BILL OF LADING CONTRACTS UNDER EUROPEAN NATIONAL LAWS

Civil law approaches to explaining the legal position of the consignee under bills of lading

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1 INTRODUCTION

1. It is often said that a bill of lading issued under a voyage charter constitutes "a mere receipt" as long as it remains in the hands of the charterer. This implies that as between the parties to a contract of affreightment the terms of the voyage charter will prevail over those of the bill of lading. Although a bill of lading in the hands of the charterer may still be used as *prima facie* evidence[2], its primary role in between the parties to the voyage charter is to facilitate delivery of the goods at destination to the party entitled to take delivery. This follows from the presentation rule which requires that an original copy of the bill of lading needs to be presented to the carrier in order to obtain delivery of the goods. It now seems to be universally accepted[3] that this presentation rule applies not only to easily transferable bills of lading made out to order or to bearer, but also to 'straight' bills of lading, i.e. those in which the consignee is a named party.

2. Interestingly, some European legal systems give a much wider application to the rule that between the parties to a contract of affreightment, the terms of the voyage charter shall prevail over those of the bill of lading. In effect, it is accepted that if a contract of carriage is concluded and subsequently a bill of lading is issued, then between shipper and carrier in principle the contract of carriage shall prevail over the bill of lading.[4] In CMNI[5], as well as under German, and Dutch law this rule has even been codified.[6] The relevant provisions read as follows:

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[2] This follows from art. III-4 Hague-Visby Rules, e.g. to prove that goods of a certain description were received for carriage or loaded on a vessel. Cf. Dieter Rabe, *Seehandelsrecht*, 4. Ed., 2000, § 656 HGB, No. 27. To the same effect: art.16-3 (a) Hamburg Rules, art. 41 Rotterdam Rules, art. 11-3 CMNI.

[3] Prior to the House of Lords decision in *The Rafaela S*, [2005] 1 Lloyd's Rep. 347 there was still uncertainty about this issue in some Common Law jurisdictions. By contrast, in the United States (see art. 80104 and 80110 (a) Pomerene Bills of Lading Act 1916) and also in continental Europe it had been accepted/confirmed much earlier that the presentation rule applied also to straight bills of lading.

[4] For French law, see: Cour de cassation (hereafter: Cass.) 18.1.1994, *DMF* 1994.548.

[5] The Convention on the Contract for the Carriage of Goods by Inland Waterway, Budapest 2000 (hereafter to be referred to by its French acronym: CMNI).

[6] Compare also art. 116 of the Swiss Federal Law of 14.12.1965: « Les rapports juridiques entre le transporteur et le chargeur sont régis par les clauses du contrat de transport. Toutefois les dispositions du connaissement sont réputées exprimer la volonté des parties s'il n'existe pas de convention contraire faire par écrit. » (*The legal relations between the carrier and the shipper are governed by the clauses of the contract of carriage. Nevertheless, the provisions of the bill of lading are deemed to express the intention of the parties, if there exists no contrary agreement in writing.*)

Art. 11 CMNI

"4. (...) The conditions of the contract of carriage shall continue to determine the relations between carrier and shipper."

§ 656 Handelsgesetzbuch (HGB)[7]

"4. Für das Rechtsverhältnis zwischen dem Verfrachter und dem Befrachter bleiben die Bestimmungen des Frachtvertrages maßgebend." (*For the legal relation between the carrier and the shipper, the provisions of the contract of carriage remain decisive.*)

Art. 8:410 Burgerlijk Wetboek (BW)[8]

"Indien een vervoerovereenkomst is gesloten en bovendien een cognossement is afgegeven, wordt, behoudens artikel 441 tweede lid, tweede volzin, de rechtsverhouding tussen de vervoerder en de afzender door de bedingen van de vervoerovereenkomst en niet door die van dit cognossement beheerst. Behoudens het in artikel 441 eerste lid gestelde vereiste van houderschap van het cognossement, strekt dit hun dan slechts tot bewijs van de ontvangst der zaken door de vervoerder. (*If a contract of carriage has been entered into, and if, in addition, a bill of lading has been issued, the legal relationship between the carrier and the consignor is governed by the stipulations of the contract of carriage and not by those of the bill of lading, except for Art. 441, §2, 2nd sentence. Except for the requirement of possession of the bill of lading provided for in Art. 441, § 1, the document then only serves them as proof of the reception of the goods by the carrier.*)

3. The idea behind this continental approach is that it is usually not a coincidence if bills of lading are issued. In fact bills of lading are generally drawn up and issued further to a pre-existing contract of carriage concluded (well) in advance, in order to allow sufficient time for the cargo to be brought to the port of shipment ahead of the ship's arrival and loading operations. This prior contract of carriage may have been concluded in writing, e.g. in the form of a standardised booking note[9] or in a fixture recap based on an exchange of e-mail messages as is often the case with voyage charters, but there is no reason why such a prior contract of carriage could not be made orally through mere offer and acceptance as well if the parties so wish. Contracts of carriage are after all consensual by nature, so that no formalities are required for their conclusion. In many cases, the parties to such a prior contract of carriage will only deal explicitly with some key provisions of the contract such as the places of taking over/delivery or loading/discharge of the goods and the freight and leave all other matters to the applicable mandatory law and to the standard terms of business of the carrier. Later on when the bill of lading needs to be issued, further instructions will be given by the shipper to the carrier.

4. Nevertheless the drawn-out process of first concluding a contract of carriage and later issuing a bill of lading implies that it is possible that the contents of the bill of lading – whether mistakenly or intentionally – depart from what was agreed earlier in the contract of carriage between the shipper and

[7] German Commercial Code.

[8] Dutch Civil Code. Art. 8:410 BW applies to carriage by sea, but similar provisions are in place for the relation between the bill of lading, resp. the consignment note and the contract of carriage in case of inland navigation (art. 8: 917 BW) and road transport (art. 8:1123-2 BW)!

[9] E.g. the Conline Booking Note Form 2000.

the carrier.[10] In that case, the above rule implies that it is the contract of carriage, rather than its (potentially imperfect) reproduction in the bill of lading, which governs the relations between the shipper and carrier as the original parties to this contract. Of course that does not preclude the bill of lading from being used as (excellent) *prima facie* evidence of the terms of that contract of carriage, similar to the role played by waybills in general. It merely means that if necessary proof to the contrary is permitted. Neither does it imply that parties may not validly agree[11] that the bill of lading shall supersede the pre-existing contract of carriage, thus in effect excluding the possibility of providing counter-evidence against the contents of the bill of lading.

2 TRANSFER OF BILL OF LADING TO THIRD-PARTY ACTING IN GOOD FAITH

5. It is also well known that with the transfer of the bill of lading to a third-party acting in good faith, its legal status changes dramatically. Firstly, the transfer of the bill of lading causes a new legal relation to arise between that third-party, the consignee[12] and the carrier. This relation is governed to a greater or lesser extent by the contents of the bill of lading, rather than by the underlying voyage charter or contract of carriage. Based upon his lawful possession of the bill of lading, the consignee can exercise the rights contained in this document directly against the carrier and independently from the charterer/shipper. Most notable among these rights of the consignee are the right to take delivery of the goods and the right to sue for damages in case of cargo loss or damage.

6. Secondly, the transfer of the bill of lading to the consignee triggers the material application of the mandatory liability regime of international conventions on the carriage of goods by sea[13] or by in-

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[10] E.g. the bill of lading may state "freight prepaid", although the shipper has not paid freight yet or where it is agreed under the contract of carriage that goods were to be carried as deck-cargo, yet the ship's agent erroneously forgets to stamp a deck-cargo clause onto the bill of lading or vice versa and where a typing error in the goods description as included in the bill of lading goes unnoticed by all.

[11] E.g. if the Booking Note contains a superseding clause as in Conlinebooking 2000: "It is hereby agreed that this Contract shall be performed subject to the terms contained on Page 1 and 2 hereof which shall prevail over any previous arrangements and which shall in turn be superseded (except as to deadfreight) by the terms of the Bill of lading.". See: N. Gaskell/R. Asariotis/Y. Baatz, *Bills of Lading*, 2000, no. 2.68 ff.

[12] In this contribution I will focus mainly on situations where the consignee is a third-party acting in good faith and not where the consignee is the voyage charterer or his receiving agent.

[13] These conventions are the following: – Brussels Convention 1924 (hereafter: Hague Rules or HR), – Modified Brussels Convention 1968 (hereafter: Hague-Visby Rules or HVR), – the UN Convention on the Carriage of Goods by Sea 1978 (hereafter: Hamburg Rules or HHR), and (in future) perhaps also: – the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, to be signed at Rotterdam in September 2009 (hereafter: the Rotterdam Rules or RR). Any comments made in this contribution are based on the text of the Convention as adopted by the General Assembly of the United Nations at its 63rd session at New York at 11 December 2008, see: *Official Records of the General Assembly*, Sixty-third Session, Supplement No. 17 (A/63/17), annex I.

land waterway[14] to the contract of carriage. In principle these transport law conventions do not apply to charter-parties, so that parties to a contract of affreightment evidenced by a voyage charter have freedom of contract.[15] However, if pursuant to the voyage charter, a bill of lading is issued which is subsequently transferred to a third-party acting in good faith, then the mandatory liability regimes will take effect, subject only to their own formal scopes of application as defined in these conventions.[16] And even if the transport law conventions do not formally apply, the same result may be achieved if such a mandatory liability regime applies to the bill of lading under the applicable national law.

3 Conclusive Evidence Rule

7. The application of these mandatory liability regimes brings amongst others the conclusive evidence-rule into operation, which – except for the Hague Rules – is common to all conventions for the carriage of goods by sea. The conclusive evidence rule in art. III-4 Hague-Visby Rules reads as follows:

Art. III-4 HVR

> "4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with § 3, a, b and c. However proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."[17]

8. It is worth observing here that (again) some continental European legal systems[18] and CMNI give a wider application to this conclusive evidence-rule by applying it not only to the cargo description in the bill of lading, but also to the other terms and clauses of the contract of carriage as they appear from the bill of lading.[19] For easy reference, I will below refer to this continental European approach as the extended conclusive evidence rule. This rule implies that as against the third-party consignee, the carrier cannot invoke clauses from or defences based upon the underlying voyage charter or contract of carriage if these contradict or depart from the clauses included in the bill of lading.[20] In CMNI, German law and Dutch law this extended rule has been codified and reads as follows:

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[14] Convention on the Contract for the Carriage of Goods by Inland Waterway, Budapest 22 June 2001 (hereafter: CMNI).

[15] See: art. 1 (e) Hague and Hague-Visby Rules.

[16] See art. X Hague and Hague-Visby Rules, art. 2 Hamburg Rules, art. 2 CMNI, art. 5-7 Rotterdam Rules.

[17] See also: art.16-3 (b) Hamburg Rules, art. 41 Rotterdam Rules as per 3-12-2008, art. 13-4 CMNI.

[18] For the position under French law, see below § 8.2.

[19] Cf. R. de Wit, *Multimodal transport*, (diss. Free University Brussels), LLP: London, 1995, nos. 5.36. As will be shown below in § 8.3, Dutch law even extends the application of the conclusive evidence-rule to the consignment note in evidence of a contract for the carriage of goods by road as between the consignee and the carrier.

[20] For French law see: P. Bonassies/C. Scapel, *Droit Maritime*, LGDJ: Paris, 2006, No. 968, 986.

Art. 11 CMNI

"3. The transport document shall be prima facie evidence, save proof to the contrary, of the conclusion and content of the contract of carriage and of the taking over of the goods by the carrier. In particular, it shall provide a basis for the presumption that the goods have been taken over for carriage as they are described in the transport document.
4. When the transport document is a bill of lading, it alone shall determine the relations between the carrier and the consignee. The conditions of the contract of carriage shall continue to determine the relations between carrier and shipper.",

§ 656 HGB[21]

-1. Das Konnossement ist für das Rechtsverhältnis zwischen dem Verfrachter und dem Empfänger der Güter maßgebend. (*The bill of lading is decisive for the legal relationship between the carrier and the receiver of the goods.*)

Art. 8:414 BW[22]

-1. Tegenbewijs tegen het cognossement wordt niet toegelaten, wanneer het is overgedragen aan een derde te goeder trouw." (*Proof to the contrary against the bill of lading shall not be admissible, when it has been transferred to a third party acting in good faith.*)

9. The ratio behind the conclusive evidence-rule is obviously to protect the position of the third-party consignee in good faith to whom the bill of lading was transferred. In continental Europe, the basic principle behind this rule is understood to be that it is essential for the transferability of the bill of lading as a document of title and for the protection of commercial interests generally, that a third-party acting in good faith, who is inclined to acquire the rights vested in a bill of lading, shall be entitled to rely on the appearance of those rights as created by the bill of lading. This implies that any defences that the carrier otherwise may have had based upon the underlying voyage charter or contract of carriage or upon facts and circumstances external to the contents of the bill of lading, are deemed inadmissible.[23] It also means that the third-party acting in good faith may acquire a better, different or even worse right through the transfer of the bill of lading to him, than the charterer or shipper as the original party under the voyage charter or contract of carriage previously had.

10. This abstraction from the underlying contractual relation is a feature which bills of lading share with negotiable instruments, however it applies not only to order or bearer bill of lading, but even to a (straight) bill of lading made out in favour of a named party. Of course there are other differences as well between the bill of lading as a document of title in relation to certain specific goods and a negotiable instrument for the payment of money. An important one is that the rights vested in the bill of la-

[21] See: Bundesgerichtshof (Federal Supreme Court, hereafter: BGH) 23.11.1978 (II ZR 27/77), *BGHZ* 73, 4-8 (*The Pia Vesta*), Rabe, *Seehandelsrecht*, 4. Ed., 2000, § 656 HGB, No. 27.

[22] Art. 8:414-1 BW applies to carriage by sea, but an identical provision applies in case of carriage by inland waterways, see art. 8:921 BW. Dutch law in art. 8:1123-1 BW extends this conclusive evidence-rule also to the contractual terms contained in a waybill issued for carriage by road as between consignee and carrier. See below § 8.3.

[23] That may be different however where the bill of lading incorporates by reference clauses from the voyage charter or the standard terms of business of the carrier, because then there need not be a contradiction between the terms of the bill of lading and those of the voyage charter. As will be explored below in § 10, continental approaches to the validity and effectiveness of such incorporation clauses vary widely.

ding are subject to defences which the carrier may invoke under the mandatory liability regimes. This means that the consignee's right under the bill of lading to take delivery of the goods or to sue for damages may be frustrated[24] by cargo loss or damage resulting from unavoidable circumstances (*force majeure*) or from an exempted cause under art. IV-2 (a) HVR, or restricted because the carrier is entitled to invoke unit limitation of liability pursuant to art. IV-5 (a) HVR[25] or prescribed because of the lapsing of a one or two year time-bar.[26]

11. It is worth observing that there is at least one more instance where the various conventions regarding the carriage of goods by sea and inland waterways provide specific protection for the third-party consignee under a bill of lading contract. Under the Hague and Hague-Visby Rules[27], the Hamburg Rules[28], CMNI[29] and the Uncitral Draft[30], it is possible to depart from the mandatory liability regime of the carrier, but only if the third-party consignee is put on notice through a statement in the bill of lading itself that the goods are carried on deck[31] or may be carried on deck[32], and are in fact so carried.

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24 Cf. R. de Wit, *Multimodal transport*, 1995, nos. 5.18, 5.34.

25 The same applies *mutatis mutandis* if the bill of lading contract is subject to (art. 5 and 6) Hamburg Rules, or to (art. 18 and 20) CMNI, or to (art. 17 and 59) Rotterdam Rules.

26 A one year time-bar applies under art. III-6 HVR, art. 24 CMNI. A two-year time-bar applies under art. 20 Hamburg Rules and art. 62 Rotterdam Rules.

27 See art. I (c) HVR. Excluded from the definition of "goods" to which the Hague and Hague-Visby Rules mandatorily apply is: "cargo which *by the contract of carriage is stated as being carried on deck* and is so carried.". This means effectively that the deck cargo statement must be included in the bill of lading in order to be effective against the third-party consignee. After all, the notion of "contract of carriage" as used in art. I (c) HVR is defined already in art. I (b) HVR as "a contract of carriage covered by a bill of lading", meaning that the "bill of lading ... regulates the relations between a carrier and a holder of the same".

28 See art. 9 (2) Hamburg Rules: "2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith."

29 See art. 3 (6) CMNI: "The carrier is entitled to carry the goods on deck or in open vessels only if it has been agreed with the shipper or if it is in accordance with the usage of the particular trade or is required by the statutory regulations.", and art. 11 (5) CMNI: "The transport document, in addition to its denomination, contains the following particulars: … (g) the statement, if applicable, that the goods shall or may be carried on deck or on board open vessels;".

Although art. 18 (1) (c) CMNI provides a special exoneration from liability for the carrier in case of: "(c) carriage of the goods on deck or in open vessels, where such carriage has been agreed with the shipper or is in accordance with the practice of the particular trade, or if it is required by the regulations in force;", based on the extended conclusive evidence rule of art. 11 (3) and (4) CMNI it seems that the carrier can only rely on this special exoneration if the statement of art. 11 (5) (g) CMNI was included in the transport document. See above, chapter 3, No. 5.

30 See art. 25 (4) Rotterdam Rules: "4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

31 See art. 1 (c) HVR, art. 9 (2) Hamburg Rules.

4 PROBLEM AREAS

12. Despite their great importance for the protection of the interests of commerce, the conclusive evidence-rule and the principle behind it, do not provide immediate or definite answers to all questions concerning the consignee's position under a bill of lading. What if the bill of lading contains a provision aiming to incorporate by reference into the bill of lading clauses from another contract, such as the Charter-Party[33], or a Volume Contract[34] or the standard conditions of the carrier? Are such incorporation clauses effective in binding the consignee to those external clauses? And what if provisions in the bill of lading place a burden on the consignee, whether of a financial[35] or a procedural[36] nature or in the form of a (potential) liability?

13. Other questions arise as well. What exactly is the nature of the consignee's right to take delivery under the bill of lading? Does he accede to the bill of lading contract or does he merely accept certain rights that are conferred upon him by the original parties under the voyage charter or contract of carriage? And when does the consignee's right arise, already upon his acquisition of the bill of lading or only after his presentation of the bill of lading?

5 SCOPE OF THIS COMPARATIVE STUDY

14. It is submitted here that the answer given to these questions, is influenced by, if not ultimately depend upon the basic approach taken with regard to the legal position of the consignee under the contract of carriage and under the bill of lading contract. As this matter has not been dealt with conclusively in any of the transport law conventions, I will below explore and compare the approaches taken by three European civil law jurisdictions with regard to the position of the consignee under a contract of carriage and under a bill of lading contract. In view of the case law of the European Court of Justice (ECJ) about opposability of jurisdiction clauses in bills of lading against third-parties, also the question will be addressed whether under these national laws the third-party consignee succeeds in

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32 See art. 9 (2) Hamburg Rules, art. 11 (5) CMNI, art. 25 (4) Rotterdam Rules.

33 See e.g. clause (1) of the Congenbill: "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.". For other examples of incorporation clauses, see: Gaskell/Asariotis/Baatz, *Bills of Lading*, 2000, 2.1-2.14, 2.41-2.45, 21.10-21.17.

34 The volume contract is defined in art. 1-2 of the Rotterdam Rules as "a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range."

35 Such as a duty to pay freight, charges or demurrage.

36 Such as a choice of law clause, a jurisdiction clause or an arbitration clause.

the rights and obligations of the shipper under the contract of carriage. Other issues which will be raised include whether and when the consignee is liable for freight, charges and demurrage, whether he is bound to choice of law, jurisdiction or arbitration clauses and the effectiveness of incorporation clauses and "merchant responsibility"-clauses and the like.

15. The continental European legal systems to be examined here are those of France, Germany and The Netherlands. I have limited myself to these legal systems because of the need of personal and direct access to the primary sources (legislation, cases, literature). I believe however that the legal systems selected are representative of European legal thinking in this area, also in view of the considerable influence exerted by especially the French and German legal systems upon other continental legal systems within Europe and beyond. Dutch law can be seen as a melting pot of influences from French, German and English law in combination with some original legal thinking based upon a long tradition of practical experience with these matters through the abundant case-law generated by the busy ports of Rotterdam and Amsterdam. Inspiration will also be drawn wherever relevant from European efforts to unify principles of contract law[37] and from provisions of uniform transport law, taken from the various unimodal conventions on the carriage of goods by sea, inland waterways, by road, rail and air.[38] It is fair to say that CMR, Cotif-CIM and CMNI especially, have been strongly influenced by continental legal thinking in the field of transport law, which finds expression in the way these conventions regulate the position of the consignee under contracts of carriage.

6 POSITION OF THE CONSIGNEE UNDER A CONTRACT OF CARRIAGE AND UNDER A BILL OF LADING CONTRACT

16. Modern transport law[39] defines the contract for the carriage of goods as the contract between a shipper and a carrier in which the latter, usually in return for freight, undertakes to carry goods from

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[37] In particular the *Principles of European Contract Law* 1998 (PECL) as prepared by The Commission of European Contract Law and the *Unidroit Principles of International Commercial Contracts 2004* (Unidroit Principles 2004).

[38] In addition to the conventions listed above already in footnotes 11 and 12, attention will be paid to the Convention on the Contract for the International carriage of Goods by Road, Geneva 19 May 1956 (hereafter: CMR), United Nations Convention on International Multimodal Transport of Goods, Geneva, 24 May 1980 (hereafter: MTC), the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail 1999 (hereafter: Cotif-CIM) and the Convention for the Unification of certain Rules for International Carriage by Air, Montreal, 28 May 1999 (hereafter: Montreal Convention or MC).

[39] See e.g. art. 1-1 and 1-6 HHR, art. 1-1 and 1-5 RR. Compare also § 407 Handelsgesetzbuch (HGB or German Commercial Code) as revised in 1998. See in great depth: Jürgen Basedow, *Der Transportvertrag*, J.C.B. Mohr (Paul Siebeck): Tübingen, 1987, p. 34 ff.

one place to another.[40] It follows from the elements of this definition that a contract for the affreightment of a ship for a voyage in order to carry goods from one place to another, qualifies (also) as a contract of carriage. It is also clear from this definition that it is not an essential characteristic of the contract of carriage that the carrier undertakes to deliver the goods to a third-party consignee. If the shipper under an ordinary contract of carriage prefers to take delivery of the goods at destination himself whether directly or through a receiving agent, all he needs to do is give instructions to that effect to the carrier. Nevertheless, several transport law conventions[41] do define the consignee as "the person entitled to take delivery of the goods."[42] If pursuant to the contract of carriage or the voyage charter a bill of lading was issued, then in view of the abovementioned presentation rule the shipper or charterer (or his receiving agent) must present the bill of lading to the carrier in order to obtain delivery of the goods.

17. But how to explain the legal situation which arises if the shipper under an ordinary contract of carriage instructs the carrier to deliver the goods to a third-party consignee? As will be shown below in § 8, the prevailing view under German and Dutch law is that the consignee's rights under the contract of carriage must be understood as a contract or a stipulation in favour of a third party.[43] This used to be the prevailing view under French law as well, but as will be seen below this interpretation was later abandoned for the notion of a so called *contrat à trois personnes* (three-party contract).[44] A further question that arises is whether the position of the third-party holder of a bill of lading can also be explained by reference to the concept of a stipulation in favour of a third-party.

18. For a better understanding of what a contract or stipulation in favour of a third party entails in the civil law, it is useful to commence with the conceptualisation of these notions in two recent non-governmental projects to define principles of contract law in Europe: the Principles of European Contract Law (PECL) and the Unidroit Principles 2004. Although these principles as such have no legislative status, they were drawn up by groups of experts originating from many European legal systems on the basis of extensive comparative legal research. Even if these principles are the largest common denominator for the European legal systems and are not specifically adjusted to the position of the third-party consignee under a contract of carriage or a bill of lading, the basic conceptualisation is useful for

40 Both "shipper" and "carrier" relate to a contractual capacity and must be distinguished from factual notions such as 'actual shipper' or 'actual or performing carrier', which relate to the person who hands the goods over to the carrier for transportation and to the person who performs the transport respectively.

41 See: art. 1-4 HHR, art. 1-5 CMNI 2001, art. 1-6 MTC 1980 and art. 1-11 RR.

42 See: art. 1-4 HHR.

43 Under German law known as a: "Vertrag zugunsten Dritter", see: § 328 BGB, under Dutch law as a "Derdenbeding", see: art. 6:253 BW, under French law as a "stipulation pour autrui", see : art. 1121 Code Civil.

44 See: Pierre Bonassies/Christian Scapel, *Droit Maritime*, 2006, No. 932.

comparative purposes and can be compared with the way that the position of the third-party consignee under a contract of carriage is regulated by the various unimodal transport law conventions.

7 PRINCIPLES OF EUROPEAN CONTRACT LAW (PECL) AND UNIDROIT PRINCIPLES

19. There is no unified law in continental Europe with regard to the contract (or stipulation) for the benefit of a third-party in general.[45] The nearest thing to such uniform rules is to be found in art. 6:110 PECL 1998 and art. 5.2.1 up to 5.2.6 Unidroit Principles 2004. These provisions read as follows:

Principles of European Contract Law (PECL)
Art. 6:110: Stipulation in Favour of a Third Party

-1. A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.
-2. If the third party renounces the right to performance the right is treated as never having accrued to it.
-3. The promisee may by notice to the promisor deprive the third party of the right to performance unless: a) The third party has received notice from the promisee that the right has been made irrevocable, or b) The promisor or the promisee has received notice from the third party that the latter accepts the right.

Unidroit Principles 2004
Section 2: Third Party Rights
Art. 5.2.1 (Contracts in favour of third parties)

-1. The parties (the "promisor" and the "promisee") may confer by express or implied agreement a right on a third party (the "beneficiary").
-2. The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

Art. 5.2.2 (Third party identifiable)

The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.

Art. 5.2.3 (Exclusion and limitation clauses)

The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.

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[45] Edgar du Perron in: 'Contract and Third Parties', chapter 19 in: Arthur Hartkamp a.o. (Ed.), *Towards a European Civil Code*, 2nd Ed., Ars Aequi Libri: Nijmegen, 1998, p. 312 gives three reasons why the prospect of codifying the law on contract and third parties seems particularly daunting: "First, the existing European Codes, the Principles of European Contract Law (PECL), the UNIDROIT principles, and the UN-Convention on the International Sale of Goods (CISG) do not cover the subject at all or do not come close to covering it extensively. Therefore, when drafting we can only be guided by existing texts to a small extent. Secondly, the topic of contract and third parties is not really a single integrated part of the law, but an umbrella under which problems stemming from various parts of the law are treated. On the European level, matters in this respect are even more complicated than on the national level, because different legal systems treat the same issues under various headings, using various techniques. Although this situation is not uncommon, here the range of solutions is particularly extensive. Thirdly, the gap between, at the one end, the law of England and Wales, which restricts the effects of contract on third parties within narrow limits and, at the other end, German law, which liberally extends these effects, may be too wide to be bridged."

Art. 5.2.4 (Defences)

The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.

Art. 5.2.5 (Revocation)

The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.

Art. 5.2.6 (Renunciation)

The beneficiary may renounce a right conferred on it."

20. A linguistic analysis shows that in both sets of principles the third-party's right is based upon the agreement[46] of the contractual parties to confer a benefit on the beneficiary, whereas the party autonomy of the beneficiary is protected by his right to renounce[47] the benefit conferred upon him. Of the original parties to the contract, the promisor, being the party who promises the performance of an obligation towards the third-party beneficiary is to be distinguished from the promisee[48], the party to whom this promise is made. In case of a contract of carriage the carrier will be the promisor as he undertakes to deliver the goods to a third-party consignee elected by the shipper, whereas the shipper will be the promisee.

21. In accordance with the fundamental principle of party autonomy[49], both sets of principles make clear that no rights can be forced upon the third-party beneficiary against his will.[50] The third-party right is of an optional nature and may be renounced by the beneficiary. Neither does the third-party become bound (to any conditions connected) to this right until he has accepted it. These general principles are in accordance with the optional right of the consignee under a contract of carriage to take delivery of the goods under various transport law conventions.[51] At a certain point in time, usually when the goods have reached the place of delivery, the consignee will obtain the right to take delivery of the goods, but he is not obliged to do so. If he so desires, he can reject the right conferred upon him, either by expressly renouncing it or by not asking for delivery of the goods.

22. As long as the third-person has not accepted the right conferred upon him, the promisee may still revoke the third-party right through notice to the promisor[52]. This latter rule is in accordance with the shipper's right of control/disposal over the goods under various transport law conventions.[53] This

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46 See: art. 6:110-1 PECL and art. 5.2.1-1 Unidroit Principles 2004.

47 See: art. 6:110-1, -2, -3 PECL and art. 5.2.5 and 5.2.6 Unidroit Principles 2004.

48 Also known as the "stipulator", i.e. he who insists upon the stipulation for the benefit of the third-party.

49 See: Du Perron, 'Contract and Third parties', op. cit., 1998, p. 314 ff.

50 See: art. 6:110-2 PECL and art. 5.2.6 Unidroit Principles 2004.

51 See: art. 15-1 and -2 CMR, art. 21-3 Cotif-CIM, and (implicitly) art. 14-2 CMNI and art. 13-1 MC.

52 See: art. 6:110 (3) PECL and art. 5.2.5 Unidroit Principles 2004.

53 See: art. 12 CMR, art. 14, 15 CMNI, art. 18, 19 Cotif-CIM, art. 12 MC. See also art. 50 RR (right of control).

right of control/disposal implies that the shipper can require the carrier to interrupt the carriage of goods, to change the place of delivery or to deliver the goods to another consignee[54], provided always that these subsequent instructions can reasonably be carried out by the carrier and do not disrupt the normal operation of the carrier's business, and further that the shipper pays the agreed freight anyway and compensates the carrier for all costs and losses incurred in carrying out the instructions.[55]

23. Under the Unidroit Principles the existence and contents of the right conferred upon the third-party beneficiary depend on the contract between promisor and promisee[56] and the promisor may invoke all defences against the beneficiary which he could raise as against the promisee.[57] In general these principles apply also to the rights of the consignee under a contract of carriage under the various transport law conventions. There are however a few exceptions. Firstly, the transport law conventions provide mandatory liability regimes, which prevail over any conflicting provisions in the contract of carriage as concluded between shipper and carrier.[58] Secondly, nearly all transport law conventions require that notice is to be given in the transport document, if under the contract of carriage freight is payable by the consignee.[59]

8 CIVIL LAW APPROACHES

8.1 German Law

8.1.a Contract of carriage

24. A virtually unanimous German case law[60] and legal literature[61] construes the position of the consignee under a contract of carriage as a Vertrag zugunsten Dritter (contract for the benefit of a

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54 See: art. 14-1 CMNI, art. 12-1 CMR, art. 18-1 Cotif-CIM. By contrast, in art. 50-1 Rotterdam Rules the right of control is limited (a) to the right to give and modify instructions in respect of the goods that do not constitute a variation of the contract of carriage, (b) the right to obtain delivery at a scheduled port of call or, in respect of inland carriage, any place en route, and (c) the right to replace the consignee by any other person including the controlling party. See also art. 52 Rotterdam Rules.

55 See: art. 15 (c) and (d) CMNI, art. 14-5 (a) CMR, art. 19-2 Cotif-CIM, art. 12-1 MC, art. 52-2 RR.

56 See: art. 5.2.2 (2) Unidroit Principles 2004.

57 See: art. 5.2.4 Unidroit Principles 2004.

58 See: art. 41 CMR, art. 23 HHR, art. 49 MC, art. 25 CMNI, art. 5 Cotif-CIM, art. 79 RR.

59 See: art. 6-1(i), art. 6-2(c), art. 13-2, art. 21 CMR (also with regard to other transport and cash on delivery charges), art. 13 MC, art. 42 RR, art. 7-1 (o) Cotif-CIM, art. 15-1 (k), art. 16-4 HHR.

60 See: Reichsgericht (RG), *Juristisches Wochenschrift (JW)* 1900, 314, BGH 10.4.1974 (I ZR 84/73), *Versicherungsrecht (VersR)*, 1974, 796 and BGH 24.11.1991, *VersR* 1992, 767.

61 See: Karl-Heinz Thume, 'Die Stellung des Empfängers im neuen Frachtrecht'' (The position of the receiver in the new law on carriage of goods), in: K.-H. Thume (ed.), *Transport- und Vertriebsrecht 2000* (Festgabe Herber), Luchterhand, 2000, p. 153, footnote no. 2 with further references to literature and case law, and more in general about the contract for the benefit of a third-party, Walter Bayer, *Der Vertrag zugunsten Dritter*, Hab. 1995, J.C.B. Mohr (Paul Siebeck): Tübingen, 1995, p. 173 ff.

third-party) in the sense of § 328 ff. BGB[62]. The consignee's position is regulated further in § 418 and 421 HGB. The relevant provisions will be cited here with a translation for easy reference:

§ 328 BGB

Vertrag zugunsten Dritter (*Contract for the benefit of third parties*)

(1) Durch Vertrag kann eine Leistung an einen Dritten mit der Wirkung bedungen werden, dass der Dritte unmittelbar das Recht erwirbt, die Leistung zu fordern. (*Performance to a third party may be agreed by contract with the effect that the third party acquires the right to demand the performance directly.*)

(2) In Ermangelung einer besonderen Bestimmung ist aus den Umständen, insbesondere aus dem Zweck des Vertrags, zu entnehmen, ob der Dritte das Recht erwerben, ob das Recht des Dritten sofort oder nur unter gewissen Voraussetzungen entstehen und ob den Vertragschließenden die Befugnis vorbehalten sein soll, das Recht des Dritten ohne dessen Zustimmung aufzuheben oder zu ändern. (*In the absence of a specific provision it is to be inferred from the circumstances, in particular from the purpose of the contract, whether the third party is to acquire the right, whether the right of the third party is to come into existence immediately or only under certain conditions, and whether the power is to be reserved for the parties to the contract to terminate or alter the right of the third party without his approval.*)

§ 333 BGB

Zurückweisung des Rechts durch den Dritten (*Rejection of the right by the third party*)

Weist der Dritte das aus dem Vertrag erworbene Recht dem Versprechenden gegenüber zurück, so gilt das Recht als nicht erworben. (*If the third party rejects the right under the contract towards the promisor, the right is deemed to not have been acquired.*)

§ 334 BGB

Einwendungen des Schuldners gegenüber dem Dritten (*Defences of the promisor in relation to the third party*)

Einwendungen aus dem Vertrag stehen dem Versprechenden auch gegenüber dem Dritten zu. (*The promisor is entitled to raise defences under the contract in relation to the third party too.*)

§ 335 BGB

Forderungsrecht des Versprechensempfängers (*Right of the promisee to demand performance*)

Der Versprechensempfänger kann, sofern nicht ein anderer Wille der Vertragschließenden anzunehmen ist, die Leistung an den Dritten auch dann fordern, wenn diesem das Recht auf die Leistung zusteht. (*The promisee may, where a different intention of the parties to the contract may not be assumed, demand performance for the third party even if the latter is entitled to the right to performance.*)

§ 418 HGB

Nachträgliche Weisungen (*Subsequent instructions*)

(1) Der Absender ist berechtigt, über das Gut zu verfügen. Er kann insbesondere verlangen, daß der Frachtführer das Gut nicht weiterbefördert oder es an einem anderen Bestimmungsort, an einer anderen Ablieferungsstelle oder an einen anderen Empfänger abliefert. Der Frachtführer ist nur insoweit zur Befolgung solcher Weisungen verpflichtet, als deren Ausführung weder Nachteile für den Betrieb seines Unternehmens noch Schäden für die Absender oder Empfänger anderer Sendungen mit sich zu bringen droht. Er kann vom Absender Ersatz seiner durch die Ausführung der Weisung entstehenden Aufwendungen sowie eine angemessene Vergütung verlangen; der Frachtführer kann die Befolgung der Weisung von einem Vorschuß abhängig machen. (*The right of disposal in relation to the goods is vested in the shipper. He may in particular instruct the carrier to stop the goods in transit or to deliver them to another consignee. The carrier is obliged to comply with such instructions only in so far as this can be done without the risk of prejudice to his business or damage to the shippers or consignees of other consignments. He may claim from the shipper reimbursement for outlays occasioned by his having carried out the instruction, as well as appropriate remuneration; he may require an advance payment as a precondition to carrying out the instruction.*)

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[62] An abbreviation for: Bürgerliches Gesetzbuch (or German Civil Code)

(2) Das Verfügungsrecht des Absenders erlischt nach Ankunft des Gutes an der Ablieferungsstelle. Von diesem Zeitpunkt an steht das Verfügungsrecht nach Absatz 1 dem Empfänger zu. Macht der Empfänger von diesem Recht Gebrauch, so hat er dem Frachtführer die entstehenden Mehraufwendungen zu ersetzen sowie eine angemessene Vergütung zu zahlen; der Frachtführer kann die Befolgung der Weisung von einem Vorschuß abhängig machen. (*The shipper's right of disposal lapses on the arrival of the goods at the place designated for delivery. Henceforth, the right of disposal under subsection 1 shall lie with the consignee. If the consignee exercises his right, he shall reimburse the carrier for any additional outlays as well as remunerate him appropriately; the carrier may require an advance payment as a precondition to carrying out the instruction.*)
(3) Hat der Empfänger in Ausübung seines Verfügungsrechts die Ablieferung des Gutes an einen Dritten angeordnet, so ist dieser nicht berechtigt, seinerseits einen anderen Empfänger zu bestimmen. (*If in exercising his right of disposal the consignee has ordered the delivery of the goods to a third person, that person shall not be entitled to specify another consignee.*)
(4) Ist ein Frachtbrief ausgestellt und von beiden Parteien unterzeichnet worden, so kann der Absender sein Verfügungsrecht nur gegen Vorlage der Absenderausfertigung des Frachtbriefs ausüben, sofern dies im Frachtbrief vorgeschrieben ist. (*If a consignment note has been issued and signed by both parties, the shipper may exercise his right of disposal only upon presentation of his copy of the consignment note, if the consignment note so prescribes.*)
(5) Beabsichtigt der Frachtführer, eine ihm erteilte Weisung nicht zu befolgen, so hat er denjenigen, der die Weisung gegeben hat, unverzüglich zu benachrichtigen. (*If the carrier intends not to comply with an instruction, he must inform the person who has given it without delay.*)
(6) Ist die Ausübung des Verfügungsrechts von der Vorlage des Frachtbriefs abhängig gemacht worden und führt der Frachtführer eine Weisung aus, ohne sich die Absenderausfertigung des Frachtbriefs vorlegen zu lassen, so haftet er dem Berechtigten für den daraus entstehenden Schaden. Die Vorschriften über die Beschränkung der Haftung finden keine Anwendung. (*If the exercise of the right of disposal has been made dependent upon the presentation of the consignment note and if the carrier carries out an instruction without having had the shipper's copy of the consignment note presented to him, he shall be liable to the person entitled for any loss or damage caused thereby. The provisions relating to limitation of liability shall not apply.*)

§ 421 HGB

Rechte des Empfängers. Zahlungspflicht (*Consignee rights – Payment duties*)

(1) Nach Ankunft des Gutes an der Ablieferungsstelle ist der Empfänger berechtigt, vom Frachtführer zu verlangen, ihm das Gut gegen Erfüllung der Verpflichtungen aus dem Frachtvertrag abzuliefern. Ist das Gut beschädigt oder verspätet abgeliefert worden oder verlorengegangen, so kann der Empfänger die Ansprüche aus dem Frachtvertrag im eigenen Namen gegen den Frachtführer geltend machen; der Absender bleibt zur Geltendmachung dieser Ansprüche befugt. Dabei macht es keinen Unterschied, ob Empfänger oder Absender im eigenen oder fremden Interesse handeln. (*After arrival of the goods at the place designated for delivery, the consignee may require the carrier to deliver them to him in exchange for the performance of the obligations resulting from the contract of carriage. If the goods have been delivered damaged or late or have been lost, the consignee may assert in his own name the rights against the carrier resulting from the contract of carriage; the shipper remains entitled to assert these rights. It makes no difference in this context whether consignee or shipper acts in his own interest or in the interest of a third party.*)
(2) Der Empfänger, der sein Recht nach Absatz 1 Satz 1 geltend macht, hat die noch geschuldete Fracht bis zu dem Betrag zu zahlen, der aus dem Frachtbrief hervorgeht. Ist ein Frachtbrief nicht ausgestellt oder dem Empfänger nicht vorgelegt worden oder ergibt sich aus dem Frachtbrief nicht die Höhe der zu zahlenden Fracht, so hat der Empfänger die mit dem Absender vereinbarte Fracht zu zahlen, soweit diese nicht unangemessen ist. (*The consignee who asserts his right under subsection 1, first sentence has to pay any outstanding freight up to the amount specified in the consignment note. If a consignment note has not been issued or has not been presented to the consignee, or if the amount payable as freight is not evidenced by the consignment note, the consignee has to pay the freight agreed with the shipper provided it is not unreasonable.*)
(3) Der Empfänger, der sein Recht nach Absatz 1 Satz 1 geltend macht, hat ferner ein Standgeld oder eine Vergütung nach § 420 Absatz 3 zu zahlen, ein Standgeld wegen Überschreitung der Ladezeit und eine Vergütung nach § 420 Absatz 3 jedoch nur, wenn ihm der geschuldete Betrag bei Ablieferung des Gutes mitgeteilt worden ist. (*A consignee who asserts his right under subsection 1, First sentence shall, in addition, pay demurrage or remuneration in accordance with § 420 subsec-*

tion 3; demurrage for exceeding the loading time and remuneration under § 420 subsection 3 is payable only if the consignee was informed, when the goods were delivered, of the amount owed.)
(4) Der Absender bleibt zur Zahlung der nach dem Vertrag geschuldeten Beträge verpflichtet. (*The shipper remains obliged to pay the sums owed under the contract.*)

25. As follows from the above provisions, the classification of the consignee's position as a *Vertrag zugunsten Dritter* (contract for the benefit of a third party) in the sense of § 328 BGB, implies that the consignee as third-party beneficiary derives his right to take delivery of the goods directly from the agreement to confer this right upon him between the promisor (the carrier) and the promisee (the shipper) in the contract of carriage. Although acceptance by the beneficiary is not required for the third-party right to arise, this is deemed not to conflict with the principles of privity of contract and party-autonomy, firstly because the contract or stipulation is supposed to be beneficial and secondly, because no rights can be forced upon the third-party consignee against his will. He can either choose to waive the right conferred upon him implicitly by not asking delivery of the goods from the carrier, or he can do explicitly by formally rejecting the benefit pursuant to § 333 BGB. In the latter case he is deemed never to have acquired the right.

26. Under § 421 (1) HGB the consignee cannot enforce his right to demand delivery until the goods have arrived at the place of delivery. Prior to their arrival, the third-party consignee's entitlement to the goods remains subject to the shipper's right of disposal pursuant to § 418 (1) HGB.[63] However, in case of cargo loss or damage, pursuant to § 421 (1) HGB the consignee is entitled to claim directly from the carrier for compensation of his loss under the contract of carriage in his own name, but interestingly the shipper remains entitled to claim as well under § 421 (1) HGB. Furthermore, under § 334 BGB the carrier as promisor is entitled to raise all defenses based upon the contract of carriage against the consignee as third-party beneficiary. In other words, the third-party consignee has no better right under the contract of carriage against the carrier than the shipper had.

27. As a matter of principle, German law rejects the notion of a *Vertrag zulasten Dritter* (contract to the detriment of third-parties), as it cannot be reconciled with the basic principle of privity of contract and of freedom and autonomy of the individual.[64] In principle therefore it is not possible for two par-

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[63] It is unclear, whether German law allows the consignee to accede to the contract of carriage at an earlier time than upon delivery of the goods, e.g. if the consignee's rights have been made irrevocable by the shipper or if there is consensus among all the parties (shipper, carrier, consignee) that the consignee should accede at an earlier stage. Compare the discussion under Dutch law below in § 8.3, No. 50.

[64] See: Gottwald, § 328 BGB, No. 188 ff. in: Wolfgang Krüger (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* Band 2 Schuldrecht Allgemeiner Teil, 5. Ed., C.H. Beck: München, 2007 and Rainer Jagmann, Vorbem zu §§ 328 ff BGB, No. 42 in: Manfred Löwisch (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Buch 2 Recht der Schuldverhältnisse, Sellier-de Gruyter: Berlin, 2004.

ties in a contract to bind a third party to his detriment against his will. However, this does not preclude the possibility under German law that when a contract for the benefit of a third-party is agreed between the promisor (carrier) and the promisee (shipper), these parties may impose a restriction on the benefit conferred upon the third-party.[65] In relation to contracts of carriage, such a restriction may take the shape of an obligation upon the consignee to pay any outstanding freight and demurrage.[66] Under German law this is a joint and several liability of the consignee with the shipper, who remains liable for all the amounts payable under the contract of carriage.[67]

28. It is noteworthy that under § 421 (2) HGB the consignee is liable to pay freight up to the amount stated in the consignment note. However, if no such freight amount was included or if there is no consignment note at all, the consignee is nevertheless bound to pay the agreed freight under the contract of carriage, provided that the freight amount is not unreasonable. This rule was introduced into the Handelsgesetzbuch in 1998 when the general part of German transport law was reformed and modernized.[68] The rule can perhaps be explained by the fact that under German law freight is in principle payable upon delivery of the goods[69], so perhaps the consignee must anticipate to be asked to settle the unpaid freight. Nevertheless with this provision German law departs from the approach taken under some of the transport law conventions[70], where the consignee's exposure for freight is limited to the amount stated in the consignment note. Under § 421 (3) HGB the consignee is also liable for demurrage, but in relation to demurrage for delay caused before arrival[71], he is only liable if he was informed when the goods were delivered, of the amount owed.

29. The above raises the question whether under German law a clause in the contract of carriage to the effect that the consignee becomes joint and severally liable with the shipper, for loss or damage resulting from a failure of the shipper to inform the carrier of the dangerous nature of the goods, may still be considered a restriction upon the benefit conferred or whether in reality it must be deemed to amount to a *Vertrag zulasten Dritter* (contract to the detriment of third-parties), which is invalid under German law, unless it has been approved expressly by the third-party consignee. As far as I can see this question has not yet been decided under German law.

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65 See: Gottwald, § 328 BGB, No. 193, in: op. cit. and Jagmann, Vorbem zu §§ 328 ff BGB, No. 43.

66 See: § 421 (2) and (3) HGB.

67 See: § 421 (4) HGB. Pursuant to § 441 HGB the carrier has a *Pfandrecht* (Statutory lien) over the cargo in support of his claims under the contract of carriage.

68 Gesetz vom 25.6.1998 zur Neuregelung des Frachts-, Speditions- und Lagerrechts (Act to reform the law of transport, freight forwarding and storage), *BGBl.* I S.1588.

69 See: § 420 (1) HGB.

70 See art. 13-3 CMR and art. 7-1 (o) Cotif-CIM.

71 See § 420 (3) HGB.

30. Finally, it is worth observing that according to German law the consignee does not succeed in the rights and obligations of the shipper under the contract of carriage.[72] Although the shipper's right of control over the goods ends when the consignee's right of control begins[73], the shipper remains entitled to claim for damages in case of cargo loss or damage[74], even after the consignee's rights have become enforceable. In addition, the shipper remains liable to pay the sums owed under the contract[75] as well as for other statutory liabilities.[76] Neither does the fact that the shipper and carrier have conferred certain rights upon the consignee, imply that he succeeds the shipper's position under the contract of carriage in every respect.

8.1.b Bill of lading contract

31. German legal doctrine applies the concept of the *Vertrag zugunsten Dritter* (contract for the benefit of third parties) in a somewhat modified form also to explain the position of the third-party consignee under a bill of lading. The idea is that when the shipper asks the carrier to issue a bill of lading[77], a so-called *Konnossement-Begebungsvertrag* (*contract for the issuance of a bill of lading*) comes into being. This is a contract for the benefit of the subsequent (lawful) holders of the bill of lading in due course[78] and must be distinguished from the underlying contract of carriage.

32. The prevailing view in German case law and legal literature is that the obligations arising out of a bill of lading are completely independent from those under the contract of carriage.[79] In the words of the German *Bundesgerichtshof* (BGH)[80]:

> "das Konnossement und der Frachtvertrag (stellen) zwei völlig getrennte Rechtsverhältnisse dar"
> (*the bill of lading and the contract of carriage constitute two entirely separate legal relationships*)

The obligations under the bill of lading exist even if no valid contract of carriage was concluded.[81]

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[72] Cf. Rolf Herber, *TranspR* 2004, p. 411 in a comment to: Oberlandesgericht (Court of Appeal, hereafter: OLG) Stuttgart 23.12.2003, *TranspR* 2004, p. 406 ff. See also: D. Rabe, *Seehandelsrecht*, 4. Ed., 2000, Vor § 556 (HGB), No. 138.

[73] See § 418 (1) and (2) HGB and § 421 (1) HGB.

[74] See § 421 (1) HGB, and in general § 335 BGB.

[75] See § 421 (5) HGB.

[76] See in particular: the liability of the shipper (irrespective of fault) pursuant to § 414 HGB for (1) insufficient packaging or labeling, (2) incorrect or incomplete statements made in the consignment note, (3) failure to disclose the dangerous nature of the goods, or, (4) absence, incompleteness, or incorrectness of the documents or the information specified in § 413 (1) HGB.

[77] The shipper is entitled to do so under all the conventions for the carriage of goods by sea. See: art. III-3 Hague and Hague-Visby Rules, art. 14-1 Hamburg Rules, art. 11-1 CMNI, art. 35 (b) Rotterdam Rules.

[78] See: Rabe, *Seehandelsrecht*, 2000, Vor § 556, No. 14, and § 656 HGB, No. 38.

[79] See: Rabe, Seehandelsrecht, 2000, § 656 HGB, No. 2.

[80] BGH 23.11.1978 (II ZR 27/77), BGHZ 73, 4-8 (*The Pia Vesta*).

[81] BGH 10.10.1957 (II ZR 278/56), *BGHZ* 25, 300-311 (*The Anten*).

33. As follows from the above cited § 656 (1) HGB[82], the contents of the bill of lading are in principle decisive for the position of the third-party consignee towards the carrier. This implies that contractual clauses[83] contained in the bill of lading will in principle be binding upon the consignee. If the bill of lading contains the clause "freight and all other terms as per charter party", this will in principle be effective in incorporating all these terms into the bill of lading contract and making them opposable to the third-party consignee.[84] It may be that the bill of lading imposes payment obligations upon the consignee, however pursuant to § 614 HGB these obligations will not bind the consignee until he has accepted the goods.[85] This provision reads as follows:

§ 614 HGB

(1) Durch die Annahme der Güter wird der Empfänger verpflichtet, nach Maßgabe des Frachtvertrages oder des Konnossements, auf deren Grund die Empfangnahme geschieht, die Fracht nebst allen Nebengebühren sowie das etwaige Liegegeld zu bezahlen, die ausgelegten Zölle und übrigen Auslagen zu erstatten und die ihm sonst obliegenden Verpflichtungen zu erfüllen. (*Through the acceptance of the goods, the receiver becomes obliged to pay freight, as well as all accessory costs and any demurrage by reference to the contract of carriage or to the bill of lading on the basis of which the goods were received, as well as to reimburse for custom duties paid and other disbursements and to fulfill the other obligations which concern him.*)

(2) Der Verfrachter hat die Güter gegen Zahlung der Fracht und gegen Erfüllung der übrigen Verpflichtungen des Empfängers auszuliefern. (*The carrier shall deliver the goods against payment of freight and fulfillment of the remaining obligations by the receiver.*)

34. It should be noted finally that under German law bill of lading clauses excluding or limiting liability are subject to material control and may therefore be invalidated under § 9 AGBG.[86] This provision reads as follows:

§ 9 AGBG

-I. Bestimmungen in Allgemeinen Geschäftsbedingungen sind unwirksam, wenn sie den Vertragspartner des Verwenders entgegen den Geboten von Treu und Glauben unangemessen benachteiligen. (*Provisions in general conditions are invalid, if these are, contrary to the requirements of good faith and equity, inappropriately prejudicial to the counterparty of the person using these conditions.*)

-II. Eine unangemessene Benachteiligung ist im Zweifel anzunehmen, wenn eine Bestimmung (*In case of doubt, an inappropriate prejudice may be assumed, if the clause*)

-1. mit wesentlichen Grundgedanken der gesetzlichen Regelung, von der abgewichen wird, nicht zu vereinbaren ist, oder (*is irreconcilable with basic principles of the statutory law, from which it departs, or*)

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82 See above in § 1.

83 E.g. with regard to jurisdiction, or choice of law or the incorporation of charter-party clauses. See: Rabe, *Seehandelsrecht*, 4th ed., 2000, § 656, No. 2.

84 Provided always that the charter party terms are fit to be applied in the relation between carrier and consignee under the bill of lading contract. In addition, pursuant to § 1031 IV Zivil Prozessordnung (German Code of Civil Procedure, hereafter: ZPO) for an arbitration clause in the charter party validly to be incorporated into the bill of lading contract, the reference should specifically mention the arbitration clause.

85 BGH 25.3.1974, *VersR* 1974, 776 [The Taboa]

86 E.g. BGH 30.11.1992, *TranspR* 1993, 248 ff. where a before and after-clause was held to be invalid. See: Rabe, *Seehandelsrecht*, 2000, § 663, No. 20-22; R. Herber, *Seehandelsrecht, systematische Darstellung*, Walter de Gruyter: Berlin, 1999, p. 343 ff.

-2. wesentliche Rechte oder Pflichten, die sich aus der Natur des Vertrages ergeben, so eingeschränkt, dass die Erreichung des Vertragszwecks gefährdet ist. (*restricts basic rights and obligations arising from the nature of the contract, to such an extent that the attainment of the purpose of the contract is endangered.*)

8.3 French law

35. Under French law, the prevailing view is that the contract of carriage is a *contrat à trois personnes* (three-party contract) between the shipper, carrier and consignee.[87] Although it may not always be known to the carrier at the time the contract is concluded to whom the goods will ultimately be delivered, a consignee is envisaged from the beginning and his interests are protected under the contract of carriage.[88] When the consignee accedes to the contract of carriage, he acquires a personal and direct right against the carrier[89] and becomes bound to any obligations which the contract entails for him.[90] However, the consignee's rights do not completely replace those of the shipper. Only the right to take delivery of and dispose over the goods passes from the shipper to the consignee, for the rest the rights and obligations of the shipper and consignee will exist concurrently.[91] With the appropriate changes, French law applies the same analysis to the position of the consignee who accedes to the bill of lading contract by accomplishing the bill of lading and taking delivery of the cargo.[92]

36. Previously, several other explanations had been proposed and sometimes accepted by the *Cour de Cassation*, the French Supreme Court, but over time these were found to be unsatisfactory. E.g. the idea that the consignee was deemed to be the agent of the shipper was often not in accordance with commercial reality and implied that the carrier could enforce all the obligations of the shipper against the consignee as well. The latter was however irreconcilable with the idea of the consignee's *droit pro-*

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87 Cf. art. L 138-8 Commercial code below. See : B. Mercadal, Droit des transports terrestres et aériens, Dalloz : Paris, 1996, No. 136, 139 ; P. Bonassies/C. Scapel, *Traité de Droit Maritime*, LGDJ : Paris, 2006, No. 931 ; F. Collart Dutilleul/P. Delebecque, *Contrats civils et commerciaux*, 8th ed., Dalloz : Paris, 2007, No. 774 ff. ; C. Paulin, *Droit des transports*, Litec : Paris, 2005, no. 435. Differently : P. Delebecque, 'Le destinataire de la marchandise tiers ou partie au contrat de transport ?', *Dalloz Affairs* (hereafter : D. Aff.), 1995, p. 189 ff.

88 See : R. Rodière, *Droit des Transports*, Sirey : Paris, 1977, No. 365.

89 See : G. Ripert, *Droit Maritime*, Tome II, 4th ed., Rousseau: Paris, 1952, No. 1582.

90 See : R. Rodière, *Droit des transports*, 1977, No. 363.

91 See : R. Rodière, op. cit., No. 363 who refers to: Cass. 3.2. 1913, *Sirey* (hereafter: S.) 1914, 1.155; *Dalloz* (hereafter: D), 1914, 1.63 and Cass. 7.5.1935, *S.* 1935.1.202, Cour d'appel (Court of Appeal, hereafter: CA) Paris, 9.11.1956, *Gazette du Palais* (hereafter: Gaz. Pal.) 1957.I.13.See also: L. Peyrefitte, in: *Juris-Classeur Transport*, Vol. 2, 1998, Fascicule 750, no. 5 who refers to: Cass. 12.4. 1948, *Bulletin des Transports* (hereafter: BT) 1948.584; Cass. 28.2.1984, *BT* 1984.430; 20.1.1998, *Bull. Civ.* IV, 1557; CA Aix-en-Provence 1.10. 1987, *BT* 1988.559.

92 See : Bonassies/Scapel, *Droit Maritime*, 2006, No. 931, 1131 ; Rodière, Traité Général de Droit Maritime, Tome I *Affrètements & Transports*, Dalloz : Paris, 1967, No. 405 ff.;

pre et direct (a personal and direct right) against the carrier.[93] Furthermore, the idea that the consignee derives his rights from a *cession des droits* (assignment of rights) by the shipper leaves unexplained why the consignee can sue for compensation of his own losses, rather than those of the shipper.[94] Also it implies that the consignee obtains no better right against the carrier than the shipper had, which is contradicted by the position of a third-party consignee under a bill of lading, who is protected by the conclusive evidence rule.[95]

37. A doctrine favoured by the Cour de Cassation for a long time explained the consignee's rights by reference to the notion of the *stipulation pour autrui* (stipulation for the benefit of another) under art. 1121 Code civil (French civil code).[96] This provision reads as follows:

> **Article 1121 Code civil**
>
> On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer si le tiers a déclaré vouloir en profiter. (*One may likewise stipulate for the benefit of a third party, where it is the condition of a stipulation which one makes for oneself or of a gift which one makes to another. He who made that stipulation may no longer revoke it, where the third party declares that he wishes to take advantage of it.*)

However, under the influence of Ripert and later Rodière it seems that this doctrine was later abandoned for the analysis of the contract of carriage as a three party-contract, which was equally applied to the bill of lading contract.[97] It was also argued that under a contract of carriage the consignee can become bound to pay freight, which does not fit well within the concept of a *stipulation pour autrui*, which under French law can only be beneficial.[98] By contrast, French law does not recognize a *promes-*

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93 Cass. 23.5.1989, *Bulletin des arrêts de la Cour de cassation (chambres civiles)* (Bull. civ.) IV, No. 164, *Revue Trimestrielle Droit Civil* (hereafter : RTD civ. 1990.72, Note by Mestre. See : G. Ripert, *Droit Maritime*, II, 1952, Nos. 1580-1582 who refers to Cass. 28.6.1928, *Rev. Dor*, 6, 385.

94 See : Rodière, *Affrètements & Transports*, Dalloz : Paris, 1967, No. 405 ; R. Rodière, *Droit des transports*, 1977, No. 364.

95 See above in § 3.

96 See : Cass. 2.12.1891, *S.* 1892.1.92, *D.* 1892.1.161; Cass. 31.1.1894, *S.* 1894.1.246; *D.* 1898.1.244 (In my free translation): *In a contract of carriage, the shipper stipulates for the consignee as a condition to the contract he concludes for himself (Code civil 1121(1)). As a result, the consignee, when taking delivery of the goods, accepts the contract which has been concluded by the shipper, from which it follows that all clauses of that contract are opposable to him.* Id. Cass. 24.5.1897, *S.* 1897.1.411, *D.* 1898.1.23; Cass. 20.5. 1912, *Revue Autran* XXVIII.327; Cass. 26.1. 1915, *D.* 1916.1.47; Cass. 17.12.1945, *S.* 1946.1.80; Cass. 12.4. 1948, *S.* 1948.1.115; Cass. 23.6.1948, *S.* 1948.1.151; Cass. 1.2.1955, *D.* 1956.338.

97 Cass. 3.6.1964, *Droit Maritime Français* (hereafter : DMF) 1964, 588, Cass. 13.5.1966, *DMF* 1966, 531 [*The Douala*], Cass. 28.2.1984, *BT* 1984,.430 ; Cass. 10.7.1989, *BT* 1989. 619 ; Cass. 18.3.2003, *D.* 2003, p. 1164. To the contrary however : P. Delebecque, op. cit., *D. Aff.*, 1995, p. 189 ff. See also: Bonassies/Scapel, *Droit Maritime*, 2006, No. 931.

98 See: Georges Ripert, *Droit Maritime*, Tome II, 1952, No. 1584-1585 ; R. Rodière, *Affrètements & Transports*, 1967, No. 407-408 ; R. Rodière, *Droit des transports*, 1977, No. 364-365.

se pour autrui (a stipulation to the detriment of another in view of art. 1165 Code civil, which reads as follows:[99]

Art. 1165 Code civil

Les conventions n'ont d'effet qu'entre les parties contractantes ; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121. » (Agreements produce effect only between the contracting parties; they do not harm a third party, and they benefit him only in the case provided for in Article 1121.)

38. Under the three-party doctrine the basic idea is that by its nature the contract of carriage by sea implies the right of the consignee to take advantage of the agreement for the transportation of the goods concluded between the shipper and the carrier. [100] The idea of the contract of carriage as a three-party contract has recently even been codified. It is the contract of carriage as stated in the consignment note which is binding upon all three parties, as follows from Art. L 138-8 Code de commerce (Code com)[101]:

Article L 138-8 Code com.

La lettre de voiture forme un contrat entre l'expéditeur, le voiturier et le destinataire ou entre l'expéditeur, le destinataire, le commissionnaire et le voiturier. Le voiturier a ainsi une action directe en paiement de ses prestations à l'encontre de l'expéditeur et du destinataire, lesquels sont garants du paiement du prix du transport. Toute clause contraire est réputée non écrite.
(The consignment note constitutes a contract between the shipper, the carrier and the consignee or between the shipper, the consignee, the freight forwarder and the carrier. The carrier has a direct action to receive payment for his services against the shipper and the consignee, who are liable for payment of the freight. Each clause which departs from this is considered non-written.)

39. It is uncertain whether despite the imperative wording of art. L 138-8 Code com, it still follows from the consensual nature of the contract of carriage, that a consignee cannot become bound to the contract against his will.[102] The position under French law used to be that the consignee by taking delivery of the goods (and receiving the consignment note), accedes to the contract of carriage.[103] The consignee was however not obliged to take delivery of the goods. If he simply refuses to do so, he will not become party to the contract of carriage.[104] However, if a consignee merely rejected the goods upon delivery on account of cargo damage or delay in delivery, it was believed that the consignee had

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99 Art. 1165 Code Civil reads as follows : « .

100 R. Rodière, *Affrètements & Transports*, 1967, No. 408 : « On dira parallèlement : le contrat de transport maritime implique, par sa nature, le droit pour le destinataire de se prévaloir de la convention intervenue entre transporteur maritime et chargeur aux fins de déplacement de la marchandise. » Cf. Bonassies/Scapel, *Droit Maritime*, 2006, No. 931.

101 This provision was introduced into the Code commercial in 1998 with the loi n° 98-69 of 6.2.1998 (JO 7.2.1998), known as the Loi Gayssot.

102 L. Peyrefitte, op. cit, Fascicule 750, No. 7 believes that the right of refusal of the consignee has been removed by art. L 138-8 Code com.

103 Cass. 6.10.1992, *Bull. Civ.*, IV, No. 300 ; Cass. 18.3.2003, *D.* 2003, 1164, Note by E. Chevrier. See also : J.P. Tosi, 'L'adhésion du destinataire au contrat de transport', *Mélanges Mouly*, Tome 2, p. 175 ff., Ph. Delebecque, op. cit., *D. Aff.,* 1995, p. 191 .

104 CA Paris 22.7.1979, BT 1979.520

nevertheless acceded to the contract of carriage and he can sue for damages[105] or be held liable for freight.[106]

40. Under French law a distinction must be made between the consignee's accession to the contract of carriage or the bill of lading contract in general, which takes place by taking delivery of the goods at destination and the opposability to the consignee of particular contract terms, which may require his *specific* acceptance i.e. by his signature or other confirmation of approval given at a later moment then when the goods were delivered.[107] This differentiation takes place with reference to a notion coined by the *Cour de Cassation*, known as "l'économie générale du contrat" (the *overall economy of the contract*). Clauses falling outside of this concept are deemed not to be opposable to the consignee, unless he has specifically accepted them.

41. The case of *The Monte Cervantès*[108] in which the notion of "l'économie générale du contrat" was first introduced, concerned the clause "livraison sous palan" (delivery under tackle) in the bill of lading. The Cour de Cassation held that this was a clause which belonged to the overall economics of the contract of carriage because it defined the scope of the obligations of the carrier without derogating from a general rule and therefore the clause was binding upon the consignee, without specific acceptance on his part being necessary.[109] Both before and after this-decision, there have been other decisions by the Cour de Cassation which go in the same direction. Based on this case-law, it can be concluded that contractual limitation of liability clauses[110], jurisdiction clauses[111] and probably also arbitration clauses[112] are not opposable to a third-party consignee. Similarly, it seems that charter-party clauses which are not reproduced in the bill of lading itself, but which are purportedly incorpora-

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105 Cass. 12.4.1948, *S.* 1948.1.115 ; CA Paris 23.6.1952, *BT* 1952.838, CA 11.7.1979, *BT* 1979.520.

106 CA Paris 11.7.1979, *BT* 1979.520, CA Toulouse 7.8.1980, *BT* 1980.486.

107 See: B. Mercadal, op. cit., 1996, No. 140; Peyrefitte, op. cit., 1998, Fascicule 750, No. 10; M. Tilche/A. Chao/P. Berthod, 'Contrat de transport, Adhésion du destinataire?', *BT*, 1992.471 ff.

108 Cass. 16.1.1996, *DMF* 1996, 627, Note Delebecque [*The Monte Cervantès*].

109 Cass. 16.1.1996, *DMF* 1996, 627: "Mais attendu, en premier lieu, que la clause par laquelle le chargeur et le transporteur maritime conviennent du moment de la livraison par une clause de livraison sous palan figurant sur le connaissement est une stipulation qui concerne l'économie même du contrat de transport en précisant, sans déroger à une règle générale, l'étendue des obligations du transporteur ; qu'en conséquence, pareille clause est opposable au destinataire sans qu'il soit nécessaire que celui-ci ait spécialement manifesté la volonté de l'accepter ; (…) ".

110 Cass. 26.5.1992, *BT* 1992.476;

111 Cass. 26.5.1992, BT 1992, 476 ; Cass. 18.10.1994, *DMF* 1995.280, Note Tassel [*The Saint-Killian*]; Cass. 29. 11.1994, *DMF* 1995, 209, Note Bonassies [*The Harmony, The Nagasaki*]; Cass. 10.1.1995 and 4.4. 1995, *Revue Critique de droit international privé* (hereafter : Rev.crit. DIP), 1995, 611, note Gaudemet-Tallon ; Cass. 16.1.1996, *DMF* 1996.393 [*The Chang Ping*], Cass. 15.10.1996, *DMF* 1997, 705 [*The Köln Atlantic]*, note Nicolas, Cass. 4.3.2003, *DMF* 2003, 556, note Delebecque [*The Houston Express]*, Cass. 7.12.2004, *DMF* 2005, 133 Note Rémény [*The Jerba*]. See also more extensively: Bonassies/Scapel, *Droit Maritime*, 2006, No. 1152 ff.

112 See for a discussion: Bonassies/Scapel, *Droit Maritime*, 2006, No. 932 ff., No. 1166 ff.

ted by reference into the bill of lading contract, are not opposable to a third-party consignee under French law.[113]

42. In his comment to *The Monte Cervantès*[114], Delebecque points out that the approach taken by the Cour de Cassation, gives a new application to a dogmatic distinction made by the great Pothier[115] between the essentialia, naturalia and accidentalia of a contract. *Essentialia* concern elements without which a contract cannot be conceived. Naturalia are elements which are normally found in this kind of contract, but which the parties can exclude with a particular provision, if they so wish. *Accidentalia*, finally are the elements which are included in the contract at the express request of one of the parties. Clauses belonging to the 'économie générale' follow the normal regime of the contract, whereas other clauses are more original, if not suspect and belong therefore to the more particular rules.

8.3 Dutch law

43. Under Dutch law, the prevailing view both in case law[116] and legal literature[117] is that the position of a third-party consignee under a contract of carriage and under a bill of lading contract is best explained by reference to the "derdenbeding" (a stipulation for the benefit of a third party), although this concept in itself does not explain why the consignee not only obtains rights, but may also become liable towards the carrier e.g. to pay freight. As will be explained below, this was more of a doctrinal problem under the old version of the Dutch Burgerlijk Wetboek (Civil Code, hereafter: BW) than under the present version of the Dutch BW, which is in force since 1992.

44. The Dutch BW of 1838 was modelled to a large extent upon the French Code civil of 1804 and as result the notion of "derdenbeding" in art. 1353 BW (old) and the privity of contract-rule in art. 1376 BW (old) were virtual translations of the "stipulation pour autrui" in art. 1121 Code civil and the rule in art. 1165 Code Civil. These provisions read as follows:

Art. 1353 BW (old)

> -1. Men kan ook ten behoeve van eenen derde iets bedingen, wanneer een beding, hetwelk men voor zich zelven maakt, of eene gift die men aan een ander doet, zulk eene voorwaarde bevat.
> (One may likewise stipulate for the benefit of a third party, where it is the condition of a stipulation which one makes for oneself or of a gift which one makes to another.)

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113 Cass. 4.6.1985, *DMF* 1986, 106, Note Achard [*The Aspilos*].

114 Cass. 16.1.1996, *DMF* 1996, 627, Note Delebecque [*The Monte Cervantès*].

115 Robert Joseph Pothier (1699-1772).

116 Hoge Raad (Supreme Court, hereafter also: HR) 22.9.2000, *Schip & Schade* (S&S) 2001, 37, *Nederlandse Jurisprudentie* (NJ) 2001, 44 [*The Eendracht*]; HR 29.11.2002, *S&S* 2003, 62, *NJ* 2003, 374 [*The Ladoga 15*].

117 See: R.E. Japikse, *Verkeersmiddelen en vervoer, Deel I Algemene bepalingen en rederij*, Part 7-1 in: Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht (Asser-Series) (hereafter: Asser-Japikse 7-I), 2004, No. 155.

-2. Die zoodanig een beding gemaakt heeft, kan hetzelve niet meer herroepen, indien die derde verklaard heeft daarvan te willen gebruik maken.
(He who made that stipulation may no longer revoke it, where the third party declares that he wishes to make use of it.)

Art. 1376 BW (old)

-1. Overeenkomsten zijn alleen van kracht tusschen de handelende partijen.
(Agreements produce effect only between the contracting parties.)
-2. Dezelve kunnen aan derden niet ten nadeele verstrekken; zij kunnen aan derden geen voordeel aanbrengen, dan alleen in het geval voorzien bij artikel 1353.
(They do not harm a third party, and they benefit him only in the case provided for in Article 1353.)

45. Clearly the notion of the derdenbeding of art. 1353 BW (old) may be usefully invoked to explain the consignee's right to take delivery of the goods or to sue for damages.[118] However, in view of the difficulty under art. 1353 and 1376 BW (old) of imposing an obligation upon the third-party, it seems that the Dutch Courts initially explored other approaches[119] to explain why the consignee was obliged to pay freight, additional expenses and demurrage to the carrier. Later, it became widely accepted both by the courts[120] and in legal doctrine[121] that the consignee, by taking delivery of the goods, accedes to the contract of carriage and thus becomes bound also to any obligations contained therein e.g. to pay freight. Rechtbank Amsterdam has concisely formulated the modern approach as follows:

That in case of contract of carriage, pursuant to which goods shall be delivered to a third person, only the shipper concludes the said contract with the carrier, however thereby something is stipu-

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118 See e.g. Hof Arnhem 29.5.1843 (confirmed but on different grounds by HR 28.2.1845), *W.* 601 [*The Stad Keulen*]; Hof Utrecht 4.3.1867, *W.* 2911; Hof Amsterdam 13.6.1879, R.B. 1880, Bijbl. 155 (Regtsgeleerde Bijdragen en Bijblad).

119 In some cases the consignee was deemed to have commissioned ('lastgeving') the shipper to enter into the contract of carriage on his behalf with the carrier. See e.g. Hof Gelderland 8.7.1863, *Weekblad van 't Regt* (W.) 2510, confirmed HR 8.1.1864, W. 2554, Rb. Haarlem 11.5.1969, confirmed HR 10.12.1969, *Magazijn van Handelsregt* (MvH) XII, 1870, p. 58. In other cases the shipper was held to have acted as the *negotiorum gestor* (a person who voluntarily and without authorization acts in the affairs of another in his absence) of the consignee, see: HR 8.1.1864, *W.* 2554; Rb. Utrecht 21.12.1870 and 29.3.1871, *W.* 3326, HR 29.12.1871, *W.* 3418. For an overview of this old Dutch case-law, see: J.J. van Troostenburg de Bruijn, *De Nederlandsche Rechtspraak omtrent overeenkomsten ten behoeve van derden*, diss. Leyden, 1892. See also the critical discussion of the various theories by: G. Kirberger, 'De positie van den geadresseerde', Rechtsgeleerd Magazijn (RM) 1898, p. 41-63.

120 See e.g. Rb. Amsterdam 3.1.1861, W. 2244 confirmed by HR 21.6.1861, *W.* 2286; Rb. Maastricht 14.2. 1867, *MvH* 1867, p. 147; HR 25.10.1872, *W.* 3525; Rb. Rotterdam 8.1.1881, *W.* 4612; Rb. Rotterdam 18. 12.1897, *W.* 7109; Rb. The Hague 4.12.1906, *W.* 8498 [*The Koophandel*]; Kantongerecht (Municipal court, hereafter: Kg) Arnhem 4.3.1913, *NJ* 1913, p. 1348.

121 See amongst many others; W.L.P.A. Molengraaff/Chr. Zevenbergen, *Leidraad bij de beoefening van het Nederlandse Handelsrecht*, 9th ed., Part IV-1, 1957, p. 924 ff.; R.P. Cleveringa, *Zeerecht*, 4th ed., 1961, p. 599 ff., A. Korthals Altes/J.J. Wiarda, *Vervoerrecht*, 1980, p. 52 ff., K.F. Haak, *De aansprakelijkheid van de vervoerder ingevolge de CMR*, diss. Utrecht, 1984, p. 287 ff., R. Cleton, *Hoofdlijnen van het vervoerrecht*, 1994, p. 112 ff., R.D. Zwitser, 'De cognossementhouder als derde uit derdenebding', Tijdschrift vervoer & Recht (hereafter: TVR), 2002, p. 157-165; M.H. Claringbould, 'Het cognossement', in: W.J. G. Oosterveen (a.o.), *Vervoerrecht in Boek 8 BW*, 1997, p. 138 ff., G.J. van der Ziel, *Het cognossement, naar een functionele benadering*, Kluwer: Deventer, 1999, p. 6 ff.; C.E. du Perron, *Overeenkomst en derden*, diss. Amsterdam (UvA), 1999, p. 43; A.S. Hartkamp, *Verbintenissenrecht, Deel II Algemene leer der overeenkomsten*, (hereafter: Asser-Hartkamp 4-II), 12th ed., 2005, No. 418;

lated for the benefit of a third person, the consignee; that this third person, whether expressly or impliedly, can give notice that he wishes to make use of the stipulation made on his behalf, and does so impliedly, if by his act he discloses his will in this respect;
that the consignee, who takes delivery of the goods consigned to him, *by this act* in the view of the court actually approves the contract of carriage, which was concluded on his behalf by the shipper and the carrier, and discloses his desire, to make use of it; that under those circumstances the consignee cannot accept the contract of carriage in part and reject for another part, because the contract of carriage with its stipulated rights and obligations constitutes one whole, which cannot with legal effect be split up;[122][123]

46. Although by his accession, the consignee becomes bound to the contract of carriage, this does not necessarily mean that all terms of this contract are opposable to the consignee. Already under art. 491 Wetboek van Koophandel (old)[124], in case of carriage of goods by sea the cargo receiver of the cargo was obliged to pay freight and whatever else was due from him *in accordance with the documents, on the basis of which he obtained delivery*. And in a decision of 1927 regarding carriage of goods by rail, the Hoge Raad held (in my free translation)[125]:

That the court was right to assume, that statement of weight in the (consignment note) has a significance, which is not limited exclusively to the performance of the contract of carriage between the parties amongst themselves;
That further to the provisions of the (railway regulations) the consignment note is intended to accompany the consignment and to be handed to the consignee;
That this entails, that the consignee, if he has no reason to doubt the accuracy of the contents of the document handed to him, may rely upon it and invoke it against the shipper, if he, in reliance on the accuracy of the data contained in the consignment note, has disposed over the consignment, yet later it appears that the document states the weight too low, whereby it is irrelevant if it was agreed between him and the shipper to settle accounts on the basis of the weight stated in the consignment note;

47. Dutch private law was fundamentally reformed in the years leading up to 1992, when the bulk of the *New* Burgerlijk Wetboek entered into force. This reform project extended also to the law of transport which was fundamentally reformed as well and moved from the Commercial Code to a new Book 8 BW, which took effect already in 1991. In the New Burgerlijk Wetboek the above more liberal approach to the "derdenbeding" was codified in the articles 6:253 to 6:256 BW, which read as follows:

Art. 6:253 BW

-1. Een overeenkomst schept voor een derde het recht een prestatie van een der partijen te vorderen of op andere wijze jegens een van hen een beroep op de overeenkomst te doen, indien de overeenkomst een beding van die strekking inhoudt en de derde dit beding aanvaardt.

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122 Rb. Amsterdam 1.10.1915, *NJ* 1915, p. 1230 [*The Engelina*] p. 1231 ff.

123 Cf. Rb. Rotterdam 20.11.1922, W. 11041; Kg Haarlem 19.10.1923, *NJ* 1923, p. 1241; Kg Groningen 18.2. 1924, *NJ* 1924, p. 277; Hof Amsterdam 2.12.1924, *W.* 11300; Hof Arnhem 21.4.1925, *NJ* 1925, p. 1100; Kg. Rotterdam 25.3.1930, *NJ* 1930, p. 1282.

124 Dutch Commercial Code of 1838, hereafter: WvK.

125 HR 18.2.1927, W. 11636. Cf. Rb. Rotterdam 23.4.1919, *W.* 10472 [*The Gaston George*]; Rb. The Hague 24.1.1922, *W.* 11006; Kg Amsterdam 6.11.1922, *NJ* 1923, p. 1253.

(A contract creates the right for a third person to claim performance from one of the parties or to invoke the contract in another manner against one of them, if the contract contains a stipulation to that effect and if the third person accepts it.)
-2. Tot de aanvaarding kan het beding door degene die het heeft gemaakt, worden herroepen.
(Until its acceptance, the stipulation can be revoked by the stipulator.)
-3. Een aanvaarding of herroeping van het beding geschiedt door een verklaring, gericht tot een van beide andere betrokkenen.
(Acceptance or revocation of the stipulation takes place by a declaration addressed to one of the two other persons involved.)
-4. Is het beding onherroepelijk en jegens de derde om niet gemaakt, dan geldt het als aanvaard, indien het ter kennis van de derde is gekomen en door deze niet onverwijld is afgewezen.
(An irrevocable stipulation which, with respect to the third person, has been made by gratuitous title, is deemed accepted if it has come to the attention of the third person and he has not rejected it without delay.)

Art. 6:254 BW

-1. Nadat de derde het beding heeft aanvaard, geldt hij als partij bij de overeenkomst.
(Once the third person has accepted the stipulation, he is deemed to be a party to the contract.)
-2. Hij kan, indien dit met de strekking van het beding in overeenstemming is, daaraan ook rechten ontlenen over de periode vóór de aanvaarding.
(The third person can also derive rights from the stipulation during the period prior to acceptance if this in conformity with the necessary implication of the stipulation.)

Art. 6:255 BW

-1. Heeft een beding ten behoeve van een derde ten opzichte van die derde geen gevolg, dan kan degene die het beding heeft gemaakt, hetzij zichzelf, hetzij een andere derde als rechthebbende aanwijzen.
(Where a stipulation for the benefit of a third person is without effect with respect to that third person, the stipulator can designate either himself or another third person as beneficiary.)
-2. Hij wordt geacht zichzelf als rechthebbende te hebben aangewezen, wanneer hem door degene van wie de prestatie is bedongen, een redelijke termijn voor de aanwijzing is gesteld en hij binnen deze termijn geen aanwijzing heeft uitgebracht.
(The stipulator is deemed to have designated himself as beneficiary when the person whose performance has been stipulated has given him a reasonable period for the designation and he has not done so within such period.)

Art. 6:256 BW

De partij die een beding ten behoeve van een derde heeft gemaakt, kan nakoming jegens de derde vorderen, tenzij deze zich daartegen verzet.
(The party who has made a stipulation in favour of a third person may claim performance toward that third person, unless the latter objects.)

48. It follows from art. 6:253-1 BW that under Dutch law a “derdenbeding” (stipulation for the benefit of a third-party) in a contract does not become binding until it has been accepted by the beneficiary.[126] This rule –which sets Dutch law apart from French and German law as well as the PECL and the Unidroit Principles – is the codification of a Hoge Raad decision of 1924 in which it was held (in my free translation) as follows:

That the argument of the claimants, that a third person can obtain rights further to a contract without any acceptance on his part or on his behalf being necessary, cannot be accepted as it departs

126 Examples of where it was held that the consignee under the contract of carriage had not acceded to the contract although the goods had arrived at the place of destination are: Rb. Rotterdam 9.3.1973, *S&S* 1974, 26 [*The Marathon*], Hof Amsterdam 2.5.1979, *S&S* 1980, 70; Rb. Utrecht 10.2.1993, S&S 1993, 132.

from principles of the Dutch law of obligations which govern also article 1353 BW, and is neither justified by the wording nor the legislative history of articles 1353 and 1376 BW.
It must therefore be presumed in accordance with these principles that the stipulation for the benefit of a third person, does offer to the third person the opportunity to obtain what was stipulated for his benefit, however that the legal relation between the third person and his debtor which gives rise to the right to what was stipulated, is born only with the acceptance.[127]

49. It is clear under Dutch law that a consignee who after arrival of the goods at the place of destination (accepts the consignment note and) takes delivery[128] or who, failing delivery, claims damages from the carrier[129], accedes to the contract of carriage. In addition, it seems that in cases where the consignee's right to take delivery of the goods has been made irrevocable or where the shipper, carrier and consignee are in agreement, that the consignee may accede to the contract of carriage already in advance of the arrival of the goods at the place of destination, this will in principle be possible under Dutch law in view of the consensual nature of the contract of carriage.[130] However, it is clear that a consignee cannot *unilaterally* accede to the contract of carriage at his discretion prior to the arrival of the goods at destination (e.g. by a declaration to that effect directed at the carrier and/or shipper), because that could conflict with the shipper's right of control over the goods.[131]

50. Similarly, in cases where a bill of lading is in circulation, there is no doubt that if the consignee accomplishes the bill of lading[132] and takes delivery of the goods[133], he has acceded to the bill of lading contract.[134] However, there has been some debate about the question whether the accomplishment of the bill of lading in order to obtain delivery of the goods is a necessary requirement for the accession of the consignee to the bill of lading contract. Van der Ziel has defended that the consignee already accedes to the bill of lading contract at the time that he acquires the bill of lading from its previous

127 HR 13.2.1924, *NJ* 1924, p. 711 ff., at p. 713.

128 See art. 8:1125-3 BW and Rb. Amsterdam 20.12.1989, *S&S* 1991, 104; Hof The Hague 22.1.1991, *S&S* 1992, 8; Rb. Rotterdam 23.5.1996, *S&S* 1997, 11 [*NS/Andalusian; Nemijtek*]. See also the cases mentioned above in footnotes 118-120.

129 See: Hof Utrecht 4.3.1867, *W.* 2911; HR 25.10.1872, *W.* 3525; Rb. Rotterdam 1.2.1985, *S&S* 1986, 45;

130 HR 22.9.2000, *S&S* 2001, 37, *NJ* 2001, 44 [*The Eendracht*], Rb. Rotterdam 24.5.2006, *S&S* 2008, 35 [*EWL Venezuela*]. In some cases the consignee's accession to the contract of carriage is based upon the fact that he disposed over the goods without actually taking delivery of them. See Hof Amsterdam 2.12.1924, *W.* 11300, and Hof The Hague 2.12.1964, S&S 1966, 45 [*The Eben Haezer*], Hof The Hague 10.10.1989, *S&S* 1990, 122 [*The Neustadt; The Rudolstadt*]. See also: Rb. Rotterdam 6.1.1984, *S&S* 1984, 58 [*The François*] where accession was based upon the consignee giving directions to the carrier as to where to berth.

131 In this sense HR 29.11.2002, *S&S* 2003, 62, *NJ* 2003, 374 [*The Ladoga 15*], see also below in § 10.2. See also; Rb. Middelburg 26.6.1963, *S&S* 1964, 30;

132 Kg Rotterdam 15.11.1929, *NJ* 1930, p. 551 [*The Drie Gebroeders*], Hof The Hague 22.5.1939, *NJ* 1939 [*The Duburg*], Hof Amsterdam 11.2.1960, *S&S* 1960, 31 [*The Hestia*].

133 Hof 's-Hertogenbosch 27.4.1926, *NJ* 1927, p. 84 [*The Vaarwel II*]; Hof The Hague 22 May 1939, *NJ* 1939, No. 755 [*Duburg*].Hof Amsterdam 15 January 1971, *S&S* 1972, 9 [*Vienne*].

134 In: Rb. Rotterdam 3.11.2004, *S&S* 2005, 86 it was held that a consignee who had taken delivery of the goods, but without presentation of the bill of lading, had not acceded to the bill of lading contract.

holder.[135] Japikse has declined this view on the ground that under Dutch law the consignee who asks delivery of the goods from the carrier, must sign off the bill of lading and hand it to the carrier.[136]

> Situations giving rise to a practical need for earlier accession to the contract of carriage by the consignee are where an unforeseen event frustrates the normal performance of the contract of carriage and interim measures are necessary in order to prevent or mitigate damage. In the case leading up to the *Eendracht*-decision[137], a cargo of beer tanks had started to shift during the sea voyage from Holland to Malta. At the time the shipper did not hold all original copies of the bill of lading anymore, because one set of documents had already been mailed to the consignee, the second was in the ship's bag and only the third was in the hands of the shipper. In order to be able to decide that the ship should discontinue its voyage and return to the port of shipment Delfzijl for repairs to the beer tanks and (re-)lashing and securing of the cargo, consultations were held between (representatives of) the shipper, consignee and carrier under the (straight) bills of lading. The Hoge Raad construed this as an early accession by the consignee to the contract of carriage with the approval of all the parties involved, which it considered possible even in a case where bills of lading were in circulation.
> However, in the subsequent decision of *The Ladoga 15*[138] the HR made clear that its words should not be taken to mean that the consignee can accede to the bill of lading contract at his discretion at any time and in every way. In that case a containerized cargo of liquor was to be carried by sea under a combined transport bill of lading from Rotterdam to St.-Petersburg and from there onwards by truck to Moscow. In view of difficulties with the land transport after St.-Petersburg it was agreed between the shipper, carrier and consignee to let delivery by the carrier take place in St.-Petersburg instead of Moscow. Because he had not yet been paid for the goods, the shipper instructed the carrier not to release the goods to (the forwarding agent of) the consignee until further notice. Nevertheless, the agent of the carrier hands the original bill of lading in the ship's bag to the agent of the consignee and subsequently delivers the goods to the consignee against presentation of that bill of lading.

51. If the beneficiary accepts the stipulation in his favour, then pursuant to Art. 6:254 BW he becomes party to the original contract (accession), which thereby changes into a three- or multiparty contract. As party to the contract, the third person may assert the rights stipulated for his benefit, but must also fulfill the obligations connected thereto. As follows from art. 6:253-1 BW the rights conferred upon the third-party beneficiary can be the performance of a contractual obligation by one of the parties[139] or the right to invoke the contract as against one or more of the other parties.[140] In principle, the consignee becomes party to the contract of carriage as a whole. He cannot go cherry-picking, accepting one part of the contract whilst rejecting other parts.[141]

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135 Van der Ziel, *Het cognossement, naar een functionele benadering*, inaugural address Erasmus University Rotterdam, Kluwer: Deventer, 1999, p. 6.

136 R.E. Japikse in his review of this inaugural address in: *RM Themis*, 2000, p. 193-194.

137 HR 22.9.2000, *S&S* 2001, 37, *NJ* 2001, 44 [*The Eendracht*].

138 HR 29.11.2002, *S&S* 2003, 62; *NJ* 2003, 374 [*The Ladoga 15*].

139 Under a contract of carriage typically the obligation of the carrier to deliver the goods in sound condition at the agreed destination.

140 E.g. a jurisdiction clause or a Himalaya-clause. Dutch law construes the Himalaya-clause as a stipulation for the benefit of third-persons as well, i.e. the agents and servants of the carrier.

141 Rb. Amsterdam 1.10.1915, *NJ* 1915, p.1230 [*The Engelina*].

52. What rights and obligations befall the third-party beneficiary upon his accession to the contract is generally a matter of interpretation of that contract. Under Dutch law pursuant to art. 6: 248-1 BW a contract not only has the legal consequences expressly agreed by the parties, but also those, which follow from the nature of the contract, from statute law, custom or the requirements of reasonableness and fairness.[142] In general under Dutch law, the interpretation of contracts is governed by the so-called Haviltex-rule[143], which (in my free translation) reads as follows:

> The question as to how the relations between the parties are regulated in a contract in writing and whether this contract contains a gap which needs to be filled, cannot be answered solely based upon the linguistic interpretation of the provisions of that contract. After all, the answer to that question depends on the meaning which each of the parties under the given circumstances could reasonably attribute to these provisions and on what they could reasonably expect from each other in this regard. In that connection it may also be relevant to which circles of society the parties belong and what legal knowledge can be expected from such parties.[144]

53. It is possible that the contract of carriage to which the third-party accedes differs from the original contract as concluded between shipper and carrier, because the consignee is entitled to rely on the appearance of the contract of carriage as created in the way-bill.[145] E.g. an obligation under the contract of carriage to pay detention damages at the port of loading may not be invoked against the consignee if not mentioned in the way-bill.[146] Although there is no *general* rule of Dutch transport law included in Book 8 BW to the effect that the way-bill or consignment note is conclusive evidence of the goods description and the contractual terms as between the consignee and the carrier, such a rule does exist with regard to bills of lading in art. 8:414-1 BW[147] and with regard to the contractual terms in a special kind of consignment note, the "transportbrief" (*transport letter*), in case of carriage of goods by road in art. 8:1123-1 BW. In addition, the general reliance rule as formulated in art. 3:36 BW could be invoked to the same effect by a consignee acting reasonably and in good faith. As far as relevant, the said provisions read as follows:

Art. 8:1123 BW

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142 In Dutch art. 6:248-1 BW reads as follows: "-1. Een overeenkomst heeft niet alleen de door partijen overeengekomen rechtsgevolgen, maar ook die welke, naar de aard van de overeenkomst, uit de wet, de gewoonte of de eisen van redelijkheid en billijkheid voortvloeien."

143 HR 13.3.1981, *NJ* 1981, 635.

144 HR 13.3.1981, *NJ* 1981, 635, No. 2.

145 HR 18.2.1927, *W.* 11636, Rb. Breda 14 April 2004, *S&S* 2005, 95. However, in cases where it was established that the consignee had received prior notice of terms of the contract of carriage, not included in the bill of lading, the consignee was held to be bound to these terms. See e.g. Rb. Rotterdam 24.1.1922, *W.* 11006 [*The Internationaal*].

146 Rb. Rotterdam 23.4.1919, *W.* 10472. See also: HR 14.4.1932, *NJ* 1932, p. 1726 [*The Louis de Geer*], Hof The Hague 22.5.1939, NJ 1939, 756 [*The Duburg*], Rb. Rotterdam 4.3.1969, *S&S* 1974, 76 [*The Gardoy*].

147 Art. 8:414-1 BW applies to carriage by sea and art. 8:921 BW to inland navigation. See above: § 3.

-1. Indien een transportbrief is afgegeven, wordt, …, de rechtsverhouding tussen de vervoerder enerzijds en de afzender of de geadresseerde anderzijds beheerst door de bedingen van deze transportbrief.
(If a consignment note has been issued, …, the legal relationship between the carrier on the one hand and the shipper and the consignee on the other is governed by the stipulations of this consignment note.)

Art. 3:36 BW

Tegen hem die als derde op grond van een verklaring of gedraging, overeenkomstig de zin die hij daaraan onder de gegeven omstandigheden redelijkerwijze mocht toekennen, het ontstaan, bestaan of tenietgaan van een bepaalde rechtsbetrekking heeft aangenomen en in redelijk vertrouwen op de juistheid van die veronderstelling heeft gehandeld, kan door degene om wiens verklaring of gedraging het gaat, met betrekking tot deze handeling op de onjuistheid van die veronderstelling geen beroep worden gedaan.
(A third person who under the circumstances reasonably bases an assumption as to the creation, existence or extinction of a legal relationship on a declaration or conduct of another, and has acted reasonably on the basis of the accuracy of that assumption, cannot have invoked against him the inaccuracy of that assumption by the other person.)

54. Under Dutch law, the consignee is obliged to pay freight, demurrage and any other amounts due under the contract of carriage, only if notice of this obligation is given in the bill of lading. This follows from art. 8:441-2 BW, which as far as relevant reads as follows:

Art. 8:441 BW

-2. Jegens de houder van het cognossement, die niet de afzender was, is de vervoerder gehouden aan en kan hij een beroep doen op de bedingen van dit cognossement. Jegens iedere houder van het cognossement, kan hij de uit het cognossement duidelijk kenbare rechten tot betaling gelden maken. Jegens de houder van het cognossement, die ook de afzender was, kan de vervoerder zich bovendien op de bedingen van de vervoerovereenkomst en op zijn persoonlijke verhouding tot de afzender beroepen. (*The carrier under a bill of lading is bound by and may invoke the provisions of this bill of lading against the holder of the bill who was not the shipper. Against each holder of the bill of lading he can assert the rights to payment which are clearly knowable from the bill. Against the holder of the bill of lading who was also the shipper, the carrier may, in addition, invoke the provisions of the contract of carriage and his personal relationship with the shipper.*)

In addition, it should be noted that under Dutch law there is a statutory obligation on the part of the shipper and the consignee under a contract of carriage, and under a bill of lading contract to compensate the carrier for any exceptional costs he had to make during the voyage to preserve the cargo.[148]

55. Under Dutch law, the effectiveness of bill of lading clauses purporting to incorporate provisions from charter-parties, general conditions or any other external documents into the bill of lading contract, depends upon whether those provisions[149] are clearly 'knowable' to the consignee or any other

[148] See: art. 8:488 BW (carriage by sea), art. 8:951 BW (inland navigation), art. 8:1129 BW (carriage by road).

[149] In: Rb. Rotterdam 15.2.1996, *S&S* 1998, 35 [*Inga B*] it was held that a reference in the bill of lading to "all details" in a "pre-loading survey" was ineffective. In: Rb. Rotterdam 20.6.1996, *S&S* 1997, 75 [*Oasis*], and Hof The Hague 21.12.1999, *S&S* 2000, 108 [*Oasis*] the reference to the charter-party was held to be too vague to be effective.

person[150] against whom these provisions are being relied upon. This follows from the flexible criterion in art. 8:415 BW, which reads as follows:

Art. 8:415 BW

> -1. Verwijzingen in het cognossement worden geacht slechts die bedingen daarin te voegen, die voor degeen, jegens wie daarop een beroep wordt gedaan, duidelijk kenbaar zijn. (*References in the bill of lading are deemed to incorporate only those provisions, which are clearly knowable or knowable to the person against whom those clauses are being relied upon.*)
> -2. Een dergelijk beroep is slechts mogelijk voor hem, die op schriftelijk verlangen van degeen jegens wie dit beroep kan worden gedaan of wordt gedaan, aan deze onverwijld die bedingen heeft doen toekomen. (*Such reliance is only possible to him, who at the written request of the person against whom such reliance could be made or is being made, has forwarded those provisions to that person without delay.*)[151]
> -3. Nietig is ieder beding, waarbij van het tweede lid van dit artikel wordt afgeweken. (*Any provision departing from subsection 2 of this article is null and void.*)

56. The required knowledge of a provision on the part of the consignee or other person may result either from a clear and precise notice in the bill of lading[152] or from other sources[153] that he had access to at the time he acquired the bill of lading.

57. Finally, it is worth observing here that according to Dutch law the consignee does not succeed in the rights and obligations of the shipper under the contract of carriage. By his accession to the contract of carriage, the consignee acquires the right to take delivery of the goods and (if necessary) to sue for damages, which he can enforce independently from the shipper. Neither does the consignee's accession to the contract of carriage as such extinguish the rights and obligations of the shipper. E.g. in case of carriage of goods by road the shipper remains entitled to claim for damages. [154] And in general

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150 In: Rb. Rotterdam 11.10.2006, *S&S* 2007, 44 [*AIG/Antimachos*] it was held that a ship-owner who was being held liable under a bill of lading referring to a sub-charter to which he was not a party, could invoke art. 8:415 BW as well to obtain a copy of the sub-charter.

151 Rb. Rotterdam 28.9.1995, *S&S* 1996, 22 [*The Skan Grete*].

152 In: Rb. Rotterdam 15.11.2000, *S&S* 2002, 2 [*Marinus Green*] the reference "All terms and conditions, liberties and exceptions of the Charter Party, dated 26 June 2000, including the law and Arbitration Clause are herewith incorporated" was deemed effective to incorporate the lien clause in that charter-party. See also: Hof The Hague 9.9.2003, *S&S* 2004, 40 [*Efrem*]. In order to incorporate arbitration or jurisdiction clauses in the charter-party into the bill of lading contract, a specific reference to this clause is required. See: Hof The Hague 23.5.1989, *S&S* 1990, 112 [*The Dajo*], Hof The Hague 19.2. 1991, *S&S* 1991, 135 [*The Orembae*], Rb. Rotterdam 28.9.1995, *S&S* 1996, 5 [*Stolt Spur*], Hof The Hague 22.2.2000, *S&S* 2001, 77 [*Stolt Taurus*], Rb. Rotterdam 26.2.2003, *S&S* 2003, 132 [*Zhen Fen 20*], Hof The Hague 27.12.2005, *S&S* 2007, 38 [*Alpha Future*].

153 In: Rb. Rotterdam 26.2.2003, *S&S* 2003, 109 [*Atlantic Comet*] the bills of lading referred to charter party on Gencon Form dated 20 May 1998 between owners and Stenaks. It was held that the consignee was familiar with the voyage charter and the Gencon Form in general which had been used during earlier voyages as well. In: Rb. Rotterdam 21 July 2004 and 27.9.2008, *S&S* 2008, 1 [*Zhen Fen 20*] it was held that the terms of the voyage charter were sufficiently knowable to the consignee who was the receiving agent of the charterer.

154 Art. 8:1126 BW.

the shipper remains liable for any breach of his duties to provide information and documentation[155], for damage caused to the carrier by the cargo and equipment provided by the shipper[156], for freight and demurrage in accordance with the contract of carriage[157] and for any exceptional costs that the carrier had to make during the voyage to preserve the cargo.[158]

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155 See: art. 8:394, 8:395 and 8:411 BW (carriage by sea), art. 8:910 and 8:911 BW (inland navigation), art. 8:1115-1 j° art. 8:1114 BW (carriage by road).

156 See: art. 8:397 BW (carriage by sea), art. 8:913 BW (inland navigation), art. 8:1117 BW (carriage by road).

157 See: art. 8:422, 8:484 BW (carriage by sea), art. 8: 931, 8:947, 8:956 BW (inland navigation), art. 8:1128 BW (carriage by road).

158 See: art. 8:488 BW (carriage by sea), art. 8:951 BW (inland navigation), art. 8:1129 BW (carriage by road).