

The sub-carrier concept in the
Norwegian Maritime Code
Chapter 13

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1 The topic

The Norwegian Maritime Code (MC)¹ Chapter 13, on the carriage of general cargo, primarily regulates the relationship between the carrier and the cargo. There are also, however, important rules on the obligations – and rights – of a sub-carrier when the cargo is damaged or delayed during the time that he is in some way involved in its carriage. In this article, these sub-carrier rules are described briefly, so that the background is reasonably clear when we come to the main theme: Who is a sub-carrier in the eyes of the law and what are the legal consequences of being a sub-carrier?

2 A preliminary description of the sub-carrier

The definition of a sub-carrier in MC Section 251 must be read in light of the definition of a carrier in the same Section: the carrier is someone “who enters into a contract with a sender² for the carriage of general cargo by sea” – in order to avoid mistakes, we often call this person the contracting carrier. A sub-carrier is defined as “the person who, pursuant to an assignment by the carrier, performs the carriage or part of it”.

¹ The Code of 24th June 1994 no. 39 (MC) is quoted from the English translation in MarLus no. 435 (2014). In relation to the matters discussed in this article, MC conforms to similar provisions as in the Danish, Finnish and Swedish Codes, all of 1994. Other translations are by the present author.

² The *sender* is correspondingly defined as «the person who enters into a contract with a carrier for the carriage of general cargo by sea”. General cargo (Norw.: stykkgoods) is not defined in the MC. In the previous code – MC 1893 as amended in 1973 – the concept was indirectly defined in Section 71 paragraph three: “Voyage chartering may be for the whole or a part of the vessel or for general cargo. It is part chartering where the agreement encompasses less than the whole vessel or a complete cargo and charter party is used”. In other words, the nature of the cargo is not decisive; the categorisation depends upon the actual transport agreement.

3 An outline of the rules on cargo liability when a sub-carrier is involved

3.1 The background

This outline is limited to a consideration of liability towards the cargo owner when the cargo is physically damaged or delayed; thus it does not address either questions related to issuance and presentation of bills of lading, or questions related to delivery to unauthorized receiver.

3.2 Has the cargo owner a claim against the sub-carrier in respect of damage or delay?

When the cargo is damaged or lost while in the custody of a sub-carrier, general principles of tort law may be applicable as regards the sub-carrier's liability. The main rule is that the cargo owner needs to prove that the sub-carrier, or someone for whom he is responsible, has caused the damage through negligence. Such principles may also cover the loss caused by delayed delivery of the cargo.³

However, MC Section 286 has regulated the sub-carrier's liability parallel to that of the contractual carrier:

“A sub-carrier is liable for such part of the carriage as he or she performs, pursuant to the same rules as the carrier. The provisions of Section 282 and 283 apply correspondingly”⁴ (paragraph one).

Difficult questions may arise in determining when the incident (or number of incidents) occurred which resulted in the loss: Was it while

³ Cf. Wilhelmssen & Hagland, *Om erstatningsrett* (2017) pp. 323-333 on monetary loss without connection to physical damage.

⁴ As stated in the text below, the contracting carrier is liable for the sub-carrier, cf. Section 285, and Section 282, to which it refers, protects “anyone for whom the carrier is responsible”. Thus, Section 286 paragraph one is superfluous, but is a convenient introduction to paragraph two.

the cargo was in the custody of the sub-carrier?⁵ In this respect, the cargo owner has the burden of proof: He needs to show that the incident occurred while the cargo was in the sub-carrier's custody.

If this first hindrance is overcome, the sub-carrier then needs to prove that neither he, nor a person for whom he is responsible, has caused the damage or delay through negligence. This potential liability is balanced by the sub-carrier's right to plead the exceptions regarding error in navigation and management of the vessel and fire (Section 276), as well as his right to limit liability according to the unit and kilo limitation rules (Section 280).⁶

The liability of the sub-carrier does not exclude liability of the contracting carrier. Section 285 paragraph one says that when the carriage "is performed wholly or in part by a sub-carrier, the [contracting] carrier remains liable according to [Chapter 13]". Thus, both the contracting carrier and the sub-carrier may be held liable for the same damage or delay, and in such circumstances they are jointly liable (Section 287 paragraph one). However, the cargo owner cannot hereby obtain the limitation amount as per Section 280 twice (Section 287 paragraph two).⁷

MC has no rules on recourse actions between the contracting and performing carriers, except that Section 287 paragraph three, which states that the Code does not preclude agreements on this issue.

⁵ However, acts or omissions, occurring prior to the actual custody period, may be relevant. Typically, making the vessel seaworthy for the voyage may require extensive preparations before receiving the cargo.

⁶ This works both ways: The sub-carrier cannot insist upon being adjudged in accordance with tort rules (e.g. claim that liability for servants in tort does not encompass the person who has caused the damage).

⁷ If a suit is instigated against the contracting carrier and the sub-carrier before the same court, the Civil Procedure Act of 2005 Section 15-6 has rules on joining the two cases: "Cases raising similar questions and shall be treated with the same composition of the court and according to mainly the same procedural rules, may be joined for a joint handling and for a joint decision." Whether the cases shall be joined, is within the discretion of the court.

4 An analysis of the elements in the sub-carrier definition in MC Section 251

4.1 Introduction

How important is it to decide whether A, who, in one way or another, is involved in the carriage of cargo from the port of loading to the port of destination, is a “sub-carrier”? If A is not considered to be a sub-carrier, he will then in most instances fall within the group of persons (entities) for whom the carrier has vicarious liability (A is “a servant”). In that event, the rules appear to be the same regarding liability for the cargo, see MC Section 282 paragraph three:

“The provisions relating to the carrier’s defences and the limits of the carrier’s liability apply correspondingly if the claim is brought against anyone for whom the carrier is responsible, and that person shows that he or she acted in the performance of his or her duties in the service or to fulfil the assignment.”

In this section 4, the elements of the sub-carrier definition, being: “the person who, pursuant to an assignment by the carrier, performs the carriage or part of it”, will be discussed in 4.2 to 4.6 of this section, and are followed by an attempt to draw some conclusions, in particular regarding the necessity of distinguishing a sub-carrier from a “servant” (section 4.7). The questions concerning forum require some final remarks in section 5.

4.2 “the person” – who may be a sub-carrier?

Anyone – a natural person or a company – can be “sub-carrier”, just as anyone can give a cargo owner a promise of carriage. Whether the undertaking will be fulfilled, as promised or as obligated by law, is another matter. As an example, the sub-carrier’s vessel might not be sufficiently cleaned and the cargo is therefore damaged, or the loaded voyage is not

performed “with due dispatch”. Such failures may lead to a claim from the contracting carrier,⁸ and/or a claim from the cargo owner.

4.3 “pursuant to an assignment” – contract of carriage?

Usually, the sub-carrier performs on the basis of a contract with the contracting carrier, which may be a lengthy, complicated document in writing, e.g. a time charter party. The assignment may take the form of a request, which is accepted by actually carrying out the transport.

Acceptance of the assignment is, in most instances, a contractual promise of carriage on the part of a sub-carrier as against the contracting carrier. He is also, by the rule of law, a carrier as against the cargo owner, and thus Chapter 13 applies.

4.4 Further on: “pursuant to”

The sub-carrier acts as a result of an assignment, which may have very precise rules governing his duties. However, non-compliance with such rules does not necessarily mean that we are outside the remit of the sub-carrier rules of Chapter 13.

In short, there are many persons contributing to the carriage for whom the carrier may be held responsible, and they may all happen to act negligently. According to court practice, the carrier is on the one hand vicariously liable where e.g. the mate acts negligently, but on the other hand he is not deprived of his right to limit liability. In this respect the answer may depend upon difficult evaluations; the tendency is, however, to accept higher degrees of negligence as being “within the scope of the service”, than was previously the case.⁹ The important point in the present context is that the contracting carrier is liable for the acts of the sub-carrier, even if the sub-carrier’s (or his servants’) performance is not within the required legal framework. However, with regard to sub-

⁸ E.g. a claim for extra expenses when chartering substitute tonnage, or a recourse claim where the contracting carrier is held liable for cargo damage.

⁹ See Falkanger, Bull & Brautaset *Scandinavian Maritime Law* (4th ed. 2017). pp. 202–206.

carrier's liability as against the contracting carrier, we have to distinguish between the acts of "the sub-carrier himself" and those of his servants.¹⁰

4.5 "performs the carriage or part of it" – actual performance

The most typical, straightforward situation where the identified sub-carrier questions arise is:

A, who has given a promise of transportation to cargo owner B, engages C to undertake the transportation, e.g. according to a voyage or time charter party. C's undertaking may cover the total transport distance, or part of it: A carries the cargo to an intermediate port, and C takes the last leg to the contractual destination.

Now, if C assigns his duty to D, is C still a sub-carrier within the definition in Section 251, or is it D that deserves the title, or should both be characterized as sub-carriers? The answer seems to depend upon the construction of the word *perform* (Norw.: *utfører*): Does it refer to physical performance (in which case D is the sub-carrier) or to the obligation to have the cargo transported from x to y (in which case both C and D are sub-carriers)?

The issue is discussed in the *travaux préparatoires* to the definition in Section 251:

"In the definition, which corresponds to the Hamburg Rules Article 1 no. 2,¹¹ the sub-carrier is 'the one who in conformity with an assignment from the carrier performs the carriage or a part thereof'. In this way the definition also comprises successive links in the assignment chain, e.g. the person that performs the carriage or part thereof in accordance with an agreement with the person to whom the carrier first assigned the carriage. That the definition, depending upon the circumstances, may comprise more than one person

¹⁰ See e.g. Falkanger, Bull & Brautaset *op. cit.* pp. 353–354.

¹¹ This article says, "actual carrier means any person to whom the performance of the carriage has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted".

does not mean that they all are liable for damage as per the draft Section 286. It follows from Section 286 that the person having the cargo in his custody at the time when the damage occurred, will usually be responsible as sub-carrier according to the rules of Chapter 13” (NOU 1993: 36 p. 20).

In ND 2003 p. 83 (Linda), the Finnish Supreme Court had to rule on the sub-carrier concept:¹²

Two ship owners – Engskip and Langh – had jointly time chartered two vessels to Jit-Trans. Under this agreement, the vessel Linda – owned by Langh and operated by Engskip – carried a cargo of steel from Finland to Germany in accordance with a contract between Jit-Trans (the carrier) and Rautaruukki. The cargo was damaged, and the cargo insurer, who had covered the loss, presented a claim against Engship as sub-carrier. A number of objections were presented – one being that the actual performance was not by Engship. To this, the Court said:

“As against the person giving him the assignment the sub-carrier is clearly responsible for the carriage undertaken, regardless of whether he performs the voyage himself or engages someone else for the actual performance or part thereof. Thus, the question is whether the direct liability of a sub-carrier towards the cargo owner – which is a liability not founded in contract but in law – should in this respect be more limited and only apply to the person actually performing the voyage. On this, there are different opinions, as well as in the international transport literature. There is no certain legal practice; this is the situation not only in Scandinavia, but also in other countries. ...

... From a general point of view it does not seem rational that a carrier should be able to escape a direct liability towards the cargo owner by leaving the actual performance of the transport to another, when he cannot in this way avoid liability towards his own contractual counterparty.”

On this basis, Engship was held liable.

¹² The decision is discussed by Selvig in ND 2003 pp. x–xiii.

4.6 “performs the carriage or part of it” – what is “part of it”?

In the above, we have first of all discussed what may be described as a type of successive carriage: A performs the first leg, and B undertakes the final one to the port of destination. However, performing “part of” the carriage may be construed to encompass a number of other situations. Some of these will now be considered.

4.6.1 Lighterage

Lighterage may be seen as a type of successive carriage: the cargo is carried by the lighter from land to ocean-going vessel which is lying on the roads, and the cargo is loaded directly from the lighter to the ocean-going vessel. However, here we have two different situations: either (i) the lighterage may be part of the carrier’s undertaking, or (ii) his period of responsibility may start on receiving the cargo from the lighter (MC Section 274). It is the first situation that is relevant in the present context: is the lightering company, engaged by the carrier, a sub-carrier? It seems difficult to avoid the conclusion that in such circumstances, the lightering company would be seen as a sub-carrier in the eyes of the law – even where the lightering distance is short.

4.6.2 «moving the cargo»

The central element in cargo carriage is *movement* of the cargo, and such movement is not necessarily directly connected to movement of the vessel.

One typical example: the cargo received, for example at the line’s warehouse, needs to be moved from there to be next to the vessel, and this is done by an independent contractor engaged by the carrier. Perhaps another person (company) is engaged to perform the actual loading and to secure the cargo on board the vessel. We may have similar movements of the cargo when the cargo is carried to an intermediate port and there

transferred to another vessel – sometimes by truck from one terminal to another, some distance away.

Do these contractors perform “part of” the carriage, with the consequence that their liability towards the cargo owner is that of a sub-carrier’s?

The question is discussed in Wilhelmsen, *Rett i havn* (2006) pp. 106-111, with the conclusion that the “most common sense answer” is that the sub-carrier rules are not applicable.

Given this conclusion, the question then arises of a possible basis for a claim against e.g. the stevedore. Does his liability depend upon general tort rules, or is his tort liability modified by general principles of contract law?

If in our example the stevedore is considered as being a servant, the answer is – as said above (section 4.1) – found in MC Section 282 paragraph two, which states that the carrier’s defences and limits of liability are available for the servant. We should also bear in mind Section 282 paragraph three, which sets out a regulation parallel to Section 287 paragraph two: the cargo owner is not entitled to receive the limitation amount twice by suing both the carrier and his servant.¹³

4.6.3 «moving the vessel»

In the lightering example, we may have a tug boat taking the lighter to the side of the ocean-going vessel, and when loading is completed, a tug boat may take the vessel from, say, an estuary, to the open sea. Now, the question is whether such a tug boat, engaged by the carrier, is a sub-carrier. We have an extreme example of “moving the vessel” when the vessel suffers major damage in the early stage of the voyage and is then towed, perhaps for days, to the final destination.¹⁴ Practically speaking,

¹³ Where there is no specific legislation – as we have in MC Sections 282 and 286 – the law is uncertain regarding the possibility for the tortfeasor to plead the terms of the contract between the cargo owner and the person who has engaged his services. See in particular Rt. 1998 p. 656 (Veidekke) pp. 661–662 and from the transport sector, Rt. 1976 p. 1117 (ND 1976 p. 1) (Siesta). See further Lilleholt, *Kontraksrett og obligasjonsrett* (2017) pp. 374–390.

¹⁴ For an example of such long towage, see ND 1983 p. 309 (Arica) Norwegian arbitration: The loaded vessel was towed across the Pacific.

the tug master is essential in such cases; he has nautical control over the vessel's movement, but not direct care of the cargo.

The general view is that tug services are of such a subsidiary nature that the carrier has vicarious liability – the tug is a servant. As regards tort, the tug is mentioned in MC Section 151 as being an entity for which the carrier has vicarious liability, and the same appears to be the case under Section 276, regarding non-liability for cargo damage due to fault or neglect in the navigation of the vessel.

4.6.4 Other modes of transport

It may be the case that the carriage or part of it is performed by another mode of transport. For example, when a vessel suffers damage it may be expedient or necessary for it to go to an intermediate port, discharge the cargo there and have it forwarded to the final destination by truck. We assume that this is not contrary to the transport agreement with the cargo owner.

The truck company's liability towards the contracting carrier depends upon its undertaking, supplemented (usually) by the rules in the Act on Road Transport 1974 (which is based upon the rules in the Convention on Road Transport 1956 (CMR)). Regarding the truck company's direct liability towards the cargo owner, here we are clearly outside the scope of MC – in other words: MC Section 286 on sub-carrier's liability is not applicable.

4.7 Some conclusions on the sub-carrier issues

We have seen that:

In order to fulfill a promise of transportation, the promisor (the contracting carrier) will need to be assisted, sometimes by a great number of persons (companies/institutions). Our concern relates to those who are participating according to “an assignment” from the carrier – practically speaking: on the basis of a contract. In most instances, these assignees fall into two groups: sub-carriers and “servants” – the latter is overwhel-

mingly dominant in number. However, there may be assignees that can be characterized neither as sub-contractor, nor as servants, see section 4.6.4.

In most instances, there is no doubt about the classification as sub-carrier or servant. Nevertheless, we have tried to clarify when an assignee is a sub-carrier, in the eyes of the law. We have examined how the importance of this distinction is minimal or non-existent, with regard to liability towards the cargo owner: Regardless of classification, the cargo owner can sue the assignee, and in both instances, the rules in Chapter 13 are applicable – both as the basis for a claim and as the basis for limitation of liability. In addition, suits against the contracting carrier and the sub-carrier do not result in the cargo owner receiving the limitation sum twice. Furthermore, the cargo owner cannot improve his recovery by pleading tort rules, cf. Section 282 paragraph one.

However, before concluding, there are two areas of law requiring some remarks. The first area, on identification when deciding cargo liability questions, is discussed below, and the second area, on the question of forum in cargo liability cases, is considered separately in section 5 below.

The first one concerns cargo liability:

MC Section 285 states that the contracting carrier (A) is liable “as if [he] had performed the voyage him- or herself”. The obvious interpretation is that the contracting carrier shall be adjudged as if he had performed the acts and errors that have in fact been made by the sub-contractor (B): the mate’s negligence is considered negligence on the part of his (A’s) own mate, i.e. as a servant of the contracting carrier A. Further, if the sub-contractor’s (B’s) vessel left the port in an unseaworthy condition, the exceptions for error in management of the vessel and for fire do not apply when “a person for whom the carrier is responsible” has not taken “proper care”.¹⁵ Likewise, the exceptions do not protect the contracting carrier A when B, the owner of the performing vessel, is “personally” to blame for the unseaworthiness. Finally, if B, the owner of the performing vessel, has personally caused the loss by such serious

¹⁵ Cf. the rules on liability for initial unseaworthiness in MC section 276. We may have some specific problems here in relation to the concept of “seaworthiness by stages”; however, these are outside the scope of this article.

acts as are described in MC Section 283, this is also to the detriment of the contracting carrier A: he will not be protected by the unit limitation rules when sued by the cargo owner.

If the person who has negligently caused the damage is considered a servant of the contracting carrier, the contracting carrier will not be exposed to the indicated extended liability.

Conversely, when the sub-contractor is sued, his liability depends upon the “same rules” that apply to the contracting carrier (Section 286). Accordingly, the sub-carrier cannot plead the exceptions if the cause of damage is negligence, by himself or by one of his servants, in making the vessel seaworthy before departure. The decisive point is that the sub-carrier is liable when the contracting carrier is liable. An example of this: the cargo owner has given the contracting carrier information on how to handle the cargo, e.g. in order to prevent fire. The consequence of the contracting carrier’s failure to convey the relevant information to the sub-carrier is that the contracting carrier cannot plead the fire exception. The complementary construction is that neither can the sub-carrier make such a pleading, even if he has acted professionally and correctly, based upon the information at hand.

5 Which court is competent when the cargo owner wishes to start legal proceedings?

We have now considered some of the substantial questions related to sub-carriage. This topic requires some additional remarks on the procedural issues.

When the cargo owner sues the contracting carrier, the sub-carrier and the servant, we may have a number of forum questions. The main principles for this are found in the Civil Procedure Act (CPA) of 2005 Chapter 4, with its rules on venue. The cargo owner may instigate proceedings against a physical person where that person is domiciled, and if the

defendant is a company/a corporation, at the place where the main office is situated – according to the registration in the Registry of Businesses (CPA Section 4-4). However, the parties have freedom to decide which court should be competent (CPA Section 4-6).

The contracting carrier's contract with the cargo owner may have derogatory clauses, but in the interests of the cargo owner, the freedom has been restricted, see MC Section 310. For our purpose, it is sufficient to quote the first part of paragraph one:

“Any agreement in advance which limits the right of the plaintiff to have a legal dispute relating to the carriage of general cargo subject to the present Chapter settled by legal proceedings, is invalid in so far as it limits the right of the plaintiff at his own discretion to bring an action before the Court at the place where [it is reasonably convenient for the cargo owner to start proceedings].”

An example could be: a jurisdiction clause that refers to the place of delivery as venue is valid, cf. paragraph one letter d, provided, however, that the cargo owner also has the options given in letters a, b and c.

The sub-carrier's procedural position is, of course, not identical to the contracting carrier's. When the contracting carrier has his main office in A and the sub-carrier's is in B, the latter is not obliged to accept a suit in A. Liability in accordance with the rules applicable to the contractual carrier, cf. Section 286, does not include the procedural rules. The rules in Section 310 are also not applicable.

The conclusion is that a suit against the sub-carrier must be brought before a court that has jurisdiction according to the general rules in CPA Chapter 4.

The procedural position of the servant is, of course, not the same as that of the contractual carrier, and if he is a servant of the sub-contractor he is not bound by the procedural rules for the sub-carrier. The servants' position when sued by the cargo owner depends upon the rules in CPA Section 4-4.

To sum up: if X – who is not the contracting carrier – has caused cargo damage and is sued by the cargo owner, he is not bound by the

same venue rules as the contracting carrier. Whether he is characterized as sub-carrier or servant is, in this respect, immaterial. He can insist that the rules in CPA Chapter 4 are decisive: the suit has to be instigated either where he is domiciled or where his main office is situated.