can invoke his own contract to which the (third-party) claimant is not a party.[940] Whether one or both effects are allowed depends to a large extent on the type of contract concluded; independent or dependent contract.

Du Perron distinguishes independent ('*zelfstandige*') and dependent ('*onzelfstandige*') contracts.[941] An independent contract is one in which the original contract does not cover the conclusion of the other, which is beneficial to the counterparty's interests. An example of this would be the loan of a painting. Clearly, the contract for the loan of a painting concluded between the owner and the person borrowing the painting does not stipulate the rights and obligations covering the restoration of the painting if the borrower decided to employ a restorer. In that case, the owner could bring an extra-contractual claim against the restorer, the latter would only be able to defend himself by relying on his own contractual terms.[942] In cases of independent contracts like these, the person providing the services would find himself opposite the third party and their contracting party. An analogy can be drawn with cases concerning freight forwarding.[943] An important element in these situations is the (implied or express) authorization given by the third party to conclude the contract on which the service provider wishes to rely.[944] In independent contracts like these, the service provider may invoke his own contract to the detriment of the third party. On the other hand, dependent contracts such as subcontracts and contracts with a preparatory nature do not only present the possibility of reliance on contractual terms to the detriment of a third party, but also of reliance to the benefit of a third party. A dependent contract is one in which the main contractor employs independent contractors or subordinates for the performance of the obligations under the (main) contract with his counterparty.[945] This, for example, occurs when a carrier employs a stevedore for the performance of (part of) the contract of carriage. Here, the independent contractor and the carrier find themselves opposite the third party (the cargo interests). In cases where extra-contractual claims are brought by this third party, the stevedore's liability exposure depends on whether the stevedore can rely on contractual clauses. There are two options which could provide him with protection: the stevedore could benefit from relying on the contract concluded between the carrier and the cargo interests (the

940. Haak and Zwitser (2003), p. 299-300.
941. Du Perron (1999), p. 322-368.
942. Du Perron (1999), p. 322-323.
943. Claeys (2003), p. 552.
944. When authorization is given by the owner to conclude the contract, the service provider can rely on his own contract to the detriment of the third party. This was the case in HR 7 March 1969, ECLI:NL:HR:1969:AB7416, *NJ* 1969, 249 with commentary from G.J. Scholten (Gegaste uien). If no authorization is given, the matter is more complicated. HR 25 March 1966, ECLI:NL:HR:1966:AC4642, *NJ* 1966, 279 with commentary from G.J. Scholten (Moffenkit). On the importance of the element of authorization: Du Perron (1999), p. 323-340.
945. Du Perron (1999), p. 341-368.

contract of carriage) or on the contract concluded between the carrier and the stevedore (the stevedoring contract).[946] Here the stevedore is assumed to be a service provider.[947]

Third party effect to the detriment of third parties

First of all, the reliance on the service contract against a third party will be discussed. When concluding contracts for the provision of services, the stevedore usually excludes or limits his liability for damage to or loss of goods to a large extent in his general terms and conditions.[948] When faced with a contractual claim from his client, the stevedore can invoke this contract. Contrary to this, when confronted with extra-contractual claims from third parties this is, in principle, not possible. An exception could be when the person contracting with the independent contractor is (expressly or impliedly) authorized by his principal to conclude the contract on those terms. This is based on agency ('*vertegenwoordiging*') in which the principal is bound by the contract concluded by his agent.[949] If the carrier has permission from his contracting party, the cargo interests, to conclude a contract with a stevedore containing limits and exclusions of liability, the cargo interests are bound by the stevedoring contract. This is also possible if the stevedore legitimately assumes that this authorization had been given. Even without this authorization, a third party can be bound if he gives his contracting party discretion ('*de vrije hand laten*') to conclude contracts with stevedores.[950]

However, the *Hoge Raad* developed case law containing strict conditions under which stevedores could rely on their contracts to the detriment of third parties. The *Hoge Raad* developed these conditions in three cases involving stevedores.[951] In the first two, *Citronas* and *Vojvodina*, the *Hoge Raad* rejected the stevedores' reliance on the stevedoring contract and the Rotterdam Stevedoring Conditions and the exonerations contained, against cargo interests who were not party to that con-

946. Du Perron (1999), p. 346.
947. See also para. 6.3.
948. For example the 'Rotterdam Stevedoring Conditions' in Dutch: '*Rotterdamse Stuwadoors Condities*' (RSC). These conditions were deposited at the registry of the District Court at Rotterdam on 12 August 1976. Cf. VRTO where the terminal operator takes on a fault-based liability. The terminal operator excludes liability for damage caused by the gross negligence or wilful intent of his employees or independent contractors. See: Claringbould (2010), p. 27.
949. See the Dutch rules on '*vertegenwoordiging*': art. 3:60-3:79 BW. There are two conditions for agency: the agent has to act in the name of his principal and there has to be authorization. See for a comparative analysis of agency in several European countries: Bonell (2011), p. 515-536.
950. Japikse observed that from 1969 there was a tide of change visible in relation to stevedores. Stevedores could more often rely on their own contracts against third parties and the courts often referred to the aspect of '*de vrije hand laten*'. The third party gives freedom to his contracting party to contract with independent contractors and is therefore bound by that contract if the terms could have reasonably been expected. See: Japikse (1988), p. 339-354. See also: Du Perron (1999), p. 355-356.
951. HR 20 June 1986, ECLI:NL:HR:1986:AD5694, *NJ* 1987, 35 with commentary from W.C.L. van der Grinten, *S&S* 1986, 120 (Khaly-Freezer); HR 9 June 1989, ECLI:NL:HR:1989:AC0927, *NJ* 1990, 40 with commentary from J.L.P. Cahen, *S&S* 1989, 121 (Vojvodina/ECT); HR 21 January 2000, ECLI:NL:HR:2000:AA4429, *NJ* 2000, 553 with commentary from J.B.M. Vranken, *S&S* 2000, 72 (Sungreen).

tract.[952] In principle, that meant that only direct parties to the contract are bound to its terms and conditions. This third party effect would only be possible in exceptional circumstances where it is justified that a third party is bound by terms in a contract to which he is not a party.

> The case *Citronas* revolved around a dock workers' strike at the stevedore's terminal. During the strike, the owner of a consignment of oranges requested to enter the premises in order to arrange for the perishable goods to be carried to their destination. The stevedore's lack of response to this request constituted a fault and the cargo interests brought an extra-contractual claim against the stevedore. The situation was similar in the *Vojvodina* case, in which containers with hams were stolen from the stevedore's terminal. In both cases the owner of the goods brought extra-contractual claims against the stevedore who, in his defence, attempted to rely on the Rotterdam Stevedoring Conditions. Although the *Hoge Raad* rejected the reliance on the stevedore's contractual terms, the court's considerations reflect the preceding case law on third party effect and determined that, in certain situations, it was justifiable to rely on terms to which the claimant was not a party. The *Hoge Raad* held the following: In short, this could include situations in which there is reliance, based on the conduct of the third party, of the person who relies on the stipulation that he will be able to invoke this stipulation in respect of the goods entrusted to him by his counterparty[953] and, furthermore, the nature of the agreement and of the particular clause in connection with the special relationship between the third party and the person who relies on the clause play a role.[954] When answering the question on where the limits should be set, the system of the law has to be taken into account, especially if the law allows third party effect, within certain limits, when it concerns particular nominated contracts and this case should be integrated into this system.[955]

Reliance on contractual terms against third parties is only permitted in exceptional circumstances. The Dutch Supreme Court allowed the third party effect of the

952. HR 20 June 1986, ECLI:NL:HR:1986:AD5694, *NJ* 1987, 35 with commentary from W.C.L. van der Grinten, *S&S* 1986, 120 (Khaly-Freezer); HR 9 June 1989, ECLI:NL:HR:1989:AC0927, *NJ* 1990, 40 with commentary from J.L.P. Cahen, *S&S* 1989, 121 (Vojvodina/ECT).
953. HR 7 March 1969, ECLI:NL:HR:1969:AB7416, *NJ* 1969, 249 (Gegaste uien).
954. HR 12 January 1979, ECLI:NL:HR:1979:AC2298, *NJ* 1979, 362 (Securicor/Nationale Nederlanden).
955. The *Hoge Raad* considers in the case Khaly-Freezer in para. 3.4 the following: '*Daarbij moet onder meer worden gedacht – kort samengevat – aan het op gedragingen van de derde terug te voeren vertrouwen van degene die zich op het beding beroept dat hij dit beding zal kunnen inroepen ter zake van hem door zijn wederpartij toevertrouwde goederen (HR 7 March 1969, ECLI:NL:HR:1969:AB7416, NJ 1969, 249 (Gegaste uien)) en voorts aan de aard van de overeenkomst en van het betreffende beding in verband met de bijzondere relatie waarin de derde staat tot degene die zich op het beding beroept (HR 12 January 1979, ECLI:NL:HR:1979:AC2298, NJ 1979, 362 (Securicor/Nationale Nederlanden)). Bij beantwoording van de vraag waar de grens ligt zal voorts mede rekening moeten worden gehouden met het stelsel van de wet, in het bijzonder indien de wet aan bepaalde daarin geregelde overeenkomsten binnen zekere grenzen werking jegens derden toekent en het betreffende geval in dit stelsel moet worden ingepast*.'

contract concluded with the carrier in the *Sungreen* case. The stevedoring conditions therefore did affect the relation between the stevedore and the cargo interests.[956]

> The case dealt with the discharge of a consignment of pipes whose owner/shipper got involved in the discharge process by discussing the discharge method to be used when discharging the goods from the ship Sungreen by the stevedore. The owner of the goods also determined the strategy of the discharge and provided constant supervision over the course of events. As the owner/shipper was thereby clearly involved with the stevedoring activities, the stevedore could reasonably infer that the stevedoring conditions could be invoked against the owner of the goods. The conduct of the owner of the goods indicated to the stevedore that he could rely on the fact that his counterparty had been authorized to conclude the contract on those terms. The stevedore was therefore able to invoke his contractual stipulations in his relation with the owner of the goods.

In short, contractual clauses in principle, only affect contracting parties and only in exceptional circumstances can a third party can be bound by them. The *Hoge Raad* has repeatedly held that the stevedores' reliance on his own contract conflicts with the system of the law. The court refers to the rules on contracts of carriage, which do not cover independent contractors.[957] However, the regulation concerning contracts of deposit allows the third party effect of contractual stipulations. If the stevedore offers services which bear a resemblance to the storage of goods, it should be possible for stevedores to rely on their contract against third parties.[958] Under the rules covering contracts of deposit, the third party effect is granted to all depositaries who may assume that their contracting party was authorized to deposit the goods.[959] They would then not be in conflict with the system of the law.

Haak and Zwitser, advocate the third party effect of the stevedore's terms and conditions analogous to the rules on deposit.[960] This was recently by the Appeal Court of the Netherlands Antilles in the case *Heinrich J*.[961]

> A motor yacht was carried from the USA to Curaçao on board the ship '*Heinrich J*', from where it was launched to complete the journey to its buyer in Venezuela. The yacht sustained damage during the launching, when a crane dropped a component on top of the yacht from a height of

956. HR 21 January 2000, ECLI:NL:HR:2000:AA4429, *NJ* 2000, 553 with commentary from J.B.M. Vranken, *S&S* 2000, 72 (Sungreen) para. 3.6.2.
957. The first two stevedoring cases were decided under the former Dutch Civil Code. Nevertheless, Japikse discusses the *Citronas* case and believes that the court anticipated on the upcoming law reform in which independent contractors are not protected by the rules on contracts of carriage. Japikse (1988), p. 339-354; Du Perron (1999), p. 353-354.
958. However, this is different if the stevedore is considered a sub-depositary. In that case, the stevedore, as a sub-depositary, can rely on the main contract of deposit according to art. 7:608 sub 2 and 4 in comparison with art. 7:608 sub 1 and 4 BW. See: Verheij (2016), nr. 373; Rutgers (1998), p. 41.
959. This should be easily assumed. Haak and Zwitser (2003), p. 327-328.
960. Haak and Zwitser (2003), p. 327-329, 545-547; Zwitser (1998), p. 59; Zwitser (1997), p. 115. Cf. Du Perron (1999), p. 367.
961. Gemeenschappelijk Hof van Justitie van Aruba, Curaçao, Sint Maarten en van Bonaire, Sint Eustatius en Saba 22 February 2011, ECLI:NL:OGHACMB:2011:BQ0644, *S&S* 2012, 131 (Heinrich J).

> 12 meters. The stevedore, contracted by a shipping agent for the performance of the stevedoring services, was faced with an extra-contractual claim from the buyer/owner of the yacht. It was found that the crane operator acted negligently which would constitute a tortious act. The stevedore's general terms and conditions stipulated an exclusion from and limits of liability. In principle, these contractual stipulations only apply between the contracting parties which is why they could not be invoked against the owner and his insurer. However, the court considered that an exception could be made as the nature of the case provided a justification while taking account of the system of the law. Following this, the court referred to Art. 7:608 sub 2 BW which establishes the third party effect of contracts of deposit. Although the case at hand is not about the mere storage of goods, the stevedore's position during the lifting operation was similar to the position of a depositary. As depositaries are provided with protection on the basis of the requirements of international commerce, it is only a small step to a similar protection for stevedores who do not only perform storage but also discharge or, in this case, launch a vessel. The stevedore could, therefore invoke his contractual stipulations to the detriment of the owner of the yacht.

This shows that a stevedore in that case could rely on his own terms against third parties by virtue of the rules on third party effect concerning contracts of deposit.[962] The Antillian Appeal Court apparently gave much importance to the special circumstances of this particular case.[963] Relevant factors included the existing business relationship between the stevedore and the owner of the yacht and the common use of these liability exclusions in that particular area of business (the carriage of yachts). Both the owner and the stevedore could have expected these particular terms would have been applicable. Due to these particularities, the rule established in this case cannot be applied all along the line.

The better view would have been, however, to regard the launching of the yacht as carriage of goods. It follows from the case at hand that the stevedore was employed for the lifting of the yacht out of the vessel *Heinrich J* in order to launch it. As argued above in paragraph 6.3, the lifting of goods can be considered as carriage of goods. It is therefore that the stevedore who acted as a carrier is subject to the general rules on contracts of carriage in art. 8:20 ff BW. Pursuant to art. 8:31 BW

962. See also: Spanjaart (2006), p. 87-88; Haak and Zwitser (2003), p. 547; Haak (2003), p. 226-232.
963. According to the court this was not unreasonable on a number of grounds; the stevedore was the only stevedore in the port of Curaçao and had performed the same activities several times for the shipping agent and for the consignee; the owner should understand that the stevedore stipulates exclusions from and limits of liability considering the considerable risk the activities carry and the small amount of compensation payable; the nature of such limits and exclusions were not unexpectedly burdensome; the owner was not a random third party, not a complete stranger to the contract, but a party involved in the contractual chain who had bought the yacht and for whose benefit and on whose behalf the transport was arranged; the stevedore could reasonably have expected that his contractual terms could be invoked against these involved parties since they could have ensured that the activities were performed on other contractual terms but they did not and gave freedom to their contracting parties to conclude the contract on these terms. This lead to the conclusion that they conformed to those conditions. The stevedore could therefore invoke the limits of liability stipulated in the stevedoring contract against the owner of the yacht.

the rules on third party effect concerning contracts of carriage are then applicable (art. 8:361-8:366 BW).

Stipulations for the benefit of third parties

When faced with extra-contractual claims, the stevedore can rely on the defences in the contract between the person by whom he is employed (usually the carrier) and his contracting party (usually the cargo interests) if that contract contains a stipulation for the stevedore's benefit. This clause in the contract of carriage, known as a Himalaya clause, can under Dutch law be explained as a stipulation for the benefit of a third party ('*derdenbeding*')[964] or as an effect of 'agency'. Preference is usually given to the former explanation because the Himalaya clause operates as a *derdenbeding* which means the stevedore becomes party to the contract of carriage after acceptance of the stipulation.[965] It is, however, also possible that the carrier impliedly, or explicitly acts as an agent of the stevedore when concluding a contract of carriage. For both approaches, a Himalaya clause can determine which contractual terms the stevedore can invoke according to the intention of the contracting parties.[966] This can be limited to the contractual defences such as limits of liability and the before-and-after clause.[967] The stevedore can only rely on a Himalaya clause in the contract of carriage for damage occurring during the operation of that contract. If damage occurs after the contract of carriage came to an end, the stevedore cannot be protected by its defences.[968]

9.4 German law

The Hague Rules 1924 were ratified in Germany in 1937. Although Germany never ratified the Hague-Visby Rules, their content was incorporated into the 5th Book of the HGB.[969] Other maritime conventions like the Hamburg Rules and the Rotterdam Rules were never ratified, although the latter may be ratified in the future and has already influenced the recent maritime commercial code reform of 2013. The *Gesetz zur Reform des Seehandelsrechts* entered into force in Germany on 25 April 2013. Germany has ratified CMR, CMNI, COTIF-CIM and MC for non-maritime modes of transport On the national level the *Transportrechtsreformgesetz* introduced unified general transport law for the modes of road, rail, inland navigation and air in § 407 ff HGB. Some specific rules on multimodal transport can be found in § 452 ff HGB.

964. Art. 6:253-6:256 BW.
965. Art. 6:254 BW. Following this, the stevedore becomes party to the contract of carriage which is why he is not a true third party.
966. This can be limited to the defenses contained in the contract of carriage. Although partial agency should not be easily accepted according to A-G Hartkamp in HR 28 June 1996, ECLI:NL:HR:1996:ZC2115, *NJ* 1997, 494 with commentary from W.M. Kleijn, *S&S* 1996, 101 (KVV/Moksel).
967. The before-and-after clause is a valid type of liability exoneration in the Netherlands (see para. 9.1.2), art. 8:386 BW. In cases of gross negligence or intentional conduct, the standard of reasonableness and fairness can preclude the reliance on this exoneration clause. Hof Den Haag 29 September 2009, ECLI:NL:GHSGR:2009:BM0027, *S&S* 2010, 2 (Dolphin I, Al Manakh, Al Isha'a). Furthermore: Boonk (1993), p. 62; Hendrikse and Margetson (2004), p. 38.
968. See Chapter 6.
969. See also: § 6 EGHGB (*Einführung des Handelsgesetzbuchs*).

The HGB also contains provisions on contracts for the storage of goods in § 467-475h HGB and on services (*Werkvertrag*) in §§ 631-651 BGB.

This paragraph discusses German law with regard to the liability of terminal operators to third parties. HGB provides a basis for direct claims against carriers and their subcontractors who fall into the category of performing carriers (in German: *Ausführender Frachtführer* or *Ausführender Verfrachter*). At the same time, when faced with cargo claims, these carriers, performing carriers and persons working on their side can rely on rules in the HGB and on terms in the contact of carriage. The terminal operator under discussion is subject to transport law if he is responsible for the goods as a carrier or if he is employed by a carrier for the performance of the carrier's obligations. While performing the main carrier's obligations under a contract of carriage subject to German law, the terminal operator as an independent contractor, can be considered a performing carrier. Depending on the scope of the specific contract of carriage, the main carrier's obligation may include the carriage of goods, performance of stevedoring services or storage. These statutory rules are therefore not only applicable if a carrier employs a terminal operator for performance of carriage but also if a terminal operator is employed by a carrier for the performance of stevedoring services or the storage of goods. Consequently, the terminal operator as an independent contractor can rely on the provisions in the HGB or the contract of carriage in cases of claims from third parties. A performing carrier is only subject to the provisions on the liability of performing carriers[970] if German law is applicable to the main contract of carriage.[971]

However, if the terminal operator is not responsible for the goods as a carrier, neither is he employed by a carrier for the performance of the carrier's obligations, these rules will be to no avail. The following paragraph will look at ways to deal with these situations with the introduction of a stipulation for the benefit of a third party (*Vertrag zugunsten Dritter*) and the concept of *Drittschadensliqidation.*

9.4.1 The liability of (performing) carriers to third parties

HGB contains statutory rules determining the legal position of carriers, performing carriers and other persons working on the carrier's side. They apply irrespective of whether a cargo claim is brought by a contracting party or by a third party. German law ensures that some persons on the carrier's side (*Die Leute des Verfrachters und der Schiffsbesatzung* or *die Leute des Frachtführers*) are able to invoke the exclusions and limits of liability which are also at the carrier's disposal.[972] The term 'persons' (*Leute*) includes only those who are employed by the carrier.[973] Furthermore, the ship's crew (*Schiffsbesatzung*) consists of all those who provide services under the supervision and control of the captain. These include the captain, ship's officers and all crew.[974] All those who fall into this category are protected from claims in the same way as

970. §§ 437 and 509 HGB.
971. HGB 30 October 2008, *TranspR* 2009, p. 130. Cf. Czerwenka (2012), p. 408-413.
972. § 508 I resp. § 436 HGB.
973. Prüssmann and Rabe (2000), § 607a HGB, Rn. 7; Herber (2014 a), § 501 HGB, Rn. 7; Paschke (2017), § 501 HGB, Rn. 1-3.
974. Pötschke (2014), § 478 HGB, Rn. 3-8; Paschke (2017), § 478 HGB, Rn. 1-3.

the carrier is. However, independent contractors like terminal operators, who independently provide services for the carrier, are not included.[975]
The contracting carrier often employs a subcontractor for the performance of the whole or part of the contract of carriage. This process can be repeated meaning that multiple subcarriers or other subcontractors are involved. German transport law provides rules on the liability of subcontractors performing (part of) the carriage (*Ausführender Frachtführer* resp. *Verfrachter*), which will hereafter be referred to as the performing carrier.[976] A performing carrier is defined as the carrier who performs part of or the entire carriage but is not the contracting carrier. A performing carrier is therefore the last carrier who actually performs the carriage.[977] This performing carrier is liable to the contracting carrier or to the cargo interests for loss, damage and in cases of non-maritime transport also for delay which can occur while the goods are in his custody as if he were the contracting carrier. The contracting carrier and the performing carrier are jointly and severally liable for loss, damage and in cases of non-maritime transport, also for delay which can occur during the performance of the contract of carriage. The HGB provides a basis for direct claims against these persons. These persons can subsequently bring recourse claims if the possibility for this is provided in the law or by their contract.[978] These rules, therefore provide the cargo interests with an additional debtor. If damage is caused during the performance of the carriage by the performing carrier, the cargo interests can bring a claim to either the main contracting carrier or to the performing carrier.[979]

German transport law contains provisions on the protection of carriers from extra-contractual claims brought by contracting parties or from direct (extra-contractual) claims brought by third parties. The rule on the position of carriers confronted with extra-contractual claims was introduced in non-maritime transport law in § 434 HGB. It applies to carriage by road, rail, inland waterways and air. Subsection I determines that the defences provided by the provisions in the HGB and those in the contract of carriage can be invoked if the carrier faces a claim brought by the shipper or consignee. Subsection II provides that these defences, under certain conditions, can also be invoked if the carrier faces extra-contractual claims from third parties. Pursuant to § 437 HGB, the performing carrier who performs (part of) the contract is protected as he has the same defences as those provided to the contracting carrier under the main contract of carriage when confronted with cargo claims. In addition to this, the performing carrier facing an extra-contractual claim brought by a third party can invoke the terms of the subcontract in some situations. Moreover, provisions to the same extent can be found in the new Maritime Code in §§ 506 and 509 HGB.[980] As a result of this, the main carrier and the performing carrier can invoke the defences provided in the HGB and can also rely on a contract

975. Herber (2014 a), § 501 HGB, Rn. 10 and Herber (2014 c), § 508 HGB, Rn. 7.
976. §§ 437 and 509 HGB.
977. Paschke (2017), § 509 HGB, Rn. 3.
978. Ramming (2000), p. 293-294.
979. For an overview of the discussion on the legal nature of a direct claim against the performing carrier I refer to Czerwenka (2012), p. 409.
980. Since the provisions on this issue concerning non-maritime transport and maritime transport are almost identical, the consideration relating to the former can also be applied to the latter. Ramming (2013), p. 81.

of carriage when facing claims from contracting or third parties. Whether and under which conditions the carrier or the performing carrier can rely on the main contract of carriage or in cases of the performing carrier on the subcontract of carriage, will be discussed below.

Under German transport law, parties to a contract of carriage are, to some extent, free to increase and decrease the carrier's liability compared to the standard HGB liability regime.[981] Parties to contracts of carriage subject to German transport law therefore enjoy freedom of contract to a larger extent than parties to contracts of carriage subject to international conventions. These permitted deviations do, although not in all situations, affect the position of third parties. In order to determine whether they affect third parties, it is important to distinguish whether this deviation increases or decreases the carrier's liability. It is also relevant to determine whether a claim is brought by a contracting party (shipper or consignee) or by a third party.

It is furthermore relevant for the position of terminal operators, that maritime carriers responsible for the independent contractors they employ,[982] can validly exclude their liability for loss or damage that occurs on land prior to loading or after discharge. This stage is not covered by the mandatory liability period under maritime law[983] and the liability for incidents during this stage is therefore often excluded. However, under the new German Maritime Law, this practice of excluding liability for loss or damage that occurs before loading and after discharge in before-and-after clauses (*Landschadenklausel*) is restricted by § 512 I HGB. Although it is still possible to stipulate a clause like this for carriage by sea, it is only possible to agree on it if it has been individually negotiated.[984] A before-and-after clause in standard contract terms and conditions will therefore not lead to the intended result.[985] However, if a liability exclusion is validly agreed upon, the carrier is not liable for damage to or loss of the goods which occurs during this period.[986]

Both the carrier and the performing carrier can, in general, rely on the provisions in the HGB and on the terms of the main contract of carriage if a claim is brought by a contracting party or by a third party. There are, however, some exceptions to this rule. It is not possible for the carrier facing an extra-contractual claim brought by a third party, to invoke liability exclusions or limits in the contract of carriage which are more beneficial to the carrier's position than the ones which can be found in the HGB.[987] The same applies to a performing carrier who wishes to rely on the main contract of carriage if confronted with a claim from a person who is not party to that main contract of carriage.[988] The legislator intended to protect

981. § 449 HGB; § 512 HGB. Decreasing the carrier's liability is only permitted in cases of non-maritime transport with a minimum limit of 2 SDR, unless the limit is individually negotiated.
982. § 501 HGB and § 278 BGB.
983. Art. I (e) H(V)R.
984. This applies to contracts of carriage by sea according to § 512 I HGB and to multimodal transport contracts including a sea stage according to § 425d HGB.
985. Drews (2013), p. 258; Herber (2014), § 498, Rn. 46.
986. Eckardt (2015), p. 60.
987. § 434 II HGB; § 506 II HGB. Furthermore: Herber (2014 b), § 506 HGB, Rn. 18-20.
988. § 437 II jo. § 434 II HGB; § 509 III jo. § 506 II HGB.

third parties who agreed to have the goods transported but did not conclude the contract of carriage and those third parties that had not given their consent.[989] However, if the shipper/consignee under the main contract of carriage brings a claim, both the carrier and the performing carrier can invoke the terms in the main contract which exclude or limit their liability. This applies to exclusions and limits of liability which either increase or decrease[990] the carrier's liability in relation to the provisions in the HGB as long as they are in line with § 512 HGB.[991] Moreover, if the parties to the main contract of carriage agreed to increase the carrier's liability, these agreements would only affect the position of the performing carrier if he agreed to those terms in writing.[992] This option is not often exercised in practice.[993]

The performing carrier can, in some cases, invoke defences provided in a subcontract of carriage when faced with an extra-contractual claim from a third party.[994] This subcontract of carriage is one concluded between the performing carrier and the main contracting carrier or another subcarrier in the chain. If this subcontract of carriage is subject to German law, the provisions of § 434 HGB and § 506 HGB are applicable. This is why the terms of the subcontract which decrease the carrier's liability in comparison to the liability under the HGB, cannot be invoked in cases of extra-contractual claims brought by third parties.[995] An exception to this rule can be found in maritime law which determines that a contractual provision decreasing the carrier's liability with respect to damage caused by navigation of the vessel or by fire or explosions can however, be invoked against third parties.[996] These third parties could, for example, be the shipper or consignee with regard to the main contract of carriage.

Multimodal contracts of carriage

The rules on the position of carriers and performing carriers in relation to third parties and to contracting parties bringing extra-contractual claims are also applicable in cases of multimodal contracts subject to German law.[997] German transport law contains provisions on multimodal contracts of carriage in §§ 452 ff HGB. They determine that these contracts are subject to the transport law rules of §§ 407-450 HGB unless international transport law conventions are applicable to the contract.[998] These rules cover transport of goods by road, inland navigation, rail and air and are also applicable to multimodal contracts of carriage containing a maritime transport stage. An exception to this can be found in § 452a I HGB which determines that in cases of localized loss, the law which applies which would apply to a contract of carriage covering this transport stage. Therefore maritime law applies if it can

989. See the parliamentary history to the new German maritime law Ds. 17/10309, p. 85-86.
990. § 449 I HGB; § 512 HGB.
991. § 437 II jo. § 434 I HGB; § 509 III jo. § 506 I HGB. Furthermore: Herber (2014 b), § 506 HGB, Rn.14.
992. § 437 I HGB; § 509 II HGB.
993. Ramming (2013), p. 81.
994. Ramming (2013), p. 86-87.
995. § 434 II HGB; § 506 II HGB.
996. § 506 II jo. § 512 II 1 HGB.
997. Ramming (2000), p. 289-291.
998. COTIF-CIM; art. 2 CMR; art. 31.1 MC.

be established that the loss occurred during the sea stage. This rule on localized loss can however be excluded, so that the transport law rules on non-maritime transport are applicable to all multimodal contracts of carriage.[999] It can therefore be determined that a direct claim can be brought against the carrier and the performing carrier and these carriers can in their defence invoke the defences provided by the multimodal contract of carriage pursuant to §§ 434 and 437 HGB if this contract is subject to the German rules on multimodal contracts of carriage.[1000] Moreover, if it was established that the loss occurred during a maritime transport stage and the applicability of German maritime law had not been excluded in the multimodal contract of carriage, the same result would be achieved if §§ 506 and 509 HGB were applied.

In conclusion, under German transport law, contracting carriers and performing carriers and their subordinates (such as servants and agents) are protected by the general transport law rules. They can therefore rely on the exclusions and limits of liability provided in the HGB or in the contract of carriage when facing contractual or extra-contractual claims. Contrary to the situation under Dutch law, German law provides a basis for liability of performing carriers. They are therefore not only protected by the rules in the HGB but these rules also provide for liability of the performing subcarrier. This is why the cargo interests can bring a direct claim against both the main carrier and the performing carrier in cases of loss, damage or delay (the latter only in respect of non-maritime carriage) which occurs during transport by the performing carrier. If a direct claim is brought, the performing carrier, as well as the contracting carrier, can invoke the defences provided by the HGB and the main contract of carriage. In general, the carrier can rely on the contract of carriage to which the claimant is party and, subject to certain restrictions, the carrier can also invoke the terms of a contract to which the claimant is a third party. Under some conditions, the rules permit performing carriers to rely on the terms of the subcontract in cases of extra-contractual claim brought by third parties.

9.4.2 Stevedores and depositaries as performing carriers

After discussing the rules on the liability of carriers and performing carriers to third parties, the question arises as to whether the terminal operator, who is responsible for the goods as a service provider or as a depositary, is also covered by these rules.[1001]

A terminal operator who is employed by a sea carrier for performing the transshipment (stevedoring services and storage) can also be qualified as a 'performing carrier' (*Ausführender Verfrachter*) in the sense of § 509 HGB.[1002] This would also apply if the terminal operator were employed by an inland carrier for loading and discharge and he can therefore be qualified as a performing carrier (*Ausführender Frachtführer*) in the sense of § 437 HGB. According to these provisions, performing

999. § 452d II HGB.
1000. §§ 452 ff HGB.
1001. For a discussion on the question who can be considered a performing carrier: Ramming (2013), p. 83-84; Herber (2011), p. 359-362.
1002. See the parliamentary history to the new German maritime law Ds. 17/10309, p. 86.

carriers are all third parties that perform (part of) the carriage undertaken by the (main) carrier. Third parties employed by the carrier for the performance of the carrier's obligations under the contract of carriage like loading, discharge or storage of goods are covered by the term performing carrier.[1003]

These persons must perform at least part of the obligations assumed by the carrier which fall within the framework of obligations related to the carriage of goods. Performing carriers are therefore regarded from the perspective of the contract of carriage and their obligations can cover all those for which the carrier is responsible under the contract of carriage and which are performed by a third party. It is however not necessary for the obligations undertaken by the third party to qualify as carriage of goods.[1004]

Terminal operators can only qualify as performing carriers if they perform obligations which are covered by the contract of carriage. This depends on the scope of the contract and therefore, the time at which the carrier directly or indirectly (through these third parties) takes over the goods for transport and delivers them is relevant.[1005]

It is possible for a terminal operator to fulfil certain obligations as a performing carrier under maritime law while fulfilling other obligations as a performing carrier under inland transport law. The terminal operator employed by the sea carrier for performing stevedoring services, like the loading and discharge of sea vessels, is considered a performing carrier under maritime law. Whether all cargo handling operations performed at the sea terminal are carried out by a performing carrier under maritime law depends on the scope of the contract of carriage by sea. Unloading a truck and loading an inland barge which delivers goods to and collects goods from the sea port, can be outside the scope of the contract of carriage by sea. The terminal operator who provides services outside the scope of the contract of carriage by sea can therefore not be considered a performing carrier in the sense of § 509 HGB. However, if these obligations are fulfilled on behalf of the inland carrier responsible for the preceding or subsequent inland transport, the terminal operator can qualify as a performing carrier in the sense of § 437 HGB. This provision is a mirror image of § 509 HGB and relates to the carriage of goods by road, rail, inland waterways and air. As a result of this, terminal operators who qualify as performing carriers can be faced with direct claims from third party cargo interests and, when facing these claims, they are liable in the same way as the main carrier is. The main contract of carriage, with its exclusions and limits of liability, can therefore be invoked in addition to the rules in the HGB.[1006]

This only applies if the terminal operator responsible for the goods as a stevedore or depositary is employed by the carrier for fulfilling obligations covered by the contract of carriage. Under German law, a terminal operator can be directly employed by the cargo interests, e.g. for stevedoring services if a type of FIO clause

1003. Herber (2014 d), § 509 HGB, Rn. 58; Paschke (2017), § 509 HGB, Rn. 6.
1004. See furthermore para. 6.3.
1005. Ramming (2013), p. 83-84.
1006. Herber (2014 d), § 509 HGB, Rn. 57-63.

was inserted into the contract of carriage. A FIO clause is permitted in Germany and it not only covers the division of costs but also the division of risks.[1007] Cargo interests often enter into contracts with terminal operators if they are obliged to load or discharge goods. Moreover, a contract for the storage of goods can also be concluded between a terminal operator as a depositary and the cargo interests. In those cases, the terminal operator responsible for the goods as a stevedore or depositary does not qualify as a performing carrier.

9.4.3 Third party effect of contractual clauses

If a terminal operator cannot benefit from the provisions on performing carriers discussed above, he has recourse to other legal principles available. German law provides rules on the inclusion of a third party in a contract. According to § 328 BGB, pursuant to a contractual stipulation, third parties can obtain rights under a contract. A contract for stevedoring duties is, for example, considered to include a stipulation for the benefit of third parties (*Vertrag zugunsten Dritter*) and vessel owners or cargo interests can be considered third parties who obtains rights under the stevedoring contract. So, if a vessel sustains damage while performing stevedoring services, the vessel owner can bring a direct action against the terminal operator who can, in turn, rely on the (liability limits stipulated in the) stevedoring contract.[1008] This also applies when a terminal operator delivers goods to the consignee. The consignee, who is a third party to the terminal operator's contract, can claim as a beneficiary under that contract as a third party.[1009] The stevedoring contract is considered to be for the benefit of these third parties because terminal operators generally provide for a liability regime in their general terms and conditions which is similar to the German general land transport regime of § 407 ff HGB.[1010] Liability is therefore not excluded, but is, to a certain extent, limited.

Contracts of carriage moreover, often contain clauses whereby the carrier attempts to extend his liability limits and exclusions to persons he uses during the transport, such as his independent contractors. These Himalaya clauses, which confer a benefit on a third party, can also be considered a stipulation for the benefit of a third party (*Vertrag zugunsten Dritter*).[1011] It can also be explained as the effect of agency.[1012] Although Himalaya clauses are generally upheld under German law,[1013] the HGB imposes some restrictions on the inclusion of third parties in contracts and only

1007. BGH 23 May 1990, *TranspR* 1990, 328 at 329. Furthermore: Prüssmann and Rabe (2000), § 561 HGB, Rn. 9; Herber (2014), § 498 HGB, Rn. 31.
1008. Thume (2014), p. 183; Prüssmann and Rabe (2000), § 606 HGB, Rn. 13; Von Waldstein and Holland (2007), § 412 HGB, Rn. 15, p. 490; BGH 12 March 1984, *VersR* 1984, 552 (this case concerning transport by inland waterways the *BGH* held that the shipowner had the option to bring a contractual claim because the stevedoring contract, to which he was a third party, should be considered a contract with protection for third parties ('*Vertrag mit Schutzwirkung zugunsten Dritter*')). Furthermore, see above para. 7.3.1.
1009. Herber (2014 d), § 509 HGB, Rn. 63.
1010. Herber (2006), p. 437; Herber (2014 d), § 509 HGB, Rn. 63.
1011. Herber (2016), p. 203; Prüssmann and Rabe (2000), § 607a HGB, Rn. 12; Gernhuber (1989), p. 462.
1012. Prüssmann and Rabe (2000), § 607a HGB, Rn. 12.
1013. BGH 7 July 1960, *VersR* 1960, p. 727; BGH 28 April 1977, *VersR* 1977, p. 717; BGH 26 November 1979, *VersR* 1980, p. 572.

those sufficiently closely connected to the main contract may be included.[1014] Moreover, all clauses, including Himalaya clauses contained in bills of lading, are subject to the control of the provisions on general terms and conditions in §§ 305-310 BGB.[1015] Although the exoneration of a third parties' liability is in principle permitted, these persons, as well as a carrier, cannot rely on the clause if they acted with wilful misconduct when they caused damage to or loss of the goods.[1016]

Moreover, due to the German concept of *Drittschadensliquidation,* the terminal operator and a third party can, under certain circumstances, be bound by the terms of a contract if the terminal operator is faced with claims brought by third parties.[1017] The doctrine of *Drittschadensliquidation*, developed by case law, allows a creditor (the promisee) to a contract to bring a contractual claim for loss resulting from the breach of contract against the defaulting party if the loss is suffered by a third party. This is an exception to the general rule that a claimant can only recover for his own losses. The third party is entitled to have this right (of action) assigned. The main purpose of this doctrine is to ensure that the defaulting party (the tort-feasor) does not benefit from a situation in which a third party and not his contracting party suffered a loss. This doctrine avoids situations whereby a defaulting party would not have been liable to the creditor (who had not suffered loss) nor to the third party (in contract) in the absence of a title to sue under the contract.[1018] Moreover, a contractual debtor should not be exposed to an unlimited number of claims. This doctrine therefore only applies in certain recognized situations like certain agency situations,[1019] trust and storage situations;[1020] and in situations related to carriage of goods.[1021]

The doctrine of *Drittschadensliquidation* is necessary in situations where before-and-after clauses are validly incorporated in bills of ladings. The cargo interests may suffer damage but they have no contractual claim against the stevedore. The carrier has the right to bring a contractual claim as the contracting party of the stevedore, but does not suffer damage (as he is not liable to the cargo interests pursuant to the before-and-after clause). This is a classic case in which the right of action under the contract and the damage are separate. The damage is shifted from the contracting party of the stevedore to the third party cargo interests.[1022] The damage is moved back from the cargo interests to the sea carrier with the application of the doctrine of *Drittschadensliquidation.* It is doubtful, however, whether the carrier will want to claim compensation. In cases like this, the doctrine ensures that the carrier is, in principle, under the obligation to assign his right of action to the cargo interests. A stevedore's liability towards the cargo interests is based on the stevedoring

1014. BGH 6 July 1995, *NJW* 1995, 2991.
1015. All clauses in bills of lading are subject to § 305 BGB. See: Krins (2012), p. 85; Herber (2016), p. 203.
1016. Rabe (2016), nr. 4, p. 139-147.
1017. Herber (2016), p. 173.
1018. BGH 18 March 2010, *TranspR* 2010, p. 380.
1019. As German law does not accept undisclosed agency it becomes clear that a doctrine like this is necessary.
1020. Ebenroth, Boujong, Joost and Strohn (2015), § 467 HGB, Rn. 35.
1021. Markesinis and Unberath (2002), p. 64-65; Koller (2013), § 437 HGB, Rn. 37.
1022. Drews (2008), p. 24.

contract, including its liability limits and exclusions, concluded with the sea carrier unless confronted with a tort-based claim (*Delikt*).[1023]

However, this situation is not likely to occur often under the new German maritime law. Before-and-after clauses will only have the desired effect if they are individually negotiated. If not, the carrier will be liable for the damage to or loss of the goods during the before-and-after period. The cargo interests can therefore bring a contractual claim against the carrier who in his turn, can bring a recourse claim against the stevedore. In that case, the contractual links should be followed. Moreover, if the terminal operator can be considered a performing carrier under German transport law, direct action can be brought against the performing carrier who, in its turn, can invoke the contractual terms.

9.5 English law

Under English law certain statutory rules are relevant when determining the legal position of terminal operators. With regard to international transport law conventions, England has ratified the Hague Visby Rules,[1024] CMR[1025] and COTIF-CIM.[1026] COGSA 1971 and 1992[1027] govern contracts of carriage by sea on a national level and except the rules on air carriage England has no further rules on inland transport.

A terminal operator can be contractually liable for damage to or loss of goods towards the contracting party who engages his services. A terminal operator's contracting party is usually a carrier or freight forwarder, but a terminal operator can also enter into a contractual relation with the cargo interests. This can occur, for example, if a terminal operator stores or carries goods or performs loading and discharge operations for the cargo interests pursuant to a type of FIO clause in the contract of affreightment. FIO clauses are, in principle, valid under English law and are recognised to affect not only the division of costs but also the division of risk.[1028] A direct contract may also come into effect between the terminal operator acting as a stevedore, and the owner of the goods if the owner himself delivers the goods into the stevedore's custody at the port of loading.[1029] However, it is unlikely

1023. Drews (2013), p. 254. For a case on *Drittschadensliquidation* concerning a performing (sub)carrier's liability towards the cargo interests, I refer to BGH 18 March 2010, *TranspR* 2010, p. 376 at 380-381. Although this case is still relevant for the purpose of *Drittschadensliquidation*, it is irrelevant for the liability of subcarriers as the new law introduced § 509 HGB. This article establishes that subcarriers are liable towards cargo interests in the same way as the main carrier.
1024. HVR have the force of law under section 1 of the Carriage of Goods by Sea Act 1971.
1025. CMR has force of law under section 1 of the Carriage of Goods by Road Act 1965.
1026. COTIF-CIM has force of law under section 1 of the International Transport Conventions Act 1983.
1027. Carriage of Goods by Sea Act 1971 and 1992.
1028. House of Lords, Jindal Iron and Steel Co. Ltd. and others v. Islamic Solidarity Shipping Co. Jordan Inc. [2005] 1 Lloyd's Rep. 57 (The Jordan II). See also para. 6.2.2.
1029. Although the court leaves open the possibility of a direct contract, it considered that no direct contract came into effect between the terminal operator and the cargo owner in the *Singer* case as the carrier delivered the goods into the terminal operator's custody at the port of loading. Moreover, the carrier acted as principal. Queen's Bench Division (Commercial Court), Singer Co. (U.K.) Ltd. and another v. Tees and Hartlepool Port Authority [1988], 2 Lloyd's Rep. 164 (Singer). Contrary to this, in the case *The Rigoletto,* the cargo owner issued the shipping note directly to the terminal operator. Building on the reasoning in the *Singer* case, this indicates a direct contract between the terminal operator and the cargo owner. It was not clear from the pleading and the judgment,

that a stevedore would enter into a direct contract with the cargo owner at the port of discharge. The carrier usually employs the stevedore at the port of discharge and it is unlikely that the stevedore would enter into a contractual relation with the cargo owner upon delivery of the goods.[1030] If a contract comes into effect between the claimant and the terminal operator, they are, in general, bound by the clauses in it.

A terminal operator does not always have a contractual relation with the claimant. A terminal operator is often employed as an independent subcontractor by a carrier and there is therefore no contract between the terminal operator and the cargo interests. If goods are damaged or lost during the performance of the carrier's obligations, the terminal operator is prima facie liable in tort (tort of negligence) towards this third party claimant. However, not everyone is under a duty to take care of other people's goods. This depends on the proximity of the parties, the foreseeability of the type of loss concerned and whether it would be just and reasonable to impose this duty. The terminal operator has, in principle, the duty to take reasonable care to avoid damage to goods and if the goods are damaged or lost, the terminal operator can generally be sued in tort.[1031] In order to avoid this liability, the terminal operator might want to overcome the privity of contract argument and fall back on a contract to which he himself is not a party, or to bind this third party to his own contract. First, this paragraph discusses the principle of privity of contract and the statutory rules on the right of third parties. Then the opportunities the terminal operator has to benefit from a clause in the contract (of carriage of goods by sea) to which he is not a party; i.e. the Himalaya clause is dealt with. Finally, the focus is on whether it is possible to bind a third party to the terminal operator's contract, pursuant to the legal principles which apply in cases of bailment. Their applicability depends, to a large extent, on the types of services the terminal operator is engaged to perform.

9.5.1 Privity of contract and the Contracts (Rights of Third Parties) Act 1999

Under English law, a terminal operator can be held contractually liable by his contracting party for damage to or loss of goods that occurred during the stevedoring services and also extra-contractually liable based on bailment or the tort of negligence. If an extra-contractual claim is accepted, the terminal operator is, in principle, liable in full for the damage caused as he cannot rely on clauses limiting his liability stipulated in a contract. This follows from the doctrine of privity of contract. Privity of contract is a fundamental principle under English law which ensures that a contract can only confer rights or impose obligations arising from it on the

---

however, whether the shipping note in this case evidenced a direct contract or a bailment or sub-bailment on terms. Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto).

1030. Central London County Court (Business List), Sonicare International Ltd. v. East Anglia Freight Terminals Ltd. and others and Neptune Orient Lines Ltd. (Third Party) [1997] 2 Lloyd's Rep. 48 (Sonicare). Furthermore, in this case it became clear that is not easy to apply an implied contract. See: Court of Appeal, Brandt v Liverpool Brazil & River Plate Steam Navigation Co Ltd. [1924] 1 K.B. 575.

1031. Aikens, Lord and Bools (2006), p. 181-182.

parties to the contract.[1032] According to this doctrine of privity of contract, consideration is necessary before a contract can be considered valid. This means that a contract is not legally enforceable unless a promise is supported by consideration, i.e. something must be given or promised in exchange for the promise.[1033] This doctrine precludes the reliance on a contract by a third party and it also precludes a third party from being bound by a contract to which he is not a party.[1034] The principle of privity of contract was significantly reformed with the introduction of the Contracts (Rights of Third Parties) Act 1999. In cases where this act is applicable, third parties can obtain rights[1035] from a contract to which they are not a party.[1036] In principle, a third party (e.g. a service provider, depositary, (non-maritime) carriers, other subcontractors, servants or agents) can enforce the terms in a contract in 'his own right' if the contract between the promisor and the promisee expressly provides that a third party shall have a right conferred on it.[1037] However, this is only possible if the third party is identified with sufficient clarity or by name, class (e.g. stevedores, non-maritime carriers and warehouses) or description.[1038] English law recognized the stipulation in favour of a third party when the Act was enforced. There are, however, exceptions to this right of a third party to enforce a contractual term to his benefit. The exception of contracts of carriage of goods by sea is extremely relevant in this context. Although contracts of carriage by sea[1039] are excluded from the scope of application,[1040] the English legislator regulates 'Himalaya clauses' in the Act.[1041] The Explanatory Notes to the Act states:

> 'Subsection (5), which excludes certain contracts relating to the carriage of goods, nevertheless does not prevent a third party from taking advantage of a term excluding or limiting liability. In particular, this enables clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by the sea to servants, agents and independent contractors engaged

1032. This principle can be illustrated by House of Lords, Midland Silicones Ltd. v. Scruttons Ltd. [1961] 2 Lloyd's Rep. 365. In this case a contract was concluded between a cargo owner and a carrier and a second contract between the carrier and a stevedore. The stevedore could not rely on the contract between the carrier and cargo owner because it was not a party to that contract nor on the contract between the stevedore and the carrier since the cargo owner was not a party to that contract.
1033. Chitty 1 (2015), nr. 4.001-4.003.
1034. House of Lords, Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co. Ltd [1915] A.C. 847 at 853. Viscount Haldane stated: 'My lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract'.
1035. Following section 1(6) this also includes 'negative rights' such as exclusions and limitation clauses.
1036. Terms to the detriment of third parties are restricted by section 2 of the Act.
1037. Section 1(1)(a).
1038. Section 1(1)(1)(B) and 1(3).
1039. A 'contract for the carriage of goods by sea' is defined as a contract either 'contained in or evidenced by a bill of lading, seaway bill or a corresponding electronic transaction' (section 6(6)(a)) or one 'under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction' (section 6(6)(b)).
1040. Contract for the carriage of goods by sea are excluded in order to exclude contracts covered by the Carriage of Goods by Sea Act 1971.
1041. Section 6(5) of the Contracts (Rights of Third Parties) Act 1999 provides: 'Section 1 confers no rights on a third party in the case of — (a) a contract for the carriage of goods by sea, or (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention, except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.'

> in the loading and unloading process to be enforced by those servants, agents and independent contractors (so called 'Himalaya' clauses).'

Liability exclusions and limits of liability in contracts of carriage by sea for the benefit of stevedores can therefore be considered a 'major exception to the exception'[1042] and are within the scope of application of the Act.[1043] Following this, the terminal operator under discussion who is employed by a main contractor and who is responsible for the goods as an inland carrier, depositary or stevedore can rely on limits of liability or exemptions from liability contained in the main contract. These clauses therefore have external effect to the benefit of the terminal operator. In the next paragraph, two clauses which are often used in maritime settings for the protection of terminal operators will be discussed.

9.5.2 Third party effect of contractual clauses: Himalaya clause

In addition to relying on the terms in a terminal operator's contract through the doctrine of sub-bailment (on terms), which will be discussed in the following paragraph, a terminal operator employed by a main contractor can avoid full liability when faced with extra-contractual claims by seeking the protection of clauses in the main contract (of carriage). There are two clauses which are often used for the benefit of terminal operators; i.e. the 'Himalaya Clause' and the 'Circular Indemnity Clause'. For the latter I refer to paragraph 9.2. This paragraph discusses the Himalaya clause under English law.

English law was initially somewhat reluctant to acknowledge the 'Himalaya clause' as it was not familiar with the stipulation for the benefit of third parties before the introduction of the Contracts (Rights of Third Parties) Act in 1999. In *Midland Silicones Ltd,* Lord Reid developed the 'agency theory' in an attempt to circumvent the doctrine of privity of contract and permit stevedores to benefit from a contract to which they were not party.[1044] He laid down four conditions which had to be met before a carrier could act as a stevedore's agent.[1045] A stevedore can rely on the terms set out in the contract of carriage if:[1046]

1. The bill of lading makes it clear that it intends to protect the stevedore by these terms.

1042. Tetley (2003), p. 44.
1043. For an overview of the impact of the Contracts (Rights of Third Parties) Act 1999 on the carriage of goods by sea I refer to Treitel (2000), p. 345-379; Carver (2011), p.472-479.
1044. House of Lords, Midland Silicones Ltd. v. Scruttons Ltd. [1961] 2 Lloyd's Rep. 365.
1045. According to Tetley there are actually five conditions. The fifth one is that the Bills of Lading Act 1855 applies, which has been replaced by the Carriage of Goods by Sea Act 1992. Tetley (2003), p. 44.
1046. House of Lords, Midland Silicones Ltd. v. Scruttons Ltd. [1961] 2 Lloyd's Rep. 365 at 374: 'I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bill of Lading Act, 1855, apply.'

2. The bill of lading makes clear that the carrier contracts for these provisions on his own behalf and also on behalf of the stevedore.
3. The carrier has authority from the stevedore or later ratification is possible.
4. There are no difficulties about consideration.

The first two conditions are merely formal requirements that depend on the formulation of the clause.[1047] The third condition, agency, can easily be established if there is a link between the stevedore and the carrier.[1048] In the absence of this link, the clause stipulates that 'the carrier is deemed to be acting as agent or trustee on behalf of its servants and agents.' Moreover, later ratification of authority would suffice.[1049] The main problem of the agency theory, however, was the lack of clarity about the fourth condition. What does the consideration moving from the stevedore to his third party actually consist of? This question was satisfactorily resolved in the case *The Eurymedon*[1050] where the four conditions were met. Here it was held that the loading and discharge operations by the stevedore could be considered as consideration, regardless of the fact that the stevedore might already be under an obligation to the carrier to perform these operations.[1051]

> Machinery that was carried from England to New Zealand in *The Eurymedon* was damaged by employees of the stevedore during the discharge operations. The contract of carriage between the shipper and carrier contained a Himalaya clause. The stevedore could successfully rely on the Himalaya

1047. Carver (2011), p. 456. A well-defined clause is essential for third parties to be able to rely on it. In *The Mahkutai* the Privy Council showed that there are limits to the doctrine especially when concerning jurisdiction clauses. In this case, the time charterer's bill of lading contained a jurisdiction clause on which the shipowner wished to rely. The Himalaya clause in this bill of lading extended to a certain group of third parties the benefit of 'exceptions, limitations, provisions, conditions or liberties *benefiting the carrier*' (emphasis added). As a jurisdiction clause does not benefit only one party, it was not covered by the Himalaya clause and could therefore not benefit the shipowner in this case. This shows that this decision can be circumvented by appropriate contract drafting. For that reason, the Himalaya clause should include a specific reference to the exclusive jurisdiction clause. Privy Council, The Mahkutai [1996] 2 Lloyd's Rep. 1. This case should be distinguished from The Pioneer Container case which dealt with the question of whether the bailor authorized the intermediate bailor to act on his behalf in agreeing with the relevant terms of the sub-bailment. The difference between the two cases is that The Pioneer Container dealt with the question to what extent there was authorization to contract on the terms of the sub-bailment, whereas The Makhutai focused on the scope of the Himalaya clause. See also: Gaskell, Asariotis and Baatz (2000), p. 400. Cf. Nossal (1996), p. 321-338.

1048. In *The Eurymedon* the stevedore was the parent company of the carrier. And in the *New York Star* the carrier owned 49 percent of the shares in the stevedoring company.

1049. It has to be borne in mind that the current situation is different as the Contract (Rights of Third Parties) Act 1999 enables third parties to take the benefit of exceptions and limitation clauses even in the absence of any agency arrangement.

1050. Judicial Committee of the Privy Council, The New Zealand Shipping Company Ltd. v. A.M. Satterthwaite & Company Ltd. [1974] 1 Lloyd's Rep. 534 (The Eurymedon). Furtermore: Powles (1997), p. 331-346.

1051. Judicial Committee of the Privy Council, The New Zealand Shipping Company Ltd. v. A.M. Satterthwaite & Company Ltd. [1974] 1 Lloyd's Rep. 534 (The Eurymedon). See also: Judicial Committee of the Privy Council, Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty. Ltd. [1980] 2 Lloyd's Rep. 317 (The New York Star) where the court held that the stevedore could take advantage of the Himalaya clause in the bill of lading before the delivery of the goods. This was further developed in the Privy Council, The Mahkutai [1996] 2 Lloyd's Rep. 1. It has to be borne in mind that the current situation is different as the Contract (Rights of Third Parties) Act 1999 enables third parties to take the benefit of exceptions and limitation clauses even in the absence of consideration provided by them.

> clause in the bill of lading as it satisfied the four conditions: (1) it provided a liability exclusion clause for servants or agents (including independent contractors) of the carrier (2) the clause was available to these persons (3) the carrier acted as agent or trustee for these person for the purpose of the clause (4) to this extent these parties should be deemed party to that contract. According to Lord Wilberforce the bill of lading 'brought into existence a bargain initially unilateral but capable of becoming mutual between the shipper and the [stevedore], made through the carrier as agent. This became a full contract when the [stevedore] performed the services by discharging the goods.'[1052]

It becomes clear that a contract is created when a subcontractor accepts the offer contained in the Himalaya clause for the performance of services for which he is engaged by the carrier. A direct contractual relationship is brought about between the shipper (or consignee if the rights have passed) and the subcontractor. The subcontractor is still third party to the contract of carriage which contains a Himalaya clause and becomes party to the separate 'Himalaya contract'.[1053] The 'Himalaya contract', to which the stevedore is party is not subject to the H(V)R as it is not a contract for the carriage of goods by ship and the stevedore is not a carrier.[1054] It is, however, controlled by the UCTA 1977.[1055] This Act subjects exception and limitation clauses to the test of reasonableness.[1056]

Third parties can only be protected by a Himalaya clause during the performance of obligations which are within the scope of the contract of carriage in which the clause is contained. This is illustrated by the case of *Raymond Burke Motors Ltd. v. The Mersey Docks and Harbour Co*[1057] where the loss occurred before the commencement

1052. Judicial Committee of the Privy Council, The New Zealand Shipping Company Ltd. v. A.M. Satterthwaite & Company Ltd. [1974] 1 Lloyd's Rep. 534 (The Eurymedon) at 538-539.
1053. Carever (2011), p. 453-454; Baughen (2013), p. 273.
1054. If art. III(8) HVR is not found to be applicable, as it only applies to clauses relieving 'the carrier or the ship', this separate Himalaya contract is controlled by the UCTA 1977. According to Baughen it follows from the Starsin case (House of Lords, Homburg Houtimport B.V. v. Agrosin Private Ltd. and others [2003] 1 Lloyd's Rep. 571 (The Starsin)) that the situation is only different if the subcontractor is the shipowner. In that case the Himalaya contract is subject to the H(V)R and a clause which relieves the 'carrier or the ship' would be rendered null and void. Baughen (2013), p. 273. Cf. Tetley (2003), p. 47.
1055. Baughen (2013), p. 271; Murdoch (1983), p. 661.
1056. Section 2 UCTA 1977: 'Negligence Liability: (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence. (2) In case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.' Section 3 UCTA 1977: 'Liability arising in contract. (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business. (2) As against that party, the other cannot by reference to any contact term — (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or (b) claim to be entitled — (i) to render a contractual performance substantially different from that which was reasonable expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.'
1057. Queen's Bench Division (Commercial Court), Raymond Burke Motors Ltd. v. The Mersey Docks and Harbour Co [1986] 1 Lloyd's Rep. 155.

of carriage under the bill of lading. The stevedore could therefore not rely on the terms of the contract of carriage contained in the bill of lading.

> Motorcycles stored in a storage facility awaiting transportation were negligently damaged by the stevedore during the discharge of a vessel, other than the one which was designated for the carriage of the motorcycles. The goods were to be shipped under a bill of lading containing a Himalaya clause to the benefit of the stevedore. The stevedore could not rely on the Himalaya clause as no act had yet been done which bore any relation to the contract of carriage (for the motorcycles). When the motorcycles were damaged, the stevedore was not performing any obligations under the contract of carriage and therefore the terms of the bill of lading did not apply. The damage occurred before the beginning of this contract which was identified as the despatch of the straddle carrier for the purpose of picking up the consignment.

This question was also dealt with in *The Rigoletto*[1058] where a similar situation arose. Judge Hallgarten reasoned as follows:

> 'As I see it, in the context of a Bill of Lading which contemplated no involvement on the part of the carrier with pre-loading operations, clause 2 [the before-and-after clause, SHLN] should be approached as a provision inserted out of an abundance of caution, so as to avoid any suggestion of the carrier being liable before the goods reach his province. But if — as in the present case — for whatever reason, directly or indirectly, the carrier, through independent contractors or otherwise, accepts super-added duties such as storage not within the scope of the Bill of Lading, I do not believe that there is any reason to extend the ambit of the exclusion clause to avoid his liability as a bailee. In those circumstances, I do not believe that SCH [the stevedoring company, SHLN] are protected by any provision of the Bill of Lading.'[1059]

This shows that the applicability of a Himalaya clause depends on the scope of the contract of carriage. A Himalaya clause does not apply if the loss of or damage to the goods occurs before or after the ambit of the contract of carriage. In *The Rigoletto* the scope of the contract evidenced by the bill of lading did not cover the pre-loading storage as the carrier was not responsible for this. In other words, the carrier has not taken over the goods for carriage. The terminal operator who performed the storage could therefore not obtain protection through the Himalaya clause. The same applied to the handling of the goods in the port of discharge.[1060]

1058. Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto).
1059. Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto).
1060. Judicial Committee of the Privy Council, Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty. Ltd. [1980] 2 Lloyd's Rep. 317 (The New York Star). The goods were misdelivered due to the negligence of the stevedoring company.

A terminal operator can rely on terms in a contract to which he is not a party if either the requirements of third-party enforcement laid down in the Contract (Rights of Third Parties) Act 1999 are met or if he shows that under the 'agency theory' the clause extends protection to him and enables him to invoke an exception to the doctrine of privity of contract.

9.5.3 (Sub-)bailment (on terms) and third parties

Bailment is a concept in common law unknown to civil law. It is a factual situation which occurs when physical possession of goods is transferred from the *bailor* to the *bailee*, who voluntarily accepts the common law duty of safekeeping.[1061] The bailee receives the goods for a particular purpose, such as transport or deposit. If this duty of safekeeping is breached, the bailee can be presented with a claim for compensation. A carrier and a depositary are typical bailees and there is therefore an additional basis for liability for damage to or loss of goods which does not exist in civil law countries. The bailment relationship between the bailor and the bailee is subject to the provisions in a contract known as *bailment on terms.* Bailment can be understood as regulatory law which gives way to a specific contract or statutory law. A classic form of bailment occurs when goods are carried under a contract of carriage or if goods are stored under a contract of deposit.

Thus, it is important to establish whether a bailment relationship is present as this would mean that the terminal operator owes a duty of care. A bailment relation in this case would depend to a large extent on the obligations performed by the terminal operator. If a terminal operator is responsible for goods as a carrier or as a depositary, then a bailment relationship can be said to generally exist. This however raises the question of whether a bailment relationship exists if the terminal operator acts as a stevedore for the loading and discharge.

Transfer of possession

A stevedore employed by a carrier for the performance of part of the contract of carriage cannot always be considered a sub-bailee. Although for a person to have possession it is not required that he has immediate physical custody of the goods as long as he has both the means and the intention of some immediate control, some cases in which a person has immediate physical control of goods do not give rise to bailment.[1062] There is no bailment relation if stevedoring services are limited to activities in which there is no voluntary transfer of possession. According to the Privy Council in the *Pioneer Container*[1063]

> '… a sub-bailee can only be said for these purposes to have voluntarily taken into his possession the goods of another if he has sufficient notice that a person other than the bailee is interested in the goods so that it can properly be said that (in addition to his duties to the bailee) he has,

1061. Palmer (2009), p. 379.
1062. Palmer (2009), p. 136-137.
1063. Privy Council, The Owners of Cargo lately on Board the Vessel K.H. Enterprise v. The Owners of the Vessel Pioneer Container [1994] 2 A.C. 324 (Pioneer Container) at 342.

> by taking the goods into his custody, assumed towards that other person the responsibility for the goods which is characteristic of a bailee'.

It is therefore doubtful whether the English law of bailment applies to the mere performance of the 'classic stevedoring duties' of loading and discharge.[1064] If goods are handled for a temporary purpose, the transaction is of a 'fleeting nature', and there is no transfer of possession, then the requirements under bailment are not met.[1065]

> In *Midland Silicones v. Scruttons,* the stevedore's duties were merely to remove goods from the sea carrier's compound after they had been discharged from the ship, in order to load them onto a truck hired by the head bailor. In that situation, possession was not transferred to the stevedore, the goods were merely handled for some temporary purpose and there was therefore no bailment relation.

However, if goods are at the terminal some days prior to the loading or after discharge, and there is a duty to take care of them, the stevedore is a (sub-)bailee under English law and can invoke the terms of his own contract.[1066]

> In the *Singer* case, a carrier took upon himself the obligation to crate and deliver a consignment of machines to several English ports for shipment to Brazil. One machine was handed over to the port authority who was contracted by the carrier for loading it onto a ship destined for Brazil. During the loading operations, the wooden box in which the machine was packed ruptured damaging the machine. The cargo interests, Singer, brought a tort claim against the port authority. According to the court, the carrier was (at least) impliedly authorized to engage in a sub-bailment on terms with the port authority with the result that Singer was bound by the terms and conditions of the port authority. The port authority could therefore invoke the limits and exonerations in his own terms and conditions. There was no direct contract between the cargo interests and the port authority as the carrier contracted as principal with the port authority.

Another example is provided by *The Rigoletto*.

> Some cars were stolen from a compound operated by SCH and owned by ABP, while they were being stored for a six-day period prior to being loaded onto the ship *The Rigoletto*. A claim was brought against both SCH

1064. Palmer (2009), p. 137, 1103.
1065. House of Lords, Midland Silicones Ltd. v. Scruttons Ltd. [1961] 2 Lloyd's Rep. 365 at 372. For the reference to the fleeting nature of the stevedore's handling of the drum I refer to Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto) at 539-540.
1066. Court of Appeal, Lotus Cars Ltd. and Others v. Southampton Cargo Handling Plc. and others and associated British ports [2000] 2 Lloyd's Rep. 532 (The Rigoletto) at 539-540; Queen's Bench Division (Commercial Court), Singer Co. (U.K.) Ltd. and another v. Tees and Hartlepool Port Authority [1988], 2 Lloyd's Rep. 164 (Singer).

and ABP. SCH received the goods at the compound from the owner Lotus, who issued a shipping note to SCH. However, whether the shipping note was considered a direct contract or evidence of bailment or bailment on terms was not clear in the decision.

It therefore follows that a terminal operator who carries goods or who stores goods in his terminal prior or subsequent to the transport and who is obliged to take care of them (subject to his conditions) has possession of the goods from the moment the goods are in his custody. In cases where the carriage or storage is supplemented by the loading and discharge from the vessel, the terminal operator also acts as a bailee.[1067] Contrary to this, no bailment relation exists if there is no transfer of possession, for example, if the terminal operator who is responsible for the goods as a stevedore is engaged to merely deliver the goods to the consignee.

Sub-bailment (on terms)

If a terminal operator is employed as a subcontractor, the question arises whether the bailor consented to the terms of the sub-bailment that exclude or limit the sub-bailees' liability for breach of this duty.[1068] If a bailor, e.g. a carrier, subsequently puts the goods at the disposal of his bailee, e.g. a terminal operator, so that the terminal operator can perform obligations under the contract of carriage and there is a contract between the carrier and the terminal operator, then a special construction known as a *sub-bailment on terms* exists. If sub-bailees are involved, the initial bailor has to take account of the contractual terms of any sub-bailment. The sub-bailee can rely on these terms if faced with a claim from the initial bailor if the bailor expressly or impliedly (or even ostensibly) agreed to the creation and terms of the sub-bailment relation. In other words, the terms and conditions cannot be relied upon by sub-bailees if the bailor was unwilling to employ sub-bailees on those terms. The stevedore, as a subcontractor, may be entitled to the benefit of terms in the sub-contract through the doctrine of sub-bailment on terms. If a cargo claim is brought against the terminal operator, these terms can only be invoked if the cargo owner, who is the initial bailor, consented to the terms of the sub-bailment. The mere consent to the creation of the sub-bailment and to the possession of the goods by the sub-bailee is not sufficient as the cargo owner can only be bound by the terms of the sub-bailment if he consented to them. This was decided by the Privy Council in the case the *Pioneer Container.*[1069]

1067. Baughen (2013), p. 277, fn. 44.

1068. The two duties of a bailee are to take reasonable care of the goods and to return them to the bailor or his order on demand or in accordance with the terms of the bailment. This duty of care of a bailee exceeds the duty of care of a non-bailee in tort. With a tort of negligence, there is a duty not to damage goods, whereas the bailee owes a duty to protect the goods from damage or loss. See: Chitty 2 (2012), p. 221-222.

1069. The Privy Council, The Owners of Cargo lately on Board the Vessel K.H. Enterprise v. The Owners of the Vessel Pioneer Container [1994] 1 Lloyd's Rep. 593 (The Pioneer Container) at 605: 'Their Lordships start, of course, with the position that, under cll. 6 and 4(1) of the Hanjin and Scandutch bills of lading respectively, there was vested in both Hanjin and Scandutch a very wide authority to sub-contract the whole or any part of the carriage of the goods 'on any terms'. As the subcontracting of any part of the carriage will ordinarily involve a bailment (or a sub-bailment) to that carrier, it must follow that both the Hanjin and Scandutch plaintiffs had expressly consented to the sub-bailment of their goods to another carrier on any terms. It further follows that there is no

> Parties interested in cargo on board the K.H. Enterprise brought an action before the Hong Kong courts which led to the arrest of its sister ship the Pioneer Container. The K.H. Enterprise and the goods carried on board were lost after a collision on a journey from Taiwan to Hong Kong. The defendants applied for a stay of action on the grounds that the goods were carried under a bill of lading which contained an exclusive jurisdiction clause stating that disputes were to be determined in Taiwan. A group of claimants objected to being bound by this exclusive jurisdiction clause as they had employed another carrier, Scandutch, who subcontracted to the defendants. The defendants could therefore be considered the performing carrier to whom goods had been bailed by the contracting carrier. The court determined that the cargo owners were bound by the terms of the sub-bailment when they consented to them. Following this, consent could be found in the sub-contracting clauses in the bills issued by the contracting carriers. The sub-contracting clauses show a wide authority given to the contracting carriers to sub-contract 'on any terms'. The cargo owners were therefore bound by the terms of the bill of lading of the K.H. Enterprise.[1070]

In the *Pioneer Container,* the court held that the cargo owner, as bailor, had expressly authorized the sub-bailment on terms, and was therefore bound by the terms of the sub-bailment.[1071] However, express authority is not always required. Authority can also be impliedly or even ostensibly given.[1072] In the case *Sonicare International Ltd. v. East Anglia Freight Terminal Ltd.*[1073] the court found there had been implied consent, which was sufficient for the warehouse company to be able to rely on standard terms against the cargo owner.

> In the *Sonicare* case, a bill of lading holder brought a claim against a warehouse company. The warehouse company employed by a ship owner to store cargo at the port of discharge was, in turn, employed by a contrac-

---

questin of no question of implied consent in the present case. The only question relates to the scope of the express consent so given.'

1070. This is in line with the judgment of Lord Denning MR in the case: Court of Appeal, Morris v. C.W. Martin and Sons Ltd. [1966] 1 Q.B. 716 (Morris v. Martin) and it disapproved the reasoning of Donaldson J in Queen's Bench Division (Commercial Court), Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd. and International Express Co. Ltd. [1976] 2 Lloyd's Rep. 215 where it was held that the consent between the bailor and the bailee was only relevant, and that when the bailee is authorized to create a sub-bailment the head bailor is bound by the terms of the sub-bailment; i.e. the head bailor will be subject to all the terms of the sub-bailment without limits.

1071. This is a different question that the one in Privy Council, The Mahkutai [1996] 2 Lloyd's Rep. 1, where the question was whether a sub-contracting carrier could take advantage of an exclusive jurisdiction clause in a contract to which he was a third party pursuant to a Himalaya clause in that contract. The Mahkutai deals with the situation where a third party became entitled to the benefit of the contract whereas in the Pioneer Container the third party became bound by the contract. This is referred to as 'the doctrine of bailment on a third party's terms' as opposed to 'the doctrine of sub-bailment on terms' in: Bugden and Lamont-Black (2013), p. 370-371.

1072. The Privy Council, The Owners of Cargo lately on Board the Vessel K.H. Enterprise v. The Owners of the Vessel Pioneer Container [1994] 1 Lloyd's Rep. 593 (The Pioneer Container) at 342. Furthermore: Gaskell, Asariotis and Baatz (2000), p. 398.

1073. Central London County Court (Business List), Sonicare International Ltd. v. East Anglia Freight Terminals Ltd. and others and Neptune Orient Lines Ltd. (Third Party) [1997] 2 Lloyd's Rep. 48 (Sonicare).

> ting carrier for the performance of carriage. The warehouse company sought to invoke standard terms limiting its liability as agreed between the warehouse and the ship owner. It was found that there was no direct or implied contract (Brandt. v. Liverpool contract[1074]) between the cargo owner and the warehouse. However, there was a bailment relation, even though the cargo owner was not the original bailor, but a successor. According to the court, the cargo owner had impliedly consented to the terms of the contract between the warehouse and the ship owner when the following factors were taken into account. (i) The cargo owner had a primary remedy against the contracting carrier who remained primarily liable for the custody of the goods; (ii) the terms did not impose uncovenanted burdens; (iii) the terms were in widespread use; (iv) the possibility of sub-bailment to the warehouse company was predicted; (v) there was no evidence that the cargo owners would have objected to the terms; (vi) any officious bystander would have been pleased with the terms of the sub-bailment as the contracting carrier remained primary liable; (vii) the cargo interests were not exposed to any additional liability and (viii) the cargo insurance would not be impaired.[1075]

Following this, the owner of goods can be bound by the terms of the sub-bailment if he consented and authorized the sub-bailment on those terms. Sub-contracting to third parties on any terms is therefore often expressly stipulated in contracts of carriage. The clause may be constructed as: 'The carrier (or any of its subcontractors) may sub-contract all or part of their obligation hereunder on any terms whatsoever.'

A stevedore will most likely be sued as a bailee if goods are lost or damaged in his custody in the port of loading. This is because, in general, only an original bailor can sue in bailment. In the port of unloading, however, the person entitled to possession will most likely not be the original holder of the bill of lading. In that case, the successor in title can only sue the stevedore as a bailee if the carrier has attorned to it by some act acknowledging that it now owes its duties as bailee to that new party.[1076]

To sum up, under English law, a terminal operator can be protected against extra-contractual claims from third parties if he acts as an independent subcontractor.

1074. Court of Appeal, Brandt v Liverpool Brazil & River Plate Steam Navigation Co Ltd. [1924] 1 K.B. 575 (Brandt v. Liverpool).

1075. Similar reasoning can be found in Queen's Bench Division (Commercial Court), Singer Co. (U.K.) Ltd. and another v. Tees and Hartlepool Port Authority [1988], 2 Lloyd's Rep. 164 (Singer) at 168 where Steyn J found: 'But I am also satisfied, on the evidence, that by entrusting to Bachman the package of services involving the crating and delivering of the machines to the ship, Singer (UK) conferred implied authority on Bachman to create a sub-bailment upon terms which included the port authority's general conditions. This view is reinforced by the fact that Bachman's conditions, which governed the contract between the plaintiffs and Bachman, contained an exception clause (cl. 14), which was wider in ambit than the port authority's cl. 24, and a limitation provision (cl. 15) which was identical to the port authority's cl. 26. Moreover, Mr. J. Proteous, who was the finance manager of Singer (UK) at the relevant time, agreed that Singer (UK) would have been aware that the goods would be delivered to the port authority which accepted goods on its own terms and conditions.'

1076. Baughen (2013), p. 281.

Subject to conditions, a terminal operator can rely on the contract concluded by him pursuant to the doctrine of sub-bailment on terms or by benefitting from terms, in a contract to which the terminal operator is a third party (e.g. the contract of carriage evidenced in a bill of lading). This may result in a stevedore being entitled to rely on the exceptions and limitation in the contract of carriage pursuant to a Himalaya clause in the bill of lading and, at the same time, to relying on the stevedoring contract pursuant to the doctrine of sub-bailment on terms. In situations like this, the presence of a Himalaya clause does not preclude a stevedore from relying on the terms of a sub-bailment. A stevedore is then able to rely on either of the two regimes.[1077]

9.6 Belgian law

In Belgium, a terminal operator's legal position is fundamentally different from most neighbouring countries. Under Belgian law, a terminal operator enjoys, in principle, 'quasi-immunity' from extra-contractual liability claims resulting from damage to or loss of goods. This can, however, be different if the terminal operator is responsible for goods as a carrier when Belgian or international transport law is applicable.

9.6.1 Quasi-immunity

This quasi-immunity of terminal operators does not follow from the Belgium Maritime Law ('*Zeewet*'), but is derived from a general principle of the Belgian law of obligations; i.e. the immunity of performance agents developed in Belgian case law. Belgian Maritime Law does not provide a specific rule for terminal operators, but deals with the sea carrier's liability for handling goods in the port. Like the Hague (Visby) Rules, 'carriage of goods' is understood as the period from the time the goods are being loaded to the time they are being discharged from the ship. The sea carrier's mandatory period of liability under Belgian law is therefore also from 'tackle-to-tackle'. The sea carrier is under the obligation to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. Before-and-after clauses, which limit or exclude the carrier's liability before loading and after discharge, are permitted.[1078] The contract for handling cargo or inland transport concluded between a terminal operator and a sea carrier is not subject to Belgian Maritime law.

1077. Lord Goff of Chievely stated in the *Pioneer Container*: '[Their Lordships] are satisfied that, on the legal principles previously stated, a sub-bailee may indeed be able to take advantage, as against the owner of the goods, of the terms on which the goods have been sub-bailed to him. This may, of course, occur in circumstances where no "Himalaya" clause is applicable; but the mere fact that such a clause is applicable cannot, in their Lordships' opinion, be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner of the goods. If it should transpire that there are in consequence two alternative regimes which the sub-bailee may invoke, it does not necessarily follow, if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods: see Mr. A.P. Bell's "Sub-bailment on terms," Ch. 6, p. 178-180, of Palmer and McKendrick, Interest in Goods (1993). Their Lordships are therefore satisfied that the mere fact that a "Himalaya" clause is applicable does not of itself defeat the shipowner's argument on this point.' The Privy Council, The Owners of Cargo lately on Board the Vessel K.H. Enterprise v. The Owners of the Vessel Pioneer Container [1994] 1 Lloyd's Rep. 593 (The Pioneer Container) at 344.

1078. Art. 91 § 7 Zeewet.

If goods are damaged or lost while located in the port area awaiting transportation, the cargo interests often have to deal with a liability gap. If goods are damaged or lost due to the actions of a terminal operator, it is practically impossible for the cargo interests to claim damages from the sea carrier or from the terminal operator. The former because before-and-after clauses are often included in contracts and are permitted, and the latter because of the famous *Müller-Thomson*-case.[1079] This case dealt with the concurrence of contractual and extra-contractual claims and answered the question of whether an independent contractor who causes damage during the performance of contractual obligations can face an extra-contractual claim from his principal's (usually the sea carrier) contracting party (usually the cargo interests).

> The *Müller-Thomson* case revolves around a hydraulic machine packed in a wooden crate. The machine sustained damage as it crashed onto the Antwerp quay during loading operations when the performance of the contract of carriage by sea had already commenced. A stevedore employed by a carrier pursuant to a contract of carriage by sea committed an error during loading operations. The Belgian Court of Cassation developed a two-step approach. As a first step, the court considered that an independent contractor employed by a carrier for the performance of whole or of part of a contract of carriage is neither a contracting party, because he is not bound by contract, nor a third party regarding the contracting party of the carrier and with respect to a particular contract of carriage. As a second step, this independent contractor, who is no true third party to the claimant, can only face an extra-contractual claim if the concurrence of a contractual and an extra-contractual claim is possible. This would only be possible if the conduct which caused the damage, were not in breach of a contractual obligation, but of an obligation imposed on each and every one and if the fault caused damage which consisted of more than the type of damage which could be caused by a mere breach of contract.[1080]

Although the court leaves some room for extra-contractual claims against independent contractors, the restrictive requirements are almost impossible to fulfil.[1081] Terminal operators therefore enjoy quasi-immunity from cargo claims. As a result of this, cargo interests cannot, in general, bring extra-contractual cargo claims against terminal operators. Moreover, if loss or damage occurs before loading or after discharge, a cargo claim can also not be brought against the sea carrier who

1079. Hof van Cassatie 7 December 1973, ETL 1974, 534 with commentary from M. Fallon.
1080. The court considers the following: '*dat de aangestelde of de uitvoeringsagent, die optreedt om een contractuele verbintenis van een partij uit te voeren, extra-contractueel enkel aansprakelijk kan worden gesteld indien de hem verweten fout de schending uitmaakt, niet van de contractueel aangegane verbintenis, doch van een ieder opgelegde verplichting, en indien die fout een andere dan een louter uit de gebrekkige uitvoering van het contract ontstane schade heeft veroorzaakt.*' This can be interpreted in different ways. See for an analysis of the '*verfijnings*' (refining) and '*verdwijnings*' (disappearing) doctrine: Claeys (2003), p. 152-160. Bocken and Boone (2010), p. 44.
1081. Heirbrant (2014), p. 113; Van Oevelen (2003), p. 168.

can rely on a before-and-after clause if inserted in the contract of carriage. However, if a sea carrier is liable, for example if loss or damage occurs during loading and discharge operations, this quasi-immunity does not affect a possible recourse claim by the sea carrier against the terminal operator.[1082] If recourse is sought, the terminal operator can rely on contractual terms and conditions concluded with the sea carrier.

9.6.2 Exceptions to the principle of quasi-immunity

The restrictive requirements imposed by the court for the concurrence of contractual and extra-contractual claims are not easily satisfied. Nevertheless, there are cases where it would be possible to bring an extra-contractual claim against a terminal operator. This could be if the terminal operator commits a criminal offence, such as theft.[1083] However, even here the cargo interests would face the difficult task of proving the causal connection between the criminal offence and the damage.[1084] A terminal operator only enjoys quasi-immunity from claims if they are brought by a person who is a contracting party of the terminal operator's principal.[1085] This could be if the cargo interests had a contract with the sea carrier who employed the terminal operator. If the claimant and the terminal operator do not have the same contracting party, the claimant is a true third party of the terminal operator. Then, extra-contractual claims would be permitted.[1086] However, if the terminal operator employs a subcontractor for the performance of its duties, this party is also protected, and it is then relevant whether the subsubcontractor undertook to perform duties of the claimant's (main) contract.[1087] A terminal operator only enjoys protection if damage occurs during the performance of obligations under the contract of carriage.[1088] If a terminal operator performs storage activities after the contract of carriage came to an end or before it commenced, the terminal

1082. Noels (2014), p. 625.
1083. Rechtbank van Koophandel Antwerpen 22 June 1992, *ETL* 1992, 74. The court is of the opinion that if a breach of contract is also a criminal offense the claimant has the option to choose between bringing a contractual and an extra-contractual claim.
1084. Vanhooff (1998), p. 123; Van Oevelen (2003), p. 170, 173.
1085. Hof van Cassatie 1 June 2001, *RW* 2001-2002, 379 with commentary from K. Broeckx. The court decided that if there is no contractual relation covering transport between a trailer owner and a sea carrier, the trailer owner can bring an extra-contractual claim against the terminal operator who is employed by the sea carrier. This shows that the terminal operator cannot invoke his quasi-immunity against a person suffering damage if that person is not a contracting party of a carrier (more specifically, the carrier who employed the terminal operator).
1086. Hof van beroep Antwerpen 16 October 2006, *RW* 2009-2010, 961. The court considers that '*De zogenaamde quasi-immuniteit van uitvoeringsagenten en hulppersonen geldt alleen wanneer zij worden aangesproken door de wederpartij van hun opdrachtgever. Hun buitencontractuele aansprakelijkheid is daarentegen onbeperkt ten aanzien van andere derden*'. (Freely translated: The so-called quasi-immunity of independent contractors only applies if a claim is brought by the contracting party of their principal. Their extra-contractual liability is, on the other hand, unlimited regarding other third parties.) In this case the FOB-seller could bring a tort claim against the terminal operator who was employed by the shipowner as the stevedore and FOB-seller did not share the same contracting party.
1087. Huyghe (2013), p. 1796-1797.
1088. If the stevedore loads a consignment of goods in the wrong vessel, this would not be considered a performance under a contract of carriage. In that case, the stevedore would not enjoy quasi-immunity. Rechtbank van Koophandel Antwerpen 19 March 1996, *RHA* 1996, 135. However, if the stevedore is also employed by the 'wrong vessel', the stevedore enjoys quasi-immunity. Rechtbank van Koophandel Antwerpen 13 June 1990, *RHA* 1992, 63.

operator could be held liable for the damage or loss of goods.[1089] However, storage activities in the sea port area are usually obligations under the contract of carriage, in which case there would not be a separate storage contract.[1090]

9.6.3 Quasi-immunity in related cases

The principle of a terminal operator's quasi-immunity can also be applied in other situations. Such situation could occur, for example, if a terminal operator damaged a vessel during loading and discharge operations. There is no contractual relation between the terminal operator and the ship owner if the terminal operator is employed by the charterer pursuant to a type of FIO-clause in a contract of affreightment.[1091] In the same way, there is usually no direct contractual relation between the terminal operator and the owner of an inland barge or another inland vehicle being loaded or discharged in a sea port area. If these vehicles are damaged during loading and discharge operations, the vehicle owner cannot bring a contractual claim against the terminal operator. The outcome of the case would then depend on whether the terminal operator were considered a true third party of the claimant.[1092] Following the reasoning of the court in the *Müller-Thomson*-case, there are situations in which the terminal operator would not be seen as a true third party of the vehicle owner. This could arise, for example, if the cargo interests, who concluded a contract of carriage by inland waterways with a barge operator, were under the obligation to load and discharge the barge. Cargo interests employ terminal operators directly or indirectly. If an inland barge sustains damage during loading or discharge operations, the terminal operator enjoys quasi-immunity.[1093] The owner of the vehicle can then only bring a claim against his contracting party (the cargo interests), who, in his turn, can bring a recourse claim against his contracting party (the terminal operator). The situation is similar for a claim brought by a ship owner for damage to a vessel during a maritime transport stage, when pursuant to a FIO clause, the cargo interests employ a terminal operator.[1094]

The motives behind quasi-immunity is that the claimant should not benefit from bringing a claim against a person who is employed by his contracting party for the performance of contractual obligations. Employing a specialized company for the performance of obligations should not make it possible for the claimant, in cases

1089. Hof van beroep Antwerpen 17 February 1982, *RHA* 1981-1982, p. 155 at 162-163. Vanhooff (1998), p. 123; Van Oevelen (2003), p. 174-175.
1090. The terminal operator is considered an independent contractor of the sea carrier performing obligations under the contract of carriage from the moment the goods arrive at the terminal. Rechtbank van Koophandel Antwerpen 9 January 1995, *ETL* 1995, 474. Furthermore: Roland (2003), p. 385.
1091. Vanhooff (1998), p. 118-119.
1092. Noels (2014), p. 622-628.
1093. Noels (2014), p. 622-628. This also applies to subcontractors who perform part of the obligations under the main contract. Second or third degree independent contractors also enjoy quasi-immunity. Furthermore, it is important that the terminal operator and the vehicle owner both have the same contracting party. If not, the terminal operator is a third party and therefore not protected when facing extra-contractual claims. If the terminal operator is employed by the FOB-seller and the owner of the inland barge by the FOB-buyer the terminal operator and the owner of the barge are third parties. In that case there would be no quasi-immunity. See also: Huyghe (2013), p. 1796-1797.
1094. Vanhooff (1998), p. 118-119. However, CLAEYS suggests that there are more conditions that should be met for quasi-immunity than this key condition of sharing the same contracting party. This would otherwise lead to unfortunate consequences: Claeys (2003), p. 191-192.

of damage, to circumvent his contracting party's contractual or statutory liability limits and exclusions to which he has agreed. These contractual limits and exclusions were negotiated between the contracting parties and circumventing the contract to the detriment of an independent contractor would disturb this contractual balance. It would not be correct for a claimant to be able to obtain higher compensation by bringing a claim against an independent contractor of his contracting party.[1095] Furthermore, quasi-immunity should not make it possible for a claimant to benefit from bringing an extra-contractual claim against his contracting party's independent contractor. Neither should his claim be to the disadvantage of the independent contractor involved. This is because terminal operators cannot rely on the contractual terms and conditions they have concluded with their contracting party for cases of extra-contractual claims. Terminal operators are therefore in a less advantageous position than when confronted with a claim from a contracting party. According to the Belgian court, cargo owners who seek recovery for damage should follow the contractual links. This would mean that both carriers and terminal operators are protected by the available statutory or contractual defences.[1096]

9.6.4 Future developments?

In recent years there has been some serious criticism about the principle of quasi-immunity. A proposal was brought forward to revise the Belgian Maritime Law in which the legal position of the terminal operators would undergo a fundamental transformation.[1097] However, the proposed revision which included a chapter on the 'cargo handler' ('*goederenbehandelaar*') met with such severe criticism that the chapter was reversed as this research was being completed. It seems that the legal position of terminal operators handling cargo remains unchanged under Belgian law.

Irrespective of the failed attempt to regulate the legal position of cargo handlers, it is valuable for research purposes to explore the criticism on the quasi-immunity of cargo handlers which exists in Belgium. The criticism centred on the lack of consistency with neighbouring countries and the observation that it is outdated. It was argued that the principle derived from the *Müller-Thomson* case, the port standards and the relevant Bill of Lading clauses, emerged within a fundamentally different legal and economic context. The factual and legal control exercised by terminal operators over terminal activities has altered. The liability gap to the disadvantage of cargo interests should therefore be considered outdated. There is also a lack of certainty over the exact scope of application of the principle resulting in fluctuating case law. This legal uncertainty on the duality of the stevedore's liability regime gave rise to a growing dissatisfaction among relevant industries and legal scholars.[1098] It was therefore decided that the quasi-immunity by which terminal operators are currently protected could not be maintained. The legislative

1095. Dirix (1984), p. 199.
1096. Noels (2014), p. 624.
1097. Van Hooydonk (2012), p. 102 ff.
1098. Van Hooydonk (2012), p. 108-109.

draft inserted a chapter on the 'cargo handler' ('*goederenbehandelaar*') in order to regulate the legal position of these independent contractors by law.

The draft chapter on cargo handling intended to put an end to the quasi-immunity of terminal operators. After weighing several possible solutions, preference was given to a specific integrated Belgian regulation concerning cargo handling operations. This liability regime for cargo handlers was based on and inspired by the OTT-Convention 1991 (not in force)[1099] and the French regulation on terminal operators. The liability regime could be characterized as a partly mandatory liability regime consistent with existing international (transport) regimes. It provided a legal framework for terminal regulations and described the rights and obligations of the parties to a contract for cargo handling. It furthermore regulated the cargo handler's liability for damage to and loss of goods as well as delay in their delivery. It also provided third parties with direct action against cargo handlers who could defend themselves by relying on several statutory transport neutral uniform exceptions. Moreover, it regulated the cargo handler's liability for damage to vehicles. Besides this, it regulated matters such as right of retention, time for suit and it covered, to a certain extent, matters of private international law.[1100] This draft chapter on cargo handlers has since been deleted. Thus, terminal operators handling cargo as performance agents are facing the prospect of being able to enjoy quasi-immunity under Belgian law in years to come.

9.7 Policy considerations

It is important to consider the terminal operators legal position towards third parties during the performance of his contractual obligations. A terminal operator is often employed as an independent subcontractor for the performance of a wide range of services. If damage occurs while he is performing these contractual obligations, the terminal operator can face extra-contractual claims brought by third parties. International transport law conventions and national law may impose rights and obligations depending on the capacity in which the terminal operator acts, whether as carrier, service provider or depositary. In some cases a terminal operator is provided with the right to invoke (contractual) defences to avert (full) liability. The question arises as to the extent to which terminal operators should be held liable towards third parties.

On the one hand, performance agents, i.e. independent subcontractors, should not be held extra-contractually liable by third parties as this would disturb the contractual balance in the logistic chain. Following this, third parties, such as cargo interests or vehicle owners who are not in a contractual relation with the terminal operator, should be barred from bringing extra-contractual claims to the terminal operator. The reason for this is that these parties and the terminal operator are not complete strangers to each other, but are in fact indirectly connected with each other. The cargo interests have concluded a contract of carriage with a carrier who employed the terminal operator for the performance of cargo handling obligations in the

1099. See para. 8.4.4 on the OTT-Convention 1991.
1100. Van Hooydonk (2012), p. 153-154.

port. The same applies to the owner of an inland barge whose contracting party, the shipper under the contract of carriage, employed the terminal operator for loading and discharge. In the relation cargo interests — carrier and the relation inland barge owner — shipper agreements are made concerning the division of risks involved in cargo handling operations (main contract). Moreover, a similar agreement is also made in the relation between the carrier — terminal operator and shipper — terminal operator (subcontract). All parties in the contractual chain carefully assess the risks involved in the performance of the contract by the main contractor or his subcontractor(s).[1101] If a specialized company is employed for the performance of contractual obligations, this should not mean that these contractual agreements, e.g. liability limits and exclusions, can easily be circumvented. These contractual limits and exclusions were negotiated in order to allocate the risks between the contracting parties and circumventing the contract to the detriment of an independent subcontractor would disturb this contractual balance which is reflected in the handling costs and insurance premium. Contractual limits and exclusions also play a significant role here. These agreements enable the services provider to charge a low price for its services. It would be considered undesirable if bringing an extra-contractual claim against the independent contractor of a contracting party would make it possible for a claimant to obtain a higher amount in compensation than the amount which had been contractually agreed upon.[1102]

Furthermore, not only should the claimant not benefit from bringing an extra-contractual claim against his contracting party's independent subcontractor, but his claim should also not be to the disadvantage of the independent subcontractor involved. In cases involving extra-contractual claims, independent subcontractors can, in principle, not rely on the contractual terms and conditions they have concluded with their contracting party due to the principle of privity of contract. Independent subcontractors are therefore in a less advantageous position than when facing a claim from a contracting party. As for the terminal operator's liability to third parties, it would seem sensible for cargo owners or vehicle owners to seek recovery from damage by following contractual links.[1103] This is in line with the current view taken by Belgian law which upholds the principle of quasi-immunity where terminal operators can generally only face (recourse) claims from contracting parties. What is more, under English and German law, a semi-contractual path can be followed by parties in the logistic chain and a (semi-)contractual claim can be brought against the terminal operator, who in his turn can rely on the terms in its contract, pursuant the common law concept of sub-bailment on terms. The concept of *Vertrag zugunsten Dritter* or *Drittschadensliquidation* is applied in German law.

1101. Koller (2015), p. 416-417.
1102. Dirix (1984), p. 199. See also note 1 of the explanatory note to the OTT-convention 1991.
1103. See the declaration of Lord Goff in Privy Council, The Mahkutai [1996] 2 Lloyd's Rep. 1: 'In more recent years the pendulum of judicial opinion has swung back again, as recognition has been given to the undesirability, especially in a commercial context, of allowing plaintiffs to circumvent contractual exception clauses by suing in particular the servant and agent of the contracting party who caused the relevant damage, thereby undermining the purpose of the exception, and so redistributing the contractual allocation of risk which is reflected in the freight rate and in the parties' respective insurance arrangements'.

However, this view on following contractual links does not always adequately reflect the legal and factual context for cargo claims. When seeking compensation for damage, the fact that contractual links have to be followed often means that cargo owners cannot obtain any compensation. This is often the case for damage caused on a terminal before and after sea transport. This is because under H(V)R, the sea carrier can validly exclude liability for loss or damage caused when goods are in his custody before loading and after discharge (in before-and-after clauses). These clauses are, however, not commonly used in multimodal contracts of carriage. If the carrier cannot be held liable, the terminal operator will not face a recourse claim from the carrier. Hence, a terminal operator is not often held contractually liable. This would only be different if the carrier had no exemption from liability, if for example, damage was caused by negligent stowage, where the terminal operator would also not be exempted.[1104] Nevertheless, both the carrier and terminal operator would then, in principle, be able to rely on the limits of liability.

This by no means serves the interests of commerce as those who cause damage should be held responsible for it. If not, there will be little incentive for terminal operators to alter their practices and act carefully and cease negligent behaviour when performing their obligations. This coincides with the observation that those suffering damage are rarely (direct) customers of the terminal operator, whose commercial interests are not immediately at stake.[1105] The incidents which lead to damage or loss of cargo will therefore increase if stevedores and terminal operators who have the care and charge of the cargo are not held liable for damage or loss (moral hazard).[1106] Moreover, the factual control exercised by terminal operators over activities performed on the terminal has vastly increased over the last decades. International and European rules on safety procedures for ships and ports like the ISPS-code has ensured that terminals are tightly fenced and secured.[1107] Moreover, the customs authority exert considerable pressure on them. Terminal operators have strict control over goods located within the terminals. It therefore rests in their hands to exercise that control and to impose and monitor the compliance of high standards in order to decrease the number of incidents at the terminal. Studies have been conducted in the field of logistics and operation management on the relevant factors in order to reduce incidents at warehouses. These show that managers are most essential in this regard. A fact which suggests that the terminal operator's management can influence the number of accidents occurring on a terminal. [1108]

1104. House of Lords, Homburg Houtimport B.V. v. Agrosin Private Ltd. and others [2003] 1 Lloyd's Rep. 571 (The Starsin).
1105. Stevedores are traditionally employed by sea carriers as they are responsible for the loading and discharge under the Hague (Visby) Rules. Only where a type of FIO clause has been inserted into the contract of carriage, do the cargo interests employ stevedores.
1106. Tetley (2003), p. 44-45.
1107. The International Ship and Port Facility Security Code (ISPS-code) forms Chapter XI-2 of the Safety of Life at Sea convention 1974 (SOLAS convention). Other European instruments concerning the safety of ships and ports: Regulation 725/2004/EC on enhancing ship and port facility security; Directive 2005/65/EC expanding requirements for maritime security beyond the port facilities to cover the entire port area. Furthermore: Paschke (2017), § 498, Rn. 3.
1108. Koster, Stam and Balk (2011), p. 753-765.

A number of legislative attempts have tried to close the liability gap in recent years. First the carrier's liability beyond the tackles was brought into focus. The Hamburg Rules and the Rotterdam Rules (not in force) introduced mandatory rules which not only cover the tackle-to-tackle period, as do the H(V)R, but also the entire period that the carrier is in charge of the goods at the port of loading, the carriage and at the port of unloading. A carrier is therefore subject to mandatory rules when goods are in his custody during the entire performance of a port-to-port contract or during the maritime stage of a multimodal (perhaps door-to-door) contract. Moreover, the Rotterdam Rules also apply to the inland leg which, in addition to a maritime stage, forms part of a contract of carriage. This is a result of the convention's 'Maritime-Plus approach'.[1109] The mandatory provisions laid down in both conventions can therefore also apply to the obligations of the carrier for handling, storage and movements when the goods are awaiting transport or delivery at a terminal in the sea port area. This makes before-and-after clauses which exclude the carrier's liability during the performance of these obligations therefore null and void.[1110]

Moreover, the OTT-convention as well as the Rotterdam Rules, which are both not (yet) in force, deal with the liability of independent contractors like terminal operators. Those subject to these mandatory regimes can be faced with direct claims under these conventions if goods are damaged or lost. At the same time, statutory provisions benefitting the independent contractor like liability limits, exclusions or the time-bar can be used as a defence against cargo claims whether these are brought in contract or in tort. If these conventions enter into force, independent contractors whose acts are governed by these conventions will be in a similar position as carriers.

Furthermore, another solution to the problem of non-responsibility of carriers and independent contractors during the period before loading and after discharge could be achieved by national legal systems. As the maritime transport law convention which is currently in force in the jurisdictions under discussion, the H(V)R, does not cover this period, it is left up to the national law to complement this liability regime. This situation could be altered without having to abolish the current convention or to wait for the conventions to enter into force.[1111] The legislator could adopt rules which apply on a mandatory basis during the period that the goods are in the charge of the carrier in the port of loading or unloading. The H(V)R mandatory scope of application can, for example, be extended beyond the tackles or other provisions can be drafted to cover this period. In the United States of America, the Harter Act applies on a mandatory basis. Moreover, the proposed revision of the Belgian Maritime Law, which however failed in this respect, implemented a mandatory liability regime for cargo handling activities.[1112] The new

1109. Berlingieri (2009), p. 54-55; Eftestøl-Wilhelmsson (2010), p. 274.
1110. Art. 79.1 RR and art. 23.1 HRR. According to art. 12.3 RR, however, the parties to a contract can still agree to a certain extent on the moment of taking over and delivery, which can still affect the period of responsibility.
1111. Under Dutch law, art. 8:386 BW should be abolished. This is proposed in the Dutch proposal concerning the act implementing the Rotterdam Rules.
1112. Van Hooydonk (2012), p. 102 ff.

German Maritime Law puts to a stop the use of exoneration clauses ('*Landschadenklausel*'), as § 512 I HGB determines that these clauses can only have effect if individually negotiated between the parties to a contract of carriage. This would seem to be a fair, practical and commercial solution to hold independent subcontractors responsible for their acts and at the same time allow them to invoke liability limits or other defences in order to evade full liability which would be in accordance with the agreements made in the logistic chain.

9.8 Conclusions Part III

A terminal operator often finds himself, like a spider in a web, connected to a number of parties in a logistic chain. His legal position is not only determined by his relation with parties by whom he is employed or other contracting parties, but also by the position of third parties with whom he has no contractual relation. A terminal operator can be held extra-contractually liable towards third parties if damage occurs during his performance of contractual obligations (co-existence and concurrence of contractual and extra-contractual claims) depending on the national laws applicable. For a terminal operator to be held liable it should be possible to bring extra-contractual claims when contracts are involved under the national laws applicable. It should also be established whether the terminal operator fell short of a certain standard of care he owed the person suffering damage. If a terminal operator can be held extra-contractually liable towards third parties, the extent of his liability depends on the possibility of invoking (contractual) defences. The principle of privity of contract means that a contract is only binding upon those party to it. A third party can therefore, in principle, not be bound by or rely on a contract to which he is not party. Whether a terminal operator can rely on the defences available in international transport law conventions or under national law depends very much upon the capacity in which he acts; whether as a carrier, a stevedore or a depositary.

The terminal operator as a carrier

A terminal operator is responsible for goods as a carrier if he assumes the obligation to carry goods by road, rail or inland waterways between the sea port and inland terminals. He can perform these obligations as a main carrier by contracting directly with the cargo interests (or their forwarding agents) or as subcarrier when employed by a main carrier or other subcarrier in the logistic chain. The terminal operator can furthermore decide to employ other (sub)subcarriers for the performance of the carriage. If the terminal operator is responsible for the goods as a carrier, (mandatory) transport law rules are applicable. International transport law conventions govern the liability of contracting carriers and, in some cases, also the liability of actual carriers.[1113] If the notion of an actual carrier exists in an applicable convention, rights and obligations are not only imposed on the contracting carrier but also on persons to whom the performance of (part of) the carriage of goods is

1113. Art. 1.2 HHR; art. 1.6, 1.7 RR; art. 1.3 CMNI; art. 3(b) COTIF-CIM; art. 39 MC; art. 1 Guadalajara Convention. However, the concept of the actual carrier is covered by the term 'substitute carrier' under COTIF-CIM and under RR by the concept of the 'maritime performing party'.

entrusted. In that case, a direct claim can be brought to the main carrier and if loss, damage or delay occurs during the performance of carriage by the actual carrier, the claimant has an additional debtor. Moreover, a terminal operator who performs inland carriage by road or rail can possibly be subject to rules on successive carriage if additional requirements are fulfilled.[1114] If a terminal operator can be considered a carrier under transport law, he has the right to rely on defences, exonerations and limits of liability provided for in the conventions. These rules apply irrespective of the ground on which a claim is based and irrespective of whether a claim is brought by a contracting or by a third party.[1115] As a result of this, the terminal operator can invoke the defences found in international conventions, like limits of liability or limitation periods, when faced with extra-contractual claims from third parties.

Moreover, rules on a (sub)carrier's liability can also be found in some national transport law regimes. Unlike English law, Dutch and German law contain national transport law regimes determining the position of inland carriers and subcarriers who perform obligations under a contract of carriage. German transport law introduces the concept of a performing carrier. This performing carrier is subject to transport law and liable to the cargo interests for loss and damage (or delay in cases of non-maritime transport) which occur during his performance of carriage as if he were the contracting carrier. The performing carrier can therefore be faced with direct claims from parties to the main contract of carriage. Under Dutch transport law, however, no obligations are imposed on performing carriers and cargo interests are offered no right to bring direct claims against performing carriers. Whether a(n extra-contractual) claim can be brought to a performing carrier depends on the general law of obligations. Under Dutch and German law, carriers are protected from claims brought by third parties. This protection goes further than that offered to carriers under international conventions. International transport conventions, except the CMNI and Guadalajara Convention, do not offer the carrier the right to also invoke the terms of a contract of carriage. Dutch and German transport law, however, provides rules on the external effect of contractual terms.[1116] Therefore, carriers in the Netherlands and Germany are able to invoke terms of the contract of carriage as well as provisions found in national transport law regimes when facing claims from contracting or third parties. There are no such rules in English transport law but the common law concept of bailment can be applied for the carriage of goods. Under the law of bailment, the performing carrier can rely on the terms of the subcontract of carriage if the shipper (head bailor) bails the goods to the main carrier (bailee) who has authority to sub-bail the goods on those terms. This notion is also referred to as sub-bailment on terms.[1117]

1114. Art. 34 ff CMR; art. 26 COTIF-CIM.
1115. Art. IV bis HVR; art. 7.1 HHR; art. 4.1 (a) RR; art. 28.1 CMR; art. 22 CMNI; art. 41.1 COTIF-CIM; art. 29 MC. See also: art. 7 OTT.
1116. Art. 8:361-366 BW; § 434, 437 HGB and § 506, 509 HGB.
1117. Palmer (2009), p. 962.

The terminal operator as a service provider or depositary

In addition to being responsible for the goods as a (sub)carrier, a terminal operator to whom the performance of (part of) the contract of carriage is delegated can also be responsible for the goods as a service provider or depositary. Whereas international or national transport law regimes generally impose rights and obligations on (sub)carriers and protect them from liability in full when claims are brought by third parties, this is different when other independent subcontractors are involved. Independent subcontractors, like depositaries, stevedores and other service providers are excluded from the scope of application of international maritime transport under Art. IVbis (2) HVR. Under the Rotterdam Rules, those performing one or more of the carrier's main obligations in a maritime port or between two ports are governed by a uniform liability regime as the rules are applicable to those who fall within the definition of the 'maritime performing party'. Stevedores and depositaries who perform (part of) a carrier's obligation related to maritime transport in ports in contracting states can be covered by this definition. Direct claims can be brought under the convention against these stevedores and depositaries and these persons may, in their turn, rely on the defences and limits of liability provided by the rules.[1118] The Rotterdam Rules not only impose rights but also obligations on persons other than the contracting carrier. Moreover, the drafters of the failed OTT-convention aimed to subject operators of transport terminals to a uniform mandatory liability regime. The inland transport law conventions on carriage by road and rail protect an extensive group on the carrier's side. CMR and COTIF-CIM extend to all persons of whose services the carrier makes use of for the performance of carriage, the right to invoke defences if they act within the scope of their employment.[1119] Furthermore, the terms 'agents and servants' under CMNI are assumed to include independent contractors and no obligations are imposed on them. As a result of this, stevedores and depositaries employed by road, inland waterways or rail carriers for the performance of contractual obligations are protected by these conventions.

Furthermore, national law may also provide rules on the legal position of independent subcontractors towards third parties. From the analysis of the liability of the terminal operator (not being a carrier) it follows that all four jurisdictions; the Netherlands, Belgium, Germany and England adopted a different approach to the matter. In Belgium a terminal operator generally enjoys quasi-immunity from liability concerning cargo claims, claims for damage to vehicles and possibly other claims. An extra-contractual claim against performance agents can only be brought under very exceptional circumstances. Under German law, a terminal operator employed by a carrier for the performance of cargo handling obligations undertaken by the carrier (stevedoring services or deposit), can be considered a 'performing carrier',[1120] and is therefore subject to German transport law. Moreover, under German law, third parties can in certain situations, claim under the terminal operator's contract. In these cases, the terminal operator can rely on the (general) terms

1118. Art. 1.6, 1.7 and 19.1 RR.
1119. Art. 3, 28.2 CMR; art. 40, 41.2 COTIF-CIM. Cf. art. 17.1 CMNI where the term servants and agents is used.
1120. § 437 HGB and § 509 HGB.

and conditions of the terminal operator's contract. Under German law, general terms and conditions are subject to the content control of §§ 305-310 BGB. Under English law, a terminal operator's liability to third parties is often determined by the common law principle of bailment. Depending on the activities performed, a terminal operator can be considered a sub-bailee (on terms) which is why a terminal operator's contract, which is subject to the control of the UCTA 1977, can be invoked against the cargo interests (head bailor). In the Netherlands, on the other hand, third parties cannot claim under the terminal operator's contract. A terminal operator who is responsible for goods as a service provider can, in general, not rely on the terms of the terminal operator's contract against third parties as these do not have external effect. This is different, however, if the terminal operator is responsible for the goods as a depositary or carrier. The contract of deposit has external effect pursuant to art. 8:608 BW.

Moreover, if terminal operators are employed by the carrier for the performance of the carrier's duties under the contract of carriage, this carriage contract often contains clauses to the terminal operator's benefit; e.g. the Himalaya clause, the before-and-after clause and the Circular Indemnity clause. The latter clause tries to preclude direct actions against performance agents. The Himalaya clause places the terminal operator in the same position as the contracting carrier should direct actions be brought. The before-and-after clause exonerates the carrier from liability if loss or damage occurs while goods are in the carrier's custody in the period before loading or after discharge. This clause is valid under the H(V)R.[1121] The combination in a bill of lading of this exoneration clause with a Himalaya clause which extends the benefit of this clause to terminal operators, relieves these terminal operators of liability.

Policy considerations

There are a number of different views on whether third parties should be able to hold a terminal operator liable for damage which occurs during the performance of transport (related) obligations. On the one hand, performance agents, like stevedores and depositaries, should not be held extra-contractually liable by third parties as this would disturb the contractual balance in the logistic chain. All parties in the contractual chain should carefully assess the risks involved in the performance of the contract and adapt their contracts and insurance cover thereto. It would therefore not be a good idea if a claimant, who is also a party in the logistic chain, could circumvent the agreements made between the parties by bringing an extra-contractual claim against the terminal operator. According to this view, it would be better to follow the contractual links. However, when seeking compensation for damage following contractual links often means that the cargo owner does not obtain any compensation. Pursuant to a Himalaya clause and a Before- and After clause the terminal operator is often relieved of liability. In this way persons who cause damage often are not held responsible for it. A number of legislative attempts have tried to close this liability gap over the last years. Contrary to the

1121. Under German law, a before-and-after clause can only have effect in case it is individually negotiated between the parties to a contract of carriage, § 512 I HGB (see para. 9.2.2).

Hague (Visby)Rules, the Hamburg Rules and Rotterdam Rules extend their scope of application beyond the tackles. Some national legal systems too have attempted to adopt rules which apply on a mandatory basis during the period goods are in the charge of the carrier in the port of loading or unloading. Whereas the proposal to adopt a mandatory liability regime for cargo handling activities failed to enter into Belgian law, the new German Maritime Law stops (to a certain extent) the use of '*Landschadenklausel*' in § 512 I HGB , where it determined that these clauses can only have effect if individually negotiated between the parties to a contract of carriage. In this way, carriers, as well as the independent contractors who are offered the benefit of the contractual terms, can be held responsible, while at the same time liability limits or other defences can be invoked in order to evade full liability which is in accordance with the agreements made in the logistic chain.

Summary/conclusion

This study focuses on the liabilities of terminal operators who are integrating the inland transport of goods into their service profile which previously mainly included the handling of cargo in terminals. It covers the applicability of different legal regimes to a terminal operator's mixed contract for the performance of a variety of logistic obligations and analyses the legal risks and liabilities involved, especially those concerning the terminal operator's position towards third parties. In order to explore the options available to deal with the legal risks and liabilities, the study is divided into three parts. After a brief introduction in Chapter 1, the three chapters in Part I address the logistic concept and its legal framework. Chapter 2 provides background information on the logistic developments which have taken place in the last one and a half centuries leading to transport integration by terminal operators. Chapter 3 gives an overview of the relevant legal framework by exploring the legal regimes applicable to the nominate contracts of carriage, services and deposit. Chapter 4 assesses the extent to which the terminal operator and his customers can validly agree on a uniform contractual liability regime to cover this wide range of services and which fully conforms to the legal regimes discussed in Chapter 3. Part II is subdivided into two chapters and deals with mixed contracts. Chapter 5 discusses the theories on mixed contracts. Chapter 6 applies these theories to the position of a terminal operator performing the transshipment of goods. A distinction is made between the terminal operator in his traditional role and in his role as transport integrator. Part III consists of three chapters and focuses on the liabilities of a terminal operator towards third parties. Chapter 7 first explores the situations in which a terminal operator can face extra-contractual claims from third parties. In Chapter 8, the applicability of international (transport) law conventions and the position of the terminal operator when subject to these conventions is discussed. Chapter 9 discusses a terminal operator's liability to third parties under Dutch, German, English and Belgian law. Concluding remarks are made in the last paragraph of each part.

Part I discusses recent developments which have taken place around transport integration by terminal operators and explores the legal framework relevant to the contract in which a terminal operator assumes a variety of logistic obligations. A terminal operator is a logistic service provider who generally performs a wide range of services covering the transshipment of goods from one means of transport to another. These services include the taking over of goods, delivering on behalf of the (sea) carrier, loading, discharging, stowing and storing. In addition to providing these services within the premises of a terminal, some terminal operators have integrated the inland transport of goods into their services profile thus moving beyond the confines of the terminal. Terminal operators are able to use their strategic position in the supply chain to coordinate the transport of goods between the sea port and inland terminals. The large quantities of cargo which arrive at the

terminal can be efficiently bundled and transported by preferred means of transport, thereby contributing to the modal shift in a cost efficient manner. This integration of transport has some legal consequences, as the variety of services undertaken by a terminal operator fall into different categories of nominate contracts. These include contracts of services, contracts of deposit and contracts of carriage. These nominate contracts adhere to diverging legal regimes, which means that different rules may apply to these distinct obligations. One of the main differences between them is that a contract of carriage is generally subject to mandatory rules whereas the parties to a contract of deposit or services enjoy more freedom to contract on the terms they seem fit.

A terminal operator undertakes a wide range of services which adhere to different legal regimes and it can sometimes be difficult to determine the legal regime(s) applicable to each service. Terminal operators may wish to create a uniform contractual liability regime which would cover all services they perform and so avoid having to determine the scope of the applicable legal regimes and reduce transaction costs involved. The validity of such contractual regime depends on the ability to agree to terms which are not in conflict with the mandatory rules of applicable legal regimes. There are no difficulties with the legal regimes applicable to contracts of services and deposit as these contain no mandatory rules. On the other hand, mandatory transport law rules have to be taken into account for inland transport of goods. This is particularly important for carriage subject to international transport law conventions, and, to a lesser extent, to carriage subject to national transport law regimes.[1122] If inland transport law conventions, which differentiate between different modes of transport, are applicable, the freedom of contracting parties to adopt deviating contractual terms is restricted.

However, not all contracts of carriage are subject to these international transport law conventions. Whether these regimes are applicable for optional[1123] or multimodal contracts of carriage[1124] depends on the national court's interpretation of the scope rules of the conventions. The applicability of transport law conventions to optional contracts of carriage depends on the transport mode used for the performance of the optional contract of carriage when following the performance-related approach. Therefore, if the mode of transport has not yet been identified at the time the contract is concluded, it is unclear which transport law regime will ultimately govern the contract.

1122. English and German law have no diverging inland transport law regimes and under Dutch law more freedom exists for the contracting parties to deviate from the rules on road transport (in individually negotiated terms).

1123. Whether an optional contract of carriage, which can be defined as a contract in which the terminal operator undertakes the obligation to carry goods without indicating by which mode(s) of transport the carriage will be performed, is subject to the international transport law conventions depends on the national interpretation of the conventions' scope rules, i.e. whether these are performance-related or contract-related.

1124. It has been held by the *BGH* in BGH 17 July 2008, *TranspR* 2008, 365 and by the *HR* in HR 1 July 2012, ECLI:NL:HR:2012:BV3678, *NJ* 2012, 516 with commentary from K.F. Haak, *S&S* 2012, 95 (Godafoss) that a multimodal contract of carriage does not fall within the scope of application of CMR. CMR is therefore not autonomously applicable to the road stage of a multimodal contract of carriage.

This study compares the inland transport law conventions (CMR, COTIF-CIM and CMNI) in order to find a common ground to be able to create a valid uniform contractual liability regime. After analysing the distinct rules of these conventions on matters like the standard of care, exoneration grounds, liability limits and procedural matters it can be concluded that terminal operators are able, to a considerable extent, to agree on a uniform contractual liability regime in their contracts. However, no contractual limit of liability can be agreed on for the vital element of limits of liability which would not be in conflict with the mandatory rules of these conventions. These limits could, although rarely done in practice, be put aside by declaring the value of the goods in the transport document.

Part II focuses on mixed contracts. A terminal operator undertakes a wide range of services which fall into different categories of specific contracts for which the law provides specific rules (also referred to as 'nominate contracts'). This contract can be characterized as a mixed contract. A mixed contract is a contract which does not neatly fit into one category of nominate contracts which is why problems occur when determining the rules applicable to them. Legal literature distinguishes three doctrines, viz. the absorption doctrine, the sui-generis doctrine and the cumulation doctrine. None of these can be used in all situations and the use of these doctrines depends on the category of mixed contract at hand. Much depends on the way the contracting parties construct the contract. It would be advisable for the terminal operator to clarify the distinguishable elements in a contract and when they commence and end. The performance of carriage between two terminals can, for example, be absorbed into the more dominant obligation to deposit the goods,[1125] depending on the agreements between the parties.

When demarcating the legal regimes applicable to the contract whereby a terminal operator assumes the obligation to perform the transshipment it is possible to apply the theories to mixed contracts. Goods are moved from one means of transport to another during transshipment, e.g. they are discharged from a vessel and placed onto a truck for transport to the hinterland. It is important, first of all, to establish that the movement of goods within the premises of a terminal, e.g. the lifting of containers with a crane for the purpose of loading and discharge and the carriage of goods within the terminal between stacks and different means of transport, can generally be qualified as carriage of goods. A terminal operator is therefore responsible for this process as a carrier subject to transport law. This can be different if transshipment is undertaken in combination with other obligations like storage, carriage outside the terminal and freight forwarding. If another obligation constitutes the characteristic element under the contract, then transshipment is considered auxiliary and is absorbed into the more dominant obligation. If a terminal operator assumes the obligation to carry goods between two terminals he is responsible as a carrier and is subject to transport law.

Furthermore, it is important to determine the scope of application for transport law rules covering carriage of goods The scope of application of the mandatory lia-

1125. HR 28 November 1997, ECLI:NL:HR:1997:ZC2512, *NJ* 1998, 706 with commentary from J. Hijma, *S&S* 1998, 33 (General Vargas).

bility regime generally covers the time that goods are in the carrier's custody from the moment they are taken over for transport until they are delivered.[1126] One important exception is the H(V)R which apply from 'tackle-to-tackle'. The carrier takes over the goods when they are brought under his control and the goods are delivered when control passes to the consignee or a person acting on his behalf. Taking over and delivery are bilateral acts whereby one party surrenders control of the goods to the other party who accepts this control.[1127] The use of a document of title can restrict the contracting party's freedom to determine the moment of taking over and delivery. Moreover, it is also possible for the goods to be in the carrier's custody under another type of contract after delivery or before taking over.[1128] It is, therefore recommended for the contracting parties to include specific provisions determining the beginning and end of the contract of carriage.

Similar issues arise for cases of multimodal contracts. If goods are transported under a multimodal contract there may be some uncertainty over the demarcation of the different transport stages. Parties to a multimodal contract of carriage should therefore include well drafted provisions on the demarcation of regimes. This should be done very precisely in order to avoid gaps. The question arises whether (part of) the transshipment phase linking two transport stages is part of the transport stage preceding it or is it part of the one following it? This is not only relevant for the legal position of the multimodal carrier but also for the terminal operator performing the transshipment. If loss, damage or delay occurs during transshipment, the terminal operator facing an extra-contractual claim from a third party may want to rely on contractual clauses in the contract of carriage to which the claimant is a party. Concerning the liability exposure of the terminal operator it is important to determine whether the loss, damage or delay occurred during the maritime stage or at a stage preceding or following it.[1129] When attributing the transshipment to the transport stage preceding or following it, in the absence of agreements between the parties on this matter, it is advisable to let the transport stages under a multimodal contract of carriage coincide with the scope of the underlying unimodal contracts of carriage. If no such unimodal contracts are concluded, as the multimodal carrier could have performed or undertaken to perform the transshipment himself, the generally accepted views should be taken into account. If these points of reference cannot solve the problems, the rules on unlocalized loss under multimodal contracts of carriage can be analogously applied as it would then be unclear during which transport stage the loss, damage or delay occurred.

The terminal operator who performs or undertakes to perform the transshipment of goods as well as the inland transport stage, can, to a certain extent, avoid problems about the demarcation of legal regimes. This requires an agreement with the contracting party on the beginning and end of transport stages. With the exception

1126. See: art. 17.1 CMR; art. 18.1, 18.3, 18.4 MC; art. 23.1 COTIF-CIM; art. 3.1 CMNI art. 12 RR; art. 4 HHR. For Dutch transport law see: art. 8:21 BW.
1127. HR 17 February 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289 with commentary from K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy).
1128. HR 24 March 1995, ECLI:NL:HR:1995:ZC1677, *NJ* 1996, 317 with commentary from R.E. Japikse, *S&S* 1995, 74 (Mars).
1129. HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris).

of loading and discharging the sea vessel on behalf of the sea carrier, all other services which a terminal operator performs at a terminal, such as placing the goods in the stack, storage (and reshuffling) in the stack and loading and discharging the inland vehicles can be performed by the terminal operator as an inland carrier. A terminal operator therefore takes over goods in his capacity as an inland carrier when they are placed in the stack at the sea port terminal. This also applies if the terminal operator uses performance agents for the inland transport as he is responsible for transport as a (main) carrier. During this part of the transshipment, the terminal operator is therefore subject to inland transport law. This also coincides with the demarcation of transport stages under multimodal contracts of carriage. As a result of this, the terminal operator can either rely on the terms of the contract of carriage by sea which are to his benefit when performing stevedoring duties on behalf of the sea carrier, or he can rely on the inland transport contract (and the international or national transport law rules which are applicable to this contract) during the performance the inland carriage which covers part of the transshipment process.

Part III discusses terminal operators' liabilities to third parties. The terminal operator is often like a spider in a web, connected to a number of parties in the logistic chain. His legal position is not only determined by his relation with parties by whom he is employed or other contracting parties but also by the position of third parties who do not have a contractual relation with him. A terminal operator can be held extra-contractually liable towards third parties for damage that occurred during the performance of contractual obligations (co-existence and concurrence of contractual and extra-contractual claims) depending on the national law applicable. If a terminal operator can be held extra-contractually liable towards third parties, the extent of this liability depends on his ability to invoke (contractual) defences. The principle of privity of contract states that a third party cannot be bound by or rely on a contract to which he is not party. The application of defences available in international transport law conventions or under national law depends to a large extent on the capacity in which the terminal operator acts; whether he is regarded as a carrier, a service provider or a depositary.

If a terminal operator takes upon himself the obligation to carry goods within the terminal or between a sea port and an inland terminal, he is responsible for the goods as a carrier subject to transport law rules. The terminal operator is a main carrier when employed directly by the cargo interests and a subcarrier when employed by a main (multimodal) carrier. A terminal operator can furthermore employ sub(sub)carriers for the actual performance of the transport. If loss, damage or delay occurs to the goods during transport, the terminal operator may face claims for compensation from third parties. Whether defences against these claims are available depends on the applicable national or international transport law rules.

The international transport law conventions govern the liability of contracting carriers and in some cases also the liability of actual carriers[1130] and successive carriers.[1131] If a terminal operator can be considered a carrier under transport law, he has the right to rely on the defences, exonerations and limits of liability provided for in the conventions. These rules apply irrespective of the ground on which a claim is based and irrespective of whether a claim is brought by a contracting or a third party.[1132]

German and Dutch transport law furthermore also contains rules on the carrier's liability to third parties. German transport law introduces the concept of the performing carrier, who is subject to transport law and liable to the cargo interests as if he were a contracting carrier. Direct claims can be brought against the performing carrier for any loss, damage (or delay in case of non-maritime transport), which occurred during his performance of carriage. Under Dutch transport law, however, no obligations are imposed on performing carriers and no right exists to bring direct claim against a subcarrier. Under Dutch law, as well as under German law, carriers are protected from claims brought by third parties. The protection of (sub)carriers from extra-contractual claims under Dutch and German law goes beyond that offered to carriers under international transport law conventions (with the exception of CMNI and Guadalajara Convention). Dutch and German transport law provides rules on the external effect of contractual terms.[1133] The carrier may therefore also invoke contractual terms if extra-contractual claims are brought as well as being able to rely on the provision of the applicable transport law regimes. No such rules can be found in English transport law, but a similar result can be achieved with the common law concept of sub-bailment on terms.

If the terminal operator is responsible for the goods as a service provider or depositary, the liability towards third parties depends on the circumstances of the case. If the terminal operator is employed by a carrier for the performance of duties under a contract of carriage, his legal position might be determined by an international transport law convention. Some international transport law conventions extend the right to invoke defences to independent contractors used for the performance of the carrier's duties.[1134] Moreover, the Rotterdam Rules, which are currently not in force, introduce the concept of the maritime performing party in order subject those performing one or more of the carrier's main obligations in a maritime port or between two ports to the scope of the convention. This convention not only extends the right to invoke defences but also imposes obligations on the independent contractor against whom direct actions can be brought under the convention. The aim to subject operators of transport terminals to a uniform mandatory liability regime was also envisaged by the drafters of the failed OTT-convention.

1130. Art. 1.2 HHR; art. 1.6, 1.7 RR; art. 1.3 CMNI; art. 3(b) COTIF-CIM; art. 39 MC; art. 1 Guadalajara Convention. However, the concept of the actual carrier is covered by the term 'substitute carrier' under COTIF-CIM and under RR by the concept of the 'maritime performing party'.
1131. Art. 34 ff CMR; art. 26 COTIF-CIM.
1132. Art. IV bis HVR; art. 7.1 HHR; art. 4.1.a RR; art. 28.1 CMR; art. 22 CMNI; art. 41.1 COTIF-CIM; art. 29 MC. See also: art. 7 OTT.
1133. Art. 8:361-366 BW; § 434, 437 HGB and § 506, 509 HGB.
1134. Under art. IV bis (2) HVR independent contractors are explicitly excluded from the scope of application. Cf. art. 7 (2) HHR, 17.1 CMNI and art. 3, 28.2 CMR; art. 40, 41.2 COTIF-CIM.

National law may also provide rules on the legal position of independent subcontractors towards third parties. The four jurisdictions which are discussed adopted different approaches to this. Whereas under Belgian law performance agents generally enjoy quasi-immunity from liability, terminal operators under German, English and Dutch law can be held extra-contractually liable. Under German law, terminal operators employed by a carrier for the performance of the carrier's duties are subject to German transport law as they are considered 'performing carriers'.[1135] Moreover, under German and English law, certain third parties may claim under a terminal operator's contract. The terms of this contract are subject to the content control of §§ 305-310 BGB and UCTA 1977.[1136] This is, however, different under Dutch law. Third parties cannot claim under the terminal operator's contract and the terminal operator can generally not rely on the terms of its contract against third parties because these have no external effect. This is different, however, if the terminal operator is responsible for the goods as a depositary as the contract of deposit has external effect pursuant to art. 8:608 BW.

In order to avoid full liability for cases of extra-contractual claims by third parties, the contract between the person by whom the terminal operator is employed (usually the carrier) and his contracting party (usually the cargo interests) generally contains clauses to the terminal operator's benefit. These include the Himalaya clause, the before-and-after clause and the Circular Indemnity clause. Whereas the Circular Indemnity clause was created to preclude direct actions against performance agents, the combination of a Himalaya clause and a before-and-after clause often relieves the terminal operators of liability. Due to the limited scope of application of the H(V)R — from tackle-to-tackle — the carrier and therefore also those independent contractors which are provided the benefit of the before-and-after clause pursuant to a Himalaya clause are exonerated from liability if goods are lost or damaged while they are in the carrier's custody in the period before loading or after discharge. The cargo owner therefore does not obtain any compensation loss or damage which occurred at the terminal.

A solution to the problem of this liability gap requires legislative adaptions. The contractual balance in the logistic chain is disturbed when a claimant who is also a party in the logistic chain circumvents the agreements and brings an extra-contractual claim against a performance agent. It is desirable that a person who causes damage can be held responsible for it. This is in line with the different legislative attempts made in recent years. The Hamburg Rules and Rotterdam Rules have extended their scope of application beyond the tackles. Moreover, national laws have been developed to address the liability gap; the Belgian (failed) proposal concerning cargo handling activities and the new German Maritime Law which determines that a before-and-after clause can only have effect if individually negotiated between the parties to a contract of carriage. This way, carriers, as well as the independent contractors who are offered the benefit of the contractual terms, can be held responsible and at the same time liability limits or other defences can be invoked in

1135. § 437 HGB and § 509 HGB.
1136. Under Dutch law, terms of a contract can be held unacceptable according to the standard of reasonableness and fairness as codified in art. 6:248 (2) BW.

order to evade full liability which is in accordance with the agreements made in the logistic chain.

Samenvatting (Summary in Dutch)

Deze studie richt zich op de aansprakelijkheid van *terminal operators* die werkzaam zijn in hinterland netwerken. Deze *terminal operators* integreren tegenwoordig het vervoer van goederen tussen de zeehaven en het achterland in hun serviceprofiel dat voorheen hoofdzakelijk het behandelen van goederen op een terminal omvatte. Het onderzoek betreft de toepasselijkheid van verschillende juridische regimes op de gemengde overeenkomst voor een verscheidenheid aan logistieke verplichtingen en analyseert de juridische risico's en aansprakelijkheden, met name met betrekking tot de positie van de *terminal operator* ten opzichte van derden. De studie bestaat uit drie delen. Na een kort inleidend hoofdstuk 1 worden in de daaropvolgende drie hoofdstukken van deel I het logistieke concept en het juridische kader behandeld. Hoofdstuk 2 geeft achtergrondinformatie over de logistieke ontwikkelingen die zich in de laatste anderhalve eeuw hebben voorgedaan en die hebben geleid tot de vervoersintegratie door *terminal operators*. In hoofdstuk 3 wordt een overzicht gegeven van het juridische kader ten aanzien van een overeenkomst van opdracht, een bewaarnemingsovereenkomst en een vervoerovereenkomst. Hoofdstuk 4 beoordeelt vervolgens in hoeverre de *terminal operator* met zijn klanten een geldig uniform contractueel aansprakelijkheidsregime kan overeenkomen dat niet in strijd is met de in hoofdstuk 3 besproken juridische regimes. Deel II, dat onderverdeeld is in twee hoofdstukken, betreft gemengde overeenkomsten. In hoofdstuk 5 worden de theorieën die in de literatuur en rechtspraak bestaan over het bepalen van de toepasselijke regels op gemengde overeenkomsten besproken en in hoofdstuk 6 worden deze theorieën toegepast op de situatie waarin de *terminal operator* de overslag van goederen uitvoert in de zeehaven. Gedurende de overslag worden goederen verplaatst van het ene voertuig naar het andere. Er wordt onderscheid gemaakt tussen de *terminal operator* in zijn traditionele rol en in zijn rol als vervoersintegrator. Deel III, dat bestaat uit drie hoofdstukken, richt zich op de aansprakelijkheid van *terminal operators* ten opzichte van derden. Hoofdstuk 7 onderzoekt eerst in welke situaties de *terminal operator* kan worden geconfronteerd met buitencontractuele vorderingen van derden. Hierbij ligt de nadruk op de aansprakelijkheid van de *terminal operator* voor schade ontstaan aan schepen en de mogelijkheid om aansprakelijkheid uit te sluiten op terminalborden. In hoofdstuk 8 wordt de toepasselijkheid van de internationale (transport)verdragen besproken in het geval dat de *terminal operator* optreedt in zijn rol als (onder)vervoerder, opdrachtnemer en bewaarnemer. In hoofdstuk 9 komt vervolgens de aansprakelijkheid van de *terminal operator* ten aanzien van derden aan bod onder het Nederlandse, Duitse, Engelse en Belgische recht. De laatste alinea van elk deel bevat enkele slotopmerkingen.

Deel I geeft een overzicht van de recente ontwikkelingen die zich hebben voorgedaan met betrekking tot vervoersintegratie door *terminal operators* en het daarop toepasselijke juridische kader. Een *terminal operator* is een logistieke dienstverlener

die een verscheidenheid aan werkzaamheden verricht met betrekking tot de overslag van goederen. De diensten betreffen onder andere de inontvangstneming en aflevering van goederen namens de (zee)vervoerder en het inladen, uitladen, stuwen en opslaan ervan. Naast het uitvoeren van deze werkzaamheden op een terminal bieden sommige *terminal operators* ook het vervoer van goederen aan tussen terminals. Door gebruik te maken van zijn strategische positie in de *supply chain*, coördineert de *terminal operator* het goederenvervoer tussen de zeehaven en de achterland terminals. De grote hoeveelheid lading die op de terminal aankomt, kan efficiënt gebundeld en vervoerd worden door duurzamere vervoermiddelen zoals binnenschepen en treinen. Hiermee wordt op een kosteneffectieve manier bijgedragen aan de gewenste *modal shift*. Deze vervoersintegratie door *terminal operators* heeft juridische gevolgen, aangezien de werkzaamheden vallen onder verschillende benoemde overeenkomsten (overeenkomst van opdracht, bewaarneming en vervoer). Uiteenlopende regels zijn van toepassing op deze overeenkomsten. Een van de belangrijkste verschillen tussen deze overeenkomsten is dat een vervoerovereenkomst over het algemeen onderworpen is aan dwingendrechtelijke regels, terwijl de partijen bij een overeenkomst van bewaarneming of opdracht meer vrijheid hebben om voorwaarden overeen te komen die hen geschikt lijken.

Indien door een persoon een verscheidenheid aan werkzaamheden wordt verricht, kunnen vragen rijzen over de toepasselijkheid van bepaalde regels. Om juridische vragen en de daarmee gepaard gaande transactiekosten te vermijden, kan de *terminal operator* een uniform contractueel aansprakelijkheidsregime creëren dat al zijn werkzaamheden omvat. De geldigheid van een dergelijke contractuele regeling hangt af van de mogelijkheid om overeenstemming te bereiken over voorwaarden die niet in strijd zijn met de dwingendrechtelijke regels van de toepasselijke juridische regimes. Geen problemen bestaan als het gaat om de regels die van toepassing zijn op de overeenkomst van opdracht en bewaarneming, aangezien deze regimes geen dwingendrechtelijke regels bevatten. Als het daarentegen gaat om het vervoer van goederen, dan moet rekening worden gehouden met het dwingendrechtelijke vervoerrecht. Dit geldt met name voor internationaal vervoer geregeld in verdragen en in mindere mate voor nationaal vervoer.[1137] Ten aanzien van de internationale vervoersverdragen, die onderscheid maken tussen verschillende vervoersmodaliteiten, is de vrijheid van de partijen om afwijkende contractuele voorwaarden op te nemen, beperkt.

Niet alle vervoerovereenkomsten zijn echter onderworpen aan deze internationale vervoerrechtverdragen. De toepasselijkheid in het geval van optionele of multimodale vervoerovereenkomsten[1138] hangt af van de bepalingen betreffende de reikwijdte van de verdragen en de interpretatie daarvan door nationale rechters. Indien met betrekking tot optionele vervoerovereenkomsten de toepasselijkheid van de verdragen afhangt van de transportmodaliteit die wordt gebruikt tijdens de uitvoe-

1137. In Duitsland en Engeland bestaat geen dwingendrechtelijke vervoerswetgeving voor nationaal vervoer die een onderscheid maakt tussen verschillende landmodaliteiten en onder Nederlands recht kunnen partijen afwijken van de vervoerrechtregels (in individueel aangegane bedingen).

1138. Zie voor de toepasselijkheid van de CMR in het geval van multimodale vervoerovereenkomsten in Duitsland en Nederland: BGH 17 juli 2008, *TranspR* 2008, 365 en HR 1 juli 2012, ECLI:NL:HR:2012:BV3678, *NJ* 2012, 516, m.nt. K.F. Haak, *S&S* 2012, 95 (Godafoss).

ring van de overeenkomst, is ten tijde van het aangaan van de overeenkomst nog niet duidelijk welk verdrag uiteindelijk van toepassing zal zijn. Deze studie vergelijkt derhalve de verdragen inzake landvervoer (CMR, COTIF-CIM en CMNI) om na te gaan of een geldig uniform contractueel aansprakelijkheidsregime kan worden overeengekomen. Na het analyseren van de verschillende bepalingen van deze verdragen over onderwerpen zoals de mate van zorg die door de vervoerder moet worden betracht, ontheffingsgronden, aansprakelijkheidslimieten en procedurele aangelegenheden, kan worden geconcludeerd dat *terminal operators* in grote mate een geldig uniform contractueel aansprakelijkheidsregime in hun contracten kunnen opnemen. Betreffende het essentiële element van de aansprakelijkheidslimieten, verdient opmerking dat geen contractuele limiet kan worden overeengekomen die niet in strijd is met alle (mogelijkerwijs) toepasselijke verdragen inzake landvervoer. Hierbij dient echter te worden opgemerkt dat deze verdragen de mogelijkheid laten voor het opnemen van een verklaring omtrent de waarde van de goederen in het transportdocument.

Deel II richt zich op gemengde overeenkomsten. De *terminal operator* verricht een verscheidenheid aan werkzaamheden waardoor de overeenkomst die hierop ziet, voldoet aan de wettelijke omschrijving van meerdere in de wet benoemde overeenkomsten. De overeenkomst kan derhalve worden aangemerkt als een gemengde overeenkomst. Bij gemengde overeenkomsten kunnen problemen rijzen bij het bepalen van de toepasselijke regels. In de literatuur kunnen drie theorieën worden onderscheiden over de vraag hoe gemengde overeenkomsten moeten worden behandeld: de absorptietheorie, de *sui generis*-theorie en de cumulatietheorie. Geen van deze theorieën kan voor alle gemengde overeenkomsten gelden. Het bepalen van de toepasselijke regels hangt uiteindelijk af van de opbouw van het contract door de partijen en de vraag of verschillende overeenkomsten kunnen worden onderscheiden. Het is raadzaam voor de *terminal operator* om te verduidelijken wat de verschillende elementen in het contract zijn en tot op zekere hoogte wanneer de elementen aanvangen en eindigen. Afhankelijk van de afspraken tussen partijen kan bijvoorbeeld het vervoerelement tussen twee terminals worden geabsorbeerd door het meer dominante element betreffende de opslag van goederen.[1139]

De drie genoemde theorieën kunnen worden gebruikt bij het bepalen van de toepasselijke rechtsregels op de overeenkomst voor de overslag van goederen (*transshipment*). Containers worden bijvoorbeeld uit een schip gelost, verplaatst binnen de terminal en op een vrachtwagen geplaatst voor vervoer naar het achterland. Tijdens het lossen tilt de *terminal operator* de container met een kraan uit het schip en zet deze op de kade. Daarna brengt hij de container van de kade of een *stack* naar een voertuig waarmee de container naar het achterland wordt vervoerd. Het is allereerst belangrijk om vast te stellen dat het (horizontaal of verticaal) verplaatsen van goederen binnen een terminal kan worden aangemerkt als vervoer. De *terminal operator* kan om die reden verantwoordelijk worden geacht voor dit proces als vervoerder onder het vervoerrecht. Dit kan echter anders zijn indien de overslag wordt uitgevoerd in combinatie met andere verplichtingen, zoals vervoer (buiten de ter-

1139. HR 28 november 1997, ECLI:NL:HR:1997:ZC2512, *NJ* 1998, 706, m.nt. J. Hijma, *S&S* 1998, 33 (General Vargas).

minal), werkzaamheden die vallen onder een overeenkomst van opdracht, expeditie of bewaarneming. Indien de andere verplichtingen als het karakteristieke element van de overeenkomst kunnen worden beschouwd dan vindt absorptie plaats. Daarnaast geldt ook dat de *terminal operator* die de verplichting op zich neemt om goederen naar het achterland te vervoeren, verantwoordelijk is als vervoerder onder het vervoerrecht.

Hieruit volgt het belang van het bepalen van de temporele toepasselijkheid van de verdragen. De dwingendrechtelijke aansprakelijkheidsperiode van de vervoerder loopt vanaf het moment dat de goederen voor vervoer in ontvangst zijn genomen tot het moment dat deze zijn afgeleverd.[1140] Een belangrijke uitzondering zijn echter de Hague (Visby) Rules die de dwingendrechtelijke aansprakelijkheidsperiode van de zeevervoerder beperken tot de tijd 'verlopen van de inlading van de goederen aan boord van het schip tot de lossing ervan uit het schip' (*tackle-to-tackle*). In het algemeen worden goederen in ontvangst genomen door de vervoerder wanneer hij de macht verkrijgt over de goederen en aflevering geschiedt wanneer de vervoerder de macht over het vervoerde goed met uitdrukkelijke of stilzwijgende instemming van de geadresseerde opgeeft en deze in de gelegenheid stelt de feitelijke macht over het goed uit te oefenen. Inontvangstname en aflevering vereisen wilsovereenstemming.[1141] Het gebruik van een cognossement kan in een specifiek geval de vrijheid van de contractspartijen beperken om het moment van inontvangstname en aflevering overeen te komen. Bovendien is het mogelijk dat na aflevering of vóór inontvangstname goederen onder een andere overeenkomst dan de vervoerovereenkomst onder de vervoerder blijven berusten.[1142] Hieruit volgt dat het begin en einde van de periode van aansprakelijkheid niet altijd overeenkomt met de fysieke overhandiging van de goederen.

Soortgelijke vragen kunnen ook opkomen bij multimodale vervoerovereenkomsten. De overslag van goederen die worden vervoerd onder een multimodale vervoerovereenkomst kan leiden tot onzekerheid omtrent de afbakening van de verschillende 'delen van het vervoer' (oftewel vervoerstrajecten). De overslag zelf zal in het algemeen geen apart vervoerstraject vormen. De vraag rijst of (een deel van) de overslag behoort tot het vervoerstraject voorafgaand aan of volgend op de overslag. Dit is niet alleen relevant voor de juridische positie van de multimodale vervoerder, maar ook voor de *terminal operator* die de goederen overslaat. Indien de goederen tijdens de overslag verloren gaan of worden beschadigd, rijst de vraag of de *terminal operator* zich tegenover een derde door middel van een *Himalaya*-clausule kan beroepen op contractuele bedingen opgenomen in de vervoerovereenkomst. Het gaat dan bijvoorbeeld over exoneraties of aansprakelijkheidslimieten. Voor de afbakening van de verschillende vervoerstrajecten onder een multimodale vervoerovereenkomst kunnen partijen afspraken maken in de vervoerovereenkomst. Het verdient aanbeveling om daarover precieze afspraken te maken zodat er geen lacunes ontstaan. Bij een gebrek aan afspraken hierover kunnen verschillende inzichten een rol

1140. Zie: art. 17.1 CMR; art. 18.1, 18.3, 18.4 MC; art. 23.1 COTIF-CIM; art. 3.1 CMNI; art. 12 RR; art. 4 HHR. Zie ook: art. 8:21 BW.
1141. HR 17 februari 2012, ECLI:NL:HR:2012:BT8464, *NJ* 2012, 289, m.nt. K.F. Haak, *S&S* 2012, 60 (Tele Tegelen/Stainalloy).
1142. HR 24 maart 1995, ECLI:NL:HR:1995:ZC1677, *NJ* 1996, 317, m.nt. R.E. Japikse, *S&S* 1995, 74 (Mars).

spelen. In het algemeen kan worden opgemerkt dat de vervoerstrajecten onder een multimodale vervoerovereenkomst samenvallen met de aansprakelijkheidsperiode van de unimodale vervoerders in de onderliggende unimodale vervoerovereenkomsten. In het geval geen sprake is van dergelijke onderliggende unimodale overeenkomsten omdat de multimodale vervoerder zelf de verplichting op zich heeft genomen om de goederen over te slaan, dient acht te worden geslagen op de plaats van overslag. Overslag in een zeehaven wordt in dat geval bijvoorbeeld tot het zeevervoerstraject gerekend. Indien het voorgaande niet tot een oplossing leidt, kunnen de regels inzake ongelokaliseerde schade bij multimodale vervoerovereenkomsten analoog worden toegepast, aangezien onduidelijk is tijdens welk vervoerstraject de omstandigheid die heeft geleid tot het schadeveroorzakende feit is opgekomen. Ook bij het maken van afspraken hierover kan met deze inzichten rekening worden gehouden.

De *terminal operator* die verschillende verplichtingen op zich neemt, waaronder overslag en vervoer, zal in mindere mate met afbakeningsproblemen worden geconfronteerd. Behalve de verplichting om het zeeschip namens de zeevervoerder te laden en te lossen, kunnen de andere verplichtingen zoals het plaatsen van de goederen in de *stack*, de opslag, mogelijke *reshuffling* in de *stack* en het laden en lossen van andere voertuigen op de terminal, in het algemeen worden uitgevoerd door de *terminal operator* als landvervoerder. Bij het bepalen van het begin en einde van de vervoerstrajecten kunnen de partijen afspreken dat de aansprakelijkheidsperiode voor het landvervoer al begint nadat de goederen uit het zeeschip zijn gelost. Tijdens dit deel van de overslag wordt de juridische positie van de *terminal operator* derhalve beheerst door het vervoerrecht. Dit geldt ook voor de situatie waarin de *terminal operator* hulppersonen voor het vervoer naar het achterland gebruikt, omdat hij in dat geval is aan te merken als (hoofd)vervoerder. Bovendien valt dit samen met de afbakening van vervoerstrajecten onder multimodale vervoerovereenkomsten. Als gevolg daarvan kan de *terminal operator* zich ofwel beroepen op de bedingen in de overeenkomst voor het vervoer van goederen over de zee die ten behoeve van de *terminal operator* zijn opgenomen ofwel op de overeenkomst van landvervoer (en de internationale of nationale vervoerrechtelijke bepalingen die van toepassing zijn op die overeenkomst) tijdens het landvervoer dat tevens een deel van de overslag absorbeert.

Deel III gaat over de aansprakelijkheden van *terminal operators* jegens derden. De *terminal operator* is als een spin in het web verbonden met de partijen in de logistieke keten. Zijn rechtspositie wordt niet alleen bepaald door de relatie met contractuele wederpartijen maar ook door de positie van derden. Afhankelijk van het toepasselijke nationale recht kan de *terminal operator* aansprakelijk worden gesteld door derden in geval van schade tijdens de uitvoering van contractuele verplichtingen (samenloop van contractuele en buitencontractuele vorderingen). Indien de *terminal operator* aansprakelijk kan worden gesteld door derden, hangt de omvang van die aansprakelijkheid af van de mogelijkheid om een beroep te doen op wettelijke of contractuele uitsluitingen of beperkingen van aansprakelijkheid. In het algemeen is een partij alleen gebonden aan, en kan een partij alleen een beroep doen op, de overeenkomst waarbij hij partij is. Of een beroep kan worden gedaan op wettelijke of contractuele uitsluitingen of beperkingen van aansprakelijkheid hangt voorna-

melijk af van de rol die de *terminal operator* vervult; van vervoerder, van opdrachtnemer of van bewaarnemer.

De juridische positie van de *terminal operator* die de verplichting op zich neemt om goederen te vervoeren tussen de zeehaven en achterland terminals wordt beheerst door het vervoerrecht. De *terminal operator* als hoofdvervoerder of onder-vervoerder kan een onder-(onder-)vervoerder inschakelen voor de uitvoering van het transport. De internationale vervoerverdragen regelen de aansprakelijkheid van vervoerders en in sommige gevallen ook de aansprakelijkheid van de ondervervoerders[1143] en opvolgende vervoerders.[1144] Als vervoerder kan de *terminal operator* een beroep doen op de bepalingen van de verdragen die de aansprakelijkheid uitsluiten of beperken. Deze bepalingen zijn van toepassing ongeacht de rechtsgrond van de vordering en ongeacht of die vordering door een wederpartij of door een derde wordt ingesteld.[1145]

In de Duitse en Nederlandse vervoerswetgeving bestaan regels over de aansprakelijkheid van de vervoerder jegens derden. Het Duitse recht kent de term 'uitvoerende vervoerder' (*Ausführender Frachtführer/Verfrachter*). Vorderingen tegen de uitvoerende vervoerder kunnen worden ingesteld in geval van verlies of beschadiging van goederen (of vertraging bij niet-maritiem vervoer), ontstaan tijdens het vervoer door de uitvoerende vervoerder. De aansprakelijkheid van de uitvoerende vervoerder komt overeen met de aansprakelijkheid van de hoofdvervoerder. De Nederlandse vervoerswetgeving legt daarentegen geen verplichtingen op aan ondervervoerders en heeft geen speciale regels voor directe acties tegen ondervervoerders. In zowel het Nederlandse als het Duitse recht worden vervoerders wel beschermd tegen vorderingen van derden.[1146] De bescherming van (onder)vervoerders tegen buitencontractuele vorderingen gaat hierbij verder dan de bescherming die wordt geboden door de internationale verdragen (met uitzondering van het CMNI en het Guadalajara-verdrag). In het Nederlandse en Duitse vervoerrecht bestaan regels over de derdenwerking van contractuele bedingen. In aanvulling op de wettelijke bepalingen kan de vervoerder zich derhalve in zekere mate ook op contractuele bedingen beroepen. Onder het Engelse recht kunnen dergelijke regels niet gevonden worden in specifieke vervoerswetgeving, maar wordt een vergelijkbaar resultaat bereikt door de *sub-bailment on terms* onder de *common law*.

Indien de *terminal operator* kan worden aangemerkt als opdrachtnemer of als bewaarnemer hangt de rechtspositie jegens derden af van de omstandigheden van het geval. In sommige gevallen wordt de juridische positie van de *terminal operator* die als hulppersoon van de vervoerder is ingeschakeld voor de uitoefening van taken in het kader van een vervoerovereenkomst, bepaald door een internationaal verdrag. Sommige verdragen geven naast de vervoerder ook zelfstandige hulpper-

1143. Art. 1.2 HHR; art. 1.6, 1.7 RR; art. 1.3 CMNI; art. 3(b) COTIF-CIM; art. 39 MC; art. 1 Guadalajara Verdrag. De term die in de verdragen wordt gebruikt is '*actual carrier*'. Onder COTIF-CIM wordt echter gesproken van '*substitute carrier*' en onder RR van '*maritime performing party*'.
1144. Art. 34 ff CMR; art. 26 COTIF-CIM.
1145. Art. IV bis HVR; art. 7.1 HHR; art. 4.1.a RR; art. 28.1 CMR; art. 22 CMNI; art. 41.1 COTIF-CIM; art. 29 MC. Zie ook: art. 7 OTT.
1146. Art. 8:361-366 BW; § 434, 437 HGB en § 506, 509 HGB.

sonen het recht om zich op het verdrag te beroepen.[1147] Zo introduceren de Rotterdam Rules, die momenteel niet in werking zijn, het begrip *maritime performing party*, zodat personen die een of meer van de hoofdtaken van de vervoerder verrichten binnen de reikwijdte van het verdrag vallen. Dit verdrag zorgt niet alleen voor bescherming, maar legt ook verplichtingen op aan zelfstandige hulppersonen. Die personen kunnen onder het verdrag worden geconfronteerd met directe acties. Het doel om *terminal operators* te onderwerpen aan uniforme aansprakelijkheidsregels werd ook beoogd door de opstellers van het OTT-verdrag, het niet in werking zijnde verdrag inzake de aansprakelijkheid van *terminal operators*. Bovendien bestaan ook in het nationale recht regels over de juridische positie van zelfstandige hulppersonen jegens derden. Hoewel het Belgische recht de quasi-immuniteit van uitvoeringsagenten kent, kunnen *terminal operators* krachtens het Duitse, Engelse en Nederlandse recht in het algemeen wel aansprakelijk worden gesteld door derden. Volgens de Duitse wetgeving zijn *terminal operators* die zijn ingeschakeld door vervoerders voor de uitvoering van vervoerstaken onderworpen aan het Duitse vervoerrecht, aangezien zij als 'uitvoerende vervoerders' kunnen worden beschouwd.[1148] Bovendien is het in het Duitse en Engelse recht in bepaalde gevallen mogelijk om een contractuele vordering in te stellen tegen hulppersonen. Die contractuele bedingen zijn onderworpen aan de inhoudscontrole van §§ 305-310 BGB en UCTA 1977.[1149] Dit is echter anders onder het Nederlandse recht. Derden kunnen geen contractuele vordering instellen jegens de *terminal operator* en de *terminal operator* kan zich in het algemeen tegen derden niet op de bedingen in zijn overeenkomst beroepen omdat deze geen derdenwerking hebben. Dit is anders indien de *terminal operator* kan worden aangemerkt als bewaarnemer, aangezien de bewaarnemingsovereenkomst derdenwerking heeft op grond van art. 8:608 BW. Om aansprakelijkheid uit te sluiten of te beperken in het geval van buitencontractuele vorderingen, neemt de vervoerder daarnaast vaak bedingen op die de hulppersonen beogen te beschermen (i.e. *Himalaya*-clausule, *before-and-after*-clausule en *Circular Indemnity*-clausule). Het doel van de *Circular Indemnity*-clausule is om directe acties tegen hulppersonen te voorkomen en de combinatie van een Himalaya-clausule en een *before-and-after*-clausule zorgt er vaak voor dat de *terminal operator* van aansprakelijkheid wordt ontheven. Vanwege het beperkte toepassingsbereik van de toepasselijke Hague (Visby) Rules, van *tackle-to-tackle*, wordt de *terminal operator* net als de vervoerder van aansprakelijkheid ontheven indien de goederen zijn beschadigd of verloren zijn gegaan in de periode vóór het inladen en na het lossen. Als gevolg hiervan krijgt de ladingbelanghebbende vaak geen schadevergoeding bij ladingschade die op de terminal is ontstaan.

Een oplossing voor dit probleem van de aansprakelijkheidskloof vereist wettelijke aanpassingen. Hoewel het contractuele evenwicht in de logistieke keten wordt verstoord als een eiser die ook een partij is in de logistieke keten de overeengekomen afspraken omzeilt en een buitencontractuele vordering instelt jegens een zelfstandig hulppersoon, is het wenselijk dat iemand die schade veroorzaakt hiervoor verantwoordelijk kan worden gesteld. Dit was ook beoogd bij het opstellen van de Ham-

1147. Art. 7 (2) HHR, 17.1 CMNI; art. 3, 28.2 CMR; art. 40, 41.2 COTIF-CIM. Cf. art. IV bis (2) HVR welke bepaling zelfstandige hulppersonen expliciet uitsluit.
1148. § 437 HGB en § 509 HGB.
1149. Vgl. voor het Nederlands recht art. 6:248 lid 2 BW.

burg Rules en Rotterdam Rules, die hun toepassingsgebied verder uitbreiden dan de *tackle-to-tackle* periode onder de Hague (Visby) Rules. Bovendien doen zich ook in de nationale wetgeving ontwikkelingen voor. Hierbij kan verwezen worden naar het Belgische voorstel betreffende de goederenbehandelaar en het nieuwe Duitse zeerecht dat bepaalt dat een *before-and-after*-clausule alleen effect kan hebben als het individueel is onderhandeld. Op deze manier kunnen vervoerders, evenals de zelfstandige hulppersonen die zich op contractuele bedingen mogen beroepen, aansprakelijk worden gesteld en tegelijkertijd kunnen aansprakelijkheidslimieten of andere bedingen ter bescherming worden ingeroepen om volledige aansprakelijkheid te voorkomen.

Bibliography

Aikens, Lord and Bools (2006)
R. Aikens, R. Lord and M. Bools, *Bills of Lading*, London: Informa 2006.

Asser/Hartkamp and Sieburgh 6-I (2016)
A.S. Hartkamp and C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht, Verbintenissenrecht. Deel I. De verbintenis in het algemeen*, Deventer: Kluwer 2016.

Asser/Hartkamp and Sieburgh 6-III (2014)
A.S. Hartkamp and C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht, Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht*, Deventer: Kluwer 2014.

Asser/Hartkamp and Sieburgh 6-IV (2015)
A.S. Hartkamp and C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht, Verbintenissenrecht. Deel IV. De verbintenis uit de wet*, Deventer: Kluwer 2015.

Asser/Hijma 7-I (2013)
J. Hijma, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht, Bijzondere overeenkomsten. Deel 7-I Koop en ruil*, Deventer: Kluwer 2013.

Asser/Houben 7-X (2015)
I.S.J. Houben, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht, Bijzondere overeenkomsten. Deel X Onbenoemde overeenkomsten*, Deventer: Kluwer 2015.

Asser/Japikse 7-I (2004)
R.E. Japikse, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht, Verkeersmiddelen en vervoer. Deel I Algemene bepalingen en rederij*, Deventer: Kluwer 2004.

Asser/van Schaick 7-VIII (2012)
A.C. van Schaick, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht, Bijzondere overeenkomsten. Deel VIII. Bewaarneming, borgtocht, vaststellingsovereenkomst, bruikleen, verbruikleen, altijddurende rente, spel en weddenschap*, Deventer: Kluwer 2012.

Atiyah (1979)
P.S. Atiyah, *The rise and fall of freedom of contract*, Oxford: Clarendon Press 1979.

Baat (1920)
M.G. de Baat, 'Gemengde contracten', Leiden: *Leidsch Dagblad* 1920.

Bannier (1973)
F.A.W. Bannier, 'Terrein-risico', *NJB* 1973, p. 314-317.

Von Bar (2009)
C. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, Munich: Sellier European law publishers 2009.

Barendrecht (2007)
M. Barendrecht et al. (eds.), *Principles of European Law. Study group on a European Civil Code. Service Contracts (PEL SC)*, Oxford: Oxford University Press 2007.

Bartels (2005)
J.F. Bartels, 'Der Teilstreckenvertrag beim Multimodal-Vertrag', *TranspR* 2005, p. 203-206.

Basedow (1987)
J. Basedow, *Der Transportvertrag*, Tübingen: Mohr 1987.

Basedow (1998)
J. Basedow, 'Die Tragweite des zwingenden Rechts im neuen Deutschen Gütertransportrecht', *TranspR* 1998, p. 58-65.

Baughen (2010)
S. Baughen, 'Bailment or conversion? Misdelivery claims against extra-contractual carriers', *LMCLQ* 2010, p. 411-430.

Baughen (2013)
S. Baughen, 'Chapter 15: Terminal operators and liability for cargo claims under English law', in: B. Soyer and A. Tettenborn (eds.), *Carriage of goods by sea, land and air: Unimodal and multimodal transport in the 21st century*, Abingdon (etc.): Informa Law 2013, p. 267-285.

Baughen (2015)
S. Baughen, *Shipping Law*, London: Routledge 2015.

Van Beelen (1996)
A. van Beelen, *Multimodaal vervoer. Het kameleonsysteem van Boek 8 BW*, Deventer: W.E.J. Tjeenk Willink 1996.

Van den Berg (2015)
R. van den Berg, *Strategies and new business models in international hinterland transport* (diss. Rotterdam), Vianen: Boxpress 2015.

Van den Berg and Zondag (2003)
P.G.J. van den Berg and W.A. Zondag (eds.), *Bijzondere overeenkomsten en het algemene overeenkomstenrecht*, Deventer: Kluwer 2003.

Berlingieri (1991)
F. Berlingieri, 'The Hague-Visby Rules and Actions in Tort', *LQR* 1991, p. 18-21.

Berlingieri (1994)
F. Berlingieri et al. (eds.), *The Hamburg rules: a choice for the EEC?: International Colloquium held on 18 and 19 November*, 1993, Antwerpen: MAKLU, Bruxelles: Bruylant, Baden-Baden: Nomos, Zürich: Schulthess 1994.

Berlingieri (1997)
F. Berlingieri (ed.), *The travaux préparatoires of The Hague rules and of the Hague-Visby rules*, Antwerp: Comité Maritime International (CMI) 1997.

Berlingieri (2009)
F. Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules', paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009.

Berlingieri (2009 a)
F. Berlingieri, 'The Rotterdam Rules: The "maritime plus" approach to uniformity', *EJCCL* 2009, p. 49-60.

Van Bockel (2002)
B. van Bockel, 'De positie van de geadresseerde in het wegvervoer, de binnenvaart en het gecombineerd vervoer', *TVR* 2002, p. 79-87.

Bocken and Boone (2010)
H. Bocken and I. Boone, *Het buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsmechanismen*, Brugge: die Keure 2010.

De Boer (1990)
J. de Boer, 'Uitwendige wetsgeschiedenis van boek 7 Nieuw Burgerlijk Wetboek', *WPNR* 1990/5982.

De Boer (GS)
M.B. de Boer, Groene Serie Bijzondere overeenkomsten, art. 7:608 BW, under note 2.

Bonell (2011)
M.J. Bonell, 'Agency', in: A.S. Hartkamp et al. (eds.), *Towards a European Civil Code, Fourth Revised and Expanded Edition*, Alphen aan den Rijn: Kluwer Law International 2011, p. 515-536.

Boon and Dokter (2005)
Y. Boon and D. Dokter, 'Opvolgend vervoer onder het CMR-regime (art. 34-40 CMR)', in: M.L. Hendrikse and Ph.H.J.G. Van Huizen (eds.), *CMR: internationaal vervoer van goederen over de weg. Een praktische rechtsvergelijkende benadering*, Zutphen: Uitgeverij Paris 2005, p. 281-290.

Boonk (1993)
H. Boonk, *Zeevervoer onder cognossement,* Arnhem: Gouda Quint 1993.

Boonk (2010)
H. Boonk, 'De Rotterdam Rules en de betekenis daarvan voor het huidige recht', *NTHR* 2010, p. 81-95.

Boonk (2012)
H. Boonk, 'De "before and after" periode en het waardepapier-karakter van het cognossement', in: M.H. Claringbould et al. (eds.), *Verbindend recht. Liber amicorum K.F. Haak*, Deventer: Kluwer 2012, p. 109-125.

Boonk W.E. (2016)
W.E. Boonk, 'Afdeling 8.2.1 BW, de overeenkomst van goederenvervoer in het algemeen', *TVR* 2016, p. 139-142.

Bruins (1906)
G.W.J. Bruins, *Een onderzoek naar den rechtsgrond der schadevergoeding* (diss. Leiden), 's-Gravenhage: Mouton 1906.

Bugden and Lamont-Black (2013)
P.M. Bugden and S. Lamont-Black, *Goods in transit and freight forwarding*, London: Sweet & Maxwell 2013.

Bydlinski (2014)
Bydlinski, 'HGB § 453 Speditionsvertrag', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Cahen (2004)
J.L.P. Cahen, *Overeenkomst en derden*, Deventer: Kluwer 2004.

Carver (2011)
G.H. Treitel and F.M.B. Reynolds, *Carver on Bills of Lading*, London: Sweet & Maxwell 2011.

Castermans and Demper (2017)
A.G. Castermans and C.W. Demper, 'Kwalificatie en uitleg van de overeenkomst van multimodaal vervoer', *AA* 2017, p. 338-346.

Castermans and Krans (2003)
A.G. Castermans and H.B. Krans, 'Gemengde overeenkomsten', *NbBW* 2003, p. 104-108.

Chitty 1 (2015)
J. Chitty, H.G. Beale et al. (eds.), *Chitty on contracts. Vol. 1 General principles*, London: Sweet & Maxwell 2015.

Chitty 2 (2012)
J. Chitty, H.G. Beale et al. (eds.), *Chitty on contracts. Vol. 2 Specific contracts* (31st edn.), London: Sweet and Maxwell 2012.

Chua (2010)
J. Chua, 'Impact of the Rotterdam Rules on the Himalaya Clause: The Port Terminal Operators', in: D.R. Thomas (ed.), *The carriage of goods by sea under the Rotterdam Rules*, London: Informa 2010, p. 295-317.

Chao and Nguyen (2007)
A. Chao and T.H. Nguyen, 'Verkorting aansprakelijkheidsperiode bij zeevervoer', *TVR* 2007, p. 193-197.

Claeys (2003)
I. Claeys, *Samenhangende overeenkomsten en aansprakelijkheid*, Antwerp/Groningen/Oxford: Intersentia 2003.

Clarke (2003)
M.A. Clarke, 'A Conflict of Conventions: The UNCITRAL/CMI Draft Transport Instrument on Your Doorstep', *JIML* 2003, p. 28-39.

Clarke (2014)
M.A. Clarke, *International Carriage of Goods by Road: CMR* (6th edn.), Abingdon, Oxon: Informa Law from Routlegde 2014.

Clarke and Yates (2004)
M. Clarke and D. Yates, *Contracts of carriage by land and air*, London: LLP 2004.

Claringbould (1992)
M.H. Claringbould, *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek: parlementaire stukken systematisch gerangschikt en van noten voorzien. Invoering boeken 3, 5 en 6. Boek 8: Verkeersmiddelen en vervoer*, Deventer: Kluwer 1992.

Claringbould (2008)
M.H. Claringbould, 'Hijsen van schip: Aanvaring? Verjaring?', *BB* 2008/778, p. 33-34.

Claringbould (2008 a)
M.H. Claringbould, 'Uit de praktijk gegrepen; de theorie verklaard', *Syllabus SVA-congres* 2008.

Claringbould (2010)
M.H. Claringbould, 'Nieuwe Terminal (stuwadoors)voorwaarden', *BB* 2010, p. 26-28.

Claringbould (2011)
M.H. Claringbould, 'Floris Bannier als natte advocaat', in: *Stof tot overpeinzing: liber amicorum Floris Bannier*, Den Haag: SDU 2011, p. 25-34.

Claringbould (2012)
M.H. Claringbould, 'Van gecombineerd vervoer naar synchromodaliteit', *W&W* 2012, nr. 65, p. 9-14.

Claringbould (2012 a)
M.H. Claringbould, 'Van multimodaal vervoer naar synchromodaal vervoer', *Syllabus SVA-congres* 2012.

Claringbould (2012 b)
M.H. Claringbould, 'Bewuste roekeloosheid en kansrekening', in: M.H. Clarinbould et al. (eds.), *Verbindend recht. Liber amicorum K.F. Haak*, Deventer: Kluwer 2012, p. 145-164.

Claringbould (2012 c)
M.H. Claringbould, 'Aflevering revisited', *W&W* 2012, nr. 67, p. 6-10.

Claringbould (2014)
M.H. Claringbould, 'Binnenvaart; afzendersaansprakelijkheid S&S 2014, 4 Rechtbank Rotterdam 27 februari 2013 "Leendert Sr"; "Leendert Sr II". Schade bij lossen schroot', *BB* 2014, nr. 832, p. 30.

Claringbould (2015)
M.H. Claringbould, 'Opvolgend vervoer: Hoge Raad kiest voor ruime uitleg', *W&W* 2015, nr. 77, p. 3-7.

Claringbould (2015 a)
M.H. Claringbould, 'Wie moet laden en lossen?', *W&W* 2015, nr. 75, p. 4-6.

Claringbould (2015 b)
M.H. Claringbould, *Toelichting op de AVC 2002*, Zutphen: Uitgeverij Paris 2015.

Claringbould (2016)
M.H. Claringbould, 'Toepasselijkheid van de CMR en multimodaal vervoer', *W&W* 2016, nr. 80, p. 3-7.

Claringbould (2016 a)
M.H. Claringbould, 'Binnenvaart; aansprakelijkheid van de afzender S&S 2016/52, Hof Den Haag 23 februari 2016, "Elan". Schade bij lossen van lading', *BB* 2016, nr. 857, p. 29.

Cleton (1994)
R. Cleton, *Hoofdlijnen van het vervoerrecht*, Zwolle: W.E.J. Tjeenk Willink 1994.

Cleveringa (1961)
R.P. Cleveringa, *Zeerecht,* Zwolle: W.E.J. Tjeenk Willink 1961.

Czerwenka (2004)
B. Czerwenka, 'Scope of application and rules on multimodal transport contracts', *TranspR* 2004, p. 297-302.

Czerwenka (2012)
B. Czerwenka, 'Die Anwendung des § 437 HGB bei grenzüberschreitenden Transporten', *TranspR* 2012, p. 408-413.

Van Dam (1989)
C.C. van Dam, *Zorgvuldigheidsnorm en Aansprakelijkheid. Een rechtsvergelijkend onderzoek naar plaats, inhoud en functie van de zorgvuldigheidsnorm bij de aansprakelijkheid voor letsel- en zaakschade*, Deventer: Kluwer 1989.

Damar (2011)
D. Damar, *Wilful misconduct in international transport law*, Berlin: Springer Verlag 2011.

Deakin, Johnston and Markesinis (2013)
S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin's Tort Law* (7th edn.), Oxford: Clarendon Press 2013.

Delebecque (2010)
P. Delebecque, 'Obligations of the carrier', in: A. von Ziegler, J. Schelin & S. Zunarelli, *The Rotterdam Rules 2008, commentary to the United Nations convention on contracts for the international carriage of goods wholly or partly by sea*, Alphen aan den Rijn: Kluwer Law International 2010, p. 83-86.

Diamond (2008)
A. Diamond QC, 'The next sea carriage convention?', *LMCLQ* 2008, p. 135-187.

Diamond (2009)
A. Diamond QC, 'The Rotterdam Rules', *LMCLQ* 2009, p. 445-536.

Van Dijk and Spijker (2016)
R. van Dijk and A. Spijker, 'Beförderung durch aufeinanderfolgende Frachtführer (art. 34-40 CMR)', *TranspR* 2016, nr. 9, p. 341-345.

Dirix (1984)
E. Dirix, *Obligatoire verhoudingen tussen contractanten en derden*, Antwerp: M. Kluwer 1984.

Dorrestein (1973)
Th.H.J. Dorrestein, 'Verkeersmiddelen en vervoer', *NJB* 1973, p. 1113-1128.

Dorrestein (1977)
Th.H.J. Dorrestein, *Recht van het internationale wegvervoer, met name het tractaat CMR d.d. 19 mei 1956*, Zwolle: W.E.J. Tjeenk Willink 1977.

Douma (2008)
A.M. Douma, *Aligning the operations of barges and terminals through distributed planning* (diss. Twente), Twente: University of Twente 2008.

Drews (2004)
K.H. Drews, 'Warenumschlag im Seehafen als Teilstrecke?', *TranspR* 2004, p. 450-454.

Drews (2008)
K.H. Drews, 'Zum Umschlag von Waren in einem Seehafen', *TranspR* 2008, p. 18-25.

Drews (2013)
K.H. Drews, 'Der Umschlag von Waren unter dem neuen Seehandelsrecht', *TranspR* 2013, p. 253-260.

Dupuy (1999)
P.M. Dupuy, 'Reviewing the difficulties in codification: On Ago's classification of means and obligations of result in relation to state responsibility', *EJIL* 1999, p. 371-385.

Duyvensz (2011)
H. Duyvensz, 'Exoneratie en bewuste roekeloosheid', *WPNR* 2011/6878.

Duyvensz (2015)
J.H. Duyvensz, 'Verzekering en exoneratie', *AV&S* 2015/18.

Ebenroth, Boujong, Joost and Strohn (2015)
C.T. Ebenroth, K. Boujong, D. Joost and L. Strohn (eds.), *Handelsgesetzbuch. Band 2. §§ 343-475h. Transportrecht Bank- und Börsenrecht*, München: C.H. Beck 2015.

Eckardt (2015)
T. Eckardt, 'The major changes of the recent reform of German maritime law', *TVR* 2015, p. 58-61.

Eckardt (2016)
T. Eckardt, 'The new VGM regulations and their impact on transport contracts', *EJCCL* 2016/3-4, p. 54-58.

Eftestøl-Wilhelmsson (2010)
E. Eftestøl-Wilhelmsson, 'The Rotterdam Rules in a European Multimodal context', *JIML* 2010, p. 274-288.

Eftestøl-Wilhelmsson (2011)
E. Eftestøl-Wilhelmsson, 'European sustainable freight: The role of contract law', in: *Environmental liabilities in ports and coastal areas – Focus on public authorities and other actors*, Åbo: Åbo Akademi University, Institute of Maritime and Commercial Law 2011, paper no. 8.

Eftestøl-Wilhelmsson (2014)
E. Eftestøl-Wilhelmsson, 'The European project on sustainable multimodal transport: Is a harmonized liability system the right tool?', in: B. Soyer and A. Tettenborn, *Carriage of goods by sea, land and air*, Abingdon: Informa law 2014, p. 232-250.

Empel and Van Huizen (2007)
G. van Empel and J.B. Van Huizen, *Goederenvervoer over zee, binnenwateren en over de weg*, Deventer: Kluwer 2007.

Falvey (1992)
P.J. Falvey, 'Liability of Terminal Operators and Insurance Cover', *IDM* 1992, p. 1063-1068.

Fazi (2014)
S. Fazi, *Mode selection, routing and scheduling for inland container transport* (diss. TU Eindhoven), Vianen: Boxpress 2014.

Feenstra (1984)
R. Feenstra, *Romeinse grondslagen van het Nederlands privaatrecht*, Leiden: E.J. Brill/ Universitaire pers Leiden 1984.

Feenstra and Ahsmann (1988)
R. Feenstra and M.J.A.M. Ahsmann, *Contract: aspecten van de begrippen contract en contractsvrijheid in historisch perspectief*, Deventer: Kluwer 1988.

Florijn (1994)
E.O. Florijn, *Ontstaan en ontwikkeling van het nieuwe burgerlijke wetboek*, Maastricht: Universitaire Pers Maastricht 1994.

Fontaine (1998)
M. Fontaine, 'Codifying 'modern' contracts', in: A. Hartkamp et al. (eds.), *Towards a European Civil Code*, Nijmegen: Ars Aequi Libri, The Hague/London/Boston: Kluwer Law International 1998, p. 371-379.

Frantzioch (2014)
F. Frantzioch, 'HGB § 467 Lagervertrag', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Freise (2013)
R. Freise, 'Der Güterumschlag im Eisenbahnverkehr', *TranspR* 2013, p. 260-265.

Freise (2014)
R. Freise, 'CIM Art. 23. Haftungsgrund', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch,* München: Beck 2014.

Fremuth, Thume and Eckardt (2000)
F. Fremuth, K.H. Thume and K. Eckardt, *Kommentar zum Transportrecht*, Heidelberg: Verlag Recht und Wirtschaft 2000.

Fujita (2008-2009)
T. Fujita, 'The comprehensive coverage of the new convention: Performing parties and the multimodal implications', *Tex. Int'l L. J*. 2008-2009, p. 349-373.

Gaskell (1993)
N. Gaskell, 'Shipowner liability for cargo damage caused by stevedores', *LMCLQ* 1993, p. 170-177.

Gaskell, Asariotis and Baatz (2000)
N.J.J. Gaskell, R. Asariotis and Y. Baatz, *Bills of lading: law and contracts*, London: LLP 2000.

Gass (2000)
W. Gass, 'Die bedeutung der Logistik für Speditionsunternehmen im Rahmen moderner Hersteller-Zulieferbeziehungen', *TranspR* 2000, p. 203-213.

Gernhuber (1989)
J. Gernhuber, *Handbuch des Schuldrechts, Das Schuldverhältnis Bd. 8*, Tubingen: Mohr 1989.

Van Gerven, Lever and Larouche (2000)
W. van Gerven, J. Lever and P. Larouche, *Tort Law,* Oxford and Portland, Oregon: Hart Publishing 2000.

Gharehgozli (2012)
A.H. Gharehgozli, *Developing New Methods for Efficient Container Stacking Operations* (diss. Rotterdam), Rotterdam: Erasmus Research Institute of Management (ERIM) 2012.

Gilke (2008)
S. Gilke, 'Probleme bei der Vertragsgestaltung aus Sicht eines Logistikdienstleisters', *TranspR* 2008, p. 380-383.

Girvin (2011)
S. Girvin, *Carriage of goods by sea*, Oxford: Oxford University Press 2011.

Glass (2004)
D.A. Glass, *Freight Forwarding and Multimodal Transport Contracts*, London: Informa Professional 2004.

Goldby (2015)
M. Goldby, 'What is needed to get rid of paper? A new look at delivery orders', *JIML* 2015, p. 339-347.

Goode (2004)
R. Goode, *Commercial Law*, London: Penguin Books 2004.

Gran (2004)
A. Gran, 'Vertragsgestaltung im Logistikbereich', *TranspR* 2004, p. 1-14.

Gran (2006)
A. Gran, 'Einfluss von Logistik-AGB auf Konfliktvermeidung und Unternehmenswert', *TranspR* 2006, p. 91-95.

Grönfors (1964)
K. Grönfors, 'Why not independent contractors', *J.B.L.* (*The Journal of Business Law*) 1964, p. 25-27.

Günther and Kim (2005)
H.O. Günther and K.H. Kim (eds.), *Container Terminals and Automated Transport Systems Logistics Control Issues and Quantitative Decision Support*, Berlin: Springer Verlag 2005.

Haak (1984)
K.F. Haak, *De aansprakelijkheid van de vervoerder ingevolge de CMR*, Den Haag: Stichting Vervoeradres 1984.

Haak (2003)
K.F. Haak, 'Het privaatrechtelijk statuut van de goederenbehandelaar in Nederland, i.h.b. derdenwerking', in: E. van Hooydonk (ed.), *Stouwers, naties en terminal operators. Het gewijzigde juridische landschap,* Antwerp/Apeldoorn: Maklu 2003, p. 226-232.

Haak (2005)
K.F. Haak, 'The harmonization of intermodal liability arrangements', *ETL* 2005, p. 11-51.

Haak (2006)
K.F. Haak, 'Optioneel vervoer en het toepasselijke recht', in: J.J. Brinkhof et al. (eds.) *Contracteren internationaal,* Den Haag: Boom Juridische Uitgevers 2006, p. 303-315.

Haak (2006 a)
K.F. Haak, 'Uniform vervoerrecht: verwezenlijking en beperking', in: F. de Ly, K.F. Haak and W.H. van Boom (eds.), *Eenvormig bedrijfsrecht, realiteit of utopie?*, Den Haag: Boom Juridische Uitgevers 2006, p. 183-202.

Haak (2010)
K.F. Haak, 'De scope van de CMR: expansief of restrictief', *NTHR* 2010, p. 46-59.

Haak (2013)
K.F. Haak, *Uniformiteit, Quo vadis?*, Den Haag: Boom Juridische Uitgevers 2013.

Haak and Hoeks (2004)
K.F. Haak and M.A.I.H. Hoeks, 'Arrangements of intermodal transport in the field of conflicting conventions', *JIML* 2004, p. 422-433.

Haak and Hoeks (2005)
K.F. Haak and M.A.I.H. Hoeks, 'Intermodal transport under unimodal arrangements', *TranspR* 2005, p. 89-102.

Haak and Zwitser (2003)
K.F. Haak and R. Zwitser, *Opdracht aan hulppersonen. Over logistieke dienstverlening in het vervoer*, Rotterdam: Sanders Instituut, Deventer: Kluwer 2003.

Hacksteiner (2014)
T. Hacksteiner, *Travaux Préparatoires des Budapester Übereinkommens über den Vertrag über die Güterbeförderung in der Binnenschifffahrt (CMNI)*, Zutphen: Uitgeverij Paris 2014.

Harten (1990)
D.J. Harten, 'Die Haftung des Terminal Operators', *TranspR* 1990, p. 54-57.

Hartenstein (2012)
O. Hartenstein, 'Haftungsfragen im Budapester Binnenschifffahrtsübereinkommen (CMNI)', *TranspR* 2012, p. 441-447.

Hartkamp, Tillema and Ter Heide (2011)
A.S. Hartkamp, M.M.M. Tillema and A.E.B. ter Heide, *Contract Law in the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2011.

Hartlief (1997)
T. Hartlief, 'Vijf jaren nieuw vermogensrecht; bijzondere overeenkomsten', *NTBR* 1997, p. 225-237.

Hartlief and Van Maanen (1995)
T. Hartlief and G.E. van Maanen, *Hoe werkt de onrechtmatige daad?*, Nijmegen: Ars Aequi Libri 1995.

Hartlief and Stolker (1999)
T. Hartlief and C.J.J.M. Stolker (eds.), *Contractvrijheid,* Deventer: Kluwer 1999.

Heirbrant (2014)
S. Heirbrant, 'Quasi-immuniteit van de uitvoeringsagent: uitzondering op principe van co-existentie', *RABG* 2014/2, p. 113-117.

Hendrikse and Margetson (2004)
M.L. Hendrikse and N.H. Margetson, *Capita zeerecht*, Deventer: Kluwer 2004.

Hendrikse, Margetson and Mater (2005)
M.L. Hendrikse, N.J. Margetson and T.M. Maters, 'Doorbreking van de bescherming van de CMR-vervoerder', in: M.L. Hendrikse and Ph.H.J.G. Van Huizen (eds.), *CMR: internationaal vervoer van goederen over de weg. Een praktische rechtsvergelijkende benadering*, Zutphen: Uitgeverij Paris 2005.

Herber (2006)
R. Herber, 'Neue Entwicklungen im Recht des Multimodaltransports', *TranspR* 2006, p. 435-440.

Herber (2011)
R. Herber, 'Wer ist ausführender Verfrachter?', *TranspR* 2011, p. 359-362.

Herber (2014)
R. Herber, 'HGB § 498 Haftungsgrund', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Herber (2014 a)
R. Herber, 'HGB § 501 Haftung für andere', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Herber (2014 b)
R. Herber, 'HGB § 506 Außervertragliche Ansprüche', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Herber (2014 c)
R. Herber, 'HGB § 508 Haftung der Leute und der Schiffsbesatzung', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Herber (2014 d)
R. Herber, 'HGB § 509 Ausführender Verfrachter', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Herber (2016)
R. Herber, *Seehandelsrecht. Systematische Darstellung*, Berlin/New York: Walter de Gruyter 2016.

Heublein (2015)
J. Heublein, 'HGB § 467', in: C.T. Ebenroth, K. Boujong, D. Joost and L. Strohn (eds.), *Handelsgesetzbuch. Band 2. §§ 343-475h. Transportrecht Bank- und Börsenrecht*, München: C.H. Beck 2015.

Heublein (2015 a)
J. Heublein, 'HGB § 475d', in: C.T. Ebenroth, K. Boujong, D. Joost and L. Strohn (eds.), *Handelsgesetzbuch. Band 2. §§ 343-475h. Transportrecht Bank- und Börsenrecht*, München: C.H. Beck 2015.

Heuer (2006)
K. Heuer, 'Brauchen wir Logistik-AGB für die Spedition?', *TranspR* 2006, p. 89-95.

Hijmans van den Berg, Hazewinkel-Suringa and Donner (1953)
L.J. Hijmans van den Bergh, D. Hazewinkel-Suringa and A.M. Donner, 'Jurisprudentie', *AA* 1953, p. 38-43.

Hoeks (2009)
M.A.I.H. Hoeks, *Multimodal transport law. The law applicable to the multimodal contract for the carriage of goods* (diss. Rotterdam), 2009. (Published in Alphen aan den Rijn: Kluwer Law International 2010.)

Hoeks (2010)
M.A.I.H. Hoeks, 'De actieradius van de Rotterdam Rules', in: G.J. van der Ziel et al., *Preadvies van de Vereeniging 'Handelsrecht' en de Nederlandse Vereniging voor Zee- en Vervoersrecht 2010, Rotterdam Rules en Boek 8*, Deventer: Kluwer 2010, p. 23-50.

Hoeks (2012)
M.A.I.H. Hoeks, 'Vallend water en verdwenen vis. Hoe bevoegdheid de toekomst van het multimodaal vervoer bepaalde', *NTHR* 2012, p. 237-248.

Hofmann and Opstall (1959)
L.C. Hofmann and S.N. van Opstall (eds.), *Het Nederlands verbintenissenrecht. De algemene leer der verbintenissen. Eerste gedeelte (artt. 1269-1387 B.W.)*, Groningen: J.B. Wolters 1959.

Hofmann, Drion and Wiersma (1959)
L.C. Hofmann, H. Drion and K. Wiersma, *Het Nederlands Verbintenissenrecht. De algemene leer der verbintenissen*, Groningen: Tjeenk Willink 1959.

Van Hooydonk (2012)
E. van Hooydonk, *Zevende blauwboek over de herziening van het Belgisch scheepvaartrecht*, Antwerp: Commissie Maritiem Recht 2012.

Huyghe (2013)
G. Huyghe, 'De overeenkomst van goederenbehandeling: de goederenbehandelaar en de stuwadoor', in: A. Poelmans, 'Overzicht van rechtspraak Vervoersrecht 1976-2012', *TPR* 2013, p. 1769-1812.

Jansen (2007)
K.J.O. Jansen, 'Het subjectieve element van de onrechtmatigheid. Over de structuur van art. 6:162 BW', *NTBR* 2007, p. 222-228.

Japikse (1980)
R.E. Japikse, 'Aflevering onder Hague Rules-cognossement', in: H.A.J. Baanders et al. (eds.), *Recht door Zee: Liber Amicorum H. Schadee*, Zwolle: T.E.J. Tjeenk Willink 1980, p. 111-124.

Japikse (1988)
R.E. Japikse, 'Derdenwerking en Zeerecht (in Nederland)', in J. Blockx et al. (eds.), *Liber amicorum Lionel Tricot*, Antwerpen: Kluwer 1988, 339-354.

Jesser-Huß (2014)
H. Jesser-Huß, 'CMR Art. 1 Anwendungsbereich, völkerrechtliche Sondervereinbarungen', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Jesser-Huß (2014 a)
H. Jesser-Huß, 'CMR Art. 17 Haftungsgrundsatz und Haftungsausnahmen', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Jesser-Huß (2014 b)
H. Jesser-Huß, 'CMR Art. 34 Aufeinanderfolgende Straßenfrachtführer', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Kienzle (1993)
J. Kienzle, *Die Haftung des Carrier und des Actual Carrier nach den Hamburg-Regeln*, Neuwied: Luchterhand 1993.

Koedood (1996)
R. Koedood, *Goederenvervoer over de binnenwateren*, Zwolle: Tjeenk Willink 1996.

Kofopoulos (2014)
K. Kofopoulos, 'Inaccurately declared container weights; The danger to Life, the International Trade and Carriage of Goods by Sea', *ETL* 2014/3, p. 279-289.

Koller (1990)
I. Koller, 'Der Entwurf eines Übereinkommens über die Haftung von Umschlagbetrieben im internationalen Handel', *TranspR* 1990, p. 89-98.

Koller (2008)
I. Koller, 'Die Rechtsnatur des Umschlagsvertrages und ihre Bedeutung für die Teilstrecke', *TranspR* 2008, p. 333-339.

Koller (2013)
I. Koller, *Transportrecht: Kommentar zu Spedition, Gütertransport und Lagergeschäft*, München: Beck 2013.

Koller (2013 a)
I. Koller, 'Der Umschlag beim CMR Transport', *RdTW* 2013, p. 417-420.

Koller (2014)
I. Koller, 'Der Umschlag und die Teilstrecke im Recht des multimodalen Transports', *VersR* 2014, p. 309-314.

Koller (2015)
I. Koller, 'Haftungsbeschränkungen zu Gunsten selbständiger Hilfpersonen und zu Lasten Dritter im Transportrecht', *TranspR* 2015, p. 409-426.

Koller (2016)
I. Koller, 'Wo liegt der Schadensort im Sinn des § 452a HGB?', *RdTW* 2016, p. 1-6.

Koller (2017)
I. Koller, 'Unterschiedliche Haftung für Güterschäden infolge mangelhafter Nebenleistungen', *TranspR* 2017, p. 1-4.

Koning (2004)
I. Koning, 'Trucking onder Warschau en Montreal', *NTHR* 2004, p. 93-101.

Koning (2007)
I. Koning, *Aansprakelijkheid in het luchtvervoer*, Zutphen: Uitgeverij Paris 2007.

Korthals Altes and Wiarda (1980)
A. Korthals Altes and J.J. Wiarda, *Vervoerrecht*, Deventer: Kluwer 1980.

Kortmann (1988)
S.C.J.J. Kortmann, 'Exoneratiebedingen', *Tijdschrift voor Privaatrecht* 1988, p. 1205-1257.

Koster, Stam and Balk (2011)
M.B.M. de Koster, D. Stam and B.M. Balk, 'Accidents happen: the influence of safety-specific transformational leadership, safety consciousness and hazard reducing systems on warehouse accidents', *Journal of Operations Management* 2011, nr. 29, p. 753-765.

Koziol (2015)
H. Koziol (ed.), *Basic questions of tort law from a comparative perspective*, Vienna: Jan Sramek Verlag 2015.

Krins (2007)
S. Krins, 'Haftung und Versicherung in der Kontraktlogistik: Ein Überblick', *TranspR* 2007, p. 269-279.

Krins (2012)
S. Krins, *Der Umfang des zwingenden Charakters des deutschen Transportrechts*, Münster: LIT Verlag 2012.

Kuipers (2014)
B. Kuipers, 'Ja, de container is de uitvinding van de eeuw', 11 October 2014, www.nrc.nl/handelsblad/2014/10/11/ja-de-container-is-uitvinding-van-de-eeuw-1427438.

Lamont-Black (2012)
S. Lamont-Black, 'Claiming damages in multimodal transport: A need for harmonisation', *TMLJ* 2012, p. 707-724.

Lamont-Black (2015)
S. Lamont-Black, 'Third party rights and transport documents under the DCFR — potential for an appropriate and effective EU unification and an improvement for the UK?', *JIML* 2015, p. 280-299.

Van Leijen and Methorst-Smaling (2016)
R. van Leijen and D. Methorst-Smaling, 'Verifiëren containergewichten: zonder VGM geen zeetransport', *W&W* 2016/80, p. 17-20.

Leloudas (2014)
G. Leloudas, 'Multimodal Transport under the Warsaw and Montreal Convention Regimes: a Velvet Revolution?', in: B. Soyer & A. Tettenborn (eds.), *Carriage of Goods by Sea, Land and Air. Unimodal and Multimodal Transport in the 21st Century*, Abingdon: Informa 2014, p. 77-110.

Logmans (2011)
H. Logmans, *Zekerheid op lading: pandrecht en retentierecht op roerende zaken en cognossement in het handelsverkeer* (diss. Rotterdam), 2011.

Loos (2011)
M.B.M. Loos, 'Chapter 33: Service Contracts', in: A. Hartkamp et al. (eds.), *Towards a European Civil Code* (4th edn.), Alphen aan den Rijn: Kluwer Law International 2011.

Loyens (2011)
J. Loyens, *Handboek transportrecht*, Antwerp: Intersentia 2011.

Van der Lugt (2015)
L. van der Lugt, *Beyond the Landlord; A strategic management perspective on the port authority* (diss. Rotterdam), 2015.

Lugt, Langen and Hagdorn (2015)
L. van der Lugt, P.W. de Langen and L. Hagdorn, 'Beyond the landlord: Worldwide empirical analysis of port authority strategies', *International Journal of Shipping and Transport Logistics* 2015/7, p. 570-596.

Lunney and Oliphant (2008)
M. Lunney and K. Oliphant, *Tort Law. Text and Materials* (3rd ed.), New York: Oxford University Press 2008.

Van Maanen (1986)
G.E. van Maanen, *Onrechtmatige daad – Aspekten van de ontwikkeling en struktuur van een omstreden leerstuk* (diss. Groningen), Deventer: Kluwer 1986.

Markesinis and Unberath (2002)
B.S. Markesinis & H. Unberath, *The German law of torts: a comparative treatise* (4th edn.), Oxford: Hart 2002.

Markesinis, Unberath and Johnston (2006)
B. Markesinis, H. Unberath and A. Johnston, *The German Law of Contract. A Comparative Treatise* (2nd edn.), Oregon: Oxford and Portland 2006.

Meijers (1948)
E.M. Meijers, *De algemene begrippen van het burgerlijk recht*, Leiden: Universitaire Pers Leiden 1948.

Merkt (2016)
H. Merkt, 'HGB § 407', in: K.J. Hopt, C. Kumpan, H. Merkt, M. Roth and A. Baumbach (eds.), *Handelsgesetzbuch*, München: Beck 2016.

Murdoch (1983)
J.R. Murdoch, 'Contracts for the supply of services under the 1982 Act', *LMLCQ* 1983, p. 652-662.

Neame (2010)
C. Neame, 'What impact will the Rotterdam Rules have on ship owners?', updated on 11 August 2010 on Mondaq at www.mondaq.com/article.asp?articleid=107610 (retrieved on 8 October 2013).

Newell (1992)
R. Newell, '"Privity Fundamentalism" and the Circular Indemnity Clause', *LMCLQ* 1992, p. 97-108.

Niessen (2014)
S.H.L. Niessen, 'A new era for terminal operators: The terminal operator as a maritime performing party under the Rotterdam Rules', *ETL* 2014, p. 33-40.

Nikaki (2011)
T. Nikaki, 'Himalaya clauses and the Rotterdam Rules', *JIML* 2011, p. 20-40.

Nikaki and Soyer (2012)
T. Nikaki and B. Soyer, 'A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?', *BJIL* (*Berkeley Journal of International Law*) 2012, p. 303-348.

Noels (2014)
D. Noels, 'Scheepsschade bij laden en lossen. Variaties op het thema van de quasi-immuniteit van de uitvoeringsagent', *RABG* 2014/9, p. 622-628.

Nossal (1996)
S. Nossal, 'Bailment on terms, Himalaya clauses, and exclusive jurisdiction clauses: the decision of the Privy Council in *The Makhutai*', *HKLJ* 1996, part 3, p. 321-338.

Notteboom (2008)
T. Notteboom, 'The relationship between seaports and the intermodal hinterland in light of global supply chains: European challenges', in M. Martinho, *Port Competition and Hinterland Connections*, Paris: OECD/ITF 2008, p. 25-75.

Van Oevelen (2003)
A. van Oevelen, 'De betekenis van het stuwadoorsarrest van het Hof van Cassatie voor het maritieme recht, bijna dertig jaar later', in: E. Van Hooydonk (ed.) *Stouwers, naties en terminal operators. Het gewijzigde juridische landschap*, Antwerp/Apeldoorn: Maklu 2003, p. 161-178.

Oostwouder (2001)
W.J. Oostwouder, *Hoofdzaken boek 8 BW. Verkeersmiddelen en vervoer*, Deventer: Kluwer 2001.

Opzoomer (1879)
C.W. Opzoomer, *Het Burgerlijk Wetboek verklaard door C.W. Opzoomer, Vijfde Deel, Art. 1269-1348*, Amsterdam: Gebhard 1879.

Otte (2014)
K. Otte, 'CMNI art. 3 Übernahme, Beförderung und Ablieferung der Güter', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Otte (2014 a)
K. Otte, 'CMNI art. 6 Pflichten des Absenders', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Otte (2014 b)
K. Otte, 'CMNI art. 17 Bedienstete und Beauftragte', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Van Overklift (2005)
H.S. van Overklift, 'De FIOS-clausule in rechtsvergelijkend perspectief', *TVR* 2005, p. 35-43.

Paardenkooper-Suli (2014)
K.M. Paardenkooper-Suli, *The port of Rotterdam and the maritime container: The rise and fall of Rotterdam's hinterland (1966-2010)* (diss. Rotterdam), 2014.

Palmer (2009)
N. Palmer, *Palmer on Bailment* (3th edn.), London: Sweet & Maxwell 2009.

Paschke (2017)
M. Paschke, 'HGB § 452 Frachtvertrag über eine Beförderung mit verschiedenartigen Beförderungsmitteln', in: H. Oetker (ed.), *Kommentar zum Handelsgesetzbuch (HGB)*, München: Beck 2017, § 452 HGB, nr. 1-14.

Peltzer and Wülbern (2016)
O. Peltzer and A.L. Wülbern, 'Die neuen Deutschen Transport- und Lagerbedingungen (DTLB)', *TranspR* 2016/6, p. 218-227.

Du Perron (1999)
E.C. du Perron, *Overeenkomst en derden: een analyse van de relativiteit van de contractswerking* (diss. Amsterdam UvA), 1999.

Piltz (2016)
B. Piltz, 'Container weights in maritime trade. VGM, Incoterms and UN Sales Convention/CISG', *EJCCL* 2016/3-4, p. 59-62.

Polak (1973)
J.M. Polak, 'Boek 7 Nieuw BW. Inleidende opmerkingen', *WPNR* 5230/1973, p. 385-387.

Pötschke (2014)
Pötschke, 'HGB § 478 Schiffsbesatzung', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Pötschke (2014 a)
Pötschke, 'HGB § 486 Abladen. Verladen. Umladen. Löschen', in: K. Schmidt, C. Beate and R. Herber (eds.), *Münchener Kommentar zum Handelsgesetzbuch*, München: Beck 2014.

Powles (1997)
D.G. Powles, 'The Himalaya clause', *LMCLQ* 1997, p. 331-346.

Prüssmann and Rabe (2000)
H. Prüssmann and D. Rabe, *Seehandelsrecht: Fünftes Buch des Handelsgesetzbuches mit Nebenvorschriften und Internationalen Übereinkommen*, München: C.H. Beck 2000.

Rabe (2008)
D. Rabe, 'Das Mafi-Trailer Urteil des BGH — Ein Fazit', *TranspR* 2008, p. 186-189.

Rabe (2016)
D. Rabe, 'Haftungsbeschränkungen zu Gunsten selbständiger Hilfpersonen und zu Lasten Dritter in Stückgutfrachtverträgen und in Konnossementen', *TranspR* 2016, nr. 4, p. 139-147.

Ramberg (2004)
J. Ramberg, 'The future law of transport operators and service providers', *Scandinavian Studies in Law* 2004, vol. 46, p. 135-151.

Ramberg (2005)
J. Ramberg, *The law of transport operators in international trade*, Stockholm: Norstedts Juridik AB 2005.

Ramming (2000)
K. Ramming, 'Die Haftung des ausführenden Frachtführers nach § 437 HGB', *TranspR* 2000, p. 277-296.

Ramming (2004)
K. Ramming, 'Umschlag von Gut als Beförderung im Sinne des § 407 Abs. 1 HGB?', *TranspR* 2004, p. 56-60.

Ramming (2007)
K. Ramming, 'Teilstrecken einer multimodalen Beförderung und ihre Abgrenzung', *TranspR* 2007, p. 89-94.

Ramming (2009)
K. Ramming, *Hamburger Handbuch zum Binnenschifffahrtsrecht*, München: Verlag C.H. Beck 2009.

Ramming (2011)
K. Ramming, *Hamburger Handbuch Multimodaler Transport: das Recht des Gütertransports mit unterschiedlichen Beförderungsmitteln einschließlich Seestrecke*, München: C.H. Beck 2011.

Ramming (2013)
K. Ramming, 'Die neuen Vorschriften über den ausführenden Verfrachter', *RdTW* 2013, p. 81-91.

Rittler (2015)
T. Rittler, *Handelsgesetzbuch (HGB) German Commercial code*, Nürnberg: KDD 2015.

Rogert (2005)
M. Rogert, *Einheitsrecht und Kollisionsrecht im internationalen multimodalen Gütertransport* (diss. Hamburg), Berlin: Logos 2005.

Roland (2003)
S. Roland, 'Aansprakelijkheid voor ladingschade die, in Antwerpen, voor het zeevervoer ontstaat', in: *Liber Amicorum R. Roland,* Brussels: Larcier 2003, p. 377-390.

Røsaeg (2002)
E. Røsaeg, 'The applicability of Conventions for the carriage of goods and for multimodal transport', *LMCLQ* 2002, p. 324-325.

Royer (1959)
S. Royer, *Hoofdzaken der vervoerdersaansprakelijkheid in het zeerecht*, Zwolle: W.E.J. Tjeenk Willink 1959.

Rutgers (1998)
G.R. Rutgers, *Bewaarneming, Monografieën Nieuw BW B-73*, Deventer: Kluwer 1998.

Schaps, Abraham and Abraham (1978)
G. Schaps, H.J. Abraham and K.H. Abraham, *Das Seerecht in der Bundesrepublik Deutschland: Kommentar und Materialsammlung*, Berlin: Walter de Gruyer 1978.

Schelhaas (2008)
H.N. Schelhaas, 'Pacta sunt servanda bij commerciële contractanten', *NTBR* 2008/4, p. 150-160.

Schelhaas (2016)
H.N. Schelhaas, 'De Koopovereenkomst', in: H.N. Schelhaas, A.J. Verheij and B. Wessels (eds.), *Bijzondere overeenkomsten* (Studiereeks Burgerlijk Recht), Deventer: Kluwer 2016, p. 21-39.

Schelhaas (2017)
H.N. Schelhaas, *Redelijkheid en billijkheid (Mon. BW nr. A5)*, Deventer: Kluwer 2017.

Schelhaas and Wessels (2016)
H.N. Schelhaas and B. Wessels, 'Algemene inleiding', in: H.N. Schelhaas, A.J. Verheij and B. Wessels (eds.), *Bijzondere overeenkomsten* (Studiereeks Burgerlijk Recht), Deventer: Kluwer 2016, p. 1-20.

Schoordijk (1979)
H.C.F. Schoordijk, *Het algemeen gedeelte van het verbintenissenrecht naar het Nieuw Burgerlijk Wetboek*, Deventer: Kluwer 1979.

Schouten (2012)
M.F. Schouten, 'De aflevering van goederen en de ontvangstbevestiging daarvan in het wegvervoer', *TVR* 2012, p. 50-53.

Schut (1963)
G.H.A. Schut, *Rechterlijke verantwoordelijkheid en wettelijke aansprakelijkheid*, Zwolle: Tjeenk Willink 1963.

Scrutton (2015)
B. Eder et al. (eds.), *Scrutton on Charterparties and Bills of Lading*, London: Sweet & Maxwell 2015.

Seck (2014)
P.A.M. Seck, *Reisbevrachting en cognossementsvervoer*, Zutphen: Uitgeverij Paris 2014.

Sekolec (1992)
J. Sekolec, 'Comments on the U.N. Convention on the Liability of Operators of Transport Terminals', *IDM* 1992, p. 1051-1062.

Sieburgh (2000)
C.H. Sieburgh, *Toerekening van een onrechtmatige daad*, Deventer: Kluwer 2000.

Smeele (2000)
F.G.M. Smeele, 'Dutch case law on art. 29 CMR', *ETL* 2000, p. 329-341.

Smeele (2001)
F.G.M. Smeele, 'Dutch case law on art. 29 CMR revisited', *ETL* 2001, p. 37-40.

Smeele (2009)
F.G.M. Smeele, 'The bill of lading contracts under European national laws (civil approaches to explaining the legal position of the consignee under bills of lading)', in: D.R. Thomas, *The evolving law and practice of voyage charterparties*, London: Informa 2009, p. 251-280.

Smeele (2010)
F.G.M. Smeele, 'The maritime performing party in the Rotterdam Rules 2009', *EJCCL* 2010-1/2, p. 72-86.

Smeele (2016)
F.G.M. Smeele, 'De expediteur in Boek 8', *TVR* 2016, p. 106-115.

Smeele and Niessen (2013)
F.G.M. Smeele and S.H.L. Niessen, 'The port of Rotterdam and its Hinterland connections, some legal aspects', in: B. Kuipers and R. Zuidwijk, *Smart Port Perspectives, Essays in honour of Hans Smits*, Erasmus Smart Port Rotterdam: Rotterdam 2013, p. 95-108.

Smits (1938)
P.H. Smits, 'Iets over de vraag der relativiteit van de onrechtmatigheid bij onrechtmatige daad in verband met de door de Hoogen Raad onderscheiden onrechtmatigheidsvormen,' *WPNR* 1938/3586-3591.

Smits (1940)
P.H. Smits, 'Aantasting en uitoefening van subjectieve rechten in hare beteekenis voor de onrechtmatige daad', *WPNR* 1940/3688.

Smits J.M. (1997)
J.M. Smits, 'Van risico-aanvaarding en toestemming naar eigen schuld: een ontwikkeling naar billijkheid?', in: W.H. van Boom et al. (ed.), *Tussen 'alles' en 'niets'*, Deventer: Kluwer 1997, p. 213-227.

Spanjaart (2006)
M. Spanjaart, 'De Himalaya-clausule en de derdenwerking van algemene voorwaarden', *TVR* 2006, p. 84-88.

Spanjaart (2012)
M. Spanjaart, *Vorderingsrechten uit cognossement*, Zutphen: Uitgeverij Paris 2012.

Spanjaart (2012 a)
M. Spanjaart, 'The applicability of the CMR within multimodal contracts of carriage', *TranspR* 2012, p. 278-282.

Spiegel (2005)
J. Spiegel, 'Buitencontractuele vorderingen en de CMR (art. 28 CMR)', in: M.L. Hendrikse and Ph.H.J.G. Van Huizen (eds.), *CMR: internationaal vervoer van goederen over de weg. Een praktische rechtsvergelijkende benadering*, Zutphen: Uitgeverij Paris 2005, p. 179-187.

Stevens (2012)
F. Stevens, 'Third party rights under bills of lading', *EJCCL* 2012, p. 54-58.

Stevens (2012 a)
F. Stevens, 'De wegvervoerder onder de Rotterdam Rules: een (maritime) performing party?', *Weg & Wagen* 2012, nr. 66, p. 20-21.

Stevens (2013)
F. Stevens, 'Aansprakelijkheidsproblemen bij belading van binnenschepen. Wie is aansprakelijk: ladingbelanghebbenden of vervoerder?', *TVR* 2013, p. 91-97.

Sturley, Fujita and Van der Ziel (2010)
M.F. Sturley, T. Fujita and G. van der Ziel, *The Rotterdam Rules, the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, London: Sweet and Maxwell 2010.

Suijling (1934)
J.Ph. Suijling, *Inleiding tot het burgerlijke recht* (2nd edn.), Haarlem: De erven F. Bohn N.V. 1934.

De Tavernier and Van der Weide (2016)
P. De Tavernier and J. van der Weide, 'Harmonising tort law. Exploring the concept of fault', in: C.G. Breedveld-de Voogd et al. (eds.), *Core concepts in the Dutch Civil Code*, Deventer: Kluwer 2016, p. 109-141.

Temme (2008)
J. Temme, 'Rechtliche Handhabung typengemischter Verträge', *TranspR* 2008, p. 374-380.

Tetley (1987)
W. Tetley, 'Responsibility of freight forwarders', *ETL* 1987, p. 79-95.

Tetley (2003)
W. Tetley, 'The Himalaya clause — revisited', *JIML* 2003, p. 40-64.

Tetley (2008)
W. Tetley, *Marine Cargo Claims*, Cowansville: Thomson Carswell 2008.

Thume (1994)
K.H. Thume, 'Gemischte Verträge mit Gemischtbetrieben', *TranspR* 1994, p. 382-388.

Thume (2000)
K.H. Thume, 'CMR art. 29', in: F. Fremuth, K.H. Thume and K. Eckardt, *Kommentar zum Transportrecht*, Heidelberg: Verlag Recht und Wirtschaft 2000.

Thume (2014)
K.H. Thume, 'Haftung für Umschlagschäden — wer haftet wem und wie?', *TranspR* 2014, p. 169-179.

Todd (2016)
P. Todd, *Principles of carriage of goods by sea*, London: Routledge 2016, p. 287-290.

Treitel (2000)
G.H. Treitel, 'Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Seas', in: F.D. Rose (ed.), *Lex Mercatoria (Essays on International Commercial Law in Honour of Francis Reynolds)*, London: LLP 2000.

Treitel and Peel (2011)
G.H. Treitel and E. Peel, *The law of contract* (13th ed.), London: Sweet & Maxwell 2011.

Ulfbeck (2011)
V. Ulfbeck, 'Contracts of logistics under the Rotterdam Rules', *JIML* 2011, p. 219-225.

Valder (2013)
H. Valder, 'AGB-recht in Logistikverträgen', *TranspR* 2013, p. 133-140.

Valder (2016)
H. Valder, 'Die ADSp 2016 — eine Analyse', *TranspR* 2016/6, p. 213-218.

Valder and Wieske (2006)
H. Valder and T. Wieske, 'Logistik-AGB: Ein neues Klauselwerk', *TranspR* 2006, p. 221-226.

Vanhooff (1998)
J.P. Vanhooff, 'De goederenbehandelaar: naties en stuwadoors', in: I. de Weerdt et al. (eds.), *Zeerecht: Grondbeginselen van het Belgisch Privaatrechtelijk Zeerecht*, Antwerp: ETL 1998, p. 104-150.

Vansweevelt and Weyts (2009)
Th. Vansweevelt and B. Weyts, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp/Oxford: Intersentia 2009.

Veenstra, Zuidwijk and van Asperen (2012)
A. Veenstra, R. Zuidwijk and E. van Asperen, 'The extended gate concept for container terminals: Expanding the notion of dry ports', *Maritime Economics & Logistics* 2012/14, p. 14-32.

Verheij (2005)
A. Verheij, *Onrechtmatige daad*, Deventer: Kluwer 2005.

Verheij (2016)
A.J. Verheij, 'Bewaarneming', in: H.N. Schelhaas, A.J. Verheij and B. Wessels (eds.), *Bijzondere overeenkomsten*, Deventer: Kluwer 2016, p. 377-390.

Verheyen (2012)
W. Verheyen, 'Optioneel Vervoer: exit CMR?', *DAOR: Le Droit des Affaires/het Ondernemingsrecht* 2012, 101, p. 25-30.

Verheyen (2012 a)
W. Verheyen, 'Fleximodal contracts and CMR: the Belgian approach', *JIML* 2012, p. 364-371.

Verheyen (2014)
W. Verheyen, *Contractuele aansprakelijkheid van vervoersintegratoren*, Brugge: Die Keure 2014.

Völlmar (1950)
H.F.A. Völlmar, *Inleiding tot de studie van het Nederlands Burgerlijk Recht door Mr. Dr. H.F.A. Völlmar*, Zwolle: W.E.J. Tjeenk Willink 1950.

Wagner (2011)
G. Wagner, 'Vicarious liability', in: A. Hartkamp et al. (ed.), *Towards a European Civil Code*, Alphen aan den Rijn: Kluwer Law International 2011, p. 903-921.

Von Waldstein and Holland (2007)
T. von Waldstein and H. Holland, *Binnenschifffahrtsrecht*, Berlin: de Gruyter 2007.

Warendorf, Thomas and Curry-Summer (2013)
H. Warendorf, R. Thomas and I. Curry-Sumner, *The Civil Code of the Netherlands*, Alphen aan den Rijn: Kluwer Law International 2013.

Werro (2011)
F. Werro, 'Liability for harm caused by things', in: A.S. Hartkamp et al. (eds.), *Towards a European Civil Code*, Alphen aan den Rijn: Kluwer Law international 2011, p. 921-943.

Wieske (2002)
T. Wieske, 'Rechtliche Probleme bei Logistikverträgen', *TranspR* 2002, p. 177-182.

Wieske (2008)
T. Wieske, 'Anmerkungen zur neueren Rechtsprechung zum Logistikrecht', *TranspR* 2008, p. 388-394.

Wieske (2013)
T. Wieske, 'Haftung für Lieferfristprobleme im Fracht-, Speditions-, Lager und Logistikrecht', *TranspR* 2013, p. 272-277.

Wilson (2010)
J.F. Wilson, *Carriage of goods by sea*, Harlow: Longman 2010.

De Wit (1995)
R. de Wit, *Multimodal transport: carrier liability and documentation*, London: LLP 1995.

De Wit (2003)
R. de Wit, 'De waarde van resoluties van beroepsgroeperingen, algemene contractsvoorwaarden en havengebruiken in de sector van de goederenbehandeling', in: E. van Hooydonk (ed.), *Stouwers, naties en terminal operators. Het gewijzigde juridische landschap,* Antwerp/Apeldoorn: Maklu 2003, p. 141-159.

Ypsilantis and Zuidwijk (2013)
P. Ypsilantis and R.A. Zuidwijk, 'Joint Design and Pricing of Intermodal Port — hinterland Network Services: Considering Economies of Scale and Service Time Constraints', *ERIM Report Series Research in Management* 2013/ERS-2013-011-LIS.

Van Zeben (1998)
C.J. van Zeben et al. (eds.), *Compendium bijzondere overeenkomsten*, Deventer: Kluwer 1998.

Van Zeben, du Pon and Olthof (1981)
C.J. van Zeben, J.W. du Pon and M.M. Olthof, *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek, Boek 6, Algemeen gedeelte van het verbintenissenrecht*, Deventer: Kluwer 1981.

Van Zeben, Reehuis and Slob (1991)
C.J. van Zeben, W.H.M Reehuis and E.E. Slob, *Parlementaire Geschiedenis van het Nieuwe Burgerlijke Wetboek, Boek 7, Bijzondere overeenkomsten Titels 1, 7, 9 en 14*, Deventer: Kluwer 1991.

Zeijlemaker (1963)
J.B. Zeijlemaker Jzn., 'Het ontwerp voor het zesde boek van het nieuwe burgerlijk wetboek. De algemene bepalingen van de titel overeenkomsten in het algemeen', *WPNR* 1963, p. 461-463

Von Ziegler (2005)
A. von Ziegler, 'Jurisdiction and forum selection clauses in a modern law of carriage of goods by sea', in: M. Davies (ed.), *Jurisdiction and Forum Selection in International*

Maritime Law: Essays in Honor of Robert Force, Alphen aan den Rijn: Kluwer Law International 2005, p. 85-118.

Zimmermann (1996)
R. Zimmermann, *The law of obligations, Roman foundations of the civilian tradition*, Oxford: Clarendon Press 1996.

Zonderland (1971)
P. Zonderland, 'De wettelijke rubricering van onrechtmatige daden', *WPNR* 1971/5123.

Zunarelli (2009)
S. Zunarelli, 'The carrier and the Maritime Performing Party in the Rotterdam Rules', *Uniform Law Review* 2009, p. 1011-1023.

Zweigert and Kötz (1998)
K. Zweigert and H. Kötz, *An introduction to comparative law*, Oxford: Clarendon Press 1998.

Zwitser (1984)
R. Zwitser, *Rond art. 1376 BW; overeenkomsten gelden vanwege en dus tussen partijen* (diss. Leiden), Leiden 1984.

Zwitser (1997)
R. Zwitser, 'Een mooi vonnis over derdenwerking', *NTBR* 1997, p. 115-119.

Zwitser (1998)
R. Zwitser, 'Aflevering onder cognossementsvervoer', in: K.F. Haak et al. (eds.), *Uitspraak en Uitleg rechtspraak zee- en vervoerrecht*, Deventer: Kluwer 1998, p. 142-149.

Zwitser (1998 a)
R. Zwitser, 'Bescherming van de stuwadoor door Himalaya-clausules', *NTBR* 1998, p. 53-59.

Zwitser (2006)
R. Zwitser, *Order- en toonderpapieren (Mon. BW A 28)*, Deventer: Kluwer 2006.

Zwitser (2012)
R. Zwitser, *De rol van het cognossement als waardepapier in het handelsverkeer*, Zutphen: Uitgeverij Paris 2012.

Table of cases

The Netherlands

HR 9 June 1989, ECLI:NL:HR:1989:AC0927, *NJ* 1990, 40 with commentary from J.L.P. Cahen, *S&S* 1989, 121 (Vojvodina/ECT).
HR 26 January 1990, ECLI:NL:HR:1990:AD1019, *NJ* 1990, 794 with commentary from C.J.H. Brunner (politie-inval).
Rb. Rotterdam 8 March 1991, ECLI:NL:RBROT:1991:AJ2657, *S&S* 1992, 74 (Pauline P).
HR 28 June 1991, ECLI:NL:HR:1991:ZC0300, *NJ* 1992, 622 with commentary from C.J.H. Brunner (Dekker/Van der Heide).
Hof Den Haag 2 July 1991, ECLI:NL:GHSGR:1991:AJ5853, *S&S* 1992, 116.
HR 21 February 1992, ECLI:NL:HR:1992:ZC0512, *NJ* 1992, 321 (Curatoren/Heppe).
HR 22 January 1993, ECLI:NL:HR:1993:ZC0831, *NJ* 1993, 456, *S&S* 1993, 58 (Van Loo/Wouters).
Rb. Rotterdam 24 December 1993, ECLI:NL:RBROT:1993:AJ2921, *S&S* 1995, 116.
HR 31 December 1993, ECLI:NL:HR:1993:ZC1210, *NJ* 1995, 389 with commentary from C.J.H. Brunner, *S&S* 1994, 36 (Matatag/De Schelde) (Serra).
Hof Den Haag 25 October 1994, ECLI:NL:GHSGR:1994:AL8990, *S&S* 1995, 38.
HR 16 December 1994, ECLI:NL:HR:1994:ZC1588, *NJ* 1995, 185 (Huting/Peters).
HR 13 January 1995, ECLI:NL:HR:1995:ZC1608, *NJ* 1997, 366 with commentary from C.J.H. Brunner (Ontvanger/Bos).
HR 24 March 1995, ECLI:NL:HR:1995:ZC1675, *NJ* 1996, 596 with commentary from R.E. Japikse, *S&S* 1995, 72 (Iris).
HR 24 March 1995, ECLI:NL:HR:1995:ZC1677, *NJ* 1996, 317 with commentary from R.E. Japikse, *S&S* 1995, 74 (Mars).
HR 30 September 1994, ECLI:NL:HR:1994:ZC1464, *NJ* 1995, 45.
Hof Den Haag 17 October 1995, ECLI:NL:GHSGR:1995:AL7248, *S&S* 1996, 54.
HR 28 June 1996, ECLI:NL:HR:1996:ZC2115, *NJ* 1997, 494 with commentary from W.M. Kleijn, *S&S* 1996, 101 (KVV/Moksel).
HR 24 January 1997, ECLI:NL:HR:1997:ZC2255, *NJ* 1997, 558 with commentary from P.A. Stein (Tokkie/Michael).
HR 5 September 1997, ECLI:NL:HR:1997:ZC2415, *NJ* 1998, 63 with commentary from R.E. Japikse, *S&S* 1997, 121 (Sriwijaya).
HR 28 November 1997, ECLI:NL:HR:1997:ZC2511, *NJ* 1998, 168 (Smits/Royal Nederland).
HR 28 November 1997, ECLI:NL:HR:1997:ZC2512, *NJ* 1998, 706 with commentary from J. Hijma, *S&S* 1998, 33 (General Vargas).
HR 17 April 1998, ECLI:NL:HR:1998:ZC2632, *NJ* 1998, 602, *S&S* 1998, 75 (Oegema/Amev).
Rb. Rotterdam 26 August 1999, ECLI:NL:RBROT:1999:AK4152, *S&S* 2000, 12 (Hanjin Singapore).
HR 21 January 2000, ECLI:NL:HR:2000:AA4429, *NJ* 2000, 553 with commentary from J.B.M. Vranken, *S&S* 2000, 72 (Sungreen).
Rb. Rotterdam 5 October 2000, ECLI:NL:RBROT:2000:AK4361, *S&S* 2001, 132.
HR 5 January 2001, ECLI:NL:HR:2001:AA9308, *NJ* 2001, 391 with commentary from K.F. Haak, *S&S* 2001, 61.
HR 5 January 2001, ECLI:NL:HR:2001:AA9309, *NJ* 2001, 392 with commentary from K.F. Haak, *S&S* 2001, 62.
Rb. Rotterdam 18 January 2001, ECLI: NL:RBROT:2001:AK4443, *S&S* 2003, 10.
Rb. The Hague 10 April 2002, ECLI:NL:RBSGR:2002:AL2179, *S&S* 2003, 104.

England

Germany

BGH 7 July 1960, *VersR* 1960, p. 727.
BGH 19 January 1973, *VersR* 1973, 350.
BGH 28 February 1975, *NJW* 1975, 1597.
BGH 28 April 1977, *VersR* 1977, p. 717.
BGH 9 November 1979, *VersR* 1980, 181.
BGH 26 November 1979, *VersR* 1980, p. 572.
BGH 12 March 1984, *VersR* 1984, 552.
BGH 15 March 1988, *TranspR* 1988, 278.
BGH 23 May 1990, *TranspR* 1990, 328.
BGH 6 July 1995, *NJW* 1995, 2991.
BGH, 15 December 1994, *NJW-RR* 1995, 415.
BGH 10 June 2002, *TranspR* 2002, 358.
BGH 4 March 2004, *TranspR* 2004, 460.
BGH 20 January 2005, *TranspR* 2005, 311.
BGH 3 November 2005, *TranspR* 2006, 35.
BGH 21 March 2007, *TranspR* 2007, 361.
BGH 19 April 2007, *TranspR* 2007, 416.
BGH 13 September 2007, *TranspR* 2007, 477.
BGH 18 October 2007, *TranspR* 2007, 472.
BGH 17 July 2008, *TranspR* 2008, 365.
BGH 30 October 2008, *TranspR* 2009, p. 130.
BGH 18 March 2010, *TranspR* 2010, p. 380.
BGH 12 January 2012, *TranspR* 2012, 107.
BGH 17 October 2013, *RdTW* 2014, 154-155.
BGH 10 April 2014, *TranspR* 2014, 283.
BGH 29 April 2014, *RdTW* 2014, p. 271.
BGH 17 September 2015, *RdTW* 2015, p. 409.
BGH 4 February 2016, *RdTW* 2016, 340.

Belgium

Hof van Cassatie 7 December 1973, *ETL* 1974, 534 with commentary from M. Fallon.
Rechtbank van Koophandel Antwerpen 15 September 1970, *R.W.* 1970-71, 620 with commentary from C. Canepeel.
Hof van beroep Antwerpen 17 February 1982, *RHA* 1981-1982, 155.
Rechtbank van Koophandel Antwerpen 15 January 1979, *R.H.A.* 1979-1980, 467.
Rechtbank van Koophandel Antwerpen 13 June 1990, *RHA* 1992, 63.
Rechtbank van Koophandel Antwerpen 22 June 1992, *ETL* 1992, 74.
Rechtbank van Koophandel Antwerpen 9 January 1995, *ETL* 1995, 474.
Rechtbank van Koophandel Antwerpen 19 March 1996, *RHA* 1996, 135.
Hof van Cassatie 1 June 2001, *RW* 2001-2002, 379 with commentary from K. Broeckx.
Hof van Cassatie 8 November 2004, *TBH* 2005, 512 with commentary from M. Godfroid.
Hof van beroep Antwerpen 16 October 2006, *RW* 2009-2010, 961.

Other jurisdictions

New Zealand Supreme Court, The Maheno [1977] 1 Lloyd's Rep. 81.
Supreme Court of Canada, ITO v. Miida Electronics Inc. [1986] 1 S.C.R. 752 (The Buenos Aires Maru).

EJC

ECJ 19 December 2013, case C-9/12, ECLI:EU:C:2013:860, *NJ* 2014, 346 with commentary from L. Strikwerda (Corman-Collins SA/La Maison du Whiskey).

Index

Acknowledgements

This thesis has been completed with the support of many. I would like to express my appreciation and thanks to all those involved. First and foremost, I wish to thank my thesis supervisor, Frank Smeele, for giving me the opportunity to carry out this research and for his guidance and useful critiques throughout the process. I would also like to thank my co-supervisor, Wouter Verheyen, for his constructive comments.

Special gratitude is due to the members of the doctoral committee, Ellen Eftestøl-Wilhelmsson, Krijn Haak, Harriët Schelhaas, Albert Veenstra, Dick Zwitser, and I am particularly grateful to Maarten Claringbould for his valuable suggestions at the final stage of the research.

My special thanks are also extended to my colleagues of the ULTIMATE-project, the *Hoge Raad* and especially to Tomas Arons, Stephan Geense, Elize Niemeijer, Tessie Schuurs, Michiel Spanjaart, Frouwke de Vries and other colleagues of the Erasmus School of Law.

I would also like to thank the Max Planck Institute for Comparative and International Private Law in Hamburg for giving me the opportunity to enjoy several research stays in Hamburg and to make use of their excellent library facilities.

Finally, I wish to thank my family, friends and Peter for their continued support and encouragement.

Curriculum Vitae

Susan Niessen was born on 8 October 1986 in Venlo, the Netherlands. After finishing her Dutch pre-university education (VWO), Susan studied Dutch law at the Erasmus University Rotterdam. As an exchange student, she studied at the Istanbul Bilgi University, Turkey. In 2009, Susan obtained her bachelor degree and she completed the Master Commercial and Company Law in 2010. Susan has been a PhD candidate at the Erasmus School of Law since September 2010. In September and October 2013 and in January, February and March 2016 she conducted part of her research at the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany. Susan has been a researcher at the Netherlands Supreme Court (*Hoge Raad der Nederlanden*) since May 2016.