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The statutory charter party liability for damaged or delayed goods

Chapter 14 of the maritime code

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To my father, simply the best and always in my closest memory.

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1 Summary

The industry of shipping reaches far back in time but the traditional view with a shipowner offering his services is a mere memory. Developing from one actor offering all services more and more players have taken a role in shipping and the “new” industry that we have seen develop over the last 150 years consists of several parties carrying out different functions. Someone does of course own the ship but this is no longer equal to being the party carrying out the transport. More likely, the shipowner is only a name on a paper unaware of the actual shipping involvements on a specific level. Irrespective of which one of these two extremes we are faced with one thing is sure; the functions relevant for shipping today differ from the traditional arrangements. A changing industry requires new tools in order to function efficiently. This concerns everything from communication, financial setups to legal solutions that are in line with the structure we see today. In this thesis the focus is on how the legal solutions can help the market or the industry to work as efficiently as possible and in order to do so it is important that the content is desirable seen from a practical perspective. Furthermore it is important that the desirable position is unambiguously expressed. This will be the main focus in the following discussion.

Concerning trade in bulk, chartering is the reality of today. A carrier enters into a chartering agreement with a charterer. This chartering agreement can be based on transport between destinations, on a specific time or on another basis the parties find appropriate to fulfil their requirements. The point being that there are many different ways to organize your trade today but common to all of them is that they will in almost every case start with a charter party. There are numerous interesting legal issues in regard of charter parties and in this thesis only one of them will be assessed. This is the question of liability. When we have a chain of charter party relationships governed by different terms and transport document between the charterer and a receiver in the end, it follows from the very nature of these contractual relationships that the issue of liability is central and complex. Who are the liable parties in this structure?

The starting point for chartering is that this is an area of freedom of contract¹. The rationale for this being that the parties involved are professionals with insight in the industry². With

¹ See NMC section 322

² Compare to liner trade where the carrier is often a bog company and the cargo owner might be a small company or even a natural person shipping a single consignment of goods. In the bulk trade the rationale is that if you are big enough to own or charter a ship you do not need protection.

this said the position evaluated in this thesis is the legal position under the maritime code. Apart from the contracts this is the main legal source and it supplements all different contracts when they are silent or unclear. Furthermore it stipulates mandatory rules for some transport³. The liability under the maritime code concerning charter parties is regulated in chapter 14. Either the liability derives from the charter party or from a tramp bill of lading⁴. These are the two main documents governing this kind of transport. The carrier can be liable as contractual carrier or as performing carrier depending on whether or not the relationship to the contractual party is directly contractual or based on performance.

When the document governing the transport of goods is a charter party the liability of the carrier concerning damaged or delayed goods is regulated in section 347 and section 383. The rules relating to charter parties are materially the same for both time- and voyage chartering in the code. In the first subparagraph the carrier's liability towards the charterer is regulated. The carrier is defined as " ...the person who, through a contract, charters out a ship to another (the charterer)..."⁵. If the performing carrier is someone else than the carrier this party is caught by the reference to section 286 made in section 347 and 383 first subparagraph second sentence⁶. The effect of the first section is in conclusion that the charterer has a claim for damaged or delayed cargo towards the carrier and the performing carrier, if this is not the same party. In the second subparagraph the carrier's and the performing carrier's liability towards a receiver who is not the charterer is regulated.

When we have a bill of lading issued under a charter party, a tramp bill of lading, and this is endorsed to someone else than the charterer, this party's rights towards the issuer follow from the bill of lading. This is stipulated in section 325 in the maritime code. In order to establish the liability under a tramp bill of lading there are two main questions that has to be answered. First, when the carrier is bound by a tramp bill of lading. In this concern it is the distinction from liner trade that is important as the rules of presumption might result in different parties being bound by the master's signature. The evaluation depends on whether it is liner trade or chartering. Secondly, it is a question about the consequences when the carrier is bound. Or expressed in another way, the substance of the liability.

³ See section 322 subsection 2-4 NMC

⁴ For the definition of bill of lading see section 292 NMC

⁵ Section 321 subsection 2 NMC

⁶ NOU 1993:36 page 70

In this thesis these rules will be evaluated from a practical basis according to the commercial patterns in the shipping industry. Who is the carrier under different aspects and more importantly, is the legal position of today also the desirable one seen from a practical perspective? By this I mean that if the liability following from statute is in line with the structure we see under different charter parties. Is it reasonable that the targeted party under the code is held liable when looking at the contractual or actual functions undertaken?

2 Introduction

Personal introduction

I came across the issue raised in this thesis during my studies at the LLM program in maritime law at the Scandinavian Institute of Maritime Law in Oslo. When there were several sub-charterers the question of liability for the carrier (reder) on top of the chain, for the carrier (bortfrakter) in the charter party where a party has suffered a loss and also for the charterer (befrakter) was to be answered. Trying to apply the provisions discussed in first one way and then the other in order to reach a solution, I realized that none of the alternative approaches had entire support in the legal sources, and that no matter how much you twisted and turned there would always be at least one party falling outside the scope. Discussing the issue with the staff on the institution I was introduced to the difficulties in the area. I decided to take the opportunity and dedicate the work of this thesis to the issue of the liability under charter parties with hope to clarify some points or at least to identify where clarification is needed in order to reach unambiguity.

Purpose and issues defined

The subject of thesis is the liability for damaged or delayed goods under a charter party under chapter 14 in the Nordic maritime code. Charter party chains give rise to complex contractual and non-contractual relationships. Whilst several of the questions arising are covered by the statutory regulation some situations do not seem to be covered at all. The main purpose is not simply to describe and clarify what the law says today but instead to analyze under what circumstances legal obscurity appear and what the desirable solution to these situations might be. However, in order to present the situation in a comprehensive way the starting point will be using ordinary legal method based on interpretation of legal wording, preparatory works and case law. The discussion will challenge the conclusions reached by the legal assessment. In situations where the legal position is clear the purpose of problematizing is to show the importance of clarification as well as to support the position taken in statute. In situations where the legal position seems unclear the purpose could instead be

described as highlighting, showing that there are gaps or ambiguousness in the legal framework is in itself an achievement desired in this thesis.

The focus of the thesis is on finding future solutions and improvements. It is accordingly not only a descriptive presentation but the description of the legal position will be the stepping-stone for the evaluation of the relevant issues. The discussion held is based on theoretical and practical considerations where the actual structure we see in the market will be the starting point. However, the history will to some extent be looked into when this is helpful for the understanding of the reasoning behind the rules at hand.

Structure

In chartering there are two main categories of documents under which liability can arise. First we have the charter party relating to the chartering of the ship or parts of the ship. Secondly, we have the tramp bill of lading, being the document relating to transport of cargo in bulk. While the bill of lading governs the transport of cargo the charter party refers to the chartering agreement as such. The ordinary situation is that a carrier and a charterer enters into a charter party and then when cargo is or is to be loaded a tramp bill of lading, referring to the charter party provisions, is issued as a receipt of the transport⁷. The two documents will thus operate simultaneously but the situations under a charter party and a bill of lading give rise to issues of different nature as they fulfil different purposes. The bill of lading relates to a shipment and the charter party to the chartering agreement between the carrier and the charterer without necessarily being directly connected to a specific shipment of cargo. The assessment will therefore be made separately, tramp bills of lading will be discussed in part I and charter parties will be discussed in part II.

2.1 Demarcations

Bills of lading: When a bill of lading is issued under chapter 13 the rules concerning carriage of general cargo are applicable. This liability falls outside the scope of liability under charter parties and will accordingly not be evaluated in this thesis, even though the material rules will be of importance for the evaluation also under chapter 14. The liability of the carrier (transportør) and the performing carrier (utførende transportør) will in this case follow directly by reference to chapter 13.

Liability: In this context the liability assessed is the liability for damaged or delayed goods.

⁷ Compare however to an FOB-sale where the bill is directly endorsed to the third party receiver

2.2 Definitions

Owner/ reder: When referring to the first party in the chain this is the party carrying out the function of the owner⁸. The Scandinavian terminology, where the shipowner is the one with the actual ownership and the owner (reder) is the one performing the functions of the owner, is used in this thesis. The result being that the owner (reder) is not always the same party as the registered ship owner. This differs from the English and American use where the party in charge of the operation is referred to as the owner or the shipowner irrespective of actual ownership. When referring to the ownership, registered shipowner is used.⁹

The Norwegian translation of the parties involved will be used in brackets in order to connect the thesis to the Norwegian version of the maritime code as well.

PART I – Liability under a tramp bill of lading

3 The liable parties under a tramp bill of lading

A bill of lading issued under a charter party is referred to as a tramp bill of lading. As soon as a tramp bill of lading is endorsed to someone who is not the charterer it “gets its own life”. Prior to the endorsement the terms in the charter party “prevails” over the terms in the bill of lading¹⁰. The effect of the endorsement is accordingly that the charter party terms are no longer applicable and instead the terms in the bill of lading governs this relationship. This is expressly regulated in section 325.1. The first question dealt with in the coming discussion is when the carrier is bound by a tramp bill of lading and section 325 accordingly is applicable.

When the carrier has issued a bill of lading this document governs the relationship between him and the receiver. The second question to answer is what the consequences of the carrier being bound are. Here the relationship between chapter 13 and chapter 14 is the subject of discussion. This is the situation dealt with in the second subsection in section 325 where an express cross-reference to section 253 is made. Section 253 say that when the carrier

⁸ Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *Scandinavian maritime law* (Oslo: universitetsforlaget, 2011) page 145

⁹ Hugo Tiberg and Johan Schelin, *Maritime & Transport Law 3rd edition* (Stockholm: Axel Ax:son Johnson Institute for Maritime and other Transport, Law 2012) page 73

¹⁰ NOU 1993:36 page 60

(transportør) has issued a bill of lading under a charter party and it governs the relationship between the carrier and a third party holder the rules in chapter 13 become applicable. This is of relevance both for the scope of application and for the character of the applicable rules as the starting point in chapter 13 is mandatory application while freedom of contract is the general rules concerning charter parties.

In short terms the two main things that will be evaluated is in what circumstances the bill governs the relationship between the carrier and the holder of the bill of lading, and the effect of being bound in regard of liability is.

3.1 The distinction from liner service- when do the rules in chapter 14 apply to the bill of lading?

Both the carrier (bortfrakter) and the time charterer¹¹ (befrakter) can issue bills of ladings. When the carrier is the issuer of a tramp bill of lading, he will according to section 325 be liable as contractual carrier towards the receiver. The charterer will in this case also be liable as contractual carrier according to the contract between him and the receiver but this liability is not regulated in the code. When the time charterer is the one issuing a bill of lading (and it does not relate to liner trade) the carrier (bortfrakter) will be liable as performing carrier in accordance with section 286 instead, this follow from the reference in section 383 subparagraph 1 second sentence. The charterer is still liable as contractual carrier under the bill of lading. This liability is not regulated in the code.¹²

In the above-mentioned situations where it is clear who the issuer is, it is easy to establish what rules are relevant. In some situations it can however be difficult to decide what party the master's signature binds. The chartering company's name can be printed on the bill at the same time as it refers to the owner as the contractual party. In the following I will look into these difficulties.

3.1.1 The Lulu-problem

¹¹ Even if the voyage charterer could issue a bill of lading this is not practically relevant

¹² Falkanger, Bull and Brautaset, *Scandinavian maritime law*, page 448

The starting point is that the master signs a bill of lading on behalf of his employer, which will be the owner¹³. This principle caused practical issues when the vessel was involved in liner trade and charterer undertook the carriage vis-à-vis the cargo customer. The traditional view with the position that the party signing the bill of lading was the party liable was anyway held on to in case law over many years¹⁴. The result being that the party liable was the owner and the party actually entering into agreement of carriage was not statutory liable¹⁵. This solution was not deemed desirable, seen from the perspective of the cargo owner. In many cases the cargo owner does not even know who the owner is and then the result that the cargo owner was unable to direct a claim towards his contracting party and that he was instead left with a claim towards a party he did not know about nor had chosen to have a relationship to, was unsatisfactory. For this reason a new principle was founded. This problem as well as the result is often referred to as the Lulu problem due to practical issues being illustrated in the case ND 1960.349 SH Lulu. The core of the principle developed after these cases is that in cases of uncertainty the bill of lading is presumed issued on behalf of the carrier (transportør). Consequently, when the ship is involved in liner trade¹⁶, the traditional view is set aside and the carrier (transportør) is liable towards the cargo owner¹⁷. This principle is nowadays implemented in the maritime code section 295.

Holding the involved parties legally liable irrespective of whether the undertaking was based on contract or not as well as to clarify the applicability of the chapter 13 and chapter 14 in cases of uncertainty, is the background for introducing both section 295 and section 286.

3.1.2 Section 295

In order to avoid uncertainty as to whom is bound by an issued bill of lading section 295 was introduced in the Scandinavian maritime code in 1973¹⁸. This is a rule of presumption that says that when a bill of lading has been issued it is deemed issued by the carrier (transportør), the carrier being the party entering into the transport agreement. Since this is

¹³ Svante O. Johansson, *an outline of transport law- international rules in Swedish context*, 2nd edition (Jure Förlag Ab 2014) page 134

¹⁴ ND 1955.81 NH Lysaker and ND 1960.349 SH Lulu

¹⁵ Falkanger, Bull and Brautaset, *Scandinavian maritime law*, page 357

¹⁶ Carriage of general cargo is defined as transport of consignments, see Martin Stopford, *Maritime economics* 7th edition (London: Routledge, 1997) page 17

¹⁷ Svante O. Johansson, *an outline of transport law- international rules in Swedish context*, 2nd edition (Jure Förlag Ab 2014) pages 134-135

¹⁸ *Ibid* page 134

a rule of presumption this means that it only applies when nothing to the contrary is indicated. If the carrier (bortfrakter) has signed the bill of lading in his own name and there is no doubt that this is the issuing party the bill of lading binds this party and not the carrier (transportør) under chapter 13. The rule therefore only gets its own meaning when a bill of lading is issued by the master on no ones expressed behalf¹⁹. In this case the carrier (transportør) is deemed to be the issuing party. The point being that the subject liable as carrier will according to the two rules of presumption, the traditional one for tramp trade and section 295 for liner trade, depend on whether it is liner trade or tramp trade.

3.1.3 Section 286

Section 286 supplements section 295 in the regard that when the bill of lading is deemed to bind the carrier (transportør) and this is not the same party as the owner (bortfrakter) who is actually performing the carriage, the owner will be liable as performing carrier. The purpose is thus to hold a party that is not targeted by the definition of carrier (transportør) directly liable.

3.1.4 Section 295 and section 286 in synergy

Whilst section 295 sets out a way to easier decide who falls under the scope of the definition of carrier, section 286 holds the parties falling outside this scope liable. Meaning, that a party that is according to section 295 not deemed to be the carrier will be covered as the performing carrier under section 286. The joint effect of section 295 and section 286 is thus that not only the contractual counterparty will be held liable. Even though the rules extend the scope of liability they are not necessarily holding all parties involved liable. This will be further discussed in section 7.6 about intermediate carriers below.

3.1.5 The effect of the rule of presumption in section 295

The result of the rule of presumption in section 295 being that when there is uncertainty as to what party is bound by the bill of lading when it is signed by the master on no one's express behalf it is presumed to be signed by the charterer (who will be the carrier under chapter 13) when it is liner trade. The charterer will in this case be the carrier (transportør) under chapter 13. This is only when the carriage relates to general cargo²⁰, for bulk carriage gov-

¹⁹ Falkanger, Bull and Brautaset. *Scandinavian maritime law*, page 333

²⁰ Ibid, page 449

erned by a charter party the traditional view that it is the person employing the master that is bound by his signature stands. When the situation is caught by section 295 the liability of both the carrier (bortfrakter) and the charterer (befrakter) will be regulated in chapter 13. Section 295 is not decisive for the applicability of chapter 13 and chapter 14 respectively but it is decisive for whom is bound by the master's signature when the transport relates to liner trade. This situation is therefore not of direct relevance for the assessment of the liability under chapter 14, even though the material rules might come into play.

3.1.6 The applicability of section 325

The basis for the above discussion has been to establish the applicability of section 325, which is the material rule for tramp bill of lading liability. According to the above discussion there are two possible bases for liability, either as performing carrier or as contractual carrier. In section 325 the liability as contractual carrier is regulated and the decisive question for the applicability of the provision is whether the carrier is bound by the tramp bill of lading. Two main things have to be evaluated in order to decide if this is the case. The first one relates to the actual conclusion of the contract and here the distinction between the traditional rule of presumption and the one found in section 295 will be decisive. When the bill relates to liner trade the liability of the carrier will be decided under chapter 13 and thus it is only when the bill relates to tramp trade that the traditional rule of presumption leads to section 325 becoming applicable. The other question related to the second requirement set out in section 325, namely that the bill has to be endorsed to someone else than the charterer. If both these prerequisites are fulfilled section 325 will apply. This leads us to the next section about the effect of section 325 deciding the liability.

3.2 The liability under a tramp bill of lading

The liability of the carrier under a tramp bill of lading is as mentioned above regulated in section 325. What is to be examined in this section is the substance of the liability, i.e. what the consequences of being liable under section 295 are.

The purpose of section 325 is to establish liability for the carrier (bortfrakter) towards the holder of the bill of lading. This is necessary since the tramp bill of lading is issued under another contractual relationship, the charter party, and the relationship between the carrier and the holder is therefore indirect in the sense that the carrier's counterparty does not normally follow from the bill of lading. Even if it should be a straight bill of lading this can be endorsed to someone else and the naming is not relevant for the entitlement to receive the

goods as well. This rule is thus necessary for the establishment of what party is subject to the statutory rights following from the binding effect of the document. The contractual liability as such follows directly from the bill itself and the holder irrespective of the right under section 325 be able to base a claim on contractual terms.

When the bill of lading is endorsed to the receiver the carrier is liable according to the second subsection in section 325. The rules in sections 295 to 307 by reference become applicable. However according to the reference made in the second sentence in this subsection, it is stipulated that the rules in sections 274 to 290 to apply, when it follows from section 253 that chapter 13 applies. Hence the question to answer is when it does follow from section 253 that chapter 13 applies?

3.2.1 What is the effect of chapter 13 becoming applicable?

When the bill of lading governs the relationship between the carrier (bortfrakter) and the receiver that is not the charterer the liability of the carrier is decided by section 325 referring to section 253. As the issue raised here is under what circumstances this is the case it is of relevance to clarify the consequences of the liability of the carrier being decided according to chapter 13 instead of under chapter 14. When the situation does not fall under section 325 the mandatory rules in chapter 13 will not apply. While the starting point under chapter 14 is freedom of contract the rules in chapter 13 are to a wide extent mandatorily applicable²¹. If the situation is not caught by section 325 the liability will be regulated by section 347 or 383 with the result of the mandatory liability being far less extensive if voyage chartering and non-existent if time chartering²².

Furthermore the applicability of chapter 13 is of relevance for the assessment of indemnity according to sections 338 and 382. These provisions regulate the possible recourse actions for the carrier towards the charterer. Here it is stipulated that if the carrier is subject to more extensive liability than what follow from the charter party the charterer is obliged to indemnify him for this. This is however only the case if the more extensive liability is due to the content in the bill of lading conflicting with the content in the charter party. If the carrier's liability is stricter than under the charter party because the bill of lading is subject to

²¹ Compare section 322 and section 254 in the NMC

²² See section 322 NMC

mandatory regulation this is not covered under these provision. This position was clarified in ND 961.325 NH (Vestkyst I) and ND 1979.364 NV (Jobst Oldendorff).

The effect being that if chapter 13 applies the carrier risks being subject to a more extensive liability than what he is under the bill of lading as such and without any possibility of directing a recourse claim towards the charterer²³.

3.2.2 When is chapter 13 applicable?

It is clarified that the starting point is that the rules in chapter 13 do not apply to charter parties. This follows from the wording in section 253, which reads:

The provisions of this Chapter do not apply to charter parties for the chartering of a whole ship or part of a ship. If a bill of lading is issued pursuant to a charter party, the provisions of this Chapter nevertheless apply to the bill of lading if it governs the legal relationship between the carrier and the holder of the bill of lading.

If the charterer enters into an agreement of carriage through a contract with the receiver and the carrier signs a bill of lading, the charterer is the contractual carrier under this contract and the carrier is the contractual carrier under the bill of lading. The charterer's liability will in this case follow from the contract²⁴ while the carrier's liability will be regulated in section 325, referring to section 253. In order for chapter 13 to become applicable, thereby making the carrier liable under section 274 to 290 according to the last sentence in section 325, the bill of lading has to govern the legal relationship between the carrier and the holder of the bill of lading. The question to answer is thus when this requirement is fulfilled.

3.2.3 The definition of the term carrier in section 321 and section 251

Examining the legal wording in section 325 and section 253 respectively the term carrier is used in both sections²⁵. This term is however not defined in the same way in the two chapters. While it refers to the party chartering out a ship (bortfrakter) in chapter 14²⁶ it refers to

²³ The latter conclusion is based on the maritime code. If the charter party provides other terms they might have another solution to the recourse question. See for example Gencon clause 10, which opens up for recourse claims also in these cases.

²⁴ See section 7.5 about the charterer's liability

²⁵ In the original Nordic version different terminology is used, transportør in chapter 13 and bortfrakter in chapter 14

²⁶ See section 321 NMC

the party entering into a contract of carriage of general cargo (transportør) in chapter 13²⁷. The definition of the carrier (transportør) in chapter 13 is to be found in section 251 in the maritime code:

“...carrier, the person who enters into a contract with a sender for the carriage of general cargo by sea;...”

“...transportør, den som inngår avtale med en sender om transport av stykkgoods til sjøs;”

If the provision is to be given a narrow interpretation with the effect that the term carrier is to be interpreted in accordance with section 251 the consequence would be that the only time when chapter 13 regulated the carrier’s liability under a tramp bill of lading is when the carrier is the one entering into the contract of carriage with the receiver *and* that the contract of carriage concerned general cargo²⁸. As the tramp bill of lading per definition does not concern general cargo but instead carriage under a charter party this solution is in itself contradictory. The carrier issuing a tramp bill of lading will never at the same time be able to fall under the definition in section 251.

To conclude, if the term carrier is interpreted in line with the definition in chapter 13 we have a conflict between the legal wording and the practical situation. The situation where the carrier (transportør) has issued a tramp bill of lading is not practically possible.

3.2.4 Preparatory works

According to the preparatory works regarding section 253, chapter 13 covers all transportation of goods, except for transport under a charter party governing the relationship between the carrier (bortfrakter) and charterer (befrakter). It is further clarified that all other transport is covered regardless of whether a bill of lading is issued or not²⁹. If all transport except for this is to be covered by chapter 13 the result is that transport governed by the bill of lading is covered, irrespective of whether this is a “liner bill of lading” issued by the carrier (transportør) or a tramp bill of lading issued by the carrier (bortfrakter). According to this standing the purpose of section 253 is to exclude charter parties and to include every other

²⁷ See section 251 NMC

²⁸ Norsk lovkommentar note 428

²⁹ NOU 1993:36 page 22 ”til §253”

contractual relationship governing carriage of cargo. Following this line of reasoning the term carrier is to be given a wide interpretation. A reflection to this is that the purpose of expressly stating that bills of lading governing the relationship between the carrier and the receiver is probably to clarify that tramp bills of lading are not excluded.

Looking at the background for section 253 in particular the above reasoning seems to make sense. However, when putting this into the context of chapter 13 and when reading section 253 in light of the preparatory works' general position concerning chapter 13, uncertainties arise. It is expressly stated that the purpose of introducing the definitions in chapter 13 was to make a distinction from the terms used for chartering³⁰. This is even more distinctive in the Nordic version of the code where the word "transportør" is used instead of the word "bortfrakter".

At the same time as it seems clear that tramp bills of lading issued by the carrier (bortfrakter) are according to section 253 falling under the scope of chapter 13 this contradicts the definition of the term carrier set out in section 251, a definition that is introduced to make a distinction from the definitions in chapter 14.

3.2.5 Section 253 – doctrine and legal commentary

In "Scandinavian maritime law" the carrier under the charter party is equalized to the party issuing the tramp bill of lading. This is an example of the general view that seems to be accepted, namely that the carrier under section 253 shall be defined as in chapter 14 and not as in chapter 13. Falkanger refers to sections §292 and §253 becoming applicable for the tramp bill of lading. This position is taken even though these rules are located in chapter 13 and it follows expressly from section 251 that in chapter 13 the word carrier means the person entering into a contract of carriage of general cargo³¹. If the carrier (bortfrakter) has signed a tramp bill of lading he will not be the carrier (transportør) under chapter 13.³²³³ However, in line with the position according to the preparatory works the situation does not seem to cause any issues in practice as it is generally accepted that the link between section

³⁰ NOU 1993:36 page 19, til §251

³¹ This position is also supported by the commentary, Norsk lovkommentar til Sjøloven note 438

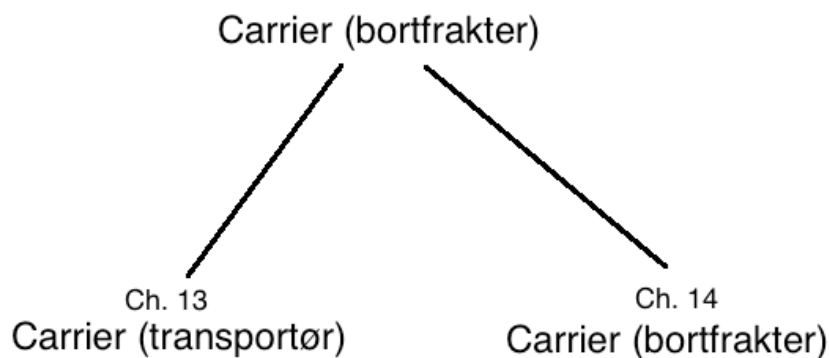
³² Falkanger, Bull and Brautaset, *Scandinavian maritime law*, page 263

³³ See also Falkanger and Bull, *Sjørett*, page 233 in fine where the term carrier (transportør) is given the same meaning as carrier (bortfrakter)

253 and section 325 is the one of a cross-reference with the effect of tramp bills of lading being covered by the liability rules in chapter 13³⁴.

3.2.6 Historical perspective- Sjøloven av 1893

In the old version of the Norwegian maritime code there was no distinction between the term carrier for the carriage of general cargo and for the term carrier in voyage chartering³⁵. The same definition was used for all kinds of transportation. Both the party chartering out a ship and the party entering into carriage of general cargo through bills of lading was covered under the term carrier (bortfrakter). Even though we have a clear distinction between these parties in today's version of the code³⁶ the historical approach could be helpful for the understanding of the background and the rationale behind the rules we see in the code today. It could be seen as that term "carrier" that covered both kinds of transports now has been divided in two subdivisions.



If the term carrier (bortfrakter) is seen as an overall term covering both of the subdivisions, this can explain the wording chosen in section 253. In other words the word carrier in section 253 might not be meant to target the carrier under chapter 13 or chapter 14 but is ra-

³⁴ Norsk lovkommentar til Sjøloven note 641

³⁵ See section 76 pp, Sjøloven av 1893

³⁶ Compare the definitions section 251 and section 321 in the NMC

ther meant as a reference to the carrier in general. When this general definition is applied to the commercial patterns we see today the only party covered will be the carrier (bortfrakter) under chapter 14 as the reference is to chartering.

Even if this does not clarify the wording we see in section 253 today it gives a reasonable explanation for what the purpose of the term carrier is.

3.2.7 The Hague-Visby rules and the Hamburg Rules

The Nordic maritime code is to a large extent based on two international sets of rules concerning carriage of goods by sea. The oldest one being the Hague-Visby rules, which with its main purpose of providing protection for the weaker party involved in the shipping market has set the tone in chapter 13³⁷. The other international convention is the Hamburg rules from 1978, these rules are more up to date than the Hague-Visby rules. The rules are not ratified in the Scandinavian countries but the code has been drafted in accordance with them.³⁸

Both the Hague-Visby rules and the Hamburg rules are clear on how section 253 is to be applied. In article 1b a in the Hague-Visby rules and in clause 12 in the explanatory notes in the Hamburg rules it is expressly stipulated that the tramp bill of lading is covered insofar it regulates the relationship between a carrier and a holder. The effect being that the rules in chapter 13 applies also for the tramp bill of lading situation³⁹.

3.2.8 Concluding remarks

The preparatory works and the generally accepted position taken in the doctrine indicate the same thing. The term carrier under section 253 covers the carrier (bortfrakter) under chapter 14. Or to put it in another way, the position that the tramp bill of lading in the hands of a receiver that is not the charterer falls under section 253. That the term carrier thus covers the carrier under chapter 14 is taken for granted, meaning that the fact that tramp trade is covered is generally accepted and the wording as such is seldom questioned. The fact that the definition of the word carrier is to be interpreted in the way stipulated in section 251

³⁷ Falkanger, Bull and Brautaset, *scandinavian maritime law*, page 278

³⁸ Falkanger, Bull and Brautaset, *scandinavian maritime law*, page 281

³⁹ Hannu Honka, *New carriage of goods by sea* (Åbo: Åbo akademis tryckeri, 1997) page 182

and thereby expressly excluding this interpretation seems to be a secondary issue that is not reflected over.

3.2.9 Some preliminary remarks regarding the charterer's liability

One issue that is neither addressed in the preparatory works nor in the doctrine is the liability of the time charterer when he is the one issuing a bill of lading that concerns transport in bulk. On the one hand the reasoning above indicates that all contractual relationships except the one under a charter party falls under the scope of chapter 13 and that the time charterer's bill of lading could be covered as well. However the charterer's liability, when he is not also the carrier under a charter party, is not regulated in chapter 14⁴⁰ and it is therefore no basis like the one in section 325 concerning this situation. The conclusion being that when the charterer has signed the bill of lading for bulk trade this liability is not regulated in the code at all. Important to stress is that if the time charterer is issuing a bill of lading under a charter party he will be the carrier under this charter party and thus falling under the definition of carrier instead. The situation assessed in this section is the one where there is no charter party between the last charterer and the receiver, i.e. when the receiver is not a charterer. Regarding the carrier's (bortfrakter) liability in this case he is not bound by the bill issued by the charterer and section 325 with references to chapter 13 does thus not apply, the liability of the carrier is not regulated in chapter 13 but instead in section 383 in this case^{41,42}.

4 Is the result of the above evaluation of the position in the code desirable seen from a practical perspective?

As we have seen the question regarding the liability under a tramp bill of lading is not whether the situation is desirable but rather to assess the discrepancies between the practical and result of the above evaluation of the legislation. The reason being that the legal position is clear and generally accepted, the issue we stand for is literal in the way that the definition contradicts the interpretation. The interesting thing to look into is therefore this contradiction. The legal position of today where the carrier under chapter 14 will be liable under the rules in chapter 13 when he has issued a tramp bill of lading that is endorsed to some-

⁴⁰ See section 7.5 regarding the charterer's liability

⁴¹ Honka, *New carriage of goods by sea*, page 188

⁴² In this case the carrier will be liable as performing carrier under section 347 or 383. See section 7.2 below

one else than the charterer is not only desirable but it is also the only possible way to apply section 253 in practice. The result being that in the conflict between practice and legal wording, practice should prevail and the legal wording ought to be changed in order to reach consistency. Even though it follows from preparatory works as well as doctrine how the provision is to be interpreted it is desirable to have a legal wording that does not contradict this position.

The wording of section 251 does not open for the interpretation suggested by preparatory works, legal doctrine and practical aspects. If the term “carrier” is to be given the desired meaning the wording should be changed. A simple solution would be to refer to chapter 14 in the provision. Alternatively a footnote referring to the definition in section 321 could be introduced. Since the footnote is not part of the law I would however suggest an express reference directly in the provision.

5 Sea Waybills- Some additional comments

A final reflection regarding sea waybills⁴³ ought to be made in order for the assessment of liability under chapter 14 to be complete. The sea waybill is becoming more frequently used in shipping and is to some extent replacing the bill of lading⁴⁴. There are several benefits with the sea waybill compared to the bill of lading, one of them being that the document is not negotiable and therefore it is not necessary to actually hold the bill to be entitled to take delivery of the cargo. Often the cargo arrives before the bill of lading and it is customary to issue letters of indemnity in order to be able to discharge the cargo anyway⁴⁵. This solution is not waterproof due to the letters of indemnity being questioned from a legal point of view⁴⁶. As the sea waybill becomes more frequently used the need for regulation arise. While chapter 13 applies irrespective of whether the transport document used is a bill of lading or a sea waybill^{47,48}, section 325 in chapter 14 expressly targets bills of ladings. Additionally sections

⁴³ See sections 308-309 NMC on sea waybills

⁴⁴ Fakanger, Bull and Brautaset, *Scandinavian maritime law*, page 344 and Svante O. Johansson, *an outline of transport law*, page 73

⁴⁵ See Gorton, Hilleniur, Ihre and Sandevärn, *Shipbroking and chartering practice*, 7th edition (2009: informa London) pages 74-78 for further discussion on the advantages of the sea waybill in this regard

⁴⁶ For further discussion see Falkanger, Bull and Brautaset, *Scandinavian maritime law*, page 341

⁴⁷ See the definition of transport document in section 251 NMC as well as art 18 and clause 13 in the explanatory notes to the Hamburg rules.

308 and 309 that regulate the sea waybills are left out of the references in section 325. The fact that a clear position is taken in regard of chapter 13, saying that the results apply to sea waybills as well as to bill of lading, but that a similar position is not taken under chapter 14 indicates that chapter 14 is not intended to cover this document. The way section 325 looks today, it does not open for any other interpretation than that it only covers bills of ladings. Even if it could be argued that sea waybills should be covered by analogy since they are covered by chapter 13 I have a hard time seeing that this will stand strong since the references in section 325 where the term “bill of lading” is used, expressly contradicts this kind of interpretation. With that said the question to answer in the following discussion is whether there is a need to regulate the sea waybill liability.

Section 325 can be divided into two categories where the first one focuses on the position of the bill of lading and the other one of the liability. While the question on the position concerns the binding effect of the bill of lading the liability part concerns the liability as such, i.e. the result of being bound by the bill.

5.1 The *binding effect* of section 325

The purpose behind the first subsection in section 325 concerns the effect of holding a bill of lading. The starting point under chapter 14 is that a charter party governs the relationship between the carrier and the charterer. The first contract entered into the accordingly a charter party. Under this charter party a bill of lading relating to the shipment of cargo is often issued. In the hands of the charterer this document has no own meaning for the relationship between the carrier and the charterer, their relationship is irrespective of the bill of lading governed by the charter party. If the bill and the charter party are contradictory the charter party terms prevails. When the receiver is someone else than the charterer the bill of lading serves a different purpose. As there is no charter party between the carrier and this receiver the bill of lading is the document governing this relationship. It is, seen from the receivers perspective, desirable that the terms in the bill of lading are the only terms that are relevant between him and the carrier as these are the terms he has agreed to. This is the rational behind the first subsection in section 325. This rule makes sure that if different terms are stipulated in the charter party and in the bill of lading, only the terms stipulated or referred to in the bill can be invoke in respect of the receiver. The effect of the rule being that in the

⁴⁸ This is also emphasised by Falkanger, Bull and Brautaset, *Scandinavian maritime law*, page 347 where they clarify the fact that the rules in chapter 13 apply to the same extent for sea waybills as they do for bills of ladings

relationship between the carrier and the receiver, that is not the charterer, the bill of lading terms prevails over the charter party terms if these are contradictory.

The functions of the sea waybill are in this context the same as those of the bill of lading. Even though the sea waybill is not negotiable they are issued for the same purpose as the bill of lading, i.e. they replace the bill of lading. To the same extent that it has been desirable to protect the receiver holding a bill of lading from being subject to terms he has not agreed to, this is desirable for a holder, other than the charterer, of a sea waybill as well. The difference between the bill of lading and the sea waybill is that while the holder is the one entitled to claim delivery under the bill of lading the named party is the correct receiver under a sea waybill⁴⁹. Even if it follows directly from the waybill who the bound parties are the prevailing effect is not regulated. It could be argued that since the purpose is not to transfer the document the receiver has a larger possibility to compare the terms in the bill of lading to the charter party, at least he can find out under what charter party the waybill is issued. Nevertheless, even if the chain to the carrier might be shorter my standing is that there is still reason to give the sea waybill the same status as the bill of lading in relation to the charter party under the first subsection in section 325.

5.2 The liability under section 325

While the first subsection in section 325 concerns the conclusion of the relationship between the issuer and the receiver the second subsection is instead regulating the liability under the bill. If the sea waybill is not targeted by section 325 the result is that the mandatory liability rules and the wider scope of mandatory application in chapter 13 do not apply. Instead the main rule is freedom of liability according to section 322⁵⁰.

Concerning the liability question the two documents fill the same purpose, namely regulating the liability of the carrier towards the receiver. Here there are no differences in the functions of the bills. In light of the practical purpose filled by the documents there is no reason for why the carrier should be subject to stricter liability when issuing a bill of lading than when issuing a sea waybill.

⁴⁹ See Gorton, Hillenius, Ihre and Sandevärn, *Shipbroking and chartering practice* 7th edition (2009: informa London) page 72

⁵⁰ See however section 322 subsection 2 NMC about the mandatory scope of application in Nordic trade

5.3 CMI Uniform Rules for Sea Waybills

The international maritime committee has developed a set of rules concerning sea waybills, the purpose being to provide a uniform position for the document. In 4 (i) it is stipulated that the sea waybills shall be subject to any international convention with mandatory scope of application to the same extent as a bill of lading would have been. The CMI-rules are not binding but they provide guidance regarding how the legal position should be and in what direction the development should be made.

5.4 The Rotterdam rules

The newest international convention, the Rotterdam rules, was signed in 2009 but the incorporation has not yet been fully effected.⁵¹ As these are the future international rules on shipping they are relevant for the evaluation for the desired development of the legislation. In NOU 2012:10, the preparatory work incorporating the Rotterdam rules, the committee states that the non-negotiable transport documents, the sea waybill, are in practice only slightly different from the negotiable ones⁵². It is further stipulated that the sea waybill is to a large extent used as replacements for the bill of lading⁵³. Even though the Rotterdam Rules are not expressly stating that the sea waybill and the bill of lading should be given equal meaning under chapter 14, the fact that the two documents are of very similar nature, that they practically fill the same purpose and that they are used equivalently indicates that there is reason to give the documents a similar legal position as well.

5.5 Liability under sections 347 and 383

In these sections the liability under a charter party is regulated. The situation when the receiver is someone else than the charterer and this person does not hold a tramp bill of lading binding the carrier under section 325 is regulated in subsection two, first sentence. The carrier is according to this provision liable under the first subsection of section 347 or section 383. This means that the sea waybill is indirectly covered under chapter 14. The carrier is liable in the same way as if for example the transport document is a charterer's bill of lading. This means that the carrier can be held liable under these sections but not under section 325 and the result is thus that the sea waybill is subject to the obligatory scope of cover to the same extent as the charter party under which it is issued. This means that the tramp bill of lading is subject to a far more extensive scope of mandatory provisions than waybill is.

⁵¹ Falkanger, Bull and Brautaset, *Scandinavian maritime law*, page 282

⁵² Chapter 11.4 page 38

⁵³ Chapter 15.60 page 93

5.6 Concluding remarks

Trying to extend the scope of section 325 to cover sea waybills is in light of the wording directly contradictory. The standing taken in chapter 14 is quite clear, the rules regarding bill of lading are not applicable to sea waybills as well.

Practically the sea waybills fill the same purpose as the bill of lading, both as a transport document in the hands of a receiver that is not the charterer and also concerning the liability under the document. The result of the sea waybills falling outside of section 325 is that the terms in the charter party can still be invoked towards the receiver, as the sea waybill does not prevail these terms. Furthermore the mandatory rules on liability in chapter 13 do not apply to this relationship. It can be questioned whether it is a desirable result that the carrier is subject to stricter liability when the carriage is governed by a tramp bill of lading than by a sea waybill. As far as I am concerned the purpose filled by the sea waybill apart from the non-negotiability is the same as the bill of lading and therefore there is reason to have an equal regulation for the material content. My suggestion is therefore to equate the sea waybill and the bill of lading also under chapter 14.

PART II- Liability under a charter party

Opposed to the general cargo where consignments are shipped, charter parties refer to the situation when a ship or a part of a ship is chartered for the sake of transportation. There are different types of chartering. A ship can be chartered over time (time chartering) and for one or several voyages (voyage chartering and consecutive voyage chartering). Depending on the type of contract different functions will be transferred from the owner to the charterer⁵⁴. It is also possible to transfer all functions except for the ones connected to the ownership, such as insurance and financing etc., to a charterer through a so-called bareboat charter party. How the functions connected to the operation of the ship are allocated will depend on the chartering agreement in each and every case. When we talk about voyage chartering the owner is involved in the commercial operation to a large extent while this is not the case in time chartering, where the charterer instead carries out these functions. When we talk about bareboat chartering the owner is not involved in the operation at all.

⁵⁴ See further section 8.1 below

Time chartering and voyage chartering is regulated in the code in chapter 14 while bareboat chartering is not targeted by this scope. The main focus in the following assessment will therefore be on time and voyage chartering. However, the bareboat example will be used for adding perspective to the question about who the owner in a chain or charter parties is.

In the following the subjects liable for damage and delay to cargo under chapter 14 will be discussed. When looking into the liability regulated the focus is the target of the definitions given in section 321 and who this will be under the separate provisions. The reason for asking this question is because while the provisions in some situations expressly refer to a specific party, there is no reference to a party but rather to a situation in others. For example, who is the party targeted by the first sentence in the second subsection in section 347 and section 383, when reference is made to the “same entitlement” rather than to a liable party. After clarifying the legal stance the practical aspects of the result reached will be analysed.

6 Whose liability is regulated?

6.1 Historical development- Sjøloven av 1893

Around 1850 the industry began to change from the shipowner having operated his own ships to him chartering out ships and thereby subletting parts of the functions to someone else⁵⁵, this is what we know as time chartering. In the legislative change following this milestone in the shipping industry the term carrier (bortfrakter) was introduced.

“Med bortfrakter forstås i dette kapittel den som ved avtale påtar seg befordring av gods med skip for en annen, befrakteren. Bortfrakteren kan være reder, befrakter (frambortfrakter) eller annen.”⁵⁶

It was further defined that this party could be the “Reder”, the charterer or someone else. The express clarification that different parties were covered by the definition was removed from the maritime code in 1994 but the content is still supposed to be interpreted in the same way⁵⁷. This is a clear indication that it is not only the liability of the owner that is regu-

⁵⁵ For further discussion see section 7.1 below

⁵⁶ Sjøloven av 1983 §71

⁵⁷ Thor Falkanger and Hans Jacob Bull, *Innføring i sjørett* 6th edition (Oslo: Forsikringsakademiet, 2004) pages 217-218

lated but that each charter party needs to be assessed separately⁵⁸. The carrier under the charter party will be subject to the rules.

6.2 Preparatory works- NOU 1993:36

The carrier is the one entering into a contractual relationship with the charterer, this follows directly from the definition in section 321. The definition implies that the liability of the carrier is connected with the signing of the contract and it is irrelevant whether he performs the actual carriage or not. The result of the definition of carrier being determined on contractual terms is that the party performing the carriage is not covered by this definition, unless the contractual carrier and the performing carrier are the same party. The liability of the owner is, when this party falls outside the definition of carrier, regulated through a reference to section 286 where the liability of the performing carrier is regulated.⁵⁹

It is expressly stated in the preparatory works that the performing carrier is liable regardless of what contractual relationship he has with the carrier; it does not matter whether it is a voyage charter party or a time charter party⁶⁰. Opposed to the liability of the carrier, which is purely contractual, the decisive point for deciding the liability of the performing carrier is the performance as such and the custody of the goods.⁶¹ The point being that the basis for claiming the performing carrier is statutory regulated in section 286 and not under contract with the receiver, unless of course the performing carrier is also falling under the definition of carrier.

When the charterer is not using the ship for transportation of his own cargo but the cargo is sold to someone else the question of liability is regulated in the second subsection of section 347 and section 383. The same parties, the carrier and the performing carrier, are according to this rule liable in the same way towards this receiver, i.e. under the provisions stipulated in the first subsection. This rule targets the situation where the transport document between the charterer and the receiver is for example a charterer's bill of lading. If the receiver holds a tramp bill of lading issued by the carrier this will as we have seen above in section

⁵⁸ This position is also supported by Johannes Jantzen (Nils Dybwald), *Håndbok i godsbefraktning til sjøs* 2nd edition (Oslo: Fabritius & Sonners Forlag, 1952) on page 1 where he stipulates that the party in disposition of the operation of the ship will be deemed the carrier (bortfrakter). Johannes Jantzen (Nils Dybwald). *Håndbok i godsbefraktning til sjøs* 2nd edition. Oslo: Fabritius & Sonners Forlag, 1952

⁵⁹ NOU 1993:36 page 70 (Til §338)

⁶⁰ Ibid

⁶¹ NOU 1993:36 page 70 (til §338)

3.1.6 above fall directly under section 325 instead. This is also reminded of in the last sentence in section 347 and section 383.⁶²

To sum up, it can be said that the term carrier is clearly defined in section 321 in the code and accordingly the party targeted is the one having a charter party with the charterer. The other party liable is the one actually performing the carriage and thus in charge of the functions of the ship owner. In most cases this will mean liability on the ship owner but not necessarily⁶³, it can also be the disposing ship owner (reder) that is covered under this rule. The shipowner is not necessarily subject to any statutory liability⁶⁴.

6.3 Concluding remarks

The legal position of today is that the parties liable under chapter 14 in the maritime code are the carrier (bortfrakter) and the performing carrier (underbortfrakter). According to the first subparagraph in section 347 and section 383 they are liable towards the charterer and according to the second subparagraph they are liable towards a receiver who is not the charterer. This position does not seem to cause any uncertainty. However, the questions that remain unanswered are who these parties actually are. Who is targeted by the definition of the carrier and the performing carrier? And when there is a chain of charter parties, what is the position of the intermediate carriers? These questions will be answered in section 7 below.

7 Who are the carrier (bortfrakter) and the performing carrier?

It has been established that the carrier (bortfrakter) is liable towards the charterer under the first subparagraph and that the performing carrier will also be liable due to the reference to section 286 following from the second sentence. According to the second subparagraph a receiver who is not the charterer also has a right to direct a claim towards these parties.

The remaining question is however who the carrier and the performing are. When looking solely at the wording used, the carrier under subparagraph one could be both the carrier under the charter party where the loss occurred as well as the carrier under the first charter party (the owner). The opening of the definition of carrier covering several different parties is at the same time as it contributes with flexibility when covering every party that can be

⁶² NOU 1993:36 pages 70 and 89

⁶³ See sections 7.1.2 and 7.2 below

⁶⁴ See further section 7.2

the carrier, confusing since it does not say what party actually is the covered one when several parties fall under the definition concurrently. The purpose of the following discussion is to establish what parties in the structure we see today are liable. Who are the carrier and the performing carrier in a charter party chain?

7.1 Historical perspective

The terminology used in shipping today is, seen from a historical perspective, quite new. In the middle of the 19th century chartering was introduced to the shipping industry. The industry changed from having used the traditional form of owners transporting cargo on their ship, to brokers and operators chartering in tonnage from third parties and making a business out of this by speculating in the market. As the market structure changed the need for another terminology arose. The owner was no longer necessarily the party entering into a contract of carriage with the cargo owner and thus the new term “charterer” or “verfrachter” (german) was introduced⁶⁵. Here we have a milestone in the shipping industry, in respect of the commercial structure.

From “shipowner shipping” to chartering

The Reder⁶⁶ is according to the original definition the party that is responsible for manning and equipping the ship and he also uses the ship for shipping⁶⁷. The functions have to a large extent been transferred to other subjects over the years. In the commercial reality today I would state that the first part of the original definition of the reder, the reder being responsible for manning and equipping the ship, is the only one that stands since the actual shipping is can be carried out by someone else. With the change in the shipping structure came the need for new terminology adapted to this structure⁶⁸. For this purpose the terminology

⁶⁵ Jan Lopuski, *Der Seefrachtvertrag in Recht der europäischen sozialistischen Länder*, (Berlin: Transpress, 1974) pages 29-30

⁶⁶ In the following I will use the term “reder” equivalent with the term owner

⁶⁷ Kurt Grönfors. *Befraktningsavtal och transportavtal: några synpunkter på sjölagens terminologi*. (Oslo: nordisk institutt for sjørett, 1980) page 3 and Falkanger and Bull. *Sjørett*. Page 124

⁶⁸ This has been commented by Grönfors who was sceptical to the consistency between the legal regulation and the commercial reality. He saw possible issues as the market became more complex while the law did not follow. He expressly suggests that instead of looking at the historical way to regulate and the traditions of the industry we should have taken the starting point in the commercial patterns of today and made a uniform legislation adopted to this. See Grönfors, *Befraktningsavtal och transportavtal*, page 2

has changed several times in order to make the wording more accurate⁶⁹. The terminology used in the Scandinavian system today is built on the German one and accordingly it targets the parties under a charter party⁷⁰. This was taken into account by the legislators that replaced “reder” with “carrier” (bortfrakter) and opened up the definition to cover the owner, the carrier and others. The thought behind this was to cover both the Reder and others that chartered tonnage, opening up for the possibility of the carrier being someone else than the owner⁷¹.

Today the carrier is defined as the one entering into a charter party with the charterer⁷². The example of parties that can be covered is removed, without the purpose of changing the content. The problem with the definition is that one term can cover several subjects at the same time; in a way that I don't think was anticipated at the time of drafting. As long as we only have one charter party this causes no difficulties but what happens when we have a chain of actors, where both the Reder and the carrier take positions as “carriers”, but under different contracts?

7.2 Who is the performing carrier?

To put the issues raised into context I will make an example with a chain of charter parties with one bareboat charter party. Under a bareboat charter party the liability of the “owner”⁷³ is transferred to the bareboat charterer⁷⁴. With this follows the liability as performing carrier. The consequence being that in cases where the contractual carrier (bortfrakter) is liable under section 347 and section 383, the bareboat charterer will in most cases be the performing carrier. The first carrier (bortfrakter) in the chain will fall outside the liability rules in chapter 14 in this case. The point made is that if there is a bareboat charter party somewhere in the chain the chain will be “breached” and the first carrier will have no liability under the code⁷⁵.

⁶⁹ Grönfors. *Befraktningsavtal och transportavtal*, page 2

⁷⁰ Ibid

⁷¹ Norsk sjølov av 1973, Grönfors, *Befraktningsavtal och transportavtal*, page 6

⁷² Section 251 NMC

⁷³ See also the definition of “reder” in the preamble to the NMC

⁷⁴ Falkanger, Bull and Brautaset, *Scandinavian maritime law*, pages 263 and 146

⁷⁵ Except for liability for oil spills

This reasoning was applied by the Supreme Court in the case Rt 2011-1225. The cargo suffered damage when the ship grounded. It was found that the reason for the grounding was that the ship was unseaworthy. Making sure the ship is seaworthy is the responsibility of the owner. In this case the bareboat charterer was held liable under section 347 while the first carrier in the chain (the shipowner) was not covered by the provision.

Liability of the owner- Section 151

In section 151 the term “reder” is used. The term is defined in the preamble as follows:
The “reder” is the person (or company) that runs the vessel for his or her own account, typically the owner or the demise charterer. Time charterers and voyage charterers are not considered “reders”.

It follows expressly from the wording that in case of a bareboat charter party (demise) the charterer is considered the “reder”. The result of this is that the owner of the ship is not necessarily target to any liability under the code.⁷⁶⁷⁷

7.3 Who is the carrier (bortfrakter)?

7.3.1 Preparatory works

It is expressly stated that different terminology should be used for time charter parties and for voyage charter parties because the purpose is to regulate each charter party and in order to do so it is necessary to separate between the different forms. The reasoning following this is that the carrier (bortfrakter) can be both the Reder⁷⁸ and the charterer (befrakter) of the ship.⁷⁹ This is again a clear position taken by the committee; “carrier” covers carriers in the chain of charter parties and not just the first one (the ship owner). This is not to interpreted as several parties falling under the definition at the same time, but rather that the party falling under the definition depends on where the loss strikes and from whose perspective the situation is assessed.

⁷⁶ The only place where the ship owner’s liability is regulated in the code explicitly is in chapter 10 regarding oil-spills, see section 183 and section 191 in the NMC

⁷⁷ Hugo Tibergh and Johan Schelin, *Maritime & Transport Law 3rd*, page 73

⁷⁸ See definition in the preamble in NMC

⁷⁹ NOU 1993:36 page 17

7.3.2 What perspective is the starting point for the interpretation

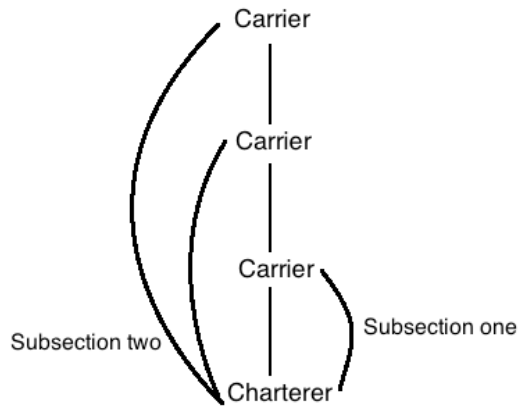
The maritime code focuses on each individual charter party and that the definition of carrier covers different parties. It is not the owner's liability that is regulated in all cases; instead the individual charter party will decide how the definition is to be interpreted. What has not yet been established is from what perspective this interpretation is to be made. Depending on the answer to this question, different subjects will be held liable.

The carrier is defined as " ...the person who, through a contract, charters out a ship to another (the charterer)..."⁸⁰. The lack of an unambiguous definition of the word carrier is causing uncertainty as to what party is subject to the provision. In a chain of several charter parties there are several possible carriers covered. The discussion below aims to clarify the scope of the carrier's liability.

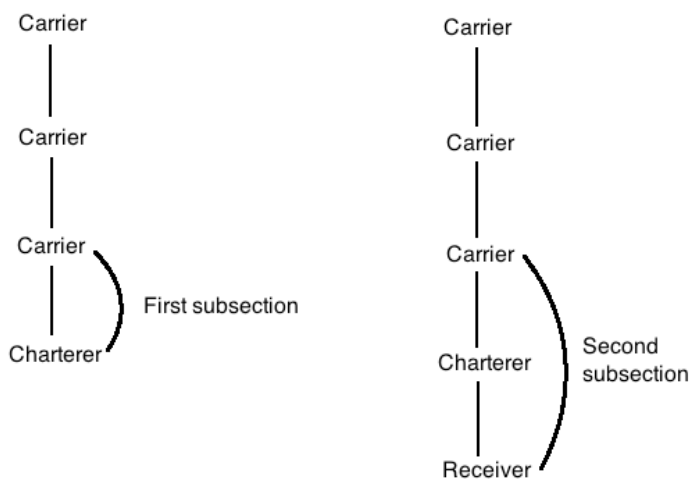
The starting point is that the charterer can claim damages under subsection one and that a receiver who is not the charterer can claim damages under subsection two. The provision cannot at the same time cover all parties since the wording does not open for this solution⁸¹. Thus the scope of the word carrier will decide whose liability is regulated and whose liability falls outside. The first paragraph concerns the liability between the carrier (bortfrakter) and the first charterer (befrakter) in the chain. When the charterer has sold the cargo to someone else this party is entitled to claim under the second subsection. The only contractual relationship this receiver has is the one to the charterer. As there are no relationships with any of the carriers in the chain there is no indication of whose liability is regulated. Seen from the perspective of the carrier every party except from the charterer under the charter party would fall under here. If this way of interpreting is applied all carriers in the chain will be liable at all times. Towards the charterer under the first subsection when this is where the loss strikes, and towards everyone else further down the chain under the second subsection if the loss occurs here. As all carriers can be subject to a claim the final distribution of liability will have to be decided by internal recourse claims.

⁸⁰ Section NMC 321 subsection 2

⁸¹ The definition of carrier in NMC section 321 covers the carrier under the charter party, there can only be one carrier under each charter party



However, seen in conjunction with the liability regulated in the first subsection the only natural way to understand the second subsection is that it is the same carrier's liability that is regulated. Looking at the purpose of the provision, which is to regulate the carrier's liability under the relevant charter party, there is no basis for a wide interpretation that includes all carriers' in the chain. The rationale behind the liability towards other receivers in the second subsection is to hold the carrier liable irrespective of who the owner of the cargo is, not to open up for claims towards other carriers. The only thing that has changed between the first and the second subsection is that the cargo has been sold and the only thing that is intended to change regarding liability is the party entitled to claim, not the party liable.



7.3.3 Conclusion

Under both approaches the carrier under the charter party where the loss strikes will be liable. The difference is that if the situation were to be seen from the carrier's perspective, all carriers in the chain would be subject to liability. When read together with the rest of the provision, that is expressly referred to, there is however only one approach that stands.

Looking at the purpose of the first sentence in the second subsection it is to cover the situation where the receiver is someone else than the charterer and does not hold any tramp bill of lading⁸². This indicates that the intent is not to hold more parties liable but rather to hold the same party liable in all situations that can arise. In the first subsection the carrier is liable towards the charterer under a charter party. According to the last sentence in the second subsection the carrier is liable towards a receiver that is not the charterer but holds a bill of lading. The purpose of the first sentence in the second subsection is to cover all situations otherwise falling outside the scope of the provision. This can for example be the situation where the transport document is a sea waybill or where the time charterer is the one who has issued the bill of lading⁸³. The result of the first sentence is that the carrier is liable towards the receiver irrespective of the contractual relationship between the two.

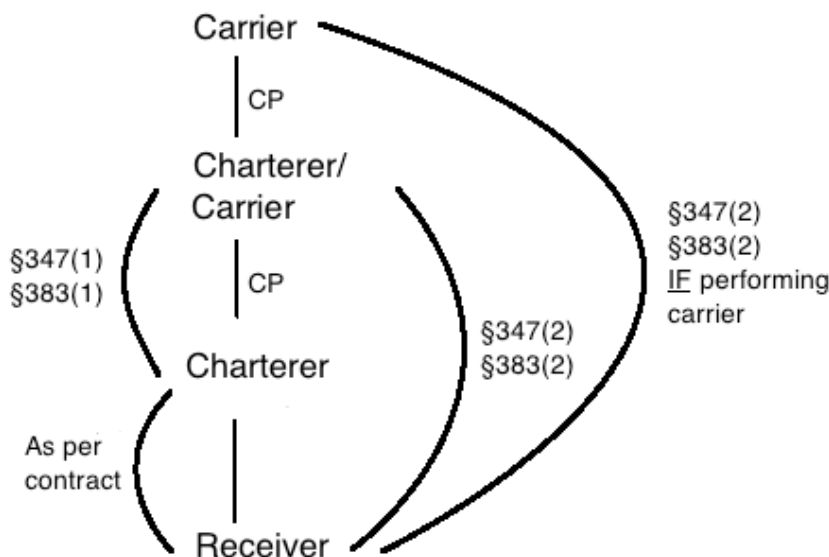
7.4 Concluding remarks regarding the carrier and the performing carrier

The conclusion is that the scope of the definition has to be decided according to where the loss has struck. Both the legal wording and the preparatory works support that the starting point for determining liability is the party that has suffered a loss. The carrier will be the carrier under this charter party and the performing carrier will be the party performing the carriage regulated in this charter party.

If the document governing the carriage is a charter party the basis for the claim is the first subsection and if the receiver is someone else than the charterer and the carriage is therefore not governed by a charter party the basis for the claim is the second subsection. The effect of section 347(2) first sentence is under this approach that the receiver is entitled to claim damages in the same way as the charterer (underbefrakter) is under the first subparagraph. The subject of the carrier's liability is thus the carrier under the last charter party. The charterer falls directly outside the scope of the provision.

⁸² NOU 1993:36 page 89

⁸³ Norsk lovkommentar til Sjøloven note 728



7.5 Some preliminary remarks on the charterer's liability

Coming to the conclusion that each charter party must be assessed separately when applying the relevant provisions, two new possible ways of interpretation must be decided amongst. This issue is commented in the preparatory works where it is stipulated that the right for the receiver to claim from the carrier (bortfrakter) comes in addition to the rights the receiver has towards the charterer (befrakter) under the transport document⁸⁴. The distinction following from this is that when the contract between the receiver and the charterer is not a charter party but a transport document issued by the charterer (and the liability is thus not regulated in the first section) the charterer (befrakter) is not liable according to the code but under contract.

The outcome is therefore that the interpretation that it is the contractual counterparty's liability that is regulated can be excluded. The liability regulated in the second subparagraph

⁸⁴ NOU 1993:36 page 89 (til §374), today's section 383

is the one of the carrier and the performing carrier, the charterer's liability is not regulated in the code.

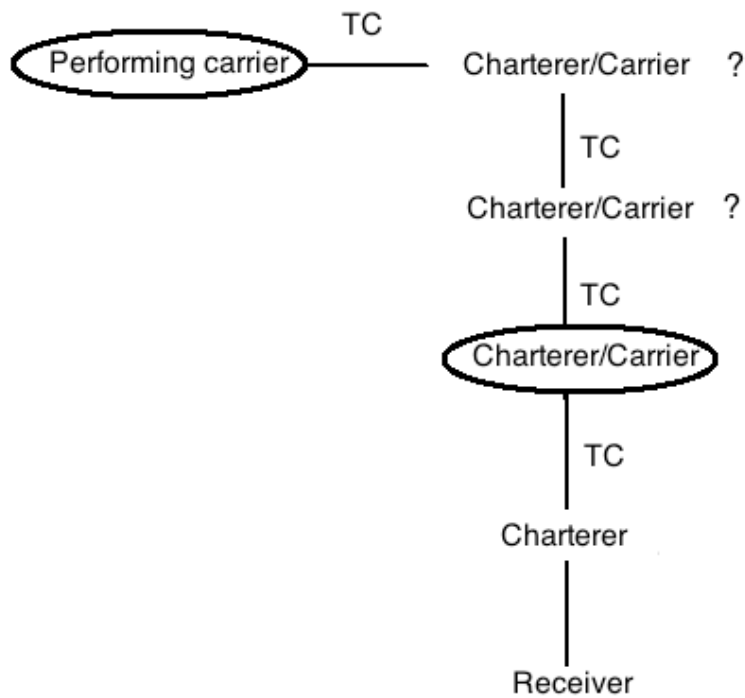
7.6 Intermediate carriers

In the analysis above the conclusion reached is that the code focuses on each charter party as well as that the carrier and the performing carrier are the two parties liable according to both subparagraphs. This conclusion gives rise to further issues.

That the last charter party is decisive for the applicability indicates that there will always be two parties that are caught by the provision. It is established that it is the carrier under the relevant charter party and the performing carrier are the subjects to the provisions in the code. But if there is a chain of charter parties there will be several parties that are not covered by this scope. As follow from the above discussion the charterer in the end of the charter party chain will not be targeted by the maritime code⁸⁵. What has not yet been answered is what happens to the intermediate carrier that are not directly targeted by any of the definitions These will be the carriers that are neither performing carrier's nor the carrier under the charter party relevant for evaluation. I will use the term intermediate carrier when talking about these parties, since they even though they have an actual contractual obligation only come in-between the parties in direct connection with the carriage.

An example will illustrate the question at hand.

⁸⁵ See section 7.5



7.6.1 Section 286

The liability of the performing carrier is regulated in section 286. The liability will be assessed under this rule irrespective of whether it is liner trade or bulk trade as the provisions in chapter 14 refers to this section for the assessment⁸⁶. According to the preparatory works the party liable as performing carrier under this rule is the one having the goods in his custody when the damage occurs⁸⁷. The standing taken is clear; the provision only regulates the liability of one party at a time since it is only one party that can have the goods in his custody. Important to stress is that there is no requirement with regard of contractual relationships. The performing carrier is liable due to the actual performance carried out rather than under contract.

⁸⁶ NMC sections 347 and 383 first subparagraph second sentence

⁸⁷ NOU 1993:36 page 40 and SOU 1990:13 page 122

The definition of the sub-carrier⁸⁸ in section 251 requires performance under an assignment while section 286 regulating the liability of this party requires actual performance. It could be argued that the definition is broader than the provision stipulating the liability. Meaning that, in order to fall under the definition an assignment would suffice while actual custody is necessary for liability.

7.6.2 The Hamburg rules as indicator for interpretation

The Nordic maritime code is based on the Hamburg rules. In art 1.2 in the Hamburg rules the actual carrier is defined. This definition is not directly forwarded to the definition of the sub-carrier in section 251 but the reasoning could be used for guidance regarding interpretation. The definition does not require custody but does instead focus on the entrustment as such. The actual carrier under these rules is the person the carrier has entrusted to perform the carriage, however the person liable as actual carrier is the person performing the carriage⁸⁹.

That the decisive point for liability is the custody of the goods has the effect that it is the person carrying out the functions of the carriage that is caught. However, this results in contractual parties possibly falling outside the scope in cases where the physical performance is outsourced to someone else. This issue was dealt with in the case ND 2003.83 FH, which will be discussed below.

7.6.3 ND 2003.83 FH Linda

In ND 2003.83 Linda, the intermediate carrier unsuccessfully argued that he was not liable as he was neither the contractual carrier nor the performing carrier. Two carriers (L and E) had undertaken to perform the carriage but the carriage was actually performed by L. The question at hand was whether E that had accepted to undertake carriage but not actually performed it was subject to any liability? This party fell outside both the definition of the contractual carrier and the performing carrier. The court reached the conclusion that the carriage had taken place on L's ship and that L was liable as performing carrier. However, E had together with L accepted liability as performing carrier and thus he was also held liable as if he performed it. It follows that one of the reasons for this liability is that E acted in a way that made the cargo owner believe that they were the liable party. The outcome that more

⁸⁸ Sub-carrier is given equivalent meaning as performing carrier in this regard

⁸⁹ See NMC section 286 and art 10.2 in the Hamburg rules

than one carrier can be held liable as performing carrier is contrary to the wording in section 286 that requires custody. The court is in this case stretching this requirement to include some kind of contractual custody as well.

It is important to highlight that it is not two different carriers in the chain of charter parties that are liable but instead two parties that together have the role of the performing carrier. The fact that both L and E are liable means that two parties together can act as performing carrier, but not that two different performing carrier's can be held liable. Nevertheless, the interpretation extends the scope of liability as performing carrier with the result that more than two parties are caught by the rules in the code at the same time.

The Supreme Court of Finland held that even though it is only the carrier that actually performs the carriage that is targeted, the "performing carrier" cannot be free of liability by subletting the carriage to another carrier and that indirect custody must be enough. The court supports this by referring to the rationale of the rules being to make it easier for the cargo owner to direct his claims and to avoid unnecessary recourse claims⁹⁰. This finding indicates the issues arising when the legal position is not in conformity with the practical structure. The position taken by the court in this case is hardly in line with the intention with section 286 as the presumption according to the preparatory works is that the performing carrier has to have the goods in his custody. The court has to twist their application quite a lot in order to reach the result they want to achieve and this indicates that the legal position of today is causing some practical difficulties.

Peter Wetterstein has criticized the above decision in an article from 2014⁹¹. He stresses that even though E should be held liable this must be on a contractual basis and holding him liable on a statutory basis might be stretching it to far. He indicates that this decision is working against a uniform application in the Nordic countries, as this is not how the concept of the performing carrier is normally understood. Furthermore his conclusion is that custody should also after the Linda case be the starting point for evaluating the liability of the performing carrier, this is a position I fully support.

7.6.4 ND 1995.238 NH Nordland

⁹⁰ See the section called "allmänna synpunkter" in the judgement

⁹¹ Peter Wetterstein, *the performing carrier after the Nordland and Linda cases- who is he?*, 2014 (Stockholm: Axel Ax:son Johnson Institute for Maritime and other Transport, Law 2012) page 129

In the case 1995.238 Nordland, a question of liability for intermediate carriers was raised. The case related to road carriage but the principles could to some extent apply to carriage at sea as well,⁹². The Supreme Court came to the conclusion that the carrier (bortfrakter) was the contractual carrier even though an agent who admitted his status as carrier entered into the contract of carriage. What is more interesting is that all parties who had admitted the status of carriers' were held liable. As everyone was targeted it was in reality not relevant to decide who the carrier was. Weight should be put on the fact that more than one carrier fell under the scope of liability at the same time. The court held that the basis for liability was general tort law principles for promises made by third parties⁹³.

7.6.5 Conclusion

The starting point is that each charter party shall be assessed individually. Looking at the individual charter party we only have one carrier who can be caught by the first section. The performing carrier will be liable according to section 286 in this case. The position in the preparatory works is clear; it is only the carrier (bortfrakter) under the charter party where the loss has struck and the performing carrier that are subjects to the provisions.

This standing is challenged by recent case law. In 1995 the Supreme Court of Norway held that all parties having accepted the position as carriers could be held liable at the same time. The basis for the evaluation is the case was not the maritime code and the outcome is accordingly not directly applicable. Even if the principles set forward in the case ought to be highlighted for the understanding of the different possibilities at hand these are different from the legal position chosen in the maritime code. In 2003 the Supreme Court of Finland came to the conclusion that more than one party could fall under the definition of "performing carrier" at the same time. I would however like to stress that no "intermediate" carrier was held liable; instead the liability of the performing carrier was allocated between two parties that had together undertaken to carry out one of the functions in the charter party chain. As a final conclusion it could be said that as long as the view that the deciding factor for liability of the performing carrier is the custody of the cargo prevails, it will be difficult to find a basis for liability for intermediate carriers in the maritime code. Unless of course the term custody is stretched in the way it was in the Linda case.

⁹² Honka, *New carriage of goods by sea*, page 88

⁹³ Rt-1995-486 Page 492

8 Is the result of the above evaluation of the position in the code desirable seen from a practical perspective?

8.1 Practical aspects concerning risk allocation

Looking at the legal position of today we have seen that the code regulates the liability within each charter party. The result being that the person liable as “carrier” is the contractual carrier under a charter party. Seen from a practical perspective where a general approach is that the risk shall be attributed to the party that is in a position to control and affect the outcome, the theoretical approach might not always be in line with the actual distribution of functions⁹⁴⁹⁵. Irrespective of the allocation of responsibilities under different types of charter parties, the owner is always responsible for interest, installment, insurance and finance and will accordingly bear the economical risk⁹⁶. This is the case regardless of whether the ship is chartered on bareboat-, time- or voyage terms. However, as will be seen below, regarding the operation of the ship the allocation of functions will be distributed in different ways depending on the type of charter party.

Michelet has discussed distribution of liability in the light of the operational structure and he takes a practical starting point where the operational structure is of relevance. The conclusion reached where both the time carrier and the carrier (reder) was and should be liable towards the time charterer (befrakter).⁹⁷ This discussion concerned the allocation of liability under charter parties but the issue regarding the distinction between contractual and statutory basis for liability was not raised. This illustrates one complicating factor in this situation. The question raised in this thesis is not who is liable but who is liable by statute. Even though the allocation of function could provide guidance with regard to the allocation of liability this is not necessarily equal to liability by statute. That liability under the code is not the same thing as liability in practice and the supplementing function of the code are important factors to bear in mind in the following discussion.

⁹⁴ Jan Hellner and Marcus Radetzki, *Skadeståndsrätt* (Visby: Norstedts Juridik 2014) page 51

⁹⁵ Hans Peter Michelet, *Håndbok i tidsbefraktning* (Bergen: Sjørettsfondet, 1997) page 403 where this approach is used when assessing the liability under time charter parties

⁹⁶ Falkanger, Bull and Brautaset, *Scandinavian maritime law 3rd edition*, pages 146-148

⁹⁷ Michelet, *håndbok i tidsbefraktning*, pages 496-498

8.1.1 Time chartering

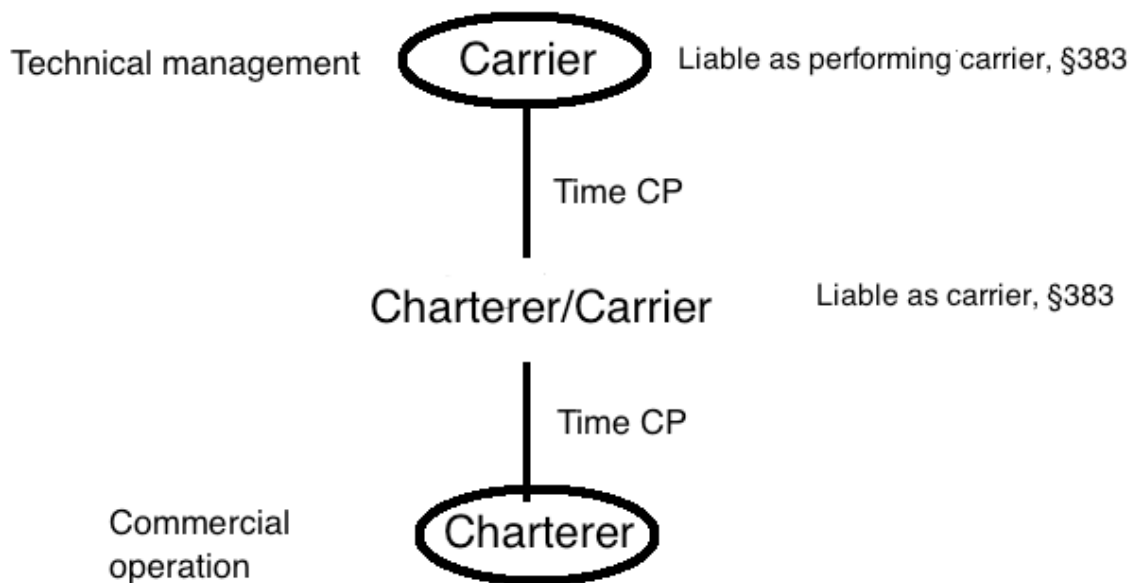
If looking at the allocation of functions, the owner's responsibility is transferred to the time charterer to a larger extent than under a bareboat charter party. The owner is however still in charge of the technical and nautical management such as crewing, maintenance and insurance⁹⁸. The commercial management is in this case the responsibility of the charterer. This involves loading, discharging and other duties of operational character. As the charterer is the one to plan the nautical operation the question of delay will as far as it is not attributable to unseaworthiness of the ship or the like be something that he has the influence over. The damages that might arise will also be connected to the commercial operation carried out by the charterer. However, as the carrier is liable for the crew and the maintenance of the ship this has indirect effect on the functions carried out by the charterer.

The owner will thus be liable for the technical and nautical management and the time charterer will be liable for the commercial management⁹⁹. There is hardly any responsibility left on the time carrier's shoulders (in the case where he is not the owner). With this aspect in mind the legal position where the time carrier is the one liable is not in conformity with the practical allocation of responsibilities. In the case the owner is also the carrier the liable party will also be the responsible party according to the provision but when the carrier is not the owner the liable party will have no responsibility at all. With responsibility comes control and it is not satisfactory to hold someone without influence to affect the situation liable.

The picture below illustrates how the responsibility for carrying out the different functions is allocated in a time charter party chain.

⁹⁸ Falkanger, Bull and Brautaset, *Scandinavian maritime law 3rd edition*, page 146-148

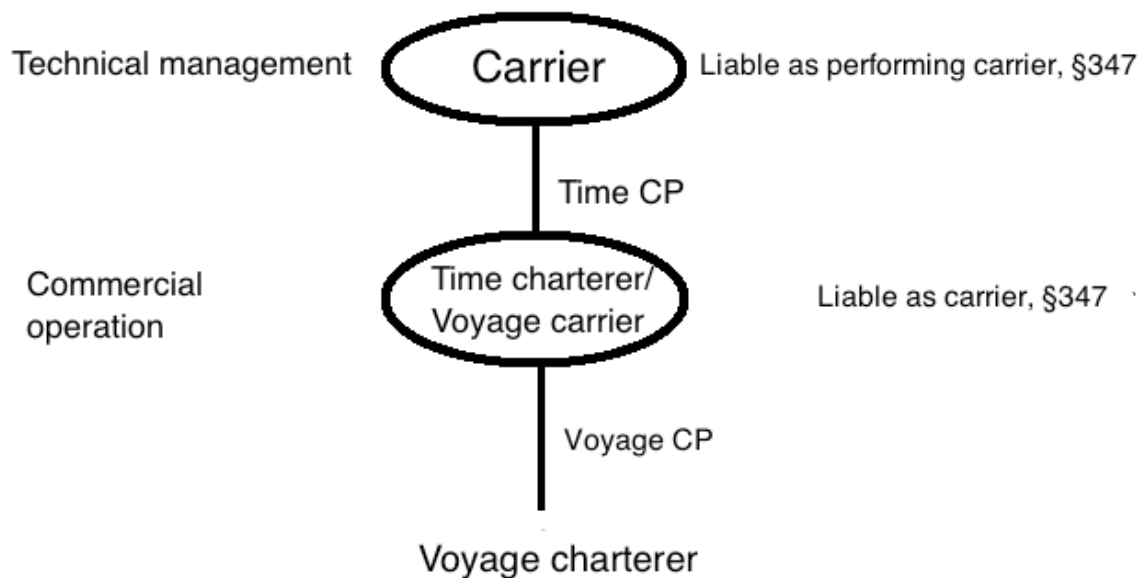
⁹⁹ The owner will also be liable for damages caused during loading and discharging towards a third party, Falkanger and Bull, *sjørett*, page 126



8.1.2 Voyage chartering

Under this form of chartering both the technical-, nautical- and commercial management is as a starting point the owner's responsibility. The voyage charterer has no practical responsibility connected to cargo handling at all. If there are no prior charter parties in the chain the responsibility will be carried out entirely by the owner. This situation is regulated in section 347 first subsection. The owner is in this case held liable as carrier and there is no other performing carrier. In this case there is no other performing carrier. If there is a time charter party prior to the voyage charter party some of the responsibilities are transferred to the time charterer, who is also the voyage carrier. Here the allocation between the performing carrier and the contractual carrier will be of interest. In this case the voyage carrier is held liable as carrier and the owner is held liable as performing carrier.

The figure below illustrates the allocation of responsibility under a voyage charter party.



8.1.3 Conclusion

Today the regulation regarding charter parties is the same, irrespective of whether it is a time or a voyage charter party. Since there are major structural differences between the two forms of chartering there might be a need for differences also in the legislation governing the situations. The general principle concerning allocation of liability is that it is desirable to have the person responsible being subject also to the liability. Under section 347 there is consistency between responsibility and liability. However, under section 383 this result is not achieved in all situations. When the receiver is not the charterer, the party responsible for the operation is not liable under the code. In order to reach a solution where the legal position is in conformity with the commercial structure it is likely that there has to be two separate systems regulating the liability for voyage chartering and time chartering respectively.

8.2 Practical aspects- contractual relationship

As the starting point for charter parties is freedom of contract the maritime code mainly serves the purpose of filling the gaps where the contracts are silent or unclear. Just as well as it could be argued that it is desirable to put the liability on a subject with responsibility it can be argued that the liability should be borne by the contractual party. The contract is the cen-

tral legal source governing the relationship between the parties and the statute is to a large extent supplementary. The contractual party is closest at hand and it can be argued that the person who should bear the loss is the person the parties involved have decided shall bear the loss.

The contractual counterparty can be either the carrier or the charterer depending on the type of transport document and on whose behalf it is issued. If it is a sea waybill issued by the carrier the carrier will be the contractual counterparty and if the transport document is a charterer's bill of lading the contractual counterparty will be the charterer. If the contractual counterparty is held liable the principle of freedom of contract is upheld and the parties have a possibility to agree upon another distribution of liability than the one following from statute. Nevertheless it has to be accepted that the carrier's liability is depending on the contractual terms with the result that this liability is not unconditional i.e. the parties can decide that the carrier shall not be liable. There are no obligations to make sure a recourse claim is possible. This question will be regulated in each individual charter party in the chain and the contractual parties involved are free to decide whether or not and to what extent recourse claims are possible.

Putting the reasoning into context, the result where the carrier might not be caught directly under the code and possibly not be available for recourse either is satisfactory under time chartering. Since the purpose of the statute is not to make law but to supplement an area of freedom of contract there is reason to argue that if the parties have agreed upon a distribution of liability this should be upheld. Concerning voyage chartering the question is of a different nature as the statute, due to the mandatory scope of application following from section 322 subsection 2, plays another role in this regard. The parties cannot agree that someone else than the one targeted in the statute should be liable instead; hence it is of importance to target the party desirable to target directly. The conclusion being that the result of holding the contractual counterparty liable differs between time- and voyage chartering.

8.3 Some preliminary remarks on contractual vs. statutory liability

A final question about the practical consequences following from the legal liability ought to be raised. The only thing looked into so far is who is legally liable. What has been left un-commented is what the consequences of this liability compared to contractual liability are.

Being subject to legal liability is normally seen as an obligation. The reason being that the opposite is to be free from liability. This is not the position in shipping. The opposite of not

being liable by law is to be liable by contract in the shipping world. This is the main rule, even though some parties might fall outside this scope as well. Opposed to liability under contract, the statutory liability is often limited¹⁰⁰. Seen from the cargo interests perspective the outcome could therefore be better when the claim can be based on contract. This reflection is, even though it is important to bear in mind, mostly theoretical since the code is only supplementing the contracts and in most cases the liability will be decided on contractual terms.

9 Clarifications and changes suggested for the legal position

In line with the discussion in section 8.1 the liability regulated in the code should be divided between voyage- and time chartering. The rationale being that the practical shipping operation is remarkably different and that this should be reflected in the allocation of liability as well.

9.1 Time chartering

The performing carrier is always responsible for seaworthiness and navigation etc. and thus the provisions should always hold this party liable. As seen above it is also preferable to target the contractual counterparty. For time chartering the contractual carrier will be targeted by the first subparagraph in section 383 when the charterer is the one suffering a loss. The only situation where the contractual counterparty can fall outside cover today is when the receiver is someone else than the charterer and the charterer is the one bound by the transport document. The reason being that in this situation the carrier is still held liable under statute, while the charterer in this case is instead liable by contract.

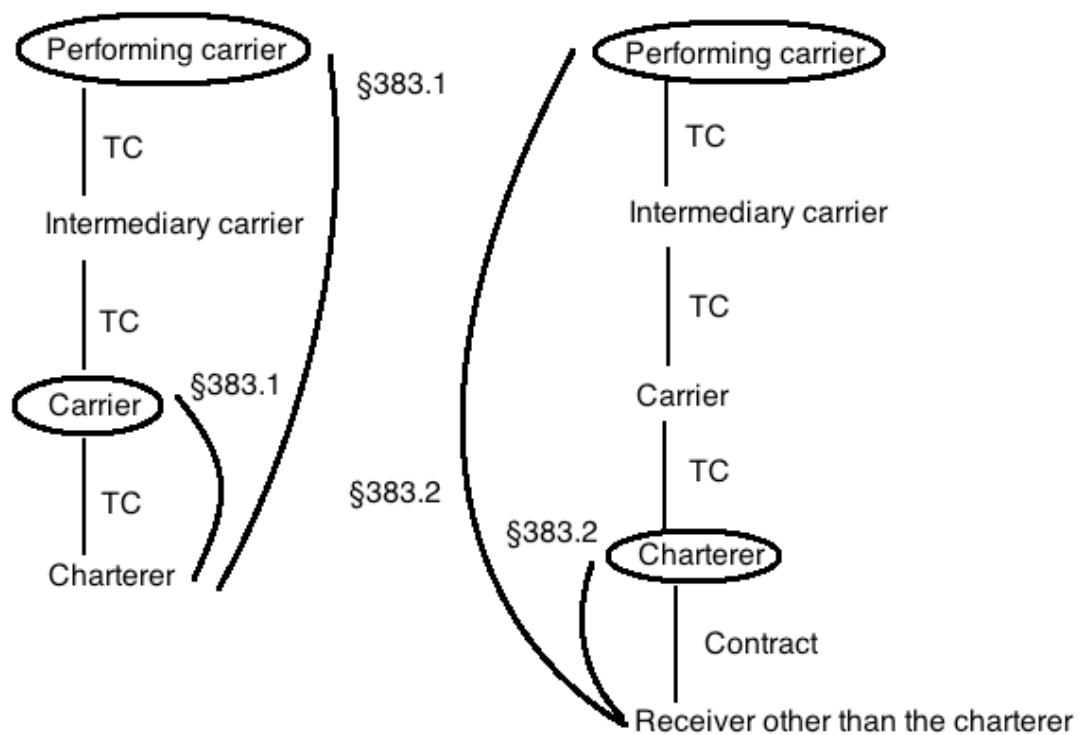
The suggested solution is therefore that the first subsection in section 383 should remain as it is since both the carrier's and the performing carrier's liability is covered¹⁰¹. Concerning the second subparagraph the party desirable to target is the contractual party as this will be the party actually carrying out the functions related to the commercial operation. As both the charterer and the carrier, seen from the receiver's perspective, can be the one having a contractual relationship that is not a charter party with the receiver this result can be achieved by making the contractual counterparty instead of the carrier (bortfrakter) liable

¹⁰⁰ See in this concern NMC section 280-283

¹⁰¹ See discussion about who the performing carrier is in section 7.2 above

under the second subparagraph. Important to stress is that this party might be the carrier but it does not necessarily have to be so.

The outcome would be that in cases where the charterer suffers a loss the carrier and the performing carrier are liable. When another receiver suffers the loss this party can claim the performing carrier and the charterer. Both the interests mentioned in section 8.1 and 8.2 would then be satisfied.



In order to achieve this result it must follow from section 383 subparagraph two that it is the liability of the contractual counterparty and the performing carrier that is covered:

Ex. A receiver who is not the time charterer is entitled to claim damages from the counterparty under the transport document. The provisions of Section 286 apply correspondingly.

9.2 Voyage chartering

9.2.1 Suggested allocation of liability

The differences regarding allocation under a voyage- and a time charter party that has been discussed in section 8.1 above provides for another distribution of liability than the one suggested for time chartering. Opposed to the situation for time chartering the party having a contract with the receiver is not also the party carrying out the commercial operation under a voyage charter party. Consequently, a decision regarding whether if it is the interest of holding the contractual counterparty liable or the interest of conformity between liability and responsibility that should prevail has to be made.

The first aspect to this discussion is that these rules are not only filling a supplementary role since section 347 is mandatory for Nordic trade according to section 322 subsection two. When taking this into account the purpose is not to fill a hole in a contract or to provide guidance for interpretation but rather to decide the allocation of liability. Furthermore if the charterer should be the targeted party, the carrier would fall outside the scope of liability all together and only be liable if a recourse claim could be directed towards him. Based on these two aspects, the maritime code not only being a supplement as well as the fact that the contractual counterparty is already liable as per transport document, I take the position that the carrier's liability is the one that should be regulated in the code. When coming to the conclusion that the carrier is the party desirable to target all parties involved can be held liable, even if the charterer's liability is regulated under contract instead of by law.

Reaching this conclusion the content of section 347 is today fulfilling the position practically desirable. The content shall thus remain untouched. For the purpose of clarification a minor change to the second subsection is suggested.

Ex. A receiver who is not the voyage charterer is entitled to claim damages from the voyage carrier. The provisions of Section 286 apply correspondingly.

9.2.2 Sections 347(2) and 383(2) in fine

This part of section 347 and section 383 has not been evaluated in the thesis. The reason being that the sentence is not adding anything new to the material evaluation but is simply a reminder of section 325 and the direct liability following from this when a tramp bill of lad-

ing is endorsed to a third party¹⁰². Nevertheless a few words can be said regarding clarifying the scope of the provision. As the purpose is to remind about the tramp bill of lading liability it is desirable that this purpose is clearly following from the wording.

The wording reads; *“If the receiver holds a bill of lading⁵ issued by the voyage carrier,⁶ the receiver can also invoke the provisions of Section 325.”*

The legal wording indicates that this is nothing but a reminder and is accordingly satisfactory. However, when looking into the footnotes the standing does not appear as unambiguous. The footnotes are not part of the legislation but they do serve a purpose of guidance regarding interpretation and application.

Footnote six is a reference from the term carrier to section 295. Section 295 stipulates the rule of presumption when it is unclear what party is bound by a bill of lading¹⁰³. As seen in section 3.1 above this is of relevance for the applicability of section 325. This rule of presumption is important to bear in mind when evaluating these questions and footnote six is in that sense filling a purpose. However, placed in the context of liability under a charter party it is likely to be misleading. Read in the context one could think that the charterer’s liability is also target to this liability when he is the one bound by the bill of lading. This is, as we have seen not the case. The charterer’s liability under a bill of lading will never be regulated in chapter 14. The footnote is probably only meant as a reminder of the presumption in cases of uncertainty with the effect that if the carrier (bortfrakter) is to be bound by the bill of lading his liability is regulated here, otherwise the situation falls outside the scope of chapter 14. The footnote thus refers to the question of whom the bill of lading binds rather than to the question of liability.

For the means of clarification this reminder is better suited in section 325 since this is where the question of who is bound by a bill of lading actually arises.

10 Conclusion

¹⁰² Norsk lovkommentar til Sjøloven note 728 in fine

¹⁰³ See section 3.1.2 above

For the liability under a tramp bill of lading issued under a charter party the legal position under the maritime code is clear. The carrier is liable under the mandatory rules in chapter 13 when the bill is endorsed to a receiver that is not the charterer. This outcome also appears to be in line with the practically desired situation. The only thing opening for another position is the wording used in section 253 as the term carrier in this chapter is defined as the party entering into a contract of carriage of general cargo. As it follows from the very nature of the tramp trade that concerns chartering of a ship or a part of a ship an interpretation of the term carrier in line with the definition in section 251 is in itself contradictory. The conclusion being that even though the position is clear the legal wording could be improved for the purpose of clarification.

The parties liable under a charter party according to the maritime code is the carrier and the performing carrier according to the first subsection section 347 and section 387 with references to section 286. This is the liability towards the charterer. When the receiver is someone else than the charterer the receiver has the same right as the charterer do under the first subsection. This means that the same parties are held liable in the second subsection, but towards another party. The last sentence in these sections is a reminder of the fact that the receiver can direct a claim towards the carrier under section 325 if the carrier is bound by a bill of lading.

Amongst the suggested improvements there are a few things that should be stressed. First and foremost a separate regulation for voyage- and time chartering should be made due to the structural differences under these contracts. If the parties actually responsible for carrying out the functions under the charter party as well as the contractual party could be caught this would be preferable. Concerning time chartering this solution is reached if it is the charterer as well as the carrier can be held liable in the second subsection in section 383. For voyage chartering this solution is harder to reach as the actual performer of the operational functions and the contractual party will not be the same person. As the contractual party is liable as per contract and a claim under this contract is possible the conclusion is that the carrier shall be liable by statute as this party would otherwise be free from all liability. Having a party responsible for carrying out functions related to the carriage falling outside the liability scope all together is not desirable. The solution in section 347 should therefore remain the same as it is today.

Looking into who caught by the definition of carrier the starting point for the evaluation is that each charter party should be assessed individually from the perspective of the party suffering the damage. In other words, "the carrier" is the carrier in the charter party under

which the damage occurs. For the performing carrier the situation is less clear. The legal position according to the legal wording and the preparatory works appears to be clear; the party actually performing the carriage is liable. The prerequisite for performance is the custody of the goods. This position is challenged by case law and especially by ND 2003.83 where the Supreme Court of Finland stretched this definition to cover more than one party by extending the definition to cover the party with contractual custody. This is an indication that the legal position is not necessarily in line with the practical structure. In conclusion it could be said that the position is that the liability of intermediate carriers are not covered by the maritime code and whether or not this is the wanted position could be further discussed.

Finally a few words on the upcoming use of sea waybill should to be said. The decisive point for the applicability of chapter 13 is that a transport document is issued, and it follows expressly from the definition in section 251 that this does not have to be a bill of lading. Chapter 14 does not open up for a similar approach as the term bill of lading is expressly used for defining the scope of application. As the practical use of the sea waybill as well as the function of it is similar to the one of the bill of lading the short comment to this is that I can't see why the carrier should be subject to stricter liability under a bill of lading than under a sea waybill.

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