SUPREME COURT OF NORWAY

O R D E R

issued on 24 June 2020 by the Supreme Court composed of

Justice Erik Møse
Justice Kristin Normann
Justice Ragnhild Noer
Justice Per Erik Bergsjø
Justice Borgar Høgetveit Berg

HR-2020-1328-A, (case no. 19-151103SIV-HRET) and (case no. 151228SIV-HRET)
Appeal against Agder Court of Appeal's order 7 June 2019

I.
Marship MPP GmbH CO KG
A Line Corporation Trust Company Complex (Counsel Andreas Stang Lund)

v.

Assuranceforeningen Gard Gjensidig (Counsel Herman Steen)

II.
Marship MPP GmbH CO KG
A Line Corporation Trust Company Complex (Counsel Andreas Stang Lund)

v.

Stolt-Nielsen B.V.
Stolt Tankers B.V.
Stolt Commitment B.V. (Counsel Herman Steen)

(1) Justice **Bergsjø:**

Issues and background

(2) The case concerns the question whether Norwegian courts have territorial jurisdiction over a direct action brought against a Norwegian P&I insurer after a collision in foreign waters between two ships registered abroad, where the proprietors and managing owners of both ships are foreign companies. It raises questions pertaining to the interpretation of the phrase "where such direct actions are permitted" in Article 11(2) of the Lugano Convention.

(3) The jurisdiction issue has previously been dealt with in the Supreme Court order HR-2018-869-A[1]. Paragraphs 2−22 of this order provide a comprehensive presentation of the parties, the facts of the case and of the proceedings up until the previous ruling. I refer to this presentation and will only cite the most important factors:

(4) On 16 December 2015, the cargo ship Thorco Cloud sank in the Singapore Strait after colliding with the chemical carrier Stolt Commitment in Indonesian territorial waters. Six crewmembers on Thorco Cloud died. Stolt Commitment suffered only minor damage.

(5) Thorco Cloud is registered in Antigua & Barbuda, and the owner is A Line Corporation Trust Company Complex – hereinafter A Line. Disponent shipowner at the time of the collision was Marship MPP GmbH Co. KG – hereinafter Marship. A Line and Marship are hereinafter referred to as the "Thorco companies".

(6) Stolt Commitment is registered in the Cayman Islands and is owned by Stolt Commitment B.V. Managing shipowner at the time of the collision was Stolt Tankers B.V., which has later demerged. Due to the restructuring of the Stolt group, both Stolt Tankers B.V. and Stolt-Nielsen B.V. are now parties to the case, see paragraphs 20−22 in HR-2018-869-A. The companies are registered in the Netherlands and are hereinafter referred to as the "Stolt companies".

(7) The Stolt companies have a liability cover – a so-called P&I insurance – with Assuranceforeningen Gard – gjensidig. Gard is a Norwegian company with headquarters in Arendal and extensive international activities. Gard has added a clause in the insurance contract stating that a direct action cannot, at the outset, be brought against it. According to Norwegian law, such an agreement is not binding if the insured is insolvent, see sections 1-3 and 7-8 of the Insurance Contracts Act, to which I will return. In this case, it means that Gard may only be held directly liable if it is demonstrated that Stolt Tankers B.V. is insolvent.

(8) On 5 January 2016, A Line, Marship and the insurers of Thorco Cloud brought an action against Gard in Aust-Agder District Court requesting a declaratory judgment on liability. The Stolt companies were later joined in the proceedings as an alleged jointly liable party. Gard requested that that the case be dismissed for lack of venue in Norway; alternatively, that the Court rule in their favour.

(9) On 23 June 2016, Aust-Agder District Court issued an order permitting the Thorco companies to bring their action against Gard at the company's ordinary venue in Arendal in accordance with Article 11(2) of the Lugano Convention Article on direct actions, see Article 9 (1)(a) on

[1] Translated order is found on https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2018-869-a.pdf

domicile court. The District Court found that there was no procedural basis for joining the Stolt companies in the case, and refused to hear the action against these companies.

(10) Gard appealed the District Court's decision to hear the Thorco companies' action to the Agder Court of Appeal. The Thorco companies, in turn, appealed against the refusal to hear the action against the Stolt companies. The Court of Appeal decided to hear the appeals jointly.

(11) In an order 11 April 2017, Agder Court of Appeal found that Gard could be sued in Norway under the general jurisdiction provision in Article 2(1) of the Lugano Convention. Although it was thus unnecessary to consider whether Norway had jurisdiction under Article 11(2), the Court of Appeal discussed this issue nonetheless, and responded in the affirmative. The action against the Stolt companies was also permitted.

(12) Both Gard and the Stolt companies appealed to the Supreme Court. The appeals were heard by a division of the Supreme Court. On 9 May 2018, the Supreme Court ruled as follows, see HR-2018-869-A:

> "In case no. 2017/1119:
> 1. The Court of Appeal's order is set aside.
>
> 2. Costs are not awarded.
>
> In case no. 2017/1124:
> 1. The Court of Appeal's order is set aside.
>
> 2. Costs are not awarded."

(13) The Supreme Court was split into three factions. Three justices concluded that the jurisdiction issue was exclusively governed by Chapter II Section 3 of the Lugano Convention on jurisdiction in matters relating to insurance. They found that the Court of Appeal had interpreted the Lugano Convention incorrectly by assuming that Article 2(1) provides a basis for bringing a direct action in the court of Gard's domicile. These justices also found that it was wrong to interpret section 7-6 subsection 5 of the Insurance Contracts Act as a choice of law rule. Because the Supreme Court did not have jurisdiction to assess whether the result could be upheld on different grounds, the Court of Appeal's order was set aside. Justice Bull found that Article 2(1) was a legal basis for action in addition to the regulations in the Convention's Section 3, and that the appeals should be dismissed. One justice agreed with the majority that the question of Norwegian jurisdiction is exclusively regulated by Article 11(2) of the Lugano Convention, but otherwise endorsed the opinion of Justice Bull. The same justice also found that the Court of Appeal's order had to be set aside.

(14) Agder Court of Appeal reheard the case, and ruled as follows on 7 June 2019:

> "1. The action brought by A Line Corporation Trust Company Complex and Marship MPP GmbH Co. KG v. Assuranceforeningen Gard – gjensidig in Aust-Agder District Court, is inadmissible.
>
> 2. The action brought by A Line Corporation Trust Company Complex and Marship MPP GmbH Co. KG v. Stolt Tankers B.V., Stolt-Nielsen B.V. and Stolt Commitment B.V. in Aust-Agder District Court, is inadmissible.
>
> 3. Costs are not awarded in any of the appeals."

(15) The Court of Appeal found that Norwegian law was applicable to the direct action from the Thorco companies against Gard. In the question regarding the interpretation of Article 11 (2) of the Lugano Convention, a dissenting opinion was given. The majority found that the phrase "where such direct actions are permitted" – the "permitted-criterion" – entails that the action must be permitted in the individual case. In the majority's view, it had not been demonstrated that the Stolt companies were insolvent, and the action against Gard was therefore not heard. As a result, the Stolt companies could not be joined in the case. The minority found that Article 11(2) had to imply that it is sufficient that direct actions are generally permitted under the law of the chosen state. Against this background, the minority found that the action against Gard should be heard.

(16) The Thorco companies have appealed against the Court of Appeal's order in both cases to the Supreme Court. The appeal concerns the findings of fact and the application of the law.

(17) On 29 November 2019, the Supreme Court's Appeals Selection Committee granted leave to appeal on the interpretation of the phrase "where such direct actions are permitted" in Article 11(2) of the Lugano Convention. The Committee decided at the same time that the case should be heard by a division of five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act.

(18) The Supreme Court has conducted a remote hearing of the case, see section 3 of the Temporary Act of 26 May 2020 No. 47 on adjustments to the procedural set of rules as a consequence of the Covid-19 outbreak.

The parties' contentions

(19) The appellants – *Marship MPP GmbH Co. KG and A Line Corporation Trust Company Complex* – contend:

(20) The condition in Article 11(2) of the Lugano Convention that "such direct actions are permitted" must imply that it is decisive whether direct actions are generally permitted under the law of the chosen state. Norwegian law is applicable here, and Norwegian law permits direct actions in connection with liability insurance, see section 7-6 subsection 1 of the Insurance Contracts Act. Norwegian courts thus have jurisdiction in the case.

(21) The "permitted-criterion" does not imply that the court, as a step in determining jurisdiction, must consider substantive individual conditions for the direct action itself. Insolvency is not a condition for proceedings, but a substantive condition that must be determined during the hearing on the merits. Nothing in the sources of law suggest that the court must first examine whether the direct action has a chance of succeeding in the particular case.

(22) This interpretation is supported by the wording in a majority of the language versions. Also, the Lugano Convention's overall objective of creating foreseeability with regard to jurisdiction in international matters indicates that it must be sufficient to demonstrate a general right to bring direct actions under applicable national legislation. The same applies to the principle that it should always be possible to bring a case before the court of the defendant's domicile, and that the special jurisdiction rules in insurance matters are intended

to strengthen the position of the presumed weaker party. Neither case law nor legal literature supports the interpretation on which the Court of Appeal has based its ruling.

(23) Marship MPP GmbH Co. KG and A Line Corporation Trust Company Complex invite the Supreme Court to pronounce the following order in the cases against Gard (case no. 19-151103SIV-HRET) and Stolt Commitment B.V., Stolt-Nielsen B.V. and Stolt Tankers B.V. (case no. 19-151228SIV-HRET), respectively:

> "In case no. 19-151103SIV-HRET:
> 1) The Court of Appeal's order is set aside.
>
> 2) A Line Corporation and Marship MPP GmbH Co. KG are awarded costs in the Court of Appeal and in the Supreme Court.
>
> In case no. 19-151228SIV-HRET:
> 1) The Court of Appeal's order is set aside.
>
> 2) A Line Corporation and Marship MPP GmbH Co. KG are awarded costs in the Court of Appeal and in the Supreme Court."

(24) The respondents – *Assuranceforeningen Gard – gjensidig, Stolt-Nielsen B.V., Stolt Tankers B.V. and Stolt Commitment B.V.* – contend:

(25) The requirement in Article 11(2) that "such direct actions are permitted", entails that the direct action must have a legal basis in the law of the chosen state. Substantive requirements for a direct action in the relevant state thus become a condition for jurisdiction under the provision. In this case, this means that the insolvency criterion in section 7-8 subsection 2 of the Insurance Contracts Act is a condition for jurisdiction in the action against Gard.

(26) This interpretation is supported by the provision's wording, stating that direct actions must be permitted, not that such actions are "generally permitted" or "permitted as a declaratory main rule". The solution is further supported by the minority's dissenting opinions in the Supreme Court's previous order in the case and in the ruling by the Danish Supreme Court in the so-called *Assens Havn* case. In addition, it is clear from other foreign case law and ECJ case law that an individual assessment is required to determine whether the direct action is permitted in the individual case. The consideration for the presumed weaker party is not relevant in a case like ours, where the injured party may bring an action in several alternative jurisdictions.

(27) The case questions in fact whether the Thorco companies may use the direct action against Gard as an anchor to pull the Dutch Stolt companies into the case in Norway. The action is a classic example of "forum shopping", as the Thorco companies' objective was to benefit from the Norwegian global limitation rules, which set a higher cap on the liability than other relevant jurisdictions. A legal action has already been brought and a global limitation fund has been established in The Netherlands, and all claims and counterclaims after the collision may and should be dealt with there.

(28) Assuranceforeningen Gard − gjensidig invites the Supreme Court to pronounce this judgment in case no. 19-151103SIV-HRET:

> "1. The appeal is dismissed.

2. A Line Corporation and Marship MPP GmbH. Co. KG is jointly and severally to compensate the costs of Assuranceforeningen Gard – gjensidig in the Supreme Court and in the Court of Appeal after the Supreme Court's order 9 May 2018."

(29) Stolt Commitment B.V., Stolt-Nielsen B.V. and Stolt Tankers B.V. invite the Supreme Court to pronounce the following judgment in case no. 19-151228SIV-HRET:

"1. The appeal is dismissed.

2. A Line Corporation and Marship MPP GmbH. Co. KG will *jointly and severally* compensate the costs of Stolt Commitment B.V., Stolt-Nielsen B.V. and Stolt Tankers B.V. in the Supreme Court and in the Court of Appeal after the Supreme Court's order 9 May 2018."

My opinion

Scope and issue

(30) The case concerns a second-tier appeal against an order. Because the Court of Appeal has refused to hear it due to lack of jurisdiction, the Supreme Court has full jurisdiction under section 30-6 (a) of the Dispute Act.

(31) The Thorco companies have brought an action against Gard in the court of the company's domicile, in Norway. The Supreme Court's previous ruling in the case clarified that the direct action cannot be made in Norway in accordance with the general provision on domicile in Article 2 (1) of the Lugano Convention. The question now is whether Norwegian courts have jurisdiction under the Convention's Article 11 (2), see Article 9. 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."

(32) Articles 8, 9 and 10 contain provisions on jurisdiction in insurance cases, and Article 9 (1) (a), states that the insurer may be sued in the courts of the state where he is domiciled. According to Article 11 (2), these provisions apply also to actions brought by the injured party against the tortfeasor's insurer "where such direct actions are permitted". It is the interpretation of this expression – the "permitted-criterion" – that forms the heart of the matter. The Thorco companies contend it is sufficient that the relevant state generally permits this type of direct action. Gard and the Stolt companies, in turn, claim that the provision only gives jurisdiction if there is a basis for a direct action in the particular case.

The choice of law when applying Article 11 (2)

(33) Whether or not such direct actions are permitted must be determined by the national law regulating the matter in dispute. Therefore, the courts must, when determining jurisdiction under Article 11 (2), first make a choice of law and decide which state's law the merits of the case are regulated. The choice of law must be made based on the choice of law rules of the chosen state, see the Supreme Court judgment HR-2018-869-A paragraph 90−92.

(34) The Court of Appeal made a final ruling stating that the direct action brought by the Thorco companies against Gard would be decided under Norwegian law. In its order, the Court of Appeal found that the case, overall, is most strongly linked to Norway.

The Norwegian rules on direct action in connection with liability insurance and the Insurance Contract Act's regulation of the right to bring a direct action

(35) According to section 7-6 subsection 1 of the Insurance Contracts Act, the injured party may claim compensation directly from the tortfeasor's insurer. The first sentence of the provision reads:

> "When the insurance covers the liability of the Insured for compensation, the injured party may claim compensation directly from the Insurers."

(36) The provision is included in the Insurance Contracts Act Part A on non-life insurance. At the outset, the provisions in Part A cannot be contracted out of to the detriment of whoever holds a right against the company by virtue of the insurance contract, see section 1-3 subsection 1 of the Insurance Contracts Act. With the exception of liability cover under section 7-8, the provisions may nonetheless be contracted out of for insurance relating to commercial business, including so-called large enterprise insurance and maritime insurance, see section 1-3 subsection 2 (a) and (c).

(37) In its terms of contract, Gard has a clause in "Rule 90", stating that although the contract is governed by Norwegian law, the Insurance Contracts Act does not apply. "Rule 87" contains a "pay to be paid" clause. According to information provided, the disclaimer is standard in this type of international maritime insurance. As mentioned, the possibility to contract out in connection with maritime insurance under section 1-3 subsection 2 (c) of the Insurance Contracts Act does not apply to liability insurance under section 7-8. It follows from section 7-8 subsections 2 and 3 that the insurer cannot contract out of the right to bring a direct action where the insured is insolvent. This implies that in this case, it is a condition for succeeding with a direct action against Gard that Stolt Tankers B.V. is insolvent.

(38) The provisions on direct action in the Insurance Contracts Act arise from a wish to strengthen the injured party's position in practical and procedural terms. I refer to Norwegian Official Report 1987: 24 item 7.3.6 on page 147 and Proposition to the Odelsting No. 49 (1988−1989) item 7.2.2.4 on page 81.

(39) Direct actions under section 7-6 of the Insurance Contracts Act must be brought in Norway, see subsection 5. The background for this is presented in the Supreme Court order HR-2018-869-A paragraph 97, where Justice Normann states:

> "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."

Briefly on the assessment of jurisdiction

(40) According to section 36 subsection 1 of the Courts of Justice Act, each court must itself assess whether a case falls within its jurisdiction. When making such an assessment, the court must, according to section 36 subsection 2, in most civil cases "base its deliberations on the claimant's submission, provided that it has not been demonstrated that the submission is erroneous".

(41) Subsection 2 has been interpreted to mean that the court, when deciding substantive issues relating to the claim in question, as a main rule must rely on what the claimant or the appellant contends. Otherwise, when deciding whether to hear the case, the court must take an individual stand on both legal and evidentiary issues, and base its ruling on the facts it considers more likely, see Skoghøy, *Tvisteløsning* [dispute resolution], 3rd edition 2017 page 254.

(42) On the assessment of territorial jurisdiction under the Lugano Convention, the Supreme Court's Appeals Selection Committee stated the following in Rt-2015-129 paragraphs 29 and 30:

> "(29) In Supreme Court case law, it is assumed that a relatively thorough assessment is made of whether a case falls within the territorial jurisdiction under the Lugano Convention, see Rt-1996-822 and Rt-2000-654. This is at least mainly in line with what applies in connection with an ordinary assessment under Norwegian civil process, see section 4-5 of the Dispute Act on venues that may be elected by the claimant.
>
> (30) What is stated here does not imply that the claimant, in a case on whether or not to hear an action, must present evidence for the merits of the case. In a dispute under Norwegian law concerning the right to own real property, it is thus sufficient that the claimant substantiates that it concerns real property in the place where the action is brought; next, it must be decided based on the merits of the case whether the claim has a chance of succeeding. The Committee assumes that the principle is the same also under the Lugano Convention, see in particular the aforementioned paragraphs in C-68/93 *Fiona Shevill and Others*. …"

The interpretation of Article 11 (2) of the Lugano Convention

Starting points and interpretive principles

(43) The Lugano Convention 2007 applies as Norwegian law under section 4-8 of the Dispute Act. In 2010, the Convention replaced the Lugano Convention 1988, but without substantive changes on the issues concerned in the case at hand. The two Lugano Conventions are modelled on the Brussels Convention 1968 and Council Regulation (EC) 44/2001 – Brussels I – applicable between EU member states. Article 11(2) of the Lugano Convention 2007 is substantively identical to Article 11 (2) of Brussels I. Therefore, in the following I will not always specify the international law instrument to which the sources of law relate.

(44) In HR-2018-869-A paragraph 72, Justice Normann states the following on the interpretation of the Lugano Convention:

> "Pursuant to Protocol 2 Article 1 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."

(45) I agree, but stress that the wording and considerations of objective are also important. I will return to that. The interpretive principles presented in Article 31 of the Vienna Convention on the Law of Treaties 23 May 1969 may also have relevance. The Convention has not been acceded by Norway, but it is assumed to express international customary law on the interpretation of treaties. According to Article 31 (1), treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

The wording in Article 11 (2) in various languages

(46) The Norwegian version of Article 11 (2) uses the plural form "når slike direktekrav er tillatt". The same applies to the English text, in which the condition is "where such direct actions are permitted". The plural form may seem to indicate that it is sufficient that direct actions are generally permitted under the law of the chosen state. In my view, the Danish version may point in the same direction, although the wording is different. The phrase "såfremt der er hjemmel for et direkte saksanlæg" suggests that it is not decisive whether a direct action is permitted in the individual case.

(47) Nor the German version refers to a specific requirement – "insofern eine solche unmittelbare Klage zulässig ist". The indefinite form – "eine solche" − may be held to support the appellant's view. In my opinion, the Swedish text is comparable, with the phrase "om sådan direkt talan är tillåten". Other versions are more neutral or point at a more specific requirement and thus a more individual assessment. This applies at least to the French wording "lorsque l'action directe est possible" by the use of the definite form "l'action". Probably, the Dutch version must also be placed in the same category – as that version, too, refers to a specific action.

(48) As I have demonstrated, various expressions are also used to describe what is required – in Norwegian translation "tillatt" [permitted], "mulig" [possible] and "hjemmel" [legal basis]. I therefore find it hard to draw any conclusions based on these nuances.

(49) Overall, several language versions suggest that the "permitted-criterion" must be interpreted to imply that it is decisive whether the chosen state generally permits direct actions. However, the image is not clear, and it is impossible to conclude based on the wording only.

Norwegian case law

(50) The interpretation of Article 10 subsection 2 of the Lugano Convention 1988, corresponding to the current Article 11 (2), was discussed in the Supreme Court ruling in Rt-2002-180 *Leros Strength.* The question was whether the state could bring an action in Norway against an English P&I insurer after a shipwreck. The state's submission is summarised as follows:

> "The State claims that Article 10 subsection 2 of the Lugano Convention must be interpreted to mean that it is decisive whether a direct action against the insurer is generally permitted under the law of the chosen state, and that there is no requirement that a direct action must be permitted in the particular case".

(51) On page 185, Justice Mæland states that 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". The contention was new before the Supreme Court, and the Supreme Court chose not to consider it, as it had not been sufficiently clarified. In the light of this, I find no reason to elaborate further on what the quoted statement signifies.

(52) The question of the interpretation of Article 11 (2) was addressed also during the previous hearing of the case in the Supreme Court, see HR-2018-869-A. With the result of the three justices constituting the majority, it was not necessary for them to take a stand. Justice Bull, on the other hand, stated in his minority vote in paragraph 117 that "*even if* the conditions for direct actions 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." He found that the insolvency criterion should also be considered as a condition for proceedings. One justice supported this view. I can understand that the Court of Appeal relied on the minority's view in the appealed ruling. However, as long as the majority omitted to take a stand, I cannot attach the same level of importance to the statements.

ECJ case law

(53) As I have already addressed, case law from the European Court of Justice (the ECJ) is important for the interpretation of the Lugano Convention. However, the ECJ has not considered the question whether the "permitted-criterion" gives rise to a general or an individual assessment. Statements in some of the judgments have nonetheless been invoked by the parties, and I will therefore make some comments to these.

(54) I start with the judgment 13 December 2007 in Case C-463/06 *Odenbreit.* The case questioned whether the injured party could be considered a beneficiary under Article 9(1)(b) of Brussels I. The ECJ answered in the affirmative. In paragraph 30, the Court stated the following with regard to Article 11(2):

> "The only condition which Article 11(2) of Regulation No 44/2001 lays down for the application of that rule of jurisdiction is that such a direct action must be permitted under the national law."

(55) I agree with the Court of Appeal that the statement is not much more than a reproduction of the Regulation's text and thus not very helpful. However, the ruling shows that the object of the Regulation is important in the interpretation, to which I will return.

(56) In three judgments, the ECJ has assessed whether the assignee of an insured party's claim may invoke the right to bring a direct action under Article 11(2). This applies to judgment 17 September 2009 in Case C-349/08 *Vorarlberger*, judgment 20 July 2017 in Case C-340/16 *KABEG* and judgment 31 January 2018 in Case C-106/17 *Hofsoe.* The issue in the case at hand was not prominent in any of these cases. The judgments therefore give limited guidance.

(57) In judgment 13 July 2017 in Case C-368/16 *Assens Havn,* the ECJ submitted an advisory opinion to the Danish Supreme Court. The Court did not examine the issue in dispute in the case at hand. However, in paragraph 36, it states that agreements on jurisdiction in insurance cases are governed by strict regulations arising from the objective to protect "the economically weaker party". That is of a certain interest also here. I will soon return to the Danish Supreme Court's ruling in the same case.

Case law from the national courts of the EU member states

(58) The parties have not referred to rulings from the national courts of the EU member states that *discuss* the interpretation of Article 11 (2). However, they have mentioned several rulings where the "permitted-criterion" is *applied* when determining the jurisdiction. The respondents contend that a practically uniform case law supports their view.

(59) In its order, the Court of Appeal has emphasised the Danish Supreme Court's order 9 October 2017 in Case 5/2015 *Assens Havn*. The ruling has also been a central part in the argumentation from Gard. The case concerned the question whether an agreement on venue entered into between the insurer and the insured was binding on the injured party. As mentioned, the question was brought before the ECJ.

(60) According to Danish law, a direct action is in principle only permitted if the injured party's claim for compensation is comprised by the insured's bankruptcy or restructuring proceedings, see section 95 of the Danish Insurance Contracts Act. As the insured party in the case was bankrupt, and the Danish Supreme Court concluded that the case could be brought to Danish courts if Danish law was applicable:

> "In the present case, where SES has been declared bankrupt, the Supreme Court therefore finds that Assens Havn has a legal basis for bringing a direct action against Navigators Management regarding the claim for compensation, which the case concerns, if Danish law is applicable to the question of the injured party's right to bring direct action against the insurer."

(61) Nor this judgment discusses the "permitted-criterion". However, as the respondents have pointed out, the Danish Supreme Court based its decision on the bankruptcy requirement being met. This may suggest that it is not the general possibility to bring a direct action that is decisive, but whether the requirements are met in the particular case.

(62) On the other hand, under Danish law, a direct action is related to objectively verifiable criteria – in practice whether the insured is bankrupt at the time of the action. Thus, it makes little sense to distinguish between whether a direct action is permitted in the individual case and whether it is generally permitted under Danish law. Against this background, I cannot see that *Assens Havn* provides any clear support to the respondents' contentions in the case at hand.

(63) The respondents have referred to a number of other rulings from the courts of various EU member states. However, in most of these cases, the direct action requirement is comparable to what applies in Denmark. The courts' statements that the jurisdiction requirement is met because the insured is bankrupt are, in my view, of limited relevance. I agree with the respondents that certain statements in the ruling from England and Wales Court of Appeal 17 June 2015, EWCA Civ 598 *Keefe*, may suggest that an individual assessment is required in each case. This applies in particular to paragraph 36 (vii), stating that the issue is whether the

injured party has a substantive right to claim and obtain payment from the insurer. On the other hand, as I see it, statements in paragraph 36 (ii) and paragraph 37 may just as well suggest the opposite. Overall, I cannot see that case law from the EU member states clearly supports the respondents' contention that it must be individually assessed under Article 11(2) whether the direct action is permitted.

Statements in reports – preparatory works

(64) The purpose of the "permitted-criterion" is commented on in the so-called Jenard report 27 September 1968, published in *EF-tidende* 5 March 1979, no. C 59. The report is written by P. Jenard based on the work of the expert group that drafted the Brussel Convention 1968. In the comments to Article 10 on page 32, the following is stated on the purpose of the "permitted criterion":

> "The phrase 'where such direct actions are permitted' has been used specifically to include the conflict of laws rules of the court seised of the matter."

(65) According to footnote 3 to the commentary, various states have different rules on direct actions. Footnote 4 says that a choice of law must be made to decide which state's law to apply. The point seems to be that the Brussels Regulation – and hence the Lugano Convention – was not intended as a legal basis for a direct action *per se*. The condition for bringing such an action was that it was permitted under national law.

(66) The statements in the report may suggest that it must be assessed on a more superior level whether the chosen state permits direct actions. The "permitted-criterion" appears to be considered a general requirement, and it is not indicated that the courts must carry out an individual assessment of facts and law pertaining to the insurance contract and the accident to determine the jurisdiction issue. The purpose was to steer the cases to courts where the direct action could be considered on its merits. Yet, the statements do not provide any clear basis for the interpretation.

(67) In connection with several states' accession of the Brussel Convention in 1978, a commentary to the Convention was issued – the so-called "Schlosser report", published in *EF-tidende* 5 March 1979, no. C 59. Here, it is set forth in paragraph 148 on page 116 that agreements on jurisdiction between insurer and policyholder are not binding upon third parties. Such agreements can thus not prevent the injured party from bringing a direct action in the court available under Article 11(2), provided that the other conditions are met. The view that such jurisdiction agreements are not binding on the injured party is also applied in case law from the ECJ, see *Assens Havn*.

(68) The appellants have emphasised that the Court of Appeal's result in the case at hand will conflict with the principle on which the Schlosser report and in ECJ case law are based, as accounted for above: The Thorco companies lose their right to bring an action against Gard in the court of Gard's domicile because Gard and the Stolt companies have agreed not to permit direct actions.

(69) I do not necessarily agree. The agreement entered into here is not a jurisdiction agreement, but an agreement regulating the right to bring direct actions. Nonetheless, it may have some

relevance that the EU sources of law are based on the idea that the injured party should not too largely be deprived of its rights through insurance contracts.

Purpose and system considerations

(70) When the wording in a convention provision does not give clear answers and contains various nuances in different language versions, the convention's objective and context become important interpretive factors, see the ECJ judgment 21 January 2016 in Case C-521/14 *SOVAG* paragraph 35. The Court's formulation is that the provision in question must be interpreted "by reference to the purpose and general scheme of the rules of which it forms part".

(71) A basic consideration behind EU jurisdiction legislation was to create *predictable and clear rules*. Furthermore, it is a clear condition that the defendant's *domicile is available.* This is expressed in the preamble of Brussels I. I refer to section 11:

> "The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor."

(72) I my view, the objectives emphasised here are best fulfilled if Article 11(2) is interpreted in the manner the appellants have argued it should. Firstly, the insurer's domicile will be available to the injured party in several cases if it is decisive that the direct action is generally permitted under the law of each state. Secondly, such an approach offers more predictability, at least the way direct actions are regulated in Norwegian law. If the insolvency requirement is to be examined in connection with the jurisdiction issue, the court will then be compelled to carry out individual and complex assessments of factors such as causality and the insured's economy. For an injured party, it will be hard to predict the outcome of such assessments.

(73) I would also like to address in more general terms the objective behind the special rules for insurance cases in the Convention. The rules are based on a fundamental wish to *strengthen the position of the weaker party* in relation to insurance. In paragraph 13 of Brussels I, it is set out that "the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules."

(74) An interpretation of the "permitted-criterion" with the implication that a general permission to bring a direct action under the relevant legal system is sufficient seems to be in line with this objective. Clear and easily verifiable criteria will normally be more important to the presumed weaker party in an insurance relationship.

(75) A counterargument in this regard is that the aim of protecting the weaker party is less weighty when the case – like in the one at hand – concerns a dispute between major commercial entities. However, the Convention must be subject to uniform interpretation, irrespective of the state in which it is applied and the individual insurance relationship. Therefore, I find that also the wish to strengthen the position of the weaker party is an argument for considering it sufficient to determine jurisdiction under Article 11(2) that the law of the chosen state generally permits direct actions.

(76) On this point, I also find reason to repeat the starting point under Norwegian law when determining jurisdiction: In issues relating to the claim concerned in the case, the mail rule is that the courts must rely on the contentions of the claimant or the appellant. As mentioned, case law prescribes a relatively thorough assessment of whether a case falls within the scope of territorial jurisdiction under the Lugano Convention, see Rt-2015-129 paragraph 29 and 30. Yet, this does not imply that the courts must consider the merits of the case. A rule implying that the courts must assess the insolvency criterion as a step in the determination of territorial jurisdiction, therefore appears *alien to the legal system*.

(77) In Norwegian law, both the positive conditions for contracting out of the main rule on the right to direct action in section 1-3 subsection 2 of the Insurance Contracts Act and the insolvency limitation in section 7-8 are substantive conditions for a claim to succeed, not conditions for a hearing. Although in this case it is clear that the conditions in section 1-3 subsection 2 are met, the assessment may create doubt in other cases. When it comes to the insolvency criterion, this case shows that it may be difficult for a Norwegian court to take a stand as to the insured's solvency. I endorse the Court of Appeal's description of the insolvency criterion in its first order in the case:

> "It goes without saying that it may be difficult for a court in Norway to take a stand on the solvency of shipowners and other large enterprises that are often domiciled abroad. Gard's submissions quoted in the District Court's order on page 20 and 21 illustrate the issue. Gard contends among other things that the court as a step in the individual insolvency assessment for Stolt Tankers must first consider the question of liability for the collision and the individual losses. It would be highly inexpedient to consider these issues when the court in the initial phase of an action is to assess whether it has jurisdiction to hear it under Article 11(2) of the Lugano Convention."

(78) In my view, it would be unfortunate if the courts were compelled to consider the merits of the case before assessing its jurisdiction. This consideration suggests that one should not interpret the "permitted-criterion" the way the respondents argue. An interpretation based on the general regulation of the direct action will to a larger extent liberate the courts from the task of considering substantive conditions for the claim when determining jurisdiction.

Summarising assessment and conclusion

(79) As mentioned, the decision whether the "permitted-criterion" is met must be based on the national law applicable to the substantive legal relationship. The legal starting point under Norwegian law is that direct actions are permitted, see section 7-6 subsection 1 of the Insurance Contracts Act. Within commercial insurance, the right to bring a direct action will nonetheless depend on whether the insured is insolvent, see section 1-3 subsection 2 and section 7-8 subsections 2 and 3. The wording in the Lugano Convention gives no clear answer to whether insolvency in such a case must be considered in connection with the jurisdiction issue. Nonetheless, several language versions point in the direction that the courts are not to carry out an individual assessment of the right to bring a direct action in the particular case. This is the solution that, in my view, best takes into account predictability and the aim to strengthen the position of the weaker party, while it also safeguards the fundamental goal that the defendant's domicile is available. Moreover, an interpretation that implies a thorough examination of the substantive issues during the assessment of territorial jurisdiction is alien to the system. So far, I believe that it would be best to rely on the appellants' interpretation of the Article 11(2) of the Lugano Convention.

(80) The Lugano Convention must be interpreted autonomously, and a challenge in this regard is that the right to bring a direct action varies between states. I refer to the report issued by IBA Insurance Committee Substantive Project from International Bar Association in 2012 and to the Court of Appeal's discussion on page 23 in the appealed order. In some states, direct action is only permitted in certain types of cases or in certain classes of claims. For example, Directive 2000/26/EC states that the injured party has a right to bring a direct action against the P&I insurer in traffic cases. As concerns these states, I cannot see that the rule I have described will entail any problems. In practice, establishing whether a direct action is permitted requires an assessment of the general rule on direct actions in the chosen state.

(81) In other states, direct actions are only permitted when a formal criterion is met, for instance that the insured is bankrupt. As mentioned, this is the situation in Denmark. The assessments of whether direct actions are generally permitted and of whether it is permitted in the individual case will thus be intertwined. The solution I have drawn from the sources of law is thus also suited in such a case.

(82) I cannot exclude that a rule whereby it is sufficient that direct actions are *generally permitted* may create delimitation problems in some states. However, a total overview of the various regulations has not been presented, but in my view, this cannot in any case be decisive for the interpretation issue in the case at hand.

(83) Against this background, my *conclusion* is that the "permitted-criterion" in Article 11(2) of the Lugano Convention does not imply that a direct action must be permitted in the particular case, as the Court of Appeal assumed. The Court of Appeal's order is thus based on an incorrect interpretation of Article 11(2) and must be set aside.

(84) The parties agree that if venue may be established for Gard, it may also be established for the Stolt companies. As the Court of Appeal found that Gard did not have venue in Norway, it found that the Stolt companies did not have venue either. With the Supreme Court's ruling that the Court of Appeal's order must be set aside on the part of Gard due to an incorrect interpretation of the "permitted-criterion", the refusal to hear the action against the Stolt companies must also be set aside.

Costs

(85) The appellants have won the case, and should therefore be awarded costs in the Supreme Court according to the main rule in section 20-2 subsection 1 of the Dispute Act. However, the case has raised a doubtful legal issue, and compelling grounds justify that costs are not awarded, see section 20-2 subsection 1 (a).

(86) The determination of costs in the previous instances is suspended until the Court of Appeal has handed down a new ruling in the case, see section 20-8 subsection 3 of the Dispute Act.

(87) I vote for this

O R D E R :

In case no. 19-151103SIV-HRET:

1. The Court of Appeal's order is set aside.

2. Costs in the Supreme Court are not awarded.

3. The ruling on costs in the District Court and the Court of Appeal is suspended until a new ruling is given by the Court of Appeal.

In case no. 19-151228SIV-HRET:

1. The Court of Appeal's order is set aside.

2. Costs in the Supreme Court are not awarded.

3. The ruling on costs in the District Court and the Court of Appeal is suspended until a new ruling is given by the Court of Appeal.

(88) Justice **Noer:**

Dissenting opinion

(89) I have arrived at a different result than Justice Bergsjø, as I interpret the phrase *"where such direct actions are permitted"* in Article 11(2) of the Lugano Convention differently from him. I thus agree with the Court of Appeal's majority and with the justices in the Supreme Court who gave their opinions on the issue the last time the case was heard here, see HR-2018-869-A paragraphs 117 and 142.

(90) The condition for direct action under Article 11(2) is, as I see it, that the action *has a chance of succeeding* under the law of the chosen state. This is a condition for proceedings, and the claimant must demonstrate with a fair degree of probability that the condition is met.

(91) The criterion relates to the special legal requirements for bringing a direct action under the law of the chosen state. In other words, the court is not to examine basis of liability, causality or other, more general conditions.

(92) Therefore, in my opinion, it is not sufficient that a general right to bring a direct action exists. In the case at hand, it means that Norwegian courts only have jurisdiction over the action brought by the Thorco companies against Gard, if the Thorco companies with a fair degree of probability can demonstrate that Stolt Tankers B.V. is insolvent.

(93) The sources of law that have formed my view are primarily foreign states' case law and objective and systemic considerations.

(94) As mentioned by Justice Bergsjø, the *Convention's text* gives no clear answer. In my opinion, both interpretation options may be united with the wording.

(95) *Foreign case law* gives the impression that the decisive factor is the injured party's likelihood of success against the insurer in the particular case. The Danish Supreme Court's order 9 October 2017 in case 5/2015 *Assens Havn* has already been addressed by Justice Bergsjø. Here, the Danish Supreme Court confined itself to establishing that the tortfeasor was bankrupt, and that a direct action was thus permitted under Article 11(2). However, the legal status under Danish law is that direct actions are generally not permitted, except in connection with the insured's bankruptcy. If it had been the general right to bring a direct action that determined jurisdiction, the action should have been declared inadmissible. The ruling thus supports that the assessment relates to the individual direct action.

(96) Alternatively, one might imagine that Danish law only permitted direct actions where the tortfeasor is insolvent, or where an agreement has been entered into permitting direct actions. Should all direct actions under Article 11(2) nonetheless be refused due to the general prohibition against direct actions in Danish law? In my view, the example illustrates that it is clear that the courts must assess the individual direct action. At any rate, it seems problematic to interpret Article 11(2) differently depending on the condition for direct action in national law.

(97) As mentioned by Justice Bergsjø, a number of foreign court rulings dealing with Article 11(2) have been presented in the case. None of them discusses the issue at hand, but all seem to apply the specific approach.

(98) However, the "permitted-criterion" is referred to in a judgment from England and Wales Court of Appeal, EWCA Civ 598 *Keefe* from 2015. One of the judges discusses whether the requirement is that the direct claim is permitted under "national procedural law", or whether it is required that the injured party has "a substantive right to recover", based on the statements in the ECJ judgment 13 December 2007 in Case C-463/06 *Odenbreit*. The conclusion is, according to the judge, that the injured party must demonstrate a substantive basis for the direct action, see paragraph 77:

> "I think one can safely assume that a similar position obtains in the other Member States of the EU, so it is difficult to think that when in *Odenbreit* the European Court referred to a requirement that a direct action be permitted under national law it can have had in mind national procedural law. In my view it must have had in mind substantive rights and have intended to recognise that if an injured party has a substantive right to recover against the wrongdoer's insurer, he can assert that right by suing the insurer in the courts of the place where as claimant he is domiciled. Only in that way would the injured party be placed on the same footing as the policyholder, insured and beneficiary to whom Article 9(1)(b) specifically refers. …"

(99) The two other judges seem mainly to base their opinions on the same views, see paragraph 36 (vi) and (vii) and paragraph 60.

(100) The judgment supports the view that jurisdiction under the Convention depends on whether the individual direct action has a chance of succeeding based on its merits.

(101) Justice Bergsjø describes it as alien to the system that the court, as a step in determining its jurisdiction, should be forced to assess whether the action has a chance of succeeding based on its merits. I agree. However, as he mentioned, it is not entirely unusual for the courts to make such an assessment as a step in determining jurisdiction under the Lugano Convention, see for example the Supreme Court judgment in Rt-2000-654 on page 665 on tangible rights to real property and that in Rt-2015-129 paragraph 29 et seq. on the existence of a contractual obligation.

(102) More importantly, one of the *objectives* of the Convention's rules on direct actions is to channel the action to where it may be heard on its merits. That will normally be in the state in which it is brought. As pointed out in Rt-2002-180 *Leros Strength* on page 185, the jurisdiction provision must thus be seen in conjunction with the substantive right arising from the law of the chosen state, and the injured party's possibility to have the claim against the insurance company heard on its merits and decided.

(103) The jurisdiction rules for direct actions may have indirect consequences for the tortfeasor. It has been contended that the Thorco companies brought a direct action in Norway for the sole purpose of having the Stolt companies joined in the case, to give application to the Norwegian global limitation rules in the dispute between the Thorco companies and the Stolt companies. The question whether such accumulation is possible has not been finally decided in the case. However, a completely necessary and general condition for accumulation must be that the court has jurisdiction over the direct action. A certain reluctance should be exercised in accepting a direct action merely based on a general possibility of success. Depending on the fulfilment of other accumulation requirements, such an interpretation may have far-reaching consequences for the tortfeasor.

(104) Moreover, I believe it would be difficult to establish the *general rule* for direct action under the law of the chosen state. In my opinion, the distinction between general regulations and exception rules is rather subtle.

(105) An example is Finnish law, under which direct actions are permitted where the insured is "bankrupt or otherwise insolvent", see section 67 of the Finnish Insurance Contracts Act. Should a court, during the process of determining its jurisdiction, then be able to assess whether the insured is bankrupt, but leave out the insolvency criterion?

(106) To me, *policy considerations* suggest that the "permitted-criterion" should be interpreted restrictively to avoid ending up with results far exceeding what is permitted under the law of the chosen state. This is a prominent issue in the case at hand. Practically all P&I insurance contracts have a clause precluding the right to bring a direct action. In other words, direct actions are normally not permitted. To claim that Norwegian law permits direct actions in P&I insurance matters, is thus inaccurate. The result may be that the courts agree to hear claims that have no chances of succeeding, with the only effect that they may provide a basis for joining other parties in the case in the relevant court.

(107) I agree with Justice Bergsjø that it may be demanding to assess a direct claim on its merits as a step in the determination of jurisdiction under the Convention. As mentioned, however, all it takes is that the claimant substantiates that it has a fair chance of succeeding. The insolvency requirement will typically be met when the insured has petitioned for bankruptcy, is undergoing bankruptcy or debt proceedings or is not capable of meeting the obligations as they fall due. In other words, the criteria are as a starting point well known.

(108) In summary, I find that interpreting the "permitted-criterion" as a requirement for a general legal basis for direct actions, does not provide more predictability. Nor can I see that the consideration for the weaker party may be given weight in insurance matters involving large undertakings and ships, see section 1-3 subsection 2 of the Insurance Contracts Act. We are dealing with professional players in the international insurance market where the right to contract out of legal rules in Norway is justified in particular by the competition situation for Norwegian insurance companies, see Proposition to the Odelsting No. 49 (1988–1989) page 30. Nor are there other factors suggesting that basing the right to bring a direct action on a general right to do so would benefit the presumed weaker party.

(109) Against this background, I find that the Court of Appeal's majority has based its ruling on a correct interpretation of the law, and that the appeal should be dismissed.

(110) Justice **Normann:** In agree with Justice Noer in all material respects and with her conclusion.

(111) Justice **Høgetveit Berg:** In agree with Justice Bergsjø in all material respects and with his conclusion.

(112) Justice **Møse:** Likewise.

(113) Following the voting, the Supreme Court issued this

O R D E R :

In case no. 19-151103SIV-HRET:

1. The Court of Appeal's order is set aside.

2. Costs in the Supreme Court are not awarded.

3. The ruling on costs in the District Court and the Court of Appeal is suspended until a new ruling is given by the Court of Appeal.

In case no. 19-151228SIV-HRET:

1. The Court of Appeal's order is set aside.

2. Costs in the Supreme Court are not awarded.

3. The ruling on costs in the District Court and the Court of Appeal is suspended until a new ruling is given by the Court of Appeal.