Cargo damage – road or vessel liability rules?

– Supreme Court decision on damage during sea passage to cargo on a trailer – HR-2019-912

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I. Introduction

The party undertaking a transport obligation regarding general cargo is often not the owner or operator of the mode of transport required for fulfilling the obligation. Furthermore, in many instances he is free to choose both the mode of transport as well as the person or entity who shall actually perform the transport. Thus, the contracting carrier may decide to use a number of subcontractors, e,g. a shipping line and/or a truck company. With the possibility of the subcontractor using subcontractors, the cargo side – which, for the sake of simplicity, we call the cargo owner – may be faced with a very complicated system of sub- and sub-sub-contractors, of which he will have no prior knowledge. Such a complex relationship may give rise to a vast number of questions when the cargo owner complains that the cargo is lost, damaged or delayed. We have the issue of the liability of the contracting carrier. as well as of one or more of the subcontractors, and in addition the possibility of recourse questions, as well as issues concerning affected insurance companies.

The decision of 14th May 2019 by the Norwegian Supreme Court in the Nexans-case – HR-2019-912-A – is a good example of these complexities.[2] But first of all, the unanimous Court ruling provides guidelines for the determination of a number of issues, and these are the topic of this article.

[2] On the home page of the Supreme Court – https://www.domstol.no/hoyesterett – there is an English translation of the judgment, which is used in this article; however, with some reservations on my side which will appear from some of the notes.

II. The Nexans-case – an outline of the factual background

The facts of the case are, in short:

Nexans had undertaken to transport a cable from its production plant in Northern Norway to North England. The first leg of transport, from Northern Norway to the Stavanger area by truck, was arranged by Nexans. For the remaining distance, Nexans engaged Kuehne + Nagel (KN). The cable, for the remote control of subsea vessels, was more than 3,3 km long and rolled up on a drum, with a total weight of about 20 tons

The truck delivered the drum to KN's terminal in Risavika (close to Stavanger). KN engaged Pentagon to carry out the transport from there to the final destination, and Pentagon in turn engaged three subcontractors:

(i) *Lode* to bring the cargo on an open trailer from KN's terminal to the terminal of Sea-Cargo – a distance of a little more than 2 km, most of it on public roadway,

(ii) *Sea-Cargo* to carry the trailer by ship to Immingham in England – a distance of about 380 nautical miles, normally covered in about 20 hours, and

(iii) *an English truck company* to take the trailer about 260 km from Immingham to the final destination.

Lode placed and secured the drum on the trailer, and on arrival at the terminal of Sea-Cargo, the trailer was drawn on board the vessel M/V Norrland by Sea-Cargo's servants. The trailer was secured to the deck.

Shortly after departure from the terminal, the vessel encountered heavy wind and waves which caused heeling up to 35 degrees, and eventually the drum loosened from the trailer and fell onto other cargo. It was agreed that the cable was a total loss.

III. The claims resulting from the casualty

The casualty resulted in two claims:

(i) Nexans and its cargo insurerer Axa claimed damages for the loss of the cable from KN, and

(ii) KN presented a recourse claim against Pentagon in the event that KN were held liable towards Nexans.

The basic issue in Nesdan's claim was whether the incident was subject to the Maritime Code or the Road Carriage Act. Before discussing the reasoning of the Supreme Court, I mention the contractual ties between Nexans and KN, and give a short summary of the possibly relevant stipulations in both the Code and the Act.

IV. The contractual relationship between Nexans and KN

Nexans and KN had cooperated since 2004 and their relationship had been formalised in a framework agreement of 2014, which referred to NSAB 2000.[3] The actual contract was initiated by a short e-mail sent on 10th November 2014 from Nexans ordering the transport; this was 3 days before the cargo arrived at KN's terminal. On 14th November, KN issued a waybill, stating that the total transport was subject to the CMR-convention and the Norwegian Road Carriage Act.

[3] NSAB = General Conditions of the Nordic Association of Freight Forwarders

V. The relevant enactments

The damage occurred on a sea voyage, and a sea voyage from Norway to England is subject to the mandatory rules in the Maritime Code of 1994 – which in this respect is in conformity with the Hague-Visby Rules.[4] The carrier is liable for cargo damage, unless he can show that the loss was not due to his personal fault or that of anyone for whom he is responsible (Section 275). The liability is, however, subject to two important exceptions regarding loss due to nautical error or fire (Section 276). In addition, there are provisions on limits of liability (Section 280), but this protection is lost if it shown that the carrier "personally caused the loss wilfully or through gross negligence and with knowledge that such loss would probably arise" (Section 283).

The Road Carriage Act of 1974, which is in conformity with CMR,[5] also has mandatory liability rules applicable to the case under review. The liability regime is, however, close to strict liability (Sections 27 to 29). In addition, liability is here subject to limitation, but with higher amounts than in sea carriage (Section 32); and, furthermore, the right to limitation is lost when the damage is caused wilfully or with gross negligence, not only by the carrier himself, but also by *anyone* for whom he is responsible (Section 38).

In principle, there are two separate regimes, and problems would appear to arise only when there is uncertainty as to whether damage occurred during the sea or during the road carriage. However, according to the Road Carriage Act, Section 4 damage may be subject to the Road Carriage Act even if the damage occurs on a vessel:

> *"If a vehicle with cargo is carried for part of the transport distance by vessel, train or aeroplane and the cargo is not unloaded from the*

4 Hague-Visby Rules = Convention for the unification of certain rules of law relating to Bills of Lading, 1924, and Protocol to amend the International Convention for the unification of certain rules of law relating to Bills of Lading, 1968.

5 CMR = Convention on the contract for the international carriage of goods by road of 1956. However, with some notes where – in my opinion – the translation is unfortunate.

> *vehicle, except for the reasons listed in Section 22, this Act is nevertheless applicable for the total transport.*
>
> *However, if it is proven that loss, damage or delay occurred under the transport during other means of transport which is not caused by the road carrier, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the road carrier is determined by the rules applicable to carriage of cargo with the other means of transport … " (my translation).*

Summing up: A road carriage contract may cover a sea leg, but difficult liability questions may arise when the cargo is damaged on board a vessel.

VI. One or several transport agreements?

When a transport is dependent upon the use of different means of transport, the result may be that the cargo owner is party to several separate contracts – one with A for the road leg, one with B for the sea leg etc. In principle, he may have all the contracts with the same person, i.e. separate contracts subject to different liability regimes. As stated by the Court:

> *"Which Act or Code is to apply must depend on which means of transport the parties have agreed upon. If they have entered into a contract of carriage by sea, the Maritime Code is applicable, and if they have entered into a road carriage contract, the Road Transport Act[6] is applicable" (section 43).*

Whether there is one or separate documents is not decisive, but one document will imply that there is one contract. In our case, there were additional factors indicating one contract:

[6] In conformity with CMR, I prefer Road Carriage Act.

> *"I take as a starting point that Nexans ordered one[7] carriage by a short e-mail to KN on 10 November 2014, providing information about the goods and place of delivery. Under the framework agreement between the parties, which is a natural reference in this regard, KN had a right to use sub-carriers and any "reasonable" means of transport, method and route. It was therefore KN or its sub-carrier Pentagon – not Nexans – that decided that parts of the carriage were to be performed by ship, although this decision was undoubtedly an obvious one to make" (section 49).*

However, the framework agreement might indicate that KN's liability depended upon the Maritime Code for the sea leg:

> *"In my opinion, this liability rule cannot in any case be decisive. As mentioned, the Road Transport Act and the Maritime Code contain invariable rules on liability, and liability is thus determined by the Act or Code I am about to choose" (section 51).*[8]

VII. Does the Road Carriage Act imply that there is actual road carriage in Norway?

The Road Carriage Act Section 1 (1) reads:

> *"This Act concerns agreements on carriage of goods by vehicle on road when the carriage is against compensation and according to the agreement shall take place between places in the Kingdom (inland carriage) or to or from the Kingdom or between foreign states whereof at least one has adhered to the Geneva Convention of 19 May 1956 on international carriage on road (international carriage)" (my translation).*

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[7] The word "one" is emphasized by the Court.

[8] The translation is here, in my opinion, unfortunate: «in any case» is too definite, "nevertheless" is better; "invariable" should have been "mandatory", and "the Act or Code I am about to choose" should have been "the choice of law I am now discussing".

The Court found this

> *"to mean that in order for the Act to be applicable, the goods must have been carried by road in Norway before they leave the country" (section 38).*

In support of this conclusion, the Court refers to Wilhelmsen, Rett i havn [Transport law in the harbour], 2006 page 38 where, without further arguments, it is stated that a prerequisite is that the transport "comprises an element of road transport in Norway".

The focus on Norway is a little surprising, given that Section 1 has reference to transport "between foreign states".[9]

Having concluded in this way, the next question was whether the contract comprised the necessary element of road transport in Norway. The Court concluded positively since

> *"the location of KN's terminal in Risavika where the transport started, required that the goods were carried by road – at least until reaching a dock. This part of KN's assignment was performed by a sub-carrier – Kåre K. Lode AS – which, in return for payment, pulled the trailer with the goods over a distance of around two kilometres" (section 38).*

As mentioned above, the greater part of the distance was along public roads.

The question of whether a required road transport had taken place had appeared before the Court of Appeal many years earlier, cf. ND 1984 p. 292 containing this essential passage:

> *"The cargo is stowed in the semi-trailer at Heitmann's terminal … Oslo harbour. Thereafter the semi-trailer is connected to a tugmaster and drawn about 300 meters along the quay and on board the vessel 'Grey Master', and then the semi-trailer is disconnected from the tugmaster which is driven ashore again. Having regard to the start-*

[9] Nor is there any mention of this part of Section 1 in ND 1984 p. 292 Court of Appeal (referred to below).

> *ing point within the quay terminal, the distance covered and the purpose of the transport, this has to be characterised as a loading operation. It is added that the driving distance along the quay could easily have been somewhat longer depending on at which berth the vessel was moored, without a different conclusion. In all events it would have been a very modest driving distance" (p. 297, my translation).*

This decision was referred to by the Supreme Court, and it was said that the situation before the Supreme Court differs

> *"from that described in Eidsivating Court of Appeal's judgment in ND-1984-292, the aluminium band judgment, which has been emphasised in legal literature. There, the goods were acquired[10] at a dock terminal and loaded onto a semi-trailer, which was then pulled some 300 meters along the dock and onboard the ship. This operation as a whole was considered a loading operation without the characteristics of carriage of goods by road" (section 39).*

VIII. The crucial question: Road or sea transport rules?

Initially the Court states that the question which

> *"Act or Code to apply must depend on which means of transport the parties have agreed on. If they have entered into a contract of carriage by sea, the Maritime Code is applicable, and if they have entered into a road carriage contract, the Road Transport Act is applicable" (section 43).*

Here there is, however, no freedom to choose because of the mandatory legislation, but the stipulations in the framework agreement are not de-

[10] "Acquired" is a somewhat questionable translation of "overtatt"; I would have preferred "taken over" or "taken into possession" or "received".

cisive, but instead "suggests a division of the assignment depending on the means of transport" (section 51). However, we are dealing

> *"with circumstances implying that this is not essential after all. After KN received the order from Nexans, KN issued a bill of lading*[11] *on 14 November 2014, clearly expressing that the entire carriage is 'subject to' the CMR Convention and the Norwegian Road Transport Act. The same was stated on the bill of lading issued by the sub-carrier Pentagon to KN three days earlier. The carriers therefore did not make arrangements for any division or special regulation of the carriage by sea as the frame agreement allowed" (section 52).*

However, KN had argued that the consignment note was issued for customs purposes and that it contained errors, was not signed and was not sent to Nexans until after the damage occurred. The Court did not accept this:

> *"A bill of lading*[12] *functions as evidence even if it is inadequate, see sections 7 and 13 of the Road Transport Act. And in the overall assessment that I am now to make,*[13] *the bills of lading will clearly indicate what KN and Pentagon – that planned, organised and completed the carriage – considered the dominant element of the assignment when the contract was entered into" (section 53).*

Regarding the total assessment, the Court mentioned that the carriage by sea was the longest part of the transport in terms of distance:

> *"But the carriage by road was also significant, and divided into two stages. Against this background, and bearing in mind that the load was to be fastened to the same trailer during the entire journey, the fact that one means of transport was used for a longer distance than the other cannot be given much weight in the overall assessment" (section 54).*

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[11] «Bills of lading» is misleading; the Norwegian text uses «fraktbrev», which corresponds to the CMR art. 4 term: "consignment note".

[12] See preceding note.

[13] Norwegian text: «den helhetsvurdering som her skal skje»; a better translation – in my view – is: «the overall assessment which here has to be made".

The conclusion was that the Road Carriage Act was "applicable as a starting point" (section 55).

My summing up is that the important elements in the Court's assessment are:

(i) a reasonable discretionary evaluation of distances on land and at sea,

(ii) what KN and Pentagon considered as dominant – sea or road carriage – at the time the contract was concluded (section 53), and

(iii) "that the load was to be fastened to the same trailer during the entire journey" (section 54).

Element (ii) has to be used with reservations: KN and Pentagon are not totally free to regulate their relationship, with consequences for the cargo owner. One cannot define as sea voyage what in the eyes of the law is road transport, with the consequence that the cargo owner is afforded less protection than under the Road Carriage Act.

IX. In principle road transport – but was the exception in the Road Carriage Act Section 4 subsection 2 applicable?

1. General principles

Before dealing with the Court's attitude to Section 4 subsection 2, a few remarks are required on what the more general contract law principles appear to entail.

The subcontractor Lode fastened the drum to the trailer, no doubt with knowledge that the trailer should be moved to Sea-Cargo's terminal and then on board a vessel. Whether the drum was securely fastened for road carriage may –based on the facts given in the judgment – be questioned. It is beyond doubt that it was not secured for a sea voyage at that time of the year – bad weather in the North Sea mid-November

should come as no surprise. It may be argued, given the fact that the trailer was due to undertake a sea voyage, that securing for the first road carriage was not sufficient to fulfil the safety obligation, or if this should be considered differently, that there was at least an obligation to inform the vessel that the drum was secured for road transport only. The errors of a subcontractor are attributed to the contractor – here Pentagon, and Pentagon in turn is the subcontractor of KN. I add, if one should find that Lode was not to be blamed, that this is not decisive as then the focus is turned against Pentagon, who had instructed Lode and should have given the relevant information to the ship, and Pentagon was the "servant" of KN.

There were also, undoubtedly, errors committed on board the vessel: Simply securing the trailer was not enough to meet the obligations set down in the Maritime Code Section 262. Then we have the difficult question:

(i) was the error on board the vessel sufficient to cause the damage?, or

(ii) was it a true case of "contributory damage" – was the damage dependent upon the combined effect of Lode's error and the vessel's error?

As for (ii), there is a regulation in the Maritime Code Section 275 subsection 3:

> *"If damage is caused partly by negligence of the carrier (or his servants or agents) and partly by something else (e.g. intervention by a third party, it is necessary to determine the extent to which the damage or loss can be traced to the carrier. There is an important rule on evidence in this connection. It is for the carrier to prove the extent to which the damage was not caused by his fault or neglect" (Falkanger, Bull & Brautaset, Scandinavian Maritime Law (4th ed. 2017) pp. 361–362).*

Summing up:

These considerations are clearly of relevance when we have recourse claims between the contractors on the transport side, but what do they lead to regarding the cargo owner's claim against KN, given the Court's conclusion that the Road Carriage Act is applicable in this respect? Under

this Act KN is obviously responsible. It is sufficient to point to the errors committed by the subcontractors. The crucial question is whether these errors can be characterised as "gross negligence", with the consequence that the right of loss limitation cannot be invoked, cf. the Maritime Code Section 283.

2. The Court's reasoning

The Court's point of departure is

> *"that the liability rules in the Maritime Code applies if the damage is 'not caused by the road carrier, but by some event that could only have occurred in the course of and by reason of' the carriage by sea" (section 60).*

"Caused by the road carrier" clearly must relate not only to the road carrier himself, but also to his subcontractors. However, the Court says that when applying subsection 2, the sea carrier is not included:

> *"Sea-Cargo, that was engaged to carry the goods by sea, is not relevant here, see Bull, Innføring i veifraktrett [introduction to road carriage law] 2000 page 138. Moreover, the wording of the CMR Convention[14] – 'caused by act or omission of the carrier by road' – clarifies that the question is whether the road carrier's acts or omissions caused [the word 'caused' emphasised by the Court] the damage. Liability is not to be assessed" (section 62).[15]*

The Court, after having referred to the finding of facts by the Court of Appeal, then concludes that it is clear that the road carrier's failure to secure the goods for the carriage by road[16] "created a risk of damage also

14 The Court had previously remarked that subsection 2 incorporates Article 2 no. 1 second and third sentence of the CMR Convention and that the subsection must as a starting point be interpreted in the same manner (section 58).

15 The last quoted sentence might have been translated as: «A negligence assessment is not required".

16 A careful reading of the judgment does not make it obvious that the securing for road transport was substandard (contrary to the road carrier's obligations) (section 69).

during the journey by sea". However, the mere existence of *such risk* is not considered sufficient to establish that the damage was *caused*[17] by the road carrier (section 68).

The reasoning creates some difficulties. When the Court uses the expression "caused by act or omission", is it then possible to disregard completely "what ought to have been done"? – e.g, to give information on the status of the cargo, cf. MC Section 258 first sentence:

> *"If the goods need to be handled with special care, the sender shall in due time give notice thereof, and state the measures which may be required".*

The Court counters such line of reasoning:

> *"I cannot see the relevance of the road carrier's omission to inform the crew about the inadequate securing of the goods upon delivery. The cable drum, poorly fastened, was placed on an open trailer. I therefore take it that the sea carrier could easily observe the need of securing" (section 72).*

However, the Court continues to state that in any circumstances, it is decisive

> *"that the damage cannot be deemed to have occurred because the risk created by the road carrier materialised. As I see it, it was the sea carrier's subsequent omission that triggered*[18] *the damage" (section 70).*

The Court's view is that only the sea carrier could evaluate the necessity of securing measures and take the required actions. Thus, it was the risk created by the sea carrier that materialised and caused the damage (section 71). In other words: The damage was not caused by the road carrier (section 73).

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17 The Norwegian word used is «forårsaket».

18 The word triggered (Norwegian "utløste") emphasised by the Court.

This conclusion brings us to the final question: Was the loss due to an event that could only have occurred in the course of and due to the sea carriage? The Court's answer is:

> *"In my view, section 4 subsection 2 of the Road Transport Act must also be interpreted to mean that the damage must have occurred as a result of a particular risk related to this means of transport. I refer to Bundesgerichtshof's (BGH's) judgment 15 December 2011 in case I ZR 12/11, which in paragraph 32 shows a similar interpretation of this condition in Article 2 of the CMR Convention" (section 75).*

In the German case it is said that typical examples of such events are loss of the vessel, stranding, heavy sea, and salt water contamination. The case concerned fire, and the German Court stated that whether fire on board a vessel falls within this category cannot be answered in general: the particular circumstances are decisive.[19]

The Supreme Court held that the heeling of the ship because of the rough sea, which in turn made the load slide off the trailer, was an event under subsection 2. It could only have occurred during carriage by sea, since the risk that materialised can exist only on a ship. And this risk is of such a nature that it demands safety measures beyond those required for carriage by road. Although a loaded trailer may also be exposed to damaging sideways impact on the road, the circumstances causing the impact and the risk in general are completely different. On the road, the risk often arises when the vehicle is exposed to strong and direct wind, to changes of direction at high speed or to irregularities in the road surface. During carriage by sea, the goods are placed on a parked vehicle with a risk of moving or sliding off during the journey. Such events may ultimately also affect the stability of the ship (sections 76 and 77).

The final conclusion was – contrary to the view held by the Court of Appeal – that KN's liability had to be decided in accordance with the

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[19] «Die Frage, ob es sich bei einem Feuer an Bord eines Seeschiffes um ein für dieses Transportmittel typisches Schadensrisiko handelt, lässt sich nicht generell beantworten. Es müssen vielmehr die bekannten Umstände des Schadenshergangs berücksichtigt werden" (section 34).

rules of the Maritime Code. The way the case had been presented to the Supreme Court, did not give the Supreme Court sufficient information to determine KN's liability under the rules of the Maritime Code. Therefore, the judgment of the Court of Appeal was set aside. The decision in the case concerning the recourse claim was also set aside because of the connection between the two cases.