Carriage of goods

Lectures by:
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The Structure of the Lectures:
• Monday
  – Introduction; What is carriage of goods all about?
  – Contract law: Contract of affrightment - contract of carriage
    • The parties and others involved
    • The contractual obligation of the parties
    • The transport documents (introduction)
  – Historical and international background – the conventions
    • Hague-Visby and Hamburg – what about the Rotterdam Rules?
  – (Scope of Application – choice of law)
The Structure of the Lectures:

- **Tuesday**
  - Carriers liability for *lost or damaged* cargo
    - Base of liability
    - Period of liability
    - Vicarious liability
  - The exemption from liability
    - Navigational errors
    - Fire
  - Deck cargo and dangerous cargo
  - Liability for *delay*
  - The amount of compensation and limitation of liability

- **Wednesday**
  - The Bill of Lading
    - The information provided in the B.o.L
    - Missing information, the carriers duty to check
  - Carriers liability for misinformation
    - Liability for misdiscription - Implied transport liability
    - Discription liability
  - Shippers obligation to give correct information
  - Delivery
    - Liability for wrongful delivery
### What is carriage of goods all about?

- Transport service: carriage of goods from A to B
- Who needs this service?
  - The parties to a distance **sales contract**
  - Others that want goods transported
- The parties to a sales contract are different from the parties in a **contract of affrightment**
- **Claims under a CoA is mandatorily regulated in the NMC**
- **No claim under tort law is accepted, § 282**

### What is a contract of affrightment?

- No definition in the code, but in the preparatory works:
- **At sea**: a contract to perform transportation services by ship or to make a ship's transportation capacity available
- Liner trade, general cargo carriage (Send a package/take the bus)
  - Carriage of goods from one port to another. Often contracts with several cargo owners
  - The freight documents: Bill of lading or sea way bill
  - Maritime Code section IV "Contracts of carriage", Chapter 13
- Voyage charters, quantity contracts and time charters (Rent a bus/take a taxi)
  - A ship is contracted out on a voyage or time charter. The charterer takes care of the commercial management.
  - The contracts: Voyage or time charter party
  - Maritime Code section IV "Contracts of carriage", Chapter 14
  - Freedom of Contract, but NOTE § 322.2.
The parties in the contract of carriage

- The parties:
  - Contracts of Affreightment:
    - **Carrier** (Norw: Transportør)
    - **Sender** (Norw: Sender)
  - Voyage and time chartering
    - Carrier (Norw: Bortfraktør)
    - Charterer (Norw: Befrakter)

- Others:
  - Shipper
    - The underlying sale
    - The Norwegian Sales Act §§ 7(2) and 8
    - INCOTERMS

The parties and others

- **Shipper**, not part of the contract
  - The code establishes a quasi-contractual relationship
  - Has certain liabilities in relation to the carrier
    - May claim Bill of Lading, § 294
    - Responsible for the accuracy of the statements relating to the goods entered in the bill of lading, § 301

- **Receiver**, not party to the contract
  - Not mentioned in § 251
  - Steps into the contract depending of the wording of the Bill of Lading (§ 292)

- **Sub contractor** (performing carrier)
  - Is liable for the transport (§286)
  - Contracting carrier is still liable (vicarious liability - §285)
The obligations of the parties to a Contract of Carriage

- **The Sender (Delivery of Goods §§255)**
  - Deliver as indicated by the carrier
  - Packing

- **The Carrier**
  - At delivery: Inspect the packing (§262)
  - Inspect the goods (§265 – Bill of lading)
  - Perform the carriage with due care and despatch
    - With a Seaworthy and Cargoworthy ship
  - If the goods are lost damaged or delayed: The carrier’s liability is regulated in §§ 274-289

- **The Receiver**
  - Receive the goods as indicated by the carrier (§ 268)
  - Pay the freight? Bill of lading/contract (§ 269)

The freight documents

- Issued as *evidence* of the contract of carriage, § 251.
  - Bill of lading (negotiable)
  - Sea way bill (not negotiable)

- The bill of lading, § 292
  - Acknowledgement that goods of a certain nature and quantity have been received (*receipt*)
  - A *promise* to transport the goods
  - A *document of title* (only the person in possession of the bill of lading can obtain delivery)
The Bill of Lading

- Signed by the carrier
- Evidence of transport agreement between the line and the cargo owner
  - Booking note
  - Delivered without any formal preliminary contact
- Different:
  - "Shipped" bill of lading
  - "Received for shipment" bill of lading
  - "Through" bill of lading
- Combined documents/multimodal transport

Sea waybill (§§ 308–309)

- Evidence that the carrier has received the goods
- Evidence of a contract carriage by sea
- Promise to deliver the goods at their destination
  - Not negotiable!
Historical and international background

- Freedom of Contract misused by European shipowners
  - Exclusion clauses and limitation of liability
- USA Harter Act 1893 – make American law applicable to Atlantic trade
- International compromise:
  - Bill of Lading Convention - Haag Rules (Brussels 1924)
  - Haag-Visby Rules (1968) incorporated in national legislation

- UNCITRAL: the 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'
- Adopted by the UN General Assembly On 11 December 2008
  - Signed in Rotterdam, 20-23 September 2009
  - Not yet ratified
  - Known as the "Rotterdam Rules".

Rotterdam Rules Signature Ceremony
20-23 September

- This new Convention extends and modernizes the existing international rules relating to the contract of maritime carriage of goods.
- The aim
  - replace the Hague Rules, the Hague-Visby Rules and the Hamburg Rules
  - achieve uniformity of law in the field of maritime carriage, as well as provide for modern industry needs in terms of door-to-door carriage.

Scandinavian solutions

- Hamburg Rules are not ratified
- Thus, the rules in the MC are aligned with the Hamburg rules as far as possible
- Separate rules on domestic transport
  - The Hague-Visby Rules apply only to international transport
  - Norwegians wanted to harmonise the legal framework for different modes of national transportation

The scope of application

- Regulated in MC § 310:
  - The jurisdiction of Norwegian courts when the contract is providing carriage between two states
    - Competent when the parties have agreed on Norway (after dispute)
    - Competent when the case has necessary connection to Norway – described in § 310, para 1,a-d
The choice of law

- In the case of cargo damages, special choice of law rules; MC § 252 and 253
- Carriage with a Scandinavian point of contact will be subject to Scandinavian rules on liability applied as lex fori
- Carriage without a Scandinavian contact – the law of another convention state most closely connected with the carriage.
- What kind of carriage?
  - § 252; Chapter 13 applies to "carriage of general cargo"
  - § 253; But not to "carriage under a charter party"
    - The dividing line?
    - depends upon the transportation document
    - however, a line will be drawn
    - Chapter 13 applies to tramp bill of lading
    - and to quantity contracts

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The Choice of Law

- Chapter 13 applies to Nordic international trade (§252.1)
- Chapter 12 applies to other international trade in 5 situations (§ 252.2)
  - Agreed port of loading in a convention state
  - Agreed port of discharge in a Nordic country
  - Several ports of loading agreed, actual port one of them and Nordic
  - Transport document issued in Convention State
  - Transport document contains Paramount clause
Choice of Law, cont.

- § 252 third paragraph
  - Outside of Nordic trade:
  - Freedom of choosing the law of a Convention State,
  - The relationship with 252 second para nr 5
    - According to preparatory work the parties have a freedom of choice
    - After a dispute has arisen, the parties may agree on how to settle it (§ 310 para 2)

To what extent are the Norwegian rules mandatory?

- The rules are mandatory, but the carrier can take on more stringent liability (§ 254)
  - Exceptions; § 254,4
    - Rt 2004.517
    - Rt 2001.676
- This includes the time-bar rules (§ 501)
Liability for damage, loss or delay

The main rule on liability; MC § 275

- MC § 275: Negligence with a reversed burden of proof
- MC § 276: Exemptions
  - 1) Fault or neglect in the navigation of the ship or
  - 2) Fire

MC § 276, second paragraph: not if "initial unseaworthiness"
Liability for loss, damaged or delayed goods: § 275

• The cargo owner must prove:
  – That the goods have been damaged while in the carrier’s custody
  – That he has suffered economic loss

• The carrier must prove himself innocent
  – That the damage is not a result of his own or any of his servants or representatives fault or negligence
  – In practical terms:
    • How the damage actually occurred
    • That neither he nor his servants were negligent
    • Borgarting lagmannsrett (Court of Appeal) 2002.3075
      – Frozen octopus used as bait when fishing code. Needed to be frozen at a certain level to be working. The carrier could not prove any other reason for why the fish was not biting. Assumed liable.

NOTE! A burden of proof assumes the availability of evidence.

What must the carrier or his servants do to avoid being branded as negligent?

• Breach of public regulations?
  – Container Code 1982/84
• Has the carrier enough knowledge?
• Not perfect – but reasonable fitness
  – The cargo owner must give the carrier necessary information
  – Not only the particular goods but also the type of voyage
  – Previous experience
    • ND 1977.1 Tor Marcia
    • Bad stowing of trailers (done by shippers known to the carrier)
The period of care, MC 274

- While the goods are in his or her custody instead of "tackle to tackle"
- At the port of loading (2. para)
  - From the carrier receives the goods
- At the port of discharge (3. para) until the goods are:
  - Delivered to the receiver
  - Warehoused on the account of the receiver (§ 271 or agreement)
  - Delivered to any authority according to law

Vicarious liability

- Identification
  - The neglect of servants is considered the fault of the carrier.
  - Section 275, para.1 “… or that of anyone for whom he or she is responsible”

- Vicarious liability is only presupposed in the code § 276, para 1 no. 1
  - Establishes pre-conditions for identification
  - Includes more than those directly employed by the carrier
  - Harbour workers? Yes
  - Shipyard employees and inspectors? ??
Exemption from liability, MC § 276
Who's fault or neglect?

- Haag/Visby – Hamburg
  - Exemptions a & b kept, but not for Norwegian domestic trade.
  - "Fault or neglect in the navigation or management of the ship"
    - Who's fault or neglect is exempted?
      - Only fault/neglect committed by master, crew etc.
      - Not his own fault, or the fault of senior management personnel
        (owner's privity)
      - What if the ship owner and the master are the same person?
        - ND 1974.315 – The master is not protected
        - Statement in preparatory work – The master is protected

Exemption for navigational errors. What is included?

- Navigation of the vessel
  - Steering and manoeuvring, response to signals etc.

- Management of the ship
  - The ship's condition, manning and equipment
  - Errors in the management of the cargo NOT included
    - Ex: Improper stowage that leads to inadequate ventilation

- Borderline cases: error in the management of the ship or the cargo?
  - Was the act or omission primarily in the interest of the cargo or the ship?
  - ND 1975.85 NSC Sunny Lady
    - Water pumped into the cargo holds, damaging the cargo
    - Why was the water pumped? The crew member intended to fill up the ship's fresh water supplies, but put the water hose into the inspection pipe for cargo hold nr. 6 = Fault in the management of the ship
Exemption for fire § 276, Para 1 no.2

- What fires are included in the exemption?
  - Fires caused by persons for whom the carrier is responsible
    - fires caused by negligent smoking by the crew (not liable)
  - Not fires caused by owner own fault, or the fault of senior management personnel (owner’s privity)
    - Fires due to inadequate fire procedures (liable)

- What is a fire?
  - Open flame
  - Smouldering? Possible

Unseaworhtiness and the exemptions in § 276 first para no. (1) and no. (2)

- The exemptions do not apply when the damage, loss or delay is connected with *initial* unseaworthiness.
  - The ship being unseaworthy at the commencement of the voyage
  - The carrier, or someone for whom he is responsible, has not exercised due diligence to make the ship seaworthy
Seaworthiness

- What is seaworthiness?
  - Narrow sense; technical
    - Must be able to perform the voyage without endangering human life
  - Broad sense; in relation to the cargo/cargoworthiness
    - The cargo can be expected to reach its destination undamaged.
  - The rule in MC § 276 second paragraph is only applicable to initial unseaworthiness
  - Gorgonzola & chocolate

Deck cargo MC § 263

- Must be in accordance with a particular right
  - Contract of carriage, custom of the trade, statutory rules
  - Loss or damage: ordinary rules on liability (§§ 275 and 276)
- Unlawful loading on deck
  - Special rules on liability in § 284.1; strict liability
- Loading on deck despite otherwise agreed §284.2:
  - Unit limitation rules (§§ 280-283) can not be invoked
Live animals

– Liable under the ordinary rules (§275)
– Not liable for *special risks* associated with such carriage § 277
– (Nordiske Dommer 2000.393 smolt=live animals)

Dangerous cargo

• Cargo, inherently dangerous
  – Definition is difficult
  – More than everyday risk
  – Lists of dangerous cargoes issued by the authorities
    • Regulation of 29 July 2006 on carriage of dangerous cargoes, by Norwegian Maritime Directorate (Sjøartsdirektoratet)
Duty of disclosure § 257

- The *sender* has a duty of disclosure; the *shipper* will be liable if the goods are not marked and informed to the carrier.
  - The goods must be marked as dangerous.
  - Reasonable notice must be given to the carrier.
  - All relevant information must be given (second paragraph).

International Maritime Dangerous Goods (IMDG) Code

- The International Maritime Dangerous Goods (IMDG) Code
- Developed as a uniform international code for the transport of dangerous goods by sea covering such matters as packing, container traffic and stowage, with particular reference to the segregation of incompatible substances.
The carrier's rights

- When the sender has not fulfilled his duty to inform
- § 291 first paragraph:
  - May refuse to take dangerous goods on board (breach of contract)
  - If on board: may discharge the goods or destroy them or render them innocuous (§291 first paragraph second sentence)
  - Not applicable when the carrier knows the cargo is dangerous (§291, 2 paragraph)

- Special rule on saving life and property – no obligation to pay damages; § 291, 3 paragraph
  - An imminent risk which is about to materialise itself in damage

Strict liability on the sender

- § 291 imposes strict liability on the sender
  - When the cargo is delivered
    - without information about dangerous characteristics or
    - Without information about necessary safety measures
  - Pre-condition: The carrier must not have had actual knowledge
  - § 291 covers both (and only) carrier and sub-carrier
Liability for delay

- The loss:
  - The goods are damaged or destroyed
    • Liability is regulated in § 275
  - The goods are ok, but market conditions have changed (Christmas decoration in January)
    • Liability is regulated in § 278

- When is there a delay?
  - Starting point: § 262 "carried out with due despatch" (care)
  - § 278.2 gives further guidelines:
    • Agreed delivery
    • Within the time which is reasonable to demand of a prudent carrier in the circumstances
    • No delivery? 60 days – total loss

Deviation

- Traditionally; serious breach of contract
- Today;
  - has the carrier chosen a reasonable voyage plan (§ 262), and
  - is the cargo at destination within a reasonable time
- § 275, second paragraph: the carrier has a right to take measures to save human life or reasonable measures to save ships or other property at sea.
# The scope of liability

- The ordinary starting point (economic loss) does not apply
- Standardised loss rule in MC § 279
  - Value of the goods
  - Exchange price, market price or current value of same goods
  - Ex LF-2006-25784

What about indirect or consequential damages? has been accepted in arbitration practice, but no general rule

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# The unit limitation rules

- SDR – Special Drawing Rights, § 505
- MC § 280 first paragraph:
  - 667 SDR for each lost or damaged unit or
  - 2 SDR per kilogram damaged or lost goods
  - Ex ND-2004-373
- What is a unit § 281; container, pallet or other transport device
  The text of the bill of lading is determinative
- The limit of liability which results in the highest liability shall be applied
  - NOTE! The rules on liability does not apply where the carrier himself caused damage willfully or through gross negligence, § 283
- Global limitation in MC Chapter 9, § 175 no 3
- Norwegian domestic trade; 17 SDR § 280 second section
Notice and period of limitation

- Notice of damage or loss § 288, 1. para
  - When the cargo is delivered
  - Immediately and written (§ 288, 1.para, 1. sentence)
  - Or, if not apparent, three days after delivery (§ 288, 1.para 2. sentence)
- Notice of loss in consequence of delay
  - 60 days § 288, 3. para
- Period of limitation § 501 nr 7

Introduction - the bill of lading

- Liability under the rules relating to bills of lading
  - Delivery liability
    - distinct type of liability, (§§ 302, 292)
  - Description liability (§ 300)
    - No right of limitation shall apply (§ 300,1.para, 2. sentence)
  - Misdescription (§299 third para)
The underlying sale and the bill of lading

- Distance sale
  - The goods and the payment cannot be exchanged simultaneously
  - The buyer cannot inspect the goods
- The bill of lading provides a description of the goods
- The value of the description hinges to a large extent on the legal rules associated with it.

The content of a bill of lading (§ 292)

What should a bill of lading contain?
MC § 292 requires that the document contains:
- evidence of an agreement of carriage by sea
- evidence that the sender has received or loaded the cargo"
- the words "bill of lading" or make it apparent that delivery will only take place on presentation of the bill
The content of a bill of lading
(§ 296, 1. para)

§ 296 first paragraph no. 1
- the nature of the goods
- their dangerous properties
- the necessary identification marks
- the number of packages or pieces and
- the weight

All as stated by the shipper

§ 296 first paragraph no 2
- the apparent condition of the goods and packaging

If this is missing, in apparent good order and
condition, § 299, 1 para, 2 sentence

§ 296 first paragraph no 3 - 13

The content of a bill of lading
(§ 296 second and third para)

• Shipped bill of lading must contain:
  – Nationality and name of the ship
  – Place of loading and the date when the loading
    was completed
• The bill of lading must be signed
  – By the carrier or someone on his behalf
    • The master, § 137; "principal" (owner)/ § 295; "carrier"
  – By someone who has been given the authority
    • An agent
What if some information is missing?

- MC § 297; still a bill of lading if the conditions in § 292 is fulfilled
  - Must be named bill of lading or
  - Indicate that the goods only will be delivered against presentation of the document

Carrier's duty to check that the information in the bill of lading is correct

- § 298 first paragraph
  - The carrier shall to a reasonable extent check the accuracy of the information on the goods entered in a bill of lading (§ 296, 1. para. No 1)

- § 298 second paragraph; make a reservation
  - Reasonable grounds for doubting or
  - Not had reasonable opportunity to check

- § 299 third paragraph; notation
  - Must state expressly that the information is incorrect
The carrier's liability for information in the bill of lading

- Designed to protect individuals who rely in good faith on the information in the bill of lading

- How far should the protection extend?
  - Is it enough that there is a gap between the information and the actual conditions of the goods?
  - Or do we need some culpable conduct causing the information to be misleading?
  - How should the damages be assessed in monetary terms?
    - Expectation interest (put in the situation as if the goods matched the description)
    - Reliance interest (put in the situation as if he had been actually informed)
    - Solution: §§ 299 and 300 - different liability regimes

Implied transport liability, § 299, third paragraph

- Only relevant when a third party has acquired the bill of lading in good faith relying on the accuracy of the statement in it
- Then evidence on the contrary shall not be admissible
Implied transport liability, cont.

• The third party must have paid the purchase price in exchange for the document
• Or it is used as a negotiable document in international trade
  – A bank has acquired the bill of lading in connection with a letter of credits obligation
  – Or otherwise has extended credit using the bill of lading as security
• The bill of lading is conclusive evidence of the condition and quantity of the goods at the commencement of carriage
  – Any difference between the description in the bill of lading and the conditions of the goods at delivery is treated as damage arising during transport

Implied transport liability, cont.

• The basis of liability is § 275; negligence with a reversed burden of proof
  – Exculpating evidence is not allowed (§ 299, 3 paragraph)
  – The liability is unconditional

• Quantum
  – The ordinary rules on cargo damage apply
Liability for incorrect description, § 300

- Protects a third party who has acquired the document relying on the accuracy of the information provided
- Basis for liability; § 300
- "the carrier understood or ought to have understood" – not strict liability
  - That the information was objectively incorrect
  - That the information was likely to mislead a third party

The scope of the carriers liability

- The holder of the bill of lading must receive compensation for losses suffered due to his reliance on the bill of lading
- As if correct information was given (reliance interest)
- Not defined as ordinary carrier of transport liability
  - Thus the unit limitation does not apply
Situations covered by both § 299 and § 300

- The cargo owner can choose which set of rules to apply

Shipper's liability to carrier

- The Shipper:
  - Provides information as described in § 296 paragraph 1 no. 1
  - The Carrier will be held liable for this information thus;
- Strict liability for information provided by the shipper, § 301 paragraph no 1
Fraud

- The shipper needs a clean bill of lading
  - "good order and condition" otherwise
  - Difficulty to sell the goods – negotiating the bill of lading
- Back letters/letter of indemnity
- The back letters can not be invoked in a court of law in the case of fraud, § 301, second paragraph
  - The cargo owner will have a claim both against the carrier and the shipper
  - The cargo owner is entitled to be informed about possible back letters (§ 300)

How to obtain delivery of cargo

- The receiver must be authorised §§ 292, 1. para no 2, 303 and 304
- Who is authorised?
  - Be expressly stated in the bill of lading (§ 302 1. first para, first alternative) or
  - A series of endorsements are leading to the person demanding delivery (§ 302 1. para, second alternative) or
  - There is an endorsement in blank /without naming the consignee (§ 302 1. para, third alternative)
    - Presents the bill of lading
- The carrier must act bona fides; if he knows that the receiver is not authorised to demand delivery he cannot deliver the goods
Liability for wrongful delivery

- The cargo should only be delivered against presentation of the bill of lading.
- What if an old customer provides a trustworthy explanation?
- And a bill of lading holder appears subsequently?
  - The carrier will be subject to unlimited liability and his insurance will not help him.
  - Often he will require a guarantee from the receiver.
  - Other documentary solutions may be possible – sea way bill.

Sea waybills (§§ 308-309)

- Not negotiable documents.
- The presentation of the original document is not a pre-condition for delivery.
- Evidence of a contract of carriage
- Acknowledges that the goods have been received.
- Contains an undertaking by the carrier to deliver the goods to the consignee named in the document.
The content of a sea waybill,

- Pre-conditions in § 309
  - Information about the goods
  - The name of the sender, consignee and the carrier
  - The terms of the carriage
  - The freight and other expenses
- According to the preparatory work
  - The place of shipment and delivery
  - Whether the goods can or shall be loaded on deck
- Exceptions are accepted
- The sea waybill shall be signed (§ 309 and the reference to § 296 third paragraph)

The carrier's duty to inspect the cargo

- MC § 309, 1.paragraph, 2. sentence – see § 298
- Regarding the information mentioned in § 296 first paragraph no 1
- And information on the condition of the goods and the packing
What are the consequences of issuing a sea waybill?

• The waybill must specify the consignee
  – The sender still may instruct the carrier to deliver to another party
  – But not when the consignee has asserted his right to the goods (demanded delivery)
• It is evidence of the contract of carriage and of receipt of the goods as described
  – § 309 second paragraph
• The shipper may demand a bill of lading (§ 308 third paragraph - § 294)
  – Not if the sender has waived his right to change consignee.

Liability for wrongful delivery

• Who appears entitled to the goods pursuant to the text of the sea waybill
  – Can be uncertainty as to the party’s identity
• Change of consignee
  – Oral or written notice must be given to the carrier prior to the time limit in § 308 second paragraph
  – In sufficient time for the carrier
When are sea waybills issued and whom are they issued to?

- Custom of the trade decides choice of document
- The sender has the right to demand a sea waybill but must accept that the shipper receives it directly from the carrier