



SUPREME COURT OF NORWAY

J U D G M E N T

given on 14 May 2019 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Bergljot Webster
Justice Ingvald Falch
Justice Espen Bergh
Acting Justice Sven-Jørgen Lindsetmo

HR-2019-912-A, (case no. 18-154904SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 25 June 2018

I.

Kuehne + Nagel AS

(Counsel Yngve von Ahnen)

v.

Axa Corporate Solutions
Nexans Norway AS
CNA Insurance Company Ltd

(Counsel Trond Hatland)

II.

Gjensidige Forsikring ASA
Pentagon Freight Services AS

(Counsel Frithjof Herlofsen)

v.

Kuehne + Nagel AS

(Counsel Yngve von Ahnen)

- (1) Justice **Falch**: The case concerns liability for damage to goods during carriage that took place partially by road and partially by sea. The issue is whether such liability is determined by the Road Transport Act or the Maritime Code.
- (2) *The course of action*
- (3) In November 2014, Nexans Norway AS (“Nexans”) was to carry a cable made for remote steering of subsea vessels from its production plant in Rognan in Nordland county to a buyer in Wallsend outside Newcastle in England. The cable had a length of an excess of 3.3 kilometres and was wound on a steel drum. The total weight was almost 20 tonnes.
- (4) The first part of the carriage – from Rognan to Risavika near Tananger in Rogaland county – took place by road and was performed by a carrier engaged in particular by Nexans. This stage is not relevant to the dispute at hand.
- (5) On 10 November 2014, Nexans engaged Kuehne + Nagel AS (“KN”) for the further carriage to the buyer in England. The companies have cooperated since 2004, and the cooperation is formalised in a frame agreement from 2014. The cable drum arrived at KN’s terminal at Risavika harbour on 13 November 2014.
- (6) KN engaged Pentagon Freight Services AS (“Pentagon”) as sub-carrier. Pentagon in turn, then operating under the name Aquatran AS, engaged three sub-carriers to perform the actual assignment.
- (7) At KN’s terminal, the cable drum was loaded onto an open trailer. On 15 November 2014, a lorry driver from Kåre K. Lode AS drove the trailer to Sea-Cargo AS’s (“Sea-Cargo”) dock in Risavika. The stretch is around two kilometres and mainly follows public road.
- (8) The trailer with the cable drum was then pulled onboard Sea-Cargo’s ship MV Norrland by the shipping company’s crew. The ship left the harbour on 15 November at 7:50 p.m. heading for Immingham on the east coast of England. The distance is 380 nautical miles, and normal sailing time is around 20 hours.
- (9) Upon arrival in Immingham, the plan was to have the trailer with the cable drum picked up by an English truck company and carried on to the buyer in Wallsend. This is a stretch of around 260 kilometres.
- (10) Around two hours after the departure, MV Norrland was hit by strong winds and waves, which made the ship heel up to 35 degrees. The shipmaster registered at around 10 p.m. that the cable drum had loosened from the trailer and fallen over another trailer loaded with windows. The ship arrived in Immingham after approximately 31 hours in service. The parties agree that the cable was damaged beyond repair.
- (11) On 25 November 2014, Nexans filed a complaint to KN reserving the right to claim compensation for the damaged cable. The parties did not reach an agreement.
- (12) *Former proceedings*
- (13) On 17 February 2016, the cable owner Nexans and its insurer Axa Corporate Solutions (“Axa”) brought an action against the carrier KN before Oslo District Court claiming compensation for the damaged cable and reimbursement of certain costs. Nexans and Axa

invoked the liability rules of the Road Transport Act, contending they were entitled to compensation for their entire loss due to the respondent's gross negligence.

- (14) KN responded by invoking the liability rules of the Maritime Code, arguing no negligence had been displayed. KN urged the court to find in its favour in return for payment of an amount lower than that claimed.
- (15) KN also brought a recourse claim against its sub-carrier Pentagon and the latter's insurer Gjensidige Forsikring ASA ("Gjensidige"), demanding payment for any compensation KN might be ordered to pay in the main action. Pentagon and Gjensidige requested a judgment in their favour in return for covering the compensation KN had accepted to pay. The cases were consolidated for joint hearing.
- (16) In its judgment of 3 January 2017, Oslo District Court found that the liability rules of the Road Transport Act are applicable, but that the exception in section 4 subsection 2 is not. The district court set the limitation of liability in the Road Transport Act aside, since gross negligence had been displayed. Nexans and Axa therefore succeeded in their claims, with some adjustments. In the action for recourse, KN succeeded in its claim that Pentagon and Gjensidige pay the compensation KN had been ordered to pay in the main action. Costs were awarded to the winning parties.
- (17) KN appealed the judgment in the main action, and Pentagon and Gjensidige appealed the judgment in the action for recourse, to Borgarting Court of Appeal. The court of appeal allowed CNA Insurance Company ("CNA") – Axa's co-insurer – to enter as respondent in the main action. On 25 June 2018, the court of appeal gave judgment with the following conclusion:

"In the main action:

- 1. **A change is made to item 1 of the conclusion of the district court's judgment that Kuehne + Nagel AS is to pay compensation to Nexans Norway AS, AXA Corporate Solutions and CNA Insurance Company Ltd, with the addition of 5 % interest on the amount in the conclusion's letter a), calculated from 23 March 2015. The amount must be paid within two weeks of the service of the judgment.**
- 2. **Kuehne + Nagel AS is to pay compensation to AXA Corporate Solutions and CNA Insurance Company Ltd. of NOK 56 382 – fiftysixthousandthreehundredandeightytwo – with the addition of 5 % interest from 21 June 2017 until payment is made. The amount must be paid within two weeks of the service of the judgment.**
- 3. **Kuehne + Nagel AS is to pay costs in the district court to Nexans Norway AS, AXA Corporate Solutions and CNA Insurance Company Ltd. jointly of NOK 1 200 000 – onemilliontwohundredthousand – within two weeks of the service of the judgment.**
- 4. **Kuehne + Nagel AS is to pay costs in the court of appeal to Nexans Norway AS, AXA Corporate Solutions and CNA Insurance Company Ltd. jointly of NOK 825 894 – eighthundredandtwentyfivethousandandninetynine – within two weeks of the service of the judgment.**

In the action for recourse:

- 1. **A change is made to item 1 a) of the conclusion of the district court's judgment in the action for recourse, that a five-percent interest accrues on the amount from 23 March 2015.**

2. **Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly and severally to pay compensation to Kuehne + Nagel AS of NOK 56 382 – fiftysixthousandthreehundredandeightytwo – with the addition of a five-percent interest from 21 June 2017 and until payment is made.**
3. **Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly and severally to compensate Kuehne + Nagel AS for costs it is ordered to pay in the district court and the court of appeal of NOK 2 025 894 – twomillionandtwentyfivethousandeighthundredandninetyfour – with the addition of statutory default interest from the due date until payment is made.**
4. **Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly and severally to compensate Kuehne + Nagel AS for costs it is ordered to pay in the district court and the court of appeal in the main action of NOK 886 635 – eighthundredandeightysixthousandsixhundredandthirtyfive – with the addition of statutory default interest from the due date until payment is made.**
5. **The appeal against item 4 of the conclusion of the district court’s judgment in the action for recourse is dismissed.**
6. **Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly and severally to pay costs in the district court and the court of appeal of NOK 115 700 – onehundredandfifteenthousandsevenhundred – to Kuehne + Nagel AS.**
7. **The due date for payment of the amounts in items 1 – 6 of this conclusion is 2 – two – weeks from the service of the judgment.”**

- (18) The court of appeal found, like the district court, that the liability rules in the Road Transport Act are applicable, and that the exception in section 4 subsection 2 is not. The court of appeal also found that the limitation of liability had to be set aside due to the gross negligence. The court adjusted the actual measurement to some extent.
- (19) KN has appealed the judgment in the main action, and Pentagon and Gjensidige have appealed the judgment in the action for recourse, to the Supreme Court. It is contended that the liability rules in the Maritime Code – rather than those in the Road Transport Act – are applicable. This part of the appeal concerns the application of the law. KN also invokes the limitation of liability in the Maritime Code. This assessment requires findings of fact beyond those made by the court of appeal.
- (20) In its response, Nexans contends that the court of appeal’s judgment is correct. In the alternative, Nexans contends that if the Maritime Code is applicable, its limitation of liability must be set aside.
- (21) On 8 November 2018, the Supreme Court’s Appeals Selection Committee granted leave to appeal with regard to the applicability of the Road Transport Act and section 4 subsection 2 of the same Act. Apart from that, leave to appeal was refused. At the preparatory meeting, it was made clear that if the Supreme Court should conclude that liability must be determined by the Maritime Code, the court of appeal’s judgment will most likely be set aside. In that case, the court of appeal must consider the scope of the liability rules in the Maritime Code.
- (22) *The parties’ submissions*
- (23) The appellant in the main action and respondent in the action for recourse – *Kuehne + Nagel AS* – contends:

- (24) The Road Transport Act is only applicable if the transport as a whole appears as goods traffic by road, see section 1 of the Act. That is not the case here. First of all, KN's assignment does not contain any elements of road transport in Norway. Secondly, under the frame agreement between Nexans and KN, the Maritime Code governs the sea transport. The bill of lading that was issued, is not decisive. And thirdly, the sea transport appeared as the dominant part of the transport. The Road Transport Act is therefore not applicable, with the consequence that liability is determined by the Maritime Code.
- (25) If the Road Transport Act is applicable as a starting point, liability must still be determined by the Maritime Code due to the exception in section 4 subsection 2 of the Road Transport Act. The loss was not caused by the road carrier, and the incident could only have occurred onboard the ship.
- (26) Kuehne + Nagel AS has submitted these prayers for relief:

"In the main action

Principally:

1. The court is to find in favour of Kuehne + Nagel AS in return for payment of compensation to CNA Insurance Company Ltd in the amount of SDR 39,929.20.
2. Nexans Norway AS, AXA Corporate Solutions and CNA Insurance Company Ltd are to pay Kuehne + Nagel AS's costs in the district court, the court of appeal and in the Supreme Court, with the addition of statutory default interest from the due date until payment is made.

Alternatively:

1. The court of appeal's judgment is to be set aside.
2. Nexans Norway AS, AXA Corporate Solutions and CNA Insurance Company Ltd are to pay Kuehne + Nagel AS's costs in the district court, the court of appeal and in the Supreme Court, with the addition of statutory default interest from the due date until payment is made.

I the action for recourse

Principally:

1. The appeal is to be dismissed.
2. Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly to pay any costs that Kuehne + Nagel AS is ordered to pay to Nexans Norway AS, AXA Corporate Solutions and/or CNA Insurance Company Ltd in the main action, with the addition of statutory default interest from the due date until payment is made.
3. Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly to pay Kuehne + Nagel AS's costs in the main action with the addition of appeal fee, provided that Nexans Norway AS, AXA Corporate Solutions and CNA Insurance Company Ltd – jointly or severally – are not ordered to pay Kuehne + Nagel AS the same costs, with the addition of statutory default interest from the due date until payment is made.
4. If the appeal succeeds, Pentagon Freight Services AS and Gjensidige Forsikring ASA are to pay compensation to Kuehne + Nagel AS of NOK 64 580, with the addition of default interest from the due date until payment is made.
5. Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly to pay Kuehne + Nagel AS's costs in the district court, the court of appeal and the Supreme Court, with the addition of statutory default interest from the due date until payment is made.

Alternatively, provided that the court of appeal's judgment in the main action is set aside:

1. The court of appeal's judgment is to be set aside.

2. **Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly to pay the costs that Kuehne + Nagel AS was ordered to pay to Nexans Norway AS, AXA Corporate Solutions and/or CNA Insurance Company Ltd in the main action, with the addition of statutory default interest from the due date until payment is made.**
3. **Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly to pay Kuehne + Nagel AS's costs in the main action with the addition of appeal fee, provided that Nexans Norway AS, AXA Corporate Solutions and CNA Insurance Company Ltd – jointly or severally – are not ordered to pay Kuehne + Nagel AS the same costs, with the addition of statutory default interest from the due date until payment is made.**
4. **Pentagon Freight Services AS and Gjensidige Forsikring ASA are jointly to pay Kuehne + Nagel AS's costs in the district court, the court of appeal and the Supreme Court, with the addition of statutory default interest from the due date until payment is made."**

(27) The appellants in the action for recourse – *Pentagon Freight Services AS and Gjensidige Forsikring ASA* – have endorsed and detailed KN's arguments, and submitted the following prayers for relief.

"Principally:

1. **The court is to find in favour of Pentagon Freight AS and Gjensidige Forsikring ASA in return for payment of compensation to Kuehne + Nagel AS equal to SDR 39,929.20.**
2. **Kuehne + Nagel AS is to pay costs in the district court, the court of appeal and the Supreme Court.**

Alternatively:

1. **Borgarting Court of Appeal's judgment in case 17-044065ASD-BORG/2 of 25 June 2018 in the action for recourse between Pentagon Freight Services AS and Gjensidige Forsikring ASA – Kuehne + Nagel AS is to be set aside.**
2. **Kuehne + Nagel AS is to pay costs in the district court, the court of appeal and the Supreme Court.»**

(28) The respondents in the main action – *Nexans Norway AS, Axa Corporate Solutions and CNA Insurance Company Ltd* – contend:

(29) The court of appeal has correctly applied the Road Transport Act in accordance with its section 1. The contract regulated carriage of goods on a trailer, door-to-door. The contractual relationship is reflected in the bill of lading that was issued, which the frame agreement does not change under any circumstances. Carriage by road took place also in Norway, from KN's terminal to Sea-Cargo's dock, and the transport as a whole generally appeared as carriage of goods by road. It is irrelevant that parts of the carriage took place at sea, see section 4 subsection 1 of the Road Transport Act.

(30) The exception in section 4 subsection 2 of the Road Transport Act is not applicable. The court of appeal has correctly ruled that the road carrier is to blame for the damage, as he had not ensured that the load was properly fastened before the trailer was pulled onboard the ship. Also, the damage was not caused by an event that could only happen onboard a ship. Sideways impact making the load fall off may also occur during carriage by road.

(31) Nexans Norway AS, Axa Corporate Solutions and CNA Insurance Company Ltd have submitted this prayer for relief:

«1. The appeal is to be dismissed.

2. Kuehne + Nagel AS is to pay the costs of Nexans Norway AS, AXA Corporate Solutions S.A. and CNA Insurance Company Ltd. in the district court, the court of appeal and the Supreme Court.»

(32) *I have concluded that the court of appeal's judgment must be set aside.*

(33) Like the court of appeal, I find that liability for the damage as a starting point must be determined under the Road Transport Act. However, my view differs from that of the court of appeal with regard to the application of the exception in section 4 subsection 2 of the Road Transport Act. I find that the effect of the exception is that the carrier's – KN's – liability towards the owner of the goods – Nexans – is determined by the Maritime Code.

(34) By way of introduction, I note that the carrier's liability may differ depending on whether it is determined under the Road Transport Act or the Maritime Code. I will not dwell on the differences, apart from pointing out that the level of limitation of liability is not the same under section 32 of the Road Transport Act as under section 230 of the Maritime Code, and that the loss of the right to limitation of liability does not have the same wording in section 38 of the Road Transport Act as in section 283 of the Maritime Code.

(35) *Is the Road Transport Act applicable as a starting point?*

(36) Section 1 of the Road Transport Act defines the area of application. The first sentence of subsection 1 reads:

”This Act governs contracts of carriage of goods by road when the carriage is performed in return for payment and, under the contract of carriage, between places within the realm (domestic transport) or to and from the realm or between foreign states of which at least one is party to the Geneva Convention 19 May 1956 on the Contracts for the International Carriage of Goods by Road (CMR).”

(37) The fact that the goods are partially carried by sea does not rule out the applicability of the Road Transport Act, see section 4 subsection 1 of the same Act. The condition is that the load is not removed from the vehicle during the journey. That was not the case here, as the trailer with the cable drum was pulled onboard MV Norrland. It was then to be pulled off the ship upon arrival and carried further to the buyer. The term “vehicle” in section 3 of the Act also refers to trailers.

(38) I interpret section 1 subsection 1 of the Road Transport Act to mean that in order for the Act to be applicable, the goods must have been carried by road in Norway before they leave the country. I refer to *Wilhelmsen, Rett i havn* [appr. harbour law], 2006 page 38. I find that this condition is met, since the location of KN's terminal in Risavika where the transport started, required that the goods were carried by road – at least until reaching a dock. This part of KN's assignment was performed by a sub-carrier – Kåre K. Lode AS – which, in return for payment, pulled the trailer with the goods over a distance of around two kilometers.

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

- (40) Also at the other end – from Immingham to Wallsend in England – carriage by road was the only option. Therefore, KN’s assignment undoubtedly involved clear and necessary elements of carriage by road.
- (41) However, at the same time, arrangements were made for carriage of the goods by sea between Norway and England in order for the assignment to be completed. According to section 252 of the Maritime Code, chapter 13 on carriage of general cargo applies to “contracts of carriage by sea” from Norway.
- (42) International conventions to which Norway is a party are enforced both through the Road Transport Act and parts of the Maritime Code. The Road Transport Act has incorporated the “Convention on the Contract for the International Carriage of Goods by Road”, or the CMR Convention, referred to in section 1 of the same Act. The Maritime Code has incorporated the Haag-Visby rules, referred to in the Code’s section 251. Common for the Road Transport Act and the Maritime Code is that their respective rules on liability are invariable, see section 5 of the Road Transport Act and section 254 of the Maritime Code.
- (43) Which Act or Code to apply must depend on which means of transport the parties have agreed on. If they have entered into a contract of carriage by sea, the Maritime Code is applicable, and if they have entered into a road carriage contract, the Road Transport Act is applicable.
- (44) In a case like the one at hand – where the carriage is performed partially by road and partially by sea, the answer is not straightforward. As I see it, an *overall assessment* of the assignment and of the manner in which it is performed is required.
- (45) I refer to the preparatory works to the Road Transport Act, NUT 1971:2 «Recommendation II on legislation regarding contracts of carriage of goods by road”. In the presentation of what was to become section 4 of the Road Transport Act, the following is stated on page 12:
- «The Committee also notes that the rules in the [CMR] Convention’s Article 2 – and *Utk.* [draft legislation] section 4 – cannot be applied in other cases than where the transport as a whole appears as carriage of goods by road, so that the agreement between the parties can rightfully be referred to as a contract of carriage of goods by road. If, thus, the dominant part of the carriage is by sea, and the bill of lading has been issued to confirm the contract entered into, the provisions in *Utk.* section 4 are not applicable when the carrier has assumed the task of also performing the pre-carriage and/or the post-carriage to and/or from the port of loading and unloading and even if the goods, also during the journey by sea, are being carried on the road vehicle; for the journey by sea, the rules in maritime legislation apply directly.»**
- (46) This suggests that the Road Transport Act is applicable to the entire assignment if the “transport as a whole appears as carriage of goods by road”. In the assessment, both the length of the individual parts of the carriage, the more detailed composition of the means of transport, the carriage documents used and the circumstances in general are relevant.
- (47) This statement is emphasised in legal literature as a basis for the assessment that is required. I refer to Bull, *Innføring i veifraktrett* [introduction to road transport law], 2000 page 133 and Wilhelmsen, *Rett i havn* [appr. harbour law] 2006 pages 40-42. The authors also refer to individual Norwegian and foreign court rulings.

(48) *The individual assessment*

- (49) I take as a starting point that Nexans ordered one carriage by a short e-mail to KN on 10 November 2014, providing information about the goods and place of delivery. Under the frame agreement between the parties, which is a natural reference in this regard, KN had a right to use sub-carriers and any “reasonable” means of transport, method and route. It was therefore KN or its sub-carrier Pentagon – not Nexans – that decided that parts of the carriage were to be performed by ship, although this decision was undoubtedly an obvious one to make.
- (50) Clause 12 of the frame agreement appears to imply that KN’s liability is to follow the Haag-Visby rules, i.e. the Maritime Code, for all carriage by sea performed as a part of an assignment. The same is set out in section 23 of *NSAB 2000*, a standard agreement attached to the frame agreement.
- (51) In my opinion, this liability rule cannot in any case be decisive. As mentioned, the Road Transport Act and the Maritime Code contain invariable rules on liability, and liability is thus determined by the Act or Code I am about to choose. However, I agree that the regulation under the frame agreement may help in the overall assessment, because – considered in isolation – it suggests a division of the assignment depending on the means of transport.
- (52) However, we are here dealing with circumstances implying that this is not essential after all. After KN received the order from Nexans, KN issued a bill of lading on 14 November 2014, clearly expressing that the entire carriage is “subject to” the CMR Convention and the Norwegian Road Transport Act. The same was stated on the bill of lading issued by the sub-carrier Pentagon to KN three days earlier. The carriers therefore did not make arrangements for any division or special regulation of the carriage by sea as the frame agreement allowed.
- (53) KN has pointed out that its bill of lading was issued for customs purposes, that it contained errors, that it was not signed and that it was not sent to Nexans until after the damage occurred. I cannot see that any of this reduces the significance of the bill of lading. A bill of lading functions as evidence even if it is inadequate, see sections 7 and 13 of the Road Transport Act. And in the overall assessment that I am now to make, the bills of lading will clearly indicate what KN and Pentagon – that planned, organised and completed the carriage – considered the dominant element of the assignment when the contract was entered into.
- (54) As I have mentioned, the carriage by sea was the longest part of the transport in terms of distance. But the carriage by road was also significant, and divided into two stages. Against this background, and bearing in mind that the load was to be fastened to the same trailer during the entire journey, the fact that one means of transport was used for a longer distance than the other cannot be given much weight in the overall assessment.
- (55) Against this background, I agree with the court of appeal that the transport, judged as a whole, appears as carriage of goods by road. The Road Transport Act is therefore applicable as a starting point.
- (56) *Section 4 subsection 2 of the Road Transport Act*
- (57) Whereas section 4 subsection 1 of the Road Transport Act states that the Act governs the entire carriage, section 4 subsection 2 contains the following exception:

“If it is proved that any loss, damage or delay in the delivery of the goods which occurs during the carriage by the other means of transport was not caused by the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined by the rules applicable for carriage of goods with the other means of transport, provided that these rules cannot be deviated from under a contract reducing the carrier’s liability. If no such invariable rules exist, the carrier’s liability is determined under this Act.”

- (58) The provision incorporates Article 2 no. 1 second and third sentence of the CMR Convention and must as a starting point be interpreted in the same manner. According to the preparatory works to the former Road Transport Act, the exception in the Convention is basically a “compromise”, and its “main purpose is allegedly to prevent that in the event of damage as mentioned, the road carrier assumes liability that differs from the recourse liability he ... may assert” against the sea carrier, see Recommendation I “on legislation regarding contracts of carriage of goods by road”, 1961, pages 15 and 16.
- (59) In this case, it is clear that the primary condition is met. The goods – the cable – were damaged “during” the journey by sea. It is also clear that the last condition is met. As I have already established, the liability rules in the Maritime Code are invariable.
- (60) This means that the liability rules in the Maritime Codes apply if the damage is “not caused by the road carrier, but by some event that could only have occurred in the course of and by reason of” the carriage by sea.
- (61) *Not caused by the road carrier*
- (62) It must be clear that the “carrier by road” includes KN and its sub-carriers engaged to carry the goods by road. Sea-Cargo, that was engaged to carry the goods by sea, is not relevant her, see Bull, *Innføring i veifraktrett* [introduction to road carriage law] 2000 page 138. Moreover, the wording of the CMR Convention – “caused by act or omission of the carrier by road” – clarifies that the question is whether the road carrier’s acts or omissions *caused* the damage. Liability is not to be assessed.
- (63) As already mentioned, the damage occurred as strong winds and high waves hit the ship and made it heel almost 35 degrees, with the consequence that the cable drum slid off the trailer and onto the trailer next to it. So far, the road carrier is not involved in the chain of events.
- (64) However, the court of appeal concluded, and the parties also agreed, that the cable drum was not properly secured for either carriage by road or carriage by sea:
- (65) As for the carriage by road, section 3-3 no. 2 of Regulations no. 92 of 25 January 1990, states that the goods must be secured so that it can take sideways impact equal to the weight of half of the goods. The court of appeal found it proven that the cable drum, prior to the carriage to Sea-Cargo’s port, had been placed on a crib standing loose on a rubber mat in the trailer. The drum was fastened to the trailer with chains through the centre opening, which protected the load in the longitudinal direction, i.e. from forward and backward impact. The drum was not adequately secured against impact from the sides.
- (66) As for the carriage by sea, sections 274 and 275 of the Maritime Code state that the carrier is liable for the goods during loading and during transport. Under section 256, the carrier must to a reasonable extent examine whether the goods are packed in such a way as not to suffer damage or cause damage to any person or property. An exception applies for goods in containers, but, here, the cable drum was placed on an open trailer.

- (67) The court of appeal found it proven that the trailer itself was fastened to the ship's floor by the crew after having been pulled onboard, and that the trailer did not move during the voyage. However, nothing was done to fasten the cable drum more solidly either to the trailer or to the ship's floor. The court of appeal also emphasised, with reference to the appointed expert witnesses, that the "cable drum due to its weight and the relatively high gravitation point should also have been fastened directly to the ship's floor". A reference is also made to the experts' estimate that the drum, without being secured on the sides, would have tipped 26 degrees or more as the ship heeled over.
- (68) Consequently, it is clear that the road carrier's failure to secure the goods for the carriage by road created a *risk* of damage also during the journey by sea. However, the mere existence of such risk is not sufficient to establish that the damage was caused – "due to acts and omissions" – by the road carrier.
- (69) Based on the court of appeal's judgment, it is not clear that the damage during the journey by sea would have been avoided if the road carrier had complied with his obligation to secure the goods. The experts' statement to which I just referred may suggest that the road carrier's securing of the goods would have been inadequate. The court of appeal has not considered whether KN has thereby sufficiently proved that the damage would have occurred anyway.
- (70) Still, to me, it is decisive under any circumstances that the damage cannot be deemed to have occurred because the risk created by the road carrier materialised. As I see it, it was the sea carrier's subsequent omission that *triggered* the damage.
- (71) Goods are exposed to extraordinary risks during carriage by sea, unlike those that arise on the road. The sea carrier is the expert in this regard, and it is his task – also in cases where the goods are not properly secured upon delivery – to see to that the goods are secured for the journey once they are loaded. This is illustrated by the fact that proper securing of the goods in this case would have been to fasten the cable drum to the ship's floor. The need for such a measure could only have been assessed – and carried out – by the sea carrier. It was thus the risk created by the sea carrier that, in my view, materialised and caused the damage.
- (72) I cannot see the relevance of the road carrier's omission to inform the crew about the inadequate securing of the goods upon delivery. The cable drum, poorly fastened, was placed on an open trailer. I therefore take it that the sea carrier could easily observe the need of securing.
- (73) Against this background, I conclude that the damage to the goods was not caused by the road carrier.
- (74) *Event that could only have occurred in the course of and by reason of the sea carriage*
- (75) The wording in Article 2 of the CMR Convention is that the damage must be caused by "some event which could only have occurred in the course of and by reason of" the carriage by sea. In my view, section 4 subsection 2 of the Road Transport Act must also be interpreted to mean that the damage must have occurred as a result of a particular risk related to this means of transport. I refer to Bundesgerichtshof's (BGH's) judgment 15 December 2011 in case I ZR 12/11, which in paragraph 32 shows a similar interpretation of this condition in Article 2 of the CMR Convention.

- (76) In my view, the heeling of the ship because of the rough sea, which in turn made the load slide off the trailer, is such an event. It could only have occurred during carriage by sea, since the risk that materialised only arises on a ship. As I have already mentioned, this risk is of such a nature that it demands security measures beyond those required for carriage by road.
- (77) Admittedly, although a loaded trailer may also be exposed to damaging sideways impact on the road, the circumstances there causing the impact and the risk in general are completely different. On the road, the risk often arises when the vehicle is exposed to strong and direct wind, to changes of direction at a high speed or to irregularities in the road surface. During carriage by sea, the goods will be placed on a parked vehicle with a risk of moving or sliding off during the journey. Such events may ultimately also impact the stability of the ship.
- (78) I therefore conclude that the cable was damaged because of an event that could only have occurred in the course of and by reason of sea carriage.
- (79) *Conclusion*
- (80) Against this background, I find that KN's liability for the damage to Nexan's cable that occurred during the carriage by sea is determined by the rules of the Maritime Code, see section 4 subsection 2 of the Road Transport Act.
- (81) The court of appeal's ruling with regard to Nexan's claim under the liability rules of the Road Transport Act is thus given on the wrong legal basis. The way the case has been presented to the Supreme Court, I am in no position to determine KN's liability under the rules of the Maritime Code. The court of appeal's judgment must therefore be set aside, and – for contextual reasons – this must apply to both the main action and the action for recourse.
- (82) *Costs*
- (83) With the setting aside of the court of appeal's judgment, the court of appeal's ruling on the costs is also set aside. As a consequence, the claims for costs in the district court and the court of appeal are to be decided in the new ruling by the court of appeal, see section 20-8 subsection 3 of the Dispute Act. These claims are thus not part of this judgment.
- (84) Before the Supreme Court, KN's alternative prayer for relief in the main action has succeeded, and KN is in principle entitled to have its costs covered. However, I find that there are weighty reasons for exempting Nexans, Axa and CNA from liability for costs, see section 20-2 subsection 3 of the Dispute Act. The appeal has raised unclear and difficult legal issues that needed the Supreme Court's clarification.
- (85) For the same reason, KN must be exempted from covering Pentagon's and Gensidige's costs in the Supreme Court.
- (86) *The time of pronouncing the judgment*
- (87) According to section 19-4 subsection 5 of the Dispute Act, the ruling must state the reason if the judgment is pronounced later than four weeks after the hearing. In this case, where this time limit has been exceeded by nearly two weeks, the delay is due to the Easter holiday and other holiday absence among the justices.

(88) I vote for this

J U D G M E N T :

1. The court of appeal's judgment is set aside.
2. Costs in the Supreme Court are not awarded.
3. The ruling on the costs in the district court and the court of appeal is delayed until a new ruling has been given by the court of appeal.

(89) Justice **Lindsetmo**: I agree with the justice delivering the leading opinion in all material respects and with his conclusion.

(90) Justice **Bergh**: Likewise.

(91) Justice **Webster**: Likewise.

(92) Justice **Indreberg**: Likewise.

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

J U D G M E N T :

1. The court of appeal's judgment is set aside.
2. Costs in the Supreme Court are not awarded.
3. The ruling on the costs in the district court and the court of appeal is delayed until a new ruling has been given by the court of appeal.