SUPREME COURT OF NORWAY

J U D G M E N T

given on 17 December 2024 by a division of the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Aage Thor Falkanger
Justice Espen Bergh
Justice Knut Erik Sæther
Justice Christian Lund

HR-2024-2330-A, (case no. 24-044348SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 19 December 2023

MAN Energy Solutions SE	(Counsel Ola Haugen)
v.	
IMSK SE, under bankruptcy IMSK SE's bankruptcy estate	(Counsel Christian Østerdahl Poulsson, Thomas Sassan Farhang)

(1) Justice **Bergh:**

Issues and background

(2) The case concerns the choice of law for a non-contractual claim for compensation between the bankruptcy estate of a Norwegian shipping company and a German ship engine manufacturer.

(3) IM Skaugen ASA, later IMSK SE – hereafter IMSK – was the ultimate parent company in a Norwegian listed shipping enterprise.

(4) In 2000, IMSK entered into an agreement with a Chinese shipyard to build four new ships. The plan was to establish a cooperation with the US GATX Corporation (hereafter GATX) for financing and ownership of the ships. GATX and IMSK were each to own half of the ships through an underlying company. Therefore, the building contracts with the shipyard were shortly after transferred to Somargas Limited, a company registered in the Cayman Islands, which was owned 50/50 by IMSK and GATX.

(5) In 2001, another two shipbuilding contracts were entered into, this time between the company Vintergas Limited, also registered in the Cayman Islands, and the Chinese shipyard. Vintergas, too, was owned by IMSK and GATX. A total of six ships were thus involved.

(6) According to the shipbuilding contracts, IMSK or the company registered as the orderer, were to accept the supplier of "important components" and "critical systems", which included the main engine and the auxiliary engine. Next, the shipyard was to enter into the contracts with the chosen manufacturers.

(7) In September 2000, IMSK informed the shipyard that it wanted a specific type of engines from the German manufacturer MAN Diesel & Turbo SE, later MAN Energy Solutions SE – hereafter MAN. Prior to this choice, there had been extensive contact between representatives from MAN and the Norwegian subsidiary MAN Energy Solutions Norway AS – hereafter MAN Norway – and central individuals in the IMSK group. In addition to MAN, IMSK considered two other engine manufacturers.

(8) MAN entered into a contract with the Chinese shipyard for the sale of engines for the six ships. According to this contract, the engines were to undergo a Factory Acceptance Test (FAT), which is a test run with class approval carried out at a test stand after the engine is manufactured and before it is delivered for installation in the ships. The purpose is to document that the engine functions in accordance with the contract specifications, including meeting the factory's stated fuel consumption.

(9) The engines were manufactured at MAN's factory in Augsburg in Germany, and, in 2001 and 2002, FATs for all six engines were carried out in the factory's test pools. The first ship was delivered in October 2002.

(10) Subsequently, it has been revealed that companies in the MAN group had manipulated FAT results for years using software that made the fuel consumption appear lower than it actually was. The software enabling the manipulation of FAT results had been available since 1993.

(11) IMSK first became aware of the possibility of excess fuel consumption in the engines in 2012, when contacted by MAN regarding what the latter referred to as "indications of possible irregularities" upon delivery of the engines. At this time, a criminal investigation of MAN had already been initiated in Germany. In a German judgment of 28 March 2013, MAN was fined EUR 8.2 million. The judgment only addresses the manipulation of documentation for MAN engines sold from 2006 onwards. Possible manipulation prior to this was time-barred under German law.

(12) On 26 August 2015, IMSK filed a writ in Oslo District Court against MAN and MAN Norway, seeking compensation. Before this, any claims from GATX and its underlying companies against MAN had been transferred to IMSK.

(13) While the case was pending in the District Court, IMSK went bankrupt. The bankruptcy estate entered the case. The parties have since been IMSK SE's bankruptcy estate, and IMSK SE under bankruptcy proceedings. In the following, these two parties will also be referred to as IMSK.

(14) The action initially included several other engines, but these parts of the case were later rejected due to arbitration clauses in force, see the Supreme Court's order 10 October 2017, HR-2017-1932-A.

(15) In a judgment of 22 April 2022, Oslo District Court concluded that the conduct of both MAN and MAN Norway gave rise to liability. The companies were jointly ordered to pay IMSK NOK 363 million in compensation and to compensate IMSK's costs.

(16) The District Court decided the case under Norwegian law, under the assumption that this was agreed between the parties.

(17) MAN and MAN Norway appealed against the judgment in its entirety. IMSK appealed against the part concerning the calculation of compensation.

(18) On 19 December 2023, Borgarting Court of Appeal handed down a judgment in which MAN was ordered to pay USD 62 million in compensation, while MAN Norway was found not liable. MAN was also ordered to compensate IMSK's costs, while IMSK was ordered to compensate the costs of MAN Norway. The conclusion read as follows:

> "1. MAN Energy Solutions SE will pay USD 62,000,000 in compensation to IMSK SE's bankruptcy estate within two weeks of the service of this judgment.
>
> 2. MAN Energy Solutions Norway AS is not liable.
>
> 3. In legal costs in the Court of Appeal, MAN Energy Solutions SE will pay NOK 18,064,651 to IMSK SE's bankruptcy estate and IMSK SE under bankruptcy proceedings, jointly, within two weeks of the service of this judgment.
>
> 4. In legal costs in the District Court, MAN Energy Solutions SE will pay NOK 13,151,313 to IMSK SE's bankruptcy estate and IMSK SE under bankruptcy proceedings, jointly, within two weeks of the service of this judgment.

5. In legal costs in the Court of Appeal, IMSK SE's bankruptcy estate and IMSK SE under bankruptcy proceedings will, jointly and severally, pay NOK 10,245,923 to MAN Energy Solutions Norway AS, within two weeks of the service of this judgment.

6. In legal costs in the District Court, IMSK SE's bankruptcy estate and IMSK SE under bankruptcy proceedings will, jointly and severally, pay NOK 8,322,314 to MAN Energy Solutions Norway AS, within two weeks of the service of this judgment.

(19) The Court of Appeal, too, found that the case should be decided under Norwegian law. Unlike the District Court, it did not find sufficient evidence that the parties had agreed on this, but reached the same conclusion based on non-statutory ordinary conflict-of-law rules.

(20) MAN has appealed to the Supreme Court, challenging the Court of Appeal's application of the law, procedure and findings of fact. Leave to appeal has been granted concerning the application of the law and the findings of fact.

(21) IMSK has not appealed against the Court of Appeal's judgment in the dispute with MAN Norway. The judgment is thus final as concerns items 2, 5 and 6 of its conclusion.

(22) By the preparatory justice's decision 25 June 2024, appeal hearing was limited under section 30-14 subsection 3 of the Dispute Act to only address the Court of Appeal's application of the law in the choice-of-law issue. The decision established that – if the Supreme Court finds that the issues of the case are governed by Norwegian law – it may be necessary to set aside the Court of Appeal's judgment and refer the case to a new hearing in the Court of Appeal.

The parties' contentions

(23) The appellant – *MAN Energy Solutions SE* – contends:

(24) The Court of Appeal's has made an error of law in concluding that Norwegian law applies.

(25) In line with the Supreme Court's case law, the applicable law must be chosen based on more definitive rules. It is principally argued that the conflict-of-law rules for contracts apply because the harmful acts involve breaches of obligations during the negotiation phase – pre-contractual obligations.

(26) In the alternative, it is argued that the claim follows from a non-contractual obligation, so that the choice of law should be based on the law of the place where the damage occurred – *lex loci delicti*. Specifically, this is the place where the immediate effect materialised, which is not Norway. A shareholder's derivative loss is not relevant.

(27) The Court of Appeal made an error of law in building on the "Irma Mignon formula". Regardless, the Irma Mignon formula cannot be interpreted to address whether it was foreseeable that the loss would end up with the single shareholder in Norway.

(28) The respondents' contention that an agreement on the choice of law was made during the legal proceedings can clearly not succeed.

(29) MAN Energy Solutions SE asks the Supreme Court to rule as follows:

> "1. The Court of Appeal's judgment is set aside.
>
> 2. MAN Energy Solutions SE is awarded costs in the Supreme Court."

(30) The respondents – *IMSK SE's bankruptcy estate* and *IMSK SE under bankruptcy proceedings* – contend:

(31) The claim concerns a disposal loss. The harmful act consists of MAN concealing fundamental and extensive problems with manufacturing engines that met the specified consumption figures, and the company's long-standing, illegal practice of manipulating FAT results to conceal this.

(32) Principally, it is contended that during the District Court's hearing, it was agreed that the claim would be governed by Norwegian law. It is established law that the parties, after the dispute has arisen, have the opportunity to agree on the applicable law, and that such an agreement under the circumstances may manifest itself through their conclusive conduct.

(33) In the alternative, the applicable law must be chosen according to Norwegian conflict-of-law rules as they read in 2000, when MAN misled IMSK into choosing MAN as its engine supplier. Then, the applicable law for non-contractual obligations was chosen based on the "Irma Mignon formula".

(34) At that time, there was no harmonisation in the EU regarding conflict-of-law rules for non-contractual obligations. There is no basis for MAN's contention that the EU rules on jurisdiction related to the distinction between direct and indirect loss must be emphasised when considering Norwegian choice-of-law issues in 2000 in a case of non-contractual obligations.

(35) The Court of Appeal's application of the Irma Mignon formula is correct. The first and direct consequence of MAN's harmful acts is IMSK's choice of MAN. The choice was made by IMSK in Norway.

(36) The nature of MAN's acts also leads to the application of Norwegian law. MAN acted fraudulently both in the sale of engines to IMSK and in its deliberate attempt to have the claim time-barred under German limitation rules. When the claim is not time-barred under Norwegian law, it would be offensive to apply German law, which leads to the claim being time-barred.

(37) If, in this case, the Supreme Court were to attribute any importance to the principles in Rome II, the applicable law would be Norwegian also according to these principles. The place of effect is Norway.

(38) The principles related to pre-contractual liability in Rome II Article 12 are not applicable. There is no contractual relationship between the parties that may justify the application of these principles.

(39) IMSK SE's bankruptcy estate and IMSK SE under bankruptcy proceedings ask the Supreme Court to rule as follows:

> "1. The appeal is dismissed as concerns the choice of law.
>
> 2. The ruling on costs is suspended until the ruling that concludes the case."

My opinion

Has a binding agreement made on the choice of law?

(40) IMSK principally argues that during the District Court's hearing, there was agreement that the claim would be governed by Norwegian law, and that the parties in the District Court agreed to litigate the case under Norwegian law.

(41) MAN has emphasised that the company, also in the District Court, argued that the limitation issue was regulated by German law. As for the other issues raised in the case, the basis was that there were no significant differences between German and Norwegian law, and that, therefore, it was not necessary to address the choice-of-law issues. This was specified in a pleading to the District Court.

(42) Also in the Court of Appeal, IMSK's principal contention was that the parties had agreed on Norwegian law. The Court of Appeal states the following regarding this:

> "The Court of Appeal cannot see any basis for establishing that the parties have agreed that Norwegian law is applicable. The fact that the case was litigated under Norwegian law in the District Court, must be considered in the light of the reservation made by MAN during the case preparation in the District Court. In the Court of Appeal's view, this implies that MAN did not take a direct stand on the choice of law for the substantive issues. Therefore, the fact that MAN litigated the case under Norwegian law in the District Court, can hardly be considered a dispositive act. This is even more the case in the Court of Appeal, where MAN has presented evidence for further differences between Norwegian and German law."

(43) I agree with the Court of Appeal. In my opinion, no agreement has been made on the applicable law in this case. This means that the non-statutory conflict-of-law rules apply.

The basis for the claim – MAN's contention regarding the choice of law based on pre-contractual liability

(44) IMSK contends that MAN is liable under the non-statutory rules on non-contractual liability – the delict liability – and that incorrect information from MAN led to a disposal loss as IMSK was misled into choosing MAN over other suppliers.

(45) The basis for the claim differs slightly between the loss considered to be IMSK's own and the claim IMSK asserts based on the claims originally held by GATX or its underlying companies and later transported to IMSK.

(46) For its own loss, IMSK argues that the company must be considered a direct injured party, even though the loss is related to its shareholdings in other companies. For the transferred claims, IMSK seeks compensation for the loss allegedly suffered by GATX or underlying companies as the direct injured party.

(47) The Court of Appeal ruled in favour of IMSK on all counts. In its appeal to the Supreme Court, in addition to challenging the choice of law, MAN disputes the claim on various grounds. For IMSK's own claim, it is argued that IMSK as a shareholder is not protected under tort law, see for instance the Supreme Court ruling in Rt-2004-1816 *sign maker.*

(48) As concerns the choice of law, MAN principally contends that although the claim is referred to as a *delict* claim, it is essentially a claim for liability for acts committed in connection with contractual negotiations. It is argued that IMSK thereby is in fact asserting pre-contractual liability, with the effect that the conflict-of-law rules for contractual compensation applies.

(49) I cannot follow MAN in this. It was clear from the start that IMSK would not be a party to either the engine supply agreements or the ship-building contracts. As IMSK's claim is presented, it is clearly detached from contractual liability. Thus, there is no basis to apply the conflict-of-law rules for pre-contractual liability.

(50) I add that MAN's contentions on pre-contractual liability are closely tied to Article 12 of the Rome II Regulation – Regulation (EC) No. 864/200 – on the law applicable to non-contractual obligations. As I will return to, this Regulation did not enter into force until 2009. Article 12 must be considered as changing the law and thus has no relevance to the case at hand, which covers an earlier period.

Non-statutory conflict-of-law rules – the starting points

(51) Disputes on the choice of law in Norwegian courts must be resolved under Norwegian international private law.

(52) Previously, Norwegian legal practice was to decide choice-of-law issues based on an overall assessment designating the country with which the specific matter was most closely connected. This approach is often referred to as the *Irma Mignon* formula, after the judgment Rt-1923-II-58.

(53) However, there has been a shift in recent years, described as follows in HR-2019-2420-A paragraph 24:

> "Recently, there has been a shift towards developing more definite rules for various areas of law or groups of legal issues. These rules are often based on what typically gives a result that aligns with the country most closely connected to the individual matter. In this context, emphasis is placed on the choice-of-law solutions in EU law, even though Norway is not formally bound by them. Consequently, the application of the Irma Mignon formula is now limited to situations where it is not possible to establish a more definite rule for the relevant type of legal issue."

(54) The Supreme Court's reference to conflict-of-law rules in EU law primarily aims at two Regulations, known as Rome I and Rome II. I have already mentioned Rome II on the law applicable to non-contractual obligations. The Regulation known as Rome I is Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations.

(55) Norway is not bound by these Regulations. However, the Supreme Court has repeatedly stressed that provided we do not have conflicting legal rules, the consideration of legal unity suggests that, when deciding choice-of-law issues, we should emphasise the solution chosen by EU countries, see for instance Rt-2009-1537 *The bookseller in Kabul* paragraph 34.

(56) Since this case concerns a non-contractual obligation, Rome II will apply if the EU rules are to be considered. The main rule for such claims is found in Article 4 (1), which reads:

> "Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

(57) According to the provision, the law of the country in which the damage occurs – the place of effect – is the law applicable to non-contractual obligations, unless the Regulation states otherwise. Thus, the choice of law is linked to the *law of the place of damage*, while it is specified that the decisive factor is the place of effect and not the place of action.

(58) Before Rome II entered into force in 2009, there was no general regulation within the EU on the choice of law for non-contractual obligations. The significance of Article 4 (1) for damage caused *before* the Regulation entered into force is discussed in Rt-2011-531 *War criminal* paragraph 46:

> "Although the Regulation is not binding on Norway, it is established in *The bookseller in Kabul* (HR-2009-2266-A) paragraph 34 that the Regulation's conflict-of-law rule should be applied in Norwegian international private law to maintain legal unity with the EU. However, if follows from Article 31 that the Regulation only applies to events occurring after its entry into force on 11 January 2009. This, in turn, relates to the intention of the Regulation to change the law. The criminal acts in our case were committed approximately 17 years before the date of effect. This precludes a direct application of the Regulation. Due to the time factor, it is also difficult, in my view, to consider the Regulation's solution as a general principle for the choice of law in the present case."

(59) This case concerns alleged harmful acts committed in 2000, and the engines were supplied in 2002. This was several years before Rome II entered into force. Consequently, as in the *war criminal* case, the solution possibly deriving from Rome II Article 4 (1) cannot automatically form the basis for the choice of law.

(60) In my view, therefore, it is necessary to examine to what extent there was a basis, also before 2009, to choose the law of the place of damage as the applicable law for non-contractual obligations.

The place of damage as a basis for the applicable law for non-contractual in the early 2000s

(61) The Irma Mignon formula, as mentioned, stems from the Supreme Court's judgment in Rt-1923-II-58. That case involved a collision between two Norwegian ships that occurred outside Norwegian territorial waters, and the norm – or formula – was described as follows:

> "From my perspective, however, it seems logical to start from the principle that a matter ideally should be adjudicated according to the law of the country with which it has its strongest connection or to which it most closely belongs."

(62) In other words, an overall assessment is required to determine where the facts of the case have their strongest connection.

(63) The significance of the law of the place of damage was also discussed:

> "I am aware that the result I have reached, namely that Norwegian law should be applied here, hardly aligns with our prevailing doctrine. To my knowledge, the legal writers who have addressed this issue at all, have expressed that a shipowner's liability in connection with a collision should be determined according to the law of the place where the collision occurred, regardless of whether both ships are registered in the same other state."

(64) The Supreme Court refers to the previous view that the law of the country where the collision occurred – the place of damage – is decisive. In the specific situation that arose in the case, this was deviated from. However, the ruling does not exclude the possibility that the place of damage could still be central in the overall assessment that the judgment prescribes.

(65) Case law following the Irma Mignon judgment and up to the 2000s contains several examples of the Supreme Court applying the law of the place of damage. Among them are Rt-1938-691, Rt-1961-730, and Rt-1978-1062.

(66) In Rt-2009-1537 *The bookseller in Kabul*, this is stated in paragraphs 32 and 33:

> "If the choice of law does not follow from more definite rules, the case must be decided based on the legal rules of the country with which, after an overall assessment, the case is most closely connected (the Irma Mignon formula'). In an increasing number of areas of law, however, firmer rules have developed – often based on the 'Irma Mignon formula'.
>
> For non-contractual obligations, the main rule is that the case must be decided according to the law of the place of damage – *lex loci delicti*. This does not create any problems in cases where the place of action and the place of effect are in the same country."

(67) This was stated in 2009, shortly after Rome II entered into force. In my view, it can only be understood to mean that, at that time – and regardless of Rome II – a more definite rule was established prescribing the law of the place of damage for non-contractual obligations.

(68) Against this background, I conclude that the law of the place of damage applies in this case. However, this rule is not absolute. If an overall assessment based on the Irma Mignon formula demonstrates a closer connection with another country, that connection will be decisive.

Is the place of action or place of effect decisive?

(69) As highlighted in what I have just quoted from Rt-2009-1537, it is unproblematic to determine the place of damage when the place of action and the place of effect are in the same country. It can be slightly more complicated when the act is committed in one country and the effect occurs in another. However, this issue is resolved in Rome II Article 4 (1). As pointed out, decisive here is the place of effect – where the damage occurs.

(70) The system in Rome II must clearly apply as Norwegian law today. As far as I know, there is no older Norwegian case law directly addressing the choice between the place of action and the place of effect. However, legal literature from the period before Rome II suggests that the decisive factor under Norwegian law also in this period was the place of effect, at least as long as it was foreseeable to the wrongdoer that the loss might occur there. I refer to Helge J. Thue in Institute of Private Law, stencil series 111, *Norsk internasjonal obligasjonsrett, Erstatning utenfor kontraktsforhold* [Norwegian international tort law, non-contractual obligations], 1st edition 1986 page 28 and 2nd edition 2001 page 24, and *Gaarders innføring i internasjonal privatrett* [Gaarder's introduction to international private law] by Hans Petter Lundgaard, 3rd edition 2000, pages 267–268.

(71) Thus, in Norwegian international private law during the period decisive for this case, the law applicable to non-contractual obligations was based on the law of the place of effect.

The distinction between direct and indirect effect

(72) The EU conflict-of-law rules are based on a distinction between direct and indirect effects. It follows from the wording of Rome II Article 4 (1) that the place of effect is where the direct damage occurs, and it is irrelevant for the choice of law where indirect consequences of a harmful act may arise.

(73) Since EU law rules cannot be applied to this case, the question is whether Norwegian international private law in the early 2000s was based on a similar distinction between direct and indirect effects. I am not aware of any Norwegian case law on the choice of law that addresses this issue. However, in my view, case law related to the rules of jurisdiction may provide guidance.

(74) The Supreme Court's judgment in Rt-2011-897 *Marin Alpin* concerned the rules of jurisdiction in the 1988 Lugano Convention. According to Article 5 (3) of this Convention, a person domiciled in a contracting state could be sued "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

(75) In the judgment, the Supreme Court presents case law practice from European Court of Justice (ECJ) dating back to 1990, summarising as follows in paragraph 46:

> "I understand the ECJ case law to mean that, when determining where the damage must be considered to have occurred under Article 5 (3), only the immediate damage effects are relevant. The occurrence of consequential or indirect damage is not sufficient for the loss to be considered to have occurred within the meaning of the Convention."

(76) The ECJ case law related to the Brussels Convention, which applied between EU countries. However, the Supreme Court emphasised that, when interpreting the Lugano Convention, emphasis must be placed on the ECJ's interpretation of corresponding provisions in the Brussels Convention.

(77) The Lugano Convention applied as Norwegian law. For the rules of jurisdiction, it is clear from what is highlighted in *Marin Alpin* that the immediate – direct – place of effect was decisive already during the period concerned in our case.

(78) There are differences between the rules of jurisdiction and the conflict-of-law rules, which means that the interpretation – even if corresponding terms are used – will not necessarily be the same. A significant difference is that, when applying the rules of jurisdiction, one may often choose between several rules to establish jurisdiction. The starting point is the court of the defendant's domicile, which can always be relied on if no mandatory jurisdiction is established. As opposed to the rules of jurisdiction, the conflict-of-law rules have direct substantive significance.

(79) At the same time, it is essential that the conflict-of-law rules enhance foreseeability. This means that not every effect of a harmful act occurring in a country can serve as the basis for choosing that country's law for deciding the claim. There must be a delimitation, which should naturally build on the proximity between the harmful act and the resulting damage.

(80) For this delimitation – when determining the place of effect among several possible countries – I see no significant differences between the rules of jurisdiction and the conflict-of-law rules. In both contexts, the question is where the damage *occurred*. There are good reasons for emphasising the immediate – direct – effect, and to disregard more indirect effects.

(81) I find no evidence that this was different in Norwegian law during the period around the year 2000, which this case concerns. This is despite the distinction between direct and indirect damage only being clearly expressed through the rules of jurisdiction. As I have explained, even before Rome II, it was necessary to determine the place of effect before choosing the law applicable to non-contractual obligations. When there were several possible places of effect, the proximity between the harmful act and the damage was central, and for this assessment, the well-established rules of jurisdiction provided good guidance.

(82) Against this background, I conclude that in order to determine the place of damage in this case, the place of the immediate – direct – effect is decisive.

(83) Both parties have delved into recent international theory on the distinction between direct and indirect effects under Rome II Article 4. I will not address this for two reasons. Firstly, as explained, the ruling cannot build on a direct application of Rome II. Secondly, this case involves unique facts. I cannot see that the presented theory provides significant guidance for the delimitation that is necessary in this case.

(84) My view is thus that the determination of where the immediate effect has occurred must build on an individual assessment of the proximity between the harmful act and the alleged damage.

The assessment in this case

Choice of law based on the place of damage

(85) The harmful act alleged in this case is the lack of information from MAN that the engines did not meet the factory's stated fuel consumption, and deficiencies in the tests that, had they been known, would have affected the choice of engine supplier. When the applicable law is chosen based on the place of effect, it is not relevant whether this information was given in Norway or Germany.

(86) What must be considered is where the immediate effect of the harmful act occurred. IMSK contends that the effect was the choice of engine supplier that was made in Norway.

(87) I find it difficult to follow this. In my view, it seems contrived to claim that the loss occurred at the moment the engine supplier was chosen. Admittedly, this decision influenced the subsequent course of events, but it was only the first step in a broader process involving many parties, all of whom were located and acted outside Norway. At the time of IMSK's decision, no damage had physically materialised in any way. The process was not irreversible. For example, if the problems with the engines had been detected earlier, the loss could have been avoided. This holds true at least until the engines were delivered.

(88) Although MAN's influence, prior to the choice of engines, was directed at IMSK in Norway, the effect – the damage – did not occur already at the time of IMSK's decision. No financial loss arose for anyone until the engines were delivered.

(89) The fact that the engines lacked the properties that were reasonably expected undoubtedly provided a basis for an economic loss for the shipowning companies. However, there was no damage that immediately affected IMSK itself. It is true that IMSK could be affected through reduced payments from the foreign companies in which it had ownership interests, but this would clearly be an indirect effect.

(90) Therefore, I do not see that there is any immediate – direct – effect of MAN’s harmful act in Norway.

(91) For the loss asserted by GATX or underlying companies, this is particularly clear. Here, IMSK’s claim stems from the view that compensation for losses suffered by a foreign company, resulting from transactions and acts that occurred outside Norway, is nonetheless governed by Norwegian law because a crucial decision was made in Norway. Such a solution seems unnatural and contradicts the principle of foreseeability.

(92) My conclusion is, therefore, that the place of damage is not Norway. In this case, the main rule that the choice of law follows the place of damage does lead to the application of Norwegian law.

(93) Many factors indicate that the place of damage in this case is Germany. However, the case in the Supreme Court revolves around the choice between Norwegian and foreign law, and I therefore do not conclude on this point.

Does an individual assessment lead to a different choice of law than the law of the place of damage?

(94) As I have emphasised, the choice of the law of the place of damage cannot be considered an absolute rule. One must assess whether an overall assessment based on the Irma Mignon formula leads to a different result.

(95) I note that Rome II Article 4 (3) also allows for a different choice of law than the law of the place of damage in certain cases. This applies if the harmful act is "manifestly more closely connected" with another country. Since this case concerns matters before the Regulation entered into force, I will not delve into this provision.

(96) The Court of Appeal bases its ruling on the choice of law on the view that the circumstances of the case are most closely connected with Norway. I have a different view.

(97) The case concerns international legal relations. All relevant contractual relationships are between parties in countries other than Norway. Admittedly, IMSK was briefly in a contractual relationship with the Chinese shipyard, but this was terminated before the period in question. The ships were built abroad to operate outside Norway, and the engines were built and delivered outside Norway. When the choice of engines was made, it is, in my view, natural to see it as IMSK acting on behalf of the foreign companies that entered into the relevant contracts and were to receive the ships, including the engines. Such a representative relationship cannot be sufficient to create a "centre of gravity" forming a basis for deciding the claim under Norwegian law. This holds true even if the representative was an entity that appeared as the ultimate parent company. Here, the corporate and contract structures must be decisive.

(98) The Court of Appeal seems to have emphasised that MAN and the shipyard were aware that the choice of engines was made in Norway, making it foreseeable that a loss would occur in Norway. In my view, this alone is not sufficient to establish the applicable law. As mentioned, it may be a condition for viewing a country as the place of effect that it is foreseeable that damage will occur there. However, the foreseeability of an effect in a country is not sufficient for that country's law to apply. This holds particularly true when, as in this case, it involves indirect damage.

(99) IMSK contends that it must be significant for the choice of law that MAN acted fraudulently both during the sale of the engines and by deliberately attempting to have the claim time-barred under German limitation rules. Legally, this must be understood as a reference to the rules on "ordre public" reservations. This means that even if foreign law is applicable at the outset, it must yield to Norwegian law if foreign law leads to a result that strongly contradicts our sense of justice, see Rt-2009-1537 *The bookseller in Kabul* paragraph 37.

(100) I cannot see that "ordre public" considerations may lead to the application of Norwegian law in this case. Although, here, the German limitation rules give a shorter limitation period than Norwegian rules, it is difficult to see how applying them contradicts Norwegian sense of justice. This applies even when considering MAN's fraud during the sale. Also, I cannot see any indication in the Court of Appeal's judgment that MAN deliberately acted to have the claim time-barred under German law.

Conclusion and costs

(101) I have concluded that the Court of Appeal made an error of law in determining that the claim should be decided under Norwegian law. Therefore, the Court of Appeal's judgment must be set aside. In the new hearing, the Court of Appeal must reconsider the choice of law and decide the case based on this choice.

(102) As mentioned, the case in the Supreme Court does not address the relationship between IMSK and MAN Norway. The setting aside thus applies to items 1, 3, and 4 of the conclusion of the Court of Appeal's judgment.

(103) MAN is the successful party in the Supreme Court and is entitled to compensation for its costs under section 20-2 subsection 1 of the Dispute Act.

(104) A cost statement totalling NOK 1,986,443 has been submitted, with NOK 1,954,040 attributed to 378 hours of legal fees. A court fee of NOK 34,479 is added to this. The substantial size of the claim is partly due to the limited hearing of choice-of-law issues in the lower instances, necessitating a thorough review of extensive international and Norwegian sources. It has also been noted that the case is extensive, with a significant amount in dispute, and that the case in the Supreme Court has not been confined to the choice-of-law issue. The counterparty has not raised any objections to the claim.

(105) Based on the grounds provided, I have concluded that the costs are necessary, see section 20-5 subsection 1 of the Dispute Act.

(106) I vote for this

J U D G M E N T :

1. The Court of Appeal’s judgment is set aside with respect to items 1, 3 and 4 of its conclusion.

2. IMSK SE’s bankruptcy estate and IMSK SE under bankruptcy proceedings are jointly and severally liable to pay MAN Energy Solutions SE's costs in the Supreme Court amounting to NOK 2,020,922 within two weeks of the service of this judgment.

(107) Justice **Falkanger:**

Dissent

(108) I have partially reached a different conclusion than Justice Bergh.

(109) I agree with him that the parties cannot be considered to have agreed that the dispute should be resolved under Norwegian law. However, I have a different view as to which country's law should instead be applied to IMSK’s claim for losses related to its ownership interests in the underlying companies. Like the Court of Appeal, I believe that this issue must be decided under Norwegian law.

(110) As Justice Bergh emphasises, the choice-of-law issue must be decided under Norwegian international private law as it read at the time the alleged harmful act took place – in September 2000.

(111) I also agree with Justice Bergh that the case cannot be resolved based on principles of pre-contractual liability, and I support his reasoning for this. As I will discuss later, I also do not believe that decisive weight should be given to the choice of law in the underlying contracts.

(112) As for the development from the Irma Mignon case in Rt-1923-II-58 and until today, I refer to Justice Bergh's opinion. As he explains, that case prescribed "that a matter ideally should be adjudicated according to the law of the country with which it has its strongest connection or to which it most naturally belongs".

(113) The Supreme Court has consistently applied this open norm, right up until the adoption of Rome II in 2009. However, in some respects, the norm has been clarified and concretised – partly through the crystallisation of more definite norms for certain types of cases, and partly as it has become slightly clearer which factors are relevant and the weight they should be given. I agree with Justice Bergh, that according to Norwegian international private law during the relevant period, the law of the place of effect formed the basis for choosing the law applicable to non-contractual obligations.

(114) However, like the Court of Appeal, I cannot find any evidence that Norwegian international private law, in 2000, provided any guidance on a fine distinction between direct and indirect loss, as prescribed in Rome II Article 4 (1). The key issue was a broader assessment of which country was most closely connected with the matter.

(115) Nor does Justice Bergh build on the distinction in Rome II Regulation Article 4 (1), but finds that the rules of jurisdiction, which were already well established in 2000, provided good guidance for the choice of law. He notes that Article 5 (3) of the Lugano Convention 1988 distinguished between direct and indirect loss, and that a similar distinction had to be made when choosing the applicable law.

(116) I place slightly less emphasis on the rules of jurisdiction and case law in effect at the time. The considerations behind the rules of jurisdiction and choice of law are largely different. Today, there are legal bases for the two types of rules to interact with each other, but in the sources from around 2000, I find little support for such an approach. It is illustrative that Ivar Alvik, in *Lovvalg og jurisdiksjon for ikke-kontraktuelle erstatningskrav* [Applicable law and jurisdiction for non-contractual obligations], in the journal *Jussens Venner* 2005 issue 5–6 page 303, does not mention the rules of jurisdiction in his discussion of the choice of law. On the contrary, he maintains that the various considerations behind the rules of jurisdiction and choice of law lead to "very different legal solutions". He also holds that the answer will "differ greatly depending on whether we consider choice of law or jurisdiction". There is no mention of the Brussels I Regulation in his discussion of the choice of law.

(117) Still, within the broad assessment recommended under the Irma Mignon formula, it was necessary to emphasise the extent to which the loss was derivative. The conflict-of-law rules should enhance foreseeability, and the more derivative the claim, the less foreseeable it becomes. Whether and the extent to which the loss was derivative had to be included in the broader assessment.

(118) I will now more *specifically* consider our case, starting with IMSK's claim related to its ownership in the underlying companies.

(119) When assessing what constituted the harmful act and its effect, the starting point must be the contentions of the party seeking compensation. The possibility that others could have made claims on different grounds is therefore – as Justice Bergh also notes – irrelevant.

(120) IMSK's claims in the case at hand are based on liability for information provided to third parties. The contention is that MAN provided misleading information, that the information was meant for IMSK and that IMSK had a reasonable and justified basis to rely on this information. As I will discuss later, this has implications for determining the place of effect and the general connection with Norway.

(121) The Court of Appeal describes the source of the dispute as follows:

> "Against this background, the Court of Appeal concludes that MAN, during the sale of the Somargas engines, concealed that MAN had significant problems manufacturing engines that met the guaranteed fuel consumption, and that the company had therefore installed software that could manipulate the test results during the FAT."

(122) And later:

> "Based on the overall body of evidence, it must be concluded that IMSK was deliberately presented with FAT results that MAN employees in Augsburg knew were incorrect, and that concealed the excess fuel consumption the engines. Consequently, the Court of Appeal is in no doubt that MAN's misleading of IMSK in connection with the FAT was intentional."

(123) I have no basis to deviate from this description. The Court of Appeal thus assumes that MAN acted grossly negligently during the sale of the engines in 2000, and intentionally when the FAT tests of the relevant engines were carried out in Germany. In other words, it involved very serious and reprehensible acts on MAN's part. The company was also held criminally liable in Germany for some of these acts. In the judgment, MAN's manipulations are described as "planned and executed with high criminal energy". Based on the Court of Appeal's judgment, I further conclude that "MAN, probably to minimise its own liability or avoid legal action, provided as little information as possible to the customers". The result was that IMSK's claims would have been time-barred under German law.

(124) In Rt-2011-531 *war criminal* paragraph 55, it was noted that the wrongdoer's liability for the very serious acts would have been time-barred under Bosnian law. Although our case is far less severe, this shows that also such circumstances may be considered under the Irma Mignon norm.

(125) The promotion of the engines towards IMSK took place in both Germany and Norway. The effect of the act, however, was that IMSK decided to choose MAN's engines. In my view, IMSK already then suffered a loss that could have justified a claim. The fact the loss was not recognised until a few years later cannot be decisive.

(126) The grossly negligent misrepresentation was aimed directly at IMSK in Norway. Both the choice IMSK then made, and the subsequent announcement thereof, occurred in Norway. MAN's representatives were fully aware of this.

(127) About IMSK's role, the Court of Appeal states:

> "Overall, it is clear that IMSK retained control and ownership of the project. The fact that technical and commercial issues were largely handled by employees of Norgas Carriers AS, and that the ship-building contracts were assigned to or entered into by Somargas Limited and Vintergas Limited, does not change this.
>
> Based on the above, it is the Court of Appeal's opinion that MAN's misleading acts were aimed at the entire IMSK sphere, but primarily at the parent company IMSK and individuals who, in various contexts, represented the parent company."

(128) And further:

> "The assessment above shows that the project was driven forward and 'owned' by IMSK, which also made the investment decision. IMSK itself appointed MAN as its engine supplier, and the dialogue during the sales phase was between MAN and individuals acting on behalf of IMSK. IMSK was represented at the FAT, and the increased fuel consumption was the exact purpose of the fleet renewal, which included a transition to more fuel-efficient ships."

(129) I have no basis to deviate from this description, either. Whether IMSK also formally represented the underlying companies, is not relevant in my opinion. Nor is the fact that the decision from IMSK was forwarded by the Norwegian representative in Germany.

(130) As concerns foreseeability for MAN, the Court of Appeal states:

> "The main purpose of the conflict-of-law rules is to enhance foreseeability for the parties' legal position with respect to the substantive law applicable to the individual legal relationship, see Cordero-Moss (2021) page 526. For MAN, it must have been foreseeable that IMSK, which was the initiator and drove the Somargas project forward, would suffer financially due to MAN's acts, and that this would influence the choice of law. At the time of the damage, MAN could not have reasonably expected that German law was applicable; the financial loss would manifest itself in countries other than Germany, by the nature of the case."

(131) I agree.

(132) I further trust that the decision to choose MAN's engines was irrevocable for all practical purposes. I have no basis to conclude anything other than that the choice led to the Chinese shipyard almost immediately entering into negotiations and a contract with MAN for the delivery of the engines. Whether IMSK theoretically – had it realised the misrepresentation shortly after – could have stopped the delivery, is in my view irrelevant. The reality was that the choice had been made.

(133) Also, I do not place emphasis on the fact that it was the underlying companies that were in a direct contractual relationship with the Chinese shipyard. In reality, as the Court of Appeal writes, there can be no doubt that IMSK, through its investments and ownership positions, was the principal stakeholder in the project. This was obviously clear to MAN's representatives.

(134) The fact that the underlying agreements were governed by the laws of other countries is also not decisive. The case in Rt-1982-1294 involved a settlement between a Norwegian wholesaler and a German firm that had entered into an agreement for the exclusive dealership

of photo flash units, which turned out to be defective. After the German firm's unsuccessful claims for settlement, the Norwegian wholesaler sought compensation for lost reputation. Although the purchase relationship under the Sale of Movable Property Act of 3 April 1964 meant that the contract dispute was to be governed by German law, the claim had to be decided under Norwegian law. The situation was therefore different from that in our case. However, when the choice of law in an underlying agreement between the injured party and the wrongdoer was not decisive for further claims, the agreements in our case – to which IMSK was not a party – should also not be emphasised.

(135) My conclusion is that the effect occurred in Norway, and therefore that Norwegian law must be applied to the claims IMSK believes it had on its ownership interest in the underlying companies.

(136) The situation is different when it comes to the claim transferred from GATX. GATX operates from the USA and has no connection with Norway apart from its ownership interests in shipowning companies together with IMSK. Although GATX's possible loss is due to IMSK being misled in Norway, this is not sufficient to meet the requirements of the Irma Mignon formula. The fact that the claim was transferred to IMSK does not change this. I will not delve into which country's law should be applied to this claim.

(137) Against this background, I conclude that IMSK's claim for compensation for the loss of ownership interests in the underlying companies should be decided under Norwegian law.

(138) Justice **Lund:** I agree with Justice Falkanger in all material respects and with his conclusion.

(139) Justice **Sæther:** I agree with Justice Bergh in all material respects and with his conclusion

(140) Chief Justice **Øie:** Likewise.

(141) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The Court of Appeal's judgment is set aside with respect to items 1, 3 and 4 of its conclusion.

2. IMSK SE's bankruptcy estate and IMSK SE under bankruptcy proceedings are jointly and severally liable to pay MAN Energy Solutions SE's costs in the Supreme Court amounting to NOK 2,020,922 within two weeks of the service of this judgment.