THE SUPREME COURT OF NORWAY

On 10 October 2017, the Supreme Court gave order in

HR-2017-1932-A, (case no. 2017/136), civil case, appeal against order

I.M. Skaugen Marine Service Pte Ltd. (Counsel Sven Eriksrud)

v.

MAN Diesel & Turbo SE
Man Diesel & Turbo Norge AS (Counsel Henrik Boehlke)

V O T I N G :

(1) Justice **Normann:** The case concerns whether or not an action must be dismissed because the dispute is subject to arbitration, see the Arbitration Act section 7 subsection 1.

(2) On 21 May 2014, I.M. Skaugen SE and Skaugen Marine Services Pte Ltd. submitted a complaint to the conciliation board in Oslo. The conciliation board decided on 27 August 2014 after receiving a reply to suspend the case, and on 26 August 2015, the appellants brought an action to Oslo District Court against MAN Diesel & Turbo SE and MAN Diesel & Turbo AS claiming damages limited upwards to NOK 400 million. The claim relates to the supply of engines from MAN Diesel & Turbo SE. It is submitted based on the MAN companies' knowing submission of false information regarding the engines' fuel consumption in marketing and other sales campaigns, inducing I. M. Skaugen SE to enter into loss-generating contracts.

(3) I.M. Skaugen SE is a Norwegian listed gas shipping company. The appellants are part of the Skaugen group. Skaugen Marine Services Pte Ltd. – registered in Singapore – is a wholly-owned subsidiary of I.M. Skaugen SE, the group's parent company.

(4) MAN Diesel & Turbo SE produces diesel engines for ships. MAN Diesel & Turbo Norge AS is a Norwegian subsidiary. The companies are part of the Volkswagen group.

(5) In the following, I.M. Skaugen SE and Skaugen Marine Services Pte Ltd. will be jointly referred to as Skaugen or individually as Skaugen Norge and Skaugen Singapore respectively, whereas MAN Diesel & Turbo SE and MAN Diesel & Turbo Norge AS will be jointly referred to as MAN or individually as MAN Germany and MAN Norge respectively.

(6) In July 2000, Skaugen entered into a contract for the building of a series of special ships at the Chinese shipyard Zhonghua Shipyard – the Shipyard. The contract provides alternative sub-suppliers for a number of components on a so-called "Makers List". Skaugen was to a varying extent to be involved in the decision-making process leading to a final choice of suppliers. MAN was – together with two competitors – a supplier of interest, and the contract left it entirely to Skaugen to choose the engines.

(7) Fuel consumption is a substantial cost in the operation of a ship and a central factor when choosing engine suppliers. Before the supplier was chosen, several meetings were held between MAN and Skaugen, where MAN's representatives gave detailed information regarding the company's engines, including their fuel consumption.

(8) After having assessed the various offers, Skaugen wrote to the Shipyard announcing that MAN was its preferred supplier. The Shipyard announced shortly after that it had entered into a contract with MAN for the supply of four engines of the type in question. During the same autumn, two more engines were ordered. The engines will be referred to as the *Somargas engines*. All contracts were entered into between the Shipyard as buyer and MAN Germany as seller. The six sales contracts contain identical arbitration clauses. The engines were installed in six sister ships that were completed and supplied to Skaugen during the period 2001-2002.

(9) On 27 November 2006, Man Germany and Skaugen Norge entered into a contract for the purchase of two more engines. The engines were for various reasons never installed in any ship, but instead stored in Hamburg. The contract contains an arbitration clause. The engines will be referred to as the *Hamburg engines*.

(10) On 12 January 2007, Man Germany's Danish subsidiary, MAN Diesel A/S, entered into a contract with Skaugen Norge for the purchase of four two-stroke engines. These are produced under licence by the STX shipyard in South Korea. In 2010, the Danish subsidiary merged with Man Germany, and the latter is therefore now a party to the contract with Skaugen Norge. The agreement contains an arbitration clause. The engines will be referred to as the *two-stroke engines*.

(11) In a press release of 25 May 2011, the MAN group announced that there had been indications that so-called Factory Acceptance Tests (FATs) of the group's four-stroke engines sometimes disclosed irregular, manipulated test results with regard to fuel consumption. An internal inquiry was initiated, and the group notified German authorities and customers. Skaugen was notified by letters of 13 and 22 June 2012. The FAT case resulted in police reports and investigation.

(12) The so-called "FAT manipulation" is central to the case at hand. MAN had used a special software during the FATs, which are completed in connection with the delivery of the engines with the presence of the customer and the classification company. The software

made it possible for MAN to manipulate the test results, so that they corresponded to and did not exceed the fuel consumption figures provided before the contract was entered into.

(13) On 28 March 2013, sentence was passed in Augsburg, Germany, fining Man Germany EUR 8.2 million. It is set out in the judgment that MAN has paid settlement amounts to customers of a total of almost EUR 43 million.

(14) Skaugen too submitted a claim against MAN, and the parties negotiated a solution without entering into any contract. This resulted in more disputes between the parties.

(15) On 28 January 2015, Skaugen brought an action to the ordinary courts of Singapore. The action was allowed, but that decision is disputed. The action concerns the same claims as those submitted in Norway. No convention is entered into between Norway and Singapore on the recognition and enforcement of civil judgments, and the case does not raise any *litispendence* issues.

(16) As of today, three arbitral awards have been issued in the same set of cases that is comprised by the appeal to the Supreme Court. The arbitral awards in question are:

(17) Arbitration award of 15 December 2014 by ICC International Court of Arbitration, Copenhagen, between Skaugen Norge and Skaugen Singapore on the one side and Man Germany on the other – The settlement judgment: The case concerned whether Man Germany was bound by the settlement agreement with Skaugen regarding compensation for all losses incurred as a result of under-reporting of fuel consumption. The arbitration court concluded that no such agreement had been entered into.

(18) Arbitration award of 4 April 2017 by The Danish Institute of Arbitration, Copenhagen, between Skaugen Singapore and Man Germany regarding the two-stroke engines: MAN was the initiator of these arbitration proceedings and largely succeeded. But the arbitration court found that MAN had cancelled the contracts for the last engines and that Skaugen was entitled to a refund of the advance payments. This issue was finally resolved through the arbitration, and the claim for a refund was consequently abandoned by Skaugen during the district court's hearing of the case.

(19) In the arbitration case, Skaugen also claimed damages for the increased fuel consumption of the two two-stroke engines supplied. This claim, however, was dismissed by the arbitration court's order of 17 June 2016 for being submitted too late. These claims for damages are still a part of the dispute at hand. The Supreme Court has been informed that an action is brought in Denmark regarding the validity of this arbitral award.

(20) Arbitration award of 12 May 2017 by the International Chamber of Commerce, Stockholm, between Skaugen Norge and Man Germany regarding the Hamburg engines: Skaugen largely succeeded with its claims, and further claims relating to these engines have been abandoned. The Hamburg engines are thus no longer part of the case before the Supreme Court. No claim for damages was submitted in that case, as the engines were never supplied.

(21) On 16 March 2016, Oslo District Court gave order with the following conclusion:

> **"1. The claimants' claims relating to the Hamburg engines and the two-stroke engines are dismissed.**
>
> **2. The request for dismissal of the claims relating to the engines is disallowed.**
>
> **3. The determination of costs is postponed until a final decision is made in the case."**

(22) Man Germany and MAN Norge – the main appeal – and Skaugen Norge and Skaugen Singapore – the cross-appeal – appealed the district court's order to Borgarting Court of Appeal which, on 31 October 2016, gave order with the following conclusion:

> **"1. The case is dismissed in its entirety.**
>
> **2. I.M. Skaugen SE and I.M. Skaugen Marine Services Pte Ltd. will jointly and severally pay costs in the district court and the court of appeal to MAN Diesel & Turbo SE and MAN Diesel & Turbo Norge AS jointly in the amount of NOK 2 160 109 – twomillionononehundredandsixtythousandonehundredandnine – within 2 – two – weeks from service of the order."**

(23) The court of appeal agreed with the district court that Skaugen was bound by the arbitration clause in the contracts concerning the Hamburg engines and the two-stroke engines. As for the Somargas engines, the court of appeal concluded – as opposed to the district court – that Skaugen was bound by the arbitration agreements between the Shipyard and MAN Germany.

(24) Skaugen has appealed the court of appeal's order to the Supreme Court. On 28 February, the Supreme Court's Appeals Selection Committee referred the appeal in its entirety to hearing in chambers with five justices, see the Court of Justices Act section 5 subsection 1 second sentence.

(25) Except for the reservations for which I have just accounted regarding the arbitration cases, the case remains mostly the same in the Supreme Court as in the court of appeal.

(26) The appellants – *I.M. Skaugen SE* and *I.M. Skaugen Marine Services Pte Ltd*. – have mainly contented the following:

(27) The court of appeal has incorrectly concluded that the claim for damages must be dismissed.

(28) The claim submitted must be heard bearing since it is clear that MAN has committed serious fraud towards a number of its customers.

(29) In posterity, it has also turned out that the fraud towards Skaugen has been far more substantial than what MAN has been willing to admit.

(30) MAN has argued that no evidence is presented of any irregularities relating to the Hamburg engines, and that the two-stroke engines have not been affected by possible irregularities either. But on 12 Many 2017, a unanimous arbitration court concluded that the Hamburg engines have been subject to same type of fraud. Newly submitted reports on the two-stroke engines confirm the same for these engines.

(31) Skaugen has incurred great losses as a result of being induced by MAN to choose MAN's engines. It would be unprofitable to replace these engines that have a lifetime of 30 years.

(32) A massive breach has been committed of a general action norm by which Skaugen is protected. The breach of such norms constitutes the basis for liability in the case at hand.

(33) The claim for damages is exclusively based on non-contractual liability, and it does not arise from contractual obligations. It is the claimant's privilege to present the claim he wants the court to hear. The court must bear this in mind when deciding whether to allow the action.

(34) As for the two-stroke motors, an arbitration agreement exists between the parties. The question is whether this, correctly interpreted, implies that the legal relationship is subject to arbitration, see the Arbitration Act section 7 subsection 1 first sentence.

(35) The claim submitted is not inextricably tied to the contract, as held by the court of appeal. When interpreting the contract, one must first consider the situation at the time of its conclusion. The parties cannot have intended that the arbitration clause was to be understood to include claims that are based on massive and repeated fraud, which, incidentally, was committed before the contract was entered into.

(36) In any case, the very arbitration clause is invalid due to rules on contract law.

(37) The action against MAN Norge relating to the two-stroke engines may not under any circumstance be dismissed. MAN Norge is not bound by the arbitration clause in the contract between Skaugen and MAN Germany. The Norwegian subsidiary cannot be identified with the parent company in Germany.

(38) No written arbitration agreement exists between Skaugen and MAN concerning the Somargas engines. At the time of the contract, there was a strict requirement for agreements to be made in writing, see the Dispute Act section 452.

(39) Skaugen is not bound by the arbitration clause in the contract between the Shipyard and MAN Germany. Skaugen was unaware of the clause until it was presented by MAN in the this case. Skaugen is not bound by an agreement it has never seen or endorsed.

(40) The arbitration clause must in any case be interpreted based on the situation at the time of the contract. It cannot be understood to include the claim from Skaugen based on events that took place before the contract was entered into and with no connection thereto.

(41) The legal relationship between the Shipyard and MAN is not transferred to Skaugen, and Skaugen has not entered or based its claim on the Shipyard’s position towards MAN. No third-party agreement exists on which to base the claim.

(42) Arbitration is unsuited for dispute resolution when gross fault is exercised. The trust required for the use of arbitration is lacking in such cases. Arbitration under these circumstances is particularly questionable due to the absence of basic procedural guarantees. The clause must be interpreted in light of the requirements for a fair trial set out in the Constitution Article 95 and the ECHR Article 6.

(43) If Skaugen is to be referred to arbitration in China based on the contract between the Shipyard and MAN Germany, the effects thereof must be assessed. The arbitration clause can most likely not be "implemented", see the Arbitration Act section 7 first subsection second sentence. Arbitration in China will be denied since Skaugen is not a party to the contract containing the arbitration clause. For the same reason, a possible arbitral award will not be enforceable towards MAN Germany. The arbitration clause is otherwise unclear.

(44) I.M. Skaugen and I.M. Skaugen Marine Services Pte Ltd. have submitted this prayer for relief:

> **"1. Principally: The case is to be heard in court.**
>
> **2. In the alternative: The court of appeal's order is to be set aside.**
>
> **3. MAN Diesel & Turbo SE Augsburg and MAN Diesel & Turbo Norge AS are to be ordered to pay – jointly and severally – the costs of I.M. Skaugen SE and I.M. Skaugen Marine Services Pte Ltd. in all instances."**

(45) The respondents – *MAN Diesel & Turbo SE* and *MAN Diesel & Turbo Norge AS* – have mainly contended the following:

(46) The entire action brought to Oslo District Court is subject to arbitration. The court of appeal has correctly concluded that the action must be dismissed.

(47) The contracts relating to the two-stroke engines contain arbitration clauses, and they were entered into directly between Skaugen Norge and MAN Germany. Arbitration proceedings have already been held regarding the same claims as those submitted in this case.

(48) It is disputed that the court is bound by Skaugen's arguments relating to the basis for the claim. The Supreme Court has full jurisdiction to review whether Skaugen's claim is subject to arbitration, irrespective of Skaugen's arguments. Whether or not the claim based on non-contractual liability is subject to arbitration depends on how the agreement is interpreted.

(49) The arbitration clause is general and far-reaching. According to its wording, it comprises what Skaugen describes as pre-contractual non-contractual liability.

(50) The action against MAN Norge is also comprised by this clause. The claims against both companies have the same factual and legal basis. MAN Norge played a central role in the contract negotiations, and it is not decisive that the formal contract was entered into with the German parent company.

(51) The concern for preventing an evasion of the arbitration agreement suggests that it is not decisive that Skaugen contends that the claim is based on non-contractual liability, see the Supreme Court judgment in Rt-1993-777.

(52) The arbitration clause applies even if the main contract is invalid, see the Arbitration Act section 18 subsection 2.

(53) It is argued that Skaugen was the beneficial buyer of the Somargas engines although the contract was formally entered into between the Shipyard and MAN. The legal relationship between the two latter parties must be regarded as assigned to Skaugen, and the arbitration agreement along with it, see the principle in the Arbitration Act section 10 subsection 2. Although it had not been clarified that this could apply for contracts entered into before the Arbitration Act was adopted, there are strong reasons for arguing that arbitration agreements "tag along" in connection with a transfer of the material legal relationship. The concern for a uniform hearing, the "remaining party" to the arbitration agreement, the fact that case law has developed in this question and international sources of law suggest such a solution.

(54) As for the Somargas engines, the supply of MAN engines was, moreover, a result of a contract chain consisting of contracts between MAN Germany and the Shipyard, and next between the Shipyard and Skaugen Norge. Under these contracts, the engines are transferred from the producer to the end-buyer. This must have the result that Skaugen is bound by the arbitration clause included in the contract between the Shipyard and MAN Germany.

(55) It is sufficient for considering Skaugen bound that its owner should have known or had reason to familiarise with the document containing the clause.

(56) The fact that the claim is dealt with by arbitration is not contrary to the Constitution Article 95 of the ECHR Article 6. Arbitration does not imply a waiver of the right to a court hearing, and arbitration is a "trial". The Arbitration Act section 10 subsection 2 does not violate the ECHR Article 6.

(57) It is unfortunate if the courts when deciding on their own jurisdiction must consider a central and substantive issue. The parties may have the validity of an arbitral award reviewed later, see the Arbitration Act section 18.

(58) The respondents – MAN Diesel & Turbo SE and MAN Diesel & Turbo Norge AS – have submitted this prayer for relief:

> **"1. The appeal from I.M. Skaugen SE and I.M. Skaugen Marine Services Pte Ltd. is dismissed.**
>
> **2. I.M. Skaugen SE and I.M. Skaugen Marine Services Pte Ltd. are to be ordered, jointly and severally, to pay the costs of MAN Diesel & Turbo SE and MAN Diesel & Turbo Norge AS in the Supreme Court."**

(59) *My view on the case*

(60) The case concerns an appeal against an order, and the jurisdiction of the Supreme Court Appeals Selection Committee is governed by the Dispute Act section 30-6, see section 29-20. The court of appeal dismissed the case arguing that the courts lack jurisdiction, see the Dispute Act section 30-6 a. The Supreme Court has then full jurisdiction.

(61) In principle, the Arbitration Act only governs "arbitration taking place in Norway", see the Arbitration Act section 1 subsection 1 second sentence. The relevant arbitration clauses refer potential disputes to arbitration in Denmark and China respectively.

However, the Arbitration Act section 7 regarding legal proceedings is also applicable when the arbitration is taking place abroad, see section 1 second paragraph.

(62) The Arbitration Act section 7 subsection 1 reads as follows:

> **"The courts shall dismiss actions concerning legal relationships that are subject to arbitration, provided that a party requests dismissal no later than when addressing the merits of the case. The court shall hear the case if it finds that an arbitration agreement is invalid or that the agreement for other reasons cannot be implemented."**

(63) The question is whether the claims submitted by Skaugen in the writ to Oslo District Court constitute "legal relationships that are subject to arbitration".

(64) In principle, Norwegian courts must comply with Norwegian procedural rules – *lex fori* – when deciding on their jurisdiction, see the Supreme Court judgment in Rt-2008-1376 para 29. As set out in the same paragraph, however, this is only a starting point.

(65) When assessing whether a legal relationship is subject to arbitration abroad, and whether the arbitration agreement is invalid, one must seek to reduce the risk of a miscarriage of justice or double hearing. It would be highly unfortunate if an action is dismissed in Norwegian courts because the case, under Norwegian law, is regarded as subject to arbitration, whereas under the rules the arbitration court itself will apply, it falls outside the scope of the arbitration agreement. It would also be unfortunate if both Norwegian courts and the arbitration court, under different sets of rules, should find that they have jurisdiction in the dispute.

(66) The parties have addressed choice of law in these issues in their statements before the Supreme Court. But they have to a very small extent addressed which country's law to apply, and even less how the relevant national rules of law may contribute to resolving them.

(67) I will first consider the issues of choice of law relating to the two-stroke engines.

(68) The contract concerning these engines was entered into on 12 January 2007 between MAN Diesel A/S, Denmark and Skaugen Norge. The Danish company has later been merged into MAN Germany, which has acquired the Danish company's rights of obligations under the agreement.

(69) Pursuant to the relevant choice of law provision in the agreement's clause 12, the applicable law in the substantive issues is Danish law, whereas procedural matters are referred to the rules of the Copenhagen Court of International Arbitration.

(70) The dismissal issue has been litigated before the Supreme Court based on Norwegian law, and I base my continued review on that. I add that there is almost no difference between Danish and Norwegian law in this respect, thus the choice of law will not in any case be significant for whether the case involving the two-stroke engines should be dismissed.

(71) The appellants have argued that arbitration is not suited for dispute resolution in a situation where the claim for damages is based alleged fraudulent conduct.

(72) It cannot be excluded that the Constitution Article 95 and the ECHR Article 6 may have the result that Norwegian courts must allow the action despite the case being subject to arbitration, if arbitration proceedings will not meet the requirements for a fair trial set out in these provisions. This is by no means practical, and one cannot argue on a general basis that arbitration is a less worthy form of procedure. In this regard, I mention that arbitration was the agreed dispute resolution between the parties, and that arbitration is generally used to resolve disputes in commercial matters.

(73) In my view, the appellants' reference to the lack of disclosure cannot be decisive in this respect. The ordinary courts may also not apply force towards a party not complying with its obligation to present evidence in cases with where the parties have free disposal, as opposed to what is stated in the Dispute Act section 26-8 subsection 2 and Schei and others *Tvisteloven* [the Dispute Act], Commentary, second edition, page 964. The significance of this when assessing the evidence follows from the principle of free assessment of evidence.

(74) In this respect, I refer to the arbitral award given on 12 May 2017 at the International Chamber of Commerce, Stockholm, regarding the Hamburg engines. There, the arbitration court would allow the application of rules on reverse burden of proof if a party refuses to present evidence.

(75) In my view, this practice in arbitration cases is not very different from in cases heard in the ordinary courts.

(76) The appellants have contended that the claim for damages is based on non-contractual liability, i.e. it does not arise from any contractual obligations and it is not connected to the contract entered into. It is the claimant's privilege – the appellants argue – to present its claim, and the courts cannot review this.

(77) Pursuant to the Courts of Justice Act section 36 subsection 1, each court shall itself assess whether a case falls within its jurisdiction. As a starting point, the parties are not competent to decide whether a court has jurisdiction, see Bøhn *Domstolloven* [Courts of Justice Act], Commentary, second edition, page 124.

(78) When deciding the issue of jurisdiction, the court cannot only rely on the parties' contentions, but must review the facts and the law to the extent required, see the Supreme Court judgment in Rt-1987-531, stating:

> **"The court shall, when considering its jurisdiction, not only rely on the claimant's contentions, but must take a stand as to the factual matters of the case to the extent required to resolve the issue."**

(79) If the court, when deciding on its jurisdiction, should have an obligation to consider the contentions of one of the parties, this could lead to a defeat of the arbitration agreement based on the claimant's opinion on how the agreement is to be interpreted and the alleged bases for the claim, see also Born, International Commercial Arbitration, second edition, volume 1, 2014, page 1359 stating:

> **"… it is frequently said that a party may not defeat an arbitration clause by casting its claim in tort, rather than contract."**

(80) Whether or not the claim relating to the two-stroke engines is subject to arbitration must consequently be decided based on an interpretation of the arbitration agreement, see Norwegian Official Report 2001: 33 page 39.

(81) The arbitration clause reads as follows:

> **"This Contract shall be governed by the Laws of Denmark.**
> **Any dispute arising out of or relating to this Contract shall be finally settled by arbitration in accordance with the Rules of Procedure of the Copenhagen Court of Arbitration."**

(82) It has not been contended that the parties had a common subjective understanding of the clause. The solution must therefore be based on an objective interpretation of the its wording.

(83) The wording is general, and does not give room for reading limitations into it, see "[a]ny dispute … relating to this Contract".

(84) Whether or not the claim is comprised by the arbitration clause, must rely on an assessment of the context between the claim and the contract entered into, as is also the conclusion in the Supreme Court order in Rt-1993-777.

(85) The order concerned a dispute between SAS and Icelandair. Icelandair had contended that the claim submitted by the company was not comprised by an arbitration clause, because the basis for the claim was non-contractual liability – not contractual liability.

(86) The submission did not succeed. The Appeals Selection Committee did not study the distinction between non-contractual and contractual liability, but based its decision on an overall assessment of whether the cause of the damage was related to the contractual relationship.

(87) A similar approach seems to be applied in international arbitration, cf. Born, International Commercial Arbitration, op.cit. page 1359 et seq and House of Lords' decision of 17 October 2007, Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others.

(88) Irrespective of the fact that the alleged legal basis for Skaugen's claim for damages is non-contractual liability, this claim and the claims arising from the contract are closely connected.

(89) The fact that several claims for damages relating to the fraud have been submitted for arbitration by Skaugen Norge shows that this has been the view of the *company itself*. It is reflected in the arbitral award issued in Stockholm on 12 May 2017 regarding the Hamburg engines, that Skaugen also there used as basis for its claim that MAN Germany had given incorrect information regarding fuel consumption, and that the German company had tried to cover this up by manipulating the FATs. The distinction between non-contractual and contractual liability is not addressed.

(90) The same applies to the Danish arbitral award issued on 4 April 2017 regarding the two-stroke engines. However, Skaugen's claim for damages based on alleged fraudulent conduct with regard to two of the engines was dismissed for being submitted too late.

(91) The appellants have contended that the parties could not have foreseen that the arbitration clause would comprise incidents of fraud, at least not when the fraud – like in the case at hand – took place before the contract was entered into.

(92) In this respect, I note that the question whether fraudulent conduct has been exercised is in fact the question concerned in the claim for damages relating to the two-stroke engines. The question whether the claim has a chance of succeeding, is in itself an unsuitable criterion to determine whether the case is subject to arbitration. Such an approach requires that the court, when deciding on its jurisdiction, considers the underlying substantive issues. The issue must therefore be resolved based on the closeness of the connection between the claim and the contract, for which I have already accounted.

(93) Policy considerations also suggest that various disputes arisen in connection with the contract will be heard as one. I assume that his has been the purpose of the general wording, see the Supreme Court decision in Rt-1994-1489.

(94) Consequently, I have concluded that the claim relating to the two-stroke engines is comprised by the arbitration agreement.

(95) With reference to the Arbitration Act section 7 subsection 1 second sentence, the appellants have contended that the arbitration clause is invalid as it is contrary to the Contracts Act section 36, so that the action cannot under any circumstance be dismissed.

(96) It is an international principle that an arbitration agreement or an arbitration clause is an independent agreement separated from the underlying contract – the separation principle, see for instance House of Lords' decision of 17 October 2007, Premium Nafta Products Limited and others vs. Fili Shipping Company Limited and others, para 17.

(97) In Norwegian law, the principle is applied in the Arbitration Act section 18. This entails that the arbitration clause as a starting point will persist even if the underlying contract is found to be invalid.

(98) I cannot see that any invalidating factor of the underlying contract, if relying on the appellants' contentions, is transferable to the arbitration agreement. In practice, such international ship engine contracts will normally contain an arbitration clause. The arbitration clause in itself is not a result of possible fraudulent conduct from MAN's side.

(99) In my view, this submission can also not succeed.

(100) Skaugen has contended that the action against *MAN Norge* under any circumstance must be allowed, because Skaugen has not entered into any arbitration agreement with this company. MAN Norge is not bound by the arbitration agreement that Skaugen has entered into with the German parent company.

(101) MAN Norge is a separate legal entity, and even in cases concerning a corporate group, it is normally the *company* having entered into an agreement that is bound by it. Furthermore, the substantive main rule is that a group company is not liable for a different group company's obligations.

(102) But in my view, the question here is not whether the Norwegian subsidiary can be identified with the parent company, but whether there are circumstances suggesting that MAN Norge must be deemed to have entered into the arbitration agreement. As emphasised by Woxholt, in corporate group cases, there may be reason to determine the agreement threshold on less strict terms than in other cases where the contractual party and the third party have no contractual obligations towards each other, see Woxholth, *Voldgift* [Arbitration] 2013, page 329. I share this view. I also share his view that in this context, it is not a question of identification or of a variant of the theory on lifting of the corporate veil under company law.

(103) The basis for the claim in the case at hand against MAN Norge, is very similar to the basis for the claim against MAN Germany. In the writ, it is mentioned that the information regarding the relevant FATs was forwarded to the claimants by MAN Norge during the parties' negotiations, and that MAN Germany and MAN Norge are jointly and severally liable.

(104) The following is stated in the court of appeal's order in this respect:

> "**In the court of appeal's view, in our case there is a particularly close connection between the claim against the parent company, which is bound by the arbitration agreement, and the claim against the wholly-owned subsidiary, which has taken part in the negotiation of the contracts on behalf of the parent company. Although Skaugen contends that MTDN [MAN Norge] has committed independent tortious acts, the same legal basis and almost the same factual basis are, as the court of appeal sees it, asserted as basis for liability for MDT [MAN Germany] and MDTN [MAN Norge]. As concerns the claim in our case, MDTN must therefore also be bound by the arbitration clauses with regard to the purchase of the Hamburg engines and the two-stroke engines**."

(105) I share this view, and refer in particular to the fact that MAN Norge played a central ancillary role in the contract negotiations with Skaugen Norge before the agreement in question was entered into.

(106) Consequently, the part of the claim concerning the two-stroke engines must be dismissed.

(107) I will now turn to considering the claims relating to the *Somargas engines*.

(108) The arbitration clause – clause 17 in the contract for the purchase of the Somargas, engines entered into between MAN Germany and the Chinese shipyard – reads as follows:

> **"All disputes in connection with this Contract or the execution thereof shall be settled friendly through negotiation. In case no settlement can be reached, the case may then be submitted for arbitration to The China International Economic and Trade Arbitration Commission in accordance with the Provisional Rules of The International Chamber of Commerce in Paris. The Arbitration shall take place in Beijing (or in Shanghai, or in Shenzhen) and the decision of the Arbitration Commission shall be final and binding upon both parties; neither party shall seek recourse to a law court or other authorities**

to appeal for revision of the decision. Arbitration fee shall be borne by the losing party. Or the Arbitration may be settled in the third country mutually agreed upon by both parties."

(109) Here too, Skaugen contends that the company has submitted a claim based entirely on non-contractual liability. Although the clause is not as generally worded as the arbitration clause relating to the two-stroke engines, the claim's character of being based of non-contractual liability cannot in itself imply that it falls outside the scope of the clause. I confine myself to referring to my review of the claim relating to the two-stroke engines.

(110) But this arbitration clause regulates the contractual relationship between the *Shipyard* and *MAN*. The question here is not how far the arbitration clause reaches in the relationship between these two companies, but to which extent Skaugen was bound by it when submitting a claim directly against MAN.

(111) When determining whether Skaugen is bound by the arbitration agreement between MAN and the Shipyard, the question arises anew as to which country's law is applicable. The arbitration agreement may, when referring to MAN's general sales terms, be interpreted to comprise disputes regarding the validity of the arbitration agreement. However, this is not decisive for the choice of law in the question whether or not Skaugen is bound by it.

(112) This issue of choice of law has also not been subject to any particular hearing before the Supreme Court, and I find the issue debatable. The case has mainly been litigated based on Norwegian law, and nothing has emerged in the material presented suggesting that the choice of law is relevant for the dispute resolution. Consequently, I will apply Norwegian law.

(113) I add that foreign sources of law may be relevant by virtue of their argumentative value, especially in connection with arbitration where the Norwegian rules are by far adjusted to international rules.

(114) It also seems to be in line with an international arbitration trend that these issues are resolved based on what one may refer to as a "denationalised approach" and freer deliberations regarding the parties' common qualifications and fair expectations. I refer to Blessing, The Law Applicable to the Arbitration Clause, from the collection Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, 1999, pages 168-188. Blessing mentions that the question to which extent an arbitration agreement is binding on other parties than those immediately bound by it, is often subjected to a "denationalised approach", which has also partially influenced the parties' litigation before the Supreme Court to the extent Norwegian law has not been applied. Under any circumstances, Norwegian judges' view on which conclusions can be drawn from such a "denationalised approach", will to some extent be coloured by habitual Norwegian legal approach.

(115) With regard to international matters, it is concluded that a third party may also be bound by an arbitration agreement based on "implied consent". Born thus argues that a third party in most developed legal systems may be bound by an arbitration agreement without explicitly having consented to it, see Born, op.cit. page 1427 et seq. On pages 1428–1429 the following is set out:

> "**Where a party conducts himself as if it were a party to a commercial contract, by playing a substantial role in negotiations and/or performance of the contract, it may be held to have impliedly consented to be bound by the contract. In the words of the Swiss Federal Tribunal 'a third party who interferes in the execution of the contract containing the arbitration agreement is deemed to have accepted it, by way of conclusive acts'.**"

(116) As mentioned, Skaugen played a central role in the entry into of the contract between the Shipyard and MAN for the supply of the Somargas engines. Skaugen instructed the Shipyard to enter into the contract with MAN, and it is set out in the complaint to the conciliation board that the negotiations of the purchase of engines to the relevant ships were mainly carried out with MAN Norge where Skaugen was represented by its Norwegian management company. The complaint also states that the contracts for the purchase of engines were "formally" entered into with the Shipyard, but that Skaugen "was the legal and beneficial buyer of the engines".

(117) I am not disregarding the possibility that a third party also under Norwegian law may be bound by an arbitration clause by – like Skaugen – having actively participated in the contract negotiations. It seems natural that the party asserting its claim based on a contract between two third parties must at the same time respect any arbitration clause applicable between those parties.

(118) Nevertheless, I cannot see that this construction reaches as far as applying in a case such as ours, where Skaugen has not entered into the Shipyard's contract with MAN. In this respect, I mention that the Shipyard has not incurred a loss due to Skaugen's increased fuel costs, and thus has no claim against MAN. The Shipyard would only have had a claim if Skaugen first had directed its claim against the Shipyard, which in turn could have submitted a recourse claim against MAN. But according to the contract between Skaugen and the Shipyard, the latter's liability for increased fuel costs is limited upwards to a discount of USD 200,000, which is only a small fraction of the loss, alternatively cancellation of the contract which was not an option when Skaugen submitted its claim. Thus, the claim submitted by Skaugen is a different claim than the claim the Shipyard could have submitted against MAN.

(119) According to what I have now said, there is also no reason – as the case stands – to argue that there has been an "assignment" of the legal relationship between the Shipyard and MAN.

(120) The respondents have submitted as further evidence of Skaugen being bound by the arbitration agreement that there is a three-party constellation – a contract chain consisting of contracts between MAN Germany and the Shipyard, and then between the Shipyard and Skaugen Norge. This chain was established by Skaugen entering into a contract with the Shipyard for the supply of ships, and thereby acquired a right to instruct the Shipyard to supply the ships with specific MAN engines. Arbitration is agreed both in the direct contractual relationship between MAN Germany and the Shipyard and in the direct contractual relationship between the Shipyard and Skaugen Norge – however with different contents as to the place of arbitration and choice of law. This contract chain – the respondents contend – is sufficient for Skaugen to be bound by the arbitration clause between the Shipyard and MAN Germany.

(121) Woxholth points out that, in Norwegian law, a third party may be bound by an arbitration clause if there has been a three-party constellation from the start, and the third party has been aware of the arbitration agreement, see Woxholth, *Voldgift* [arbitration] page 342. It is also stated:

> "**In that case, the rule under contract law that he must be regarded as bound by the arbitration agreement, possibly as a third party agreement, and the principle in the Arbitration Act section 10 subsection 2 may both justify such a view."**

(122) The situation Woxholth describes seems to concern a case where a third party is trying to advance the claim of its legal predecessor, for instance in the form of a direct claim from a buyer against the seller' supplier. As it will have appeared, this is not the situation in the case at hand.

(123) When the arbitration agreement between MAN and the Shipyard was entered into, there was also a requirement that such agreements must be made in writing, see the former Dispute Act section 452 subsection 2. Skaugen has neither orally nor in writing endorsed the arbitration agreement between the Shipyard and MAN.

(124) Consequently, I have concluded that Skaugen cannot be regarded as being bound by the arbitration clause in the engine supply contract between the Shipyard and MAN Germany. The request for dismissal must thus be disallowed for the part of claim concerning the Somargas engines.

(125) MAN Diesel & Turbo SE Augsburg and MAN Diesel & Turbo Norge AS have claimed costs in the Supreme Court, whereas I.M. Skaugen SE and I.M. Skaugen Marine Services Pte Ltd. have claimed costs in all instances.

(126) The case is partially won and partially lost, and I have concluded that costs should not be awarded in any instance.

(127) I vote for this

O R D E R :

1. The appeal is dismissed for the part of the claim concerning the two-stroke engines.

2. The request for dismissal is disallowed for the part of claim concerning the Somargas engines.

3. Costs are not awarded in any instance.

(128) Justice **Noer:** I agree with the justice delivering the leading opinion in all material aspects and with her conclusion

(129) Justice **Arntzen:** Likewise.

(130) Justice **Bull:** Likewise.

(131) Justice **Endresen:** Likewise.

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

O R D E R :

1. The appeal is dismissed for the part of the claim concerning the two-stroke engines.
2. The request for dismissal is disallowed for the part of claim concerning the Somargas engines.
3. Costs are not awarded in any instance.