SUPREME COURT OF NORWAY

On 9 May 2018, the Supreme Court gave an order in

HR-2018-869-A (case no. 2017/1119), civil case, appeal against order, 2017/1124, civil case appeal against order

Assuranceforeningen Gard – gjensidig –
Stolt Commitment B.V.
Stolt Tankers B.V.
Stolt-Nielsen B.V. (Counsel Herman Steen
Counsel Kaare Andreas Shetelig)

v.

A Line Corporation Trust Company
Complex
Marship MPP GmbH Co. KG (Counsel Kristian Lindhartsen
Counsel Andreas Stang Lund)

(1) Justice **Normann:** The case concerns the question whether Norwegian courts have jurisdiction in an action brought directly against a Norwegian P&I insurer after a collision in foreign waters between ships registered abroad. The proprietors and managing owners of both ships are foreign companies. It also raises the question of whether the claimants may include in their action against the insurer a claim against the proprietor and the managing owner of the ship that are allegedly liable for the collision.

(2) On 16 December 2015, the cargo ship "Thorco Cloud" sank after colliding with the chemical carrier "Stolt Commitment" in Indonesian territorial waters in the Singapore Strait. Six crewmembers on "Thorco Cloud" died in the shipwreck. "Stolt Commitment" only suffered minor damage in the collision and was back in operation after the damage had been repaired.

(3) "Thorco Cloud" is registered in Antigua & Barbuda. The proprietor is A Line Corporation Trust Company Complex – hereinafter A Line. A Line is a company registered on the Marshall Islands and is a subsidiary of the Danish shipowner Thorco Shipping AS. Managing shipowner at the time of the collision was Marship MPP GmbH Co. KG –

hereinafter Marship. Marship had chartered the ship in accordance with a bareboat charter party. Marship is registered in Germany.

(4) A Line and Marship will be referred to as the Thorco companies unless a distinction between them is required.

(5) Standard Club Europe Ltd., England – Standard Club – is P&I insurer for "Thorco Cloud". The ship's hull insurer is Mitsui Sumitomo Insurance Co. Ltd., Japan – hereinafter Mitsui.

(6) "Stolt Commitment" is registered in Cayman Islands. The proprietor is Stolt Commitment B.V., and managing shipowner according to a bareboat charterparty is Stolt Tankers B.V. Both companies are registered in the Netherlands. The shipowner companies are part of the international Stolt group with offices in 26 countries. The parent company – Stolt-Nielsen Ltd. – is a listed company registered in Bermuda with headquarters in London. Stolt Tankers B.V., one of the four largest subsidiaries in the group, is the owner of 97 companies, one of which is Stolt Commitment B.V. Stolt Commitment B.V. and Stolt Tankers B.V. will be referred to as the Stolt companies unless a distinction between them is required.

(7) P&I insurer for "Stolt Commitment" is Assuranceforeningen Gard – gjensidig – hereinafter Gard – a Norwegian company with headquarters in Arendal. Hull insurer is Gard Marine & Energy Ltd. – Gard ME.

(8) Protection and Indemnity Insurance – P&I insurance – is the traditional name for insurance for third party liability and certain other losses in connection with ship management. The insurance stems from England and has kept its English name. The first P&I clubs were established in England in the mid-19th century and originated from mutual hull insurances. Gard is the largest player of a total of 13 clubs comprised by the International Group of P&I Clubs, and is exposed to claims from all over the world.

(9) On 5 January 2016, A Line, Marship, Standard Club and Mitsui brought an action before Aust-Agder District Court against Gard and Gard ME requesting a declaratory judgment on liability. In a pleading of 27 April 2016, the claimants requested an extension of the case by the inclusion of a claim against the Stolt companies as jointly liable parties.

(10) The Gard companies requested dismissal for lack of jurisdiction in Norway under the Lugano Convention; alternatively, that the court rule in their favour.

(11) The claimants withdrew their action against Gard ME in a submission of 7 June 2016.

(12) After an oral hearing of the dismissal issue, the district court concluded the following on 23 June 2016:

> **"1. Aust-Agder District Court will hear the action brought by A Line Corporation Trust Company Complex and Marship MPP GmbH Co. KG against Assuranceforeningen Gard Gjensidig.**
>
> **2. The action brought by Standard Club Europe Limited and Mitsui Sumitomo Insurance Co. Limited against Gard Gjensidig before Aust-Agder District Court is dismissed.**

3. The action brought by A Line Corporation Trust Company Complex, Marship MPP GmbH Co. KG, Standard Club Europe Limited and Mitsui Sumitomo Insurance Co. Limited against Stolt Commitment B.V. and Stolt Tankers B.V. before Aust-Agder District Court is dismissed.

4. Assuranceforeningen Gard Gjensidig will pay costs to A Line Corporation Trust Company Complex and Marship MPP GmbH Co, of NOK 723 060 – sevenhundredandtwentythousandandsixty within two weeks of the service of the order.

5. Standard Club Europe Limited and Mitsui Sumitomo Insurance Co. Limited will jointly pay costs to Assuranceforeningen Gard Gjensidig, of NOK 587 519 – fivehundredandeightyseventhousandfivehudredandnineteen within two weeks of the service of the order.

6. A Line Corporation Trust Company Complex, Marship MPP GmbH Co. KG, Standard Club Europe Limited and Mitsui Sumitomo Insurance Co. Limited will jointly pay costs to Stolt Commitment B.V. and Stolt Tankers B.V, of 587 519 – fivehundredandeightyseventhousandfivehudredandnineteen within two weeks of the service of the order. "

(13) The Thorco companies were permitted to bring their action against Gard at the company's general venue in Arendal pursuant to Article 11(2), cf. Article 9(1)(a) of the Lugano Convention.

(14) The district court found that there was no procedural basis for including the claim against the Stolt companies. In the court's view, it followed from Article 11(3) of the Lugano Convention that only Gard as the insurer had a right to include the two companies, and there was no other venue for the claim in Norway.

(15) The action brought by Standard Club and Mitsui was not admitted as the insurance companies could not be regarded as "injured parties" with a right under Article 11(2) of the Lugano Convention to bring an action directly against the P&I insurer.

(16) Gard appealed item 1 of the conclusion of the district court's ruling – the decision to hear the Thorco companies' action. The Thorco companies, in turn, appealed item 3 – the dismissal of the action against the Stolt companies. The court of appeal decided that the appeals were to be heard jointly, and by way of oral proceedings pursuant to section 29-15 subsection 2 of the Dispute Act.

(17) Agder District Court concluded as follows on 11 April 2017:

"I. In the appeal Assuranceforeningen Gard (Gjensidig) versus A Line Corporation Trust Company Complex and Marship MPP GmbH Co.:

1. The appeal against the district court's order is dismissed as concerns the court's decision to hear the case, see item 1 of its conclusion.

2. Assuranceforeningen Gard (Gjensidig) will pay costs of NOK 723 060 – sevenhundredandtwentythreethousandandsixty – in the district court and NOK 765 814 – sevenhundredandsixtyfivethousandeighthundredandfourteen – in the court of appeal to A Line Corporation Trust Company Complex and Marship MPP GmbH Co. within 2 – two – weeks of the service of the order.

II. In the appeal A Line Corporation Trust Company Complex and Marship MPP GmbH Co. versus Stolt Commitment B.V. and Stolt Tankers B.V.:

1. Aust-Agder District Court will hear the case.

2. Costs in the district court and the court of appeal are not awarded."

(18) The court of appeal assumed that Gard could be sued in Norway under the general jurisdiction provision in Article 2(1) of the Lugano Convention. Although it was then unnecessary to consider whether jurisdiction in Norway was consistent with Article 11(2), the court of appeal considered it nevertheless, and responded in the affirmative. In the action against the Stolt companies, the court of appeal found that the inclusion of the claims was in accordance with Article 6(1) of the Lugano Convention.

(19) Both Gard and the Stolt companies have appealed to the Supreme Court. On 28 August 2017, the Supreme Court's Appeal Selection Committee made two identical decisions, reading:

> **"The appeal in its entirety is to be heard by the Supreme Court before a panel of five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act. The proceedings are to follow the rules in the Dispute Act concerning appeals against judgments, see section 30-9 subsection 4 of the Dispute Act."**

(20) In pleadings to the Supreme Court of 19 March 2018, it was announced that one of the appellants in case no. 2017/1119 and in case no. 2017/1124, Stolt Tankers B.V. in an internal restructuring process had demerged with effect from 1 August 2017. The tanker business had been separated into a new company, taking over the name Stolt Tankers B.V. The rest of the business remained in the original company that was named Stolt-Nielsen B.V. The demerger was completed in accordance with Dutch company law. It has been stated that the new Stolt Tankers B.V. is fully liable for claims arising from the carrier business taking into account any limitation rules, including possible liability for damages in the case at hand, while Stolt-Nielsen B.V. is only liable for claims limited upwards to net assets remaining after the demerger.

(21) The appellants contend that the new Stolt Tankers B.V. must be joined as a party alongside the original company Stolt-Nielsen B.V., see section 15-3 subsection 2, cf. section 15-2 subsection 5 of the Dispute Act. The respondents have opposed this.

(22) In my opinion, section 15-3 subsection 2, cf. section 15-2 subsection 5 of the Dispute Act must be interpreted so that Stolt Tankers B.V. may be joined in the case without the respondents' consent, see Skoghøy, *Tvisteløsning* [dispute resolution], 3rd edition page 488. Stolt Tankers B.V. (new) is thus entered as a party to the case before the Supreme Court alongside Stolt-Nielsen B.V. and Stolt Commitment B.V.

(23) Appellant no. 1 – *Assuranceforeningen Gard - gjensidig* – contends the following:

(24) Article 2(1) of the Lugano Convention does not regulate the issue of jurisdiction for a direct action against Gard.

(25) Jurisdiction must be determined based on Section 3 of the Convention that provides a self-contained regulation of jurisdiction in insurance matters, also with regard to direct actions.

(26) This follows directly from the wording of Articles 2(1) and 8 of the Convention, systemic considerations, preparatory works to the Convention and case law. Norwegian and legal theory also holds that regulation of jurisdiction in insurance matters in Section 3 is self-contained and exclusive.

(27) The ruling of the Court of Justice of the European Union (the ECJ) 13 December 2007 in Case C-463/06 *Odenbreit* does not support the view that Section 3 supplements the Convention's general provisions, as the court of appeal has assumed.

(28) Jurisdiction under Article 2(1) in the action against Gard cannot be based on purpose considerations, as such an interpretation contravenes the wording of the Convention.

(29) It is not unreasonable that a shipping company operating in international waters is not permitted to bring an action before the court of the insurer's domicile. Direct actions against the insurer demand a special legal basis. Direct actions is permitted neither in England nor in Indonesia. As such, the Thorco companies are in the same position as the Stolt companies, and have no legitimate expectation of being entitled to bring an action in Norway.

(30) Article 11(2) does not establish jurisdiction for direct claims in Norway. The condition that "such direct actions are permitted" has not been met. The choice of law must be made before it can be considered whether to permit a direct action. The Insurance Contracts Act section 7-6 subsection 5 is not a choice of law rule, but a substantive law rule. The choice of law must be based on Norwegian non-statutory international private law rules.

(31) Any reliance on Regulation (EC) no. 864/2007 – Rome II – Article 18 is unfounded. Norway is not bound by the Regulation, and it differs substantially from Norwegian choice of law rules.

(32) In order to determine the applicable law where no legislation, customary law or other forms of firm rules regulating this issue exist, one must first identify the state to which the case is most strongly or naturally connected – *the Irma Mignon formula*.

(33) Direct actions are governed by tort law according to Norwegian choice of law rules. The underlying claim for damages is governed by Indonesian law – the law of the place where the harmful event occurred. The direct claim against the insurer is most strongly connected to the place where the harmful event occurred and to the underlying claim for damages, see the Danish Supreme Court ruling 9 October 2017 in Case 5/2015, *Assens Havn*.

(34) Section 7-8 subsection 2 of the Insurance Contracts Act is not an overriding mandatory rule. In the event it should be deemed to be such a rule, it must still come down to a concrete assessment whether the provision's terms are met in this specific case.

(35) It is not sufficient that a direct action is *generally* permitted under Norwegian law. The condition in Article 11(2) that a direct action must be permitted entails that it must have a legal basis *in the case at hand*.

(36) In its terms, Gard has departed from the Insurance Contracts Act and included a "pay to be paid" provision. A direct claim may only be brought if Stolt Tankers B.V. is insolvent, see section 1-3 subsection 2, cf. section 7-8 subsection 2 of the Insurance Contracts Act. The company is solvent and able to bridge-finance the claims from the Thorco companies.

(37) The courts must review the Thorco companies' submissions regarding insolvency to the extent necessary to determine jurisdiction, see section 36 of the Courts of Justice Act.

(38) Assuranceforeningen Gard – gjensidig – has submitted this prayer for relief:

> **"1. The case is to be dismissed.**
>
> **2. A line Corporation and Marship MPP GmbH. Co. KG are jointly to pay the costs of Assuranceforeningen Gard – gjensidig."**

(39) The appellants no. 2 and 3 – *Stolt Commitment B.V. and Stolt-Nielsen B.V. and the joining party Stolt Tankers B.V.* – contend the following:

(40) There exists no independent basis for international jurisdiction for the action against the Stolt companies, as they are not domiciled in Norway. The action against the Stolt companies must, however, also be dismissed even if the court agrees to hear the direct action against Gard.

(41) Article 6(1) on joint jurisdiction is not a legal basis for suing the Stolt companies, as jurisdiction for Gard cannot be established under Article 2(1). As contended by Gard, Section 3 provides self-contained jurisdiction rules in insurance matters.

(42) The Thorco companies may not sue the Stolt companies under Article 11(3), as this provision only allows the insurer to request that the insured or the policyholder be joined as a party to an action against the insurer. The linkage between (1) and (3) in Article 11 indicates that it is the right of the insurance company that is regulated. Also under Norwegian law, it is *the insurer* that is entitled to bring the insured into the case, see section 7-6 subsection 3 of the Insurance Contracts Act.

(43) Stolt Commitment B.V. and Stolt-Nielsen B.V. and the joining party Stolt Tankers B.V. have submitted this prayer for relief:

> **"1. The case is to be dismissed.**
>
> **2. A Line Corporation and Marship MPP GmbH. Co. KG are jointly to pay costs to Stolt Commitment B.V., Stolt-Nielsen B.V. and Stolt Tankers B.V."**

(44) The respondents − *A Line Corporation Trust Company Complex and Marship MPP GmbH Co. KG* – contend the following:

(45) In the action against Gard, Norway has jurisdiction under both Article 2(1) and Article 11 no. 2, cf. Article 9(1)(a) of the Lugano Convention. The order of the court of appeal is based on a correct application of the law.

(46) Article 2(1) is a general rule on jurisdiction based on domicile with a special status within the Convention. Pursuant to Article 3(1) of the Lugano Convention, exemptions from the

main rule on domicile jurisdiction require a specific legal basis.

(47) The wording in Article 11(2) does not support the argument that Section 3 provides self-contained rules on jurisdiction in direct actions.

(48) There is no reason for assuming that Section 3 is meant to exclude general domicile jurisdiction in insurance matters.

(49) In its judgment 13 December 2007 in Case C-463/06 *Odenbreit*, the ECJ found that the provisions in Section 3 are *a supplement* to the Convention's general provisions, and case law from the Court supports that it is contrary to the purpose of the Convention to deny a party the right to bring an action before the courts of the respondent's domicile.

(50) Hence, it is not required to assess whether the condition for bringing a direct action in Article 11(2) has been met in cases where the injured party brings an action before the courts of the insurer's domicile in accordance with Article 2(1) of the Lugano Convention.

(51) In the alternative, Norway has jurisdiction for the action against Gard under Article 11(2), cf. Article 9(1) a.

(52) To determine whether "such direct actions are permitted", the governing law must be determined. Section 7-6 subsection 5 of the Insurance Contracts Act is a choice of law rule prescribing Norwegian law when an action is brought directly against an insurer in Norway, see the preparatory works to the Insurance Contracts Acts.

(53) Should the Supreme Court conclude that section 7-6 subsection 5 of the Insurance Contracts Act does not regulate the choice of law, Norwegian law applies in the case at hand according to non-statutory choice of law rules.

(54) The subject to consider is the existence of an individual connection – *the Irma Mignon formula*. An assessment must be made based on an aggregate contacts test.

(55) Article 18 of Rome II, regulating direct actions, sets out that the injured party may choose between the law of the place where the harmful event occurred and the applicable law according to the insurance policy. The policy provides that it is governed by Norwegian law. It follows from Supreme Court case law that the rules prescribed in EU law should be applied if no alternative legislation exists.

(56) Should section 7-6 subsection 5 of the Insurance Contracts Act not be regarded as a choice of law rule, the provision may in any case be invoked in support of claims against Norwegian insurers brought in Norway with a legal basis in section 7-6 subsection 1 of the Insurance Contracts Act being be governed by Norwegian law.

(57) Direct claims are in any case "permitted" under Article 11(2), as section 7-8 subsection 2 of the Insurance Contracts Act is an overriding mandatory rule.

(58) The requirement that "such direct actions are permitted" indicates that the essential point is whether this is generally permitted under the law of the chosen state. Norwegian law is applicable, and Norwegian law generally permits direct actions, see section 7-6 subsection 1 of the Insurance Contracts Act. The meaning of this condition cannot be that

the court, without prejudice for subsequent ruling, must consider individual requirements for the direct claim to succeed as part of considering whether the court has jurisdiction. Insolvency is not a requirement for instituting proceedings, but a substantive condition subject to regular evidence rules when the direct claim is to be considered on the merits.

(59) Under the assumption that the courts agree to hear the action against Gard, it is contended that the Stolt companies may be joined in the proceedings.

(60) The Stolt companies may be joined in the proceedings in accordance with Article 6(1) of the Lugano Convention. The action against the Stolt companies is not an insurance claim, but a pure claim for damages governed by the provisions in Sections 1 and 2 on tort. The claims against Gard and the Stolt companies may be joined under Article 6(1).

(61) A number of issues concerning the conditions for liability will be the same in both cases, which implies a risk of irreconcilable judgments if the cases are to be decided by different courts. Considerations of costs and effective presentation of facts also suggest that the cases should be heard jointly.

(62) Under any circumstance, the Stolt companies may be joined in the proceedings with a legal basis in Article 11(3). Article 11(3) of the Lugano Convention must be read in the light of the general rules on joinder of causes of action.

(63) The considerations behind the rules on joinder of causes of action are also applicable here. Barring the injured party from bringing the injuring party into the case is not an intended consequence of Section 3. The purpose of Section 3 is to protect the weaker party.

(64) There is no reason for differentiating between this case and other cases involving alleged joint and several liability without insurance. The Stolt companies' submissions entail that the injured party's right to bring an action against the injuring party and the latter's liability insurer will be more limited than in other cases on joint and several liability for the same loss.

(65) It is contended that the wording in Article 11(3) is a reference to the chosen country's legal rules – Norwegian law in the case at hand. Pursuant to section 15-2, cf. section 15-1 of the Dispute Act, a joinder of actions is possible.

(66) A Line Corporation Trust Company Complex and Marship MPP GmbH Co. KG have submitted this prayer for relief:

"In the appeal from Assuranceforeningen Gard (Gjensidig) case no. 2017/1119:

1. The appeal is to be dismissed.

2. Assuranceforeningen Gard (Gjensidig), Stolt Commitment BV and Stolt-Nielsen BV are jointly to pay costs in the Supreme Court to A Line Corporation and Marship MPP GmbH Co. KG.

In the appeal from Stolt Commitment BV and Stolt-Nielsen B.V. case no. 2017/1124:

1. The appeal is to be dismissed.

2. Assuranceforeningen Gard (Gjensidig), Stolt Commitment BV and Stolt-Nielsen BV are jointly to pay costs in the Supreme Court to A Line Corporation and Marship MPP GmbH Co. KG."

(67) *My view on the case:*

(68) The appeal is a further appeal against an order, and the Supreme Court's authority is limited to reviewing the court of appeal's procedure and general interpretation of a written legal rule, see the Dispute Act section 30-6 b and c. "Written legal rules" also include international conventions, see Supreme Court rulings Rt-2012-1486 paragraph 25 and Rt-2012-1951 paragraphs 31 and 68. Thus, the Supreme Court may review whether the court of appeal has interpreted the Lugano Convention correctly when presenting Article 2(1) as a basis for bringing a direct action against Gard in Norway, and Article 6(1) as a basis for including the Stolt companies.

(69) Whether or not the actions may be brought before Norwegian courts, must be answered based on the rules in the Lugano Convention 2007. The Lugano Convention 1988 was, with effect from 1 January 2010, replaced by the Lugano Convention 2007, but the rules governing the issues in the case at hand have not been altered. Case law prior to 2010 is thus of interest.

(70) The Convention applies as Norwegian law, see the Dispute Act section 4-8, and prevails as *lex specialis* over conflicting national rules, see Supreme Court ruling Rt-2012-1951 paragraph 33 with further references to case law and preparatory works.

(71) The Lugano Convention is modelled on the Brussels Convention 1968 and Council Regulation 44/2001 – Brussels I – applicable between the EU member states. For the part of the Convention text relevant to our case, the rules in the Lugano Convention 2007 and Brussels I are substantively identical. That was also the case with the relationship between the Lugano Convention 1988 and the Brussels Convention, see Supreme Court ruling Rt-2012-1951, paragraphs 34 and 35 with further references.

(72) Pursuant to Protocol 2 Article 2 of the Lugano Convention, the courts must duly consider the rulings of the ECJ and those of national courts concerning Brussels I. EU case law is thus an important source when Norwegian courts are to interpret the Convention, see Supreme Court rulings Rt-2012-1951 paragraphs 34 and 35 and Rt-2015-129 paragraph 24.

(73) The court of appeal has based its decision on the view that the action against Gard may be heard pursuant to Article 2(1) of the Lugano Convention. I will first discuss whether the court of appeal has interpreted the Convention correctly when concluding that Article 2(1) may also be applied in an insurance case like the one in question, for which comprehensive rules are provided in Section 3. The question is whether Section 3 provides self-contained rules on jurisdiction in insurance matters in general, and, in particular, whether Article 2(1) may supplement Article 11(2) in direct actions.

(74) Article 2(1) establishes the Convention's main rule that actions can be brought before the courts of the state of the domicile "[s]ubject to the provisions of this Convention". This alone indicates that other rules in the Convention may prevail as lex specialis.

(75) Section 3, which contains Articles 8 - 14, deals with "Jurisdiction in matters relating to insurance". Actions brought directly against the insurer are dealt with in Article 11(2).

(76) Article 8 sets out that "[i]n matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Articles 4 and 5(5)" Articles 4 and 5(5) have no relevance to the issues raised in this case.

(77) The wording in Articles 2 and 8 suggests that Section 3 exhaustively regulates jurisdiction in insurance matters except for the express reservations in Article 8.

(78) In my view, systemic concerns suggest the same: Several of the general provisions have parallel rules in Section 3. For instance, Article 9(1) permits actions against the insurer in the courts of its domicile, and a parallel rule is found in Article 2(1). Under Article 10, concerning P&I insurance, the insurer may be sued in the courts of the place where the harmful event occurred, and a parallel rule is found in Article 5(3) on the right to sue in the courts for the place where the harmful event occurred in matters relating to tort. It is hard to understand the relevance of Section 3 if the general rules were applicable.

(79) Section 3 being a self-contained regulation of jurisdiction in insurance matters is also reflected in the preparatory works to the Lugano and Brussels instruments, see Jenard Report 27 September 1968, reproduced in the EC Official Journal 5.3.79, no. C 59/32 and in the Evrigenis and Kerameus Report paragraph 45, reproduced in the EC Official Journal, 24.11.86, no. C 298/01.

(80) I also find support for my interpretation in the House of Lords' ruling 16 December 1998 *Jordan Grand Prix Ltd. and others v. Baltic Insurance Group,* page 133 reading:

> **"The structure of the Convention, the language of Section 3, and in particular the express qualification contained in the words 'without prejudice to the provisions of articles 4 and 5.5' in article 7, demonstrate that Section 3 is a self-contained and exclusive code governing insurance."**

(81) The reference to "Article 7" relates to the current Article 8.

(82) The same perception is found in Norwegian legal theory, see Henrik Bull *Norsk Lovkommentar på nett*, online comments to the Dispute Act, notes to the Convention's Article 2, and Stein Rognlien *Luganokonvensjonens kommentarutgave*, online comments to the Lugano Convention 1993, page 163.

(83) The court of appeal has referred to the ECJ's ruling 13 December 2007 in Case C-463/06 *Odenbreit paragraph* 21, setting out that the regulation of jurisdiction in Section 3 are "additional" to the general provisions – in the Danish translation *føjes til* [are added to].

(84) The court of appeal has used this statement in support of its view that the rules in Section 3 apply *in addition* to Article 2(1). However, the statement is not clear, and, under any circumstance, I cannot see that *Odenbreit* has such relevance as given to it by the court of appeal.

(85) The court of appeal has also emphasised the purpose – the consideration for the weaker party, see *Odenbreit paragraph* 28. To this I would comment that the ECJ, in that case, referred to purpose considerations in support of an interpretation in line with the wording

in Article 11(2), cf. Article 9(1)(b), which had the consequence that the injured party in addition to "the policyholder, the insured or the beneficiary" could sue the insurance company in the courts of its domicile, see paragraph 26.

(86) In the light of the other legal sources in our case, I cannot see that purpose considerations carry much weight. I emphasise that if the purpose were to justify the application of Article 2(1), it would entail an interpretation contrary to the wording of the Convention.

(87) Against this background, I find that the court of appeal has erred in its interpretation of the Lugano Convention when concluding that Article 2(1) permits a direct action brought before the courts of Gard's domicile.

(88) The next question is whether the conditions for Norwegian jurisdiction are met under the Lugano Convention Article 11(2), cf. article 9(1)(a), as assumed by the court of appeal.

(89) Article 11(2) reads:

> **"Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted."**

(90) When determining the jurisdiction the court must first consider the choice of law, see Supreme Court ruling Rt-2002-180 *Leros Strength* page 185:

> **"When Article 10(2) provides conditions for direct actions, the intention is that this must be considered according to lex causae, the chosen law with regard to the substantive legal rules, see the Jenard Report, reproduced in Danish translation in *De Europæiske Fællesskabers Tidende*, 5.3.79, No. C 59/32 [EC Official Journal]. This implies that a choice of law must be made before it can determined whether jurisdiction is present. The jurisdiction provision must be considered in context with the substantive law pursuant to *lex causae*, and the injured party's possibilities of having the claim against the insurance company decided on the merits."**

(91) The Lugano Convention 2007 Article 11 corresponds to the Lugano Convention 1988 Article 10.

(92) The choice of law issue must be decided based on Norwegian international private law. Supreme Court ruling HR-2016-1251-A *Eimskip* paragraph 27 reads:

> **"To establish the choice of law – where there is no legislation, custom or other clear rules to regulate the issue – one must find the state to which the case after an overall assessment is most closely or strongly connected (the Irma Mignon formula). If the choice of law issue does not have a clear answer in Norwegian law, there may also be reason to closely consider EU's choice of law rules provided in the Rome Regulations. I refer to Supreme Court rulings Rt-2009-1537 paragraphs 32 and 34 and Rt-2011-531 paragraph 29 and 46 on the Irma Mignon formula and the application of the Rome Regulations in Norwegian law…"**

(93) I will first examine whether a statutory choice of law rule exists that may be applied to our case.

(94) The claim against Gard is rooted the Insurance Contracts Act section 7-6 subsection 1, cf. subsection 5. Subsection 1 permits the injured party to bring a direct action, and subsection 5 reads:

> **"An action against the insurers under this section must be brought in Norway unless anything else follows from Norway's obligations under international law."**

(95) The court of appeal has assumed that section 7-6 subsection 5 of the Insurance Contracts Act – in addition to being a substantive law rule – is a choice of law rule implying that Norwegian law is applicable in direct actions in Norway, regardless of where the harmful event occurred.

(96) My first comment to this is that the wording of the provision does not support such a view. The provision merely states that direct actions must be brought in Norway, and linguistically, it does not regulate the choice of law. In order for the provision, nevertheless, to be seen as a choice of law rule, this must be rooted in other sources of law.

(97) The court of appeal has based its view on statements in preparatory works and on purpose considerations. According to the preparatory works, the Insurance Contracts Act section 7-6 subsection 5 was based on the insurance companies' concern that the right to bring direct actions could lead to proceedings in countries with different legal traditions relating to actions for damages and the level of compensation. The committee drafting the Insurance Contracts Act found that this could be avoided to a certain extent by establishing by law that the extended right to direct action was made conditional on the action being brought in Norway, and the Ministry concurred, see Norwegian Official Report 1987: 24 page 149 and Proposition to the Odelsting no. 49 (1988–1989) page 83.

(98) The statements may support the view that the provision is based on the legislative intent that Norwegian law apply in all direct actions brought in Norway, regardless of where the harmful event occurred. However, I cannot see that these "clearly" require such a solution, as assumed by the court of appeal.

(99) In this connection, I mention that the Insurance Contracts Act Committee also stated that regulating choice of law in nonlife insurance matters would go beyond what it considered necessary, see Norwegian Official Report 1987: 24 page 37. This suggests that the non-regulation of choice of law issues was a conscious choice. If the intention was that section 7-6 subsection 5 of the Insurance Contracts Act should contain a choice of law rule, this ought to have been pointed out.

(100) Furthermore, I refer to the preparatory works to the Act on the choice of law in insurance, see Proposition to the Odelsting no. 72 (1991–1992) paragraph 5.2 "More on the current Norwegian rules" page 19, reading:

> **"If the contractual relationship is internationally connected, e.g. by the policyholder, the insured or the insured object or undertaking being located abroad, there are currently no positive provisions regulating the choice of law issue. This applies both when the insurance company is Norwegian and when it is a foreign company with a branch in Norway that functions as the insurer."**

(101) Hence, the Ministry found that we do not have any explicit legal provisions regulating choice of law. This, too, indicates that the Insurance Contracts Act section 7-6 is not a choice of law rule.

(102) Against this background, I find that the court of appeal erred in its interpretation of the law when concluding that the Insurance Contracts Act section 7-6 subsection 5 contains a choice of law rule. As I see it, the provision alone does not solve the choice of law issue. However, the intent of the legislature may nevertheless be relevant in the choice of law issue, to which I will revert shortly.

(103) In my view, the Supreme Court is not competent in the case at hand to assess whether the court of appeal's result can be upheld on a different basis. Here, I refer to Supreme Court ruling Rt-2005-1476 paragraph 14, where the Supreme Court's Appeal Selection Committee explains this limitation in further detail:

> **"The interpretation of the law also comprises determining which considerations are relevant when the interpretation entails an assessment based on discretionary criteria, and deciding whether the court of appeal has made a sufficiently broad assessment. The Committee refers to Schei, *Tvisteloven* [the Dispute Act], 2nd edition page 1085 and to Skoghøy, *Tvisteløsning* [Dispute resolution] page 965. The application of the law to the specific facts cannot be reviewed."**

(104) The specific balancing of the various considerations – the very result of the discretion – is thus not to be reviewed by the Supreme Court. In the case at hand, the court of appeal has decided the choice of law issue on the wrong legal basis. When the application of the law to the specific facts cannot be reviewed, it follows that the Supreme Court cannot assess whether the court of appeal's result could have been upheld on different grounds, see Skoghøy, *Tvisteløsning* [Dispute resolution], 3rd edition, page 1265 with reference to Supreme Court ruling Rt-1985-1036. The Supreme Court can only review whether the legal basis applied by the court of appeal is correctly interpreted.

(105) Against this background, the order of the court of appeal must be set aside. In its new trial, the court of appeal must assess whether the choice of law follows from a different, firmer rule, or if one must fall back on an overall assessment in accordance with the *Irma Mignon formula*, see Supreme Court ruling HR-2016-1251-A *Eimship* paragraph 27. In both cases, the legislative intent of section 7-6 subsection 5 of the Insurance Contracts Act is crucial.

(106) It is thus not for the Supreme Court in the context of the present case to assess how the condition in Article 11(2) of the Lugano Convention "permitting" direct actions is to be interpreted when Norwegian law is chosen.

(107) The right to include the Stolt companies in the case depends on whether legal action against Gard can be brought in Norway. As I have concluded that the order in the case between Gard and the Thorco companies must be set aside, the same must apply to the court of appeal's order in the appeal case between the Stolt companies and the Thorco companies.

(108) The appellants have claimed costs in all instances. Taking into account that they have demanded that the action be dismissed for lack of jurisdiction, and not set aside, my conclusion is that neither of the parties have succeeded in full or to a significant degree, see section 20-2 of the Dispute Act. In my view, there is also no basis for awarding costs under section 20-3 or section 20-4. Following an overall assessment, I conclude that costs should not be awarded in any instance.

(109) I vote for this

O R D E R :

In case no. 2017/1119:

1. The order of the court of appeal is set aside.

2. Costs are not awarded.

In case no. 2017/1124:

1. The order of the court of appeal is set aside.

2. Costs are not awarded.

(110) Justice **Bull**: As opposed to Justice Normann, I believe it is clear from section 7-6 subsection 5 of the Insurance Contracts Act that a direct action brought in Norway by an injured party against a P&I insurer is governed by Norwegian law. Whether or not one finds that section 7-6 subsection 5, stating that a direct action under section 7-6 must be brought in Norway, is also a choice of law rule, or that such a choice of law rule derives from the legislative intent, is a matter of taste in my view.

(111) As pointed out by Justice Normann, section 7-6 subsection 5 was added due to the insurance companies' concern that the right to bring direct actions could lead to proceedings in countries with different legal traditions relating to actions for damages and the level of compensation. The intent was to avoid such proceedings by making a direct action conditional on being brought in Norway.

(112) The level of compensation is however determined by the legal system governing the claim. The intent of section 7-6 subsection 5 is thus only achieved to a limited extent through a jurisdiction rule – and hardly at all if the direct claim, in a choice of law context, is regarded as a tort claim. That would entail that the choice of law, also before Norwegian courts, is established according to the principle of application of the law of the country where the harmful event occurred. And there would be very limited scope for applying the *ordre public* exception under these circumstances.

(113) From this, I believe one may derive a legislative intent that direct actions against a P&I insurer in Norwegian courts are governed by Norwegian law.

(114) Justice Normann has pointed out that the legislature desisted from including choice of law rules in the Insurance Contracts Act, without this being a weighty counter-argument in my view. The statements in the relevant preparatory works concern general and statutory choice of law rules. They cannot prevent single provisions on direct claims from being considered to require a specific solution to the choice of law issue for such claims.

(115) Thus far, on a practical level, I follow the court of appeal's interpretation of the law.

(116) In "Rule 90", Gard has a clause in its terms of contract stating that even if the agreement is governed by Norwegian law, the Insurance Contracts Act does not apply. "Rule 87" contains a "pay to be paid clause", which excludes direct claims. However, under section 1-3 subsection 2 of the Insurance Contracts Act, one cannot "contract out of" section 7-8

subsection 2 stating that direct claims in any case may be brought against the insurer when the insured is insolvent. When applying the requirement in Article 11(2) of the Lugano Convention that "such direct actions are permitted", the question becomes whether the court must verify if the insured is insolvent before it decides whether it has jurisdiction.

(117) The court of appeal found that since in Norwegian law, this is a substantive condition for the claim to succeed and not a condition for allowing the action, the same must apply when Article 11(2) is to be applied by Norwegian courts. Here, my view differs. I read this to mean that *even if* the conditions for direct claims in the applicable legal system, in isolation, must be understood as substantive conditions, they are under Article 11(2) to be understood as conditions for allowing the action. Why then "stop halfway" and omit to consider also the insolvency condition as a condition for proceedings?

(118) I find, nonetheless, that the appeals must be dismissed, as my view on the consequences of this condition not being met differs from that of Justice Normann. I agree with the court of appeal that Norwegian courts' jurisdiction in this case follows from Article 2 of the Lugano Convention.

(119) It is true that Chapter II Section 3 of the Lugano Convention on jurisdiction in insurance matters is self-contained. As pointed out by Justice Normann, this has been established in a number of rulings by the ECJ and by legal theory.

(120) But these rules cannot be more self-contained than what they provide for themselves. When Article 11(2) states that "Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted", it is, in my view, natural to take the provision at its word: If such direct actions are not permitted, Article 8 does not apply either, which is in fact the provision stating that the provisions in Section 3 – with a couple of exceptions – are exhaustive in insurance matters. The argument that such direct claims concern insurance matters within the meaning of the Convention can thus not lead to a different result. I do not see this as a restrictive interpretation of the provision.

(121) As far as I can see, this particular issue has not previously been dealt with in case law or in legal theory. The issue is generally irrelevant because the Convention's Chapter II Section 3 itself contains a rule that the insurer can always be sued in the courts of the state of the insurer's domicile. This has made it possible to formulate Article 8 in so absolute terms. Yet, the wording in Article 11(2) makes it possible to disregard Article 8 in a case like the one we are dealing with.

(122) The practical consequence of this is that Gard can be sued in the courts of the state of its domicile in accordance with the Convention's basic rule in Article 2 – as the company was, and as the Convention forces everyone else to accept. But the company could not have been sued in courts of the claimant's domicile. Such a right can only be derived from the separate provisions on insurance matters in Chapter II Section 3, more specifically Article 9(1)(b).

(123) Whether a foreign P&I insurer, in accordance with Article 5(3), could also have been sued in Norway if the harmful event had occurred here is a question that does not need to

be answered in the context of this case. This would in any case presuppose that such a direct action would have had to be regarded as covered by "matters relating to tort".

(124) In my view, the reservation "[s]ubject to the provisions of this Convention" in Article 2 cannot give any other result as long as Article 11(2) reads as it does with respect to the application of Article 8.

(125) It may seem inexpedient to permit proceedings in the domicile state under Article 2 when the condition in Article 11(2) – as I interpret it – for falling outside the special jurisdiction rules in insurance matters, is that direct actions are not permitted: Why permit an action that will not succeed? However, it is not a condition under the Lugano Convention that also other requirements for instituting proceedings must be met. Under Norwegian law, one must also assume that the insolvency condition in section 7-8 subsection 2, cf. section 1-3 subsection 2 of the Insurance Contracts Act is not a condition for proceedings at all, but a substantive condition for the claim to succeed. If one disregards the very particular provision in Article 11(2), which here in a way "transforms" a substantive requirement of insolvency for the insured to a condition for proceedings, it is not consistent with the system of the Lugano Convention to let the prospects of success dictate whether jurisdiction exists.

(126) As emphasised by the court of appeal, it is also inexpedient to consider such an insolvency requirement when the court early on is to establish whether it has jurisdiction. The same may apply to any other conditions for direct action under other countries' law. The consequence of my reading of Article 11(2) is that if the action is brought in the domicile state of the P&I insurer, it is unnecessary to consider specifically the conditions for direct action as part of the review of the court's jurisdiction.

(127) As I see it, purpose considerations also suggest that Article 2 applies in a case like the one at hand. The special jurisdiction rules in insurance matters are not there to protect the insurers, but their counterparties. The intent of these rules can thus not have been that an insurer cannot even be sued in the courts of its domicile, as everyone else must accept. The ECJ's judgment 13 December 2007 in Case C-463/06 *Odenbreit*, concerning a slightly different issue relating to the interpretation of Article 11(2), demonstrates in my view that the Court takes the provision for its word – the way I believe I do in my interpretation of the reference to Article 8 in Article 11(2) – when this is in accordance with the protective intent of the provisions.

(128) My conclusion is that Gard under any circumstance can be sued in the courts of the state of its domicile under Article 2. With such a standpoint, it is necessary to consider whether the Lugano Convention permits the inclusion of the Stolt companies in the proceedings at Gard's domicile in Arendal, as concluded by the court of appeal.

(129) When assuming that the action against Gard has its legal basis in Article 2, this question may be answered based on Article 6(1) on the right of joining several defendants in the proceedings when the action is brought in the courts for the place where any of them is domiciled. However, the claims must be so closely connected that it is desirable to hear them jointly to avoid the risk of irreconcilable judgments resulting from separate proceedings. The court of appeal has concluded that this condition is met.

(130) The Stolt companies contend that the action against Gard has been brought in Norway primarily to make it possible to sue the Stolt companies here. In this regard, I refer to the ECJ's judgment 11 October 2007 in Case C-98/06 *Freeport*, establishing in paragraphs 51-54 that as long as the claims are so closely connected that it is expedient to hear and determine them together to avoid irreconcilable judgments, there cannot be yet another requirement that the co-defendants must not have been joined in the case only to prevent that their cases are decided by a different court. Secondly, it follows from Case C-103/05 *Reisch*, the ECJ's judgment 13 July 2006, that a co-defendant may be introduced to the case in accordance with Article 6(1) even if the action against the defendant being sued at his domicile court has already been dismissed. Hence, Article 6(1) is applicable even if the action against Gard has been brought primarily to make it possible also to sue the Stolt companies in Norway.

(131) Against this background, it is not necessary for me to consider whether it would have been possible to include the Stolt companies in the action against Gard if the action against Gard had had a legal basis in Article 11(2). But with my view on the application of Article 2 and Article 6(1) in this case, it would be a paradox if the Stolt companies could not also have been included if the action against Gard were permitted under Article 11(2). I will therefore say a few words in that regard.

(132) First of all, the need to avoid irreconcilable judgments is of course the same.

(133) The right to introduce other defendants would then seem to depend on Article 11(3), which states that "[i]f the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them". At the outset, the purpose of this provision is probably to enable the insurer to include the policyholder or the insured. It is possible that the German version, using the term "Streitverkündung", is limited to this possibility. If so, the consequence must be that Article 11(3) cannot prevent the alleged injuring party from being included under Article 6(1) when the action – like here – is brought against the insurer in the courts of the insurer's domicile. The claim against the alleged injuring party is not an insurance claim, but a regular tort claim. There is no reason why Section 3 on insurance matters should have a limiting effect on such actions.

(134) The wording in the Norwegian version and – as far as I can see – also in the English, French, Danish and Swedish versions seems more open in terms of reading Article 11(3) also to permit the injured party to include the alleged injuring parties in the case against the insurer.

(135) Apart from that, I cannot see that Norwegian law regulating direct actions – which under the circumstances must be the provisions in the Insurance Contracts Act – should prevent this. They do not regulate this issue.

(136) There are a couple of English rulings reflecting such an interpretation of Article 11(3). These are [2009] EWCA Civ 1191 *Maher*, ruling 12 November 2009, and [2015] EWCA Civ 598 *Keefe*, ruling 17 June 2015, both given by England and Wales Court of Appeal. The latter is currently pending before the UK Supreme Court, which has submitted several questions to the ECJ. The questions seem to be based on the premise that Article 11(3) in principle allows an injured party to include the alleged injuring party – they only

ask on which terms.

(137) If Article 11(3) is to be read in this manner, it becomes possible to include alleged injuring parties in the case against the insurer also when the action has not been brought in the courts of the insurer's domicile. That was the situation in the two English cases. It is not obvious that this should be possible, as the right to introduce the injuring party would then extend beyond Article 6(1). However, if it is not possible, the result of that must be that one falls back on reading Article 11(3) as a provision on the insurer's right to introduce the policyholder and the insured in the proceedings, with the consequence that the provision – and Section 3 – do not at all regulate the injured party's right to introduce the injuring party.

(138) In other words, I cannot see that Article 11(3) – to the extent Article 11(2) gives the injured party a right to bring a direct action against the insurer – constitutes an argument against my interpretation of Article 11(2).

(139) Against this background, I vote for a dismissal of the appeals.

(140) Acting Justice **Sverdrup:** I agree with the justice delivering the leading opinion, Justice Normann, in all material aspects and with her conclusion.

(141) Justice **Bergsjø:** Likewise.

(142) Justice **Tønder:** I agree with Justice Normann that the question of Norwegian jurisdiction is exclusively governed by Article 11(2) of the Lugano Convention. With respect to the choice of law issue, I agree with Justice Bull. I have, too, concluded that the court of appeal's order must be set aside, as I – on the same grounds as Justice Bull – find that the court of appeal must consider whether the insolvency requirement in section 7-8 subsection 2 of the Insurance Contracts Act has been met.

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

O R D E R :

In case no. 2017/1119:

1. The order of the court of appeal is set aside.

2. Costs are not awarded.

In case no. 2017/1124:

1. The order of the court of appeal is set aside.

2. Costs are not awarded.