SUPREME COURT OF NORWAY

J U D G M E N T

given on 4 February 2020 by the Supreme Court composed of

Justice Bergljot Webster
Justice Kristin Normann
Justice Henrik Bull
Justice Espen Bergh
Justice Kine Steinsvik

HR-2020-257-A, (case no. 19-053865SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 11 February 2019

I. Assuranseforeningen SKULD SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd	(Counsel Atle Johansen Skaldebø-Rød)
v.	
Assuranceforeningen Gard Gjensidig	(Counsel Bjarne Andreas Meidell) (Assisting counsel: Stephen Knudtzon)
II. SwissMarine Services S.A.	(Counsel Bjarne Andreas Meidell) (Assisting counsel: Stephen Knudtzon)
v.	
Assuranseforeningen SKULD SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd	(Counsel Atle Johansen Skaldebø-Rød)

(1) Justice **Bull:** The case concerns possible limitation of insurance claims in international maritime insurance. The injured party has brought a direct claim against the liability insurer after the insolvency of the insured.

(2) Mineral Libin is a large – so-called capesize – cargo vessel owned by the Belgian company Bocimar. When the ship was being maneuvered into place at the port of Fangcheng in China on 18 May 2007, it collided with another ship and a buoy belonging to the port authorities. Bocimar incurred losses in the form of own repair costs, responsibility for damage to the other ship and the buoy as well as a loss of time – lost earnings from Mineral Libin – and certain other losses.

(3) At that time, Mineral Libin was chartered under a chain of several charterparties. The top charterer in the chain was Bocimar. The six first charterparties, counted from Bocimar, were time charterparties based on a standard form approved by New York Produce Exchange. The three next were voyage charterparties.

(4) Bocimar held that the damage had occurred because the vessel had been ordered to Fangcheng in violation of the "safe port" warranty in the time charterparties prohibiting the ordering of vessels to unsafe ports. The charterers lower in the chain held in turn that the damage was due to errors committed by the shipmaster and the pilot, and that no breach of the charterparties had taken place. The charterparties were subject to English law and arbitration in London in the event of a dispute. Arbitration proceedings were initiated in June 2010.

(5) The companies SwissMarine Services S.A. – SwissMarine – and Transfield ER Cape Limited – Transfield – constituted the fourth and fifth link after Bocimar in this chain of "back-to-back" time charterparties. Transfield was also the seventh link in the chain, with Transfield as charterer under the first of the three voyage charterparties. Both SwissMarine and Transfield were initially parties to the arbitration.

(6) At the time of the incident, Transfield had a combined liability insurance – a so-called Charterers' Liability to Hull and Protection and Indemnity (CLH/P&I) – in SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd and Assuranceforeningen SKULD (Gjensidig), hereafter jointly referred to as Skuld. SwissMarine was insured for its charterer's responsibility in Assuranceforeningen Gard – gjensidig, hereafter referred to as Gard. Own loss of time is not covered by the insurances. The insurance contracts are governed by Norwegian law.

(7) In accordance with the insurance terms and general practice in maritime insurance industry, Skuld and Gard have managed the negotiations and the arbitration regarding the claims for compensation on behalf of their members – i.e. the insured – Transfield and SwissMarine.

(8) On 30 September 2010, Transfield was placed in liquidation on the British Virgin Islands due to insolvency. A contract was entered into between the liquidators and Skuld under which Skuld was still to manage the arbitration on behalf of Transfield. SwissMarine filed a claim in the estate based on possible liability for the incident in Fangcheng.

(9) Because of Transfield's insolvency, SwissMarine had a direct claim against Skuld under section 7-8 subsection 2 of the Insurance Contracts Act. On behalf of SwissMarine, Gard notified Skuld of this direct claim on 5 November 2010, holding that it was subject to a

limitation period of six years under English law. Skuld confirmed receipt of the claim on 2 February 2011 and stated that they would not consider the limitation issue.

(10) The arbitration process was lengthy. In April 2013, agreements were entered into under which the charterparty between SwissMarine and Transfield would be the final link in the liability case and the arbitration. The third arbitrator was appointed in December 2015, and a hearing was held over five days in April 2016. Due to the chain of "back-to-back" time charterparties, five arbitrations were formally conducted, but the proceedings were in practice only between Bocimar at the top of the chain and Transfield at the foot. Thus, on 14 July 2016, five awards were given with common reasons. The arbitration tribunal found that the charterers had breached the "safe port" warranty and that there was a basis for liability.

(11) The arbitration tribunal chose not to determine the amount of compensation for the time being. Negotiations in this regard were initiated instead.

(12) In a letter of 13 September 2016, SwissMarine sent a notification of possible initiation of legal proceedings concerning the direct claim to Skuld. Skuld rejected the claim in its response of 22 September 2016, and SwissMarine filed a complaint to the conciliation board on the same day. The conciliation proceedings were suspended and a writ of summons was issued to Oslo District Court. Skuld held that the claim was time-barred, and that Transfield's liability to SwissMarine, in any case, was not covered by Transfield's P&I insurance. The District Court decided to hear the limitation issue separately.

(13) On 21 March 2017, Transfield's liquidators announced that Transfield would no longer participate in the arbitration in London.

(14) On 5 September 2017, Oslo District Court ruled that SwissMarine's direct claim against Skuld was not time-barred. Skuld appealed to Borgarting Court of Appeal.

(15) A settlement was reached on 10 January 2018 on the amount of compensation. Transfield is not a party to the settlement. Likewise, Skuld had declined to participate in the settlement in December 2017.

(16) Already on 30 November 2010, Gard had issued a guarantee – a "letter of undertaking" – for SwissMarine's possible liability to the preceding link in the charter chain, a company now named Exelon. Gard settled SwissMarine's debt towards Exelon in accordance with the settlement deed by direct payment to Exelon on 1 February 2018 and notified Skuld thereof on 23 February 2018. Gard then joined the case before the Court of Appeal asserting, by way of subrogation, a recourse claim against Skuld because of its payment to Exelon. It was held that this recourse claim was not time-barred even if SwissMarine's direct claim was.

(17) Gard's recourse claim against Skuld amounts to approximately USD 14.6 million. In addition, SwissMarine has a claim of approximately USD 0.9 million for SwissMarine's loss of time and own risk.

(18) On 11 February 2019, Borgarting Court of Appeal concluded:

> **"1. Judgment is given in favour of Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd with regard to the claim from SwissMarine Services S.A.**

2. The recourse claim from Assuranceforeningen Gard – gjensidig against Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd as a result of the collision and other incidences in Fangcheng in May 2007 involving the ship Mineral Libin and for which Transfield ER Cape Ltd was insured in SKULD, is not time-barred.

3. SwissMarine Services S.A. will pay to Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd costs in the District Court and Court of Appeal of NOK 2 339 507 – twomillionthrehundredandthirtyninethousandfivehundredandseven – within two weeks of the service of this judgment.

4. Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd will pay to Assuranceforeningen Gard – mutual costs in the Court of Appeal of NOK 1 072 500 – onemillionandseventytwothousandfivehundred – within two weeks of the service of this judgment."

(19) The Court of Appeal found, as opposed to the District Court, that SwissMarine's direct claim against Skuld was time-barred. Gard's recourse claim against Skuld was, in the Court of Appeal's view, not time-barred.

(20) SwissMarine has appealed the Court of Appeal's judgment to the Supreme Court. The appeal challenges the application of law and findings of fact with regard to the Court of Appeal's conclusion that SwissMarine's direct claim is time-barred. Skuld, too, has appealed the Court of Appeal's judgment. The appeal from Skuld challenges the Court of Appeal's result that Gard's recourse claim is not time-barred and challenges both the application of law and the findings of fact.

(21) *SwissMarine Services S.A.* as the appellant and *Assuranceforeningen Gard – gjensidig* as the respondent contend:

(22) The direct claim against Skuld is not time-barred. On this point – referred to as part II in the requests for relief to the Supreme Court – the Court of Appeal's judgment is incorrect.

(23) Although section 1-3 subsection 2 of the Insurance Contracts Act permits contracting out of the Act's provisions on non-life insurance in maritime insurance relationships like those in the case at hand, a restriction still applies to "liability insurance under section 7-8". The restriction implies that the injured party will always have a direct claim against the insurer if the insured – the tortfeasor – is insolvent, see section 7-8 subsection 2. Then, also the limitation provisions in section 8-6 apply to the direct claim – and they cannot be precluded in the insurance contract with effect for the insolvency cases. This solution is not inconsistent with the provision's wording and follows from the systematic consistency between the provisions, the history of the law and policy considerations.

(24) In the alternative, it is contended that Skuld in its insurance terms – the so-called Rules – have not taken the opportunity to contract out of section 8-6 of the Insurance Contracts Act. This provision is therefore applicable at any rate.

(25) According to section 8-6, SwissMarine's direct claim is not time-barred. Section 8-6 subsection 2 implies that the direct claim, as a starting point, will be time-barred under the same provisions as SwissMarine's claim for compensation against Transfield. The charterparties were subject to English law, and under English law the period of limitation is

six years counted from the date of Transfield's insolvency, which occurred at the earliest on 30 September 2010. The limitation period was interrupted within the deadline of six years by the complaint to the Conciliation Board of 22 September 2016.

(26) At any rate, the claim is not time-barred under section 8-6 subsection 3. The direct claim against Skuld was announced already on 5 November 2010, and limitation occurs at the earliest six months after the insurer has given a written notification that limitation will be asserted. Skuld has never given such a notification.

(27) If, nonetheless, section 8-6 may be contracted out of, and has been contracted out of, the parties now agree that the limitation provision in Skuld's Rule 37.2 is not applicable in the relationship between SwissMarine and Skuld, but only regulates limitation between the association and its member; that is, between Skuld and Transfield. Hence, one must fall back on the provisions of the Limitation Act, or – both for SwissMarine and Gard – liability follows from section 7-8 subsection 1 of the Insurance Contracts Act.

(28) The direct claim is not time-barred under the provisions of the Limitation Act. In this case, it is section 3 (1) that applies, stating that the limitation period commences on the day the creditor at the earliest may claim performance. This means that the limitation period of three years does commenced on the day the arbitration awards were given – SwissMarine's direct claim depended on the outcome of these awards, as no performance could be claimed from Skuld before that. The same result follows from section 10 under which an additional period of one year may be granted from the day necessary knowledge was gained of the claim and the debtor – this knowledge was also lacking before the outcome of the arbitration. Contemporaneous evidence shows that there was significant doubt relating to the facts of the case. The binding effects of a Norwegian judgment forced SwissMarine to await the arbitrations in London, where SwissMarine and Skuld had a common interest in Transfield succeeding.

(29) If section 9 of the Limitation Act on compensation should apply, the result will in any case be the same as under section 10.

(30) Gard's recourse claim against Skuld is not time-barred, either. On this point – Part I of the case in the requests for relief to the Supreme Court – the Court of Appeal's judgment is correct.

(31) In this relationship, limitation is regulated by section 8 of the Limitation Act on recourse claims. The debtors – here Gard and Skuld – are liable towards the creditor – SwissMarine – for the same loss. Gard's guarantee towards Exelon does not change this – it is conditional on SwissMarine's liability towards Exelon. It is not a condition for section 8 to apply that the debtors are liable on the same grounds towards the creditor.

(32) First, the provision entails that Gard's recourse claim towards Skuld will not be time-barred until SwissMarine's direct claim towards Skuld is time-barred, and the direct claim is, as already submitted, not time-barred. Gard's settlement of SwissMarine's debt to Exelon does not affect the limitation of SwissMarine's direct claim against Skuld.

(33) Even if the direct claim should be time-barred, the recourse claim is not. It is undisputed that the co-debtor – Skuld – was notified of the settlement within reasonable time – as section 8 requires. Further, if, before the settlement, the limitation period has been interrupted or an

extension has been agreed in the relationship between the paying debtor – Gard – and the creditor – SwissMarine –, the co-debtor – Skuld – has to have been notified thereof within reasonable time. However, this provision does not apply if the claims against the co-debtors, as a starting point, are subject to limitation under different rules. That is the case here, since SwissMarine's claim against Gard is time-barred under Rule 81 in Gard's insurance terms, not under the Insurance Contracts Act or the Limitation Act. In any case, SwissMarine's claim against Gard is not time-barred under Rule 81, which means that notification is also not required for that reason.

(34) Section 8-6 of the Insurance Contracts Act does not apply to recourse claims between insurance companies. In any case, Gard has entered – subrogated – into SwissMarine's direct claim, which means that – had 8-6 applied – Gard's claim would not be time-barred as long as SwissMarine's direct claim is not.

(35) Finally – if both Gard's recourse claim and SwissMarine's direct claim are time-barred – Skuld will still be liable based on principles in section 7-8 subsection 1 of the Insurance Contracts Act: Transfield's insurance claim against Skuld is not time-barred – here Rule 37.2 is directly applicable. SwissMarine's claim for compensation against Transfield is also not time-barred because the limitation period in this relationship was interrupted by the arbitration process in London. Furthermore, under section 7-8 subsection 1 first sentence, Skuld is liable to SwissMarine for retaining payment to Transfield until Transfield documents that SwissMarine has obtained compensation. Section 7-8 subsection 1 second sentence stating that the insured's claim against the insurer cannot be made the subject of legal action other than for recovery of the injured party's claim for compensation, is an international legal principle implying that the claim cannot benefit the other creditors of the insolvent Transfield. In such a situation, Transfield's insurance claim against Skuld is transformed to a direct claim from SwissMarine against Skuld that is not time-barred, since neither the insurance claim nor the claim for compensation is. This also benefits Gard.

(36) SwissMarine Services S.A. and Assuranceforeningen Gard – Gjensidig invites the Supreme Court to pronounce the following judgment:

In part II of the case:

1. The direct claim from SwissMarine Services S.A. against Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd. for compensation due to a collision and other incidents in Fangcheng in May 2007 in which the ship Mineral Libin was involved and for which Transfield ER Cape Ltd was insured in Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd., is not time-barred.

2. Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd. will jointly compensate SwissMarine Services S.A.'s costs in the Court of Appeal and in the Supreme Court.

In part I of the case:

1. The appeal is dismissed.

2. Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd. will jointly compensate the costs of Assuranceforeningen Gard – Gjensidig, in the Court of Appeal and the Supreme Court."

(37) *Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd* contend:

(38) The Court of Appeal has arrived at the correct conclusion that SwissMarine's direct claim against Skuld is time-barred.

(39) In the insurance contract with Transfield, Skuld has precluded the application of the Insurance Contracts Act to the extent possible. This preclusion, which includes the limitation rules in section 8-6 of the Act, affects the injured party's right to file a direct claim. SwissMarine's right to file a direct claim against Skuld upon the insured's – Transfield's – insolvency therefore follows directly – and only – from the Act. The Insurance Contracts Act must be interpreted to mean that only the provisions expressly referred to in section 7-8 subsection 2, namely sections 7-6 and 7-7, see section 8-3 subsections 2 and 3, apply. Since section 8-6 is not mentioned, it is not applicable. System considerations, history of the law and policy considerations cannot lead to a different result.

(40) The claim is time-barred under section 9 of the Limitation Act on compensation. The limitation period thus commenced when SwissMarine gained or should have gained necessary knowledge of the damage and the tortfeasor. SwissMarine – and Gard – learned of Transfield's insolvency as late as in October 2010, when the direct claim arose. At that time, they already possessed detailed knowledge of the damage and the claim. The arbitration did not raise difficult evidentiary issues; the case was centred on the application of clear legal rules to the facts at hand. Commencement of the limitation period is postponed until such application has been clarified. The limitation period of three years therefore commenced in October 2010, while the interruption, the complaint to the conciliation board, did not occur until on 22 September 2016, almost three years too late.

(41) The recourse claim from Gard against Skuld is also time-barred. On this point, the Court of Appeal's judgment is incorrect.

(42) Section 8 of the Limitation Act requires joint liability, which means that two or more persons are liable for the *same* claim. In contract chains, joint liability only occurs if the preceding link, here Exelon, may file a direct claim against its debtor's, here SwissMarine's, preceding link, in this case Transfield. Such a right does not exist under English law in these circumstances.

(43) Exelon's claim against SwissMarine is not the same as SwissMarine's claim against Transfield and Skuld. Had it not been for the guarantee, Gard would not have had any obligation to settle SwissMarine's debt to Exelon – the right to file a direct claim had been waived and SwissMarine is solvent. This is what one may refer to as "sequential liability", which falls outside the scope of section 8.

(44) In the alternative, if section 8 is applicable, the condition that notification must be given of any interruption or extension of the limitation period in the relationship between the paying debtor and the creditor, here Gard and SwissMarine, is not met. SwissMarine's claim against Gard was initially time-barred under Gard's Rule 81. The Limitation Act does not make exceptions from the duty to notify when the claims against the co-debtors are, as a starting point, subject to limitation under different rules. Skuld has not received adequate notification of possible interruption or extension of the limitation period in the relationship between Gard

and SwissMarine, nor has Skuld otherwise had actual knowledge of this. Gard must carry the burden of proof in this regard.

(45) Even if limitation of SwissMarine's direct claim against Skuld should be regulated by section 8-6 subsection 2 of the Insurance Contracts Act, the recourse claim from Gard against Skuld is time-barred. The limitation period of six years under English law for Transfield's liability to SwissMarine commenced already upon the breach of the "safe port" warranty, in May 2007, not at the time of Transfield's insolvency. The limitation period thus commenced before the direct claim arose, and English law does not allow for limitation period extension like section 10 of the Limitation Act. Gard is also not protected by the notification provision in section 8-6 subsection 3, as Gard is not "injured", and cannot enter into SwissMarine's position in this regard. Gard has had the beneficial interest in most of the claim against Skuld from the issuance of the guarantee in 2010, and Gard has been in full control of the process. Gard could have entered into SwissMarine's claim against Transfield and Skuld at an earlier stage and filed a complaint to the conciliation board.

(46) Finally, it is incorrect that Skuld, at any rate, is still liable under section 7-8 subsection 1 of the Insurance Contracts Act. Transfield has not pursued any claim against Skuld, probably because the claim is time-barred. Further, Skuld also has other objections to Transfield's claim. The possibility of unintended enrichment for the insurer is not a conclusive counter-argument – limitation will always, in some sense, lead to unintended enrichment.

(47) *Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd* invites the Supreme Court to pronounce the following judgment:

> **"I.**
>
> **1. Judgment is given in favour of Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd.**
>
> **2. Assuranceforeningen Gard – will jointly compensate the costs of Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd in the Court of Appeal and the Supreme Court.**
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> **II.**
>
> **1. The appeal is dismissed.**
>
> **2. SwissMarine Services S.A. will compensate the costs of Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd in the Court of Appeal and the Supreme Court."**

(48) *My view on the case*

(49) At the heart of this case is Transfield's liability to SwissMarine for breach of contract. SwissMarine's loss is partially caused by compensation paid to the carrier immediately above it in the charter chain – Exelon – and partially loss of earnings while the vessel was off hire. Both Transfield and SwissMarine have carrier's liability insurance in Skuld and Gard, respectively. Under the insurance contract between Transfield and Skuld, Skuld is in principle to indemnify Transfield only when Transfield has paid compensation to the injured party. The same applies to Gard's liability under the so-called "pay-to-be-paid" clause in the contract with SwissMarine.

(50) Both insurance contracts are governed by Norwegian law.

(51) According to section 7-6 of the Insurance Contracts Act, the injured party may claim compensation directly from the tortfeasor's insurer, and section 1-3 of the Act states that section 7-6 is mandatory, but with certain exceptions. One exception applies according to section 1-3 subsection 2 (c) "when the insurance relates to a ship under a duty to register, see section 11 of the Maritime Code". It is not disputed that the insurances in this case fall under the scope of this exception.

(52) However, section 1-3 subsection 2 opens as follows:

> **"With the exception of liability cover according to section 7-8 the provisions may nevertheless be contracted out of for insurance relating to…"**

(53) In other words, section 7-8 can never be contracted out of – we may refer to it as "absolutely mandatory". The following is provided in section 7-8:

> **"In the event that the Insured is insolvent, the provisions of sections 7-6 and 7-7, cf. section 8-3 subsections two and three shall apply."**

(54) As mentioned, Transfield became insolvent in September/October 2010. According to section 7-8 subsection 2, cf. section 7-6, of the Insurance Contracts Act, SwissMarine then had a direct claim against Skuld, without consideration for what might be stated in the insurance contracts. SwissMarine, in practice Gard on behalf of SwissMarine, filed such a direct claim against Skuld on 5 November 2010. However, Skuld has contested the direct claim, stating among other things that it is time-barred. As mentioned, the District Court split the adjudication of the case, which means that the Supreme Court now will consider the limitation issue only.

(55) *Limitation under section 8-6 of the Insurance Contracts Act?*

(56) The first question to be answered is whether the limitation is regulated by section 8-6 of the Insurance Contracts Act. This paragraph contains a special provision on claims "for compensation", which in this case equals a claim for insurance payment from the insurer. Subsections 2 and 3 of the section regulate the "liability of the Insurers" in connection with liability insurance and thus cover direct claims from the injured party. The provisions entail that a direct claim, as a starting point, is time-barred under the same provisions as the underlying claim for compensation against the insured tortfeasor/the responsible party; however, so that the direct claim on certain terms may exist even if the claim for compensation against the injured party has become time-barred.

(57) The parties agree that SwissMarine's *claim for compensation* against Transfield is not time-barred. Yet, this is not crucial for the limitation of SwissMarine's *direct claim* towards Skuld. In the Supreme Court judgment Rt-1999-7 page 10–11, the Supreme Court found that the injured party's claim for compensation against the responsible party and the injured party's direct claim against the insurer must be considered as two separate claims that become time-barred separately, despite becoming so under the same rules. The consequence is that the limitation period for the direct claim must be interrupted separately towards the insurer.

(58) SwissMarine contends that section 8-6 is "absolutely mandatory" and therefore regulates the limitation of SwissMarine's direct claim. First, SwissMarine has referred to the wording in section 1-3 allowing exceptions for "liability insurance under section 7-8", and argued that it may be interpreted to mean that the exception generally applies for liability insurances covered by section 7-8, not only for the provisions referred to in 7-8 subsection 2. In that respect, it has been pointed out that the proposed wording in Norwegian Official Report 1987: 24 [containing a proposal for a new insurance act forming the basis for the present Act] was "[w]ith the restriction expressed in section 7-8". I agree that this wording is even clearer. Nonetheless, the most natural interpretation is that the exception only applies to the provisions mentioned in section 7-8 subsection 2, and that the amended wording – which is not further explained in the Proposition – was only to inform the reader of what type of insurance section 7-8 covered. Section 8-6 is not mentioned in section 7-8 subsection 2.

(59) On the other hand, SwissMarine contends that the protection under section 8-6 subsections 2 and 3 is in a way accessory to the protection under section 7-8 subsection 2 and must, in a natural interpretation, be "absolutely mandatory" without regard to the wording in section 7-8 subsection 2. Here, it is held that section 8-6, like section 7-8, refers to sections 7-6 and 7-7, and that section 8-6 subsection 2 was added during the Ministry's processing of the Proposition, probably without the Ministry realising how it would affect the wording in section 7-8 subsection 2. The question is not commented on in the Proposition. Nor did the legislature seem to have considered the effect on section 7-8 subsection 2 when section 8-6 subsection 3 was adopted at a later stage. It is also pointed out that Norwegian Official Report 1987: 24 pages 134–135 states that it may be difficult to establish the exact extent to which a legal provision is mandatory, and that the courts will be highly sceptical to insurance contract provisions that weaken the injured party's protection without justification in technical insurance considerations.

(60) In my view, these arguments cannot be heard. A natural interpretation of section 7-8 subsection 2 is that the legislature has taken a firm stand as to how "absolutely mandatory" the provision should be. The statement in Norwegian Official Report1987: 24 concerned the situation under the previous Insurance Contracts Act of 1930. I therefore find that section 1-3 subsection 2 of the Insurance Contracts Act presents an opportunity to contract out of section 8-6.

(61) The question is whether section 8.6 has been contracted out of under Skuld's insurance terms. SwissMarine contents that it has not, and refers to Rule 2.1 and Rule 47.3 in Skuld's P&I Rules. Rule 2.1 reads:

> **"The terms of entry and cover provided by the Association to the member are subject to the Statutes, these Rules and any special conditions agreed between the member and the Association.**
> **Provided always that it is not intended that any third party other than those referred to in Rules 1.2 or permitted assign has any right under this Contract."**

(62) Thus, the principle arising from this rule is that no one other than the insured – the member – may invoke rights under the insurance contract. It is clear that the exceptions for Rule 1.2 and "permitted assign" does not comprise the injured party.

(63) Rule 47.3 reads:

"The Rules and any arbitration proceedings shall be governed by Norwegian Law, except that the Insurance Contracts Act of 1989 shall not apply."

(64) SwissMarine's submission is that Rule 2.1 in principle entails that the injured party does not have a direct claim, but that this is overridden by section 7-8 subsection 2 of the Insurance Contracts Act, which in turn refers to section 7-6. Furthermore, it is held that the choice of law in Rule 47.3 only applies to "[t]he Rules", and not the injured party's direct claim based on the Insurance Contracts Act, as in our case. In this regard, a reference is made to Norwegian Official Report 1987: 24 page 161, emphasising in its comments to section 7-6 that any contracting out of the provision must be explicit.

(65) I do not support these arguments, either. Section 1-3 subsection 2 is built on the premise that the parties to the insurance contract – in this case the insurance association Skuld and its member Transfield – can make exceptions from the Insurance Contracts Act also with its effect for the legal protection of the injured third party, if we disregard section 7-8. The statement in the preparatory works that any contracting out of section 7-6 must be explicit only applies to contracting out under subsection 6, and thus regulates an issue different from the one at hand. There must be certain requirements of clarity also for the type of exceptions concerned in this case, but I do not consider this issue relevant here.

(66) If follows from Rule 2.1 that with certain specific exceptions, the contract does not entail any rights for any parties other than the association and the member. This can only mean that the right under section 7-6 to make a direct claim may not be invoked. When this right is precluded, section 8-6 is, in a sense, void in this context, without it being necessary to say so explicitly.

(67) If the member becomes insolvent, a direct claim arises nonetheless, and SwissMarine is right in pointing out that this claim arises from section 7-8 subsection 2 of the Insurance Contracts Act, not the insurance contract. However, as mentioned, section 7-8 subsection 2 cannot be interpreted to mean that section 8-6, also, is "absolutely mandatory", and in light of Rule 47.3, I cannot see how section 8-6 in such a situation may apply based on Skuld's rules merely because the contract does not express the opposite.

(68) In my opinion, it is therefore sufficiently clear from Skuld's insurance terms that section 8-6 does not apply to the direct claim from SwissMarine. Before the Supreme Court, Skuld and SwissMarine agree that the limitation period for the direct claim is not regulated by the limitation provision – Rule 37.2 – in Skuld's insurance terms, but by the Limitation Act. This must be accepted in the case between them.

(69) *Time-bar under the Limitation Act?*

(70) This means that the limitation period for SwissMarine's direct claim is regulated by the Limitation Act. However, the parties disagree as to whether this means that the claim is time-barred.

(71) The parties differ as to whether the general rules in sections 3 and 10 (1) of the Limitation Act or the special rule in section 9 on limitation for claims for compensation apply. Section 3 provides a limitation period of three years from the day the creditor, at the earliest, may claim performance. However, section 10 permits a one-year extension if the creditor has lacked necessary knowledge of the claim or the debtor. Time-bar thus occurs at the earliest one year after the day the debtor gained or should have gained such knowledge. According to section 9,

the claim for compensation is time-barred three years after the day the injured party gained or should have gained necessary knowledge of the damage and the tortfeasor. As I view the question whether SwissMarine gained the necessary knowledge, to which I will come back shortly, I do not need to consider whether it is sections 3 and 10 or section 9 that apply.

(72) SwissMarine could not have gained the necessary knowledge of the direct claim before it arose; that is, when Transfield became insolvent. Skuld holds that the facts with regard to the extent of damage and responsibility were sufficiently clear shortly after the collision in May 2007, and, consequently, that the knowledge requirement was met already when the direct claim arose. All that remained was doubt as to the outcome of the concrete application of law, and such doubt cannot postpone the commencement of the limitation period. SwissMarine, in turn, holds that the knowledge requirement could not be met until the outcome of the arbitration in London was known.

(73) As pointed out in the Supreme Court judgment in HR-2019-2034-A paragraph 62, the knowledge requirement is mainly the same in sections 9 and 10, and case law on one of these provisions gives guidance for the interpretation of the other. In the Supreme Court judgment Rt-2007-1665 paragraph 54, the requirement of necessary knowledge was formulated as a question whether the claimants "possessed information that gave them a sufficient basis for filing a claim against … [the debtors] with prospects of a positive result". This formula is relied on in HR-2019-2034-A paragraph 63 as well, with the comment that the starting point is expressed in similar wordings in several earlier rulings. In paragraph 64, The Supreme Court stated that because of the binding effects of a judgment, it would be unfortunate if the limitation provisions forced a claimant to bring an action before he had the possibility to succeed.

(74) As set out in paragraphs 65 to 68 in the same judgment and in that in Rt-2008-1665 paragraphs 41 and 42, particular considerations obtain if the uncertainty concerns the meaning of the applicable legal rules. Such doubt will not postpone the commencement of the limitation period in the same way as doubt with regard to the facts.

(75) As mentioned initially, the ship owner Bocimar and the charterers disagreed on whether the damage and the losses were a result of breach of the "safe port" warranty in the time charterparties, or whether they were due to errors committed by the shipmaster or the pilot for which Bocimar could not hold the subsequent links in the charter chain responsible. In an email of 2 February 2011, Gard expressed that "the port was safe and the incident caused due to master and or pilot error", and that they had received a "spurious claim" from the ship owner. It was pointed out that the incident occurred back in 2007, while the arbitration had commenced only "very recently", which demonstrated a "lack of faith in [the owners'] own claim". No submissions have been made indicating that SwissMarine and Gard, at that time, ought to have possessed other knowledge of the collision or of the port conditions than that possessed by Skuld.

(76) In response, Skuld has referred to the citing of the parties' submissions in the arbitration award relating to whether the port in Fangcheng was physically suited to receive such a large ship and whether the port was operated in a "proper and effective" manner. This, Skuld argues, merely relies on a concrete legal assessment of the conditions at the port, and the arbitration tribunal did conclude that it was not a "safe port".

(77) However, the charterers' main submission was still that the collision with the other ship and the buoy was not due to breach of the "safe port" warranty in the charterparty, but to the pilot's errors that should have been, but were not, discovered and appropriately corrected by personnel on the bridge. After an individual assessment, the arbitration tribunal found that the pilot's measures had only been "sub-optimal", not "sub-standard", and that the port lacked adequate systems to tolerate pilot errors committed with ships of that size. The port was thus not "safe":

(78) In other words, what in fact happened when the ship was being maneuvered into place, an evidentiary issue, was relevant during the arbitration. It must have been natural to assume that even small nuances in the total evidence presented were essential to assess the conduct of the parties involved. I find it clear that not least the shipmaster's testimony, as part of the total evidence, must have been crucial to determine liability and thus the prospects of success of a direct claim against Skuld. SwissMarine has pointed out that, according to the arbitration award, the Ukrainian shipmaster's testimony was not ready until 18 November 2015.

(79) Skuld has not argued that the mentioned facts should have been clarified earlier by SwissMarine and Gard, either within the scope of the arbitration or through a direct claim action against Skuld in Norwegian courts. I mention in this regard that in the email of 2 February 2011, Skuld expressed that the ship owner "[a]t no time have … provided any documents or evidence to substantiate their allegations or rebut ours". In other words, Skuld must already then have been actively engaged in the case without it seeming to be possible, more than three years after the collision, to obtain necessary clarification of the facts. As mentioned, a contract was at one point entered into under which Transfield – and in practice Skuld – was to argue the arbitration case on behalf of the charterers. During the proceedings in April 2016, they upheld their main submission that the collision was due to errors committed by pilot and crew.

(80) As I see it, the knowledge requirement in sections 9 and 10 of the Limitation Act cannot on these grounds be considered met before 18 November 2015. Before this date, SwissMarine and Gard lacked sufficient knowledge of the liability issue to bring an action concerning the direct claim against Skuld. Since SwissMarine filed a complaint against Skuld to the conciliation board on 22 September 2016, less than a year after the shipmaster's testimony was ready, the limitation period was interrupted in time. This is true irrespective of whether section 9 or 10 applies.

(81) Against this background, SwissMarine has succeeded in its appeal against the Court of Appeal's judgment.

(82) *Skuld's appeal*

(83) When it comes to Skuld's appeal against the Court of Appeal's judgment, it is directed against Gard as the respondent. The appeal concerns Gard's recourse claim against Skuld after having paid SwissMarine's debt towards Exelon under the deed of settlement, and the question is whether Gard's recourse claim is not time-barred despite SwissMarine's claim against Skuld being time-barred. The parties agree that Gard's recourse claim against Skuld derives from Gard's entry into SwissMarine's direct claim against Skuld by way of subrogation.

(84) The parties' arguments in this regard have generally been based on the assumption that SwissMarine's claim is time-barred, at least under the Limitation Act. The central issue has

then been whether section 8 of the Limitation Act regulating recourse is applicable, and whether the recourse claim is nonetheless not time-barred under this provision. However, as I have concluded that SwissMarine's claim against Skuld is not time-barred under the provisions of the Limitation Act, neither is Gard's claim.

(85) Consequently, Skuld's appeal against Gard must be dismissed.

(86) *Costs*

(87) A final partial judgment has hereby been given on the limitation issue. It now remains to consider Skuld's other objections to the claim. That case is still pending before Oslo District Court. The award of costs will thus be postponed to a ruling concluding the case has been given, see section 20-8 subsection 3 of the Dispute Act and the Supreme Court judgment HR-2019-1929-A paragraphs 50 and 51. Paragraph 52 leaves some room for exceptions. SwissMarine has argued that an exception should be made here, as the case mainly evolves around the limitation issues, which have been extensive and complex. In my opinion, the argument against splitting the award of costs nonetheless prevails: The liability for costs should not be affected by the separate adjudication of individual issues. The validity of SwissMarine's arguments in favour of being awarded costs is best assessed in light of the final outcome of the case.

(88) I vote for the following:

J U D G M E N T :

1. The direct claim from SwissMarine Services S.A. against Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd for compensation due to a collision and other incidents in Fangcheng in May 2007 is not time-barred.

2. The appeal from Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd against Assuranceforeningen Gard – gjensidig is dismissed.

3. A ruling on the costs is postponed until the ruling that concludes the case.

(89) Justice **Steinsvik:** I agree with the Justice Bull in all material respects and with his conclusion.

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

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

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

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

J U D G M E N T :

1. The direct claim from SwissMarine Services S.A. against Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd for compensation due to a collision and other incidents in Fangcheng in May 2007 is not time-barred.

2. The appeal from Assuranceforeningen SKULD (Gjensidig) and SKULD Mutual Protection and Indemnity Association (Bermuda) Ltd against Assuranceforeningen Gard – gjensidig is dismissed.

3. A ruling on the costs is postponed until the ruling that concludes the case.